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THE SCOPE OF CONGRESS' CONSTITUTIONAL  
POWER UNDER THE PROPERTY CLAUSE:  
REGULATING NON-FEDERAL PROPERTY TO  
FURTHER THE PURPOSES OF NATIONAL PARKS  
AND WILDERNESS AREAS

Blake Shepard\*

I. INTRODUCTION

The National Park System has been heralded as one of the "few unambiguous triumphs of American public policy." It is comprised of roughly forty-five million acres of predominantly federally-owned land<sup>2</sup> that has been removed from the public domain and reserved by Congress for a specific public use.<sup>3</sup> The fundamental purpose of the national parks is "to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations"<sup>4</sup>

In recent years, however, the activities of private industries and individuals have threatened to prevent many national parks and other specially protected federal reserves<sup>5</sup> from fulfilling their declared purposes. For example, during the late 1960's and

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1. Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239, 239 (1976) (hereinafter cited as Sax, *Helpless Giants*).

2. NATIONAL PARK SERVICE, SUMMARY OF ACREAGES (Sept. 30, 1982).

3. P. GATES, HISTORY OF PUBLIC LAND Law Enforcement 28 (1968). See also McNally, *The Grand Canyon National Park Enlargement Act: Perspectives on Protection of a National Resource*, 18 ARIZ. L. REV. 232, 233-34 (1976); Note, *The Sagebrush Rebellion: Who Should Control the Public Lands?*, 1980 UTAH L REV. 506, 508.

4. 16 U.S.C. § 1 (1982).

early 1970's, a logging company operating on private land immediately adjacent to Redwood National Park in California caused extensive physical harm within the boundaries of the park, including soil erosion, stream siltation, and tree damage.<sup>6</sup> Several years ago, a private entrepreneur erected a highly visible 300-foot steel observation tower on private property located immediately adjacent to Gettysburg National Military Park despite the strenuous objections of the National Park Service and the Commonwealth of Pennsylvania.<sup>7</sup> Recently, Indiana Dunes National Lakeshore was threatened by a proposal to construct a nuclear power plant next to the park.<sup>8</sup> Currently, numerous parks are

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5. In addition to National Parks, Congress has reserved several other classifications of federal property from the public domain for special uses, such as National Forests, 16 U.S.C. § 471-542 (1982); National Wildlife Refuges, 16 U.S.C. § 669-669; (1982); National Seashores, 16 U.S.C. § 459-459j-8 (1982); and National Recreation Areas. 16 U.S.C. § 460n460mm (1982). Most relevant for purposes of this article is the National Wilderness Preservation System, created by the Wilderness Act of 1964. "Wilderness" is defined as follows:

c) Definition of wilderness. A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the *earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain*. An area of wilderness is further defined to mean in this Act an area of undeveloped Federal land retaining, its *primal character and influence, without permanent improvements or human habitation which is protected and managed so as to preserve its natural conditions* and which (1) generally appears to have been affected primarily by the forces of nature, *with the imprint of man's work substantially unnoticeable*; (2) *has outstanding opportunities for solitude or a primitive and unconfined type of recreation*; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, or historical value.

16 U.S.C. § 1131-1136 (1982) (emphasis added).

Lands designated as wilderness areas may include other classifications of federal property, such as National Parks and Forests; thus, the Wilderness Area classification is in a sense, superimposed upon other federal land classifications. Coggins & McCloskey *New Directions for the National Park System: The Proposed Kansas Tallgrass Prairie National Park*, 25 KAN. L. REV. 477, 503 (1977). Wilderness Areas are entitled to the highest degree of protection from human exploitation accorded to any federal land classification by federal law. *Id.* A wilderness area is by definition roadless. *Id.* at 504. It is to be preserved, to the maximum extent possible, in its primitive natural state, and its management is to be directed at protecting its integrity from human uses. *Id.* See *infra* text and notes at notes 252-58.

6. See *Sierra Club v. Morton*, 400 F. Supp. 610 (N.D. Cal. 1976); *Sierra Club v. Morton*, 398 F. Supp. 284 (N.D. Cal. 1975); *Sierra Club v. Morton*, 376 F. Supp. 90 (N.D. Cal. 1974).

7. See *Pennsylvania v. Morton*, 381 F. Supp. 293 (D.D.C. 1974); *Commonwealth v. Natl. Gettysburg Battlefield Tower, Inc.*, 454 Pa. 193, 311 A.2d 588 (1973).

8. See *Izaak Walton League of America v. A.E.C.*, 615 F.2d 513 (7th Cir. 1975), *rev'd and remanded*, 423 U.S. 12 (1975); *on remand*, 533 F.2d 1011 (7th Cir. 1976), *cert. denied*, 429 U.S. 945 (1976).

suffering from the adverse effects of air pollution generated by nearby industries and urban centers.<sup>9</sup>

In addition to harm from activities occurring *beyond* the boundaries of national parks and wilderness areas, many areas are also subject to potentially adverse conduct occurring on nonfederal<sup>10</sup> land holdings located *within* their perimeter.<sup>11</sup> There are over 2.5 million acres of non-federal land inside the boundaries of national parks<sup>12</sup> and substantial non-federal in holdings within the borders of national preserves, seashores, lakeshores, river ways, and recreation areas.<sup>13</sup> Such non-federal in holdings are particularly common among many recently established national parks and seashores located near heavily populated urban areas.<sup>14</sup>

9. For example, during the late 1960's and early 1970's pollution emitted by an aluminum processing plant located several miles from Glacier National Park caused damage to trees and vegetation within the Park. The problem has since been largely corrected by a substantial reduction in plant emissions. Telephone conversation with C. J. Martinka, Chief Scientist, Glacier National Park (Feb. 2. 1984). Similarly, air quality and visibility at Grand Canyon National Park has been adversely affected by particulate pollution from urban areas and industrial activities, such as copper smelting, in both Arizona and Southern California. Telephone conversation with Bill Dickinson, Management Assistant; Grand Canyon National Park (Feb. 2. 1984).

10. For purposes of this article, "non-federal property" refers to both privately-owned property and state-owned property. The term "non-federal property" will be used where it is unnecessary to make a distinction between private and state lands. When such a distinction is important, property will be specifically identified as being either state owned or privately-owned.

11. In many instances, tracts of land located within a particular federal enclave passed into private ownership prior to the establishment of the enclave as a park or wilderness area. Sometimes the administering federal agency may acquire these tracts by purchase, donation, or condemnation: at other times, the tracts may be left in private ownership as "in holdings." In other cases, landowners may be able to convince Congress to exclude their land from the boundaries of a park, so that while such tracts may be physically within the park, they are legally outside its boundaries. Sax, *Buying Scenery: Land Acquisitions for the National Park Service, 1980* DUKE L.J. 709, 713-14 [hereinafter cited as Sax, *Buying Scenery*]. Use of the term "inholding" in this article refers to non-federal property that is both physically and legally within the boundaries of a park or wilderness area.

12. NATIONAL PARK SERVICE, SUMMARY OF ACREAGES (Sept. 30, 1982).

13. LAND CLASSIFICATION	TOTAL ACREAGE	ACRES OF NON-FEDERAL IN HOLDINGS
National Preserves	21,106,342	713,401
National Seashores	598,663	142,451
National Lakeshores	232,770	106,802
National River ways	550,184	328,726
National Recreation Areas	3,693,179	336,612

Source: NATIONAL PARK SERVICE, SUMMARY OF ACREAGES (Sept. 30. 1982).

14. Sax, *Helpless Giants*, *supra* note 1, at 239-40.

While these inholding are in many instances devoted to uses compatible with the policies of the nationally protected areas, adverse uses of such non-federal lands in some cases may threaten the physical integrity of the parks and wilderness areas or conflict with the purpose for which the areas were established.<sup>15</sup> At Lassen Volcanic National Park, for example, a privately owned tract of land within the boundaries of the park, which for more than forty years had not been put to any private use, was leased in 1960 to an oil company for geothermal development. Over the course of the next seventeen years, the oil company drilled exploratory wells on the site, built a road into the well site area, cleared land for a drill rig, and excavated a large trench before the land was finally condemned by the National Park Service.<sup>16</sup>

The scenarios described above are only examples of the potential harm that could result to the nation's parks and wilderness areas from incompatible use of nearby non-federal property.<sup>17</sup> They also illustrate the need for federal regulation of non-federal lands in and around national parks and wilderness areas in order to preserve those special federal enclaves for their intended public uses.<sup>18</sup>

These examples, however, represent only one side of a complex issue regarding Congress' authority over federal property. The United States owns roughly one-third of the nation's lands,<sup>19</sup> including over ninety percent of the entire state of Alaska and eighty-seven percent of Nevada.<sup>20</sup> Furthermore, the federal lands

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15. *See, e.g.*, *United States v. Brown*, 552 F.2d 817 (8th Cir. 1977) (hunting on state waters within Voyageurs National Park) (*see infra* text and notes at notes 173-93); *Minnesota v. Block*, 660 F.2d 1240 (8th Cir. 1981) (use of motorboats on state waters in Boundary Waters Canoe Area Wilderness) (*see infra* text and notes at notes 194-232).

16. Sax, *Buying Scenery*, *supra* note 11, at 717-18.

17. For a further discussion of the harm to National Parks caused by incompatible use of neighboring non-federal property, see generally Sax, *Helpless Giants*, *supra* note 1.

18. *See infra* text and notes at notes 248-58.

19. BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR, PUBLIC LAND STATISTICS 1 (1977) (hereinafter cited as PUBLIC LAND STATISTICS).

20. *Id.* at 10. The federal government also owns vast amounts of property in many other Western states:

STATE	% OF STATE COMPRISED OF FEDERAL LAND
Alaska	90.6
Nevada	87.6
Utah	65.1

contain a substantial portion of the nation's natural resources, particularly those related to energy production.<sup>21</sup> National parks and wilderness areas constitute only a fraction of the lands owned and operated by the federal government,<sup>22</sup> and are therefore only one part of a larger problem regarding the government's ability to regulate federal property.<sup>23</sup>

In the West, where federal land ownership is most pervasive,<sup>24</sup> the government's extensive land holdings have become an economic and political liability to the respective states.<sup>25</sup> Federal land is immune from state property taxation;<sup>26</sup> in many Western states

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Idaho	63.7
Oregon	52.5
Wyoming	48.6
California	46.1
Arizona	44.2
Colorado	35.6
New Mexico	33.5
Montana	29.6
Washington	29.1

Source: PUBLIC LAND STATISTICS *supra* note 19, at 10 (1977).

21. RESOURCE	TOTAL U.S. RESOURCES	TOTAL ON FEDERAL LAND	
Oil	144 billion bbls.	122.3 billion bbls.	84.9%
Oil Shale	122 billion bbls.	87.8 billion bbls.	72%
Natural Gas	1.975 trillion cubic feet	740 trillion cubic feet	37.4%
Timber	820.1 million acres	365.1 million acres	45%
Geothermal			
Energy	1,560 quadrillion tons	780 quadrillion tons	50%
Coal	4 trillion tons	148 billion tons	3.7%
Uranium Ore	4.2 million tons	1.6 million tons	37.4%

Source: Note, *Sagebrush Rebellion: Who Should Control the Public Lands*, 1980 UTAH L. REV. 505, 511 [hereinafter cited as *Sagebrush Rebellion*].

22. The federal government owns in excess of 750 million acres of land. PUBLIC LAND STATISTICS, *supra* note 19, at 1. Of this total, only 45 million acres comprise the National Park System. And roughly 80 million acres are part of the National Wilderness Preservation System. NATIONAL FOREST SERVICE, NINETEENTH ANNUAL REPORT ON THE STATUS OF THE NATIONAL WILDERNESS PRESERVATION SYSTEM FOR 1982. Of these 80 million acres of National Wilderness, 56.4 million acres are within the state of Alaska. *Id.*

23. *See infra* text and notes at notes 263-65.

24. Of all the land controlled by the federal government, 93.5% is located in 12 Western states. Titus, *The Nevada "Sagebrush Rebellion" Act: A Question of Constitutionality*, 23 ARIZ. L. REV. 263, 265 (1981).

25. *Sagebrush Rebellion*, *supra* note 21 at 511-12.

26. *Id.* at 511. *See also* Engdahl, *State and Federal Power Over Federal Property*, 18 ARIZ. L. REV. 283, 373 (1976).

are thereby deprived of substantial tax revenues.<sup>27</sup> Furthermore, federal lands are subject to both Congressional legislation and federal agency regulation.<sup>28</sup> As a result, much of the land in the West is governed by restrictive federal land-use policies.<sup>29</sup> Most importantly, perhaps, federal regulation of activity on government property in many instances preempts state legislation,<sup>30</sup> thereby depriving the states of the ability to exercise their traditional police power authority over federal property within their boundaries.<sup>31</sup>

In response to these factors, many Western states have recently expressed their vehement opposition to the federal government's extensive landholdings in the West.<sup>32</sup> Leaders of the so-called "Sagebrush Rebellion" have denounced the government's pervasive property interests as an intrusion upon the sovereignty of the Western states and as an ominous threat to the balance of state and federal legislative power.<sup>33</sup> In 1979, the Nevada legislature expressed its disapproval of the situation by enacting a statute declaring that the jurisdiction and control of all public lands and minerals in Nevada belonged to the state.<sup>34</sup> Numerous Western states followed Nevada's example and passed similar Sagebrush Rebellion bills.<sup>35</sup> Regardless of their validity, these statutes serve as a clear indication of the widespread public hostility in the West toward any reminder of the federal government's

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27. The federal government makes payments to public land states to help replace this loss of tax revenue, but payment of these "in-lieu" funds is made according to Congress' discretion. *Sagebrush Rebellion*, *supra* note 21, at 511; Engdahl, *supra* note 26, at 373.

28. *See infra* text and note at note 113.

29. *Sagebrush Rebellion*, *supra* note 21, at 510-11.

30. *See infra* text and notes at notes 108-13.

31. *See infra* text and notes at notes 108-13.

32. *See generally Sagebrush Rebellion*, *supra* note 21; Titus, *supra* note 24.

33. *See generally Sagebrush Rebellion*, *supra* note 21; Titus, *supra* note 24.

