

# THE LEGAL HISTORY OF FEDERALLY GRANTED RAILROAD RIGHTS-OF-WAY AND THE MYTH OF CONGRESS'S “1871 SHIFT”

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*Beginning in the 1830s, the United States government granted railroads thousands of miles of rights-of-way across the public lands. In 1850, Congress began to further subsidize the construction of certain railroads by granting them title to millions of acres of the public lands. By the late 1860s, however, the public came to vehemently oppose giving vast tracts of the public domain away to railroads. As a consequence, in 1871, Congress ceased granting subsidy lands to railroads. Federal grants of railroad rights-of-way, though, continued well into the twentieth century.*

*The Supreme Court has held that the year 1871 marked a transition between two distinct eras in congressional railroad grant policy. Before 1871, the Court held, federal grants comprising both rights-of-way and subsidy lands gave railroads a “limited fee” property interest in the right-of-way. The United States retained a “right of reverter” if the right-of-way was ever abandoned. But after 1871, according to the Court, Congress no longer wished to “grant lands” to railroads, and altered the nature of its rights-of-way. Post-1871 rights-of-way became mere “easements.” This concept of an 1871 shift in right-of-way law was first announced by the Court in 1942 and has defined this area of the law ever since.*

*Today, many railroads are abandoning federally granted rights-of-way across lands that once were public, but that*

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*have long since passed into private ownership. Federal law allows these rights-of-way to be reused for new purposes, including recreational trails. This has raised a contentious question that has split the federal courts of appeals: did the federal government retain any ownership interest in railroad rights-of-way that it granted after 1871? If not, private landowners may own such rights-of-way upon their abandonment. The government's attempts to reuse such property could then make it liable for millions of dollars in Fifth Amendment "takings"—a conclusion endorsed by the Federal Circuit in 2005.*

*This Article contends, however, 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. The evidence actually indicates that beginning in the 1830s and throughout the nineteenth century, Congress followed consistent policies with respect to its railroad rights-of-way. Despite characterizing them as "easements" or similar to easements, it viewed them as property over which it retained continued ownership and control. Moreover, because Congress viewed railroad right-of-way grants as separate from its railroad land subsidy grants, it did not intend to change rights-of-way in 1871 when it ceased granting land subsidies. The Solicitor General and the Supreme Court erred in 1942 by conflating the two types of grants and misreading the relevant legislative history. If the Supreme Court has the opportunity to resolve the circuit split, it should overrule its erroneous prior reasoning and affirm the United States' broad and continuing authority over all federally granted railroad rights-of-way, from both before and after 1871.*

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## INTRODUCTION

In the nineteenth century, as American history texts classically describe, the United States government granted huge tracts of the public lands to railroads.<sup>1</sup> These grants, which eventually totaled over one hundred million acres, helped subsidize the construction of many significant railroads, including the Illinois Central and the first transcontinentals, and helped open the West to settlement.<sup>2</sup> Congress actually gave the land grants to railroads only between 1850 and 1871. But their influence on the development of the West was so great that they have long been the focus of political and legal history concerning government aid to the railroads.

The huge subsidy land grants, though, were not the federal government's only significant nineteenth-century grants of public land to railroads. Beginning in the 1830s, Congress also

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1. See generally Robert S. Henry, *The Railroad Land Grant Legend in American History Texts*, 32 MISS. VALLEY HIST. REV. 171 (1945).

2. See generally PAUL W. GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* 356-86 (1968). The railroad grants totaled as much as 125 million acres of the public lands. *Id.* at 384-85.

granted thousands of miles of rights-of-way—the narrow corridors of property along which the railroads actually run their trains—to hundreds of different railroads.<sup>3</sup> Without such right-of-way grants, it would have been impossible for the railroads to cross the vast tracts of the federal public lands. These grants were justified on the grounds that they would open the surrounding public lands to sale and settlement and help bind the United States together.

Many of these “federally granted railroad rights-of-way” still exist today, although they now often run across private lands. Because the right-of-way grants followed the lines of the railroads, they often cut angles and curves across the rectangular survey lines that the government used to divide and transfer most of its other public land. As a result, thousands of private landowners now hold title to parcels of former federal lands that are physically crossed by federally granted railroad rights-of-way.

Being lengthy and continuous, railroad rights-of-way are well suited to additional uses, such as utility easements. Some former rights-of-way have also been converted to streets and highways. Many others have been converted to multipurpose recreational trails under federal statutes intended to promote alternative transportation and preserve disused rights-of-way for potential future railroad use.<sup>4</sup>

These alternative uses of railroad rights-of-way, particularly as recreational trails, have sparked contentious legal battles. Under state property law, some rights-of-way are held by railroads not as fee simple property, but as easements. In some states, if such easements are abandoned by the railroads, the easements terminate, with the property reverting to the owner of the servient estate—i.e., the successor in interest of any party who originally granted the easement to the railroad.<sup>5</sup> Because of this, many property owners have sued over rails-to-

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3. *E.g.*, THOMAS DONALDSON, *THE PUBLIC DOMAIN: ITS HISTORY*, H.R. MISC. DOC. NO. 47-45, pt. 4, at 261–87 (1884).

4. *E.g.*, Danaya C. Wright & Jeffrey M. Hester, *Pipes, Wires, and Bicycles: Rails-to-Trails, Utility Licenses, and the Shifting Scope of Railroad Easements from the Nineteenth to the Twenty-First Centuries*, 27 *ECOLOGY L.Q.* 351, 356–57 (2000).

5. The reversionary owner is sometimes, but not always, the adjacent landowner. *See, e.g.*, *Litigation and its Effect on the Rails-to-Trails Program: Hearing Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 107th Cong. 4–5 (2002) (statement of Danaya C. Wright) (describing complications with related property deeds).

trails conversions. They argue that when federally authorized trail conversions prevent an otherwise abandoned railroad right-of-way easement from reverting to the servient owner under state law, the owner of the fee title to the underlying property has lost a property right, entitling that owner to Fifth Amendment compensation from the federal government.<sup>6</sup> This question has been litigated since the 1980s, with no definitive conclusion.<sup>7</sup>

Federally granted railroad rights-of-way are an important subpart of the rails-to-trails controversy. If railroads abandon such rights-of-way, federal law has (essentially) always asserted control over the disposition of those rights-of-way. For many decades, the government effectively avoided any controversy over this assertion of control by allowing abandoned rights-of-way, if not needed for highways, to pass into the possession of adjoining private landowners. More recently, though, the government has declared that it may reuse federally granted rights-of-way for recreational trails.<sup>8</sup> Adjoining landowners who oppose these conversions—or seek monetary compensation for them—have since sued the government over several such projects.<sup>9</sup>

In 2005, reviewing such a suit, the Federal Circuit rejected the United States' assertion of ownership and control over many abandoned federally granted rights-of-way, creating a split with the Seventh, Ninth, and Tenth Circuits. In *Hash v. United States*,<sup>10</sup> the Federal Circuit held that Congress intended to retain no rights in the property underlying railroad

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6. See, e.g., Danaya C. Wright, *Eminent Domain, Exactions, and Railbanking*, 26 COLUM. J. ENVTL. L. 399 (2001); Nels Ackerson, *Right-of-Way Rights, Wrongs and Remedies: Status Report, Emerging Issues, and Opportunities*, 8 DRAKE J. AGRIC. L. 177 (2003) (extensively describing modern right-of-way litigation); Alison Frankel, *Blood on the Tracks*, AM. LAW., June 2002, at 74 (same).

7. In 1990, the Supreme Court considered the issue but ultimately left the takings question open, holding that even if the rails-to-trails program effected a taking, there was “just compensation” available through federal statutes such as the Tucker Act. See *Preseault v. Interstate Commerce Comm’n*, 494 U.S. 1, 4 (1990); see also Andrea C. Ferster, *Rails-to-Trails Conversions: A Review of Legal Issues*, PLAN. AND ENVTL. L., Sept. 2006, at 3.

8. See 16 U.S.C. §§ 1247(d), 1248(c) (2006).

9. See, e.g., *Beres v. United States*, 64 Fed. Cl. 403 (2005); *Ellamae Phillips Co. v. United States*, 77 Fed. Cl. 387 (2007), *vacated and remanded by* *Ellamae Phillips Co. v. United States*, 564 F.3d 1367 (Fed. Cir. 2009); Mark F. Hearne, II et al., *The Trails Act: Railroad Property Owners and Taxpayers for More Than a Quarter Century*, 45 REAL PROP., TR., AND EST. L. J. 115 (2010) (describing such litigation from the plaintiffs' perspective).

10. 403 F.3d 1308 (Fed. Cir. 2005).

rights-of-way granted after 1871. As a result, any reuse of such property for a trail would constitute a Fifth Amendment taking.<sup>11</sup>

*Hash's* holding relied heavily on the history of federal railroad grant policy set forth in the Supreme Court's influential 1942 opinion *Great Northern Railway Co. v. United States*.<sup>12</sup> The *Great Northern* Court held that the history of federal railroad grants had two distinct phases: the first from 1850 to 1871, and the second from 1871 onward.<sup>13</sup> From 1850 to 1871, the Court stated, Congress made land grants to support railroads, granting both rights-of-way and millions of acres of free "checkerboard" subsidy lands.<sup>14</sup> The checkerboard subsidy lands were granted in fee simple, while the right-of-way grants, the Court held, took the form of a "limited fee" estate.<sup>15</sup> This granted the railroad the exclusive right of possession and use, but maintained an "implied condition of reverter" to the government if the right-of-way ceased to be used for railroad purposes.<sup>16</sup>

According to *Great Northern* (and the Solicitor General), though, land grants to railroads became unpopular in the 1860s, and in 1871, Congress engaged in a "change of policy."<sup>17</sup> It ceased granting checkerboard lands, and instead granted only rights-of-way to the railroads.<sup>18</sup> Supposedly, because Congress no longer intended to "grant lands" to railroads, it also changed the nature of its post-1871 right-of-way grants from limited fees to grants of easements.<sup>19</sup> The railroads that ac-

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11. *Id.* at 1310–18; see also Danaya C. Wright, *The Shifting Sands of Property Rights, Federal Railroad Grants, and Economic History*, 38 ENVTL. L. 711, 716 (stating that *Hash* "profoundly altered decades of precedents"). In 2009, the Federal Circuit called one part of *Hash* into question but did not question the fundamental notion of an 1871 shift in right-of-way law. See *infra* Part I.E.

12. 315 U.S. 262 (1942).

13. *Id.* at 273–74.

14. See GATES, *supra* note 2, at 397. A "section" was a one-mile square of land. During the 1800s, the general federal land survey system surveyed and then divided the public lands into a numbered grid of sections. The numbering method meant that when the government granted either all even- or all odd-numbered sections, it formed a "checkerboard" pattern alternating granted land with reserved public land. See *infra* Part II.A.

15. *Great Northern*, 315 U.S. at 273 n.6 (citing *N. Pac. Ry. Co. v. Townsend*, 190 U.S. 267 (1903)).

16. *Id.* at 276.

17. *Id.* at 279.

18. *Id.* at 274.

19. *Id.* at 271–75.

quired such easements, the Court held, acquired no interest in the land underlying their rights-of-way.<sup>20</sup>

*Great Northern's* idea of an "1871 shift" in federal railroad right-of-way law has come to pervade the relevant case law.<sup>21</sup> In addition, several courts have followed the holding of *Hash*, citing it and *Great Northern* as authoritative statements on the history and status of federal right-of-way law.<sup>22</sup> These decisions threaten to saddle the United States with millions of dollars of legal liability for rail-to-trail conversions of federally granted railroad rights-of-way.<sup>23</sup>

This Article contends, however, that the argument originally advanced by the Solicitor General, adopted by *Great Northern*, and later relied on by *Hash*—that there was a substantial shift in federal right-of-way law around 1871—is historically indefensible. There is no evidence of such a shift in the law or legislative history. The Solicitor General and the *Great Northern* Court appear to have mistakenly believed that such a shift existed 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. This mista-

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20. *Id.* at 278–80.

21. *See, e.g.*, *Dayton Valley Investors, LLC v. Union Pac. R.R. Co.*, 664 F. Supp. 2d 1174, 1181–82 (D. Nev. 2009); *Brown v. N. Hills Reg'l R.R. Auth.*, 732 N.W.2d 732, 735 (S.D. 2007); *Wash. Sec. & Inv. Corp. v. Horse Heaven Heights, Inc.*, 130 P.3d 880, 883 n.4 (Wash. Ct. App. 2006); *Hallaba v. Worldcom Network Servs. Inc.*, 196 F.R.D. 630, 638 (N.D. Okla. 2000); *City of Maroa v. Ill. Cent. R.R.*, 592 N.E.2d 660, 664 (Ill. App. Ct. 1992). Many well-informed articles also accept the supposed "1871 shift" with little or no question. *See, e.g.*, THOMAS E. ROOT, RAILROAD LAND GRANTS FROM CANALS TO TRANSCONTINENTALS 25–35 (1986); Gregg H. Hirakawa, *Preserving Transportation Corridors for the Future: Another Look at Railroad Deeds in Washington State*, 25 SEATTLE U. L. REV. 481, 501–02 (2001).

22. *See, e.g.*, *Schneider v. United States*, Nos. 8:99CV0315, 4:99CV3056, 4:99CV3154, 4:99CV3153, 2008 WL 160921, at \*2 (D. Neb. Jan. 15, 2008); *Blendu v. United States*, 75 Fed. Cl. 543, 546–49 (2007); *Home on the Range v. AT&T Corp.*, 386 F. Supp. 2d 999, 1016 (S.D. Ind. 2005); *see also Beres v. United States*, 64 Fed. Cl. 403, 418–19 (2005) (decided just before *Hash*, but with very similar reasoning and authority); *cf. Wright, supra* note 11, at 762–63.

23. *See, e.g.*, *Litigation and its Effect on the Rails-to-Trails Program: Hearing Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 107th Cong. 16 (2002) (statement of Thomas L. Sansonetti, Assistant Att'y Gen.) (estimating "total potential monetary exposure" from all "rails-to-trails takings litigation" up to 2002 at \$57 million, while also requiring a significant time commitment from attorneys at the Environment and Natural Resources Division of the Department of Justice). Litigation involving federally granted rights-of-way would represent a subpart of this total.



ken belief also caused the Court and Solicitor General to misinterpret the relevant legislative history.

The evidence actually indicates that throughout the nineteenth century, beginning in the 1830s, Congress followed consistent policies with respect to its railroad rights-of-way. Despite characterizing them as “easements” or similar to easements, it viewed them as property over which the United States retained continued ownership and control. Moreover, because Congress viewed railroad right-of-way grants as separate from its railroad land subsidy grants, Congress did not intend to change rights-of-way in 1871 when it ceased granting land subsidies. This Article concludes that because there was no 1871 shift in federal right-of-way law, the federal government may reuse any federally granted right-of-way for an alternate purpose, such as a recreational trail, without effecting a Fifth Amendment taking.

To explain the current (and historically inaccurate) state of the law, Part I of this Article summarizes the most significant court cases involving federally granted railroad rights-of-way, including *Great Northern* and *Hash*. Part II then reviews the history of Congress’s federal right-of-way grants and subsidy land grants to railroads in the nineteenth and early twentieth centuries. It explains how that history reveals a consistent congressional policy of ownership and control over railroad right-of-way grants and does not support the notion of an 1871 shift in the law.<sup>24</sup> Part III of the Article then analyzes in detail *Great Northern*’s reading of certain legislative history from the early 1870s and explains why the Court’s reading was substantially inaccurate. Finally, Part IV discusses an overlooked part of Congress’s railroad legislation—the reserved right to “alter, amend, or repeal” grants—that further supports the notion of continued federal power over this type of property. Based on all of this evidence, the Article concludes that the most historically accurate interpretation of the right-of-way grants’ current status is that the federal government retained ownership of the public land underlying federally granted railroad rights-of-way, or a reversionary interest in it, as well as broad discretion over the ongoing use of such rights-of-way.

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24. An earlier draft of this Article, which also discusses administrative agency construction of the relevant statutes, is available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1567091](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1567091).

## I. THE KEY CASES CONCERNING FEDERALLY GRANTED RAILROAD RIGHTS-OF-WAY

The federal court cases interpreting right-of-way grants have heavily influenced not only the law governing those grants but the contemporary historical understanding of the grants—in particular, by cementing the idea that there was an “1871 shift” in federal policy. To understand the true meaning of the nineteenth-century legislative history, it is helpful to first review the changes, conflicts, and reversals that have taken place over decades of case law. This case law is described in the five Sections below. First, in *Townsend* and *Stringham*, the Supreme Court initially defined all federally granted rights-of-way as “limited fees.” In 1942, however, in *Great Northern*, the Court decided instead that post-1871 grants had conveyed only easements. Since then, lower courts have never unanimously agreed what property interests are held by the United States, by a railroad, and by adjoining landowners in a post-1871 federally granted railroad right-of-way. The eventual majority view was that the United States retained an interest, but in *Hash*, the Federal Circuit disagreed. A number of appellate courts are now considering this issue, making it essential to determine whether there was in fact any 1871 transition in right-of-way law.

### A. *The “Limited Fee” Cases: Townsend and Stringham*

One of the most important cases defining the property interests in federally granted railroad rights-of-way was *Northern Pacific Railway v. Townsend*,<sup>25</sup> decided in 1903. In *Townsend*, the Supreme Court described railroads’ property interest in Pacific railroad rights-of-way<sup>26</sup> as a “limited fee,” with an exclusive right of possession in the railroad and an “implied condition of reverter” in the United States.<sup>27</sup>

*Townsend* involved a dispute over the ownership and use of property within the 400-foot-wide right-of-way granted to the Northern Pacific by the Pacific Railroad Act of 1864.<sup>28</sup> Abner

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25. 190 U.S. 267 (1903).

26. “Pacific railroad” grants referred generally to grants from the 1860s, to railroads like the Union Pacific and Northern Pacific, that granted to the railroads large subsidy checkerboard land grants as well as rights-of-way. See *infra* Part III.G.

27. *Townsend*, 190 U.S. at 271.

28. *Id.* at 267–69.

Townsend and other farmers had obtained homestead patents<sup>29</sup> that appeared to cover acreage that was officially part of the right-of-way but was unused by the railroad.<sup>30</sup> In addition, they had farmed the land long enough to claim title to it through adverse possession.<sup>31</sup> When the railroad sought to eject them from the right-of-way property, they refused to comply.<sup>32</sup>

The Court rejected the homesteaders' claims, holding that they could not adversely possess the federally granted right-of-way and that they acquired no rights to it through their homestead patents.<sup>33</sup> The Court held that Congress had decided that all the land within the right-of-way, up to its full 400 foot width, was "necessary for a public work of such importance" as the transcontinental railroad.<sup>34</sup> "In effect," the Court stated, "the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted."<sup>35</sup> Essentially, this meant the railroad had received a fee interest that could not be alienated for non-public purposes and would revert to the government if railroad use ever ceased.<sup>36</sup>

In addition, the Court held that once the railroad had taken legal possession of the land comprising the right-of-way, that land "was taken out of the category of public lands subject to pre-emption and sale."<sup>37</sup> This meant that "the land department was therefore without authority" to convey any rights to the right-of-way property to subsequent homesteaders, even if the area covered by the homesteaders' grants nominally included the land covered by the right-of-way.<sup>38</sup> This principle—that public land "appropriated" to one purpose cannot subsequently be regranted for another purpose—has been referred to

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29. A land patent is "an instrument by which the government conveys a grant of public land to a private person." BLACK'S LAW DICTIONARY 1156 (8th ed. 2004). For discussion of the Homestead Act of 1862, see Part II.H, *infra*.

30. *Townsend*, 190 U.S. at 269.

31. *Id.*

32. *Id.*

33. *Id.* at 270–72.

34. *Id.* at 272 (citing *N. Pac. R.R. Co. v. Smith*, 171 U.S. 260, 275 (1898)).

35. *Id.* at 271. The court in *Idaho v. Or. Short Line R.R. Co.*, 617 F. Supp. 207, 210–12 (D. Idaho 1985), suggested that the Supreme Court used the term "limited fee" because it was concerned that an "easement" would not provide the exclusivity of possession necessary for railroad operations. See also Wright, *supra* note 11, at 731, 758–62 (discussing these issues).

36. See Wright, *supra* note 11, at 725–26.

37. *Townsend*, 190 U.S. at 269–71.

38. *Id.*

as the “appropriation doctrine.”<sup>39</sup> As discussed throughout this Article, the doctrine is consistent with the manner in which Congress treated its right-of-way grants throughout the nineteenth century.<sup>40</sup>

In 1915, the Supreme Court extended its “limited fee” concept to rights-of-way granted under non-land-grant statutes such as the 1875 General Right of Way Act.<sup>41</sup> In *Rio Grande Western Railway Co. v. Stringham*, the Court held that the right-of-way granted by the 1875 Act conveyed the same property interest as had the Pacific Railroad land grant acts.<sup>42</sup> Citing earlier cases, and echoing the language of *Townsend*, the Court held that an 1875 Act right-of-way

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.<sup>43</sup>

Together, the *Townsend* and *Stringham* decisions effectively affirmed that if federally granted rights-of-way were abandoned, ownership of the strip of land would return to the United States.<sup>44</sup>

### B. Great Northern Redefined Post-1871 Rights-of-Way as “Easements”

Although the *Townsend* and *Stringham* decisions defined all federally granted rights-of-way as “limited fees,” this doctrine lasted only until 1942. Then, in *Great Northern Railway Co. v. United States*,<sup>45</sup> at the suggestion of the Solicitor General, the Court substantially altered its view. *Great Northern* introduced the concept of an “1871 shift” in federal right-of-way

39. The appropriation doctrine originated in *Wilcox v. Jackson*, 38 U.S. 498 (1839). The doctrine’s history was very well summarized in *Home on the Range v. AT&T Corp.*, 386 F. Supp. 2d 999 (S.D. Ind. 2005), although that court arguably mistakenly concluded that it did not apply to 1875 Act rights-of-way.

40. See, e.g., discussion *infra* Parts II.C, F, K, and L (describing how disposition of land for a railroad right-of-way was viewed by Congress as an appropriation of the public land for that purpose).

41. See discussion of the 1875 Act *infra* Part II.K.

42. 239 U.S. 44, 47 (1915).

43. *Id.*

44. After the *Stringham* decision, Congress passed legislation regulating the disposal of such property. See *infra* Part II.M.

45. 315 U.S. 262 (1942).

law and held that all rights-of-way granted after 1871 shifted from limited fees to easements.<sup>46</sup> This concept would have tremendous influence on all subsequent cases in this area of the law.

*Great Northern* was part of a series of state and federal cases decided in the mid-twentieth century that concerned whether the railroads could exploit their rights-of-way to drill for oil and gas.<sup>47</sup> As the Solicitor General's brief noted, "the recent discovery of oil" under several rights-of-way had suddenly highlighted the formerly unimportant issue of whether railroads took any subsurface rights in their rights-of-way.<sup>48</sup> The railroad argued that it could extract the oil because, under *Stringham*, its right-of-way was a "limited fee" that included subsurface mineral rights.<sup>49</sup> The United States sued to enjoin any drilling, contending that the railroad took only an easement and that the minerals and other subsurface rights remained federal property.<sup>50</sup>

The Court sided with the United States, holding that a post-1871 right-of-way grant did not grant mineral rights to the railroad. The Solicitor General argued, and the Court agreed, that this was because federal railroad land grants were divided into two distinct time periods, and a different type of interest was granted during each period. The Solicitor General wrote that "[t]he year 1871 marks the end of one era and the beginning of a new in American [railroad] land-grant history."<sup>51</sup> Beginning with the Illinois Central Railroad land grant in 1850,<sup>52</sup> both the Court and the Solicitor General noted, "Congress embarked on a policy of subsidizing railroad construction by lavish [land] grants from the public domain," and donated tens of millions of acres to various railroads.<sup>53</sup> The So-

46. *Id.* at 279.

47. See Wright, *supra* note 11, at 730–31 (describing this effort by the railroads to increase their profits as part of what led the courts to shift from defining railroad rights-of-way as defeasible fees to defining them as "railroad easements").

