A LEGAL FRAMEWORK FOR PUBLIC RAIL OWNERSHIP IN THE UNITED STATES

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ABSTRACT

This paper provides a comprehensive overview of the historical context and legal framework surrounding railroading law and public rail ownership in the United States. It examines rail ownership in the pre-Civil War era, the impact of the Civil War, and subsequent developments in the modern era. The paper analyzes the constitutional authority of Congress over channels and instrumentalities of interstate commerce, exploring the implications for public rail ownership. Potential legislative approaches are discussed, including eminent domain power and the spending power, along with obstacles and suggested next steps for implementing public rail ownership. A case study on Brightline West illustrates a possible model for future public railway development. While acknowledging challenges, the paper concludes that with effective public education, coalition building, and strategic planning, public rail ownership remains an option for transforming America's transportation system.

INTRODUCTION

On February 3, 2023, a Norfolk Southern freight train derailed in East Palestine, Ohio, causing a mile-wide evacuation area and an emergency response.[1] At the time of the derailment, the train was 1.76 miles (9,300 feet) long and contained 150 cars, weighing over 18,000 tons.[2] Of these, 20 cars held hazardous materials.[3] Some of these toxins spilled into the town's dirt, water, and air.[4]

Since the disaster, there have been increased calls to place the railroads under public ownership.[5] Due to a lack of writings on the subject, this paper aims to provide a legal framework for public rail ownership in the United States.

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[1] *See East Palestine: Ohio Train Derailment*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, https://www.epa.gov/east-palestine-oh-train-derailment/background (last visited Jul. 24, 2023).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *See* John Nichols, *It's Time to Talk About Nationalizing America's Railroads*, THE NATION, https://www.thenation.com/article/politics/railroad-nationalization-public-ownership/ (last visited Jul. 24, 2023); Kari Lydersen, *The Case for Nationalizing the Railroads: Workers Say Now is the Time to Do the Impossible*, IN THESE TIMES, https://inthesetimes.com/article/nationalize-the-railroads-workers-on-strike-biden-wages (last visited Jul. 24, 2023); Maximillian Alvarez, *US Freight Workers Say It's Time to Nationalize the Railroads*, THE REAL NEWS

I. A BRIEF HISTORY OF RAILROADING LAW & PUBLIC RAIL OWNERSHIP

A. Pre-Civil War

Until the end of the nineteenth century, railroad charters and policies remained largely under the guise of state law.[6] Within states, some legislators questioned the private nature of railroad operations.[7] This led one New York State Assemblyman to conclude that "the very idea of employing a private company to construct and manage a public work involves a political absurdity and a paradox in terms."[8] Nonetheless, many states encouraged the expansion of railways by granting railroad corporations monopoly status, giving financial contributions, offering tax exemptions, and allowing them the authority to exercise eminent domain.[9]

In 1850, by passing the Land Grant Act, the federal government took an important first step to encourage railroading.[10] This law provided that nearly 3.75 million acres of land in the public domain be given to Alabama, Illinois, and Mississippi in creating a railroad line between Chicago and Mobile.[11] Once this land was turned over to the states, their legislatures "were given discretion as to how to dispose of the land to achieve the congressional purpose."[12] While rights-of-way were given through public land and "alternative sections of public lands along the proposed route for every completed mile of track," the grants were "subject to forfeiture unless the projects were completed within a ten-year period."[13] Astoundingly, by only 1857, an incredible 21 million acres of public land were used for railroads in the Mississippi River Valley.[14] Importantly, because of ambiguity in the law,[15] the federal government inadvertently established a policy of reduced land grant rates for traffic of the federal government.[16]

B. The Civil War

During the Civil War, Congress offered a war-time exception to this state-oriented approach by passing the Railroad and Telegraph Seizure Act.[17] Under this law, the president's Commander-in-Chief powers were expanded to allow him to seize any railroad when "public safety may require

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NETWORK, https://therealnews.com/us-freight-workers-say-its-time-to-nationalize-the-railroads (last visited Jul. 24, 2023).

[6] *See* JAMES W. ELY, JR., RAILROADS AND AMERICAN LAW 2 (2001).

[7] *Id.* at 3.

[8] *Id.* (citing D.G. BRINTON THOMPSON, RUGGLES OF NEW YORK: A LIFE OF SAMUEL B. RUGGLES 103 (1946)).

[9] *See generally* ELY, *supra* note 1, at 10-39.

[10] *See* 9 Stat. 466 (although its official title is "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," this law is commonly referred to as the "Land Grant Act of 1850.").

[11] *See* JULIAN E. ZELIZER, THE AMERICAN CONGRESS: THE BUILDING OF DEMOCRACY 288 (2004).

[12] *See* ELY, *supra* note 1, at 52.

[13] *Id.*

[14] *See* ZELIZER, *supra* note 6, at 288.

[15] The law provided that the railroads must remain "a public highway for the use of the government, free from any toll or other charge whatever, for any property of the United States, or persons in their service."

[16] *See* ELY, supra note 1, at 52.