34. Act of June 4, 1979, ch. 633, § 5(1) (Nevada) (codified at N. R. S. Ch. 321, 596-599 (1983)).

35. Sagebrush Rebellion legislation has also been passed in Arizona, Colorado, Hawaii, Idaho, New Mexico, Utah, Washington, and Wyoming. 1980 Ariz. Sess. Laws ch. 38, §§ 1-5, at 52-57 (codified at Ariz. Rev. Stat. Ann. §§ 37-901 - 37-909 (Supp. 1980-81)); 1980 Colo. Sess. Laws, house Joint Resolution No. 1006, at 857-58; Hawaii Senate Resolution No. 266 (1980); 1980 Idaho Sess. Laws, Senate Concurrent Resolution No. 129, at 1003-04; 1980 N.M. Laws ch. 153 §§ 1-10, at 675-84 (codified at N.M. Stat. Ann. §§ 19-15-1 to 19-15-10 (Supp. 1980)); 1980 Utah Laws ch. 79, §§ 1-10, at 441-44; 1980 Wash. Laws ch. 116, §§ 1-10, at 358-60; 1980 Wyo. Sess. Laws ch. 53 §§ 1-3, at 264-67. The California Legislature has recently passed a bill commissioning a study of Sagebrush Rebellion issues and authorizing the state Attorney General to take legal action to vest the ownership of BLM lands in the state. 1980 Ca. Legis. Serv. Ch. 831, § 2, at 2636-37.

pervasive property interests and its concomitant administrative authority over federal lands.

The raging debate over the federal government's tremendous land holdings underscores the importance of defining the constitutional limits of Congress' authority to regulate and administer federal property.<sup>36</sup> Congress derives its primary authority to regulate activity on federal lands from the rarely-invoked Property Clause,<sup>37</sup> which provides that "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."<sup>38</sup> At present, the scope of this constitutional power is unclear.<sup>39</sup> Ultimately, however, the extent of Congress' constitutional authority will have a profound impact upon the two competing concerns identified above: on one hand, the need to provide adequate regulation and protection for national parks, wilderness areas, and other federal enclaves reserved by Congress for a specific purpose;<sup>40</sup> and on the other hand, the need to preserve the sovereignty of those Western states comprised largely of federally owned lands.<sup>41</sup>

This article will examine the scope of the federal government's constitutional power to regulate federal property, and will focus particularly on its authority to regulate activity on adjacent *nonfederal property*. This article will first trace the Supreme Courts historical construction of Congress' power under the Property Clause,<sup>42</sup> and will discuss two cases in which the Supreme Court, has upheld Congress' authority to regulate activity on private property.<sup>43</sup> Second, this article will discuss the expansive construction of Congress' Property power outlined in the Supreme Court's most recent opinion on the subject.<sup>44</sup> Third, this article will examine in detail two circuit court cases that sustained Congress' broad powers to regulate activity on non-federal property in order to preserve national parks and wilderness areas for their

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36. *See infra* text and notes at notes 263-360.

37. U.S. CONST. art. IV, § 3, cl. 2.

38. *Id.*

39. The scope of Congress' constitutional power to regulate activity occurring on *non-federal land* is particularly unsettled. *See infra* text and notes at notes 114-72.

40. *See supra* text and notes at notes 1-18.

41. *See supra* text and notes at notes 19-35.

42. *See infra* text and notes at notes 48-113.

43. *See infra* text and notes at notes 114-36.

44. *See infra* text and notes at notes 137-72.

intended purposes.<sup>45</sup> Fourth, this article will analyze the consequences of these two decisions and the resulting expansion of federal power under the Property Clause.<sup>46</sup> Finally, this article will attempt to define some appropriate limits to Congress' authority over federal lands by examining the Property Clause in light of Congress' other constitutional powers.<sup>47</sup>

## II. THE SCOPE OF CONGRESS' POWER OVER FEDERAL LANDS: AN HISTORICAL PERSPECTIVE

Congress derives its power to regulate the use of lands owned by the federal government from two distinct constitutional grants of authority: the Cession Clause<sup>48</sup> and the Property Clause.<sup>49</sup> At times, the distinction between these two provisions has been blurred,<sup>50</sup> creating uncertainty with regard to Congress' legislative authority over federal property. To comprehend fully the scope of Congress' regulatory power over federal lands, it is important to understand the differences between these two grants of authority.

### *A. Congress' Power Under the Cession Clause*

Under the Cession Clause, Congress may obtain authority from a state to exercise legislative power over a federal enclave within that state in two ways: (1) by purchasing land with consent of the state; or (2) by purchasing land without the state's consent and subsequently obtaining the state's cession, or consent, to federal legislative authority over the land.<sup>51</sup> While the language of

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45. See *infra* text and notes at notes 173-232.

46. See *infra* text and notes at notes 233-62.

47. See *infra* text and notes at notes 263-360.

48. U.S. CONST. art. I, § 8, cl. 17. The Cession Clause provides that:

[Congress shall have the power] to exercise legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by Cession of Particular States, and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful governmental buildings.

U.S. CONST. art. I, § 8, cl. 17.

49. U.S. CONST. art. IV, § 3, cl. 2. See *supra* text and notes at notes 37-38.

50. See, e.g., *Kleppe v. New Mexico*, 426 U.S. 529, 541-42 (1976).

51. See *id.* at 542. See also *Paul v. United States*, 371 U.S. 245, 264 (1963); *Fort Leavenworth R. Co. v. Lowe*, 114 U.S. 525, 541-42 (1885). A state often cedes jurisdiction over land within its boundaries by enactment of a statute. Sax, *Helpless Giants*, *supra* note 1, at 246 n. 42.

the Clause specifies that Congress may only exercise its legislative authority under the Cession power for certain designated federal purposes,<sup>52</sup> this language has been broadly construed to permit federal jurisdiction over land ceded for any legitimate governmental purpose.<sup>53</sup> Congress' legislative power under the Cession Clause has been held to be derivative in nature,<sup>54</sup> in the sense that it derives its authority over ceded property only by the consent of the ceding state.

When the federal government acquires land within a state pursuant to a valid federal purpose, the state *may* consent to the acquisition, although it is not *required* to do so.<sup>55</sup> If the state consents to the acquisition, Congress' legislative authority over the land becomes exclusive.<sup>56</sup> In such cases, state laws and regulations issued under its police power are not enforceable within that federal enclave.<sup>57</sup> The federal government then assumes the "combined powers of a general and a state government."<sup>58</sup>

If the state refuses to consent to the government's acquisition, the degree of federal jurisdiction over the land is contingent upon a subsequent cession of legislative authority by the state.<sup>59</sup> The extent of legislative power conferred by the state is determined by the specific terms of the state's cession.<sup>60</sup> A state may still confer *exclusive* jurisdiction over the federal enclave to Congress by subsequently making "a cession of legislative authority and polit-

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52. The Clause specifically authorizes Congress to exercise exclusive legislation over federal lands used as the seat of the federal government, or purchased for the erection of forts, magazines, arsenals, dockyards, and other needful governmental buildings. *See supra* note 48.

53. *Kleppe v. New Mexico*, 426 U.S. at 542 n. 11. *See also* *Collins v. Yosemite Park and Curry Co.*, 305 U.S. 518, 528-30 (1938).

54. *Kleppe v. New Mexico*, 426 U.S. at 541-42.

55. *United States v. Unzeuta*, 281 U.S. 138, 142 (1930); *Paul v. United States*, 371 U.S. at 264-65; *James v. Dravo Contracting Co.*, 302 U.S. 134, 147 (1937); *Ft. Leavenworth R. Co. v. Lowe*, 114 U.S. at 539. It is well established that the federal government may acquire land within a state by purchase or condemnation, even without the consent of the state. *Kohl v. United States*, 91 U.S. 367, 371 (1875). But without the state's consent, the Supreme Court has held that the government's possession is simply that of an ordinary proprietor. *Ft. Leavenworth R. Co. v. Lowe*, 114 U.S. at 531; *James v. Dravo Contracting Co.*, 302 U.S. at 141-42.

56. *Ft. Leavenworth R. Co. v. Lowe*, 114 U.S. at 537-38; *Paul v. United States*, 371 U.S. at 264.

57. *Pacific Coast Dairy v. Dept. of Agriculture*, 318 U.S. 285, 294 (1945).

58. *Id.*

59. *James v. Dravo Contracting Co.*, 302 U.S. at 147.

60. *United States v. Unzeuta*, 281 U.S. at 142; *James v. Dravo Contracting Co.*, 302 U.S. at 147.

ical jurisdiction."<sup>61</sup> It is also well established, however, that a state may condition its cession upon its retention of certain jurisdictional powers over the federal enclave, so long as the state's jurisdiction is not inconsistent with the federal purpose for which the property was acquired.<sup>62</sup> A state may decide to make no cession whatsoever,<sup>63</sup> or it may qualify its cession by reserving specific rights of jurisdiction over the federal enclave.<sup>64</sup> The state may thereby retain its police power authority over the federal property so long as that power does not interfere with the government's use of that land.<sup>65</sup> Therefore, federal jurisdiction obtained by cession may range from *exclusive* federal jurisdiction with no residual state police power,<sup>66</sup> to concurrent federal legislative jurisdiction over the enclave, under which the state may retain some legislative authority.<sup>67</sup>

Congress' power under the Cession Clause was once viewed as a major factor in determining the authority of the federal government, to regulate activity on non-federal lands within and around national parks.<sup>68</sup> Traditionally, state cessions were considered the only grounds for federal legislative jurisdiction over non-federal lands within parks.<sup>69</sup> In some instances, states were deemed to have explicitly ceded jurisdiction over all property, federal and

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61. *Paul v. United States*, 371 U.S. at 264; *Ft. Leavenworth R. Co. v. Lowe*, 114 U.S. at 541.

62. *Paul v. United States*, 371 U.S. at 265; *James v. Dravo Contracting Co.*, 302 U.S. at 147.

63. *James v. Dravo Contracting Co.*, 302 U.S. at 147. *See also*, *Colorado v. Toll*, 268 U.S. 228, 231 (1925).

64. *United States v. Unzeuta*, 281 U.S. at 142; *Paul v. United States*, 371 U.S. at 264-65; *James v. Dravo Contracting Co.* 302 U.S. at 146-49.

65. *See supra* cases cited at note 62.

66. *Kleppe v. New Mexico*, 426 U.S. at 542. *See also* *Pacific Coast Dairy v. Dept. of Agriculture*, 318 U.S. at 294.

67. *Kleppe v. New Mexico*, 426 U.S. at 542. For example, the Supreme Court has upheld a state's power to levy a tax on a railroad located within a federal military reservation, *Ft. Leavenworth R. Co. v. Lowe*, 114 U.S. at 525; to tax a contractor engaged in the construction of dams within a federal enclave purchased for the purpose of improving navigation, *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937); to enforce state price regulations on milk purchased for consumption or resale on federal military bases and in military clubs, *Paul v. United States*, 371 U.S. 245 (1963); to maintain state legislative jurisdiction over highways within the boundaries of a national park, *Colorado v. Toll*, 268 U.S. 228 (1925); and to impose an excise tax on the sale of intoxicating liquor within a national park. *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938).

68. *Sax, Helpless Giants*, *supra* note 1, at 248. *See infra* text and note at note 237.

69. *Sax, Helpless Giants*, *supra* note 1, at 245.

non-federal, within the boundaries of a national park,<sup>70</sup> thereby granting to the federal government the authority to regulate the entire park. In other cases, courts held that if a state had ceded a park to the federal government without retaining jurisdiction over privately owned land within the park, the government's exclusive jurisdiction over the park extended by implication to the non-federal lands as well.<sup>71</sup> In such cases, the federal government was authorized to exercise exclusive police power jurisdiction over all lands within the park boundaries.<sup>72</sup>

Such complete cessions of state jurisdiction over all lands within the park, however, have been the exception rather than the rule.<sup>73</sup> While states routinely cede jurisdiction over all *federal* lands within the parks,<sup>74</sup> they often specifically retain jurisdiction over all non-federal lands inside park boundaries.<sup>75</sup> In such situations, some courts have held that Congress may not regulate those non-federal inholding.<sup>76</sup> Thus, the breadth and scope of a state's cession of land within national parks was once deemed to have a substantial impact on the federal government's constitutional authority to regulate activity occurring on non-federal property within park boundaries.

In the recent case of *Kleppe v. New Mexico*,<sup>77</sup> however, the Supreme Court substantially minimized the importance of state cessions as a constitutional basis for the federal administration of public lands. In *Kleppe*, the state argued that absent cession of exclusive legislative authority over federal property by the state, the federal government lacked authority under the Property

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70. *Id.* at 246.

71. *See, e.g.*, *United States v. Petermen*, 91 F. Supp. 209 (S.D. Cal. 1950). *aff'd*, 191 F.2d 154 (9th Cir. 1951), *cert. denied*, 342 U.S. 885 (1951); *See also* *United States v. Unzeuta*, 281 U.S. at 145.

72. Sax, *Helpless Giants*, *supra* note 1, at 246-47.

73. *Id.* at 247. In a letter to Professor Sax dated August 12, 1976, D. Griggle, Acting Director of the National Park Service, wrote: "Exclusive jurisdiction is not uniformly ceded to the United States .... Of the 287 areas of the Park System, only about 72 have exclusive jurisdiction . . . . When the States cede exclusive jurisdiction, such cession normally covers all lands within the authorized boundary of the park, including private inholding." *Id.* at n. 45.

74. *Id.* at 246.

75. *See, e.g.*, *Halpert v. Udall*, 231 F. Supp. 574 (S.D. Fla. 1964). *aff'd*, 379 U.S. 645 (1965); *Colorado v. Toll*, 268 U.S. 288 (1925).

76. *See, e.g.*, *Halpert v. Udall*, 231 F. Supp. at 577. *Cf. Petersen v. United States*, 191 F. 2d 154 (9th Cir. 1951) (where state has ceded jurisdiction over private inholding within a national park, the federal government has exclusive jurisdiction over those lands).

77. 426 U.S. 523 (1976).

Clause to enforce a statute<sup>78</sup> regarding those federal lands that contravened state law. The Court rejected this argument, emphasizing that the Property Clause and the Cession Clause were two entirely distinct sources of constitutional power over federal property.<sup>79</sup> The Court stated that while a cession of jurisdiction would be necessary for the federal government to exercise *exclusive* legislative authority over the federal lands in question,<sup>80</sup> Congress' jurisdiction over the land in question need not be *exclusive* before it can exercise its other constitutional powers.<sup>81</sup> The Court therefore found that Congress could enact legislation respecting federal land under the Property Clause, even in the absence of a cession.<sup>82</sup> The Court further held that such federal legislation superseded conflicting state law under the Supremacy Clause.<sup>83</sup>

Under the rule announced in *Kleppe*, Congress may enact legislation pertaining to federal property, regardless of whether or not the state has consented to such federal legislative authority. Even in the absence of a cession, Congress still has the requisite jurisdictional authority to implement its other constitutional powers, including its Property Clause power. Therefore, the extent of Congress' modern constitutional authority over federal lands is largely defined by the scope of its power under the Property Clause.