48. Brief for the United States at 9, *Great Northern*, 315 U.S. 262 (No. 149), 1942 WL 542545, at \*9.

49. *Great Northern*, 315 U.S. at 270.

50. *Id.* at 270–71. The parties avoided the issue that would arise in *Hash*—whether the United States had retained title under the right-of-way if it had patented away the underlying lands—by litigating over lands in Glacier National Park. See *id.* at 279–80; Wright, *supra* note 11, at 729–30.

51. Brief for the United States, *supra* note 48, at 15.

52. See *infra* Part II.D.

53. *Great Northern*, 315 U.S. at 273; Brief for the United States, *supra* note 48, at 15–16.

licitor General argued that “[f]aced with such an open-handed congressional policy, the courts have construed such early grants as conveying to the railroads a fee in their rights of way.”<sup>54</sup> The Court similarly reasoned that “[w]hen Congress made outright grants to a railroad of alternate sections of public lands along the right of way, there is little reason to suppose that it intended to give only an easement in the right of way granted in the same act.”<sup>55</sup>

But, said the Court, the “lavish grants” given to the Pacific Railroads in the 1860s incurred “great public disfavor.”<sup>56</sup> In 1871, the Court stated, there was a “marked” or “sharp change in Congressional policy” with respect to railroad grants.<sup>57</sup> “In that year,” asserted the Solicitor General, due to the public reaction against the grants, “the policy of lavish grants of land to encourage railroad construction was replaced by a new policy of severe restriction of federal munificence in respect of railroads.”<sup>58</sup> The “public sentiment” against “the lavish land grant policy,” said the Solicitor General, “promptly found congressional expression” in a House resolution of March 1872.<sup>59</sup> That resolution declared that “the policy of granting subsidies in public lands to railroads and other corporations ought to be discontinued,” and that “the public lands should be held for the purpose of securing homesteads to actual settlers . . . .”<sup>60</sup> In the years after 1871, several members of Congress also stated in debates that their bills to grant individual railroads rights-of-way granted “no land” or were simply grants of the right-of-way.<sup>61</sup> Citing this resolution and those statements, the Solicitor General argued, and the Court held, that after 1871, Congress did “not intend[ ] to convey any land” even when it made right-of-way grants to railroads, and instead switched to grant-

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54. Brief for the United States, *supra* note 48, at 16 (citing *N. Pac. Ry. Co. v. Townsend*, 190 U.S. 267, 271 (1903)).

55. *Great Northern*, 315 U.S. at 278.

56. *Id.* at 273.

57. Brief for the United States, *supra* note 48, at 15 (“marked change”); *Great Northern*, 315 U.S. at 275 (“sharp change”).

58. Brief for the United States, *supra* note 48, at 15.

59. *Id.* at 16–17. As discussed below, this was actually only one of four similar resolutions between 1867 and 1872 that were part of the reformers’ struggle, during several successive Congresses, against railroad land subsidies. *See infra* Part II.I.

60. *Great Northern*, 315 U.S. at 273–74 (citing CONG. GLOBE, 42nd Cong., 2d Sess. 1585 (1872)).

61. *Id.* at 271 n.3 (citing CONG. GLOBE, 42nd Cong., 2d Sess. 2137 (1872)).

ing only easements in federally granted railroad rights-of-way.<sup>62</sup>

The Court and the Solicitor General also found support for their conclusions in the text of the General Right of Way Act of 1875.<sup>63</sup> They described section 4 of the 1875 Act as “especially persuasive” of a congressional shift to granting only easements.<sup>64</sup> That section provided that after rights-of-way were either constructed or officially mapped out, the public lands over which they passed “shall be disposed of subject to such right of way.”<sup>65</sup> The Solicitor General contended that “[t]o construe the right of way grant as a fee in the land would be to rob this provision of all meaning.”<sup>66</sup> *Great Northern* agreed that “[t]his reserved right to dispose of the lands subject to the right of way is wholly inconsistent with the grant of a fee.”<sup>67</sup> They both also cited statements in the *Congressional Globe* by the original author of section 4, “Congressman Slater.” Slater had stated that the point of section 4 was to make the right-of-way “an incumbrance upon the land,” and he agreed in debate that the provision “grants no land to any railroad company.”<sup>68</sup>

The theory of a major historical shift in right-of-way law in 1871 appears to have originated in *Great Northern*. When advanced by the Solicitor General, this theory provided the *Great Northern* Court with a superficially logical and reasonable basis for the Court to distinguish its prior holding from *Stringham*. After *Great Northern*, the theory has been cited and repeated many times.<sup>69</sup> As discussed throughout this Article, however, while it is clear that checkerboard land grants to railroads ended in 1871, there is actually scant historical support for the notion that right-of-way grants also changed significantly around that time.

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62. *Id.* at 274. *Great Northern* also distinguished *Stringham* by arguing that the Court in 1915 had supposedly paid insufficient attention to “the shift in Congressional policy” away from granting lands that occurred in 1871. *See id.* at 277–79.

63. *Great Northern*, 315 U.S. at 271–72; Brief for the United States, *supra* note 48, at 10–11.

64. *Great Northern*, 315 U.S. at 271; *see also* Brief for the United States, *supra* note 48, at 11–12.

65. Act of Mar. 3, 1875, ch. 141, § 4, 18 Stat. 477 (now codified at 43 U.S.C. § 937 (2006)).

66. Brief for the United States, *supra* note 48, at 11.

67. *Great Northern*, 315 U.S. at 271.

68. Brief for the United States, *supra* note 48, at 12; *see also Great Northern*, 315 U.S. at 271 n.3 (quoting CONG. GLOBE, 42d Cong., 2d Sess. 2137 (1872)).

69. *See supra* note 21; *infra* Parts I.D and E.

C. *Union Pacific Redefined Pacific Railroad Rights-of-Way as Excluding Mineral Rights*

In 1957, in another mineral rights case, the Supreme Court further altered and muddled its interpretation of federal right-of-way grants. In *United States v. Union Pacific Railroad Co.*, the Court ruled that the 1862 Pacific Railroad Act, which would have been considered a “limited fee” under *Townsend*, had nevertheless not granted mineral rights to the Union Pacific.<sup>70</sup> This, the Court said, was because the granting statute’s reservation of “mineral lands” to the United States applied both to the checkerboard subsidy lands and to the right-of-way itself.<sup>71</sup> The Court distinguished *Townsend* on the grounds that *Townsend* addressed the issue of whether valid home-steads could be located on the right-of-way, not who owned the minerals under it.<sup>72</sup> But *Union Pacific* did not go so far as to hold, following *Great Northern*, that a pre-1871 Pacific Railroad right-of-way was an “easement,” even though the relevant legislative history suggests some reasons to use that term.<sup>73</sup> As such, *Union Pacific* further confused the issue of the ownership of rights-of-way under both pre- and post-1871 statutes.<sup>74</sup>

D. *After Great Northern and Union Pacific, Lower Courts Disagreed Whether the United States Retained an Interest in Federally Granted Rights-of-Way*

Many post-1871 rights-of-way were located in the Tenth Circuit. After *Great Northern*, the Tenth Circuit concluded that if the United States issued land patents that covered the same property crossed by a post-1871 federally granted right-of-way, the mineral rights to that property belonged to the patentee and not the United States.<sup>75</sup> Citing *Union Pacific*, the

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70. *United States v. Union Pac. R.R. Co.*, 353 U.S. 112, 119–20 (1957).

71. *Id.* at 114–15.

72. *Id.* at 118.

73. *See infra* Parts II.G and N.

74. *See Wright, supra* note 11, at 732–33 (discussing difficulties in distinguishing between “limited fee” and “easement” right-of-way interests after *Union Pacific*).

75. *See Chi. & Nw. Ry. Co. v. Cont'l Oil Co.*, 253 F.2d 468, 471–73 (10th Cir. 1958) (rejecting railroad’s appropriation argument as a variation of the “limited fee concept” rejected by *Great Northern*); *Mo.-Kan.-Tex. R.R. Co. v. Ray*, 177 F.2d 454, 456 (10th Cir. 1949) (holding that an 1875 Act right-of-way was subject to the



Tenth Circuit also went one step further and applied this logic to *pre-1871* rights-of-way.<sup>76</sup> The U.S. District Court in South Dakota similarly concluded that if post-1871 rights-of-way were only easements, the United States ceased to retain any rights in them if it patented away the underlying lands.<sup>77</sup>

But other courts declined to follow this view. In 1985, the U.S. District Court in Idaho published an influential opinion concluding that the United States had in fact retained an interest in both pre- and post-1871 rights-of-way, regardless of whether patents covering the land had subsequently been issued. In *State of Idaho v. Oregon Short Line Railroad Co.*,<sup>78</sup> the court emphasized that the pre-1871 and post-1871 grants contained identical right-of-way granting language, and that Congress had authority to grant railroad easements “subject to its own terms and conditions.”<sup>79</sup> Congress, it concluded, “could pre-empt or override common-law rules regarding easements, reversions, or other traditional real property interests.” Accordingly, “even if the 1875 Act granted only an easement,” Congress may still have intended “to retain an interest in that easement.”<sup>80</sup>

In addition, in 1988, Congress passed legislation, codified as 16 U.S.C. §1248(c), to officially retain any rights it still had in its federally granted railroad rights-of-way.<sup>81</sup> Citing section 1248(c) and *Oregon Short Line*, a number of courts concluded that the United States retained an interest in both pre- and post-1871 rights-of-way that was sufficient to support rail-to-

“manifest policy of the Congress . . . to limit [federally granted rights-of-way] to easements for railroad purposes”).

76. See *Energy Transp. Sys., Inc., v. Union Pac. R.R. Co.*, 606 F.2d 934, 936–37 (10th Cir. 1979) (holding that railroad’s ownership interest in the right-of-way, originally established in *Townsend*, had been “severely cut back” by *Union Pacific* and that the servient estate passed with a homestead patent); *Wyoming v. Andrus*, 602 F.2d 1379, 1383 (10th Cir. 1979) (holding that the Union Pacific Railroad “did not own the minerals” underlying its right-of-way, and that if the railroad “should cease to . . . use the land [for railroad purposes], it would revert to the fee owner, whoever that is”).

77. See, e.g., *City of Aberdeen v. Chi. and Nw. Transp. Co.*, 602 F. Supp. 589, 593–95 (D.S.D. 1984) (holding that *Great Northern* meant that no federal interest remained in a post-1871 right-of-way). This was despite the seemingly contrary language of 43 U.S.C. § 912 (1982), which purported to regulate the disposition of such property.

78. 617 F. Supp. 207 (D. Idaho 1985).

79. *Id.* at 212.

80. *Id.*

81. National Trails System Improvement Act of 1988, Pub. L. No. 100-470, 102 Stat. 2281 (codified at 16 U.S.C. § 1248(c) (2006)); see also *infra* Part II.M.

trail conversions.<sup>82</sup> This included the Tenth Circuit, which adopted this view in the mid-1990s.

*E. In Hash, the Federal Circuit Held the United States Retained No Interest in Rights-of-Way Granted After 1871*

In 2005, in *Hash v. United States*, the Federal Circuit broke with the courts that had found a retained federal interest in post-1871 rights-of-way.<sup>83</sup> It held instead that the United States would effect a taking of adjacent patentees' property rights if it tried to redevelop an 1875 Act right-of-way for recreational trail use.<sup>84</sup>

The *Hash* court asserted that “[t]he nature of the transfer of a right-of-way to a railroad under the 1875 Act, and the patenting to settlers of the land subject to the right-of-way, has been extensively explored” and “extensively litigated.”<sup>85</sup> Relying heavily on *Great Northern's* analysis, *Hash* stated:

The text of the 1875 Act, and the omission of any reservation or retention or reversion of the fee by the United States, negate the now-asserted intention on the part of the United States to retain ownership of the lands underlying railway easements when the public lands were disposed of.<sup>86</sup>

*Hash* added that “[w]e have been directed to no suggestion, in any land patent, deed, statute, regulation, or legislative history, that can reasonably be construed to mean that the United States silently retained the fee to the land traversed by the right-of-way, when the United States granted that land to homesteaders.”<sup>87</sup> Instead, the Court held that the language of section 4 of the 1875 Act indicated that Congress had *specifi-*

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82. See, e.g., *Avista Corp. v. Wolfe*, 549 F.3d 1239, 1246–51 (9th Cir. 2009); *Samuel C. Johnson 1988 Trust v. Bayfield Cnty.*, 520 F.3d 822 (7th Cir. 2008); *Mauler v. Bayfield Cnty.*, 309 F.3d 997 (7th Cir. 2002); *Phillips Co. v. Denver and Rio Grande W. R.R. Co.*, 97 F.3d 1375 (10th Cir. 1996); *Marshall v. Chi. & Nw. Transp. Co.*, 31 F.3d 1028 (10th Cir. 1994); *Vieux v. E. Bay Reg'l Park Dist.*, 906 F.2d 1330 (9th Cir. 1990); *King Cnty. v. Burlington N. R.R. Co.*, 885 F. Supp. 1419 (W.D. Wash. 1994).

83. *Hash v. United States*, 403 F.3d 1308, 1318 (Fed. Cir. 2005).

84. *Id.*

85. *Id.* at 1313, 1316.

86. *Id.* at 1317.

87. *Id.*

*cally intended* to dispose of any interest that it had in the land underlying post-1871 rights-of-way.<sup>88</sup>

In 2009, in *Ellamae Phillips Co. v. United States*,<sup>89</sup> the Federal Circuit appeared to retreat somewhat from its holding in *Hash. Ellamae Phillips* held that the scope of an 1875 Act right-of-way easement might still be broad enough to encompass reuse for non-railroad purposes, such as recreational trails.<sup>90</sup> But in remanding that issue for further consideration, *Ellamae Phillips* never questioned the *Great Northern* holding that there was an 1871 shift in federal right-of-way law.<sup>91</sup>

In sum, the courts first identified a federal reversionary interest in Pacific Railroad rights-of-way and later extended it to rights-of-way from the 1870s. But *Great Northern* overturned this view and introduced the notion of an “1871 shift” in right-of-way law. Ever since, there has been confusion over the United States’ interests in post-1871 rights-of-way. The issue remains important today. Cases involving property rights in such rights-of-way repeatedly come before the courts; such cases are currently pending before the Seventh and Tenth Circuits and in the U.S. Court of Claims.<sup>92</sup> These courts will have to determine whether government agencies must pay compensation in order to use federally granted rights-of-way to build trails or highways, make telecommunications leases, or take other actions consistent with ownership.

There is a significant chance that in answering these questions, the courts will follow prior practice, apply the “1871 shift” paradigm from *Great Northern*, and assume that rights-of-way granted after 1871 must be different from those granted before. If, however, there was actually no shift in the law in 1871, applying *Great Northern* will result in decisions based on a faulty premise and will create a significant risk of legal error. Fortunately, as described in the next section, a careful review of history provides a clear answer: there is no evidence to sup-

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88. *Id.* at 1314. For discussions of this specific language in the 1875 Act, see *infra* Parts II.K and III.

89. 564 F.3d 1367 (Fed. Cir. 2009).

90. *Id.* at 1372–74.

91. *Id. passim.*

92. See *United States v. Wyo. & Colo. R.R., et. al.*, No. 09-8047 (10th Cir.) (filed 2009); *Johnson v. Bayfield Cnty.*, Nos. 09-2876, 09-2879 (7th Cir.) (filed 2009), *appealing* *Samuel C. Johnson 1988 Trust v. Bayfield Cnty.*, 634 F. Supp. 2d 956 (W.D. Wis. 2009); *Ellamae Phillips Co. v. United States*, No. CV04-1544 (Ct. Cl.), *vacated and remanded by* 564 F.3d 1367 (Fed. Cir. 2009).

port *Great Northern's* theory of an 1871 shift in federal right-of-way law.

## II. THE CONGRESSIONAL HISTORY OF FEDERAL RIGHT-OF-WAY GRANTS (AND LAND GRANTS) TO RAILROADS

Congress's nineteenth-century land grants to railroads were characterized by the Solicitor General, *Great Northern*, and *Hash* as having comprised two basic types: fee simple "land grants" from 1850 to 1871, and easement rights-of-way after 1871. But the history of federal right-of-way grants to railroads was much longer and more complex than the Solicitor General and the *Great Northern* Court acknowledged. When this history is reviewed in full, it fails to indicate any "1871 shift" in right-of-way law.

Part II reviews this history in thirteen sections. As described below, land grants to support transportation improvements such as railroads and canals began very early in the history of the United States. Congress did not extend the land grant policy to railroads until 1850. But beginning in the 1830s, Congress readily granted rights-of-way through the public lands of the United States to railroads. The evidence indicates that Congress consistently viewed such rights-of-way as being a special type of "easement," dedicated out of the public lands for a public purpose and subject to continuing federal ownership and control.

This Part further describes that between 1850 and 1871, Congress combined its right-of-way and land grant policies by giving both types of grants to many individual railroads. But there is no evidence that in combining these grants, Congress intended any change to the nature of its right-of-way grants. In the late 1860s, the public became angry at the vast amount of lands that Congress was granting to railroads. This led to the end of subsidy land grants in 1871. When Congress ceased granting railroads subsidy lands, though, there is again no evidence that it intended to change the law governing federal rights-of-way. Instead, Congress merely continued to follow the same practices that it had followed since the 1830s. For that reason, the evidence indicates Congress intended to retain federal ownership and control over all its railroad right-of-way grants, both before and after 1871.

A. *Early Federal Land Subsidies to Support Transportation*

From the start of the nineteenth century, the United States government owned great expanses of sparsely settled land that lacked the transportation infrastructure necessary for its development.<sup>93</sup> Many members of Congress wanted the federal government to fund roads and other transportation improvements. But some constitutional “strict constructionists,” including James Madison and James Monroe, opposed such subsidies on the grounds that they exceeded Congress’s constitutional powers.<sup>94</sup>

Both sides generally agreed, however, that under the Constitution, Congress could dispose of the public lands as it saw fit.<sup>95</sup> As early as the 1790s, therefore, the federal government began to use grants of the public land to subsidize new transportation projects.<sup>96</sup> These early grants were typically given to states or to state-chartered corporations, with a few given to individuals.<sup>97</sup> The recipients could sell or mortgage granted lands to finance the project or retain them for speculative profit once the project was completed.<sup>98</sup>

Proponents of granting lands for transportation improvements commonly argued that the grants would confer a net benefit on the country.<sup>99</sup> Even if the government gave away part of its land to support a new road or canal, they said, the transport route would promote settlement, increasing the value of all the land in the area, and increasing the government’s

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93. See GATES, *supra* note 2, at 341–43; BENJAMIN H. HIBBARD, *A HISTORY OF THE PUBLIC LAND POLICIES* 7–16 (1965).

94. See, e.g., ROOT, *supra* note 21, at 8; see also GATES, *supra* note 2, at 341–43; John Lauritz Larson, “Bind the Republic Together”: *The National Union and the Struggle for a System of Internal Improvements*, 74 J. AM. HIST. 363, 381–87 (1987).

95. See GATES, *supra* note 2, at 8, 341–43; see also DONALDSON, *supra* note 3, at 257.

96. See GATES, *supra* note 2, at 345; Lewis Henry Haney, *A Congressional History of Railways in the United States to 1850*, 211 BULL. U. WIS. ECON. & POL. SCI. SERIES 167, 328 (1908) (citing Act of May 17, 1796, ch. 27, 1 Stat. 464). Haney’s volumes covering the pre-1850 and 1850–1887 periods are the preeminent early histories of Congress’s railroad grant policies and contain a wealth of detail.

97. See HIBBARD, *supra* note 93, at 241.

98. See GATES, *supra* note 2, at 350 (noting that Illinois profited exceptionally by holding its canal lands from its grant lying partly in “what soon became the mushrooming city of Chicago”).

99. See *id.* at 341–42.

profits from land sales.<sup>100</sup> After New York's Erie Canal was completed in 1825, it was widely regarded as having proved this theory. The canal "was a spectacular success in showing the results that could be expected from the building of internal improvements into largely undeveloped areas."<sup>101</sup> This success sparked an era of intense interest in granting lands to support internal improvements.<sup>102</sup>

Around 1827, Congress began granting subsidies to canal and turnpike projects in the form of "alternate sections" of public land, first forming the famous "checkerboard" land grant pattern.<sup>103</sup> For example, an 1827 grant to the State of Illinois to aid in the construction of a canal gave the state "a quantity of land equal to one-half of five sections in width, on each side" of the canal, reserving alternate sections to the government.<sup>104</sup> Grant proponents contended that intermixing the granted and reserved lands in this way would help the reserved lands maintain their value.<sup>105</sup> Later grants often required that the reserved lands be sold for double the government's minimum per-acre price, supposedly directly compensating the Treasury for the granted land.<sup>106</sup>

*B. Early Federal Land Subsidy Grants to Railroads Were Very Limited*

At the beginning of the 1830s, railroad technology was still primitive and only a few short railroads had been built.<sup>107</sup> Nevertheless, railroads and projected railroads became im-

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100. *See id.* at 345–46.

101. *Id.* at 343.

102. *See id.* at 341–56; *cf.* FRANZ ANTON RITTER VON GERSTNER, EARLY AMERICAN RAILROADS 375 (Frederick C. Gamst ed., David J. Diephouse & John C. Decker trans., Stanford Univ. Press 1997) (1842–1843) (discussing predicted effect of Miami Canal in Ohio on land values). At the end of 1825, it was suggested that Congress enact a "general system of Internal Improvement, embracing Canals, Roads, and Railways, with a fund to be derived from the sale of public lands." *See* H.R. Res. 7, 19th Cong. (1st Sess. 1825).

103. GATES, *supra* note 2, at 345–46.

104. *Id.* at 350 (citing Act of Mar. 2, 1827, ch. 51, 4 Stat. 234); *id.* at 347 (citing a similar grant in 1827 to Indiana).

105. *See id.* at 345–46.

106. Although the railroads long argued that this double-minimum price would fully compensate the government for its granted lands, Gates strongly disagrees. GATES, *supra* note 2, at 358.

107. *See* GEORGE ROGERS TAYLOR, THE TRANSPORTATION REVOLUTION 1815–1860, at 79 (1951) (stating that as of 1830, seventy-three miles were in operation nationwide).

mensely popular in the first half of the decade. In 1832, one congressman bemoaned the enthusiasm for new railroads (and canals) as “a mania,” under which “the people rushed blindly into schemes for constructing them every where, and which they would have ample reason hereafter to repent.”<sup>108</sup>

From the beginning of the railroad era, Congress heard proposals to support railroads through subsidy land grants, like those given to canals.<sup>109</sup> The first significant “land grant” to aid in railroad construction occurred in 1833, when Congress authorized the state of Illinois to use an existing canal land grant for railroad purposes as well.<sup>110</sup> But this turned out to be the only significant subsidy land grant to a railroad in the 1830s or 1840s. Even though the question of whether railroads should be granted checkerboard subsidies was “agitated almost continually” in Congress beginning in 1835, opinion on the policy was divided.<sup>111</sup> Western public land states favored land subsidies for railroads, expecting them to bring economic progress, but the southern states, and some of the eastern states, generally opposed them.<sup>112</sup> Bills to grant checkerboard lands to states in support of particular railroads failed in Congress in 1835, 1838, 1840, and 1846.<sup>113</sup>

108. See 8 REG. DEB. 1841 (1832) (comments of Rep. Hall of North Carolina). See also DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848*, at 562–64 (2007) (describing parallels between railroads and earlier canal construction).

109. See Haney, *supra* note 96, at 342–43.

110. GATES, *supra* note 2, at 350 (noting that the 1827 canal land grant to Illinois was converted to a railroad grant by an Act of Congress (citing Act of Mar. 2, 1833, ch. 85, 4 Stat. 662)); see also S. REP. NO. 21-798, at 138 (1st Sess. 1830) (conversion of Ohio canal grant to railroad). John Bell Sanborn, *Congressional Grants of Land in Aid of Railways*, 30 BULL. U. WIS. ECON., POL. SCI. & HIST. SERIES 263, 273–74, 281 (1899) (citing DONALDSON, *supra* note 3, at 257–61).