[17] *See* 12 Stat. 334 (although its official title is, "An Act to authorize the President of the United States in certain Cases to take Possession of Railroad and Telegraph Lines, and for other Purposes," this law is commonly referred to as the "Railroad and Telegraph Seizure Act.").

it."[18] If a seizure occurred, the railroad corporation and employees were to be placed under military control with the government providing – per the taking clause of the Fifth Amendment – reasonable compensation.[19] This law was not to remain in force longer "than [was] necessary for the suppression of the rebellion."[20]

Fearful this power might be abused, Congress later passed a joint resolution clarifying that the president was not authorized to construct or complete any railroad line that - to a greater degree - remained uncompleted at the time the Railroad and Telegraph Seizure Act had passed.[21] In reality, President Lincoln decided to use this power sparingly.[22] Lincoln instead treated the added authority as a "weapon to secure the cooperation of railroad companies for the military effort."[23] Ironically, in one of the few times this power was used, the federal government cited this Act to seize and end the longest work stoppage of the Civil War.[24]

Also, during the Civil War, the government continued its tradition of relying on private corporations to bring about internal improvements by passing the Pacific Railway Acts (1862) to incorporate the Central Pacific - which was already chartered under California law - and Union Pacific Railroads.[25] Under this law, two types of subsidies were used by the federal government to incentivize private railway expansion.[26] The first subsidy gave land grants directly to the private railroad corporations rather than the states, unlike what had been done in the Land Grant Act of 1850.[27] Under this subsidy, the railroads were obligated to lay a certain mileage of track.[28] The second subsidy existed as thirty-year government bonds that the rail corporations could use to sell to investors and thereby increase their capital.[29] As a loan to the railroads, the corporations were to repay the principal and interest as the bonds came to maturity.[30] When railroad corporations failed to raise a sufficient revenue by 1864, Congress amended the law to effectually take out a second mortgage and, *inter alia*, double the size of the land grants.[31]

C. After the Civil War and Before World War I

By 1878, there existed fears in Congress regarding the railroad corporations' ability to repay the bonds.[32] This led to the passage of the Thurman Act which created a "sinking fund" in the Treasury Department, whereby the railroads were expected to pay half of the compensation

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[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *See* 12 Stat. 625.
[22] *See* ELY, *supra* note 1, at 49.
[23] *Id.*
[24] *See generally* John L. Blackman Jr., *The Seizure of the Reading Railroad in 1864*, THE PA. MAG. OF HIST. AND BIOGRAPHY, Jan. 1987, at 49-60.
[25] *See* 12 Stat. 489.
[26] *See* ELY, *supra* note 1, at 53.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *See* 13 Stat. 356.
[32] *See* ELY, *supra* note 1, at 56 (citing ALBRO MARTIN, RAILROADS TRIUMPHANT: THE GROWTH, REJECTION, AND REBIRTH OF A VITAL AMERICAN FORCE 287-288 (1992); PAUL KENS, JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE 220-222 (1997); CHARLES FAIRMAN, RECONSTRUCTION AND REUNION 1864-88, PART TWO 604-606 (1987); STUART DAGGETT, CHAPTERS ON THE HISTORY OF THE SOUTHERN PACIFIC 370-394 (1922)).

they had received from the government.[33] The Act also "extended the lien of the government to subsequently acquired property of the railroad."[34]

Because the railroad corporations perceived this Act as changing their contract with the government, they filed suit in what became known as the *Sinking Fund Cases* (1879).[35] In upholding the constitutionality of the Act, Chief Justice Morrison R. Waite relied on the idea that railroads were "chartered to effectuate a public purpose"[36] and stated that "railroads are a peculiar species of property, and railroad corporations are in some respects peculiar corporations."[37] The Chief Justice also "pointed out that the United States was in the dual position of a sovereign and a creditor of the railroad companies. While the government was bound by its contracts…it did not relinquish the sovereign power to enact future regulations."[38] Not only would the *Sinking Fund Cases* become one of the most cited government contracts precedents, but it was one of the earliest assertions of the federal government's authority over railroad corporations – especially when it involved the power to change an original contractual agreement.[39]

As railroad corporations became America's first "big business," the political landscape quickly changed from subsidizing the industry to attempts at regulating it.[40] However, because railroads and early attempts at regulating them were almost entirely state-based, one railroad commentator noted the need for federal regulations by claiming that "state lines [have been] done away with by corporations created by States."[41] Although the Supreme Court had previously created the *Munn* doctrine to allow states to regulate private entities that influenced "the common good,"[42] this doctrine was overturned ten years later by the landmark case *Wabash, St. Louis & Pacific Railway Co. v. Illinois*.[43] Under *Wabash*, states were no longer able to regulate railroads involved in interstate commerce, which created a "regulatory vacuum" and the urgent need for Congressional legislation.[44]

Congress responded in 1887 by passing the Interstate Commerce Act (ICA).[45] This Act created the Interstate Commerce Commission (ICC) to "establish[] that railroad rates, charges, and rules had to be reasonable and non-discriminatory, non-preferential or prejudicial, and that rates, fares, rules, and charges had to be made available by the railroads to the general public."[46] Also, the ICA made railroads accountable for any damage, injury, or loss to people or property. Further, the ICA "attempted to establish regulatory equity among shippers and shipments regardless of how much business they tendered the industry."[47] Unfortunately, as one author noted, "the ICC [became] a study in frustration."[48] Not only did the ICC lack proper enforcement mechanisms, but