#### *B. Congress' Power Under the Property Clause.*

The Property Clause entrusts Congress with the constitutional authority to regulate the occupation and use of lands owned by the United States government.<sup>84</sup> It authorizes Congress to perform two distinct functions: (1) to dispose of federal property; and

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78. See *infra* text and note at note 138.

79. *Kleppe v. New Mexico*, 426 U.S. at 542-43.

80. *Id.* at 542-43.

81. *Id.* at 543.

82. *Id.*

83. *Id.* The Supremacy Clause provides:

This Constitution, and the Laws of the United States made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing, in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

84. *Utah Power & Light Co. v. United States*, 243 U.S. 389, 405 (1916).

(2) to make "needful rules and regulations" respecting the federal lands.<sup>85</sup> The Supreme Court has declared on several occasions that Congress' authority under the Clause is "without limitations."<sup>86</sup> It has also stated, however, that the limits of Congress' power under the Property Clause have not yet been definitely resolved.<sup>87</sup> This article will now examine the various ways in which Congress has exercised its power under the Property Clause, and will attempt to define the scope of congressional power by examining past Supreme Court decisions.

### 1. The Power to Dispose of Federal Lands

It is well established that Congress is entrusted with plenary power to decide when, if, and how to dispose of federal lands.<sup>88</sup> In addition, the Supreme Court has recognized that Congress may impose conditions for the use of public lands upon any grant or sale of those lands.<sup>89</sup> For example, in *United States v. San Francisco*,<sup>90</sup> the Supreme Court examined the constitutionality of a grant of public land to the City of San Francisco to be used for the generation of water and electrical power.<sup>91</sup> The federal grant prohibited the city from transferring any rights in the land to a private utility and required that all energy produced on the federal lands be supplied directly to consumers.<sup>92</sup> The city subsequently transferred to a private utility the right to sell and distribute power to San Francisco residents.<sup>93</sup> The Court found that this transfer violated the condition of the public land grant and held that the land should revert to the government.<sup>94</sup>

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85. U.S. CONST., art. IV, § 3, cl. 2. *see supra* text at note 38.

86. *See* *United States v. San Francisco*, 310 U.S. 16, 29 (1940); *Gibson v. Chouteau*, 80 U.S. (13 Wall.) 92, 99 (1871); *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537 (1840); *Alabama v. Texas*, 347 U.S. 272, 273 (1954); *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1914); *United States v. California*, 332 U.S. 19, 27 (1947); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 294-95 (1958); *Kleppe v. New Mexico*, 426 U.S. 523, 539 (1976).

87. *Kleppe v. New Mexico*, 426 U.S. at 539. *See also* *Kansas v. Colorado*, 206 U.S. 46, 89 (1907).

88. *See generally* *United States v. San Francisco*, 310 U.S. 16 (1940); *United States v. Gratiot*, 39 U.S. (14 Pet.) 526 (1840); *Alabama v. Texas*, 347 U.S. 272 (1954); *United States v. Midwest Oil Co.*, 236 U.S. 459 (1914); *Gibson v. Chouteau*, 80 U.S. (13 Wall.) 92 (1871).

89. *See generally* *United States v. San Francisco*, 310 U.S. 16 (1940).

90. *Id.*

91. Congress granted to the City certain lands in Yosemite National Park and Stanislaus National Forest. Congress intended for Congress to construct and maintain a means of supplying water and electricity to residents of the City. *Id.* at 18.

92. *Id.* at 18-19.

93. *Id.* at 28.

94. *Id.*

Thus, Congress may use its power to dispose of federal property to achieve certain public policies by limiting the disposition of lands to uses which will implement those policies.<sup>95</sup> Such use of the dispositional power enables Congress to regulate the use of lands even after government title in those lands has been transferred.<sup>96</sup>

## 2. Congress' Power to Make Needful Rules and Regulations Respecting the Federal Lands

The Property Clause also empowers Congress to make "needful rules and regulations" "respecting" federal property.<sup>97</sup> This provision of the Clause is primarily a grant of power to Congress to regulate activity occurring *on* federal property.<sup>98</sup> The Supreme Court has recognized, however, that Congress may, in limited circumstances, extend its regulatory authority beyond the boundaries of federal land and onto neighboring non-federal property.<sup>99</sup>

### a. Regulation of Conduct Occurring on Federal Property

The Supreme Court has recognized that Congress has broad powers under the Property Clause to protect federal lands from physical harm<sup>100</sup> and to determine how those federal lands will be used.<sup>101</sup> The Court has repeatedly stated that the public lands of the nation are held in trust for its people by the federal govern-

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95. *Id.* at 30. Congress has used its broad dispositional power under the Property Clause to achieve such important national goals as the construction of the transcontinental railroad and the rapid settlement of the West by granting vast amounts of land to railroads and homesteaders. *See generally* *Camfield v. United States*, 167 U.S. 518 (1897); *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979). *See infra* text and note at note 115.

96. Gaetke, *Congressional Discretion under the Property Clause*, 33 HASTINGS. L.J. 381, 384 (1977).

97. U.S. CONST. art. IV, § 3, cl. 2. *See supra* text at note 38.

98. *Kansas v. Colorado*, 206 U.S. at 89.

99. *See, e.g., Camfield v. United States*, 167 U.S. 518 (1897); *United States v. Alford*, 274 U.S. 264 (1927). *See infra* text and notes at notes 114-36.

100. *Camfield v. United States*, 167 U.S. at 526; *United States v. Alford*, 274 U.S. at 267; *Utah Power & Light Co. v. United States*, 243 U.S. 389, 405 (1916); *Hunt v. United States*, 278 U.S. 96, 100 (1928). *See also* *New Mexico Game Comm'n v. Udall*, 410 F.2d 1197, 1200 (9th Cir. 1968), *cert. denied*, 396 U.S. 961 (1969); *United States v. Lindsey*, 595 F.2d 5, 6 (9th Cir. 1979); *United States v. Arbo*, 691 F.2d 862, 864 (9th Cir. 1982).

101. *Light v. United States*, 220 U.S. 523, 536 (1911); *Utah Power & Light Co. v. United States*, 243 U.S. at 404; *Camfield v. United States*, 167 U.S. at 524.

ment.<sup>102</sup> As trustee of those lands, it is the function of Congress to decide how the trust should be administered.<sup>103</sup> Congress may "sanction some uses [of the federal lands] and prohibit others, and may forbid interference with such [uses] as are sanctioned."<sup>104</sup> For example, the Court has recognized Congress' power to create forest reserves on federal land and to prohibit grazing thereon;<sup>105</sup> to regulate or prohibit the use and occupancy of federal land for purposes of commercial electrical production;<sup>106</sup> and to prohibit individuals from obstructing access to federal lands in order to encourage their rapid settlement.<sup>107</sup>

The Supreme Court has given great deference to federal legislation regarding the use of federal lands and their protection from physical harm.<sup>108</sup> Such legislation has been upheld even where it has infringed upon the states' traditional police power function.<sup>109</sup> While the states may retain general police power jurisdiction over all federal lands within their boundaries in the absence of a session,<sup>110</sup> such jurisdiction does not extend to any matter that interferes with federal legislation pertaining to the protection and use of the federal lands.<sup>111</sup> When such a conflict exists, federal

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102. *Light v. United States*, 220 U.S. at 537; *United States v. San Francisco*, 310 U.S. at 29; *Alabama v. Texas*, 347 U.S. at 273.

103. *See supra* cases cited at note 102.

104. *McKelvey v. United States*, 260 U.S. 35.3, .159 (1922).

105. *See, e.g.*, *Light v. United States*, 220 U.S. 523 (1911).

106. *See, e.g.*, *Utah Power & Light Co. v. United States*, 243 U.S. .389 (1916).

107. *See, e.g.*, *Camfield v. United States*, 167 U.S. 518 (1897).

108. *Kleppe v. New Mexico*, 426 U.S. at 536; *Light v. United States*, 220 U.S. at 537; *Utah Power & Light Co. v. United States*, 243 U.S. at 404-05. *See also* *United States v. San Francisco*, 310 U.S. at 29; *United States v. Gratiot*, 39 U.S. (14 Pet.) at 538.

109. *See, e.g.*, *Camfield v. United States*, 167 U.S. at 526; *Utah Power & Light Co. v. United States*, 243 U.S. at 405. In *Utah Power*, the Court upheld a statute which gave to the Secretary of the Interior the sole authority to grant permits for rights of way on public lands for electrical power. The Court stated:

The states and the public have almost uniformly accepted federal legislation [concerning the public lands] as controlling, and in the instances where it has been questioned in this Court, its validity has been upheld and its supremacy over state enactments sustained.... The inclusion within a state of lands of the United States does not take from Congress the power to control their occupancy and use to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them, *even though this may involve the exercise in same measure of what is commonly known as the police power.*

243 U.S. at 405 (emphasis added).

110. *See supra* text and notes at notes 59-67. *See also* *McKelvey v. United States*, 260 U.S. at 359; *Utah Power & Light Co. v. United States*, 243 U.S. at 404-05.

111. *United States v. California*, 332 U.S. at 36; *McKelvey v. United States*, 260 U.S. at 359; *Utah Power & Light Co. v. United States*, 243 U.S. at 404-05.

legislation supersedes state law under the Supremacy Clause.<sup>112</sup> Thus, with respect to the use and protection of federal lands, the Supreme Court has given Congress broad discretion to determine what are "needful" rules and regulations "respecting" those lands, and has upheld Congress' use of its property power even when it conflicts with local interests.<sup>113</sup>

#### b. Regulation of Conduct on Non-Federal Property

A more serious constitutional question arises when the exercise of federal power affects activity occurring on *non-federal property*. The Supreme Court has upheld Congress' authority to regulate activity occurring, beyond the boundaries of federal property on only two occasions.

In *Camfield v. United States*,<sup>114</sup> the defendants owned several

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112. *Utah Power & Light Co. v. United States*, 243 U.S. at 404-05; *Kleppe v. New Mexico*, 426 U.S. at 543; *United States v. California*, 332 U.S. at 36; *Hunt v. United States*, 278 U.S. at 99. In *Hunt*, a severe overpopulation of deer in a National Forest and Game Preserve led to overgrazing, which caused injury to the trees and shrubs on federal property. The Supreme Court upheld an order by the Secretary of Agriculture to kill many of the deer in the interest of protecting the federal lands, even though the order violated state hunting laws and resulted in the arrest of the foresters who carried out the Secretary's orders. The Court stated: "The power of the United States to thus protect its land and property does not admit of doubt, statute of the state to the contrary notwithstanding." *Hunt*, 278 U.S. at 99.

113. It is also well established that Congress may statutorily delegate to an administrative agency the authority to make rules and regulations respecting the occupancy, use and protection of the federal lands. *See generally* *United States v. Grimaud*, 220 U.S. 506 (1911). Federal statutes may also provide criminal sanctions for the violation of such regulations. *Id.* Under 43 U.S.C. § 2 (1976); the Secretary of the Interior is given the power to perform "all executive duties appertaining to the surveying and sale of public lands of the United States, or in anyway respecting such public lands." Courts have recognized that this statute entrusts the Secretary with broad authority to issue regulations concerning the public lands. *See, e.g.*, *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963). The Secretary is also given specific legislative authority to pass rules and regulations pertaining to the National Park System. 16 U.S.C. § 3 (1982) provides that "the Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service." Regulations issued by the Secretary have the force of law. *See* *United States v. Petermen*, 91 F. Supp. 209 (S.D. Cal. 1950). *See generally* *Yakus v. United States*, 321 U.S. 414 (1944).

Similarly, under 16 U.S.C. § 471 (1976) (repealed Pub. L. 94-579, 90 Stat. 2792 (1976)), the Secretary of Agriculture was granted the power to issue rules and regulations by which to administer the National Forest System. Regulations passed by the Secretary have been upheld as a constitutional exercise of federal power under the Property Clause. *See* *United States v. Grimaud*, 220 U.S. 506 (1911); *Light v. United States*, 220 U.S. 523 (1911); *Hunt v. United States*, 278 U.S. 96 (1928).

114. 167 U.S. 518 (1897).

odd-numbered tracts of land in a large "checkerboard" land scheme in which the federal government owned the alternating even-numbered tracts.<sup>115</sup> By constructing a network of fences built entirely on privately owned odd-numbered tracts, the defendants successfully enclosed 20,000 acres of public land in violation of a federal statute.<sup>116</sup> The federal government subsequently sued to have the fences removed. The defendants argued that application of the statute to fences located on private property exceeded the scope of Congress' constitutional authority under the Property Clause.<sup>117</sup> The Supreme Court, however, found the fence to constitute a "nuisance"<sup>118</sup> and sustained Congress' power to prevent the enclosure of the public lands, even though the legislation at issue affected activity on, privately owned land.<sup>119</sup>

Central to the Court's rationale in *Camfield* was its articulation of the legislative intent underlying the statute in question.<sup>120</sup> Tracing the factors that gave rise to the Act, the Court found that prior to the enactment of the statute, the government had suffered serious abuses at the hands of private individuals occupying the odd-numbered checkerboard sections, who had repeatedly succeeded in enclosing tracts of government land for their private

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115. The federal government conceived the "checkerboard" land scheme as a means of encouraging the construction of the transcontinental railroad and the development of the Western United States in the nineteenth century. The Union Pacific Act of 1862 granted federal land to the Union Pacific Railroad for each mile of track that it laid. Under the terms of the Act, the land within 20 miles of the railroad right-of-way was divided into checkerboard blocks; the odd-numbered lots were granted to the railroad as the track was laid, and the even-numbered lots were reserved to the government for subsequent sale. The purpose of the land grant policy was two-fold: first, it was designed to provide an incentive to the railroad to hasten construction of the project; second, the government hoped that the completed railroad would lure settlers to the West and increase the sales value of the reserved government blocks of land in the checkerboard scheme. For a colorful history of the checkerboard land plan, see Justice Rehnquist's majority opinion in *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979).

116. The Unlawful Enclosures Act, Feb. 25, 1885, ch. 149, § 1. 23 Stat. 321 (codified as amended at 43 U.S.C. § 1061 (1982)), states:

All enclosures of any public lands in any State or Territory of the United States ... are hereby declared to be unlawful, and the maintenance, erection, construction or control of any such enclosure is hereby forbidden and prohibited; and the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States in any State or any of the Territories, without claim, color of title or asserted right, as above specified as to enclosure, is likewise declared unlawful and hereby prohibited.

42 U.S.C. § 1061 (1982).

117. *Camfield v. United States*, 167 U.S. at 522.