111. See JOHN BELL RAE, *THE DEVELOPMENT OF RAILWAY LAND SUBSIDY POLICY IN THE UNITED STATES* 2 (1979); see also *infra* Part II.D.

112. See GATES, *supra* note 2, at 356–57 (noting that western states favored railroad subsidies, but subsidies were opposed by a coalition of southern states that wanted to limit the powers of the federal government and by eastern states that were opposed to numerous land grants in the West). On southern opposition to land grants, see Haney, *supra* note 96, at 377–78; HIBBARD, *supra* note 93, at 241–44.

113. See Sanborn, *supra* note 110, at 281–82. In the Distribution Act of 1841, though, the federal government gave lands to individual states for the general purpose of “internal improvements,” which some states used to support railroads. GATES, *supra* note 2, at 15–17 (citing Distribution Act of Sept. 4, 1841, ch. 16, 5 Stat. 453). The government also subsidized railroads during this period with engineering assistance. See Forest G. Hill, *Government Engineering Aid to Railroads before the Civil War*, 11 J. ECON. HIST. 235, 238–40 (1951); see also Haney,

C. *In the 1830s, Congress Began Supporting Railroads Through Right-of-Way Grants*

As railroads grew in number and length in the 1830s, railroad companies began asking for the legal right to build across the federal public lands.<sup>114</sup> Even though Congress would not grant subsidy lands to support railroad construction, it favored railroad right-of-way grants and began to regularly pass them.

These early federal right-of-way grants appear to have received very little historical scrutiny.<sup>115</sup> During this period, however, Congress confronted many of the issues and formulated many of the grant terms that it would use in most of its grants throughout the rest of the nineteenth century. At this time, terms of art such as “right-of-way” had not yet come into standard use.<sup>116</sup> When describing in these grants what the railroads were permitted to do, Congress often used terms that were more lengthy and elaborate—and that shed more light on Congress’s intentions—than in later statutes. As a result, the language and legislative history of the 1830s grants suggest a great deal about the meaning of later grants. They indicate that Congress intended its right-of-way grants to be used for the benefit of the public and not to be permanently alienated to the railroads.

As early as 1834, Congress considered a “general” right-of-way bill to grant any railroad permission to cross the public lands.<sup>117</sup> It would have allowed railroads and canal companies to condemn, in any state’s local or county courts, “the title to each section” of federal land “through which [the] railroad or

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*supra* note 96, at 275–88 (providing description and tables of the various engineering surveys).

114. *See, e.g.*, H.R. REP. NO. 24-1460, at 530–31 (1st Sess. 1836) (“The application [for a right-of-way] is made for the reason . . . that the [railroad] . . . cannot pass beyond the town of New York, in the county of Shelby, either on the right or left branch of the railroad, without entering on the public land of the United States . . .”).

115. *Cf.* PAMELA BALDWIN & AARON M. FLYNN, CONG. RESEARCH SERV., RL 32140, FEDERAL RAILROAD RIGHTS OF WAY 1–3 (2006) (commencing analysis with 1850s grants).

116. The term had been used in the early 1830s. *See, e.g.*, MEMORIAL OF THE BALTIMORE AND OHIO RAILROAD COMPANY, H.R. DOC. NO. 22-113, at 1 (2d Sess. 1833) (discussing contest between B&O Railroad and Chesapeake and Ohio Canal Company for the “right of way” along the Potomac). *See also* GERSTNER, *supra* note 102, at 815 n.14 (discussing legal antecedents of American railway law in canal acts from Elizabethan England).

117. H.R. 385, 23d Cong. (1st Sess. 1834).



canal may pass.”<sup>118</sup> But that general bill, and its fee-like conveyance of title to the railroads, did not pass.<sup>119</sup> Instead, Congress began to consider and pass bills that granted specific rights-of-way to individual railroad projects, or to small groups of railroads.

A flurry of individual right-of-way bills and statutes in the Twenty-Third and Twenty-Fourth Congresses, between 1835 and 1838, proposed grants and granted public lands in support of projected roads in states including Mississippi, Missouri, Indiana, Florida, Alabama, Louisiana, Tennessee, and Michigan.<sup>120</sup> The 1835–1837 bills and statutes typically stated that they authorized the railroads to “locate and construct” their roads on or through the public lands.<sup>121</sup> “Location” or “locate” were terms of art under the public land laws; they referred to the taking possession of a specific tract of public land, pursuant to a more general legal authority to do so. The practice had originated in the pre-Revolutionary War southern colonies, where previously unclaimed land “was taken up by the location of warrants giving the holder a right to select his parcel on any part of the unappropriated area.”<sup>122</sup> Similarly, the railroad grants gave the railroads the general legal right to build between one geographic location and another, but their roads were not technically “located” until they filed a precise map of

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118. *Id.* ll. 15–16.

119. Haney, *supra* note 96, at 335. The first “general” right-of-way law passed in 1852. *See infra* Part II.F.

120. *See, e.g.*, S. 151, 24th Cong. (1st Sess. 1836) (Florida and Alabama); H.R. 387, 24th Cong. (1st Sess. 1836) (Missouri and Mississippi); S. 66, 24th Cong. (1st Sess. 1836) (Indiana); S. 196, 24th Cong. (1st Sess. 1836) (Alabama); H.R. 647, 24th Cong. (1st Sess. 1836) (Louisiana, Alabama, and Tennessee); H.R. 740, 24th Cong. (1st Sess. 1836). A grant over a federal reservation in Massachusetts also passed. *See* Act of Apr. 29, 1836, ch. 58, 5 Stat. 17 (providing for a reversion to the United States upon abandonment).

121. *See, e.g.*, H.R. 387, 24th Cong. (1st Sess. 1836); S. 66, 24th Cong. (1st Sess. 1836); S. 196, 24th Cong. (1st Sess. 1836); H.R. 593, 24th Cong. (1st Sess. 1836); H.R. 740, 24th Cong. (1st Sess. 1836); *see also* 13 REG. DEB. 1420–22 (1837) (House debate on the Atchafalaya Railroad grant bill, in which the bill was described as “grant[ing] the privilege of locating [the] road on the public lands”).

122. HIBBARD, *supra* note 93, at 36–37. Similarly, beginning with the American Revolution, military veterans were often granted “military land warrants” to “locate” a certain amount of the public land as a reward for their service. *See, e.g.*, GATES, *supra* note 2, at 259; ROBERT M. KVASNICKA, THE TRANS-MISSISSIPPI WEST 1804–1912 PART IV: A GUIDE TO RECORDS OF THE DEPARTMENT OF THE INTERIOR FOR THE TERRITORIAL PERIOD, SECTION 3: RECORDS OF THE GENERAL LAND OFFICE 46–47 (2007).

their projected route with the government or actually built the road and occupied a strip of the public lands.<sup>123</sup>

The authors of these bills and statutes also searched for appropriate legal terms to describe how the railroads were to occupy portions of the public lands. Although it would soon become standard for Congress to grant a “right of way” a certain number of feet wide “across” or “through” the public lands, only some of these early bills and statutes used such language.<sup>124</sup> A number of them instead used more elaborate terms to define the boundaries of a railroad’s grant. Two bills directed that the railroads would be granted a chain of adjacent square lots of the public lands that the railroads’ tracks crossed over.<sup>125</sup> They specified that those lots of public land, “whether full sections or smaller legal subdivisions, and no other, shall be permanently reserved from sale” for the benefit of the railroad—a reservation in which there is another strong echo of the “appropriation doctrine.”<sup>126</sup> Several other bills in 1836 came closer to the future standard language: they granted the railroads strips of land described by terms such as a “route,” to run “through the public lands of the United States . . . one hundred and eighty feet wide,”<sup>127</sup> or “fifty feet of the public lands on each side of said rail-road, in addition to one hundred feet, the width thereof.”<sup>128</sup> Elsewhere in the bills, these strips of land were referred to as the railroad’s “way” or “right of way.”<sup>129</sup>

The 1830s bills and statutes did not themselves describe the right-of-way grants as granting any particular type of estate in real property to the railroads. To the extent Congress discussed this issue, though, it appears it considered these grants to be similar to easements. The House debate over the Florida grant of 1837 described the grant, and “numerous . . .

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123. See, e.g., 1875 General Right of Way Act, ch. 152, § 4, 18 Stat. 482, 483 (codified at 43 U.S.C. § 937 (2006)) (discussed *infra*, Part III).

124. See, e.g., Act of Mar. 3, 1835, ch. 45, 4 Stat. 778; H.R. 593, 24th Cong. (1st Sess. 1836) (granting both a right-of-way and alternate “checkerboard” sections of the public lands); H.R. 647, 24th Cong. (1st Sess. 1836) (enacted as Act of July 2, 1836, ch. 255, 5 Stat. 65); *cf.* Act of Mar. 30, 1822, 3 Stat. 659, 660 (reserving from sale both a strip of land ninety feet on either side of the canal, and the sections of land through which the canal was to run, but without using the phrase “right-of-way”).

125. See S. 147, 23d Cong. § 3 (2d. Sess. 1835); H.R. 593, 24th Cong. § 3 (1st Sess. 1836)

126. See sources cited *supra* note 124; see also *supra* Part I.A (discussing the “appropriation doctrine”).

127. S. 66, 24th Cong. § 1 (1st Sess. 1836)

128. H.R. 387, 24th Cong. (1st Sess. 1836).

129. Act of Jan. 31, 1837, ch. 9, 5 Stat. 144.

similar grants,” as “g[iving] to this company” a tract of land “in the character of an ‘incorporated hereditament.’”<sup>130</sup> Similarly, a Louisiana grant was described by its sponsor as more similar to an easement than a fee; he said that “[t]here was no pre-emption granted” to the railroad company, “but they were merely granted the privilege of locating their road on the public lands.”<sup>131</sup>

Most of the bills and statutes explicitly restricted the railroads’ ownership and use of the rights-of-way by specifying that they were granted for public purposes. In part, this was because railroads were viewed as potentially “monopolistic” when compared to roads or canals, upon which individuals could run their own carts or boats.<sup>132</sup> Several of the bills and statutes contained the qualification that the lands were only to be “enjoyed by said company so long as they maintain said road for the public accommodation”<sup>133</sup> or were “kept up” as a “public way.”<sup>134</sup> Many of the bills and statutes further specified that if the public railroad use ceased, “the reservation and grant shall be void,”<sup>135</sup> or that “the grants, hereby made, shall cease and determine,”<sup>136</sup> or that the lands would “revert to the United

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130. 12 REG. DEB. 2964 (1836). An “incorporated hereditament” was, in essence, an easement; Blackstone described “ways, or the right of going over another man’s ground” as one type of “incorporeal hereditament.” See 2 WILLIAM BLACKSTONE, COMMENTARIES \*35–36; *but see* ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY 437 (2d ed. 1993) (criticizing this term as “carr[ying] inaccurate connotations” because “incorporeal” usually means “non-possessory”). Rather, according to Cunningham et al., easements “give the holder . . . a right to use or to take something from land, the possessory estates in which are owned by others.” *Id.* Railroad easements, however, “present special problems” in the general category of easements because unlike other easements, they carry the right to exclude the servient estate owner from shared use. *Id.* at 460. See also Wright, *supra* note 11, at 724–33 (discussing cases, including *Great Northern*, construing railroad right-of-way property interests).

131. See 13 REG. DEB. 1420–22 (1837).

132. See Haney, *supra* note 96, at 243–44.

133. Act of Jan. 31, 1837, ch. 9, 5 Stat. 144, 145; S. 66, 24th Cong. § 1 (1st Sess. 1836).

134. Act of Jan. 31, 1837, ch. 9, 5 Stat. 144; see also S. 196, 24th Cong. § 4 (1st Sess. 1836); S. 66, 24th Cong. (1st Sess. 1836); H.R. 740, 24th Cong. § 4 (1st Sess. 1836). *But see* Lake Superior & Miss. R.R. Co. v. United States, 93 U.S. 442, 444–56 (1876) (discussing origins of the use of the term “public highway” in the early years of railroading, when it was thought that individuals might run private cars on railroad tracks, like boats on a canal).

135. See, e.g., S. 147, 23d Cong. § 2 (2d Sess. 1835); see also S. 66, 24th Cong. § 1 (1st Sess. 1836) (route of railroad to be “enjoyed by said company so long as they maintain said road for the public accommodation”).

136. Act of July 2, 1836, ch. 255, 5 Stat. 65, 66; see also Act of Mar. 3, 1837, ch. 49, 5 Stat. 196.

States.”<sup>137</sup> There is no indication in the legislative history, however, that in bills and statutes containing no explicit reversion language, Congress was either deliberately choosing to give the railroads a permanent interest in their right-of-way property or intending to transfer control of the rights-of-way to any adjacent third parties upon abandonment. Rather, Congress seems to have consistently intended to allow the railroads the use of appropriated property, while reserving ultimate title in the government.

Congress also debated the extent to which it should impose additional public obligations upon the railroads in exchange for the grants. Some of the bills contained provisions that in exchange for their federal land, the railroads should transport the United States mail, the military, and other federal property “without any charge or expense,” or at “a reasonable compensation.”<sup>138</sup> During the 1830s, such requirements were blocked in Congress on the grounds that railroads still faced uncertain financial prospects and that any federal mandates would “clog and encumber” them.<sup>139</sup> By the time of the Distribution Act of 1841, though, Congress decided to require such services from federally subsidized railroads.<sup>140</sup>

Other features of the 1830s right-of-way bills became part of almost all future federal railroad right-of-way legislation. Many bills and statutes gave the railroads plots of land to use for stations and depots.<sup>141</sup> Many permitted the railroads to use timber or stone located on adjacent, unclaimed public lands to

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137. Act of June 28, 1838, § 6, 5 Stat. 253, 254. Like the explicit reversion provisions, the “cease and determine” language also appears to have required a reversion to the United States, consistent with the idea that a right-of-way was a parcel of land that had been “located” from out of the public lands. *See also infra* Part II.F.

138. *See, e.g.*, H.R. 387, 24th Cong. § 9 (1st Sess. 1836) (all such property); S. 196, 24th Cong. § 6 (1st Sess. 1836) (mail); 13 REG. DEB. 1421 (1837) (mails and “munitions of war”). At the time, the Postal Service was one of the most significant activities of the federal government. *See* HOWE, *supra* note 108, at 225. *See also* ANDREW JACKSON, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TO THE TWO HOUSES OF CONGRESS DEC. 7, 1835, at 26–27, *reprinted in* S. JOURNAL, 24th Cong., 1st Sess. 30 (1835) (raising possibility of refusal by monopolistic railroads to carry the mail).

139. 13 REG. DEB. 1421, 1423 (1837) (containing objections made during debate on Atchafalaya Railroad by Rep. Reynolds of Illinois and Rep. Garland of Louisiana maintaining that such a requirement “would lead to the inevitable loss of the bill”).

140. Distribution Act of Sept. 4, 1841, § 9, 5 Stat. 453, 455.

141. *See, e.g.*, Act of Mar. 3, 1837, ch. 49, 5 Stat. 196; S. 86, 24th Cong. (2d Sess. 1837).

construct their lines.<sup>142</sup> Even by this early date, then, some of the right-of-way legislation, such as the New Orleans and Nashville grant of 1836, looked extremely similar in form to legislation from the rest of the century:

[T]here be, and is hereby granted . . . the right of way through such portion of the public lands as remain unsold, *Provided*, That the portion of the public lands occupied therefor, shall not exceed eighty feet in breadth . . . . *And be it further enacted*, That for such depots, watering places and work-shops as may be essential to the convenient use of said road; there shall also be granted . . . such portions of the public land [of five acres, for every fifteen miles] . . . . *And be it further enacted*, That so long as the public lands in the vicinity of the road shall remain unsold, the said company shall have power to take therefrom, such materials of earth, stone, or wood, as may be necessary for the construction of said road . . . .<sup>143</sup>

The “mania” for railroad construction contributed to a boom in land speculation that helped cause the economic “Panic of 1837” and the ensuing depression.<sup>144</sup> The depression lasted into the mid-1840s and virtually halted railroad construction. Many states, plunged deep into debt over railroad and canal projects, went on to enact constitutional prohibitions against debts to fund internal improvements.<sup>145</sup> Federal right-of-way legislation ceased until the later 1840s, when the economy recovered.<sup>146</sup>

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142. See, e.g., Act of Mar. 3, 1835, ch. 45, 4 Stat. 778; Act of July 2, 1836, ch. 255, 5 Stat. 65, 66.

143. Act of July 2, 1836, ch. 255, 5 Stat. 65, 65–66.

144. See JOHN MOODY, *THE RAILROAD BUILDERS* 9–10 (1919). *But compare* ROY M. ROBBINS, *OUR LANDED HERITAGE* 62–63 (2d ed. 1976) (describing the sale of the “Uncle Sam” townsite, sixty miles outside New Orleans, for \$500,000, as an example of wild real estate speculation), *with* GERSTNER, *supra* note 102, at 750–51 (describing “Uncle Sam” as predicted to be a popular, mosquito-free refuge from New Orleans’s “summertime outbreaks of yellow fever” when reached by the railroad).

145. See JOHN LAURITZ LARSON, *INTERNAL IMPROVEMENT: NATIONAL PUBLIC WORKS AND THE PROMISE OF POPULAR GOVERNMENT IN THE EARLY UNITED STATES* 236–38 (2001); Diane Lindstrom, *Depressions, Economic*, in *THE OXFORD COMPANION TO UNITED STATES HISTORY* 182, 182–83 (Paul S. Boyer ed., 2001).

146. See GATES, *supra* note 2, at 353. The last grant of the 1830s was the Act of June 28, 1838, ch. 150, 5 Stat. 253, conveying a right-of-way in Florida, which included an explicit reversion provision. Grants appear to have resumed in 1849 with the Act of March 3, 1849, ch. 116, 9 Stat. 771 (grant in Florida), and the Act of March 3, 1849, ch. 117, 9 Stat. 772 (grants in Alabama and Tennessee).

*D. The Illinois Central Grant of 1850 Inaugurated an Era of Railroad Grants that Gave Both Rights-of-Way and Significant Checkerboard Land Subsidies*

As the economy recovered in the 1840s, railroad projects once again began to attract serious public enthusiasm.<sup>147</sup> Cities including Chicago and St. Louis held “railroad conventions” to promote the construction of new lines,<sup>148</sup> and businessman Asa Whitney famously began urging Congress to subsidize a transcontinental route.<sup>149</sup> Congress again began to consider aiding railroad projects through grants of the public lands.

In 1850, Congress gave its first large subsidy grant of checkerboard public lands to an individual railroad project: the “Illinois Central,” which would run through the states of Illinois, Alabama, and Mississippi.<sup>150</sup> This was also the first railroad grant that included both a right-of-way and a checkerboard land subsidy.<sup>151</sup> The Illinois Central’s combination of right-of-way and checkerboard grant would be heavily used through 1871 in grants including the famous Pacific Railroad Acts.<sup>152</sup> Based on this, the Supreme Court asserted in *Great Northern* that the Illinois Central grant inaugurated and defined the “first” era of federal railroad grants, from 1850 through 1871.<sup>153</sup> But, as described below, the grant’s text and legislative history indicate that it was really just a marriage of the preexisting railroad right-of-way policy with the preexisting canal land grant subsidy policy, which did not significantly change the nature of either the right-of-way or the subsidy grant.

The Illinois Central grant did not pass Congress easily. Several versions of the bill, supporting somewhat varying Illi-

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147. See CARLOS A. SCHWANTES & JAMES P. RONDA, *THE WEST THE RAILROADS MADE* 15–23 (2008).

148. *Id.* at 51.

149. *Id.* at 15–23; see also LARSON, *supra* note 145, at 241.

150. The Illinois Central grant followed the pattern of many earlier canal grants, in which the states received the federal lands on behalf of the project. See, e.g., GATES, *supra* note 2, at 346–57.

151. *Id.* at 357.

152. See, e.g., HIBBARD, *supra* note 93, at 244–51.

153. See *Great N. Ry. Co. v. United States*, 315 U.S. 262, 273 (1941) (“Beginning in 1850, Congress embarked on a policy of subsidizing railroad construction by lavish grants of the public domain.”) (citing the 1850 Illinois Central, 1862 and 1864 Union Pacific, and 1864 Northern Pacific grants as representative of this policy).

nois-based railroad projects, failed prior to 1850.<sup>154</sup> In 1850, the bill was pressed forward by Illinois Sen. Stephen Douglas, who urged that granting checkerboard land subsidies to railroads was a logical extension of the well-established canal land subsidy policy.<sup>155</sup> But much skepticism remained over the idea of granting checkerboard land subsidies to railroads. Just as they had done in defeating several previous railroad land subsidy bills,<sup>156</sup> a number of senators questioned whether such land grants were constitutional, whether they would promote development, and whether granting alternate sections would recover the value of the granted land.<sup>157</sup> Opponents of land grants also feared the Illinois Central grant would lead to a flood of similar land grants to other railroads.<sup>158</sup> The Illinois Central grant may have passed only because, unlike most other contemporary railroad projects, it ran through both the North and South, thereby picking up support from southerners who typically opposed “internal improvement” grants.<sup>159</sup>

There are strong textual indications that Congress viewed the Illinois Central Act as a combination of two separate grants: one grant of the right-of-way and another of the subsidy lands. The Act was titled “An Act granting the Right of Way, and making a Grant of Land to the States of Illinois, Mississippi, and Alabama, in Aid of the Construction of a Railroad from Chicago to Mobile.”<sup>160</sup> The right-of-way grant—the Act’s first section—gave the states a two-hundred-foot-wide right-of-way through the federal lands, in a form nearly identical to that established in the 1830s:

[T]he right of way through the public lands be, and the same is hereby, granted to the State of Illinois for the construction of a railroad . . . with the right also to take neces-

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154. See GATES, *supra* note 2, at 357; see also *infra* notes 163–64.

155. See GATES, *supra* note 2, at 357; see also RAE, *supra* note 111, at 2–3 (“the terminology used in” federal canal grants “was transported almost bodily into the Illinois Central law”).

156. See *supra* Part II.B (discussing the failure of railroad land grant bills in the 1830s and 1840s).

157. CONG. GLOBE, 31st Cong., 1st Sess. 844–54 (1850); See also GATES, *supra* note 2, at 357–58.

158. Indeed, even before the Illinois Central grant passed, more than twenty other bills for similar grants were already being considered by the Senate Committee on Public Lands. GATES, *supra* note 2, at 357 (citing CONG. GLOBE, 31st Cong., 1st Sess. 844–45 (1850)).

159. See Paul Wallace Gates, *Land Grants to Railways*, in 3 *DICTIONARY OF AMERICAN HISTORY* 237 (James Truslow Adams ed., 1940).

160. Act of Sept. 20, 1850, ch. 61, 9 Stat. 466.

sary materials of earth, stones, timber, etc., for the construction thereof: *Provided*, That the right of way shall not exceed one hundred feet on each side of the length thereof . . . .<sup>161</sup>

As with earlier grants, Congress did not explain the precise nature of the property interest it intended to convey in this right-of-way. But legislative history from related bills suggests that Congress considered the right-of-way to be the same type of “easement” as the rights-of-way from the 1830s.<sup>162</sup> An Illinois railroad land grant bill from 1846, which also would have granted both a right-of-way and a checkerboard land subsidy, was described in the accompanying Senate report as granting a right-of-way “easement.”<sup>163</sup> Another Senate report in 1847, on a predecessor version of the Illinois Central land grant bill, observed that the grant of “a right of way over the public lands” was “an easement [that] will rather accelerate than retard [the lands] sale” in conjunction with a checkerboard grant.<sup>164</sup> Nothing in this legislative history, or the legislative history of the 1850 Illinois Central Act, suggests that Congress believed these right-of-way grants would differ in any way from the rights-of-way it had previously granted. This, combined with the fact that the bills and grants all used similar language, suggests that Congress intended the bills and grants to continue its practice from the 1830s: conveying a right-of-way “easement” that was an appropriation of the public lands for railroad purposes, which would remain subject to ultimate federal ownership and control.