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[33] *See* 20 Stat. 56.
[34] *See* ELY, *supra* note 1, at 56.
[35] *See* Union Pacific Railroad v. United States (Sinking Fund Cases), 99 U.S. 700 (1878).
[36] *See* ELY, *supra* note 1, at 56.
[37] *Sinking Fund Cases*, 99 U.S. at 722.
[38] *See* ELY, *supra* note 1, at 56.
[39] *Id.* at 57.
[40] *See generally* ELY, *supra* note 1, at 80-90.
[41] *See* Charles F. Adams, *Railway Problems in 1869*, 110 NORTH AMERICAN REVIEW 116, 123 (1870).
[42] *See* Munn v. Illinois, 94 U.S. 113 (1876).
[43] *See* Wabash, St. Louis & Pacific Railway Company v. Illinois, 118 U.S. 557 (1886).
[44] *See* ELY, *supra* note 1, at 91.
[45] *See* 24 Stat. 379.
[46] *See Railroad Industry*, PROQUEST CONGRESSIONAL, https://congressional-proquest-com.gwlaw.idm.oclc.org/congressional/docview/t70.d75.tp-cong-187?accountid=147036 (last visited Jul. 24, 2023).
[47] *Id.*
[48] *See* ELY, *supra* note 1, at 93.

the Supreme Court "struck down every major ICC initiative in the late nineteenth century...[and] not until the early twentieth century…would Congress revitalize the ICC."[49] However, the ICC Termination Act of 1995 would replace the ICC with the Surface Transportation Board (STB), a smaller agency with a more limited regulatory reach.[50]

With increased calls for federal regulations on rail corporations, there emerged those who thought public ownership of the rails was a viable solution to the "railroad problem."[51] One of the earliest mass movements that called for public ownership of the railways was the Great Railroad Strike of 1877.[52] These calls continued and, in the wake of the Pullman Strike of 1894, would be endorsed by the famous Eugene V. Debs.[53] With the rise of Debs and the Populist movement in the late 1800's, The People's Party endorsed public ownership of the railroads in their 1892 party platform: "We believe that the time has come when the railroad corporations will either own the people or the people must own the railroads."[54] Nonetheless, the push for public rail ownership never stayed consistent in the public sphere – partially because it never became a demand of either major political party.[55]

D. World War I

The government's attitude towards public ownership of the railroads changed as America entered World War I in April of 1917.[56] Congress, having been warned that the railroads might collapse due to existing inefficiencies and the exponential increase of rail traffic in transporting goods for the war effort, empowered the president to take control of the nation's transportation system.[57] Relying on this Congressional grant of power, President Woodrow Wilson issued a proclamation on December 26, 1917, to seize the railroads for the government.[58] One year later, Congress passed another act that guaranteed that the railroad system would return to private control within 21 months after a peace treaty was signed by the United States.[59] However, when the United States failed to ratify the peace treaty at the end of the War, the Transportation Act of 1920 returned the railroad system to its private owners, expanded the powers of the ICC, and established collective bargaining systems.[60]

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[49] *Id.* at 96.
[50] *See* 109 Stat. 803.
[51] *See* ELY, *supra* note 1, at 103 (citing *The State Ownership of Railroads*, 28 AM. L. REV. 608 (1894)).
[52] *See* PHILIP SHELDON FONER, THE WORKINGMEN'S PARTY OF THE UNITED STATES 34-35 (1984).
[53] *See* DAVID RAY PAPKE, THE PULLMAN CASE: THE CLASH OF LABOR AND CAPITAL IN INDUSTRIAL AMERICA 86 (1999).
[54] *See Populist Party Platform (1892)*, NATIONAL CONSTITUTION CENTER, https://constitutioncenter.org/the-constitution/historic-document-library/detail/populist-party-platform-july-4-1892-in-a-populist-reader-selections-from-the-works-of-american-populist-leaders-9096 (last visited Jul. 24, 2023).
[55] *See* ELY, *supra* note 1, at 103-4.
[56] *Id.* at 241-49.
[57] *See* 39 Stat. 619 (although its official title is "An Act Making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," this law is commonly referred to as the "Army Appropriation Act of 1916.").
[58] *See* Proclamation No. 1419 (Dec. 26, 1917).
[59] *See* 40 Stat. 451 (although its official title is "An Act To provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes," this law is commonly referred to as the "Railroad Control Act.").
[60] *See* 41 Stat. 456 (although its official title is "Transportation Act of 1920," this law is commonly referred to as the "Esch-Cummins Act.").

By the time the railroads were returned to their private owners "more than 100,000 railroad cars had [been] built using standardized designs and an estimated $1 billion was invested in transportation systems."[61] That's about $15.25 billion in today's money.[62] Additionally, because the Supreme Court later noted that the government "was acting under a right in the nature of eminent domain," it was decided that "compensation [to the railroad corporations] for the taking of property was required under the Fifth Amendment."[63] Under a formula used laid out in the Railroad Control Act, the government "paid more than $2 billion in compensation for the temporary taking of the railroads."[64]

It's interesting to note that when William McAdoo, the appointed Director General of Railroads and son-in-law of President Wilson, took charge of the nation's rail system, he recognized that the most pressing issue was a shortage of railroad workers and depressed wages.[65] In response, McAdoo implemented far-reaching concessions that transformed labor conditions.[66] For example, he: (1) ordered a substantial wage increase in April 1918, with more wage hikes to follow; (2) extended the eight-hour workday to all rail employees; (3) standardized wages across the country; (4) encouraged collective bargaining by banning discrimination against union members; (5) eliminated traffic congestion; (6) streamlined services; and (7) upgraded equipment and rolling stock.[67]