118. *Id.* at 525.

119. *Id.*

120. See *supra* note 116.

use.<sup>121</sup> Declaring that the government had a duty as trustee of the federal lands to prevent individuals from monopolizing those lands for private gain,<sup>122</sup> the Court in *Camfield* concluded that Congress' decision to prohibit all enclosures of federal property<sup>123</sup> was designed to prevent the exclusion of prospective settlers from federal property by private individuals.<sup>124</sup>

The Court analogized the Act to a state statute prohibiting the erection of "spite fences",<sup>125</sup> and held that it was within Congress'

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121. *Camfield v. United States*, 167 U.S. at 524-25.

122. *Id.* at 524.

123. The Court stated that even if the statute had not been enacted, the federal government would still have possessed the power as an ordinary proprietor to prevent the erection of fences *on federal property* under a common law trespass theory. *Id.* Thus, the statute expanded the government's power to protect its land by prohibiting the construction of all enclosures, whether built on federal or non-federal property. *Id.*

124. *Id.* Prior to the enactment of the Unlawful Enclosures Act, the government had engaged in a policy of permitting, by tacit acquiescence, owners of the odd-numbered tracts of land to use the even-numbered federal lands for pasturage. *Id.* at 527. Control and monopolization of the government lands by proprietors of the odd-numbered lots within the checkerboard scheme finally became so extreme that Congress passed the Unlawful Enclosures Act to put an end to the abuses. Thus, while the government did not object to the use of the federal checkerboard lands for pasturage per se, *id.*, the Act represented Congress' declaration that such use of the federal lands could not interfere with the government's broader policy of settling the federal lands:

These grants were made in pursuance of the settled policy of the government to reserve to itself the even-numbered sections for sale at an increased price. . . . If practices of this kind were tolerated, it would be but a step further to claim that the defendants, by long acquiescence of the government in their appropriation of public lands, had acquired a title to them as against everyone except the government and perhaps even against the government itself.

*Id.*

Thus, the Court in *Camfield* viewed the statute in question as a means of effecting Congress' policy of settling the western lands by preserving free public access to the federal lands in the checkerboard scheme.

125. The Court referred to *Rideout v. Knox*, 148 Mass. 368, 19 NE 390 (1889), a case decided by the Massachusetts Supreme Judicial Court which involved the constitutionality of a state law prohibiting the erection of "spite fences." The Massachusetts statute was passed to put an end to the injustice of the prevailing common law doctrine, which recognized that "a man may build a fence upon his own land as high as he pleases, even though it obstructs his neighbor's lights, and . . . his motives in so doing cannot be inquired into, even though the fence be built expressly to annoy and spite his neighbor." *Camfield v. United States*, 167 U.S. at 523. The Massachusetts statute remedied this situation by declaring that any fence "unnecessarily exceeding six feet in height, maliciously erected or maintained for the purpose of annoying the owners, or occupants of adjoining property" should be deemed a private nuisance and that any proprietor injured in the quiet enjoyment of his land by such a fence had an action in tort for damages. *Id.* The Massachusetts Supreme Judicial Court upheld the constitutionality of the statute as a valid exercise of the state's police power. *See Rideout v. Knox*, 148 Mass. at 373, 19 N.E. at 392. The *Camfield* court stated that the case was "authority for the

power to order the abatement of the defendants' fence.<sup>126</sup> The Court described the basis of this constitutional authority as follows:

*The general government doubtless has a power over its own property analogous to the police power of the several states, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case. If it be found necessary for the protection of the public, or of intending settlers, to forbid all enclosures of public lands, the Government may do so ....*<sup>127</sup>

The Court further stated that while Congress did not possess an *unlimited* power to legislate against nuisances within a state,<sup>128</sup> it did have the authority to legislate for the protection of the public lands, even if it involved the exercise of what is ordinarily known as the "police power."<sup>129</sup> The Court noted that "a different rule would place the public domain of the United States completely at the mercy of state legislation."<sup>130</sup> The *Camfield* Court thus concluded that legislation enacted to "protect" federal property from "nuisances" constituted a needful regulation respecting federal land, even though the nuisances in question arose on private property.

Over thirty years later, the Supreme Court resolved a far easier question concerning Congress' Property Clause authority to regulate activity on non-federal land. In *United States v. Alford*<sup>131</sup> the defendant built a fire on private property adjacent to federal lands and failed to extinguish the fire before leaving the area, thereby violating a federal law.<sup>132</sup> The Court, in a brief opinion by Justice Holmes, held that Congress had the statutory authority to prohibit activity on privately owned land that imperiled federal

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proposition that the police power is not subject to any definite limitations, but is coextensive with the necessities of the case and the safeguard of the public interest." *Camfield*, 167 U.S. at 524.

126. *Camfield v. United States*, 167 U.S. at 525.

127. *Id.* (emphasis added).

128. *Id.*

129. *Id.* at 526.

130. *Id.*

131. 274 U.S. 264 (1927).

132. The Act of June 25, 1910, ch. 431, § 6, 36 Stat. 855, 857 states: "Whoever shall build a fire in or near any forest, timber, or other inflammable material upon the public domain ... shall before leaving said fire, totally extinguish the same; and whoever shall fail to do so shall be fined not more than one thousand dollars, or imprisoned not more than one year or both." *Id.* at 266-67 (emphasis added).

property.<sup>133</sup> Finding that the purpose of the statute was to prevent economically disastrous forest fires on federal lands,<sup>134</sup> the Court reasoned that "(t)he danger [to the federal lands] depends upon the nearness of the fire, not upon the ownership of the land, where it is built."<sup>135</sup> The *Alford* Court therefore upheld Congress' authority under the Property Clause to regulate activity on private property in order to protect adjacent federal lands from physical harm.<sup>136</sup>

The *Alford* and *Camfield* decisions represent the only pronouncements by the Supreme Court to date on the extent of the federal government's power to regulate *non-federal property* as an incident of its authority under the Property Clause. Although the constitutional principles at issue in *Alford* and *Camfield* remained dormant for many years after these decisions, these principles are now being reexamined as a result of the Supreme Court's most recent decision construing the scope of federal authority under the Property Clause.

### 3.The Supreme Court's Latest Word on the Property Clause: Expansion of Federal Power under *Kleppe v. New Mexico*

The Supreme Court most recently examined the scope of congressional power under the Property Clause in *Kleppe v. New Mexico*.<sup>137</sup> The issue in that case concerned the validity of a fed-

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133. *Id.* at 267.

134. *Id.*

135. *Id.*

136. *Alford* was recently followed in *United States v. Lindsey*, 595 F.2d 5 (9th Cir. 1979). In *Lindsey*, two persons rafting down the Snake River in Idaho set up camp and built a fire along a section of the river surrounded by National Forests. The campsite was located on dry land below the river's high water mark and was therefore legally on the state-owned river bed. Appellees were charged with violating regulations issued by the Secretary of Agriculture prohibiting camping and the building of fires near the National Forests without permits. The Court upheld the validity of the regulations. Stating that the Property Clause "grants to the United States power to regulate conduct on non-federal land when reasonably necessary to protect, adjacent federal property or navigable waters." *Id.* at 6. While the activity in question took place on state-owned land, and not on privately owned property as in *Alford*, the court made no reference to this distinction, and held that *Alford* controlled the case. *Id.* Similarly, in *United States v. Arbo*, 691 F.2d 862 (9th Cir. 1982) the National Forest Service inspected Appellee Arbo mining operation, located on *state land* within a National Forest, to verify Appellee's compliance with certain federal regulations. The court found that the inspection was reasonably necessary to ensure that private activity did not pose a fire or health risk to the adjacent federal land, and therefore held that the inspection was within the agency's power under the Property Clause. *Id.* at 865.

137. 426 U.S. 529 (1976).

eral statute that established certain federal lands in the West as a refuge for wild horses and burros.<sup>138</sup> The state of New Mexico refused to recognize the authority of the federal government to manage the wild animals on the public lands within its boundaries.<sup>139</sup> Subsequently, the New Mexico Livestock Board, acting pursuant to state law,<sup>140</sup> seized nineteen wild burros from federal property and sold the animals at a public auction.<sup>141</sup> In response to the State's action, the Federal Bureau of Land Management<sup>142</sup> asserted jurisdiction under the federal statute at issue and demanded the return of the seized animals.<sup>143</sup> The State filed suit challenging the constitutionality of the statute, claiming that the federal government lacked authority to control wild animals on public lands unless the animals were moving in interstate commerce or causing damage to federal lands.<sup>144</sup> In a unanimous

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138. The Wild Free-Roaming Horses and Burros Act, 85 Stat. 649, 16 U.S.C. §4 1331- 1340 (1982) was enacted in 1971 to protect all unbranded and unclaimed horses and burros on public lands of the United States "from capture, branding, harassment, or death." 16 U.S.C. 1331 (1982). The Act provides that all such horses and burros on the public lands administered by the Secretary of Agriculture or by the Secretary of the Interior are committed to the jurisdiction of the respective Secretaries, who are "directed to protect and manage [the animals] as components of the public lands ... in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands." 16 U.S.C. § 1333 (1982). The Act also prohibits private land owners from harming or capturing such animals that stray onto private lands and requires instead that landowners notify the federal authorities to have the animals removed from private land. 16 U.S.C. 1334 (1982). *See Kleppe*, 426 U.S. at 531-32.

139. *Kleppe*, 426 U.S. at 533.

140. The New Mexico Estray Law, N.M. STAT. ANN. § 47-14-1-47-14-10 (1966). grants to the New Mexico Livestock Board the authority to regulate, impound and sell estray horses, mules, and asses in the state.

Under the New Mexico law, an estray is defined as:

Any bovine animal, horse, mule or ass, found running at large upon public or private lands, either fenced or unfenced, in the state of New Mexico, whose owner is unknown in the section where found, or which shall be fifty (50) miles or more from the limits of its usual range or pasture, or that is branded with a brand which is not on record in the office of the cattle sanitary board of New Mexico ....

N.M. STAT. ANN. § 147-14-1 (1966). The New Mexico Livestock Board is the state agency charged with the duty of enforcing the New Mexico Estray Law.

141. *Kleppe*, 426 U.S. at 534.

142. The Bureau of Land Management (BLM) is a division of the Department of the Interior charged with the duty of administering the public domain, i.e., those lands owned by the federal government which are not reserved and protected for a special purpose. *See generally* 43 U.S.C. §§ 1-25b (1982); *See also* Reorg. Plan No. 3 of 1946, § 403, eff. July 16, 1946, 11 F.R. 7876, 60 Stat. 1100.

143. *Kleppe*, 426 U.S. at 534.

144. *Id.* at 533.

opinion, the Supreme Court sustained the federal statute as a valid exercise of congressional power under the Property Clause, and held that it superseded the conflicting state Estray Law.<sup>145</sup>

In its brief in *Kleppe*, the State contended that Congress possessed only two types of power under the Property Clause: (1) the power to *protect* federal property; and (2) the power to dispose of and make incidental rules regarding the use of federal property.<sup>146</sup> The Court dismissed the State's contention, finding that while it had previously recognized Congress' power to prevent damage to federal property,<sup>147</sup> it had never *limited* Congress' power to such situations.<sup>148</sup> The Court stated that damage to federal land was a *sufficient*, but not a *necessary*, basis for congressional regulation under the Property Clause.<sup>149</sup>

The Court also held that the federal government's regulatory power extended beyond disposing of its property and making incidental rules as to its use. The Court instead adopted a more expansive construction of federal power under the Property Clause,<sup>150</sup> stating that the Clause in broad terms gave Congress the power to determine what were "needful" rules "respecting" the public lands.<sup>151</sup> The opinion noted that the regulation of federal lands under the Property Clause was entrusted primarily to the judgment of Congress,<sup>152</sup> and declared that federal power over the public land was without limitations.<sup>153</sup> The Court reaffirmed *Camfield's* recognition of a federal-power analogous to the state police power,<sup>154</sup> stating that "Congress exercises the powers both of a proprietor and of a legislature over the public domain."<sup>155</sup> While the Court acknowledged that the Property Clause did not authorize an exercise of general federal control over state public policy, it nonetheless asserted that the Clause did permit "an exercise of the complete power which Congress has over particu-

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145. *Id.* at 540-41.

146. *Id.* at 536.

147. *See, e.g.*, *Hunt v. United States*, 278 U.S. 96 (1928), and other cases cited *supra* note 100.

148. *Kleppe*, 426 U.S. at 537.

149. *Id.*

150. *Id.* at 539.

151. *Id.*

152. *Id.* at 536.

153. *Id.* at 539.

154. *Id.* at 540. *See supra* text and notes at notes 125-30.

155. *Kleppe*, 426 U.S. at 540.

lar public property entrusted to it."<sup>156</sup> In the unanimous opinion of the Court, that complete power included the authority to protect wild animals on those lands.<sup>157</sup>

The overwhelming approval of the Wild Free-Roaming Horses and Burros Act in *Kleppe* marks a significant expansion of federal power in Property Clause jurisprudence. In contrast to previous Supreme Court decisions upholding congressional exercise of the Property power,<sup>158</sup> the nexus between the legislation in *Kleppe* and the federal lands themselves is relatively indirect.<sup>159</sup> By upholding Congress' authority to act as both proprietor and legislature with respect to federal property,<sup>160</sup> the Court in *Kleppe* sus-

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156. *Id.* (quoting *United States v. San Francisco*, 310 U.S. at 30).

157. *Id.* at 540-41. The Court acknowledged that the government's assertion of Property Clause authority was not based on any claim of ownership of the wild animals on the federal land. *Kleppe*, 426 U.S. at 537 n.8. Rather, the Court adopted the federal government's argument that a sufficient nexus existed between the protection of the wild animals and the federal property itself to sustain the Act under the Property Clause. *See infra* text and notes at notes 163-66.

158. *Compare, e.g., Utah Power & Light Co. v. United States*, 243 U.S. 389 (1916) (right of government to require power company to obtain permit to maintain powerhouses, pipelines, diversion dams, transmission lines and other subsidiary structures on federal forest reservations upheld); *United States v. California*, 332 U.S. 19 (1947) (right of government to regulate removal of gas and other mineral deposits from sea beds beneath coastal waters upheld); *Light v. United States*, 220 U.S. 523 (1911) (right of government to reserve federal lands as national forest and prohibit grazing thereon upheld).