The land grant was a separate grant in the second section of the Illinois Central Act.<sup>165</sup> Although the Act’s land grant language was very similar to that of earlier canal land grants,

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161. *Id.* § 1.

162. See GATES, *supra* note 2, at 357 (discussing predecessor bills to Illinois Central).

163. S. REP. NO. 29-295, at 3 (1st Sess. 1846) (accompanying S. 154, 24th Cong. (1st Sess. 1846)). See also GATES, *supra* note 2, at 357.

164. S. REP. NO. 29-23, at 13 (2d Sess. 1847) (accompanying S. 22, 29th Cong. (2d Sess. 1847)). Senate Bill 22 also contained a reversionary provision for this easement, stating that

if at any time after its construction . . . said railroad shall be suffered to fall into utter decay, or shall cease to be used as and for the purposes of a railway, then, and from that time, all right of way hereby granted shall revert to the United States, and the same shall be disposed of as other public lands are or may be disposed of by the said United States.

S. 22 § 7.

165. § 2, 9 Stat. at 466.



the Illinois Central's grant was by far the largest federal "internal improvement" land grant to date, due to the length of the railroad.<sup>166</sup> The land grant granted to the states of Illinois, Mississippi, and Alabama six alternate, even-numbered checkerboard sections of unsold federal land for each mile of constructed track.<sup>167</sup> Importantly, if there was not enough free, unsold public land within six miles of the track to satisfy the grant, the Act also permitted the selection of lands "in lieu" of these sections up to fifteen miles away from the track.<sup>168</sup> This provision led to policy changes in the General Land Office that would later help cause much of the opposition to railroad land grants.<sup>169</sup>

Like the Distribution Act of 1841, the Illinois Central grant also imposed conditions on the railroad for the benefit of the United States, indicating that Congress viewed railroads as an enterprise constructed for the good of the public, not just for private gain. The grant stated that the road must "be and remain a public highway, for the use of the government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States," and carry the U.S. mail.<sup>170</sup>

The Illinois Central Act "was heralded throughout the country as the advent of a new era" in which distant parts of the country would be linked by railroads.<sup>171</sup> As its opponents had feared, this new practice of making substantial land grants in aid of railroad construction led to other such grants, although not immediately. For the next few years, many land grant bills stalled in the House, opposed by eastern and southern states and President Franklin Pierce.<sup>172</sup> Congress's only other substantial railroad land grants in the first half of the 1850s were to Missouri in 1852<sup>173</sup> and to Missouri and Arkansas in 1853.<sup>174</sup> Each of these grants included both a right-of-

166. GATES, *supra* note 2, at 357–58; RAE, *supra* note 111, at 4.

167. § 2, 9 Stat. at 466.

168. *Id.*; see also HIBBARD, *supra* note 93, at 245; GATES, *supra* note 2, at 358.

169. See *infra* Part II.E.

170. §§ 4, 6, 9 Stat. at 467. Soon afterwards, Congress designated all railroads in the United States as post roads. Act of March 3, 1853, ch. 146, § 3, 10 Stat. 249, 255.

171. ROBBINS, *supra* note 144, at 163.

172. HIBBARD, *supra* note 93, at 246; ROBBINS, *supra* note 144, at 164–65 (citing FRANKLIN PIERCE, PRESIDENT'S ANNUAL MESSAGE OF DECEMBER 3, 1853, S. DOC. NO. 33-1, at 19).

173. Act of June 10, 1852, ch. 45, 10 Stat. 8.

174. Act of Feb. 9, 1853, ch. 59, 10 Stat. 155.

way and a checkerboard land subsidy. Notably, the 1852 grant also described its right-of-way as an “easement” to be “locat[ed]” on the public lands.<sup>175</sup>

In 1856, the floodgates finally opened for railroad land subsidies. The successful completion of the Illinois Central inspired the western states to “renew[ ] their drive for federal aid.”<sup>176</sup> Congress responded by granting millions of acres of federal public land to support railroads in Iowa, Florida, Alabama, Louisiana, Wisconsin, Michigan, Mississippi, and Minnesota.<sup>177</sup> One commentator has described 1856 as the year in which Congress shifted from a policy of making grants to support individual projects based on their merits, to a policy of granting lands “without too much consideration of the worth of the schemes thus benefited, on the principle that it was the duty of Congress to promote railroad construction in this manner.”<sup>178</sup> From 1856 into the 1860s, “farmer pioneers,” inspired by the possibility of easy overland transportation, clamored “for the building of more [railroad] lines on practically any terms”<sup>179</sup> with “every effort . . . made to move Congress to grant lands for railroads no matter how dubious the projects might be.”<sup>180</sup>

*E. The 1850 “Administrative Withdrawal” Policy Made Millions of Acres Unavailable for Settlement*

Sales and grants of the public lands were administered by the Department of the Interior’s General Land Office (“GLO”).

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175. Act of June 10, 1852, ch. 45, § 1, 10 Stat. 8.

176. ROBBINS, *supra* note 144, at 164–65.

177. GATES, *supra* note 2, at 361. The 1856 checkerboard-only grants were passed as a series of companion acts in May through August of 1856. See Act of May 15, 1856, ch. 28, 11 Stat. 9; Act of May 17, 1856, ch. 31, 11 Stat. 15; Act of June 3, 1856, ch. 41, 11 Stat. 17; Act of June 3, 1856, ch. 42, 11 Stat. 18; Act of June 3, 1856, ch. 43, 11 Stat. 20; Act of June 3, 1856, ch. 44, 11 Stat. 21; Act of Aug. 11, 1856, ch. 83, 11 Stat. 30. These grants did not explicitly grant rights-of-way through the public lands, but provided that the railroads supported thereby “shall be and remain public highways for the use of the government of the United States.” § 3, 11 Stat. at 18. The Seventh Circuit has interpreted the rights-of-way of railroads receiving these grants which did *not* explicitly grant rights-of-way as nonetheless subject to the same conditions as rights-of-way explicitly granted by Congress in the granting statutes. See Samuel C. Johnson 1988 Trust v. Bayfield Cnty., 520 F.3d 822, 825–26 (7th Cir. 2008). But these rights-of-way may have been laid out over public lands under the 1852 General Right of Way Act. See *infra* Part II.F.

178. RAE, *supra* note 111, at 31–32.

179. MOODY, *supra* note 144, at 213.

180. GATES, *supra* note 2, at 455.

In 1850, in response to Congress's grant of millions of subsidy acres to the Illinois Central, the GLO made a major change to its public land policies. It began to "temporarily" withdraw vast tracts of the public lands from settlement, pending the railroad's selection of its subsidy lands. As these withdrawals expanded across the West, they became one of the primary reasons for anti-railroad anger in the 1860s and in turn for the discontinuance of railroad land subsidies in 1871. But the anger at these withdrawals had virtually nothing to do with railroad rights-of-way—another reason why the end of land subsidies in 1871 did not also imply any corollary change in right-of-way law.<sup>181</sup>

Historian John B. Rae has observed that "the first problem to come up" in administering the Illinois Central grant "was that of protecting the interests of the railroads against adverse claims to their lands."<sup>182</sup> After a grant was passed, it had to be accepted by the recipient states and assigned to the railroads.<sup>183</sup> The railroads then had to survey their routes and file maps in the GLO.<sup>184</sup> Only after this could "the specific tracts included in the subsidy" be identified by the GLO and selected by the railroads.<sup>185</sup> "Such a procedure would necessarily take time, and in the interim something had to be done to prevent the lands along the probable line from being taken up by individuals who would naturally be attracted by the opportunity for profitable speculation."<sup>186</sup> The GLO decided that it could preemptively withdraw such lands from settlement as part of the President's "executive powers."<sup>187</sup>

To protect the Illinois Central's grant, the GLO preemptively withdrew over 15 million acres of public land from settlement, even though the railroad eventually selected fewer than three million of those acres.<sup>188</sup> This practice of overbroad withdrawal was followed in many of the checkerboard railroad grants over the next twenty years.<sup>189</sup> To facilitate the checkerboard grants in 1856 and 1857 to various states, the GLO in-

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181. See discussion *infra* Part II.I.

182. RAE, *supra* note 111, at 5.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 5–6.

188. *Id.* at 6 (citing Gen. Land Office, Div. C Letter Record, v. 24, at 102, from Comm'r Justin Butterfield to Sec. of Interior Stuart (Dec. 31, 1851)).

189. *Id.*

initially withdrew as many as 78 million acres from settlement, including two-thirds of the public lands in Iowa.

Although the withdrawal policy achieved its intended purpose of protecting the various railroad grants, it resulted in millions of acres of land being unavailable to settlers for years at a time. As described below, as the number of railroad grants and withdrawn lands grew through the 1860s, the withdrawal policy became extremely unpopular, helping turn public opinion against “the land grant policy as a whole.”<sup>190</sup>

*F. In 1852, Congress Passed a “General” Law to Administratively Grant Railroad Rights-of-Way Across the Public Lands*

From the late 1840s, the number of requests for individual right-of-way grants began to increase again, including an “unusually large number” during the 1850–1851 congressional session.<sup>191</sup> In response, in 1852, Congress passed the first “general” right-of-way act for railroads to cross the public lands, allowing railroads to obtain administrative, rather than legislative, authorization for their rights-of-way.<sup>192</sup> This Act, and the debates that led up to it, exhibit several of the principal characteristics of federal right-of-way grants in the nineteenth century: the continuity among the terms of such grants, the fact that Congress considered such grants to be a type of easement, and Congress’s intent that these “easements” would nevertheless be subject to a federal reversionary ownership interest.

In 1852, Congress felt a pressing need for a general right-of-way law, and each house was at work on a bill. On May 25, 1852, Senator Alpheus Felch of Michigan observed that the Senate’s bill would supersede the “applications from a great number of companies” for individual rights-of-way, which, he said, “[w]e have been in the habit of granting . . . whenever it has

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190. *Id.* at 6–7. See also Leslie E. Decker, *The Railroads and the Land Office: Administrative Policy and the Land Patent Controversy, 1864–1896*, 46 MISS. VALLEY HIST. REV. 679, 679 (1960); Lewis Henry Haney, *A Congressional History of Railways 1850–1887*, 342 BULL. U. WIS. ECON. & POL. SCI. SERIES 1, 29–30 (1910).

191. Haney, *supra* note 96, at 336–37.

192. Act of August 4, 1852, ch. 80, 10 Stat. 28. In contrast, checkerboard land grants to railroads always required an initial statutory authorization and were never obtained purely through an administrative process.

been asked.”<sup>193</sup> Implicitly acknowledging the lengthy controversies over land grant subsidy bills like the Illinois Central Act, he declared that the bill “gives no land—nothing but the right of way.”<sup>194</sup> Although the Senate bill appears to have passed easily,<sup>195</sup> there was relatively more debate in the House. The House argued over the extent to which grantee companies should be allowed to take construction materials from the public lands, how wide the rights-of-way should be, and whether the companies would automatically be permitted to run through certain lands, such as federal military reservations.<sup>196</sup>

Both chambers agreed, however, that the federal government would retain a reversionary interest in the rights-of-way created by the bill, regardless of whether the bill specifically stated that fact. House Bill 284 was the version eventually enacted. It stated that upon abandonment of a right-of-way, “the grants hereby made shall cease and determine, and said lands hereby granted revert back to the general government.”<sup>197</sup> The Senate version, Senate Bill 113, used language more typical of the 1830s grants, stating that if abandoned, “the grants hereby made . . . shall cease and determine.”<sup>198</sup> But both bills were characterized in the House debate on July 28, 1852, as having “precisely” the same effect.<sup>199</sup> The House sponsor of Senate Bill 113 declared that under the Bill, “whenever the company or State ceases to use the right of way for the purposes indicated by the grant, the land reverts to the General Government.”<sup>200</sup> Similarly, the Senate eventually acceded to the House bill, based upon the representation that “the House bill . . . in substance, is precisely the same as that passed by

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193. CONG. GLOBE, 32d Cong., 1st Sess. 1460 (1852).

194. *Id.* Notably, when this exact phrase was used in 1872, it was cited by the Solicitor General as evidence of Congress’s “sharp” post-1871 change from its pre-1871 granting practices. Brief for the United States, *supra* note 48, at 30; *see also infra* Part II.K. This again suggests that the Solicitor General misconstrued references to a lack of checkerboard subsidy lands as statements about the nature of property rights in the rights-of-way.

195. CONG. GLOBE, 32d Cong., 1st Sess. 1460 (1852) (reflecting quick passage of the Senate bill).

196. *Id.* at 1837.

197. H.R. 284, 32d Cong. § 3 (1st Sess. 1852).

198. S. 113, 32d Cong. § 2 (1st Sess. 1852).

199. CONG. GLOBE, 32d Cong., 1st Sess. 1949 (1852).

200. *Id.* at 1854.

the Senate.”<sup>201</sup> There was no disagreement in debate over the inclusion of this reversionary language.

Even though the 1852 general right-of-way bills contained reversionary provisions, they were still intended to grant a kind of easement to the railroads. At one point, a representative offered an amendment to the House Bill providing that “said company shall have no interest in the minerals on the lands thus granted” because “[o]therwise they will take up half the California gold lands.”<sup>202</sup> This amendment was opposed as unnecessary and was rejected on the grounds that “[t]he bill purports simply to grant the right of way and occupancy—a usufruct right such as highways have in all cases of that kind, and it is well understood that they have no other right than the right to occupancy, for the purpose of passing over”—in essence, an easement.<sup>203</sup>

In its final form, the 1852 Act was characterized as merely granting “privileges, such as are granted to railroad companies, and with like limitations.”<sup>204</sup> It was evidently an uncontroversial continuation of the policy that had been in effect since the 1830s: that Congress considered federally granted railroad rights-of-way to be “locations” or appropriations of the public lands, which would revert to the government if they ceased to be used for the public purposes for which they had been granted. Congress never debated any alternative to this policy—for example, that the United States might alienate its interests in such a right-of-way to the recipient railroads or to persons acquiring the underlying land.

In 1855, another statute expanded this policy to public lands in the territories.<sup>205</sup> In 1862, both the 1852 and 1855 statutes were extended through August 4, 1867.<sup>206</sup>

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201. *Id.* at 1949.

202. *Id.* at 1869.

203. *Id.* A “usufruct” is defined as “[a] right to use and enjoy the fruits of another’s property for a period without damaging or diminishing it . . . .” BLACK’S LAW DICTIONARY, *supra* note 29, at 1580.

204. CONG. GLOBE, 32d Cong., 1st Sess. 1949 (1852). Like earlier right-of-way acts, it also granted land for station grounds and the right to use nearby timber and stone for construction. Act of August 4, 1852, ch. 80, §§ 2–3, 10 Stat. 28.

205. Act of March 3, 1855, ch. 200, 10 Stat. 683.

206. Act of July 15, 1862, ch. 179, 12 Stat. 577. These general right of way statutes did not entirely replace the practice of statutory grants of individual rights of way. The Act of July 15, 1862 itself simultaneously granted a specific right of way for a railroad in Wasco County, Oregon. *Id.* § 2.

G. *The Pacific Railroad Grants in the 1860s Granted Subsidies That Were Lavish, but Based Firmly in Prior Practice*

In the 1850s, Congress began to seriously examine the possibility of building or subsidizing a transcontinental railroad. The idea of such a project had attracted interest beginning as early as the 1830s, when the “primitive character of railroad-ing” made the notion of such an enterprise “surprising.”<sup>207</sup> Nevertheless, a transcontinental railroad and its associated development were seen as one means to project the United States’ power across the width of North America.<sup>208</sup>

In the 1850s, there were fairly extensive Congressional debates over the project, but passage of any bill was frustrated by the North-South rivalry over the route, and the obstinate (mostly southern) constitutional objectors to internal improvement grants.<sup>209</sup> There was also continued controversy over whether the project should be privately or publicly financed and constructed.<sup>210</sup> Despite these controversies, there seems to have been no debate in Congress over what kind of legal interest would be granted in a transcontinental railroad’s right-of-way. In 1855, the intended legal status of the future right-of-way was described in a manner consistent with Congress’s prior practice:

[W]e grant [the railroad company] the right of way—a mere easement, the fee remaining in the Government, and all rights granted would revert to it, should the road at any time be abandoned.<sup>211</sup>

In the 1860s, once secession and the Civil War had removed the southern opponents, Congress was free to act. But

207. GATES, *supra* note 2, at 363.

208. See SCHWANTES & RONDA, *supra* note 147, at 20–21; MAURY KLEIN, UNION PACIFIC: VOLUME I 1862–1893, at 9–13 (2006).

209. GATES, *supra* note 2, at 363–64; KLEIN, *supra* note 208, at 9–11. Some members suggested that these constitutional objections to the Pacific Railroad were not raised against other bills that would have made legally indistinguishable land grants. See, e.g., CONG. GLOBE, 33d Cong., 2d Sess. 333 (1855) (remarks of Mr. Davis of Indiana on Pacific Railroad bill).

210. See KLEIN, *supra* note 208, at 13.

211. CONG. GLOBE, 33d Cong., 2d Sess. 333 (1855) (remarks of Galusha A. Grow of Pennsylvania). Grow became Speaker of the House in the 37th Congress, which in 1862 passed both the Homestead Act and the first Pacific Railroad Act. See JAMES T. DUBOIS & GERTRUDE S. MATTHEWS, GALUSHA A. GROW: FATHER OF THE HOMESTEAD LAW 248, 253–61 (1917).

the actual construction of the transcontinental railroad was still perceived as too risky to attract the necessary capital from private investors.<sup>212</sup> The government very much wanted the project to begin but lacked cash because of the war. For that reason, it chose to support the project through the now well-established practice of land grant subsidies, in addition to mortgages and government bonds.<sup>213</sup>

In 1862, Congress passed the first Pacific Railroad Act.<sup>214</sup> The 1862 Act chartered the Union Pacific and Central Pacific Railroads as corporations and set forth specifications for the cross-country line they were to complete.<sup>215</sup> For the actual location of the track, the Act granted both the Union Pacific and Central Pacific the widest rights-of-way yet—four hundred feet. But Congress employed its standard right-of-way granting language:

[T]he right of way through the public lands be, and the same is hereby, granted to said company for the construction of said railroad and telegraph line; and the right . . . to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof; said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, and depots, machine shops, switches, side tracks, turntables, and water stations.<sup>216</sup>

Congress gave no indication that it considered the interests granted in these rights-of-way to be any different than in any of its earlier right-of-way grants. In debate, the general right-of-way act of 1852 was cited as a precedent.<sup>217</sup> This suggests, again, that Congress merely intended to continue its prior practice of granting the railroad an “easement” while retaining a reversionary interest and ultimate title to the lands underlying the right-of-way.

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212. See ROBERT G. ATHEARN, *UNION PACIFIC COUNTRY* 26–30 (1971).

213. *Id.* at 30; see also KLEIN, *supra* note 208, at 12–15.

214. Act of July 1, 1862, ch. 120, 12 Stat. 489.

215. These were the first federal corporate charters since the Second Bank of the United States in 1816. See KLEIN, *supra* note 208, at 13.

216. § 2, 12 Stat. at 491.

217. See CONG. GLOBE, 37th Cong., 2d Sess. 2676 (1862) (but statement erroneously references the “law approved 4th of August, 1854,” rather than the fourth of August, 1852); see also CONG. GLOBE, 37th Cong., 2d Sess. 1579–80, 2675–77, 2778–80 (1862) (debates on the Pacific Railroad Act).



The 1862 Act also exceeded its predecessors in the amount and scope of its checkerboard land grants. The railroads were now granted five odd-numbered sections for each mile of road, and all public lands within fifteen miles of the route were withdrawn from settlement.<sup>218</sup>

Congress also retained extensive continuing powers over the enterprises. It specified that in order to

accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, . . . Congress may, at any time, having due regard for the rights of said companies named herein, add to, alter, amend, or repeal this act.<sup>219</sup>

This reservation was described in debate as among the provisions of the Act that “carefully protected” the “interests of Government.”<sup>220</sup>

In the midst of the Civil War, even the 1862 Act’s large subsidies proved insufficient to induce adequate investment in the railroads.<sup>221</sup> The government responded with the 1864 amendatory Pacific Railroad Act, which essentially doubled the land subsidy of the 1862 Act and added other aid.<sup>222</sup> On the same day, a companion act chartered the Northern Pacific Railroad to build a line connecting Lake Superior with Washington Territory, giving it even more subsidy land than the Union Pacific.<sup>223</sup> The 1864 Acts also gave the Union Pacific, Central Pacific, and Northern Pacific railroads the authority to condemn private property for their rights-of-way.<sup>224</sup>

During the rest of the 1860s, Congress passed several more Pacific Railroad acts, subsidizing more southerly transcontinental projects with 200- to 400-foot rights-of-way and vast tracts of land.<sup>225</sup> Congress also considered scores of other railroad grant bills. It granted subsidy lands and rights-of-way to non-Pacific railroads in Kansas, Arkansas, Missouri, Califor-

218. § 3, 12 Stat. at 492; § 7, 12 Stat. at 493. *See also* KLEIN, *supra* note 208, at 14–15.

219. § 18, 12 Stat. at 497.

220. CONG. GLOBE, 37th Cong., 2d Sess. 1580 (1862). The legal effect of the “alter, amend, or repeal” clause is discussed in detail, *infra* Part IV.

221. KLEIN, *supra* note 208, at 16–32.

222. Act of July 2, 1864, ch. 216, § 4, 13 Stat. 356, 358; *see also* KLEIN, *supra* note 208, at 30–31.

223. Act of July 2, 1864, ch. 217, 13 Stat. 365; GATES, *supra* note 2, at 367.

224. § 3, 13 Stat. at 357–58.; § 7, 13 Stat. at 369–70.

225. *See* GATES, *supra* note 2, at 375–77.

nia, and Oregon.<sup>226</sup> In addition, Congress made several new land grants to states for railways, following the same form as the Illinois Central Act.<sup>227</sup> All of these grants followed Congress's typical right-of-way granting practices, with a number of them reserving Congress's authority to "alter, amend, or repeal" the grant.<sup>228</sup>

*H. In the Late 1860s, the Public Turned Against Huge Railroad Land Grants, Even as Congress Continued to Support the Railroads*

Even as checkerboard land grants to railroads reached their peak in the 1860s, public sentiment turned rapidly against them. Later court opinions have suggested that this public opposition to railroad land grants led Congress, after 1871, to grant only right-of-way easements to railroads, so that the land *under* the rights-of-way would be reserved for "homesteading by settlers."<sup>229</sup> The actual history of the era, however, shows that public anger was overwhelmingly directed at the huge expanses of lands taken up by railroad subsidy land grants and administrative withdrawals, and not at the strips covered by rights-of-way. This was because the subsidy lands and withdrawals, and various "unfair" practices associated with them, obstructed settlers' efforts to "homestead" or purchase government land.

The Homestead Act of 1862 was the culmination of decades of effort by American social reformers to give free "land to the landless."<sup>230</sup> It permitted settlers to acquire a farm out of the public domain, free of charge, by entering upon "one quarter section or a less quantity of unappropriated public lands" and

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226. See, e.g., Act of July 4, 1866, ch. 165, 14 Stat. 83; Act of July 13, 1866, ch. 182, 14 Stat. 94; Act of Mar. 2, 1867, ch. 189, 14 Stat. 548; Act of July 25, 1866, ch. 241, 14 Stat. 236; Act of July 25, 1866, ch. 242, 14 Stat. 239; Act of May 4, 1870, ch. 69, 16 Stat. 94.

227. See GATES, *supra* note 2, at 367–68; see, e.g., Act of March 3, 1868, ch. 98, 12 Stat. 772 (Kansas), Act of May 5, 1864, ch. 79, 13 Stat. 64 (Minnesota).

228. See, e.g., § 12, 14 Stat. at 96; § 12, 14 Stat. at 242.

229. See *Beres v. United States*, 64 Fed. Cl. 403, 423 (2005) (citing *Great N. Ry. Co. v. United States*, 315 U.S. 262, 272 (1942)) ("[T]he 1875 Act legislative history suggests that the railroads should be given only a right-of-way through the public lands so the public land can be reserved for homesteading by settlers and for educational purposes."); *Hash v. United States*, 403 F.3d 1308, 1314 (Fed. Cir. 2005) ("The 1875 Act contemplated that public land carrying a railway right-of-way would be 'disposed of.'").

