The Constitutionality of Rails-to-Trails Conversions under the National Trails Systems Act Amendments of 1983: Preseault v. ICC

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THE CONSTITUTIONALITY OF RAILS-TO-TRAILS CONVERSIONS UNDER THE NATIONAL TRAILS SYSTEMS ACT AMENDMENTS OF 1983: PRESEAULT V. ICC

I. INTRODUCTION

Outdoor recreational trails used for hiking, biking, and jogging are becoming popular throughout the United States. States, cities, and private organizations are building thousands of miles of trails. Congress, supporting this trend, passed the National Trails System Act Amendments of 1983 (Trails Act Amendments or Amendments) to promote the conversion of abandoned railroad rights-of-way into trails. So far, approximately 3,100 miles of the 150,000 miles of abandoned railroad beds have been converted into trails. Nearly 3,000 additional miles are abandoned every year, increasing the potential for further rails-to-trails conversions.

Not everyone, however, finds the results of the Trails Act Amendments to be beneficial. The Supreme Court addressed opponents of the Amendments in Preseault v. ICC. Faced with the possibility of strangers jogging, hiking, and biking across their property, the Preseaulsts found the rails-to-trails conversion to be less than ideal because they held a reversionary interest in a railroad right-of-way. After abandonment by the railroad, their reversionary interest was “suspended,” enabling the city to convert the railbed into a trail under the Amendments. The

2. Id.
4. Grove, supra note 1, at 91.
5. Grove, supra note 1, at 91.
6. Grove, supra note 1, at 91. “Not everyone agrees. Many midwestern farmers struggling with high operating costs and low crop prices have watched angrily as rail lines crossing their land are turned into walkways used mostly by urbanites.” Grove, supra note 1, at 91.
8. Reversionary interest is defined as “[t]he interest which a person has in the reversion of lands or other property. A right to the future enjoyment of property, at present in the possession or occupation of another. The property that reverts to the grantor after the expiration of an intervening income interest.” BLACK’S LAW DICTIONARY 1320 (6th ed. 1990).
Preseaults contended that the legislation, empowering the government to arbitrarily transform abandoned railroad beds into recreational trails, was unconstitutional. They claimed that there was not only a taking without just compensation but also an invalid exercise of congressional commerce clause power.\(^9\)

The grant of continued use by the Amendments raises the potential conflict between state-defined reversionary property interests and federal regulation affecting such interests.\(^10\) The Amendments authorize interim trail use of discontinued railroad rights-of-way without explicitly requiring compensation for property owners holding reversionary interests.\(^9\)

The Supreme Court found, however, that the Trails Act Amendments are a valid exercise of congressional power under the commerce clause and that the Tucker Act\(^11\) is available to provide a remedy for possible takings claims.\(^12\) While the Tucker Act is capable of providing an adequate remedy in terms of fifth amendment requirements,\(^13\) the Court’s failure to address the possibility of takings under state property law could potentially weaken precedents protecting property rights. In addition, Preseault could broaden the power of a federal agency to displace state law, eventually negating fifth amendment protection of property owners’ rights.

II. STATEMENT OF PRESEAULT

The Preseaults owned land in Vermont which was subject to an easement for a railroad right-of-way.\(^14\) The railroad had not used the land as a route for more than ten years and had removed all tracks and

\(^9\) Preseault, 110 S. Ct. at 921.
\(^10\) In Board of Regents v. Roth, 408 U.S. 564 (1972), the Court noted that state law, not the Constitution, defined the interests and dimensions of property interests. Id. at 577. See also Comment, The Use of Discontinued Railroad Rights-of-Way as Recreational Hiking and Biking Trails: Does the National Trails System Act Sanction Takings?, 33 ST. LOUIS U.L.J. 205, 210 (1988).

The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. Id. at § 1491(a)(1).

\(^12\) Preseault, 110 S. Ct. at 914-15.


\(^14\) Preseault, 110 S. Ct. at 920-22. In 1899 the Rutland-Canadian Railroad Company obtained an easement to the Preseaults’ land through delegation of the state’s power of eminent domain to
equipment. Bringing a quiet title action in the Superior Court of Chittenden County, the Preseaults claimed the easement had terminated when the railroad ceased operations; therefore, the right-of-way should revert to them by operation of state law. The court dismissed the action, holding that the Interstate Commerce Commission (ICC) retained exclusive jurisdiction until the Commission authorized abandonment of the easement. The Supreme Court of Vermont affirmed.

Challenging the decision, the Preseaults petitioned the ICC for a certificate of abandonment. The state and the railway responded by filing a notice of exemption with the ICC requesting permission to discontinue use and to allow the right-of-way to be transferred to the City of Burlington for use as a public trail pursuant to the Trails Act Amendments. The ICC granted the state's request and dismissed the Preseaults' petition.

On appeal to the Second Circuit Court of Appeals, the court held that, under the Trails Act Amendments, no taking of private property occurred because interim trail use did not constitute an abandonment, which would have activated reversionary rights. The court also upheld the Trails Act Amendments as a valid exercise of congressional power under the commerce clause.