159. Note. *Constitutional Law-Expansion of National Power Under the Property Clause: Federal Regulation of Wildlife: Kleppe v. New Mexico*, 12 LAND & WATER L. REV., 181, 190 (1977). Congress' strained attempts to create a nexus between the federal property and the protection of wild horses and burros is manifest in the wording of the statute, which declares that in order to achieve its purpose of protecting the animals from capture, branding, harassment, and death, "they are to be considered in the area where presently found as an integral part of the natural system of the public lands." 16 U.S.C. § 1331 (1982) (emphasis added). Section (3a) of the Act also provides that the Secretaries of Agriculture and Interior are "directed to protect and manage [the animals] as components of the public lands ... in a manner that is designed to achieve and maintain a thriving natural ecological balance of the public lands." 16 U.S.C. § 1333(a) (1982) (emphasis added). The Act also states that the animals preserved in their natural habitats "contribute to the diversity of life forms within the Nation and enrich the lives of the American people," and are "living symbols of the historic and pioneer spirit of the West." 16 U.S.C. § 1331 (1982).

In a case decided five years after *Kleppe*, the Eighth Circuit Court of Appeals went so far as to interpret *Kleppe* as holding that "any conduct taking place on United States land may be subject to congressional authority regardless of its relationship to that land." *Minnesota v. Block*, 660 F.2d 1240, 1248 n.16 (1981) (emphasis added). For a further discussion of *Block*, *see supra* text and notes at notes, 194-232.

160. *See supra* text at note 155.

tained federal legislation which more closely resembled a general police power regulation than a typical land use regulation.<sup>161</sup>

*C. Current Scope of Federal Property Power--Questions in the Wake of Kleppe*

While the Supreme Court's decision in *Kleppe* gives Congress a seemingly limitless mandate to regulate activity on federal property, the decision expressly reserved judgment on a more difficult question concerning federal Property Clause power: that is, the extent to which Congress may regulate activity occurring: *beyond the boundaries of federal property*.<sup>162</sup> The *Kleppe* Court, acknowledging its previous decision in *Camfield*, stated in dicta that "the power granted by the Property Clause is broad enough to reach beyond territorial limits."<sup>163</sup> Since the Court chose not to address the issue directly, however, the scope of Congress' authority to regulate non-federal land under the Property Clause remains unclear.

A close examination of the Court's language in *Kleppe* suggests that the Court itself may be uncertain as to Congress' authority to regulate non-federal property. The *Kleppe* Court suggested two possible interpretations of its earlier holding in *Camfield*. On the one hand, the Court cited *Camfield* as sustaining the constitutionality of Congress' proscription of fences on private property "when the regulation is for the *protection of the federal property*."<sup>164</sup> On the other hand, it cited *Camfield* as upholding federal legislation "necessary for the *protection of the public, or of the intending settlers [of the public lands]*."<sup>165</sup> In the context of the facts of the *Camfield* case, these two statements have entirely different meanings and reflect a persisting judicial uncertainty as

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161. The Court in *Kleppe* clearly distinguished Congress' powers under the Property Clause from its powers under the Cession Clause. *Kleppe*, 426 U.S. at 542. The Court thus found that federal legislative jurisdiction under the Property Clause is not *exclusive*, so as to exclude completely the states' police power authority, unless there is a cession by the state. *Id.* at 543. See *supra* text and notes at notes 77-83. However, even when there is no cession, the range of subject matter upon which Congress may legislate under the Property Clause is considerably broadened under *Kleppe* to include many areas traditionally reserved to the state under its police power. *Id.* at 545.

162. *Kleppe*, 426 U.S. at 546-47.

163. *Id.* at 538.

164. *Id.*

165. *Id.* (quoting *Camfield*, 167 U.S. at 525).

to what in fact Congress was "protecting" when it enacted the Unlawful Enclosures Act at issue in that case.<sup>166</sup>

The distinction between these two interpretations, though subtle, is extremely important. The defendants' fences in *Camfield* posed absolutely no threat of physical harm to the federal lands. Therefore, the legislation at issue in *Camfield* clearly cannot be viewed as a regulation to protect the lands from *physical harm*.<sup>167</sup> Rather, Congress' proscription against enclosures of federal property was designed to further its policy of encouraging the settlement of those federal lands.<sup>168</sup> In light of this declared federal land settlement policy, the Court found that the erection of a fence around federal property constituted a nuisance.<sup>169</sup> Congress' proscription of such enclosures thereby transformed an otherwise lawful act into an enjoined nuisance.<sup>170</sup> While there is language in the *Camfield* opinion that suggests that the Supreme Court was upholding only Congress' power to protect federal property pursue, the facts of the case make clear that the Court in fact sustained Congress' authority to regulate non-federal property to protect federal policy pertaining to federal property.<sup>171</sup>

As the confusing language in *Kleppe* suggests, however, the Supreme Court has not expressly recognized this distinction between the physical protection of federal lands pursue and the protection of congressional policy regarding those lands. In cases subsequent to *Camfield*, the Court has generally cited that cases as merely sustaining Congress' power to protect federal property from physical harm.<sup>172</sup> As discussed above, however, a close reading of *Camfield* suggests that it confers upon Congress the broader power to regulate conduct on non-federal property that interferes with a specifically designated purpose for the use of

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166. See *supra* text and notes at notes 114-30.

167. Cf. *Hunt v. United States*, 278 U.S. 96 (1928); *United States v. Alford*, 274 U.S. 264 (1927); *New Mexico Game Comm'n v. Udall*, 410 F. 2d 1197 (9th Cir. 1968); *United States v. Lindsey*, 595 F. 2d 5 (9th Cir. 1979).

168. See *supra* text and notes at notes 120-24.

169. See *supra* text and notes at notes 125-27.

170. Gaetke, *The Boundary Waters Canoe Area Wilderness Act of 1978: Regulating Non-Federal Property Under the Property Clause*, 60 OREGON L. REV. 157, 172 (1981).

171. See generally *Id.* at 169-174.

172. The Supreme Court's Property Clause decisions have repeatedly cited the literal language of *Camfield* for the proposition that Congress may legislate for the protection of federal lands from harmful activity occurring beyond the boundaries of the federal lands. See *Kleppe v. New Mexico*, 426 U.S. at 538; *Hunt v. United States*, 278 U.S. at 100; *United States v. Alford*, 274 U.S. at 267.

federal property. This interpretation of *Camfield*, if not consistent with all of the Supreme Court's language in *Kleppe*, is at least consistent with the spirit of *Kleppe's* expansive construction of federal authority under the Property Clause.

Recently, two circuit court decisions have adopted this argument and have upheld Congress' authority to regulate non-federal property in order to further the declared purpose of specially reserved federal lands. These decisions suggest that the Supreme Court will ultimately be forced either to endorse this view of Congressional power or to reconcile some serious ambiguities in its prior Property Clause decisions.

### III. EXPANSION OF THE PROPERTY CLAUSE AFTER *KLEPPE*: CONGRESS' POWER TO REGULATE NON-FEDERAL LAND TO FURTHER THE DESIGNATED PURPOSE OF FEDERAL PROPERTY

Since the Supreme Court's decision in *Kleppe* in 1976, the Eighth Circuit Court of Appeals has upheld the federal government's authority to regulate non-federal property in and around national parks and wilderness areas on two occasions. Both decisions were heavily influenced by the Supreme Court's expansive reading of the Property Clause in *Kleppe*, even though the Court in *Kleppe* expressly reserved the question of whether Congress could regulate conduct on non-federal lands. These two circuit court decisions permit Congress to regulate non-federal property in order to effect Congress' policy regarding the use of federally protected areas, thereby expressly adopting the rule implicitly recognized by the Supreme Court in *Camfield*.

#### A. *United States v. Brown*

The Eighth Circuit Court reached the first of its recent decisions regarding the Property Clause in *United States v. Brown*.<sup>173</sup> In that case, the defendant was convicted for duck hunting on state waters<sup>174</sup> within Voyageur's National Park in violation, of National Park Regulations.<sup>175</sup> At the time and place of the viola-

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<sup>173</sup> 552 F.2d 817 (8th Cir. 1977).

<sup>174</sup> Although the waters in question were located within the boundaries of the park, the Court found them to be "owned" by the State of Minnesota. In the deed by which the state conveyed the lands in the park to the federal government, "all water power rights" were expressly reserved to the state. *Brown*, 552 F.2d at 820 n.3., For a further discussion of state "ownership" of waters, see *infra* text and notes at notes 260, 320-21.

<sup>175</sup> At the time of the infraction, 36 C.F.R. §§ 2.11 and 2.32 (1975) prohibited possession of a loaded firearm and hunting of wildlife in national parks, respectively.

tions, duck hunting by licensed hunters was permitted under state law.<sup>176</sup> The defendant challenged the validity of the federal regulations, arguing that the State of Minnesota had not ceded jurisdiction over the waters in the park to the United States,<sup>177</sup> thereby depriving the federal government of constitutional jurisdiction over those waters.<sup>178</sup> The court of appeals sustained the defendant's conviction, holding that the state had in fact ceded jurisdiction over the waters in the park to the federal government.<sup>179</sup> The court further held that *even in the absence of a cession*, the regulation was a valid exercise of federal authority under the Property Clause.<sup>180</sup>

The *Brown* court acknowledged that the case presented the specific issue that the Supreme Court had expressly declined to address in *Kleppe*: namely, the scope of Congress' constitutional authority over non-federal property.<sup>181</sup> Nevertheless, the *Brown* court referred to *Kleppe* on several occasions throughout its opinion to support its holding. For example, the court observed that determinations under the Property Clause were entrusted primarily to the judgment of Congress, and noted that reviewing courts generally have given the clause an expansive reading.<sup>182</sup> It also noted *Kleppe's* approval of Congress' power to regulate non-federal property when such regulation is necessary for the "protection of federal property."<sup>183</sup>

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176. *Brown*, 552 F.2d at 819.

177. *Id.*

178. *Id.* See *supra* text and notes at notes 51-83.

179. Even though Minnesota did not *expressly* cede jurisdiction to the government, the court found that the "state's active participation in the creation of Voyageurs Park with the knowledge that Congress intended that hunting would be prohibited throughout the park was tantamount to a cession of jurisdiction over the lands and waters within the park boundaries." *Brown*, 552 F.2d at 821. The court also referred to a state statute that expressed Minnesota's concurrence with Congress' declared purpose in authorizing the creation of the park and its intent to preserve the outstanding scenery, geologic conditions and waterway system which constituted a part of the historic route of the Voyageurs. *Id.*

180. *Id.* The court wrote: "The presence or absence of federal jurisdiction obtained through a state's consent or cession is unrelated to Congress' powers under the Property Clause." *Id.* (citing *Kleppe v. New Mexico*, 426 U.S. at 542-43).

181. *Id.* at 822. The Court framed the issue before it as "whether the Property Clause empowers the United States to enact regulatory legislation *protecting federal lands from interference* occurring on non-federal public lands or, in this instance, waters." *Id.* at 822 (emphasis added).

182. *Id.*

183. *Id.* at 822.

The *Brown* court, however, made clear that its decision was not based upon Congress' authority to protect federal lands per se. Nowhere in its decision did the *Brown* court suggest that the Park Regulations at issue were designed to provide physical protection for the federal lands within the Park. Rather, the court indicated that the proscription of hunting was enacted to promote the federal policy underlying the creation of the park. It noted the district court's determination<sup>184</sup> that hunting on park waters could "significantly interfere with the use of the park and the purpose for which it was established."<sup>185</sup> The court then asserted that the government's authority to regulate non-federal property need not be limited to protecting federal property per se, stating that, "we view the congressional power over federal lands to include the authority to regulate activities on non-federal public waters *in order to protect wildlife and visitors on the lands.*"<sup>186</sup>

The court provided only a summary explanation of the constitutional grounds for this exercise of federal power. Aside from its reference to the expansive language in *Kleppe*,<sup>187</sup> the court cited as authority only the declaration in *Camfield* that the federal government "doubtless has a power over its own property analogous to the police power of the several states."<sup>188</sup> The Court found statutory authority for the administrative regulations in section three of the National Park Service Act, which allows the Secretary of the Interior to promulgate such "rules and regulations as he may deem necessary or proper for the use and management of the parks."<sup>189</sup> The court held that in light of the congressionally declared policy for the establishment of the National Parks,<sup>190</sup> the regulations at issue were "valid prescriptions designed to promote the purposes of the federal lands within the National Park."<sup>191</sup>

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184. 437 F. Supp. 56 (D. Minn. 1976).

185. *Brown*, 552 F.2d at 822.

186. *Id.* This language is similar to the Supreme Court's statement in *Camfield* that the exercise of federal power over non-federal property is appropriate when "necessary for the protection of the public, or of intending settlers." *Camfield* 167, U.S. at 525. The regulations in both cases are aimed at protecting federal policy regarding the federal lands, not the lands themselves.

187. See text and notes at notes 181-83.

188. *Brown*, 552 F.2d at 822 (quoting *Camfield* 167 U.S. at 525).

189. 16 U.S.C. § 3 (1982).

190. The court noted that the fundamental purpose of the national parks, including Voyageurs Park, is to "conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." *Brown*, 552 F.2d at 822 (quoting 16 U.S.C. § 1 (1982)).

191. *Brown*, 552 F.2d at 822-23.

Under the rule articulated in previous Supreme Court cases,<sup>192</sup> the court stated that such a valid exercise of the Property Clause power must necessarily override the conflicting state law permitting hunting within the park.<sup>193</sup>

*B. State of Minnesota by Alexander v. Block*

Four years later, the Eighth Circuit reached a similar decision in *State of Minnesota by Alexander v. Block*.<sup>194</sup> In *Block*, the State of Minnesota challenged the constitutionality of portions of a federal statute<sup>195</sup> that restricted motorized travel on non-federal lands and waters located within the Boundary Waters Canoe Area (BWCA), a national wilderness area<sup>196</sup> in Northern Minnesota. The BWCA had long been a source of conflict between state and federal regulatory authority<sup>197</sup> as a result of the area's bifurcated state/federal ownership structure. Of the more than one million acres within the BWCA, 160,000 acres are comprised of navigable lakes and streams, the beds of which are owned by the State of Minnesota.<sup>198</sup> In addition, the State owns 121,000 acres of land, while the United States owns approximately 192,000 acres of land.<sup>199</sup>

Throughout most of its history, the BWCA had been managed jointly by the state and federal governments<sup>200</sup> under an

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192. *See supra* text and notes at notes 110-12.

193. *Brown*, 552 F.2d at 823.

194. 660 F.2d 1240 (8th Cir. 1981), *cert. denied*, 456 U.S. 944 (1982).

195. The Boundary Waters Canoe Area Wilderness Act of 1978, Pub. L. No. 95-495, 92 Stat. 1649 (1978) (hereinafter cited as BWCAW Act).