230. See GATES, *supra* note 2, at 390–94.

cultivating those lands for five years.<sup>231</sup> But the homesteading policy faced problems from its inception. Not only were millions of acres of potential homestead lands being granted to railroads, but the GLO was “administratively withdrawing” even greater expanses of land to protect the railroads’ incipient grants until they could make their selections.<sup>232</sup>

The railroads’ selection of their granted lands and the release of the remaining lands for homesteading was beset with problems. The GLO lacked sufficient resources to properly administer Congress’s complicated, overlapping grants.<sup>233</sup> Partly as a result, the GLO allowed a number of irregular land selections by railroads that sparked conflicts with settlers.<sup>234</sup> But the GLO was only part of the problem. The railroads deliberately prolonged the process of surveying the lands and making their final selections, which allowed them to avoid paying local real estate taxes.<sup>235</sup> This ploy eventually became almost as great a public scandal as the government’s withdrawal policy.<sup>236</sup>

As a result of these problems, would-be homesteaders frequently found no desirable, unclaimed public land near either civilization or transportation.<sup>237</sup> Instead, they found only land offered for cash sale by railroads or other private land agen-

231. Act of May 20, 1862, ch. 75, § 1, 12 Stat. 392.

232. Gates estimates that as many as 127 million acres were subject to such withdrawals. GATES, *supra* note 2, at 396. As discussed above, these were designed to protect the railroads’ lands from speculators until the railroads made their selections. See *supra* Part II.E. The homestead policy was also impaired by having been “superimposed upon a public land system with which it was incongruous in many ways”; it supplemented but did not replace older land sales laws, which themselves were subject to rampant but uncorrected abuses. GATES, *supra* note 2, at 396; see also Paul Wallace Gates, *The Homestead Law in an Incongruous Land System*, 41 AM. HIST. REV. 652, 657 (1936); ROBBINS, *supra* note 144, at 64–65, 72–91.

233. Decker, *supra* note 190, at 681–85; David Maldwyn Ellis, *The Forfeiture of Railroad Land Grants 1867–1894*, 33 MISS. VALLEY HIST. REV. 27, 32–33 (1946); RAE, *supra* note 111, at 127; GATES, *supra* note 2, at 380.

234. GATES, *supra* note 2, at 366–67, 371–72. In Kansas, settlers began a war against a railroad that had to be suppressed by the state militia. *Id.*

235. Haney, *supra* note 190, at 181 (citing *Ry. Co. v. Prescott*, 83 U.S. (16 Wall.) 603, 607 (1872)); see also CONG. GLOBE, 42d Cong., 2d Sess. 1590 (1872) (remarks of Sen. Sherman).

236. GATES, *supra* note 2, at 365, 460–61; see also Decker, *supra* note 190, at 679–80 (emphasizing the outrage caused by the delays). The tax-avoidance scheme was finally banned in 1886. GATES, *supra* note 2, at 460–61.

237. GATES, *supra* note 2, at 397–98. Being near a railroad *right-of-way*, of course, would help a farmer transport crops to market—an obvious reason why *right-of-way* grants were viewed differently from land grants.

cies.<sup>238</sup> All of this led to a growing “fear of land monopoly” by the railroads and great public anger at them.<sup>239</sup>

By the second half of the 1860s, much of the public that had once clamored for subsidies to build railroads had become incensed at the results of that policy.<sup>240</sup> A movement led by the Grangers and organized labor sought to end the subsidy grants and reserve the public lands for “actual settlers only.”<sup>241</sup> After “much heated argument in state capitals, in Washington, and in the press,” the legislatures of a number of states presented Congress with petitions stating that “land grants were a ‘violation of the spirit and interest of the national Homestead Law and manifestly in bad faith toward the landless.’ ”<sup>242</sup> Even President Grant expressed support for this position.<sup>243</sup>

In Congress, though, support for the railroads remained strong. Pro-railroad legislators were backed by the railroads and by eastern financial, iron, and manufacturing interests.<sup>244</sup> Railroad lobbyists were also very active in Congress during this period because Congress had restricted the territories from chartering railroad corporations. In the 1860s, territorial legislatures eager for “internal improvements” (and perhaps unduly influenced by railroad promoters) had granted numerous problematic railroad charters.<sup>245</sup> Many charters were purely speculative, lacking any potential for construction, but nonetheless had exclusive privileges that blocked any potential competitors from building lines, particularly through narrow canyons.<sup>246</sup> Other railroad corporations persuaded county governments to

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238. *Id.*

239. Ellis, *supra* note 233, at 40; GATES, *supra* note 2, at 455; see also E.T. PETERS, THE POLICY OF RAILROAD LAND GRANTS (1870).

240. GATES, *supra* note 2, at 181, 361–67, 455 (describing the acting Governor of Nebraska’s 1867 denunciation of “the evil effects of this baleful system of land grants”); Sanborn, *supra* note 110, at 339; Ellis, *supra* note 233, at 32.

241. Ellis, *supra* note 233, at 38; GATES, *supra* note 2, at 380, 454–56. The Grangers were an agrarian populist movement that favored public regulation of the railroads. See Roy V. Scott, *Granger Movement*, in THE OXFORD COMPANION TO UNITED STATES HISTORY 318, 318 (Paul S. Boyer et al. eds., 2001).

242. GATES, *supra* note 2, at 380 (quoting petitions).

243. *Id.*

244. See, e.g., MOODY, *supra* note 144, at 141 (discussing financier Jay Cooke’s backing of the Northern Pacific).

245. See, e.g., CONG. GLOBE, 42d Cong., 2d Sess. 4162 (1872); 2 CONG. REC. 2898, 2949, 2953, 2996 (1874) (discussing these issues).

246. 2 CONG. REC. 2898, 2949, 2953, 2996 (1874). Although *Great Northern Railway Co. v. United States*, 315 U.S. 262, 271 (1942), cited the canyon issue as evidence of a post-1871 shift to right-of-way easements, it had been addressed by Congress as early as 1866. See Act of Apr. 10, 1866, ch. 33, 14 Stat. 31.

borrow to support their projects, saddling some counties with both large debts and useless, uncompleted railroads.<sup>247</sup>

Surveying these problems, Congress concluded that the territorial legislatures had been “improvident” in granting railroad charters.<sup>248</sup> It responded in 1867 by amending the organic acts of the federal territories to block their legislatures from chartering railroads.<sup>249</sup> With the additional lapse in 1867 of the extension of the 1852 General Right of Way Act, Congress had the sole authority to grant territorial railroad charters, subsidy lands, or rights-of-way across the public lands. The promoters of all types of railroad projects—from local lines in the territories to the great transcontinentals—therefore focused their attentions on Washington. They were able to secure the support of many members through both legal and illegal means.<sup>250</sup> By 1869, despite the mounting public opposition to railroad land grants, members of Congress were still introducing dozens of bills to charter and subsidize railroads.<sup>251</sup>

*I. In 1871, During Several Years of Intense Conflict,  
Reformers in Congress Managed to Halt Checkerboard  
Land Grants to Railroads*

By the end of the 1860s, the mounting public opposition was about to help bring the great railroad land grants to an end. The last checkerboard land grant to a railroad passed Congress in 1871. In *Great Northern*, the Supreme Court characterized this development as a “sharp change in Congressional policy with respect to railroad grants after 1871.”<sup>252</sup> The

247. 2 CONG. REC. 2902 (1874).

248. *Id.* at 2898, 2953.

249. Act of Mar. 2, 1867, ch. 150, 14 Stat. 426.

250. See ROBBINS, *supra* note 144, at 276–77 (citing an 1870 article in the *Nation* magazine claiming that there were dozens or hundreds of “agents in the corridors of the Capitol for the purpose of lobbying and bribing members of Congress”).

251. In the first session of the Forty-First Congress alone, in 1869, land grant bills included H.R. 99, 41st Cong. (1st Sess. 1869) (introduced Mar. 15); H.R. 225, 41st Cong. (1st Sess. 1869) (Mar. 22); H.R. 226, 41st Cong. (1st Sess. 1869) (Mar. 22); H.R. 311, 41st Cong. (1st Sess. 1869) (Mar. 29); H.R. 393, 41st Cong. (1st Sess. 1869) (Apr. 5); S. 112, 41st Cong. (1st Sess. 1869) (Mar. 11); S. 126, 41st Cong. (1st Sess. 1869) (Mar. 15); S. 154, 41st Cong. (1st Sess. 1869) (Mar. 17); S. 173, 41st Cong. (1st Sess. 1869) (Mar. 19); S. 228, 41st Cong. (1st Sess. 1869) (Mar. 30); S. 267, 41st Cong. (1st Sess. 1869) (Apr. 7). Congress made only a right-of-way grant in the Act of Mar. 3, 1869, ch. 129, 15 Stat. 325.

252. *Great N. Ry. Co. v. United States*, 315 U.S. 262, 275 (1942).

Court, following the Solicitor General's arguments, asserted that this "sharp change" manifested itself in both an end to the land grants and a transition from fee simple railroad rights-of-way to easement rights-of-way.<sup>253</sup>

But this description by *Great Northern* and the Solicitor General misstates and greatly oversimplifies how the checkerboard land grants came to their end in Congress. In fact, there was no consensual, "sharp" change in Congress's land grant policy in 1871. Rather, congressional opponents of checkerboard land subsidies, backed by the public's anger, struggled for the better part of a decade to halt the subsidies.

As described below, the anti-grant "reformers" slowed the grants from 1867 to 1871 but could not block them entirely. After 1871, the reformers gained enough strength to block new grants but had to fight off numerous bills for such grants. During this time, however, even the reform faction permitted and supported federal railroad right-of-way grants—including ones that were characterized in debates as "grants of land."<sup>254</sup> This was because such rights-of-way were still necessary in much of the country for transportation, and because the public's anger at "land grants" was directed at the vast checkerboard subsidies, not at the land taken up by the rights-of-way themselves. Accordingly, rather than enacting *Great Northern's* alleged "1871 shift" in right-of-way law, Congress in the early 1870s continued to follow its long-standing rights-of-way policies.

1. In the Fortieth and Forty-First Congresses, Pro-Settler Reformers Slowed, but Could Not Stop, the Checkerboard Railroad Land Grants

Representative George W. Julian of Indiana was one of the first congressional leaders of the 1860s opposition to checkerboard railroad land grants.<sup>255</sup> In 1867, during the Fortieth Congress, Rep. Julian introduced a resolution calling for such grants to be "carefully scrutinized and rigidly subordinated to the paramount purpose of securing homes for the landless poor."<sup>256</sup> His resolution passed the House but failed in the Se-

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253. *Id.* at 274–75; Brief for the United States, *supra* note 48, at 15.

254. *See infra* Parts II.J and III.

255. Gates, *supra* note 232, at 677–78 (citing CONG. GLOBE, 40th Cong., 2d Sess. 97, 371, 1712–15 (1867)).

256. *Id.* at 678 (citing CONG. GLOBE, 40th Cong., 2d Sess. 97 (1867)).

nate, and had little effect on the overall policy in either house.<sup>257</sup>

During the Forty-First Congress in 1869, advocates of land policy reform began a concerted effort to halt federal land grants to the railroads. Led by Rep. William S. Holman of Indiana,<sup>258</sup> along with Rep. Julian and Sen. James Harlan of Iowa,<sup>259</sup> the reformers tried to put Congress on record as opposing land grants, to block pending land grant bills, and to pass legislation reserving the public lands for “actual settlers.”<sup>260</sup> In 1869, Rep. Holman proposed that the House adopt a resolution affirming that its public lands policy was pro-settler and anti-land grant.<sup>261</sup> Feeling some pressure from public opinion, the House agreed that “grants of public lands to corporations ought to be discontinued,” but rejected the statement that the “whole of such lands ought to be held as a sacred trust to secure homesteads to actual settlers.”<sup>262</sup> Consistent with Holman’s views, Congress passed no additional checkerboard grants in 1869 despite numerous bills for such grants.<sup>263</sup> Congress also began to legislate that some of the lands granted to railroads should be sold by the railroads to “settlers only” at no more than \$2.50 an acre.<sup>264</sup>

The struggle over the grants escalated in 1870. Railroad boosters introduced many more railroad land subsidy bills.<sup>265</sup>

257. *Id.* (citing CONG. GLOBE, 40th Cong., 2d Sess. 1861 (1867)).

258. Holman had a lengthy career in Congress, serving sixteen House terms as a Democrat between 1859 and 1897. *William S. Holman Dead*, N.Y. TIMES, Apr. 23, 1897, at 7. He has been called “[p]erhaps the most determined foe of land grants in 1870 and the most vigorous advocate of [land grant] forfeiture for the following two decades.” Ellis, *supra* note 233, at 38.

259. Gates, *supra* note 232, at 679.

260. GATES, *supra* note 2, at 455–56 (citing CONG. GLOBE, 41st Cong., 2d Sess. 424 (1869)).

261. *Id.*

262. *Id.* at 456 (citing and quoting CONG. GLOBE, 41st Cong., 2d Sess. 424, (1869)). Ending direct grants “to corporations” would not have prevented Congress from following the Illinois Central model of grants to states, used in turn to support corporations.

263. See Act of Mar. 2, 1867, ch. 150, 14 Stat. 426.

264. GATES, *supra* note 2, at 380, 456–57 (discussing addition of this clause to 1869 legislation amending a prior land grant to the Oregon and California Railroad, and to the Texas and Pacific land grant in 1871); HIBBARD, *supra* note 93, at 253 (citing Act of Apr. 10, 1869, ch. 26, 16 Stat. 46).

265. In the second session of the Forty-First Congress, see, e.g., S. 381, 41st Cong. (2d Sess. 1870) (introduced Jan. 12); H.R. 1082, 41st Cong. (2d Sess. 1870) (Feb. 3); H.R. 1154, 41st Cong. (2d Sess. 1870) (Feb. 7); S. 609, 41st Cong. (2d Sess. 1870 (Mar. 2); H.R. 1830, 41st Cong. (2d Sess. 1870) (Apr. 20); H.R. 2056, 41st Cong. (2d Sess. 1870) (May 19).

By this time, many were “local projects of very questionable soundness,” sought to be “pushed through Congress by pork-barrel methods.”<sup>266</sup> In March of 1870, Rep. Holman brought forth another anti-land-grant resolution:

*Resolved*, That in the judgment of this House the policy of granting subsidies in public lands to railroads and other corporations ought to be discontinued; and that every consideration of public policy and equal justice to the whole people requires that the public lands of the United States should be held for the exclusive purpose of securing homesteads to actual settlers under the homestead and preëmption laws, subject to reasonable appropriations of such lands for the purposes of education.<sup>267</sup>

This time, the resolution passed in its entirety.<sup>268</sup> But it was, at most, a rhetorical victory for the reformers; Paul Gates commented that “[a]lthough adopted without any debate the resolution was just a bluff.”<sup>269</sup> Less than two weeks later, pro-railroad members called up yet another checkerboard subsidy bill for a railroad in Oregon.<sup>270</sup> Representative Holman protested passionately and at length, declaring in part:

I trust the House will allow me to call attention to the fact that we only a week ago last Monday, without even a division of the House, adopted a resolution declaring it was the true policy of this Government that grants of lands to railroad corporations should cease; that it was the true policy to hold those lands for the exclusive purpose of securing homesteads to actual settlers under the homestead and preëmption laws.<sup>271</sup>

This drew an equally vehement response from western congressmen. When the Oregon bill was next debated, on April 29, 1870, pro-land-grant members from California and Nevada vi-

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266. RAE, *supra* note 111, at 123.

267. CONG. GLOBE, 41st Cong., 2d Sess. 2095 (1870).

268. *Id.*

269. Gates, *supra* note 232, at 658.

270. CONG. GLOBE, 41st Cong., 2d Sess. 2361 (1870).

271. *Id.* Holman also stated that many newspapers had approved of the resolution and cited a petition signed by “tens of thousands” of the public in favor of ending land grants. *Id.*; see also CONG. GLOBE APP., 41st Cong., 2d Sess. 310 (1870) (speech by Holman on “Land Monopoly”).



gorously defended the subsidy policy.<sup>272</sup> They accused Holman's home state of having "had their cake and eaten it," as Indiana had "already had their great system of internal improvements built up by means of just such public lands as the gentleman now condemns so strongly."<sup>273</sup> Despite the opposition of Rep. Holman's faction, the Oregon railroad land grant passed.<sup>274</sup>

Another exchange from the same day perfectly captures the clash between the reformers' quest to preserve the public lands for individual citizen-homesteaders, and the railroad advocates' efforts to subsidize the nation's transportation network (and the businessmen who were building it). When Rep. Holman cited a petition from citizens of New York advocating that the public lands be "set apart for the exclusive use of actual settlers," and not railroads, it provoked this colloquy:

Mr. MAYNARD. Where does that [petition] come from?

Mr. HOLMAN. From the city of New York.

Mr. ROOTS. A petition on morals from New York Five Points! The devil preaching Christianity!

Mr. HOLMAN. It comes from laboring men of New York, from the hovels of New York, if you please, right under the shadow of the marble palaces from which the men come who are demanding the passage of this and similar bills.

Mr. SARGENT. Allow me one question. Why is it that the men from the hovels of New York do not go out into the West and occupy the lands? What prevents them from going there?

Mr. HOLMAN. The gentleman has asked his question.

Mr. SARGENT. I can give the gentleman his answer. The reason is because there are no railroads.<sup>275</sup>

The two factions struggled over land grants through the rest of the Forty-First Congress.<sup>276</sup> But Rep. Holman's 1870 resolu-

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272. CONG. GLOBE, 41st Cong. 2d Sess. 3104–08 (1870); CONG. GLOBE APP., 41st Cong., 2d Sess. 312 (1870).

273. CONG. GLOBE, 41st Cong., 2d Sess. 3104 (1870).

274. Act of May 4, 1870, ch. 69, 16 Stat. 94.

275. CONG. GLOBE APP., 41st Cong., 2d Sess. 312 (1870).

276. See Ellis, *supra* note 233, at 38. For representative debates on land grant policy from this period, see, e.g., CONG. GLOBE, 41st Cong. 2d Sess. 1636–38, 1665–66 (1870) (debating land grant in Missouri and Arkansas, including anti-grant remarks by Holman); CONG. GLOBE APP., 41st Cong. 3rd Sess. 90–94 (1871) (Jan. 27, 1871 speech by Holman opposing extension of the "St. Croix and Bayfield" grant through Wisconsin to Duluth, Minnesota).

Also on January 27, 1871, the House heard what was probably the most famous anti-land grant oration of the era. CONG. GLOBE APP., 41st Cong., 3d

tion against further grants represented the “true policy of this Government”<sup>277</sup> only when it suited the majority to see it that way. During the final twelve months following Rep. Holman’s resolution, the Forty-First Congress granted nearly twenty million more acres to railroads.<sup>278</sup> This included one of the largest checkerboard grants ever made: the grant to the Texas and Pacific Railroad, which passed on March 3, 1871, the last day of the Forty-First Congress’s lame duck session.<sup>279</sup>

## 2. In the Forty-Second Congress, the Reformers Blocked Further Land Grants Only by Fighting Off a Slew of New Grant Bills

The Texas and Pacific checkerboard grant would in fact be the last ever to pass Congress. The election of 1870 resulted in a large gain by the Democratic House minority in the Forty-Second Congress.<sup>280</sup> This strengthened the reform faction, which was finally able to block railroad land grants. But it was “[o]nly the most vigorous opposition by the land reformers [that] prevented further grants from being made [thereafter].”<sup>281</sup> Land grant advocates continued to seek “additional grants which, if made, would have required practically all the valuable lands remaining to the government.”<sup>282</sup>

The debate raged during the years 1871 to 1873, as railroad backers introduced many new land grant bills. In February of 1872, a reformist member of the House Committee on Public Lands claimed in debate that “[t]here are pending before

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Sess. 66–68 (1871). Opposing the St. Croix grant, Rep. J. Proctor Knott of Kentucky delivered a lengthy satire of Duluth and the “prolific region of sand and pine shrubbery” surrounding it. *Id.* at 66. To howls of laughter from his colleagues, Knott said Duluth must be “destined to become the commercial metropolis of the universe” through the railroad grant, as a map promoting the railroad suggested the surrounding country was truly “a terrestrial paradise, fanned by the balmy zephyrs of an eternal spring,” and thus not at all “cold enough . . . to freeze the smoke-stack off a locomotive.” *Id.* at 66–68; see also STEWART HOLBROOK, *THE STORY OF AMERICAN RAILROADS* 150–53 (1959).

277. CONG. GLOBE, 41st Cong., 2d Sess. 2361 (1870).

278. Gates, *supra* note 232, at 658.

279. Act of Mar. 3, 1871, ch. 122, 16 Stat. 573, 573–579.

280. See *Party Divisions*, OFFICE OF THE CLERK OF THE U.S. HOUSE OF REPRESENTATIVES, [http://clerk.house.gov/art\\_history/house\\_history/partyDiv.html](http://clerk.house.gov/art_history/house_history/partyDiv.html) (last visited Sept. 14, 2010).

281. GATES, *supra* note 2, at 456; see also CONG. GLOBE, 42d Cong., 1st Sess. 744–45 (1871) (Rep. Holman attempting to block grant extension); CONG. GLOBE, 42nd Cong., 2d Sess. 1689–96 (1872) (Rep. Holman and allies attempting to block grant extension again).

282. See Gates, *supra* note 232, at 658.

this Congress, in the two Houses, fifty-six bills which upon a careful calculation that has been made propose to grant away two hundred million acres more” of the public lands.<sup>283</sup> He argued that these bills were being advanced by procedural tricks and by a mob of railroad lobbyists, declaring:

The Committee on Public Lands is beset and besieged by those urging these grants. Our time is taken up daily and weekly in hearing arguments from monopolists and their attorneys, who talk to us by the hour in favor of the extension of their grants, for relief from all conditions which in any way limit their powers, and for the making of new grants, and when these monopolists are not in our committee-room they are at our door, and if the door be left ajar they overhear our consultations. And while this is the condition of business, pressed upon us by monopolists, we have bill after bill and petition after petition from settlers in the great West, and from soldiers and people all over the country; the settlers asking relief against these very monopolies; the people and the soldiers asking that the public domain be reserved for them. We have no time to hear settler, citizen, or soldier. The House has no time to hear them. But bills come over from the Senate and are piled upon the Speaker’s table, and are taken up in an irregular manner and crowded through this House under whip and spur, repressing debate and rejecting amendments without adequate argument, even suppressing official documents.

I for one am bound to my constituents . . . to stay here in my place and let no other duty draw me away from it until this tide of monopoly be checked.<sup>284</sup>

About two weeks later, Rep. Holman’s reformers again re-introduced their resolution to end land grants and preserve the public lands for “actual settlers.”<sup>285</sup> Although the resolution passed, it still was not a final victory for the reformers. Many pro-railroad members continued to insist that land grants to support railroads were an important aid to settlement and that

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283. CONG. GLOBE, 42d Cong., 2d Sess. 1304 (1872) (remarks from Rep. Stevenson of Ohio).

284. *Id.* (remarks delivered February 29, 1872).

285. *Id.* at 1585. The language of the 1872 version was similar to the 1870 version. The 1872 version was the resolution that would be cited by the Solicitor General and the Supreme Court in *Great Northern* as the “prompt” expression of Congress’s intent to “grant no lands” in post-1871 rights of way. See *supra* Part I.B.