The Preseaults appealed the Second Circuit's decision. At issue on appeal was whether the Amendments' authorization of indefinite postponement of a private property owner's reversionary interest resulted in

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15. Preseault, 110 S. Ct. at 920.


18. Preseault, 110 S. Ct. at 920.

19. Id. Under the Amendments, the ICC allows a railroad seeking abandonment of its right-of-way to transfer it when there is a voluntary agreement and an acceptance of maintenance and liability. Upon reaching an agreement between the railroad and the transferee, the ICC withholds abandonment authorization and issues a Certificate Interim Trail Use (CITU), allowing interim trail use. If no agreement is reached between the railroad and the prospective entity, the ICC converts the CITU into a full certificate of abandonment. Glosemeyer, 685 F. Supp. at 1116-17.

20. Preseault, 110 S. Ct. at 920.

21. Id. at 921.

22. Id.
a violation of the fifth amendment because it permitted a taking of private property without just compensation. Also at issue was whether the Trails Act Amendments were a valid exercise of congressional power under the commerce clause. The United States Supreme Court granted certiorari.

III. THE LAW PRIOR TO PRESEault

A. Eminent Domain and Railroad Land Acquisitions

1. Eminent Domain

The power of the government to take private property, although well-established, is limited by the United States Constitution. Eminent domain is the “power of the sovereign to take private property for public use without the owner’s consent.” This definition is incomplete, however, without recognizing that operation of the power of eminent domain requires compensation as an element in order to satisfy fifth amendment requirements. Takings that occur without the benefit of formal eminent domain proceedings also are afforded protection under the Constitution. The landowner may initiate an inverse condemnation action to obtain compensation when the government does not intend to bring eminent domain proceedings. Under such action, the property owner’s interest is “constitutionally protected against any taking of, interference with, impact upon, or damage to his right to use, possess or enjoy such property or his

24. Id. at 918.
25. Id. at 921.
26. 1 Nichols’ THE LAW OF EMINENT DOMAIN § 2.13, at 2-41. (rev. 3d ed. 1989) [hereinafter Nichols]. “[I]t is now well settled that whenever, in the execution of powers granted to the United States by the federal constitution, lands in any state are needed by the United States for... any... public purpose the Congress of the United States, exercising the right of eminent domain, may authorize such lands to be taken...” Id. § 2.131, at 2-43.
27. 3 Nichols, supra note 26 § 8.1, at 8-5.
28. Id. § 8.1. “Courts have defined eminent domain so as to include this universal limitation [right to compensation] as an essential constituent of its meaning.” Id. at 8-5.
29. Id. § 8.1[2], at 8-8.
31. Inverse condemnation is defined as: An action brought by a property owner seeking just compensation for land taken for a public use, against a government or private entity having the power of eminent domain. It is a remedy peculiar to the property owner and is exercisable by him where it appears that the taking of the property does not intend to bring eminent domain proceedings.

freedom to dispose of the property.\textsuperscript{3}\textsuperscript{2}

2. Land Acquisition by the Railroad

Using the doctrine of eminent domain, the railroads acquired land to build lines.\textsuperscript{3}\textsuperscript{3} When doing so, they did not customarily gain an interest in fee to the land.\textsuperscript{3}\textsuperscript{4} The railroad took either an easement\textsuperscript{3}\textsuperscript{5} or a fee simple determinable interest,\textsuperscript{3}\textsuperscript{6} granting the railroad exclusive use of the right-of-way.\textsuperscript{3}\textsuperscript{7} The landowners usually held the right of reversion,\textsuperscript{3}\textsuperscript{8} thus retaining their right to prevent the right-of-way from being used for any function other than railroad purposes.\textsuperscript{3}\textsuperscript{9}

B. The National Trails System Act

1. History of the Act

In 1968, Congress passed the National Trails Systems Act (Trails

\textsuperscript{3}\textsuperscript{2} 3 NICHOLS, supra note 26, § 8.1[4], at 8-28 (emphasis in original).

\textsuperscript{3}\textsuperscript{3} G. COGGINS & C. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES LAW 106 (2d ed. 1987). Congress has used its power of eminent domain to grant rights-of-way to the railroads since 1835. During the expansion of the west in what became known as the "Great Barbeque," Congress gave "over 90 million acres to the railroads directly and another 35-40 million acres to states to be used by railroads..." Id.

\textsuperscript{3}\textsuperscript{4} 3 NICHOLS, supra note 26, § 11.1, at 11-1.

Although an easement is all that is ordinarily taken for a railroad, and in the absence of a specific provision of statute to the contrary, authority to take more than an easement is not presumed, the extent of the interest that a railroad corporation may obtain in the land required for its location lies almost wholly in the discretion of the legislature, and there seems to be no constitutional objection to a statute which authorizes a railroad corporation to condemn a fee, leaving no reversionary interest in the former owner.