E. Post-World War I to Present

Once the War ended, public debate raged over how to best transition the railroads back to private control.[68] In a referendum of railroad workers conducted at the time, 306,720 out of 308,186 (more than 99%) voted to keep the rails under public control.[69] Because organized workers were clearly in favor of a public rail system, labor unions widely supported the "Plumb Plan," named after the union attorney Glenn E. Plumb.[70] Under the Plan, the federal government was to issue bonds, purchase the railroads with the proceeds, and lease the lines to a public corporation to run.[71] Additionally, the ICC Commissioner at the time, Joseph B. Eastman, believed that public rail ownership would provide a long-term solution to the railroad problem.[72] However, due to a lack of support in Congress the Plumb Plan was discarded and, as mentioned previously, the

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[61] *See On this day, Woodrow Wilson seizes the nation's railroads*, NATIONAL CONSTITUTION CENTER, https://constitutioncenter.org/blog/on-this-day-woodrow-wilson-seizes-the-nations-railroads (last visited Jul. 24, 2023).
[62] *See* U.S. INFLATION CALCULATOR, https://www.usinflationcalculator.com (last visited Jul. 24, 2023).
[63] *See* ELY, *supra* note 1, at 242.
[64] *Id.* at 243.
[65] *Id.* at 244.
[66] *Id.*
[67] *Id.* at 244-43.
[68] *Id.* at 243.
[69] *See* Editorial, *Is it Time for U.S. Rail Workers to Consider Railroad Nationalization?*, HIGHBALL NEWSL. 1, 3 (2020), https://static1.squarespace.com/static/505b96a8c4aa40a37a143c49/t/5e9144927c981153fd9c4d66/1586578579341/Is+it+Time+for++U.S.+Rail+Workers+to+Consider+Railroad+Nationalization.pdf.
[70] *See* ELY, *supra* note 1, at 245.
[71] *Id.*; *see generally* The Plumb Plan League, *Labor's Plan for Government Ownership and Democracy in the Operation of the Railroads: Based on Statements by Glenn E. Plumb Before the Interstate Commerce Committee of the United States Senate with Additional Material*, 3-32 (1919); *see also* The Plumb Plan League, *A.B.C. of the Plumb Plan*, 3-8 (1919).
[72] *See* ELY, *supra* note 1, at 245.

railways were returned to their private owners in 1920.[73] Since World War I, there has yet to be another prolonged instance of national public rail ownership.[74]

In the 1960s and 70s, many of the nation's major railroad companies went bankrupt due to their failure to compete with alternative forms of transportation – especially the car and airplane.[75] In an effort to save passenger rail services, Congress passed the Rail Passenger Service Act of 1970,[76] which established Amtrak as a quasi-public corporation (although technically a private corporation, Amtrak's board of directors is appointed by the President and it relies heavily on Federal subsidies to cover operating costs).[77]

Most recently, to maintain railroad profitability and competitiveness, major legislation aimed at deregulating the railroad industry came with the passage of the Staggers Rail Act of 1980.[78] This Act removed many of the restrictions on how railroads are allowed to set rates, permitted railroads and shippers to establish contracts with one another, and allowed the industry more flexibility on rail route-setting.[79]

II. THE CONSTITUTIONALITY OF PUBLIC RAIL OWNERSHIP: CONGRESSIONAL AUTHORITY OVER CHANNELS & INSTRUMENTALITIES OF INTERSTATE COMMERCE

A. Channels of Interstate Commerce

Article I, Section 8, Clause 3 of the United States Constitution reads in part: "[The Congress shall have Power…] To regulate Commerce…among the several States…". In the landmark case *United States v. Lopez*, the Supreme Court found that "channels of interstate commerce" are within Congress's Commerce Clause authority.[80] Channels of interstate commerce encompass physical conduits of interstate commerce such as railroads, highways, waterways, airspace, and telecommunication networks, as well as the use of such interstate channels for ends Congress wishes to prohibit.[81]

As early as 1849, the Supreme Court concluded that "the transportation of passengers [as] a part of commerce is not now an open question."[82] Then, in 1913, the Court expanded its description of interstate commerce to include "the transportation of persons and property."[83] Four years later, in *Caminetti v. United States*, the Court observed that the use of Congressional authority to keep these channels "free from immoral and injurious uses" falls within Congress's regulatory

[73] *Id.* at 246.
[74] Note that on Dec. 27, 1943, President Franklin D. Roosevelt nationalized the railroads for a few weeks to settle a strike; *see* Exec. Order No. 9,412 (Dec. 27, 1943).
[75] *See Railroad Industry*, *supra* note 41.
[76] *See* 84 Stat. 1327.
[77] *See Railroad Industry*, *supra* note 41.
[78] *See* 94 Stat. 1895.
[79] *See Railroad Industry*, *supra* note 41.
[80] *See* 514 U.S. 549, 558 (1995).
[81] *See* Cong. Rsch. Serv., *ArtI.S8.C3.6.2 Channels of Interstate Commerce*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S8-C3-6-2/ALDE_00013419/ (last visited Jul. 24, 2023).
[82] *See* Smith v. Turner, 48 U.S. (7 How.) 283, 401 (1849).
[83] *See* Hoke v. United States, 227 U.S. 308, 320 (1913).

power under the Commerce Clause.[84] Over the years, Courts have upheld various acts of Congress as falling within its authority to regulate channels of interstate commerce.[85]