Congress should make more.<sup>286</sup> Even after the March 1872 Holman resolution, they introduced a number of new bills proposing additional land grants, or bargain-priced sales of the public lands, to aid railroads.<sup>287</sup> Other bills sought to renew expired land grants to railroads that had not been constructed within their statutory time limits. For several years afterwards, the legislatures of several states also requested additional railroad land grants.<sup>288</sup>

In 1872, the reformers had to constantly oppose and harry land grant bills on the floor of Congress. They repeatedly added procedural roadblocks and proposed limiting amendments, causing much discord in debate.<sup>289</sup> The reformers also proposed a Constitutional amendment that would have banned the disposal of the public lands except “to actual settlers thereon, for homestead purposes only, and in quantities limited by general laws.”<sup>290</sup> The amendment’s sponsor remarked that such a law would be far preferable to the prolonged delay and uncertainty in homestead land titles caused by railroad grants and withdrawals.<sup>291</sup> Nevertheless, like most other efforts at “positive action” in favor of settlers or against land grants, the amendment did not pass.<sup>292</sup>

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286. See CONG. GLOBE, 42d Cong., 2d Sess. 1308 (1872) (remarks of Mr. Beck of Kentucky, endorsing railroad land grants); see also *id.* at 1689–96 (in particular, note the remarks of Mr. Conger of Michigan, at 1695–96, arguing that the government had an obligation to settlers who had gone to live in “the wild, uncultivated, rough, northern regions of country” due to “the offer of the Government to give aid to build a railroad past their homes”).

287. Land grant bills from March, 1872 through the end of the Forty-Second Congress included the following: making direct checkerboard grants, S. 960, 42d Cong. (2d Sess. 1872) (introduced Apr. 11); S. 1502, 42d Cong. (3d Sess. 1873) (Jan. 31); allowing railroads to cheaply purchase land grants, see H.R. 1844, 42d Cong. (2d Sess. 1872) (Mar. 4); S. 1323, 42d Cong. (3d Sess. 1873) (Jan. 8); S. 1564, 42d Cong. (3d Sess. 1873) (Feb. 10); awarding railroad profits from land sales along their lines, H.R. 1905, 42d Cong. (2d Sess. 1872) (Mar. 11); H.R. 1908, 42d Cong. (2d Sess. 1872) (Mar. 11).

288. See S. 565, 42d Cong. (2d Sess. 1872) (extending time for railroad’s completion); H.R. MISC. DOC. NO. 42-27 (3d Sess. 1873); S. MISC. DOC. NO. 42-52 (3d Sess. 1873) (memorials from state legislatures); H.R. MISC. DOC. NO. 43-31 (2d Sess. 1875) (same); see also 2 CONG. REC. 2904 (1874) (Sen. Howe, endorsing more land grants to railroads).

289. See, e.g., CONG. GLOBE, 42d Cong., 2d Sess. 1311 (1872) (Rep. Eldredge of Wisconsin, accusing Holman, “who arrogates to himself the special advocacy of the people’s rights,” and his faction of “insincerity” in “the pretense that they wanted to debate this bill” rather than kill it); see also *infra* Part III.

290. CONG. GLOBE, 42d Cong., 2d Sess. 653–54 (1872).

291. *Id.* at 654.

292. Cf. HIBBARD, *supra* note 93, at 249–50.

Railroad backers persisted in seeking government subsidies even after 1872. By this time, though, the Credit Mobilier scandal, which exposed the use of Union Pacific securities to bribe members of Congress, destroyed the last remnants of any public inclination to aid the railroads.<sup>293</sup> When the Panic of 1873<sup>294</sup> dried up private investment capital, the railroads pleaded in vain for additional land grants from Congress.<sup>295</sup> As the reformers held their ground against checkerboard land grant subsidies, the railroad lobby shifted its focus to the kind of grants that it could still get through Congress: federally granted rights-of-way.

In sum, as historian Benjamin Hibbard put it, the demand of the reformers in the late 1860s and early 1870s “that no more land be granted to railroads was met not by positive action,” such as legislation favoring homesteaders, but instead by a mere “discontinuance of the [checkerboard subsidy] policy following the grants of 1871.”<sup>296</sup> While this is consistent with the end of the railroad subsidy land grant era in 1871, it is inconsistent with *Great Northern’s* theory of a deliberate congressional shift in right-of-way policy at that time.<sup>297</sup>

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293. See KLEIN, *supra* note 208, at 291–305.

294. The panic represented the collapse of the railroad boom of the 1860s thought early 1870s and touched off a depression lasting until 1879. See Lindstrom, *supra* note 145, at 183.

295. See Ellis, *supra* note 233, at 38. Later, there were still occasional bills to grant land to railroads. See, e.g., H.R. REP. NO. 46-735, (2d Sess. 1880) (recommending passage of House Bill 1313, granting land to Chicago, Milwaukee, and Saint Paul Railway). Railroads also sought non-land subsidies. Between 1875–1876, for example, Rep. Holman battled Colonel Tom Scott, a promoter of the Texas Pacific Railroad, over government guarantees for the railroad’s bonds. See *The Texas Pacific Job*, N.Y. TIMES, Feb. 11, 1876, at 4.

296. HIBBARD, *supra* note 93, at 249. “Positive action” against the railroads arguably did not begin until the forfeiture movement took hold in the 1880s. See *infra* Part II.L.

297. In support of their notion that there was a “sharp change” in congressional policy after 1871, both the Solicitor General’s brief and the Court *Great Northern* cited an article about railroad land grants in the Encyclopedia of the Social Sciences. Though the author was not cited, it was written by Hibbard, and like HIBBARD, *supra* note 93, it provides no support for *Great Northern’s* conclusions that right-of-way law, as opposed to land grant law, changed drastically around 1871. See B. H. Hibbard, *Land Grants—United States*, in 9 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 32, 35 (Edwin R. A. Seligman & Alvin Johnson eds., 1933) (cited in *Great N. Ry. Co. v. United States*, 315 U.S. 262, 273 n.7, n.8 (1942)).

*J. The Forty-Second and Forty-Third Congresses  
Returned to Granting Only Rights-of-Way to Railroads*

While Rep. Holman and his allies were blocking congressional action on land grant railroads, the territorial legislatures were still unable to charter railroad corporations, and the 1852 Act's general authority to build rights-of-way across the public lands had expired. Faced with these obstacles, railroad lobbyists besieged the Forty-Second Congress in 1871–1873 not just with requests for additional land grants, but also with requests for “special” railroad bills conferring federal corporate charters and/or federally granted rights-of-way. One Senator stated that the Forty-Second Congress saw “one hundred and eight bills . . . asking the right of way to build railroads and making special incorporations in the territories, and you have a lobby here averaging from fifty to one hundred and fifty men pressing these schemes.”<sup>298</sup>

There were many debates over these “special” railroad bills.<sup>299</sup> Notably, not a single one of these debates seems to have discussed the property interests Congress was granting in its rights-of-way, or whether Congress should change those interests from its prior practice. The lack of any such discussion is starkly inconsistent with the theory that around 1871, Congress changed its policy and practice regarding right-of-way grants.

During a number of the debates, some members of Congress did describe right-of-way bills as “grant[ing] no land,” or being “nothing but a grant of the right of way.”<sup>300</sup> In *Great Northern*, the Solicitor General and the Supreme Court placed great weight on such comments, asserting that they made it “inferable” that “those acts were not intended to convey any land,” and instead were meant to grant only “easements” in the post-1871 rights-of-way.<sup>301</sup> But the Court's and Solicitor General's reliance on such statements is problematic. Because there was such vehement public opposition in 1872 to “grants of land” to railroads, that term was freely used in debates in

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298. CONG. GLOBE, 42d Cong., 2d Sess. 4162 (1872) (remarks of Mr. Stewart, June 1, 1872).

299. See, e.g., CONG. GLOBE, 42d Cong., 2d Sess. 1589, 2951, 3526, 4134 (1872).

300. *Great Northern*, 315 U.S. at 272 n.3, 274 (citing CONG. GLOBE, 42d Cong., 2d Sess. 3913, 4134 (1872)); Brief for the United States, *supra* note 48, at 19–20.

301. *Great Northern*, 315 U.S. at 274 (citing CONG. GLOBE, 42d Cong., 2d Sess. 3913, 4134 (1872)); Brief for the United States, *supra* note 48, at 19–20.

opposition to any railroad grant, as the following example, from May 1, 1872, shows:

Mr. STORM. I hope the consideration of this bill will not be pressed to-night. It creates a corporation and makes a grant of land, both of which measures have never yet passed the House without a good deal of care and consideration. I hope the consideration of the bill will not be pressed this evening in view of the absence of the gentleman from Indiana, [Mr. HOLMAN,] who is the constitutional objector to all bills of this character.

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Mr. SHOEMAKER. . . . [The advocates of this bill] ask no subsidy, no part of the public lands—nothing but the right of way through a wilderness of country.

Mr. FINKELNBURG. How much land does the bill grant in the aggregate?

Mr. SHOEMAKER. It grants nothing but the right of way.

Mr. FINKELNBURG. How much land in the aggregate?

Mr. SHOEMAKER. Just as much as is necessary to use for depots, workshops, and the other appurtenances along the road. . . .

\* \* \*

Mr. FINKELNBURG. But it is said here that it amounts to ten thousand acres.

Mr. SHOEMAKER. It grants only what is necessary for the purposes of the road.

Mr. FARNSWORTH. I do not think the House ought to haggle over a land grant like this if they can build a road through this wilderness, with little stations ten miles apart, and nothing but the right of way one hundred feet on either side. Certainly we should not stop over that.

Mr. CLAGETT. . . . This bill does not grant a single acre of land for any purpose whatever except for the right of way, and twenty acres every ten miles of the road for the necessary depots, switches, and side tracks which it is absolutely essential every road shall have.<sup>302</sup>

In response, supporters of right-of-way bills repeatedly argued that such bills were not *checkerboard* land grant *subsidy* bills, the bills and subsidies most hated by the reform faction.<sup>303</sup> As

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302. CONG. GLOBE, 42d Cong., 2d Sess. 2951–52 (1872). William Clagett was Montana's territorial delegate and was the co-author, around the same time, of the Yellowstone National Park Act. See *A Brief History of the National Park Service*, NAT'L PARK SERV., [http://www.nps.gov/history/history/online\\_books/kieley/kieley2.htm](http://www.nps.gov/history/history/online_books/kieley/kieley2.htm) (last visited Nov. 6, 2010).

303. See *id.* at 4162.

seen above, contrary to the Solicitor General's and *Great Northern* Court's assumptions, this remained a meaningful distinction in 1872, because checkerboard land grants were still very much a live issue before the Forty-Second Congress.<sup>304</sup>

Moreover, despite the general anti-land-grant rhetoric used by some members of the reform faction in 1872, the reformers did not reflexively oppose right-of-way grants. In fact, even Rep. Holman, the "constitutional objector to all" railroad subsidy bills, is on record having approved of right-of-way bills—even though both he and other reformers described those very bills as *grants of land*. An example is a debate over a right-of-way grant bill from April of 1872:

Mr. COX. I should like to know whether this bill makes any grant of lands?

Mr. DUNNELL. There is no land grant further than a hundred feet on each side of the road.

Mr. HOLMAN. And it grants forty acres of land for each section and depot. Will the gentleman accept an amendment limiting the grant of land for depots and sections to so many acres for each ten miles of length in the road?<sup>305</sup>

Holman's reformers remained steadfastly opposed to new checkerboard land grant proposals, and consistently tried to make sure that the right-of-way bills were not too generous.<sup>306</sup> But they recognized that federal right-of-way grants were still necessary in many areas to help develop the public lands, and a number of such grants passed the Forty-Second Congress.<sup>307</sup> Indeed, in 1873, Congress went so far as to pass affirmative legislation allowing homesteaders to sell parts of their claims to railroads, even as Congress failed to enact other measures

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304. Compare *Great Northern*, 315 U.S. at 273–74 (claiming that “[a]fter 1871 outright grants of public lands to private railroad companies seem to have been discontinued”), with *supra* note 287 (listing the various land grant bills pending in 1872). The Solicitor General's brief in *Great Northern*, erroneously interpreting its primary and secondary sources, wrongly assumed Congress had intentionally and finally ceased “granting lands” in 1871. See Brief for the United States, *supra* note 48, at 16–20.

305. CONG. GLOBE, 42d Cong., 2d Sess. 2138 (1872).

306. See CONG. GLOBE, 42d Cong., 2d Sess. 2137, 3407 (1872) (Rep. Holman refereeing railroad bills).

307. See OFFICE OF AUDITOR OF R.R. ACCOUNTS, DEPT OF THE INTERIOR, REPORT OF THE AUDITOR OF RAILROAD ACCOUNTS 916–18 (1878) (listing eleven right-of-way-only grants made in the Forty-Second and Forty-Third Congresses in 1872–75). While this list purports to compile all railroad granting statutes up to 1878, it seems to have missed several statutes that did in fact pass, for example, the Act of June 10, 1872, ch. 437, 17 Stat. 393.



that would have protected homesteaders and reserved the public lands for their benefit.<sup>308</sup>

Between 1871 and 1875, then, Congress returned—in the midst of much controversy over land grants—to its practice from before it passed the general right-of-way Act of 1852: granting rights-of-way to specific railroads through individual bills. These rights-of-way were narrower than those under the Pacific Railroad acts, but still one or two hundred feet, comparable to those from the 1850s and earlier.<sup>309</sup> Like their predecessors, they typically conferred the right for the railroads to lay out station grounds and use adjacent materials for construction.<sup>310</sup> And with the contemporary attention to the problems that might attach to railroad grants, they frequently reserved the right of Congress to “alter, amend, or repeal” the grant.<sup>311</sup>

This complex, rich legislative history contrasts starkly with the vague, thin account of the early 1870s offered in *Great Northern*, which described these years as merely “a time” in which “special acts were passed granting to designated railroads simply ‘the right of way’ through the public lands.”<sup>312</sup> When reviewed in full detail, including the reformers’ explicit support of right-of-way-only “land grants,” the legislative history severely undermines *Great Northern*’s theory of a deliberate 1871 shift in right-of-way policy. The debates of this time were not discussing a new, diminished property interest to be granted in the right-of-way itself. Instead, they reflected the ongoing struggle over the *subsidy* land grant policy, as the progrant faction slowly succumbed to public disfavor. This struggle manifested itself in repeated arguments over whether particular bills constituted right-of-way-only bills, which could still attract enough votes to pass, or bills to grant subsidy lands, which had quickly become unpassable.

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308. Act of March 3, 1873, ch. 266, 17 Stat. 602; cf. HIBBARD, *supra* note 93, at 249.

309. See, e.g., *supra* Part II.F (discussing 1852 Act).

310. On occasion, such rights were also retroactively added to earlier statutes that had lacked them. See Act of March 3, 1873, ch. 292, 17 Stat. 612; Act of March 3, 1873, ch. 293, 17 Stat. 613.

311. See, e.g., Act of June 1, 1872, ch. 258, § 5, 17 Stat. 202, 203; Act of June 1, 1872, ch. 261, § 5, 17 Stat. 212, 212–13; Act of June 4, 1872, ch. 293, § 3, 17 Stat. 224, 225; Act of June 7, 1872, ch. 323, 17 Stat. 280.

312. *Great N. Ry. Co. v. United States*, 315 U.S. 262, 274 (1942).

*K. Passage of the General Right-of-Way Act of 1875*

The great number of “special” railroad bills and their attendant debates soon became a burden on Congress’s calendar.<sup>313</sup> Over several years in the early 1870s, Congress attempted to cure this problem with a new general “territorial railroad” law. Several bills were introduced, in both houses and in both the Forty-Second and Forty-Third Congresses, that would have provided both for the federal incorporation of railroad companies and for grants of rights-of-way.<sup>314</sup> There was extensive committee work and lengthy debates over these bills.<sup>315</sup> Congress originally viewed the primary purpose of the legislation as authorizing the territories to incorporate railroads; the replacement of the lapsed 1852 general right-of-way law was only a secondary purpose.<sup>316</sup> At one point, the right-of-way granting provisions were stripped out of the pending bill entirely (although they were later restored).<sup>317</sup>

In keeping with this focus on incorporation, the debate hardly touched on the nature of the property rights in the rights-of-way. Throughout 1874, Congress seems merely to have intended to follow its prior right-of-way granting practice, as the new bill was analogized to previous grants.<sup>318</sup> Instead, Congress focused almost exclusively on other issues, which stalled the bill for some time. These included the potential dangers associated with corporate charters, the degree to which

313. See 2 CONG. REC. 2898 (1874) (remarks of Sen. Stewart) (“[D]uring the last Congress there were several hundred bills introduced granting privileges to individuals to build railroads with all sorts of provisions.”).

314. See, e.g., H.R. 2684, 42d Cong. (2d Sess. 1872); H.R. 3474, 42d Cong. (3d Sess. 1873); H.R. 3709, 42d Cong. (3d Sess. 1873); S. 378, 43d Cong. (1st Sess. 1874) (in several different versions); see also Haney, *supra* note 190, at 186–87.

315. See, e.g., 2 CONG. REC. 2898 (1874) (remarks of Sen. Stewart of Nevada, the floor manager of Senate Bill 378). The bill “was at the last session referred to the Committee on Public lands,” then “reported [ ] twice” and “re-referred for further examination,” and in the current session “referred to the Committee on Railroads” and “gone through” again, during which “the lawyers who happen to be on each of those committees” examined it “as carefully as it could be.” *Id.* For the extensive 1874 debates over Senate Bill 378, the direct Senate precursor of the 1875 Act, see 2 CONG. REC. 2896–2905, 2946–58, 2987–97, 3028–42 (1874). See also Haney, *supra* note 190, at 188–89 (discussing controversy over incorporation provisions).

316. Haney, *supra* note 190, at 188–89.

317. *Id.*; see 2 CONG. REC. 2949 (1874).

318. See, e.g., 2 CONG. REC. 2898 (1874) (remarks of Sen. Stewart) (“The bill grants the right of way simply. There is no grant of lands except for stations and depots and the right of way over the public lands. This is the minimum of what is in any bill that has been proposed to Congress.”).

rights-of-way should be subject to state regulation and control, and the extent to which the bill might impact the rights and welfare of Indians.<sup>319</sup>

Eventually, Congress broke the stalemate by striking the provisions authorizing corporate charters, though they had originally been the main purpose of the legislation.<sup>320</sup> Somewhat oddly, members seem to have realized in 1874 that Congress had already reauthorized territorial railroad charters in 1872.<sup>321</sup> The final version of the General Railroad Right of Way Act of 1875, then, merely granted rights-of-way to railroads already incorporated under state or territorial law, or separately incorporated by Congress.<sup>322</sup>

The terms of the 1875 Act plainly drew upon earlier right-of-way laws, including the general right-of-way Act of 1852 and the Pacific Railroad acts. Its basic grant followed the familiar pattern:

[T]he right of way through the public lands of the United States is hereby granted to any railroad company . . . to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station-buildings, depots, machine shops, side-tracks, turn-outs, and water-stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.<sup>323</sup>

The Act also gave the railroads the power of condemnation for the right-of-way across private lands or “possessory claims” (e.g. unperfected homestead and preemption entries) on the

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319. *See, e.g., id.* (remarks of Sen. Stewart) (“It was alleged as against [the territorial] laws that they gave extensive privileges which monopolized cañons and defiles where roads must necessarily go to companies having no legitimate basis and having invested no funds.”); *see also id.* at 2949, 2953–58 (remarks of Sen. Stewart) (arguing that under the territorial charters, “every cañon and defile in the country would have been monopolized”).

320. *See* 2 CONG. REC. 2898 (1874). *See also supra* text accompanying note 304.

321. 2 CONG. REC. 2898 (1874) (remarks of Sen. Stewart); Act of June 10, 1872, ch. 484, 17 Stat. 390 (amending territorial organic acts to allow them to charter corporations). *See also* CONG. GLOBE, 42d Cong., 2d Sess. 2951 (1872) (titled “Government of Montana,” discussing revision to territorial acts).

322. Act of March 3, 1875, ch. 152, 18 Stat. 482, 483 (codified at 43 U.S.C. §§ 934–39 (2006)).

323. *Id.* § 1.

public lands, incorporating by reference the 1864 Pacific Railroad Act's condemnation provisions.<sup>324</sup> It reserved to Congress the same broad power reserved in the Pacific Railroad Acts to "alter, amend, or repeal" the Act.<sup>325</sup>

Two features of the 1875 Act reflected efforts to fix contentious issues from recent years of railroad law. The Act dealt with the problem of railroads monopolizing canyons and passes by requiring such locations to be shared.<sup>326</sup> To prevent speculators' interfering with the right-of-way without the government having to withdraw lands from settlement, the Act permitted the road to be "located" in advance of construction through the filing and administrative approval of a route map.<sup>327</sup> The Supreme Court later held that once obtained, this approved map of location was the railroad's "equivalent of a patent defining the grant" under the Act.<sup>328</sup> After the railroad officially located its right-of-way, the Act further provided that "all such lands over which such right of way shall pass shall be disposed of subject to such right of way."<sup>329</sup> As discussed below, the meaning of this latter provision would become a very important issue in *Great Northern* and *Hash*.<sup>330</sup>

The remarks of legislators on the final version of the 1875 Act affirm Congress's intent to make the Act consistent with earlier policy and earlier grants. In one of the final House debates before passage of the Act, the bill's floor manager analogized the right-of-way property interests granted by the 1875 Act to those granted by the Pacific Railroad Acts, under which the land underlying the rights-of-way would remain in federal ownership, even if the United States alienated the other public lands in the vicinity of the road.<sup>331</sup> On January 12, 1875, the "territorial railroad" bill was reported back from the Committee on Public Lands by the committee's chair, Representative

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324. *Id.* § 3.

325. *Id.* § 6. See also discussion *infra* Part IV.

326. § 2, 18 Stat. at 482.

327. *Id.* § 4. See also discussion *infra* Parts II.E, H.

328. *Great N. Ry. Co. v. Steinke*, 261 U.S. 119, 125 (1923) (citing *Noble v. Union River Logging R.R. Co.*, 147 U.S. 165 (1893)).

329. § 4, 18 Stat. at 483.

330. This provision has grown in relative importance due to the administrative and judicial constructions that were later put on it—in particular, *Great Northern's* holding that it was meant to make the right-of-way an "easement" and *Hash's* insistence that it was meant to alienate any federal interest in 1875 Act rights-of-way. See discussion *infra* Part III.

331. 3 CONG. REC. 404, 404–07 (1875)

Washington Townsend of Pennsylvania.<sup>332</sup> The debate on the bill quickly focused on the respective state and federal powers to regulate railroads that received federally granted rights-of-way.<sup>333</sup> This led to a discussion of the retained federal interest in a federally granted right-of-way of this type:

Mr. G.F. HOAR [of Massachusetts]. I ask my friend from Pennsylvania [Mr. Townsend] to hear me a moment in explanation of my point. Suppose after a railroad company has built a railroad under this bill in a Territory a State is formed there, through whose territory the road passes. Now, what 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 limits the property [sic] 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 [its] ordinary local authority. . . 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. Mr. TOWNSEND. *Is not that the condition in which the Union Pacific Railroad stands in Kansas and has stood, and in California too?*

Mr. G.F. HOAR. Undoubtedly; . . . [which] I regard as a most lamentable fact.<sup>334</sup>

These statements are tremendously important. They confirm that the legislators who passed the 1875 Act believed that the

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332. *Id.* Representative Townsend introduced the Senate bill in the House; the *Great Northern* opinion referred to him as the bill's sponsor and cited these and other remarks by Townsend in debate. See *Great N. Ry. Co. v. United States*, 315 U.S. at 274; see also *Townsend, Washington*, BIOGRAPHICAL DIRECTORY OF THE U. S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=T000337> (last visited Sept. 8, 2010).

333. 3 CONG. REC. 405 (1875).

334. *Id.* at 406 (emphasis added). See also *R.R. Co. v. Peniston*, 85 U.S. 5, 50 (1873) (a railroad taxation case, in which the Court held that in addition to the exemption from state taxation for the operations on the Union Pacific's 1862 right-of-way, "[t]he estate in the soil [under the right of way] cannot be taxed, for that remains in the United States").