3 NICHOLS, supra note 26, § 11.1, at 11-4 (footnote omitted).

\textsuperscript{3}\textsuperscript{5} An easement is defined as "[a] right of use over the property of another." BLACK'S LAW DICTIONARY 509 (6th ed. 1990). "[A] right in the owner of a parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with the general property of the owner." 2 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 315, at 3 (1980). See also 7A NICHOLS, supra note 26, § 12.05.

\textsuperscript{3}\textsuperscript{6} See National Wildlife Fed'n v. ICC, 850 F.2d 694, 703 (D.C. Cir. 1988); see also 3 NICHOLS, supra note 26, § 9.36, § 11.1, at 11-6. "A 'fee simple determinable' is created by conveyance which contains words effective to create a fee simple and, in addition, a provision for automatic expiration of estate on occurrence of stated event." BLACK'S LAW DICTIONARY 615-16 (6th ed. 1990).

\textsuperscript{3}\textsuperscript{7} 3 NICHOLS, supra note 26, § 11.1[1], at 11-6. In most jurisdictions, the railroad acquires "the right to construct and maintain a railroad in accordance with the original plans, but it is the easement to make any use of the land for railroad purposes that the public necessity and convenience may from time to time require." 3 NICHOLS, supra note 26, § 11.11 at 11-9 (footnote omitted).

\textsuperscript{3}\textsuperscript{8} See 2 NICHOLS, supra note 26, § 5.05; see also 3 NICHOLS, supra note 26 § 9.36[1].

\textsuperscript{3}\textsuperscript{9} 3 NICHOLS, supra note 26, § 11.1[1], at 11-7. "[T]he easement of a railroad is perpetual, as long as the land is used for railroad purposes." 3 NICHOLS, supra note 26, § 11.1[2], at 11-8 (footnote omitted).
Act)\(^{40}\) to advance outdoor recreational activities through the development of a nationwide system of trails.\(^{41}\) Because the Act did not specifically address railroad trail use, Congress enacted the Railroad Revitalization and Regulatory Reform Act (4-R Act) in 1976.\(^{42}\) The 4-R Act included provisions that allowed the conversion of inactive or abandoned railroad rights-of-way into trail use.\(^{43}\)

Both the Trails Act and the 4-R Act contained inherent weaknesses from the legislations' failure to provide sufficient flexibility for creating trails after the railroad rights-of-way were abandoned.\(^{44}\) Due to the nature of the interests held by abutting landowners under state law,\(^{45}\) the right-of-way reverted to the landowner when the railroad had abandoned the line.\(^{46}\) Once the land reverted to the landowner, there was nothing left for trail use.\(^{47}\)

Catalyzed by this failure, Congress amended the 1968 Trails Act to deal more effectively with the rails-to-trails conversion.\(^{48}\) The 1983


\(^{43}\) Section 809 of the Railroad Revitalization and Regulatory Reform Act of 1976 was Congress's first attempt to promote reuse of the railroad rights-of-way for trail use. According to the court in National Wildlife, it “required the Secretary of Transportation to prepare a report on alternative uses for abandoned railroad rights-of-way” and “to provide financial, educational, and technical assistance to various government entities for programs involving the conversion of abandoned rights-of-way to recreational and ‘conservational’ uses.” It also authorized the ICC to delay giving up control of the railroad right-of-way for 180 days after the abandonment became effective, unless the right-of-way had been presented for sale for public purposes. National Wildlife, 850 F.2d at 697.

\(^{44}\) Railroad Abandonments—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591 (1986). See also H.R. REP. No. 28, supra note 41, at 8.


\(^{46}\) H.R. REP. No. 28, supra note 41, at 9. See 3 NICHOLS, supra note 26, § 11.[1], at 11-6 to -7.

\(^{47}\) H.R. REP. No. 28, supra note 41, at 9.


The Secretary of Transportation, the Chairman of the Interstate Commerce Commission, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976, shall encourage State and local agencies and private interest to establish appropriate trails using the provisions of such programs. Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter [the Trails Act], if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated,
Amendments focused on the method used by the government to acquire the railroad rights-of-way for trail conversion.\(^{49}\) They specifically considered the conversion of inactive or abandoned railroad rights-of-way into national scenic trails.\(^{50}\) To solve the difficult problem of reacquiring the abandoned railroad rights-of-way, Congress determined that interim trail use under the Amendments would not constitute an abandonment as long as the route itself remained intact.\(^{51}\) By concluding that no abandonment occurred during interim use, Congress delayed landowners' reversionary interests indefinitely, thus enabling the government to use the land for trails.\(^{52}\)

2. Interpretation of the Act

Although the Amendments attempted to solve the defects in the earlier legislation, important questions were left unanswered.\(^{53}\) The principle question concerned the inconsistency between the Amendments and state law pertaining to reversionary interests.\(^{54}\) Under state law, because trail use did not qualify as railroad use, landowners' reversionary rights entitled them to reclamation of the rights-of-way once they became a

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\(^{49}\) The 1983 Amendments promoted other integral objectives in addition to the provision of a national trails system. The Amendments allowed interim use of the railroad right-of-way as a trail while retaining the railroad's right to re-establish rail service at an unidentified future date (rail banking). 54 Fed. Reg. 38,011-12 (1989). See also Rail Abandonments—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 598-99 (1986). By providing interim trail use while postponing authorization for abandonment and subsequent reversion to property owners, Congress intended for the railroad right-of-way to be available should the railroad ever need to restore service on that line in the future. H.R. Rep. No. 28, supra note 41, at 9.