196. The BWCA was included as part of the National Wilderness Preservation System established under the Wilderness Act of 1964, 16 U.S.C. §§ 1131-36 (1976). *See supra* note 5. .

197. *See, e.g.*, *Izaak Walton League of America v. St. Clair*, 313 F. Supp. 1312 (1970), 55 F.R.D. 139 (1972), 353 F. Supp. 698 (1973), 497 F.2d 849 (8th Cir. 1974), *cert. denied*, 419 U.S. 1009 (1974).

198. *Block*, 660 F.2d at 1247. The network of lakes and streams within the BWCA are "navigable waters of the United States," based on their use as a trade route by canoe traveling fur traders. *See* Brief of Appellees Sierra Club at 40, *Minnesota v. Block*, 660 F.2d 1240 (8th Cir. 1981) *cert. denied*, 456 U.S. 944 (1982) [hereinafter cited as Brief of Sierra Club]. As such, they are subject to Congress' regulatory authority over navigable waters pursuant to the federal commerce power, *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189 (1824).

199. *Block*, 660 F.2d at 1247. Private parties own approximately 7300 acres of land in the BWCA. *Id.* at n.12.

200. The BWCA has been the subject of extensive legislation enacted by both the state and federal governments. *See Block*, 660 F.2d at 1245-48. For a thorough recounting of the history of legislative entrapments pertaining to the BWCA. *see Izaak Walton League of America v. St. Clair*, 353 F. Supp. at 702-07.

arrangement whereby the federal government generally regulated motorized travel over the federal lands within the area, and the state generally retained jurisdiction over the waters.<sup>201</sup> While

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201. As a general rule, federal regulations enacted before passage of the BWCAW Act in 1978 avoided extending the Secretary's authority to non-federal lands or waters. For example, a 1965 regulation attempting to limit motor travel in the BWCA was worded as follows:

No motor or other mechanical device capable of propelling, a watercraft through water shall be transported across National Forest land except over routes designated by the Chief, Forest Service, who shall cause a list and map of all routes so designated and any special conditions governing their use to be maintained for public reference.

36 C.F.R. § 251.85 (1965) (emphasis added). Thus, the Secretary regulated motorized travel on *federal lands* and, based upon control of land access to certain waters, the motorized use of those waters. Statement of the Commissioner of National Resources Joseph N. Alexander Regarding the State of Minnesota's Litigation Concerning Assertion by the Federal Government of Jurisdiction Over Certain of the Public Water, Located Within the Superior National Forest, at 1 n.1 [hereinafter cited as Statement of the Commissioner of Natural Resources]. In accordance with this limit on federal regulatory authority, jurisdiction over the waters within the BWCA prior to 1978 was vested in the State. In its Management Plan for the BWCA, the Department of Agriculture stated:

Control over water use on the International Boundary waters is of concern to both the U.S. and Canada .... Jurisdiction over surface use is shared by the State of Minnesota and the Province of Ontario in Canada.

Control over surface uses of the waters further inland is vested in the State. Particularly the Department of Natural Resources.

U.S. Dept. of Agriculture, Forest Service, Boundary Waters Canoe Area Management Plan and Environmental Statement 136-37 (1974) (emphasis added). The State, pursuant to rules promulgated by the Department of Natural Resources, regulated motorized use of both the surface of public waters and state lands in the BWCA. Under these regulations, the state generally prohibited motor use except in those areas permitted by the Secretary of Agriculture's regulations. See Mn. N.R. 1000, (b)(2)(aa). Thus, prior to the enactment of the BWCAW Act, jurisdiction over the area was generally shared by the federal and state governments as follows: the Secretary of Agriculture exercised jurisdiction over federal property only, and Minnesota exercised jurisdiction over state land and the public waters within the area. Statement of the Commissioner of Natural Resources. *supra* note 201, at 1.

However, as intervenor/appellee Sierra Club noted in its brief in *Block*, the federal government did in fact exercise regulatory authority over Waters within the BWCA in certain circumstances. Brief of Sierra Club, *supra* note 198, at 8-9. See, e.g., Shipstead-Nolan Act, Act of July 10, 1930. ch. 881, 46 Stat. 1020 (codified at 16 U.S.C. § 577-577b (1982). which prohibits logging within 400 feet of any lake shore within the BWCA and restricts the alteration of the water levels within the canoe area to protect the federal lands from flooding. See also 1899 Rivers and Harbors Act, 33 U.S.C. § 401, 403 (1976); The Motorboat Act of 1940, 46 U.S.C. § 526-526(u) (1976 & Supp. IV 1980); The Federal Boat Safety Act of 1971, 46 U.S.C. §§ 1451-1489 (1974 & Supp. V 1981); and the 1972 Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1976 & Supp. V 1981). However, these latter statutes were merely general regulations pertaining to a wide range of navigable waters and did not specifically regulate activity on waters within the BWCA. Their impact on the state's ability to regulate motorized travel on those waters, therefore, was only indirect.

seemingly simple, this system created a great deal of confusion and litigation.<sup>202</sup> This confusion was compounded in 1964, when the BWCA was included in the national wilderness system under the Wilderness Act of 1964.<sup>203</sup> That Act generally prohibited the use of motorized vehicles in all national wilderness areas, but included a special proviso for the BWCA, permitting the continued use of motorboats in that area.<sup>204</sup>

In response to the confusion generated by this proviso and the broader concern for preserving the wilderness character of the BWCA,<sup>205</sup> Congress enacted the Boundary Waters Canoe Area

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202. *Block*, 660 F.2d at 1246. *See supra* text and note at note 197.

203. Pub. L. No. 88-577 (codified at 16 U.S.C. §§ 1131-1136 (1982)).

204. The general prohibition of motorized travel in national wilderness areas is contained in 16 U.S.C. § 1133(c) (1982). The BWCA exception was contained in 16 U.S.C. § 1133(d)(5) (1976), which provided as follows:

Other provisions of this chapter to the contrary notwithstanding, the management of the Boundary Waters Canoe Area . . . shall be in accordance with regulations established by the Secretary of Agriculture in accordance with the general purpose of maintaining, without unnecessary restrictions on other uses, including that of timber, the primitive character of the area, particularly in the vicinity of lakes, streams, and portages; *Provided*, that nothing in this chapter shall preclude the continuance within the area of any already established use of motorboats.

16 U.S.C. § 1133(d)(5) (1976).

Pursuant to this mandate, the Secretary of Agriculture issued a management plan for the area designating specific routes for motorized travel within the BWCA. *See* 36 C.F.R. § 251.85 (1965).

205. *Block*, 660 F.2d at 1246. Sections one and two of the BWCAW Act manifest Congress' intent to promote the use of the BWCA as a wilderness reserve. The Act states as follows:

#### FINDINGS

SECTION 1. The Congress finds that it is necessary and desirable to provide for the protection, *enhancement, and preservation of the natural values of the lakes, waterways, and associated forested areas* known as the Boundary Waters Canoe Area, and *for the orderly management of public use and enjoyment of that area as wilderness*, and of certain contiguous lands and waters, while at the same time *protecting the special qualities of the area as a natural forest-lakeland wilderness ecosystem* of major esthetic, cultural, scientific, recreational and educational value to the Nation.

#### PURPOSES

SEC. 2. It is the purpose of this Act to provide for such measures respecting the areas designated by this Act as the Boundary Waters Canoe Area Wilderness and Boundary Waters Canoe Area Mining Protection Area as will-

(1) *provide for the protection and management of the fish and wildlife of the wilderness so as to enhance public enjoyment and appreciation of the unique biotic resources of the region,*

(2) protect and enhance the natural values and environmental quality of the lakes, streams, shorelines and associated forest areas of the wilderness.

Wilderness Act of 1978 (BWCAW Act).<sup>206</sup> The Act specifically barred the use of motorboats and snowmobiles in all but certain limited portions of the wilderness area<sup>207</sup> thereby prohibiting motorized travel on hundreds of thousands of acres of both state and federal property.<sup>208</sup> While the Act stated that Minnesota would retain its jurisdiction over the waters within the BWCA, it prohibited the State from regulating those waters in a manner less stringent than that mandated by the Act.<sup>209</sup> The practical consequence of this proviso was to prohibit the state from allowing motorized travel in those areas protected by the federal statute.

The State challenged the constitutionality of those provisions of the federal statute that applied to non-federal lands and waters, arguing that they exceeded Congress' power Under the Property Clause.<sup>210</sup> The court, following the rule previously announced in

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- (3) maintain high water quality in such areas,  
(4) minimize to the maximum extent possible, the environmental impacts associated with mineral development affecting such areas,  
(5) prevent further road and commercial development and restore natural conditions to existing temporary roads in the wilderness, and  
(6) provide for the orderly and equitable transition from motorized recreational uses to non-motorized recreational uses on those lakes, streams, and portages in the wilderness where such mechanized uses are to be phased out under the provisions of this Act.

Boundary Waters Canoe Area Wilderness Act of 1978, Pub. L. No. 95-495, §§ 1-2, 92 Stat. 1649 (1978) (emphasis added).

206. *See supra* note 195.

207. Section 4(c) of the Act provides: "Effective on January 1, 1979, the use of motor boats is prohibited within the wilderness designated by this Act, and that portion within the wilderness of all lakes which are partly within the wilderness." These section provides a list of lakes upon which the use of motorboats is still permitted. The section also imposes restrictions on the size of motors permitted on those lakes exempted from the Act's general prohibition of motorboats. Section 4(e) of the Act prohibits the use of snowmobiles within the BWCA, except on two routes upon which the Secretary of Agriculture may choose to permit their use.

208. *Block*, 660 F.2d at 1244.

209. Specifically, § 15 of the Act provides:

The Secretary is authorized to promulgate and enforce regulations that limit or prohibit the use of motorized equipment on or relating to waters located within the wilderness in accordance with the provisions of this act: *Provided*, that nothing in this act shall be construed as affecting the jurisdiction or responsibilities of the state with respect to such waters, except to the extent that the exercise of such jurisdiction is less stringent than the Secretary's regulations promulgated pursuant to this section.

Boundary Waters Canoe Area Wilderness Act of 1978, Pub. L. No. 95-495, § 15, 92 Stat. 1649 (1978).

210. *Block*, 660 F.2d at 1244.

*United States v. Brown*,<sup>211</sup> held that the statute was a valid exercise of the federal government's Property Clause power, and sustained Congress' authority to regulate non-federal lands and waters within the BWCA.<sup>212</sup>

As in *Brown*, the Eighth Circuit Court acknowledged that it had to resolve the issue left open in *Kleppe*: that is, the scope of Congress' Property Clause power over activity occurring on non-federal property.<sup>213</sup> Once again, however, the court relied on the *Kleppe* decision for "guidance"<sup>214</sup> and noted that *Kleppe* demanded a broad construction of the Property Clause.<sup>215</sup> The court then examined the Supreme Court's decision in *Camfield v. United States*,<sup>216</sup> and concluded that Congress possessed the power to control conduct on non-federal property as an incident of its power to *protect* the public lands.<sup>217</sup> The court further stated that Congress had the power to dedicate federal lands for particular purposes.<sup>218</sup> The court then reasoned that this power, combined with Congress' power to protect federal property, necessarily extended to permit the "regulation of conduct on or off the public land that would *threaten the designated purpose of federal lands*."<sup>219</sup>

The court noted that its approval of this federal power was consistent with its earlier decision in *Brown*.<sup>220</sup> It stated that the purpose of the regulations in *Brown* extended beyond the "mere protection of the federal land from physical harm."<sup>221</sup> Rather, argued the court, the federal regulations sustained in *Brown*

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211. 552 F. 2d 817. *See supra* text and notes at notes 173-93.

212. *Block*. 660 F. 2d at 1244.

213. *Id.* at 1248.

214. *Id.*

215. *Id.* The Court interpreted *Kleppe* broadly, stating:

Prior to *Kleppe*, language in Supreme Court opinions supported the argument that Congress' power over federally owned property did not exceed the rights of an ordinary proprietor ... (T)he Court in *Kleppe*, however, rejected any narrow construction of the property clause, holding that Congress possessed full legislative/police power over activity occurring *on federal property*. In other words, any conduct taking place on United States land may be subject to congressional authority, regardless of its relationship to that land.

*Id.* n. 16.

216. 167 U.S. 518. *See supra* text and notes at notes 114-30.

217. *Block*, 660 F.2d at 1249.

218. *Id.* *See supra* text and notes at notes 101-07.

219. *Block*. 660 F.2d at 1249.

220. *Id.*

221. *Id.*

were necessary to prevent significant interference with the use of the park and the purposes for which it had been established.<sup>222</sup> On the basis of its decision in *Brown* and the Supreme Court's acknowledgment in *Camfield* and *Kleppe* of Congress' general power to regulate activity on non-federal property, the court concluded that Congress had the constitutional power to regulate conduct on non-federal land that interfered with the *intended purpose of federal property*.<sup>223</sup>

After setting out the constitutional limits of federal power under the Property Clause, the court turned to the statutory provisions at issue.<sup>224</sup> It acknowledged that Congress' judgment under the Clause was entitled to judicial deference.<sup>225</sup> The court then engaged in a limited two-step analysis of the challenged provisions, restricting its inquiry to the following two issues: (1) whether the statutory restrictions were enacted to protect the fundamental purpose for which the BWCA was reserved; and (2) whether they were reasonably related to that purpose.<sup>226</sup> Looking first at the purpose of the federal lands within the BWCA, the court found that Congress had enacted the BWCAW Act "with the clear intent of insuring that the area would remain as wilderness and could be enjoyed as such."<sup>227</sup> It further noted that Con-

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222. *Id.*

223. *Id.* Although the *Block* decision unequivocally sustained Congress' power to regulate activity on non-federal land to *promote the purposes of federal lands*, its interpretation of past Supreme Court decisions is perplexing. The Supreme Court came closest to articulating the *Block* holding in *Camfield*; however, the *Block* court overlooked the language in *Camfield* that best supports Congress' power to regulate beyond federal lands to further the purpose of those lands. *See supra* text and notes at notes 164-71. Rather, the *Block* court read *Camfield* as sustaining Congress' power to regulate non-federal lands only for purposes of protecting the public lands. *Block*, 660 F.2d at 1249. In so doing, the court ignored compelling Supreme Court language in support of its holding. Without this support from *Camfield*, the court's conclusion that Congress may regulate non-federal lands for policy reasons is based strictly on common sense reasoning:

Under this authority to protect public land *Congress' power must extend* to regulation of conduct on or off the public land that would threaten the designated purpose of federal lands. Congress clearly has the power to dedicate federal land for particular purposes. *As a necessary incident of that power, Congress must have the ability* to insure that these lands be protected against interference with their intended purposes.