United States would retain ownership of the land underlying these federally granted railroad rights-of-way. Congress intended that in patenting away “the public lands . . . in the vicinity of the road,” the government was not patenting away its ownership of the land underlying the right-of-way.<sup>335</sup> To the contrary, Congress intended to retain control of that land, consistent with the “appropriation doctrine,” and to retain federal authority over the railroad. The legislators also believed that even though the 1875 Act would grant the railroads only “the right to lay their tracks and run their trains over the public lands”—in other words, a type of “easement”—there was “undoubtedly” no difference between the United States’ property rights in an 1875 Act right-of-way and a Pacific Railroad right-of-way.<sup>336</sup> Notably, in an earlier debate on the 1875 Act, it was also remarked that the fundamental purpose of the Act was not “for the benefit of railroad companies” but rather “for the benefit of the public.”<sup>337</sup>

A significant number of rights-of-way were laid out under the 1875 Act.<sup>338</sup> It remained in effect until 1976, when it was superseded by the Federal Land Policy and Management Act.<sup>339</sup>

*L. Forfeiture: Congress Reasserted Its Ownership and Control Over “Unearned” Railroad Grants*

The public’s anti-railroad views led to consequences for railroads even harsher than the end of the checkerboard land grants. Beginning in the 1870s, Congress acted on public demands to “forfeit,” or rescind and recapture, checkerboard land grants and right-of-way grants that had not been properly “earned” through timely railroad construction. In doing so, Congress once again affirmed its significant continuing authority over its railroad grants: first reasserting its ownership of

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335. 3 CONG. REC. 406 (1875)

336. *Id.* at 407, 406.

337. 2 CONG. REC. 3030 (1874). *See also* United States v. Denver & Rio Grande Ry. Co., 150 U.S. 1, 8 (1897) (The 1875 Act “was not a mere bounty for the benefit of the railroads that might accept its provisions, but was legislation intended to promote the interests of the government in opening to settlement, and in enhancing the value of those public lands through or near which such railroads might be constructed.”).

338. *See, e.g.*, DONALDSON, *supra* note 3, at 769–71, 1263 (listing, as of 1884, approximately 150 companies granted rights-of-way under the 1875 Act).

339. *See, e.g.*, Hash v. United States, 403 F.3d 1308, 1315 (Fed. Cir. 2005).

such property, and then regulating the property's re-disposition to the public.

Many land grant railroads failed to meet their statutory deadlines for construction.<sup>340</sup> This led to vigorous public demands for congressional forfeiture of the land grants.<sup>341</sup> Between 1884 and 1890, Congress forfeited a number of grants to individual railroads and then finally passed a "general" land grant forfeiture law.<sup>342</sup> In 1906 and 1909, Congress also extended the forfeiture policy to unbuilt railroad "right of way only" grants under statutes such as the 1875 Act. These "paper rights of way" were complained to be "cloud[ing] the title" to public lands.<sup>343</sup>

When checkerboard lands were forfeited, existing adverse claimants (typically squatters on the land, who were would-be homesteaders or preemptors) could not simply step in and take over possession directly from the railroads. Instead, the government first reasserted title to the railroad lands, which fell "back into the mass of the public lands" after forfeiture.<sup>344</sup> The forfeited lands were not legally open to new homestead and preemption entries until the government declared an administrative reopening of the lands to public entry.<sup>345</sup> To minimize

340. Ellis, *supra* note 233, at 30; GATES, *supra* note 2, at 457–61.

341. GATES, *supra* note 2, at 458 (citing *Schulenberg v. Harriman*, 88 U.S. 44 (1874) (holding that Congress had to affirmatively act to forfeit federal grants)); see also Haney, *supra* note 190, at 23; Ellis, *supra* note 233, at 39–41, 45–46.

342. Ellis, *supra* note 233, at 51–52.

343. See Act of June 26, 1906, Pub. L. No. 59-301, ch. 3550, 34 Stat. 482 (codified at 43 U.S.C. § 940 (2006)); Act of February 25, 1909, Pub. L. No. 60-261, ch. 191, 35 Stat. 647 (codified at 43 U.S.C. § 940 (2006)). The Commissioner of the General Land Office called these grants "mere paper rights of way which lie as a burden upon the public lands and cloud the title to such lands when entered by individuals." DEPT OF THE INTERIOR, *Report of the Commissioner of the General Land Office—Rights of Way*, in 1 REPORTS OF THE DEPARTMENT OF THE INTERIOR FOR THE FISCAL YEAR ENDED JUNE 30, 1909, 74, 75 (1910).

344. See, e.g., Comm'r S. S. Burdett, Gen. Land Office, Letter Ruling: Stockton and Copperopolis Railroad (Dec. 29, 1875), reprinted in COPP'S LAND-OWNER, Aug. 1876, at 73–74.

345. *Id.* at 73 (stating that forfeited railroad lands are not "subject to entry until after published notice under the direction of" the General Land Office). In the nineteenth century, it was common practice that if a homesteader, preemptor, or grant claimant failed to perfect a claim, the claimed land would revert to the government. See Homestead Act of 1862, ch. 75, § 5, 12 Stat. 392, 393 (reversion to government upon failure of claim); see also *Newhall v. Sanger*, 92 U.S. 761, 763–64 (1875) (explaining that failure to perfect claim under Spanish or Mexican grant meant that claimed lands "fell into the category of public lands"). *But cf.* ROBBINS, *supra* note 144, at 258–59 (discussing administrative policy that before 1871, abandoned homestead claims within railroad grants inured to the railroads, but after 1871 went back to the public domain).

unfairness, though, Congress permitted settlers who claimed particular tracts of checkerboard railroad lands to take priority on those same lands, once the lands had been forfeited and restored to the public domain.<sup>346</sup>

Similarly, when right-of-way-only grants were forfeited by statute, the United States first “resume[d] the full title to the lands covered thereby free and discharged from [the right-of-way] easement.”<sup>347</sup> It then declared that this forfeiture “shall . . . inure to the benefit of any owner or owners of land conveyed by the United States prior to such date subject to any such grant of right-of-way or station grounds.”<sup>348</sup> Although transitory, this too amounted to an assertion of continuing federal control and a reserved right to regulate the disposition of such property.

### *M. Congressional Regulation of Abandoned Rights-of-Way*

The final phase of congressional control over federally granted railroad rights-of-way involved the disposition of such property after it was abandoned by the railroads. Congress first legislated on this issue in the early 1920s, after the *Townsend* and *Stringham* decisions had held that the United States held a reversionary interest in such property. In 1921, Congress enacted 43 U.S.C. § 912, which regulated the disposition of abandoned rights-of-way.<sup>349</sup> If the property was forfeited or abandoned by the railroad, as declared by decree of a “court of competent jurisdiction” or by an Act of Congress, the United States would regain title to the land.<sup>350</sup> That title would then pass to the patentee (or successor) of each “legal subdivision” traversed by the right-of-way, with three exceptions: if the right-of-way was converted to public highway use; if the right-of-way was located within a municipality, in which case the municipality would gain title; and in regard to the mineral rights, which under all circumstances were retained by the United States.<sup>351</sup> Thus, even though Congress authorized many rights-of-way to pass out of federal surface ownership, it

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346. RAE, *supra* note 111, at 321–22.

347. See 43 U.S.C. § 940 (2006).

348. *Id.*

349. Act of Mar. 8, 1922, Pub. L. No. 67-163, 42 Stat. 414 (codified at 43 U.S.C. § 912 (2006)).

350. *Id.* at 414–15.

351. See H.R. REP. NO. 67-217 (1921) (“Abandoned Portions of Rights of Way Granted to Railroad Companies.”).



asserted a great deal of power to control what happened to such property.

In 1988, 43 U.S.C. § 912 was modified by the National Trails System Improvement Act. This law provided that the United States would retain any rights it had in its rights-of-way, instead of transferring them to adjacent property owners.<sup>352</sup>

*N. Conclusion: The Legislative History Reflects the Consistency of Congressional Policy*

Over the course of the nineteenth century, Congress acted consistently when it granted railroad rights-of-way through the federal public lands. Congress settled on legal terminology in the late 1830s, early in the development of American railroads, and used that terminology with relatively little variation throughout the rest of the century. Congress repeatedly referred to its granted rights-of-way as “easements” or as similar to easements.<sup>353</sup> But it viewed federally granted railroad rights-of-way as very different from mere common-law easements. Congress considered the rights-of-way appropriations of public lands for a public purpose, which made those lands unavailable for subsequent settlement or acquisition.<sup>354</sup>

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352. National Trails System Improvement Act of 1988, Pub. L. No. 100-470, § 3, 102 Stat. 2281 (codified at 16 U.S.C. § 1248(c) (2006)).

353. Descriptions of federally granted rights-of-way as “easements” (or analogous terminology) are found in the language and legislative history of right-of-way grants from the 1830s, *see supra* Part II.C; in legislative history pertaining to early versions of the Illinois Central grant, *see supra* Part II.D; in the checkerboard land grant to Missouri in 1852, *see supra* Part II.D; in the legislative history of the general right-of-way act of 1852, *see supra* Part II.F; and in an early debate on the Pacific Railroad, *see supra* Part II.G. Significantly, *after* 1871, Congress also described a pre-1871 right-of-way grant from one of the Pacific Railroad acts as an “easement.” In 1886, a report by the House Committee on Public Lands stated that the 1864 Act gave the Northern Pacific “a right to build its road across any of [the] public lands, and for that purpose had the use of an *easement* in 200 feet on each side of its track.” *See* H. COMM. ON PUB. LANDS, FORFEITED GRANTS NORTHERN PACIFIC RAILROAD, H.R. REP. NO. 49-1226, at 9 (1st Sess. 1886) (emphasis added). The report also characterized the right-of-way and the checkerboard subsidy as separate grants. *Id.* at 10–11. If Congress had consciously shifted from granting “limited fee”-type interests before 1871 to granting easements thereafter, as *Great Northern* contended, it seems especially unlikely that in 1886, Congress would erroneously describe a pre-1871 Pacific Railroad right-of-way grant as an “easement.”

354. There appears to have been *no* statement by Congress between 1835 and 1871 that a right-of-way was being granted in fee simple, or as a “limited fee.” One unusually generous land grant bill from 1870 would have given its recipient

Through its enactments and in its debates, Congress indicated its consistent intent that the land underlying rights-of-way was owned by the government, which was either implicitly or explicitly subject to reversion if the purpose of the appropriation terminated. Finally, Congress confirmed this view of the property by asserting the right to revoke and forfeit railroad grants back to the United States and to regulate the disposition of forfeited and abandoned railroad rights-of-way.

### III. THE MISINTERPRETATION OF THE 1875 ACT'S LEGISLATIVE HISTORY

When the *Hash* court held that the federal government lost control of the land underlying post-1871 rights-of-way by issuing patents to other private landowners, it relied very heavily on section 4 of the 1875 Act, 43 U.S.C. § 937, and its legislative history, as the *Great Northern* Court interpreted it.<sup>355</sup> Section 4 provided that after a right-of-way was established pursuant to the section's procedures, any lands that it passed over "shall be disposed of subject to such right of way."<sup>356</sup> That language has been repeatedly cited by those who argue that there was an 1871 shift in right-of-way law; they assert that section 4 evinces a specific congressional intent to dispose of any government interest in post-1871 rights-of-way.<sup>357</sup>

As the following subsections of this Article make clear, however, section 4's actual origins, authorship, and history show that it was intended to do nothing of the sort. Rather, it was a relatively minor piece of legislation that was meant to allow right-of-way-only railroads to claim rights-of-way in advance of actual construction. This would protect the railroads

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railroad a 200-foot right-of-way from Chicago to San Diego "in fee," in addition to subsidy lands, but it did not pass. See H.R. 935, 41st Cong. § 9 (2d Sess. 1870).

355. See, e.g., *Hash v. United States*, 403 F.3d 1308, 1314 (Fed. Cir. 2005).

356. Act of Mar. 3, 1875, ch. 152, § 4, 18 Stat. 482, 483 (codified as amended at 43 U.S.C. § 937 (2006)).

357. See, e.g., *Hash*, 403 F.3d at 1314 ("The 1875 Act contemplated that public land carrying a railway right-of-way would be 'disposed of.'"); see also Brief of Plaintiffs-Appellants at 13, *Hash*, 403 F.3d 1308 (No. 03-1395), 2003 WL 25291551 ("Under the 1875 Act, Congress Intended to Dispose of the Fee Title to the Public Lands That Were Subject to the Railway Grants."); Appellants' Opening Brief at 21-22, *United States v. Colo. & Wyo. R.R. Co.*, No. 09-8047 (10th Cir.), Sept. 30, 2009, (citing *Hash*, 403 F.3d at 1314) (decision forthcoming). Oral argument in these pending cases was held on May 4, 2010. *Legal Cases*, MOUNTAIN STATES LEGAL FOUND., [http://www.mountainstateslegal.org/legal\\_cases.cfm?legalcaseid=143](http://www.mountainstateslegal.org/legal_cases.cfm?legalcaseid=143) (last visited Sept. 25, 2010).

from adverse claims to the lands along their projected routes, without the need for administrative withdrawals of those lands from settlement. The author of the language, Rep. James Harvey Slater of Oregon, in fact was a dedicated advocate for railroad land grants. There is no indication that he intended to make any change to the nature of a railroad right-of-way grant or to alienate the government's previously retained interests therein. To the contrary, Rep. Slater stated his intent was to follow Congress's prior right-of-way granting practice.

Consistent with these facts, the reformers did not hail the language as attaining their goal of reserving the public lands for "actual settlers." Instead, they treated it as just another piece of railroad legislation and consented to its passage because it did not include any checkerboard land subsidy. Finally, the other contemporary legislative, administrative, and judicial interpretations of the statute were consistent with this view of section 4. In sum, the historical record is devoid of evidence that Congress intended the section 4 language to make *any* change to the fundamental property rights in federally granted railroad rights-of-way—much less that Congress intended it to make the most significant change of the nineteenth century.

A. *Hash's and Great Northern's Interpretations of Section 4 of the 1875 Act*

As stated above, section 4 of the 1875 Act provided that a railroad could file a "profile" of its road with the Secretary of the Interior, following which any lands passed over by the right-of-way "shall be disposed of subject to such right of way."<sup>358</sup> According to a footnote in *Great Northern*, section 4 evinced a "clear" congressional intent to grant only an easement right-of-way, as revealed by legislative history from April 3, 1872:

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358. The language of section 4:

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

§ 4, 18 Stat. at 483 (emphasis added).

[The language of section 4] first appeared in a special right of way statute, Portland, Dalles, and Salt Lake Act of April 12, 1872, 17 Stat. 52. Congressman Slater reported that bill for the Public Lands Committee, and, in discussing the reason for the clause, said:

Mr. Slater: The point [of this clause] is simply this: the land over which this right of way passes is to be sold subject to the right of way. It simply provides that this right of way shall be an incumbrance upon the land for one hundred feet upon each side of the line of the road; that those who may afterward make locations for settlement shall not interfere with this right of way.

Mr. Speer of Pennsylvania: It grants no land to any railroad company?

Mr. Slater: No, sir.<sup>359</sup>

If the statute “grant[ed] no land to any railroad company,” reasoned the *Great Northern* Court, it must have been intended to grant an easement.<sup>360</sup> To the Court, apparently, section 4’s language and this legislative history apparently epitomized the purported 1871 shift from fee “land grants” to railroads, to grants of easement rights-of-way only.<sup>361</sup> *Hash*, in turn, pushed this interpretation even further. *Hash* cited section 4 as support for the theory that the United States not only intended to “grant no land” to any railroad under the 1875 Act, but also *intended to surrender* any interest in the land underlying an 1875 Act right-of-way, when it patented away any land that that right-of-way happened to cross.<sup>362</sup> *Hash* found that because section 4 stated that lands would subsequently pass “subject to” a right-of-way, the 1875 Act “recognized” that the United States would be disposing of its interest in those lands.<sup>363</sup>

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359. *Great N. Ry. Co. v. United States*, 315 U.S. 262, 271 n.3 (1942) (quoting CONG. GLOBE, 42d Cong., 2d Sess. 2137 (1872)). See also *supra* Part I.B. The Solicitor General called this colloquy evidence that granting an easement was the “precise intent of Section 4.” Brief for the United States, *supra* note 48, at 11–12.

360. *Great Northern*, 315 U.S. at 271, 272 n.3 (quoting CONG. GLOBE, 42d Cong., 2d Sess. 2137 (1872)).

361. *Id.* at 272–74.

362. *Hash*, 403 F.3d at 1314 (stating that “the Act recognized the future disposition of the lands over which the right-of-way passes”).

363. *Id.*; see also *Ellamae Phillips Co. v. United States*, 77 Fed. Cl. 387, 389 (2007) (reaching the same conclusion that the United States “intended” to alienate any rights it otherwise held in such property), *vacated and remanded*, 564 F.3d 1367 (Fed. Cir. 2009).

B. *James Harvey Slater, the Author of the Language Used in Section 4, Was a Dedicated Proponent of Railroad Subsidies*

*Great Northern* stated that the comments made by “Congressman Slater” on April 3, 1872, demonstrated a great post-1871 shift in congressional right-of-way policy.<sup>364</sup> But had the *Great Northern* Court or Solicitor General known anything about James Harvey Slater, they would have realized that he would never have advocated such a shift. In the Forty-Second Congress that began in 1871, Mr. Slater was a freshman representative from Oregon.<sup>365</sup> As a legislator, he was such a dedicated and enthusiastic proponent of railroad land grants that he quickly became one of the chief antagonists to Rep. Holman and his anti-land-grant reformers. Even though Rep. Slater entered the House almost a year after it resolved that railroad land grants “ought to be discontinued,”<sup>366</sup> and a few days after it passed what would turn out to be the very last checkerboard railroad grant,<sup>367</sup> he was an unabashed advocate for land grant railroads. Rep. Slater believed that Oregon desperately needed more checkerboard grants to promote railroad construction and populate his large, empty state.

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364. *Great Northern*, 315 U.S. at 271 n.3 (quoting CONG. GLOBE, 42d Cong., 2d Sess. 2137 (1872)).

365. *Slater, James Harvey*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=S000476> (last visited Sept. 18, 2010). Slater, who lived from 1826 to 1899, was a Democratic representative for one term in the Forty-Second Congress from 1871 to 1873 and a U.S. Senator for one term from 1879 to 1885. *Id.* Born in Illinois, he settled in Oregon in 1850, during its days as a “wilderness,” where, despite “limited” early education, he became a newspaperman in Corvallis and later a “prosperous lawyer” and district attorney in La Grande. Editorial, N.Y. TIMES, Sept. 19, 1878, at 4. An uncharitable letter to the *New York Times* in 1878, during Slater’s Senate candidacy, described him as having “no talent, but slow, hard sense and persistent industry; . . . no speculation in his eye or imagination in his soul; [he] does but one thing at a time, and the one thing he is doing now is to run for the Senate.” *Oregon’s New Senator*, N.Y. TIMES, Sept. 23, 1878, at 4. The anonymous correspondent claimed he was “well acquainted” with Slater, having “sat for hours on the bank and seen him pipe his diggings and work his sluices, and then the scene would change in term times, and he would plead at the court where I kept the records.” *Id.*

366. CONG. GLOBE, 41st Cong., 2d Sess. 2095 (1870). See discussion *supra* Part II.I.

367. Act of Mar. 3, 1871, ch. 122, 16 Stat. 573 (grant to Texas and Pacific Railroad); see discussion *supra* Part II.I.

On March 13, 1871, Rep. Slater had been a Congressman for nine days when he introduced his first two bills.<sup>368</sup> Both would have given huge checkerboard land grants to subsidize Oregon railroad projects. One, House Bill 137, was the direct predecessor of the Portland, Dalles, and Salt Lake Act of 1872: the special right-of-way grant later cited by *Great Northern* as the origin of section 4 of the 1875 Act. House Bill 137 would have granted twenty alternate sections per side per mile—as much land as the legendary Northern Pacific grant of 1864—to build a line east and southeast from Portland to connect with the Central Pacific in Utah (likely passing near Mr. Slater’s hometown of LaGrande).<sup>369</sup>

After an eight-month congressional recess, the next recorded action on Rep. Slater’s bills was December 21, 1871. Rep. Slater asked unanimous consent to present a memorial (petition) from 300 citizens of Baker City, Oregon, also on the projected line of the Portland and Salt Lake, in support of its land grant.<sup>370</sup> The instant Slater uttered the words “grant of land,” however, Rep. Holman cut him off mid-sentence by objecting to the unanimous consent request.<sup>371</sup> Representative Slater was forced to delay presenting his citizens’ memorial until January 9, 1872.<sup>372</sup> On January 27, he followed up with a lengthy, colorful, and impassioned speech in support of his railroad land grant bill.<sup>373</sup> Filling almost six full pages of the *Congressional Globe*, Rep. Slater acknowledged the vehement opposition to such grants but insisted that they remained the only feasible way to develop Oregon’s vast but sparsely populated natural riches.<sup>374</sup>

Around February, apparently, Rep. Slater came to realize the difficulty of promoting any checkerboard land subsidy in 1872 and changed his tactics. On February 27, 1872, he reported from the Committee on the Public Lands a new, simple right-of-way-only bill for the Salt Lake project.<sup>375</sup> This bill,

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368. H.R. 137, 42d Cong. (1st Sess. 1871) (“A Bill Granting lands to aid in the construction of a railroad and telegraph line from Great Salt Lake to Portland, Oregon”); H.R. 138, 42d Cong. (1st Sess. 1871) (Slater’s other bill, for a southern railroad route through Oregon).

369. H.R. 137 § 3.

370. CONG. GLOBE, 42d Cong., 2d Sess. 258 (1871).

371. *Id.*

372. *Id.* at 310 (1872).

373. *Id.* at 657–62.

374. *Id.*

375. H.R. 1767, 42d Cong. (2d Sess. 1872).

House Bill 1767, was very close to what would become the final Portland, Dalles, and Salt Lake Act of 1872. It now included the “disposed of” language that would become section 4 of the 1875 Act, 43 U.S.C. § 937,<sup>376</sup> even though it retained the title of the 1871 land grant bill: “A Bill Granting lands to aid in the construction of a railroad and telegraph line from Great Salt Lake to Portland, Oregon.”<sup>377</sup>

By this time, Rep. Holman had become reflexively suspicious of Rep. Slater. On March 14, 1872, Rep. Slater reported a bill completely unrelated to railroads, which would have created a new federal land sales district and land office in Oregon.<sup>378</sup> After the bill was read, Rep. Holman needled Rep. Slater, asking “Does this bill grant the right of way?”<sup>379</sup> Rep. Slater, though, refused to be drawn in, replying “No, sir; it creates a new land district, and the bill has the approval of the Committee on the Public Lands.”<sup>380</sup>

On March 28, 1872, Rep. Slater introduced another iteration of the Portland and Salt Lake bill.<sup>381</sup> While House Bill 2124 contained exactly the same text as House Bill 1767, he strategically altered the title to drop the phrase “Granting lands,” changing it to a less controversial “A Bill Granting the right of way through the public lands.”<sup>382</sup>

Given Rep. Slater’s reputation and the history of his Portland and Salt Lake bill, the change in title did not keep Rep. Holman’s faction from closely scrutinizing the bill. When House Bill 2124 was debated on April 3, 1872, Rep. Slater was questioned by both Rep. Holman and Rep. Holman’s ally, Rep. Robert M. Speer of Pennsylvania.<sup>383</sup> *Great Northern* reported too little of this dialogue (and its context) to reveal its true meaning.<sup>384</sup> Immediately after the bill was read, Rep. Holman asked the clerk to re-read the particular language that would later become section 4 of the 1875 Act, 43 U.S.C. §937. He then asked:

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376. *Id.* § 2.

377. *Id.* Slater put the “subject to” language in some of his railroad bills, but not others. Compare H.R. 1910, 42d Cong. § 2 (2d Sess. 1872), with H.R. 3692, 42d Cong. (3d Sess. 1873).

378. H.R. 1638, 42d Cong. (2d Sess. 1872).

379. CONG. GLOBE, 42d Cong., 2d Sess. 1685 (1872).

380. *Id.*

381. H.R. 2124, 42d Cong. (2d Sess. 1872).

382. *Id.*

383. See, e.g., CONG. GLOBE, 42d Cong., 2d Sess. 1301, 1305 (1872) (Speer and Holman opposing land grant extension).

384. See *Great N. Ry. Co. v. United States*, 315 U.S. 262, 271 n.3 (1942).

Mr. HOLMAN. I do not understand the object of expressly providing that after the location of this road the lands shall be sold. Is it meant that before that time the lands shall not be subject to location for settlement; that they shall only become subject to location by homestead settlers after the location of this road? If that is the object I object to the provision.