B. Instrumentalities of Interstate Commerce

Not only did *Lopez* establish Congress's authority to govern channels of interstate commerce, but the Court also made it clear that Congressional power under the Commerce Clause extended to "instrumentalities of interstate commerce, or persons or things in interstate commerce."[86] Instrumentality is defined as "a thing used to achieve an end or purpose."[87] Stated differently, instrumentalities of commerce are the "means of commerce[,] such as airplanes, trains, or automobiles, and to persons or things that are transported interstate by these instrumentalities."[88] For example, in *Perez v. United States* the Supreme Court used the example of a law prohibiting the destruction of an aircraft as a regulation of instrumentalities of interstate commerce.[89] Regulations under this category are not limited to persons or objects crossing state lines but may extend to objects or persons that have or will cross state lines.[90]

Note that under certain conditions, the Commerce Clause also allows Congress the ability to regulate wholly local intrastate economic activities (in this case, possibly intrastate railroad activities) that, when taken in the aggregate, would "substantially affect" interstate commerce.[91]

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[84] *See* 242 U.S. 470, 491 (1917).

[85] *See* CONSTITUTION ANNOTATED, *supra* note 76 ("For example, in United States v. Morrison, 529 U.S. 598, 613 n.5 (2000), the Court noted that federal courts have uniformly upheld a federal prohibition on traveling across state lines to commit intimate-partner abuse, reasoning that the prohibition regulates the use of channels of interstate commerce—i.e., the use of the interstate transportation routes through which persons and goods move. [Additionally], in Pierce County v. Guillen, 537 U.S. 129, 133–34, 146–48 (2003), the Court considered the constitutionality of a law that prohibited using certain highway data identifying hazardous highway locations, which the Highway Safety Act (HSA) of 1966 required states to collect, in discovery or as evidence in state or federal court proceedings. The Court observed that the provision had been adopted in response to states being reluctant to comply with the HSA's requirements due to concerns about potential liability for accidents that occurred in those hazardous locations before they could be addressed. The Court concluded that the data collection requirement was adopted to help state and local governments in reducing hazardous conditions in the Nation's channels of commerce, and that Congress could reasonably believe that adopting a measure eliminating an unforeseen side effect of the information-gathering requirement . . . would result in more diligent efforts [by states] to collect the relevant information.8 Accordingly, the Court held that the provision preventing use of the data in state and federal court proceedings—not just the data collection itself—was within the scope of Congress's Commerce Clause power.").

[86] *See* Lopez, 514 U.S. 549 at 558.

[87] *See Instrumentality*, BLACK'S LAW DICTIONARY (9th ed. 2009).

[88] *See* MICHAEL A. FOSTER & ERIN H. WARD, CONG. RSCH. SERV., IF11971, IN FOCUS: CONGRESS'S AUTHORITY TO REGULATE INTERSTATE COMMERCE 1 (2021).

[89] *See* 402 U.S. 146, 150 (1971) (citing 18 U.S.C. § 32).

[90] *See* Cong. Rsch. Serv., *ArtI.S8.C3.6.3 Persons or Things in and Instrumentalities of Interstate Commerce*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S8-C3-6-3/ALDE_00013420/#ALDF_00024079 (last visited Jul. 24, 2023) ("…for example, the Court has upheld federal laws [in Scarborough v. United States, 431 U.S. 563 (1977)] that penalized convicted felons for possessing or receiving firearms that had been previously transported in interstate commerce, independent of any activity by the felons, with no other connection between the felons' conduct and interstate commerce.").

[91] *See* Lopez, 514 U.S. 549 at 558; FOSTER, *supra* note 83, at 1-2 ("In general, courts have identified four factors to consider when assessing whether Congress may regulate an activity that in the aggregate has a substantial effect on interstate commerce: (1) the economic nature of the activity; (2) a jurisdictional element limiting the reach of the law to a discrete set of activities that has an explicit connection with, or effect on, interstate commerce; (3) express congressional findings regarding the regulated activity's effects on interstate commerce; and (4) the link between the regulated activity and interstate commerce.") (citations omitted).

Therefore, Congress has the authority to regulate both the physical conduits of the railroads that operate in interstate commerce (being a channel of commerce) and the trains - and their goods - moving upon those railroads in interstate commerce (as an instrumentality of commerce). Currently, the Supreme Court has only offered one limit to Congress's broad Commerce Clause authority: Congress cannot regulate inactivity.[92]

III. POSSIBLE LEGISLATIVE APPROACHES TO PUBLIC RAIL OWNERSHIP

A. Eminent Domain Power

Eminent domain "appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty."[93] Nonetheless, the Fifth Amendment's Takings Clause reads, "nor shall private property be taken for public use, without just compensation." Therefore, whenever the United States acquires property through its eminent domain authority, it has a constitutional responsibility to: (1) ensure the taking is for public use[94] and (2) justly compensate the property owner for the fair market value of the property.[95]

In his *Commentaries on the Constitution of the United States*, the famous Justice Joseph Story grounded the Takings Clause in natural equity, describing it as a principle of universal law without which almost all other rights would become utterly worthless.[96] Additionally, the Supreme Court has noted that inherent in the government's power is the ability to take property: "[t]he Fifth Amendment to the Constitution…is a tacit recognition of a preexisting power to take private property for public use, rather than a grant of new power."[97]

The Supreme Court first examined federal eminent domain power in 1876 in *Kohl v. United States*.[98] This case presented a landowner's challenge to the power of the United States to condemn land in Cincinnati for use as a custom house and post office building.[99] Justice William Strong called the authority of the federal government to appropriate property for public uses "essential to its independent existence and perpetuity."[100]

The Supreme Court again acknowledged the existence of condemnation authority twenty years later in *United States v. Gettysburg Electric Railroad Company*.[101] In this case, Congress

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[92] *See* National Federation of Independent Business v. Sebelius, 567 U.S. 519, 551-58 (2012); *see also* FOSTER, *supra* note 83, at 2 ("[In challenging] the individual mandate aspect of the Affordable Care Act [in *Sebelius*], the Supreme Court concluded that "compel[ling] individuals to become active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce" exceeded Congress's authority under the Commerce Clause.").