\(^{50}\) Id. at § 1247(d).

\(^{51}\) Id. at § 1247(d).

\(^{52}\) Rail Abandonments, 2 I.C.C.2d at 597-98.

\(^{53}\) Brief for Petitioners at 8, Preseault, 110 S. Ct. 914 (1990) (No. 88-1076).

\(^{54}\) Rail Abandonments, 2 I.C.C. 2d at 596.
The landowners claimed that the Amendments must be construed so that state law would not be preempted in favor of the Amendments, thus allowing the landowners to retain their proprietary interests in the railroad rights-of-way or to be compensated for any takings.

In attempting to resolve the legislative ambiguity and to draft appropriate rules to implement the Trails Act Amendments, the ICC considered the landowners' arguments. In its initial interpretation, the ICC rejected these arguments, concluding that federal law preempted state law. The ICC determined because there technically was no abandonment under the amended Trails Act, the railroads' rights-of-way were never interrupted; therefore, the landowners' reversionary interests never matured. Abutting landowners had no proprietary interest to protect or compensate under the fifth amendment.

The only ensuing trail conversion case supporting the ICC's interpretation was the lower court decision in Preseault. The Second Circuit found that because an indefinite postponement of reversionary interests did not constitute a taking, no compensation was necessary.

Lacking significant judicial support, the ICC adopted a modified position that was more consistent with two other cases. In one case, National Wildlife Federation v. ICC, the D.C. Circuit Court of Appeals, although affirming Congress's power to preempt state law through the Amendments, found that the legislation could be considered a taking of private property. The court suggested that even a delay in property

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55. Id. at 596, 600.
56. Id. at 596. In a comment to the ICC concerning the accuracy of the ICC's interpretation of the Amendments, the state of Wisconsin argued that state law should not be ignored. “The amendment should be construed to avoid inconsistency with State property laws.” Id.
57. Id. at 591-93.
58. Id. at 600.
59. Id. at 596-97.
60. Id. “Preemption will be unaffected by the railroad's discontinuance of service and salvage of track because the amendment provides that qualified interim use itself prevents reversion.” Id. at 600.
62. Id. at 151.
65. Id. at 705. “No one doubts that Congress has the authority to provide that rights-of-way no longer needed for rail use be converted to trail use, nor that state property laws to the contrary must be displaced by Congress's exercise of that authority.” Id. The court relied on article VI, cl. 2 of the Constitution for support. Id. Article VI states: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST. art. VI, cl. 2.
66. National Wildlife, 850 F.2d at 705. “We are unable, therefore, to conclude that existing
owners' reversionary interests could be considered a taking. The court remanded the case for further consideration, requiring the ICC to reevaluate its conclusion that a delay of landowners' reversionary rights could never constitute a compensable taking.

The second case, Glosemeyer v. Missouri-Kansas-Texas-R.R. Co., analyzed the takings issue differently by recognizing the availability of a remedy for a possible taking. The court found the Trails Act Amendments to be constitutional, holding that any taking that occurred under the statute could be compensated under the Tucker Act. The court noted that Congress either did not believe that a taking would occur under the statute or assumed that the Tucker Act would supply an appropriate remedy for any takings that did occur.

After examining National Wildlife, Glosemeyer, and Preseault, the ICC concluded that, although a taking could occur under the Trails Act Amendments, the availability of the Tucker Act to provide compensation for property owners' claims prevented a violation of the fifth amendment.

C. The Tucker Act

Historically, the Tucker Act has provided a process for property owners to pursue compensation for fifth amendment takings. Congress also furnished a specific judgment fund which provides for claims under the Tucker Act.

Two early Supreme Court cases, United States v. Causby precedent provides that the rights of those who have an interest in railroad property may be frustrated indefinitely in order to preserve the possibility, however slight, that rail service may be resumed in the future. The court in National Wildlife instructed the ICC to give special attention to instances where the railroad's right-of-way is strictly limited to use for railroad purposes and future restoration of rail service is not foreseeable. The ICC did not take a firm stand on the merits of the interpretation of the compensation issue. The Tucker Act gives the Court of Claims jurisdiction over claims founded on the Constitution. Necessary amounts are appropriated to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law . . . .