Mr. SLATER. The point is simply this: the land over which this right of way passes is to be sold subject to this right of way. It simply provides that this right of way shall be an incumbrance [sic] upon the land for one hundred feet upon each side of the line of the road; that those who may afterward make locations for settlement shall not interfere with this right of way.

Mr. SPEER, of Pennsylvania. It grants no land to any railroad company?

Mr. SLATER. No, sir.

Mr. HOLMAN. If the provision means what the gentleman from Oregon [Mr. SLATER] has explained it to mean, I have no objection to it, although I think the Committee on Public Lands might well consider whether a strip of land one hundred feet wide is not an ample grant to any railroad company for the construction of its road. I think that in the older settled sections of the country the road-beds seldom exceed one hundred feet in width.

Mr. SLATER. The bill follows the uniform precedents in bills of this character. I do not think a bill has been passed within the last ten years for a right of way giving less than one hundred feet on each side.

Mr. HOLMAN. I do not object, although the provision struck me as somewhat singular.<sup>385</sup>

Because the Solicitor General and the Court failed to assess the identities or motives of these Congressmen, their interpretation was not historically accurate. Mr. Slater was a rearguard *advocate* for land grant railroads. When he agreed that House Bill 2124 “grants no land,” he was not describing a new post-1871 paradigm in right-of-way property rights, as *Great Northern* and the Solicitor General claimed.<sup>386</sup> Rather, he was acknowledging that, despite his previous attempt to give the railroad a checkerboard land grant bounty worthy of the Northern Pacific, the revised bill granted only a right-of-way and did not

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385. CONG. GLOBE, 42d Cong., 2d Sess. 2137 (1872).

386. See *Great Northern*, 315 U.S. at 271 n.3; Brief for the United States, *supra* note 48, at 9.



withdraw any land from settlement.<sup>387</sup> Moreover, consistent with his reputation as an earnest but uninventive person,<sup>388</sup> Rep. Slater stated that the bill's intent was to "follow[] the uniform precedents" for railroad right-of-way bills from the prior decade.<sup>389</sup>

In addition, the next bill introduced by Rep. Slater further confirms that he did not mean to make any change to the property interest granted in the right-of-way. On May 6, 1872, less than a month after the Portland and Salt Lake grant had passed, Slater introduced a bill to regulate the disposal of the public lands in the vicinity of its right-of-way.<sup>390</sup> The bill provided a retroactive and indirect land sales subsidy for the railroad by appropriating any local land sales proceeds to support the railroad's mortgage bonds. In doing so, the bill specified that these proceeds would be derived from the sale of "the public lands along and within twenty miles of each side of the line of" the railroad, "*except those heretofore granted for the right of way, depots, stations, side-tracks, and needful uses in operating said road.*"<sup>391</sup> Far from recognizing the "subsequent disposition" of the lands underlying the right-of-way, Rep. Slater viewed those lands as already having been granted for use by the railroad—again, a view entirely consistent with the "appropriation theory" of railroad grants.<sup>392</sup>

Thus, when Rep. Slater's statements are viewed with an accurate understanding of his identity and motives, there is no evidence at all that he intended the language that later became 43 U.S.C. § 937 to transform right-of-way law, or to surrender government ownership of the land underlying post-1871 federally granted railroad rights-of-way.

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387. Again, Slater's claim that his right-of-way-only bill "granted no land" to a railroad would also have been common for a railroad proponent at the time. See discussion *supra* Part II.J.

388. See *Oregon's New Senator*, *supra* note 365.

389. CONG. GLOBE, 42d Cong., 2d Sess. 2137 (1872).

390. H.R. 2660, 42d Cong. (2d Sess. 1872).

391. *Id.* ll. 3–7 (emphasis added).

392. See discussion *supra* Part I.A. After *this* bill failed to pass, the relentless Portland and Salt Lake backers then attempted to have part of the Northern Pacific's land grant forfeited by Congress and transferred to the Portland and Salt Lake. See Ellis, *supra* note 233, at 47.

C. *Other Legislative History, Including the Response of the Reformers, Also Belies Section 4 Being Part of Any "1871 Shift"*

There is also no evidence in the legislative history that anyone else in Congress—including Rep. Holman, the chief opponent of railroad land grants and the champion of “actual settlers”—viewed Rep. Slater’s bill as altering existing law in any significant way. If, as *Hash* and *Great Northern* suggested, Congress deliberately meant the bill to alienate the title to the land under its post-1871 rights-of-way, as part of a post-1871 congressional strategy to cease “land grants” to railroads and give the public lands to settlers,<sup>393</sup> one might expect Rep. Holman to welcome the bill. He did not. Far from endorsing Rep. Slater’s “subject to” language as a long-sought implementation of his 1870 and 1872 resolutions to reserve the public land for “actual settlers,” Rep. Holman called the language “somewhat singular” and said he “d[id] not understand [its] object.”<sup>394</sup> After Rep. Slater explained that the object was to protect the right-of-way from persons subsequently acquiring lands, Rep. Holman checked that the bill was not withdrawing large tracts of land from settlement and asked whether the right-of-way needed to be so wide.<sup>395</sup> But with the bill granting no subsidy lands, Rep. Holman raised no further objection and did not even insist that the right-of-way be narrowed before it was allowed to pass.<sup>396</sup>

In fact, Rep. Holman was so far from opposing “grants of lands” for rights-of-way that, mere minutes after Rep. Slater’s grant passed, Rep. Holman agreed to another right-of-way grant in Utah.<sup>397</sup> This grant was virtually identical to that of the Portland and Salt Lake. Not only was it characterized by its sponsor as a “grant of land,” but Rep. Holman himself used the term “grant of land” to describe its legal effect.<sup>398</sup> Clearly, Rep. Holman and his allies were not intent on altering decades of precedent concerning the legal rights to property that lay

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393. See *Hash v. United States*, 403 F.3d 1308, 1314–17 (Fed. Cir. 2005); *Great N. Ry. Co. v. United States*, 315 U.S. 262, 273–74 (1942).

394. CONG. GLOBE, 42d Cong., 2d Sess. 2137 (1872).

395. *Id.*

396. Act of Apr. 12, 1872, ch. 99, 17 Stat. 52 (granting the railroad a right-of-way from Salt Lake to Portland, Oregon).

397. CONG. GLOBE, 42d Cong., 2d Sess. 2138–39 (1872).

398. *Id.* at 2138; see discussion *supra* Part II.J.

underneath railroads but were simply policing checkerboard grants.

In the Senate, the cursory debates on Rep. Slater's Portland and Salt Lake bill further belie any claim that the bill was part of the nineteenth century's most important shift in right-of-way law. The Senate dealt with the bill in two brief discussions over just two days in April of 1872. In doing so, it did not even address the future section 4 language, much less refer to any new policy involving the disposition of public lands underlying railroad rights-of-way.<sup>399</sup>

In sum, the legislative history fits very poorly with *Great Northern's* theory about what section 4 of the 1875 Act means. The remarks cited by *Great Northern*, supposedly reflecting the "precise intent" of Congress to create a new, restrictive paradigm in right-of-way law, in fact were spoken by an unrepentantly pro-land-grant and pro-railroad Congressman. Rep. Slater's comment that his bill granted "no lands" was based on the fact that he had stripped it of a land grant worthy of the Northern Pacific's. He even stated that it was his intent to follow the "uniform precedent" in granting rights-of-way. Finally, the nineteenth century's most significant change in right-of-way law also supposedly passed without any relevant debate in the Senate and without meaningful participation from Rep. Holman's reform faction—who were busy *approving* right-of-way grants that even Rep. Holman himself characterized as "grants of land." In light of all this, the Solicitor General's, *Great Northern's*, and *Hash's* interpretations of the "legislative intent" behind section 4 of the 1875 Act is entirely unconvincing.

*D. The "Subject To" Language of Section 4 Was Meant to Protect the Railroads' Rights From Adverse Claims, Not to Alienate the Interests of the United States*

The "subject to" language was most likely included in the Portland and Salt Lake bill, and in section 4 of the 1875 Act,

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399. On April 4, 1872, the Senate discussed which committee should review the bill. CONG. GLOBE, 42d Cong., 2d Sess. 2151 (1872). On April 5, the bill came back to the full Senate for a brief debate over the railroad's route and its station grounds. *Id.* at 2185. Senator Morrill of Vermont questioned why the railroad would be granted forty acres for station grounds "wherever they choose," which he said "might involve a very considerable sum of land, although it is not ostensibly a land-grant railroad." *Id.* When told that the railroad was limited to one forty-acre station ground every ten miles, Sen. Morrill agreed, and the bill passed. *Id.*

because pro-railroad legislators like Rep. Slater could no longer protect rights-of-way from “interference” and speculative settlement through unpopular, large-scale withdrawals of the public lands.<sup>400</sup> Consistent with this, section 4 was repeatedly interpreted by the Department of the Interior as protecting railroads from any settlement rights acquired after the railroads had filed their route profiles. In March of 1878, Interior declared that section 4 was intended to allow Interior to make “the proper notes and records for *the protection of* [the railroad’s] *rights*” against subsequent claims to the same property.<sup>401</sup> In an administrative opinion in 1889, Interior stated that section 4 was intended to permit a railroad to give its right-of-way “fixity of location, *before* its road shall be constructed” to give an 1875 Act railroad “a similar privilege” to those previously conferred on the Pacific railroads.<sup>402</sup> This administrative opinion, in turn, was cited by the Supreme Court in 1900 as correctly defining the purpose of section 4.<sup>403</sup>

Moreover, Congress’s statement that the lands would “pass subject to” the right-of-way does not indicate any special congressional intent to dispose of the federal interest in the rights-of-way. At the time, the phrase “subject to” was routinely used to describe the priority among competing claims to the same public lands—especially lands crossed by rights-of-way.<sup>404</sup>

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400. See also Act of June 10, 1872, ch. 437, 17 Stat. 393 (granting right-of-way to Eastern Nevada Railroad Company and directing Interior Department, upon railroad’s filing of profile map, “to protect said right of way,” by “withdrawal or otherwise”).

401. DEPT’ OF THE INTERIOR, CIRCULAR OF INSTRUCTIONS UNDER THE ACT OF CONGRESS, S. EXEC. DOC. NO. 45-30, at 6 (1879) (emphasis added). Compare this agency interpretation with the “contemporaneous administrative interpretations” cited by *Hash v. United States*, 403 F.3d 1308, 1314–15 (Fed. Cir. 2005), and *Great N. Ry. Co. v. United States*, 315 U.S. 262, 275–76 (1942), which come from as late as 1909.

402. *Dakota Central R.R. Co. v. Downey*, 8 Pub. Lands Dec. 115, 118 (1889).

403. *Jamestown & N. R.R. Co. v. Jones*, 177 U.S. 125, 130–31 (1900). The interpretation that section 4 protected 1875 Act rights-of-way from subsequent adverse claims was also the foundation for Interior’s decision not to insert right-of-way reservations in patents to lands crossed by 1875 Act rights-of-way. See, e.g., *Dunlap v. Shingle Springs & Placerville R. R. Co.*, 23 Pub. Lands Dec. 67, 67–68 (1896). Although the *Hash* court cited the omission of any such reservation in homestead patents as a reason the United States supposedly retained no interest in post-1871 rights-of-way, the *Hash* court failed to recognize or acknowledge that the omission was an explicit decision by Interior, based on this protective interpretation of section 4. See *Hash*, 403 F.3d at 1314–15.

404. *R.R. Co. v. Baldwin*, 103 U.S. 426, 429–30 (1880) (settlers who acquired land rights after the effective date of pre-1871 land grants held those rights “subject to” the right-of-way); *Bybee v. Oregon & C.R. Co.*, 139 U.S. 663, 679–80 (1891) (citing *Baldwin*, 103 U.S. 426) (same); *Broder v. Water Co.*, 101 U.S. 274, 275

Congress also used the phrase “subject to” in several bills from before 1871, which provided that later-acquired lands would pass “subject to” earlier right-of-way grants.<sup>405</sup> Particularly telling is the Senate version of the 1852 general right-of-way act, which contained a provision very similar to the future 1875 Act’s section 4. It provided that “the public land intersected by” any 1852 Act rights-of-way “shall thereafter be sold subject to the rights granted by this act”<sup>406</sup>—even though the United States retained a reversionary interest in the rights-of-way granted thereunder. If the language of section 4 had the meaning that *Hash* asserted—an explicit “contemplat[ion] that public land carrying a right of way would be ‘disposed of,’ ”<sup>407</sup> ending any federal ownership—it would make no sense for similar language to have appeared in a bill that also explicitly directed that rights-of-way would revert to the United States upon abandonment. By the time any of the land could have reverted, so much of it would have been “disposed of” to private landowners that the corridor would have been rendered useless.<sup>408</sup>

An 1895 decision by the Supreme Court further reinforces the interpretation that the “subject to” language was merely a way to establish priority among private claims and not to alienate the government’s interests. In *Shiver v. United States*, the Court held that “[t]he right which is given to a person or corporation by a reservation of public lands in his favor is intended to protect him against the actions of third parties, as to whom his right to the same may be absolute. But as to the government, his right is only conditional and inchoate.”<sup>409</sup> This is a far more convincing interpretation of section 4 than the one proposed by *Hash* and *Great Northern*. Section 4 did not give the settlers, or the railroads, any additional property rights that had traditionally been retained by the United States. Instead, consistent with Rep. Slater’s description, it merely

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(1879) (former checkerboard grant land “subject to” a preexisting canal right-of-way).

405. See, e.g., discussion *supra* Part II.F; S. 113, 32d Cong. § 1 (1st Sess. 1852). See also H.R. 999, 41st Cong. § 1, ll. 15–18 (2d Sess. 1870) (pre-1871 checkerboard grant bill, which nevertheless provided that “all lands hereafter conveyed by the United States, through which said railroad shall run, shall be granted and conveyed subject to said right of way”).

406. S. 113, 32d Cong. § 1 (1st Sess. 1852).

407. See *Hash*, 403 F.3d at 1314.

408. *But cf.* Brief of Plaintiffs-Appellants, *supra* note 357, at 16 (arguing that the use of the phrase “subject to” was a common-law “term of art” meaning the “servient estate was burdened by an easement or other restriction on use”).

409. *Shiver v. United States*, 159 U.S. 491, 496 (1895).

created a rule to establish priority between claims by railroads and settlers, without affecting the government's rights.

In conclusion, there is no evidence that section 4 of the 1875 Act was intended to change existing right-of-way law, or commence a new policy of alienating the land underlying federally granted railroad rights-of-way. The arguments of the Solicitor General, *Great Northern*, and *Hash* are plainly at odds with the legislative history of section 4. This, too, strongly undercuts the theory of an 1871 shift that resulted in the United States surrendering any interest in its rights-of-way. Instead, the history demonstrates that in the 1870s, in grants including the 1875 Act, Congress merely continued its prior practice of maintaining ultimate ownership and control of federally granted railroad rights-of-way.

#### IV. CONGRESS'S RETAINED POWER TO "ALTER, AMEND, OR REPEAL" RAILROAD GRANTS ALSO INDICATES THE BROAD SCOPE OF ITS INTENDED CONTROL

A final important feature of many right-of-way grants, ignored by *Hash*,<sup>410</sup> was Congress's reservation of the power to "alter, amend, or repeal" the grants. Congress intended this language to reserve wide congressional power to actively control the use and disposition of federally granted railroad rights-of-way. It too is consistent with Congress's retention, not alienation, of its interests in these transportation corridors.

From the Pacific Railroad Acts onward, Congress nearly always reserved to itself the general power to "alter, amend, or repeal" its railroad grant statutes. In the 1862 Act, Congress set forth the purpose of its "alter, amend, or repeal" clause in detail. It stated that:

[T]he better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military and other purposes, Congress may, at any time, having due regard for the rights of said compa-

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410. Cf. *Hash*, 403 F.3d 1308 *passim* (failing to discuss this provision).

nies named herein, add to, alter, amend, or repeal this act.<sup>411</sup>

This reserved power was described in the debates on the 1862 Act as being among the reasons that “[t]he interests of Government are carefully protected in the bill.”<sup>412</sup> In the 1864 Act, Congress retained the right to “alter, amend, or repeal,” although it dropped the explanatory language from 1862.<sup>413</sup> The Supreme Court later held that the legislative purpose remained the same.<sup>414</sup> A number of other railroad grants, both land grant and right-of-way-only, contain the same reservation clause. These include the General Right of Way Act of 1875.<sup>415</sup> In one of the final House debates over the 1875 Act, the clause was described as “reserv[ing] the right of Congress to alter or amend [the grant] in any manner it may choose.”<sup>416</sup>

In the 1870s and 1880s, Congress declared numerous times that it believed the inclusion of the right to “alter, amend, or repeal” a railroad grant reserved for it extensive authority to regulate the railroads’ conduct and use of their property.<sup>417</sup> Likewise, the Supreme Court has affirmed several times that the reservation of the right to “alter, amend, or repeal” retains broad powers for Congress to later modify statutorily granted rights.<sup>418</sup> The Court stated that under that power, “‘Congress not only retains, but has given special notice of its intention to retain, full and complete power to make such

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411. Act of July 1, 1862, ch. 120, § 18, 12 Stat. 489, 497 (providing aid for the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean).

412. CONG. GLOBE, 37th Cong., 2d Sess. 1580 (1862).

413. Act of July 2, 1864, ch. 216, § 22, 13 Stat. 356, 365.

414. *Sinking-Fund Cases*, 99 U.S. 700, 719–21 (1878).

415. Act of March 3, 1875, ch. 152, § 6, 12 Stat. 482, 483 (codified as amended at 43 U.S.C. § 939).

416. 3 CONG. REC. 406 (1875). For this reason, Congress may also have believed that the comprehensive “alter, amend, or repeal” language made explicit reversionary provisions superfluous.

417. See, e.g., H.R. REP. NO. 44-440, at 26–35 (1st Sess. 1876) (discussing scope of power reserved under the “alter, amend, or repeal” provision of the Pacific Railroad Acts); H.R. REP. NO. 44-809, at 2 (1st Sess. 1876) (regarding regulation of railroad operations under authority including reserved right to “alter, amend, or repeal”). See also STATIONS AND DEPOTS ON CERTAIN RAILROADS IN THE TERRITORIES, H.R. REP. NO. 53-74 (1st Sess. 1893) (power to regulate depot sites).

418. See *Sinking-Fund Cases*, 99 U.S. at 719–20 (affirming that the power allowed Congress to force the railroads to create a bond fund); *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 53 (1986) (holding that the meaning of an “alter, amend, or repeal” clause “has been settled since the *Sinking-Fund Cases*”).

alterations and amendments as come within the just scope of legislative power,' ” including “the proper disposition” of the corporation’s assets.<sup>419</sup>

Congress’s reserved power to “alter, amend, or repeal” federal railroad grants has significant consequences for the present-day control of federally granted rights-of-way. Congress’s reserved authority is part and parcel of the granting statute and commenced at the time of the original grant. Any such right-of-way must be construed as imbued with “special notice” of Congress’s intent to retain and exercise its powers.<sup>420</sup> A party who took property “subject to” this type of federal railroad right-of-way grant, therefore, such as through a homestead patent, also took it subject to special notice of Congress’s right to alter, amend, or repeal the grant.<sup>421</sup> This can readily be construed to encompass a congressional right to regulate the post-railroad use and disposition of such property, of the type enacted in 16 U.S.C. § 1248(c).

#### CONCLUSION

The 1871 end to checkerboard railroad land grants was described by *Great Northern* and the Solicitor General in 1942, and by *Hash* in 2005, as marking a dramatic shift in federal policy regarding rights-of-way. The legal history, however, shows that this assessment is wrong. The source of this unfortunate error was a relatively simple mistake in the Solicitor General’s brief in *Great Northern*. The brief failed to adequately distinguish between congressional “land grants” and grants of railroad rights-of-way during the nineteenth century, thereby obscuring the great historical and political differences between them. The brief then compounded that simple error into a grand historical blunder by concluding that the 1871 end of checkerboard land grants must have resulted in a parallel 1871

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419. *Bowen*, 477 U.S. at 53 (quoting *Sinking-Fund Cases*, 99 U.S. at 720).

420. *Cf. Hash v. United States*, 403 F.3d 1308, 1315 (Fed. Cir. 2005) (“[T]he property rights of these early landowners are governed by the law in effect at the time they acquired their land.”).

421. The Homestead Act itself only authorized the acquisition of “unappropriated public lands.” *See* Homestead Act of 1862, ch. 75, § 1, 12 Stat. 392. If federally granted rights-of-way constituted “appropriations” of the public lands, the Homestead Act may have been legally insufficient to vest title to the property in or underlying a right-of-way in a homestead patentee. *Cf. supra* Parts I.A & II.H.



shift in right-of-way law.<sup>422</sup> With the Supreme Court's institutional imprimatur, this illusory "1871 shift" has gone on to distort the law of federally granted railroad rights-of-way for generations. Opinions such as *Hash* have been able to rely on little more than a citation to *Great Northern* to claim that the 1871 shift is an inarguable fact, as well as that the legal history of right-of-way grants is so "extensively explored" that it needs no further analysis.

To their credit, some courts, like the District of Idaho in *Oregon Short Line*, have been perceptive enough to question *Great Northern's* historical analysis, look behind it, and reach conclusions that are generally historically accurate. But even *Oregon Short Line* failed to illuminate the fact that the legislative history plainly lacks any evidence of an 1871 transition in federal right-of-way law. All of this evidence suggests that courts should be cautious about endorsing broad historical conclusions like those advanced by the Solicitor General in *Great Northern*, unless those conclusions are supported by appropriate research and properly limited in scope. Compounding the difficulty in this case, however, is that the Solicitor General's research was detailed enough to appear quite persuasive without being factually correct.

Some of the fault for the courts' inaccurate analysis, of course, also lies with Congress, which could have easily made its legislation more explicit. But most nineteenth-century legislators believed they were authorizing great public highways that would persist indefinitely. Congress might therefore be forgiven for not always clearly stating what would happen when its railroad grants were abandoned. Moreover, since Congress assumed it was making conditional appropriations of its public lands, and would be able to control the ultimate disposition of the right-of-way property, it likely did not perceive any such ambiguity as a legal problem.

Based on all the evidence discussed here, the United States arguably retains two types of interests in its federally granted rights-of-way. The first is the right to use the rights-of-way to cross the underlying land, regardless of that land's ownership, with this right deriving from Congress's public pur-

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422. Admittedly, *Great Northern's* error is made more understandable by the ways in which administrative opinions between 1890 and 1909, also cited in the Solicitor General's brief and in *Great Northern*, seem to have diverged from Congress's actual legislative intent.

pose in making its grants.<sup>423</sup> The second is the continuing (or “reversionary”) ownership of the land underlying the right-of-way, if it was public land at the time the right-of-way was granted. These powers are in no way a violation of the Fifth Amendment rights of adjoining landowners. Instead, they are the legacy of Congress’s nineteenth-century decision to dedicate certain parts of the public domain to support transportation to benefit the country as a whole. To support and enforce those policies, Congress reserved ownership and control over its federally granted railroad rights-of-way. As a consequence, even today, it is well within Congress’s discretion to regulate and reuse such property.

As the federal courts consider these issues, they should discount any remaining notion of an “1871 shift” in right-of-way law. If a circuit split on this issue persists, the Supreme Court should take the opportunity to overrule its errors in *Great Northern* and correct the legal history of federally granted railroad rights-of-way.

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423. See, e.g., *United States v. Denver & Rio Grande Ry. Co.*, 150 U.S. 1, 8, 14 (1893); Wright, *supra* note 11, at 764–65 (discussing the existence of a continuing federal interest in the “right of way itself”). See also Theodore G. Phillips, Note, *Beyond 16 U.S.C. § 1247(d): The Scope of Congress’s Power to Preserve Railroad Rights-of-Way*, 18 HASTINGS CONST. L.Q. 907 (1991) (discussing federal grants and the “navigational servitude doctrine” as bases for federal authority over rights-of-way).