[93] *See* Boom Co. v. Patterson, 98 U.S. 403, 406 (1879).

[94] *See* Kelo v. City of New London, 545 U.S. 469 (2005).

[95] *See* Bauman v. Ross, 167 U.S. 548 (1897); Kirby Forest Industries, Inc. v. United States, 467 U.S. 1, 9-10 (1984).

[96] *See* Cong. Rsch. Serv., Amdt5.9.1 Overview of Takings Clause, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt5-9-1/ALDE_00013280/#ALDF_00022063 (last visited Jul. 24, 2023) (citing 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1784 (1833). *See also* United States v. Great Falls Mfg. Co., 112 U.S. 645 (1884) (federal government must compensate private property owner for loss of property resulting from federal river project)).

[97] *See* United States v. Carmack, 329 U.S. 230, 241–42 (1946). The same is true of just compensation clauses in state constitutions. Boom Co. v. Patterson, 98 U.S. 403, 406 (1879).

[98] *See History of The Federal Use of Eminent Domain*, THE U.S. DEP'T OF JUST., https://www.justice.gov/enrd/history-federal-use-eminent-domain (citing 91 U.S. 367, 371 (1875)).

[99] *See* Kohl v. United States, 91 U.S. 367, 371 (1875).

[100] *Id.*

[101] *See History of The Federal Use of Eminent Domain*, THE U.S. DEP'T OF JUST., https://www.justice.gov/enrd/history-federal-use-eminent-domain (citing 160 U.S. 668, 679 (1896)).

wanted to acquire land to preserve the site of the Gettysburg Battlefield in Pennsylvania.[102] The railroad company that owned some of the property in question contested this action.[103] Ultimately, the Court opined that the federal government has the power to condemn property "whenever it is necessary or appropriate to use the land in the execution of any of the powers granted to it by the constitution."[104]

Although the Supreme Court has recognized the power of eminent domain to be inherent to federal and state governments, these federal and state governments may exercise such power only through legislation or delegation.[105] Such delegation is usually to another governmental body - such as an agency or local government - although it may also be to private corporations such as public utilities, railroad companies, or bridge companies, so long as the delegation is for a valid public purpose.[106] Furthermore, legislation that delegates taking authority or authorizes an agency to take property by eminent domain does not by itself constitute a taking, as "[s]uch legislation may be repealed or modified, or appropriations may fail before the taking itself is effectuated."[107]

The modern conception of "public use" equates it with the police power in furtherance of the public interest.[108] No definition of the reach or limits of the power is possible, the Court has said, because "such definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition…Public safety, public health, morality, peace and quiet, law and order—these are some of the…traditional application[s] of the police power…".[109] If there is a dispute about if something is or isn't a public use, that becomes a judicial question.[110] However, legal history shows that the Court largely gives deference to legislative decisions.[111] In fact, the Court has said, "[t]he role of the judiciary in determining whether [eminent domain] power is being exercised for a public use is an extremely narrow one."[112]

Although Congress may be able to meet the public use requirement relatively easily in a wide number of circumstances, attempting to determine the proper fair market value for a taking can be much more difficult.[113] Just compensation is measured "by reference to the uses for which the property is suitable, having regard to the existing business and wants of the community, or such as may be reasonably expected in the immediate future…[but] 'mere possible or imaginary uses

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[102] *See* United States v. Gettysburg Electric Railroad Company, 160 U.S. 668, 679 (1896).
[103] *Id.*
[104] *Id.*
[105] *See* CONSTITUTION ANNOTATED, *supra* note 91.
[106] *Id.* (citing Noble v. Okla. City, 297 U.S. 481 (1936); Luxton v. N. River Bridge Co., 153 U.S. 525 (1894). One of the earliest examples of such delegation is Curtiss v. Georgetown & Alexandria Turnpike Co., 10 U.S. (6 Cr.) 233 (1810)).
[107] *See* CONSTITUTION ANNOTATED, *supra* note 91 (citing Danforth v. United States, 308 U.S. 271 (1939)).
[108] *See* Cong. Rsch. Serv., Amdt5.9.2 Public Use and Takings Clause, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt5-9-2/ALDE_00013281/#essay-4 (last visited Jul. 24, 2023).
[109] *Id.* (citing Berman v. Parker, 348 U.S. 26, 32 (1954)).
[110] *See* City of Cincinnati v. Vester, 281 U.S. 439, 444 (1930) ("It is well established that in considering the application of…cases of expropriation of private property, the question what is a public use is a judicial one.").
[111] *See* Kelo, 545 U.S. 469, 482 (2005) ("The taking need only be rationally related to a conceivable public purpose. *Id.* at 490 (Kennedy, J., concurring)).
[112] *See* Berman, 348 U.S. at 32.
[113] *See* Cong. Rsch. Serv., Amdt5.9.8 Calculating Just Compensation, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt5-9-8/ALDE_00013287/ (last visited Jul. 24, 2023).

or the speculative schemes of its proprietor, are to be excluded.'"[114] The general standard thus is the market value of the property, i.e., what a willing buyer would pay a willing seller.[115] If fair market value does not exist or cannot be calculated, resort must be had to other data which will yield a fair compensation.[116] However, the Court has resisted alternative standards, having repudiated reliance on the cost of substitute facilities.[117]

Therefore, Congress has the authority to use its Fifth Amendment eminent domain power to create a public rail system from property of the existing railroad corporations if it declares it has a public use and offers just compensation to the impacted corporations. However, determining the appropriate fair market value of such an endeavor would certainly be a heavily contentious and litigated part of the process.