Yearsley v. W.A. Ross Construction Co.,76 confirm the availability of the Tucker Act to provide a process for compensation where there is a taking. In Causby, the Court held that property owners claiming a taking by the U.S. Government can avail themselves of the Tucker Act to pursue compensation.77 The Court stated in Yearsley that "if the authorized action . . . does constitute a taking of property for which there must be just compensation under the Fifth Amendment, the Government has impliedly promised to pay that compensation and has afforded a remedy for its recovery by a suit in the Court of Claims."78

Two recent Supreme Court cases reaffirm the availability of the Tucker Act in situations where a taking has occurred.79 In both cases the Court relied on Causby and Yearsley to confirm that the Tucker Act is an available remedy unless explicitly withdrawn.80 In Ruckelshaus v. Monsanto Co.,81 the Supreme Court declared that a taking had occurred under the Federal Insecticide, Fungicide, and Rodenticide Act;82 however, a remedy was available for plaintiffs seeking compensation because Congress had not explicitly withdrawn the Tucker Act under the statute.83 In the Regional Rail Reorganization Act Cases,84 the plaintiffs claimed that the Regional Rail Reorganization Act of 1973 (Rail Act)85 was unconstitutional since it resulted in a taking of private property without just compensation, thereby violating the fifth amendment.86 Once again, though, the Court found that because Congress had not expressly withdrawn the Act as a possible remedy, the Tucker Act was available to provide compensation.87

76. 309 U.S. 18 (1940).
77. Causby, 328 U.S. at 267.
78. Yearsley, 309 U.S. at 21-22.
80. Regional Rail, 419 U.S. at 126-27; Ruckelshaus, 467 U.S. at 1016-17.
81. 467 U.S. 986.
82. Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136 (1982). The Supreme Court found that trade secrets, recognized as property right under state law, were protected by the fifth amendment. Ruckelshaus, 467 U.S. at 1002-05.
83. Ruckelshaus, 467 U.S. at 1017. The Court rejected the defendant's claims that Congress intended the compensation scheme provided by FIFRA to be exclusive. Id.
84. Regional Rail, 419 U.S. at 102.
86. Regional Rail, 419 U.S. at 118.
87. Id. at 129-36.
IV. THE PRESEAULT DECISION

A. The Decision of the Court

In Preseault v. ICC, the Supreme Court unanimously affirmed the decision of the Second Circuit U.S. Court of Appeals\(^8\) but based its decision on different criteria.\(^9\) The lower court held that a taking of private property without just compensation did not occur under the Trails Act Amendments and that they were a valid exercise of congressional power under the commerce clause.\(^9\) It rejected the argument that indefinite postponement of the Preseaults' reversionary interests constituted a taking.\(^9\) The Supreme Court, however, did not actually determine whether there was such a taking, yet held that even if there were a taking, the availability of the Tucker Act as a remedy satisfies the compensation requirement of the fifth amendment.\(^9\)

B. The Court's Reasoning in Preseault

1. The Constitutionality of the Trails Act Amendments

The first issue addressed by the Court was whether compensation was available for potential takings under the Amendments, thus rendering them unconstitutional. The Preseaults claimed that the Trails Act Amendments were unconstitutional because the Amendments resulted in a taking of personal property without compensation.\(^9\) The Supreme Court rejected this argument, stating that the fifth amendment does not prevent government taking of private property; it merely requires payment of compensation for any interference with property rights such as a taking.\(^9\)

The Court further determined that the fifth amendment merely requires that compensation be made, not that compensation be paid prior

\(^8\) Preseault, 110 S. Ct. at 914. Justice O'Connor concurred and was joined by Justices Scalia and Kennedy. Id. at 926.
\(^9\) Id. at 926.
to or contemporaneously with the taking. At the time of the actual taking, the only requirement is the presence of a "reasonable, certain and adequate provision for obtaining compensation." The property owner will also have no claim that an unconstitutional taking has occurred unless he or she has first utilized the available provision and received no compensation.

According to the Court, the Tucker Act supplied the necessary compensation process for property owners for any taking claims against the government. Because the Tucker Act grants the Court of Claims jurisdiction for any claim founded on the U.S. Constitution, and a taking claim against the federal government is founded on the fifth amendment, the Court reasoned that the Tucker Act provides jurisdiction for a taking claim to be heard. Thus, the Court concluded that normally a property owner must first take advantage of the Tucker Act process or any taking claims against the federal government will be premature.

In determining the availability of the Tucker Act to provide the requisite compensation in cases involving the Amendments, the Court also focused on congressional intent. The critical issue was whether Congress demonstrated the necessary "unambiguous intent[ ] to withdraw the Tucker Act as a remedy," not whether Congress displayed an express intent to supply the Tucker Act as a remedy. Finding no evidence in the legislative history to indicate that Congress withdrew the Tucker Act, the Court concluded that the Tucker Act provided the means to compensate any taking that might occur under the Trails Act Amendments.