*Id.* Therefore, while the Court's reasoning does make sense intuitively, it lacks the foundation of Supreme Court precedent that *Camfield* clearly provides.

224. *Id.* at 1250.

225. *Id.*

226. *Id.*

227. *Id.*

gress' specific proscription of the use of motorboats was enacted in order to enhance the wilderness character of the area.<sup>228</sup> The court reasoned that by restricting the use of motorized vehicles in the BWCA, Congress was bringing the BWCA in line with other areas in the wilderness system where, as a general rule, motorized travel is statutorily prohibited.<sup>229</sup> According to the *Block* court, the BWCAW Act reflected Congress' recognition that "the use of motor vehicles could not be reconciled with retaining a primitive wilderness area."<sup>230</sup> On the basis of the evidence presented, the court concluded that it was reasonable for Congress to restrict the use of motorboats to further the BWCA's wilderness

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228. *Id.* The Court quoted the comments of Congressman Fraser, who introduced the Bill in the House: "The bill has four major thrusts. First and most important, it seeks to end those activities that threaten the integrity of the BWCA's wilderness character by expressly prohibiting ... recreational uses of motorized watercraft and snowmobiles." *Id.*

It is arguable that the proscription of motorized travel protects the federal lands in the BWCA from physical and environmental harm. Indeed, Congress was presented with some testimony concerning the physically damaging effects of motorboat use in the BWCA. See Brief of Sierra Club, *supra* note 198, at 24. However, both the Sierra Club and the State of Minnesota agreed that the regulations were designed to further the purpose of the BWCA as a wilderness area, and were not primarily enacted to provide protection for the federal lands themselves. See, Brief of Sierra Club, *supra* note 198, at 23; Brief of Appellant State of Minnesota at 8, *Minnesota v. Block*, 660 F.2d 1240 (8th Cir. 1981), *cert. denied* 456 U.S. 944 (1982) (hereinafter cited as Brief of State of Minnesota). In its brief, the State attempted to obscure the importance of the motorboat regulations by arguing that they involved merely a question of "recreational preference." Brief of State of Minnesota at 8-11. While in a very literal sense the proscription of motorboats is merely a declaration of Congress' preference of the use of canoes to the use of motorboats, this is a shortsighted view of the statute's purpose. The legislative history of the provisions, which the State itself cites in its brief, makes clear that Congress' declaration of "recreational policy" is integrally related to preserving the wilderness character of the area. In his statement on the Senate Floor, Minnesota Senator Wendell Anderson said: "The question for the Senate ... is what kinds of recreational use to permit to maintain the BWCA as a lakeland wilderness." 124 Cong. Rec. 637 (1978), reprinted in LEGISLATIVE HISTORY OF THE BOUNDARY WATERS ACT OF 1978, at 143 (emphasis added). The State's brief also quoted Minnesota Congressman Vento, who stated that canoeists felt that motorboats "disrupted their wilderness experience;" Brief of State of Minnesota at 9 (quoting 124 CONG. REC. 4944 (1978), reprinted in LEGISLATIVE HISTORY OF THE BOUNDARY WATERS ACT OF 1978, at 119, 125); and Rep. Burton, who stated: "We are trying to give some tilt to the canoe wilderness experience in this magnificently beautiful part of our country." Brief of State of Minnesota at 10 (quoting 124 Cong. Rec. 4953 (1978) 6/578) (remarks of Rep. Burton), reprinted in LEGISLATIVE HISTORY OF THE BOUNDARY WATERS ACT OF 1978 at 128.

These remarks cited by the State in its brief belie its contention that Congress' decision to proscribe motorboats was merely an issue of recreational preference. While the primary purpose of the regulation was not to protect the federal lands in the BWCA, they were specifically enacted to promote the use of the area as a wilderness reserve.

229. *Block*, 660 F.2d at 1251 n.21. The Wilderness Act prohibits motor travel generally in all national wilderness areas. See *supra* text and note at note 204.

230. *Block*, 660 F.2d at 1251 n.21.

purpose<sup>231</sup> and upheld the restrictions under the Property Clause as "needful regulations respecting public lands."<sup>232</sup>

*C. Analysis of Brown and Block: A Victory for National Parks  
and Wilderness Areas*

The Eighth Circuit's decisions in *Brown* and *Block* signify an important development of federal power under the Property Clause. Using *Kleppe* as their starting point,<sup>233</sup> these opinions expand Congress' Property Clause authority beyond limits expressly sanctioned by the Supreme Court in two significant respects. First, they explicitly recognize the authority of Congress to regulate activity on non-federal property, even when that activity poses no threat of physical harm to federal property.<sup>234</sup> Second, the decisions recognize Congress' authority under the Property Clause to regulate all forms of non-federal land, state as well as private.<sup>235</sup>

These two developments should be of particular interest to the National Park Service and other federal agencies charged with the duty of administering and protecting government property. Historically, the Park Service has taken an extremely narrow view of its own constitutional authority to regulate activity on non-federal property. The *Brown* and *Block* decisions provide the Park Service with a constitutional basis for regulating activity on non-federal property when necessary to promote the purpose of the government lands under its domain. These two cases therefore signify an important victory for national parks, wilderness

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231. *Id.* at 1251. The court noted: "Testimony established that the sight, smell, and sound of motorized vehicles seriously marred the wilderness experience of canoeists, hikers, and skiers, and threatened to destroy the integrity of the wilderness."

232. *Id.* The court in *Block* also rejected the state's contention that the regulation of state land and waters constituted a violation of the Tenth Amendment. *Id.* at 1251-53. For a further discussion of the Tenth Amendment as a potential limit on federal power under the Property Clause, see *infra* text and notes at notes 305-32.

233. See *Brown*, 552 F. 2d at 822; *Block*, 660 F. 2d at 1246.

234. In the two previous cases in which the Supreme Court has upheld Congress' power to affect activity occurring on non-federal lands, the regulation was either designed to protect the federal lands from harm per se, *United States v. Alford*, 274 U.S. 264 (1927) (proscription of fires on land adjacent to federal property), or was phrased by the Court in terms of protecting the federal property, *Camfield v. United States* 167 U.S. 518 (1897) (proscription of fences on property adjacent to federal land). See *supra* text and notes at notes 114-36.

235. In both *Alford* and *Camfield*, the Supreme Court upheld Congress' regulation of activity occurring on private land adjacent to federal property. See *supra* text and notes at notes 114-36.

areas, and other federal enclaves which Congress has reserved for a specific public purpose.

1. The Federal Government's Past Timidity Regarding  
Regulation of Non-Federal Property Near Parks and Wilderness Areas

Historically, national parks, wilderness areas, and other specially protected federal enclaves have been vulnerable to adverse activity on non-federal lands located both within and adjacent to their boundaries.<sup>236</sup> Problems created by the incompatible use of non-federal lands within and around the parks have been compounded by the National Park Service's narrow interpretation of its own Property Clause powers<sup>237</sup> and by the limited statutory authority that Congress has granted to the Service to regulate non-federal property.<sup>238</sup> Among the numerous federal statutes establishing national parks, very few have granted the Park Service the express authority to regulate activity occurring on non-federal inholding.<sup>239</sup> In the few instances in which Congress has deemed such controls necessary, it has chosen to impose regulations on non-federal land indirectly--for example, by encouraging local government entities to pass their own zoning laws to help

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236. See *supra* text and notes at notes 1-18.

237. For many years, the Park Service adhered to the position that it could not regulate non-federal lands within a park in the absence of a cession by the state. Sax, *Helpless Giants*, *supra* note 1, at 245. See *supra* text and notes at notes 68-69. For example, Professor Sax recounts an incident in 1966 when the Service sought the advice of the Solicitor of the Department of the Interior regarding the constitutionality of imposing federal zoning on private, unceded lands within an area that had been authorized as a park. The Solicitor advised the Service that "in the absence of a cession by a state and acceptance by the United States of legislative jurisdiction over a specific area authorized for federal administration, the zoning statute suggested in your memorandum would be held unconstitutional." Sax, *Helpless Giants*, *supra* note 1, at 247-48.

Another telling example of the Park Service's hesitancy to regulate activity on nonfederal land was its response to a private entrepreneur's proposal to construct a 300-foot observation tower on private property overlooking the Gettysburg National Military Park. Although the Park Service and the President's Advisory Council on Historic Preservation both concluded that construction of the tower would have an adverse aesthetic impact on the park, the Solicitor of the Department of the Interior advised the Park Service that it lacked the constitutional authority to challenge the construction of the tower on private land. Sax, *Helpless Giants*, *supra* note 1, at 248. See also *Pennsylvania v. Morton*, 381 F. Supp. 293 (D.D.C. 1974); *Commonwealth v. Nat'l. Gettysburg Battlefield Tower Inc.*, 454 Pa. 193, 311 A. 2d 588 (1973).

238. Sax, *Helpless Giants*, 9, *supra* note 1, at 241-43.

239. *Id.*

protect the federal reserves.<sup>240</sup> With respect to activity occurring on non-federal land outside the boundaries of the national parks, Congress has given the Park Service virtually no regulatory authority whatsoever.<sup>241</sup>

As a result of the longstanding uncertainty regarding federal constitutional power to regulate activity on non-federal lands and Congress' reluctance to confer such authority statutorily, the Park Service's own policies regarding the regulation of incompatible activity on non-federal lands have been marked by timidity.<sup>242</sup> The Service has long ascribed to the view that adverse private activity within park boundaries is better eliminated by government acquisition than by regulation.<sup>243</sup> Therefore, the Park Service has pursued a policy of acquiring non-federal inholding either by negotiating with the owner or, as a last resort, by condemnation.<sup>244</sup> The effectiveness of this policy of acquisition however, has been limited by a chronic shortage of federal condemnation funds.<sup>245</sup> It has also failed to address problems arising

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240. *Id.* Some federal lands, principally national seashore areas, are governed by statutes containing "Sword-of-Damocles" provisions. *Id.* at 242. Under such statutes, the Secretary of the Interior relinquishes its power to acquire or condemn private inholding, within the parks, so long as local governments impose zoning requirements which meet standards promulgated by the Secretary, and so long as landowners comply with these zoning ordinances. While the Secretary has no *direct* regulatory control over private landowners under such provisions, he has the power to condemn inholdings if local zoning statutes fail to comply with agency standards, or if private landowners fail to comply with the local zoning requirements. *See, e.g.,* *Biderman v. Morton*, 497 F. 2d 141 (2d Cir. 1974). However, such provisions have proved ineffective in some instances due to the large number of local zoning variances granted. Sax, *Helpless Giants*, *supra* note 1, at 242. In response to this problem, the Department of the Interior has encouraged the Park Service to become actively involved in reviewing local ordinances and hearings to obtain variances in areas such as Fire Island in New York. Memorandum from Solicitor's Office, Dept. of the Interior, to the Regional Solicitor, Boston (Sept. 12, 1982).

241. Congress has granted the Park Service explicit authority to regulate lands outside the boundaries of a park on only one occasion; however, that authorization was repealed 70 years ago. Sax, *Helpless Giants*, *supra* note 1, at 244.

242. *See supra* text and note at note 237.

243. *See* Sax, *Helpless Giants*, *supra* note 1, at 243.

244. *Id.*

245. *Id.* at 242. *See also* Sax, *Buying Scenery*, *supra* note 11, at 713 n.15. This shortage of condemnation funds is further complicated by federal condemnation proceedings. Congress requires that advance permission be obtained from a congressional committee before a tract of land can be acquired. Consequently, non-federal lands in and around the national parks that threaten to be developed incompatibly must be identified well in advance of actual development. *Id.* at 713 n.21. Because the government uses its power of eminent domain only as a last resort, and because acquisition funds are often not authorized promptly enough to prevent incompatible private development, land values

from conduct occurring on non-federal land located *outside* the external boundaries of the parks. Despite the real and potential harm caused to parks by activity on non-federal lands immediately outside their boundaries, the Park Service in the past has failed to regulate activity on those adjacent lands.<sup>246</sup> Rather, its attempts to eliminate adverse activity occurring on lands outside the parks have been limited to negotiating with local governments to pass protective zoning legislation.<sup>247</sup> A clear articulation by the federal courts of Congress' authority to regulate non-federal land for the protection of national parks and wilderness areas would give the Park Service the judicial authority necessary to protect these resources more vigilantly.

## 2. *Brown* and *Block*: Constitutional Basis for a More Aggressive Federal Policy Regarding the Protection of National Parks and Wilderness Areas

The rationale of the *Brown* and *Block* decisions provides the constitutional basis for creating a more effective policy of regulating non-federal lands both within and immediately beyond the boundaries of specially designated federal land reserves. These decisions expand the federal government's power to protect its parks and wilderness areas in two crucial respects: first, they authorize Congress to regulate activity on non-federal property which interferes with the purpose for which those federal lands, were reserved; and second, they permit federal regulation of incompatible activity occurring on state-owned property.

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on the tracts being condemned often skyrocket before the land is actually acquired. Since the owner of condemned property receives the full development value of his land, the government's condemnation policy has the ironic economic effect of *encouraging* private landowners to develop their land before condemnation so that they receive full value for their land. *See id.* 716-27.

246. Sax, *Helpless Giants*, *supra* note 1, at 244.

247. *Id.* Such negotiations are authorized by Congress. *See, e.g.*, 16 U.S.C. § 460ff-460-3(f) (1982). Local governments, however, are ordinarily willing to impose fewer land use restrictions than the Park Service would prefer. In response to this problem, some of the newer park statutes contain provisions by which the federal government may offer subsidies and financial incentives to local, regional, and state governments to encourage passage of zoning laws designed to protect park lands. While these incentives are often attractive, local governments are not legally compelled to adopt federal recommendations. Federal dependence on local zoning, therefore, is not in itself sufficient to insure that the National Parks will be adequately protected. *See Sax, Buying Scenery*, *supra* note 11, at 715-16.

a. Regulation of Non-Federal Lands to Promote the Purpose of Adjacent Federal Property

The *Brown* and *Block* decisions recognize that federal land dedicated for a particular purpose must be protected from activity inconsistent with its intended use, as well as from conduct which threatens to harm the land physically. In its brief to the Circuit Court in *Block*, intervenor/appellee Sierra Club noted: "[L]and is of value in light of its dedicated purpose. Thus, the use of a building as a symphony hall or the use of an area as a Wilderness can be undermined as much by noise as by fire."<sup>248</sup> Given Congress' broad declaration of legislative purpose in creating the national park and wilderness systems, the holdings of *Brown* and *Block* considerably expand the federal government's ability to regulate non-federal property in and around such federal enclaves. For example, section one of the National Parks Organic Act proclaims that the purpose of the parks is to "conserve the scenery and the national historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."<sup>249</sup> Under *Brown* and *Block*, the federal government possesses the constitutional power to regulate non-federal property so long as such regulations served to foster any of the goals embodied in this statement of legislative purpose. In theory, this statutory provision authorizes Congress or the Park Service to enjoin any activity on private property that would mar the aesthetic beauty of a National Park or threaten the ecological balance of the wildlife living therein. This broad scope of constitutional discretion would encompass federal regulations to enjoin such aesthetic nuisances as the 300-foot observation tower overlooking Gettysburg National Military Park,<sup>250</sup> as well as environmental hazards such as the logging operation adjacent to Redwood National Park.<sup>251</sup> Similarly, in the Wilderness Act, which was enacted to secure the "benefits of an enduring resource of wilderness"<sup>252</sup> Congress defines "wilderness" in equally broad language. Section 1131(c) of the Act states that wilderness is an area where "earth and its community of life are untrammelled by

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248. Brief of Sierra Club, *supra* note 198, at 32.