B. Spending Power

Article I, Section 8, Clause 1 of the Constitution reads in part: "Congress shall have Power…to pay the Debts and provide for the common Defence and general Welfare of the United States...". Since the 1930s, the Supreme Court has embraced a broad view of Congress's discretion to identify the expenditures that further the general welfare.[118]

Therefore, Congress can use its comprehensive Spending Power to build and manage a new public railway system – with or without taking property from the already existing railroad corporations.

IV. ANALYSIS: OBSTACLES OF PUBLIC RAIL LEGISLATION & SUGGESTED NEXT STEPS

The above history, constitutional analysis, and given legislative approaches have shown that public rail ownership in the United States is possible. Nonetheless, it is necessary to determine some of the major obstacles of public rail legislation and offer reasonable next steps.

A. Obstacles to Public Rail Ownership

Like all major pieces of legislation, the call for public ownership of the rails will likely face intense lobbying pressure. In 2022 alone, the federal lobbying monies spent by railroad related groups was $24.6 million.[119] For further context, the freight industry has spent more than $254

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[114] *Id.* (citing Chi. B. & Q. R.R. v. City of Chi., 166 U.S. 226, 250 (1897); *see* McGovern v. City of N.Y., 229 U.S. 363, 372 (1913). *See also* Boom Co. v. Patterson, 98 U.S. 403 (1879); McCandless v. United States, 298 U.S. 342 (1936)).

[115] *See* CONSTITUTION ANNOTATED, *supra* note 108 (citing United States v. Miller, 317 U.S. 369, 375 (1943); Powelson, 319 U.S. at 275. See also United States v. New River Collieries Co., 262 U.S. 341 (1923); Olson v. United States, 292 U.S. 264 (1934); Kimball Laundry Co. v. United States, 338 U.S. 1 (1949). Exclusion of the value of improvements made by the government under a lease was held constitutional. Old Dominion Land Co. v. United States, 269 U.S. 55 (1925)).

[116] *See* CONSTITUTION ANNOTATED, *supra* note 108 (citing Miller, 317 U.S. at 374).

[117] *See* CONSTITUTION ANNOTATED, *supra* note 108 (citing United States v. 564.54 Acres of Land, 441 U.S. 506 (1979) (condemnation of church-run camp); United States v. 50 Acres of Land, 469 U.S. 24 (1984) (condemnation of city-owned landfill). In both cases the Court determined that market value was ascertainable)).

[118] *See* Cong. Rsch. Serv., ArtI.S8.C1.2.1 Overview of Spending Clause, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S8-C1-2-1/ALDE_00013356/#ALDF_00023242 (last visited Jul. 24, 2023).

[119] *See Industry Profile: Railroads*, OPEN SECRETS: FOLLOWING THE MONEY IN POLITICS, https://www.opensecrets.org

million in federal lobbying in just the last decade.[120] In only twenty states with published data on the subject, the railroad industry spent an additional $60.3 million in state-level lobbying between 2002 – 2022.[121] Of course, challenging the ownership of the railroads would not just garner attacks from the railroad industry itself, but all other industries that may benefit from private rather than public ownership.

Additionally, any major piece of public rail legislation will likely face headwinds in public support and perception. Not only does the railroad industry regularly pay media outlets for beneficial coverage,[122] but the very foundation of most American's views on property rights - even in the most progressive parts of the country - tends to favor corporate control over communal or government ownership.[123] Further, because most Americans likely do not understand the impact of freight rail on their daily lives and budgets, such a piece of legislation may feel distant and unimportant.

Finally, because moving from private ownership to public control of the railroads will likely be a highly complex, tedious, long, and heavily litigated process, perhaps the biggest obstacle is obtaining the requisite political will for creating such a drastic change to America's transportation system. For example, because this process will likely require that Congress debate and pass a multitude of bills over an extended period, such a process will require near-constant political support for the idea of public rail. Also, such a project would be threatened by every presidential or midterm election if those elected are neither friendly nor supportive of public rail ownership. Additionally, political pressure will not only be tested by changes in Congress and the White House, but by the shifting political landscape of state governments, which will affect how the project is supported on a local level.

B. Possible Next Steps

There are three next steps that may be beneficial in approaching some of the obstacles listed above:

1. Public Education, Coalition Building, and Research. The initial step towards passing legislation around public rail ownership begins and ends with molding public opinion. Because most Americans likely know little to nothing about the benefits of a public rail system, a broad education campaign effort will be required. Perhaps one effective way of accomplishing this is by building a wide coalition with key figures from a spectrum of industries. For example, while it will be important to educate and gain support from environmental and public interest groups, it will be just as important to find support from organizations whose costs would

/federal-lobbying/industries/summary?cycle=2022&id=M04 (last visited Jul. 24, 2023).