2. The Exercise of Congressional Power

The Court next addressed the congressional authority to enact the Trails Act Amendments. The Preseaults had claimed that the Amendments were not a valid exercise of the commerce clause power because a stated purpose of the Amendments, conservation of railbeds for future

95. Id. at 921 (citing Williamson, 473 U.S. at 194).
96. Id. (quoting Regional Rail Reorganization Act Cases, 419 U.S. 102, 124-25 (1974) (internal quotation omitted)).
97. Id. (quoting Williamson, 473 U.S. at 194-95.).
98. Id. at 922 (citing United States v. Causby, 328 U.S. 256, 267 (1946)).
99. Id.
100. Id. at 924 (citing Williamson, 473 U.S. at 195).
101. Id. at 922 (quoting Ruckleshaus v. Monsanto, Co., 467 U.S. 986, 1019 (1984)).
102. Id. at 922.
103. Id. at 922-23.
use, was not the true purpose of the legislation.\textsuperscript{104} According to the Preseaults, the true purpose was to preempt reversionary interests of property owners in order to create permanent public trails after the railroad discontinues service.\textsuperscript{105} They alleged that this unidentified, underlying purpose made the legislation a violation of congressional power.\textsuperscript{106}

In analyzing the Preseaults' claim, the Court used the traditional rationality standard of review to find that the Amendments were a valid exercise of congressional power.\textsuperscript{107} The Court found a rational basis for Congress's decision that the Trails Act Amendments were related to commerce\textsuperscript{108} and determined that the "means selected by Congress are 'reasonably adapted to the end permitted by the Constitution.'"\textsuperscript{109} The purposes of the Trails Act Amendments, extensive trail development and preservation of railbeds for future use, were clearly set out in the legislative history.\textsuperscript{110} These purposes were found to be "valid congressional objectives to which the Amendments are reasonably adapted."\textsuperscript{111}

According to the Court, even if there were merit to the Preseaults' claim that the Trails Act Amendments were based on an invalid purpose, they would still be a valid exercise of congressional power.\textsuperscript{112} The Amendments are "reasonably adapted to the goal of encouraging the development of additional recreational trails,"\textsuperscript{113} thus fulfilling the requirement of any legitimate purpose under the traditional test.\textsuperscript{114}

3. The Availability of the Tucker Act

Having established the Trails Act Amendments as a valid exercise of power under the commerce clause, the question for the Court becomes

\textsuperscript{104} Id. at 924-25. The Preseaults advocated a "particularly careful" examination of the basis for the regulation based on their interpretation of Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987). The Preseaults claimed that the Supreme Court in \textit{Nollan} had used the strict scrutiny standard in striking down purposes it deemed "made-up" or difficult to understand. The Preseaults argued that "[r]egulations can no longer be sustained in court merely because there is some rational basis for believing that the challenged action \textit{might} be necessary or useful." Petition for a Writ of Certiorari at 18, \textit{Preseault} (No. 88-1076).

\textsuperscript{105} \textit{Preseault}, 110 S. Ct. at 924.

\textsuperscript{106} Id. at 924-25.

\textsuperscript{107} Id. at 924 (citing \textit{Hodel v. Virginia Surface Mining & Reclamation Ass'n}, 452 U.S. 264, 276 (1981)).

\textsuperscript{108} Id. at 924.

\textsuperscript{109} Id. at 924-25 (quoting \textit{Hodel}, 452 U.S. at 276).

\textsuperscript{110} Id. at 925.

\textsuperscript{111} Id.

\textsuperscript{112} Id.

\textsuperscript{113} Id.

\textsuperscript{114} Id.
whether the Tucker Act provides a remedy to those parties whose property rights are affected. A sound basis exists in the reasoning of *Regional Rail* for the *Preseault* Court to uphold the availability of the Tucker Act in the absence of specific withdrawal by Congress.\(^{115}\) Also an analysis of specific canons of construction, coupled with the examination of other case law, supports the availability of the Tucker Act under the Trails Act Amendments.

### a. Literal Interpretation

Analysis of the literal meaning of the Tucker Act affirms its availability for takings under the Trails Act Amendments. The Tucker Act offers a remedy available for "any claim" founded on the Constitution,\(^{116}\) not any claim when the Tucker Act is *specifically provided*. This interpretation, endorsed by the Court, indicates that the Tucker Act is available unless it is specifically withdrawn.\(^{117}\)

### b. Canons of Construction

Certain canons of construction, discussed in *Regional Rail*, also aid in interpreting equivocal legislation and confirm that the preservation of a statute is a primary objective.\(^{118}\) According to the first canon, a statute always is interpreted as consistent with constitutional policy when the statute is unclear in that regard.\(^{119}\) Thus, if there are two opposing interpretations of the statute, the interpretation favoring the statute's constitutionality will prevail.\(^{120}\) This is true even if the legislative history suggests otherwise.\(^{121}\) Whenever possible, the court will fulfill its purpose of preserving legislation by interpreting it as consistent with constitutional restrictions.\(^{122}\)

A second canon is that "repeals by implication are disfavored."\(^{123}\) Whenever two statutes are compatible with one another, both will endure

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\(^{115}\) *Regional Rail*, 419 U.S. at 126.


\(^{117}\) See *Regional Rail*, 419 U.S. at 126; *Ruckelshaus*, 467 U.S. at 1019.

\(^{118}\) *Regional Rail*, 419 U.S. at 133-36.

\(^{119}\) *Id.* at 134.


\(^{121}\) *Id.* at 134 (quoting *In re* Penn Cent. Transp. Co., 384 F. Supp. at 944).

\(^{122}\) *Id.* (quoting United States Civil Serv. Comm’n v. National Ass’n of Letter Carriers, 413 U.S. 548, 571 (1973)).

\(^{123}\) *Id.* at 133.
as long as Congress has not indicated otherwise. Furthermore, a more recent statute will not modify an older statute unless there is definite contradiction. Because there is a presumption that Congress carefully contemplated the purpose of the earlier statute, it is erroneous to assume Congress repealed the first statute unless specified.

Failure to apply these principles of construction in defining the relationship of the Tucker Act to the Trails Act Amendments could abolish valuable legislation. The Amendments would be unconstitutional without the benefit of the Tucker Act because Congress did not specifically supply compensation for possible takings under the Trails Act Amendments. In fact, Congress apparently did not contemplate the possibility that takings could even occur under the Trails Act, explaining its disregard for compensation provisions. By upholding the Amendments using these principles, the Supreme Court preserved the goal of providing practical public nature trails while preserving future railway rights despite congressional inability to foresee all possible consequences of its legislation.

c. Case Law

Case law also confirms the availability of the Tucker Act when a taking has occurred and Congress has failed to supply compensation. Causby and Yearsley lay the foundation for the Tucker Act's availability in any situation where a taking occurs. In Regional Rail, the Court affirmed the approach suggested in Yearsley, holding that the Tucker Act is available as a remedy so long as Congress has not expressly withdrawn it. The Court in Regional Rail conducted a close examination of the legislative history behind the Rail Act and found no evidence of Congressional intent to withdraw the Tucker Act remedy.

As noted by the Court in Preseault, the legislative history of the Rail

124. Id. at 133-34 (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974)).
125. Id. at 134 (quoting In re Penn Cent. Transp. Co., 384 F. Supp. 895, 943 (1974)).
126. Id.
127. Id.
128. H.R. REP. No. 28, supra note 41, at 8-9. Congress intended to redefine an abandonment in order to overcome property owners' reversionary interests, keeping the right-of-way in the control of the Government as if no abandonment had ever occurred. For Congress, this appeared to solve the problem of interests reverting to landowners thus requiring compensation in order to reacquire the interest. H.R. REP. No. 28, supra note 41, at 8-9.
130. Regional Rail, 419 U.S. at 126-27.
132. Regional Rail, 419 U.S. at 126-33.
Act closely parallels the legislative history of the Trails Act Amendments. Both demonstrated legislative silence regarding the availability of the Tucker Act. Each time the legislature had provided specific appropriations for carrying out the legislation and had been emphatic about the importance of controlling the expenditure of federal funds under the statutes. The Tucker Act addresses this legislative restriction by providing monies for compensation from an independent judgment fund, allowing the statutes to stay within their budgetary constraints.

4. The Adequacy of the Tucker Act

Once the availability of the Tucker Act is established, one must consider the adequacy of the remedy obtainable under the Act. For a remedy to be adequate, it must comply with the fifth amendment’s requirement of “just compensation” for the taking of private property. The “just compensation” standard demands payment to the landowner for the “full and complete equivalent” of the value of the property lost and requires that the owner receive the “full and perfect equivalent in money” for the value of the land that is taken as well as the value of any damage to land not taken. Moreover, the owner is entitled to the value of the property at the time of the taking.

134. Id.
135. Id.
136. Preseault, 110 S. Ct. at 923.
137. 3 Nichols, supra note 26, § 8.1[2], at 8-8 to -24.
138. 3 Nichols, supra note 26, § 8.6, at 8-119.
139. “Compensation” means a full indemnity or remuneration for the loss or damage sustained by the owner of property taken or injured for public use; and “just compensation” means the full and perfect equivalent in money of the property taken, whereby the owner is put in as good a position pecuniarily as he would have occupied if his property had not been taken.

140. 3 Nichols, supra note 26, § 8.6, at 8-125.
141. 4 Nichols, supra note 26, § 12.01, at 12-2. The value is generally based on fair market value. Fair market value means “the amount of money which a purchaser willing, but not obliged, to buy the property would pay to an owner willing, but not obliged, to sell it . . . .” 4 Nichols, supra note 26, § 12.02[1], at 12-62. The use of market value is not ordered by the Constitution and “actual” or “intrinsic” value may be used. 4 Nichols, supra note 26, § 12.01, at 12-22 to -23. Furthermore, the value of the compensation must be paid to the owner in cash. The landowner cannot be
The Tucker Act demonstrates congressional intent to provide a substantively and procedurally adequate remedy. First, the language of the Tucker Act indicates that a full, substantive remedy is available. The Act uses language such as "to provide an entire remedy" and "to complete the relief afforded by the judgment" when referring to the power of the court to grant a remedy. The Tucker Act also refers to "complete relief" when discussing contract claims. This language reflects the intent of Congress to provide a remedy that fully complies with the terms of "just compensation." In addition, the lack of remedial limitations in the Tucker Act sustains the Act's adequacy. Instead of limiting the remedy, the Act emphasizes the ability of the court to do whatever is necessary to make the remedy fair. There is no indication that the remedy is limited to non-cash payment or that the available amount is restricted. The Tucker Act gives the claimants the ability to receive compensation in cash for any reasonable value established for their property.