[120] *See* Timothy Cama, *Rail safety plans likely to hit wall of industry lobbying*, E&E NEWS BY POLITICO, https://www.eenews.net/articles/rail-safety-plans-likely-to-hit-wall-of-industry-lobbying/ (last visited Jul. 24, 2023).

[121] *See* Inci Sayki, *The railroad industry's hold over Washington goes beyond Norfolk Southern*, OPEN SECRETS: FOLLOWING THE MONEY IN POLITICS, https://www.opensecrets.org/news/2023/03/the-railroad-industrys-hold-over-washington-goes-beyond-norfolk-southern/ (last visited Jul. 24, 2023).

[122] *See* Andrew Perez, *Railroad Industry Lobbyists Are Paying Politico to Tout Train Safety*, JACOBIN, https://jacobin.com/2023/03/railroad-industry-lobbyists-politico-ad-campaign-train-safety-regulations (last visited Jul. 24, 2023).

[123] *See* Rachael Scarborough King, *John Locke and America's Cult of Private Property: Californians both voted to protect their private property rights and for Biden by a nearly two-to-one margin. How do those two things square?*, THE NATION, https://www.thenation.com/article/society/california-private-property-locke/ (last visited Jul. 24, 2023).

decrease under a public rail system. This will require an extensive research effort into how public railways might improve local and national economies.

2. Determine the Preferred Model of Public Ownership. Of course, there are a wide variety of methods for obtaining and managing public ownership of the railroads. For example, one method involves state ownership of the primary railroad arteries with city and county governments encouraged to build local lines from these arteries. This method retains both local and federal autonomy in shaping America's railway system. Another model involves the government retaining an equal share of control in all of America's railroad corporations, so there exists a public say in the safety, management, and expansion of the railroads. Yet another, and perhaps the most radical option, relies on the federal government's eminent domain and spending power to acquire all major interstate railroad lines over several years' time. Certainly, there are countless other options (or a combination of methods) that could be used to bring the railroads into public control. It would be important that the research done in step one above would shed light onto the most effective, suitable, and politically secure model.
3. Re-Education & Lobbying Support from Local Governments. After the initial education, research, coalition building, and preferred model of public ownership is decided, it will then be necessary to take this information to the local governments that would most benefit from a public rail system. By showing what public rail would do for their economies in the short and long-term, this would incentivize these local leaders to push their representatives in supporting public rail bills in Congress.

V. CASE STUDY: BRIGHTLINE WEST AS A POSSIBLE MODEL FOR PUBLIC OWNERSHIP OF NEW RAILWAYS

Although most of this paper has been devoted to public ownership over existing railways, it's important to ask what could be done about public ownership over future railroad developments in the United States.

Brightline West is a planned 218-mile-long private passenger high-speed rail line between Los Angeles and Las Vegas with an expected completion date of 2027. The journey would take just over two hours, with the train averaging speeds of over 100 mph.[124]

On June 30, 2020, the California Department of Transportation (Caltrans), on authority from the California State Transportation Agency, released a statement that read in part: "[Caltrans]… has entered into a lease agreement allowing XpressWest, a Brightline company, to use existing State right-of-way along Interstate 15 for high-speed passenger rail service… [t]he proposed XpressWest project will construct a…rail system that will run along I-15's median protected by barriers."[125]

In other words, because Caltrans already owned the median area of Interstate 15, they were able to lease this section of land to Brightline for the development of the railway. This allowed Brightline to avoid the very lengthy, costly, and regulatory mess that would've existed in trying to acquire private land adjacent to the Interstate.

Clearly, using government-owned interstate medians could have incredible benefits in developing a public rail model. For example, because state governments own and operate interstate highways and their medians, it's possible to build new public rail developments across the country

[124] *See generally*, https://www.brightlinewest.com.

[125] *See Caltrans and XpressWest Complete Lease Agreement*, CA.GOV: CALTRANS, https://dot.ca.gov/caltrans-near-me/district-8/district-8-news/caltrans-and-xpresswest-complete-lease-agreement (last visited Jul. 24, 2023).

without (or critically reducing) the need to use the federal government's eminent domain power against private landowners.

Obviously, this method would be the easiest, fastest, cleanest, and least controversial way to develop a new, electrified, public railway system in the United States.

VI. CONCLUSION

The given historical overview of railroading law and public rail ownership highlights the complex evolution of the railroad industry in the United States. This paper demonstrates that public ownership of railways has been a subject of debate and consideration since the early days of railroad development.

While the legal analysis establishes that Congress has the constitutional authority to pursue public rail ownership through its eminent domain and spending powers, there are significant obstacles to overcome if such powers are used.

One major challenge lies in the considerable lobbying influence of the existing private railroad corporations, which have vested interests in maintaining their control over the industry. Public support and perception also pose significant hurdles, as many Americans may favor corporate control over communal or government ownership. Moreover, transitioning from private to public ownership would entail a complex and lengthy process, requiring unwavering political will and support, which may fluctuate with changes in government.

To address these challenges, the paper suggests several next steps. First, there should be a comprehensive public education campaign to raise awareness of the benefits of a public rail system, involving coalition building with diverse stakeholders and conducting thorough research on economic advantages. Determining the most appropriate model of public ownership is also crucial. Finally, significant efforts should be directed towards gaining the support from local governments whose communities would benefit the most from a public railway system.

Lastly, a case study on Brightline West showcases the potential of using government-owned interstate medians in building a new public railway system.