Second, the Tucker Act was intended to supply a procedure for obtaining an adequate remedy under any claim founded on the Constitution. In Preseault, the Supreme Court properly relied on authoritative precedent to find that the Tucker Act provides a means for adequate compensation. In the 1940's, Causby and Yearsley acknowledged the use of the Tucker Act for any takings that occur. Since then, the Supreme Court has frequently relied on the Tucker Act. The Court's acceptance of the adequacy of the compensation available under the Tucker Act is evidenced by the lack of any attempt to supply alternative means of compensation or to strike the questioned legislation as unconstitutional on the basis of past failures to supply an adequate remedy.
C. Future Implications

Although the Supreme Court in *Preseault* confirmed a procedure for an adequate remedy, it failed to address the crucial issue of whether there is a taking under the Trails Act Amendments. While the majority failed to consider this, Justice O'Connor's concurring opinion dealt with the issue, acknowledging that a taking could occur under the Trails Act Amendments. She also emphasized the important role of state law in defining the property interest land owners hold and in determining whether, based on that interest, compensation should be paid.

Failure of the majority to confront the issue of a possible taking under the Trails Act Amendments could lead to significant future implications. Minimizing the power of the states to govern property rights could initiate dangerous precedent. Property rights are defined by state law, and those rights, granted by the state, are constitutionally protected. The majority's failure to make a strong statement preserving the rights of individuals under state law could conceivably weaken such rights as lower courts and lawmakers rely on the *Preseault* decision to support or create legislation.

Additionally, failure to recognize explicitly that a taking could occur under state law suggests that the ICC has the power to interpret federal laws as invalidating state laws and individual rights. The ICC may have the right to preempt state property law but not the power to displace it as the source of property rights. Failure to limit the power of a governmental agency could potentially indicate approval of its power.

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154. Exploring the Preseaults' claim, the Second Circuit Court found that takings could not possibly occur under the Amendments. *Preseault*, 853 F.2d at 151. The Second Circuit's holding regarding the takings issue directly conflicted with decisions of other courts. *See National Wildlife*, 850 F.2d at 702-708; *Glosemeyer*, 685 F. Supp. at 1121.


156. *Id.*

157. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980). “[P]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . .” *Id.* at 161 (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972)).

158. U.S. CONST. amend. V.

159. *Ruckelshaus*, 467 U.S. at 1012; *Preseault*, 110 S. Ct. at 927 (O'Connor, J., concurring).

160. *Preseault*, 110 S. Ct. at 927 (O'Connor, J., concurring). “Any other conclusion would convert the ICC's power to preempt conflicting state regulation of interstate commerce into the power to pre-empt the rights guaranteed by state property law, a result incompatible with the Fifth Amendment.” *Id.* "If Congress can 'pre-empt' state property law in the manner advocated by EPA, then the Takings Clause has lost all vitality . . . . This is the very kind of thing that the Taking Clause of
taking occurs may lead to an invalidation of the fifth amendment. If
the ICC is acting under Congress's laws, the Constitutional violation is
basically left unchecked unless the courts restrict that power.

This unrestricted statutory redefinition of the concept of abandon-
ment ultimately amounts to an invitation to joggers and assorted stran-
gers to enjoy privately owned property without the permission of the
owner. This result is inconsistent with the Court's role to guard the
Constitution and individual rights.

V. CONCLUSION

Congress's legislative authority under the commerce clause gives it
the power to regulate through the National Trails System Act Amend-
ments of 1983. The inadvertent failure by Congress to supply compen-
sation for property owners under the Amendments does not render it
unconstitutional under the fifth amendment. The availability of the
Tucker Act provides the necessary mechanism for adequate compensa-
tion for any property owner.

On the other hand, failure to recognize the power of state property
laws in relation to inadvertent takings by the federal government could
conceivably usurp the very rights the fifth amendment was created to
protect. Recognition by the Supreme Court in Preseault that a taking
occurred would have provided strong support for the evaluation of each
case presented in terms of applicable state property law. Furthermore, it
would have confirmed a strong precedent for recognition and protection
of individual rights as intended under the Constitution.

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the Fifth Amendment was meant to prevent." Ruckelshaus, 467 U.S. at 1012 (internal quotation
omitted).


1669 (1975). Under the traditional model of administrative law, the agency is seen as a "transmis-
sion belt" for executing Congress's laws. Congress's direction for execution of law is carried out by
agencies. The court's function is to contain the agency's actions within the parameters of the direc-
tives given by Congress. The role of the court is to operate as the check required by the Separation
of Powers Doctrine. Id. at 1675-76.

163. See Grove, supra note 1, at 91.