249. 16 U.S.C. § 1 (1982).

250. *See supra* text and notes at notes 7, 237.

251. *See supra* text and note at note 6.

252. 16 U.S.C. § 1131(a) (1982).

man" and where "the imprint of man's work [is] substantially unnoticeable."<sup>253</sup> Wilderness is further defined as an area that has retained its "primeval character and influence," and that "has outstanding opportunities for solitude or a primitive and unconfined type of recreation."<sup>254</sup>

Under the doctrine announced in *Brown* and *Block*, such sweeping statements of legislative purpose regarding these federal reserves afford Congress wide parameters within which to prescribe regulations affecting non-federal property. For example, Congress' power to preserve the natural character of wilderness areas for public use presumably includes within its scope the authority to promote quietude;<sup>255</sup> to restrict modes of travel to "primitive methods;"<sup>256</sup> to preserve the opportunity for solitude on those lands;<sup>257</sup> and to protect the area from aesthetic intrusions.<sup>258</sup> Under the holdings of *Brown* and *Block*, the authority to preserve the wilderness qualities of a federal wilderness area extends to activity on non-federal property which interferes with Congress' purpose for the use of such a federal reserve.

#### b. Regulation of State Property

The *Brown* and *Block* decisions are of further significance inasmuch as they recognize for the first time Congress' Property Clause power to regulate activity occurring on *state property*.<sup>259</sup> The doctrine created by the Eighth Circuit in *Block* and *Brown* guarantees that the federal government *will* have the authority to impose restrictions on activity that threatens to cause harm to the federal lands or that interferes with congressional policy regarding their use, regardless of whether that activity occurs on federal, private, or state property. Furthermore, these decisions

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253. 16 U.S.C. § 1131(c) (1982).

254. *Id.*

255. Brief of Sierra Club, *supra* note 198, at 24. Quietude is recognized as a natural resource in the Minnesota Environmental Rights Law, MINN. STAT. § 116B.02 subd. 4 (1978). See *MPIRG v. White Bear Rod & Gun Club*, 257 N.W.2d 726 (Minn. 1977) (enjoining trap shooting, in part because of its impact on quietude),

256. See *supra* text at note 254.

257. *Id.*

258. See *supra* text at note 253.

259. See *supra* text and note at note 235. In addition to *Brown* and *Block*, federal regulation of activity on *State* property has been upheld under the Property Clause in two cases where the federal regulation was designed to protect federal property from *physical harm*. See *United States v. Arbo*, 691 F. 2d 862 (9th Cir. 1982); *United States v. Lindsey*, 596 F. 2d 5 (9th Cir. 1979). See *supra* note 136.

considerably broaden Congress' ability to regulate navigable lakes and rivers under the Property Clause, since title to the beds of navigable waters are generally retained by the respective states.<sup>260</sup>

Judicial approval of federal authority over state lands and waters will be particularly important in protecting the nation's parks and wilderness areas. Many of these federal reserves contain within their boundaries substantial amounts of state land and water.<sup>261</sup> For these areas, particularly national seashores, lakeshores, riverways, and other parks where regulation of the surface use of waters is vital to give effect to a federally designated purpose, federal authority to regulate state property is of special importance.<sup>262</sup>

For these reasons, the Eighth Circuit's decisions in *Brown* and *Block* must be viewed as a major step toward insuring that the

260. See generally *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845); *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet) 367 (1842).

261. There are 714,271 acres of *non-federal public lands* in the National Parks alone, and 1,300,958 in the entire National Park System administered by the Park Service. The following parks contain relatively large inholding of non-federal public lands:

<i>PARK</i>	# of Public Non-Fed. Acres	Total Acres
Apostle Islands NL	26,266	67,884
Appalachian NS Trail	27,337	101,464
Assateague Isl. NS	21,848	39,630
Biscayne NP	75,761	172,845
Canaveral NS	15,782	87,627
Cape Cod NS	15,643	44,596
Channel Islands NP	124,554	249,353
Cumberland Island NS	14,011	36,978
Fire Island NS	12,535	19,518
Golden Gate NRA	35,517	72,815
Gulf Islands NS	35,641	139,775
Kaluapapa NAP	10,729	10,902
Ozark NS Riverway	14,062	80,698
Redwood NP	34,678	110,130
Rio Grande NSR	2,150	9,600
St. Croix NSR	26,293	64,119
Santa Monica Mts. NRA	93,741	150,000
Sleeping Bear Dunes NL	14,157	69,452
Voyageurs NP	80,385	219,128

Source: NATIONAL PARK SERVICE, SUMMARY OF ACREAGES (Sept. 30, 1982).

262. Since title to the beds of navigable waters are generally retained by the state, *see supra* text and note at note 260, such areas generally contain large areas of state-owned property. See figures reported *supra* at note 260.

nation's parks and wilderness areas will be absolutely sheltered from adverse activity on nearby non-federal property. In the absence of such federal authority to effect Congress' legislative intent, the government's power to *create* parks and wilderness areas would be rendered meaningless. In light of the vast range of adverse conduct that has afflicted the nation's protected federal enclaves in the past and that may arise in the future, the Eighth Circuit Court's approval of Congress' authority to regulate non-federal property in *Brown* and *Block* was an appropriate and welcome expansion of the federal property power.

The need to promote the legislative purpose underlying the creation of these special enclaves, however, represents only one manifestation of Congress' broad power under the Property Clause. In the following section, this Article will explore the need to place some limits on Congress' authority to regulate federal lands.

#### IV. DEFINING THE LIMITS OF CONGRESS' PROPERTY CLAUSE POWER: RECONCILIATION OF PARK PROTECTION AND STATE SOVEREIGNTY

Because of the pervasiveness of the federal government's land holdings in the United States,<sup>263</sup> the Property Clause is a potential source of tremendous federal regulatory authority. The extension of Property Clause jurisdiction to neighboring non-federal lands renders this power even more expansive.<sup>264</sup> By using its vast land holdings as a basis for exercising such a broad regulatory power, Congress could severely limit the ability of many states, particularly those in the West, to retain any meaningful legislative control over both federal and non-federal lands within their boundaries.<sup>265</sup>

The prospect of such a devastating federal power underscores the importance of defining the limits of Congress' authority under

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263. *See supra* text and notes at notes 19-23.

264. In an amicus brief submitted on behalf of the State in *Minnesota v. Block*, 660 F. 2d 1240 (1981), the National Governors' Association argued that in Alaska, Nevada, Idaho, Utah, and Oregon, which are more than 50% owned by the United States, "there would be no land or water areas under the jurisdiction of the state that might not plausibly be subject to federal regulation" as a result of the *Block* decision. Brief of the National Governors Association as Amicus Curiae in support of the Petition for a Writ of Certiorari, *Minnesota v. Block*, 660 F. 2d 1240 (8th Cir. 1981), cert. denied, 456 U.S. 944 (1982).

265. *See supra* text and notes at notes 19-23.

the Property Clause. Before considering such limits, however, it is instructive to compare Congress' Property power to the scope of its authority under the Commerce Clause. Like the Property Clause, the Commerce Clause is a plenary grant of power to Congress. An examination of the judicial construction of the Commerce power suggests that the federal powers approved in *Brown* and *Block*, while broader than any powers ever upheld under the Property Clause, would clearly fall within the well established scope of Congress' Commerce power. This analysis of the Commerce power will also provide a useful model for defining the scope of Congress' power under the Property Clause.

*A. Other Constitutional Grounds for Sustaining the Federal Regulations in Brown and Block*

The Eighth Circuit Court in *Block* held that Congress' restrictions on motor travel in the BWCA were within the purview of its authority under the Property Clause.<sup>266</sup> The court therefore found it unnecessary to decide whether those restrictions could be sustained under any of Congress' other constitutional powers.<sup>267</sup> Alternative constitutional bases may exist, however, for congressional regulations like those at issue in *Block* and *Brown*.

The Sierra Club intervened in *Block*, and submitted an appellate brief offering two alternative constitutional bases for upholding Congress' restrictions on motor travel in the BWCA that are pertinent to this article: (1) Congress' general power under the Commerce Clause,<sup>268</sup> and (2) Congress' specific power under the Commerce Clause to regulate the navigable waters of the United States.<sup>269</sup> While the scope of this article permits only a brief review of these powers, both of these powers appear to be sufficiently broad to sustain the federal regulation of activity on non-federal land within and adjacent to national parks, wilderness areas, and other specially reserved federal enclaves.<sup>270</sup>

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266. See *supra* text and notes at notes 194-223.

267. *Block*, 660 F.2d at 1251 n.24.

268. U.S. CONST. art. 1, § 8, cl. 3.

269. *Id.* The Supreme Court's decision in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), firmly established that the commerce power permits the exercise of federal jurisdiction over navigable waters of the United States.

270. The Sierra Club also proposed in its brief to the circuit court that the BWCAW Act's regulation of motorized travel could be constitutionally sustained under its treaty-making power, which declares that "all treaties made, or which shall be made,

### 1. Congressional Power Under the Commerce Clause

The Commerce Clause grants to Congress the power "to regulate Commerce with foreign nations, and among the several states, and with the Indian Tribes."<sup>271</sup> The Supreme Court today interprets the Commerce Clause as a complete grant of power to Congress.<sup>272</sup> With only one exception, the Court has not invalidated an act of Congress pursuant to the Commerce Clause in more than forty years.<sup>273</sup> Congress' power to regulate commerce has been upheld even when the activity in question is intrastate in nature<sup>274</sup> or has only a trivial impact on interstate commerce.<sup>275</sup> If individual activity might affect commerce when combined with similar small-scale activities, it falls within the purview of Congress' regulatory authority under the Commerce Clause.<sup>276</sup>

Moreover, Commerce power legislation will be upheld if there is any arguable connection between the regulation and commerce that touches more states than one.<sup>277</sup> The nexus between the legislation and commerce may be based upon theoretical economic relationships;<sup>278</sup> legislative judgment concerning the economic effects of certain activities or the directness of their rela-

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under the authority of the United States, shall be the supreme law of the land. U.S. CONST. art. VI, § 2. Congressional legislation that serves to implement the provisions of a treaty validly entered into under the authority of the United States will be given very limited judicial review. *See Missouri v. Holland*, 252 U.S. 416 (1920); *United States v. Rodriguez-Camacho*, 468 F. 2d 12 (9th Cir. 1972); *United States v. LaFroschia*, 354 F. Supp. 1338 (S.D.N.Y. 1973), *aff'd*, 485 F. 2d 457 (2d Cir. 1973). The Sierra Club argued that the BWCAW Act of 1978 implemented the Boundary Waters Treaty of 1909 between the United States and Canada. That treaty sought to: (1) preserve the boundary waters as an international wilderness; (2) prohibit pollution of the boundary waters; (3) set the order of procedure to be observed among various uses of the area; and (4) prohibit actions of one nation that resulted in injury to the use of the boundary water on the other side of the border. *See State v. Kuluvar*, 266 Minn. 408, 123 N.W. 2d 669 (1963). *See generally* Brief of Sierra Club, *supra* note 198, at 46-49. Since the vast majority of the nation's parks and wilderness areas are not affected by international treaties, this article will not discuss Congress' power to legislate pursuant to this power.

271. U.S. CONST., art. I, § 8, cl. 3.

272. J. NOWAK R. ROTUNDA, & J. YOUNG, *CONSTITUTIONAL LAW* 161 (1983) [hereinafter cited as J. Nowak].

273. *But see National League of Cities v. Usery*, 426 U.S. 833 (1976).

274. *See Fry v. United States*, 421 U.S. 542, 547 (1975); *Perez v. United States*, 402 U.S. 146, 154 (1971); *Wickard v. Filburn*, 317 U.S. 111, 122-24 (1942).

275. *See e.g.*, *Wickard v. Filburn*, 317 U.S. at 127-28; *Katzenbach v. McClung*, 379 U.S. 294, 301 (1964).

276. *Wickard v. Filburn*, 317 U.S. at 127-28.

277. *Katzenbach v. McClung*, 379 U.S. at 301.

278. J. Nowak, *supra* note 272, at 161.

tionship to commerce will be given judicial deference.<sup>279</sup> Furthermore, federal legislation under the Commerce Clause will be upheld even if it invades the traditional subject matter of local police power legislation.<sup>280</sup>

Congress may also exercise its commerce power for purposes unrelated to commerce per se.<sup>281</sup> Federal laws relating to the environment, for example, have been routinely upheld by reviewing courts under the Commerce Clause.<sup>282</sup> Once a link between commerce and an environmental regulation is established, the judiciary will intervene only where a legislative determination is found to be irrational.<sup>283</sup>

Given this broad judicial interpretation of federal Commerce powers, congressional regulation of non-federal property deemed by Congress to be necessary to promote the designated purpose of a national park or wilderness area could be sustained under the Commerce Clause. The nexus between the regulation of such federal reserves and interstate commerce is sufficiently strong to meet the exceptionally broad test of constitutionality under the Commerce Clause. Parks and wilderness areas are used by persons who engage in interstate travel.<sup>284</sup> Furthermore, the incompatible use of nearby non-federal lands could have a potentially adverse impact upon the environment, wildlife, and natural beauty of those federal enclaves.<sup>285</sup> The Supreme Court has even upheld the constitutionality of congressional legislation enacted

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279. *Wickard v. Filburn*, 317 U.S. at 129.

280. See generally *Perez v. United States*, 402 U.S. 146 (1971) (federal statute prohibiting loan-sharking activity is within Congress' power under the Commerce Clause, and may be applied to such activity even when completely local in nature).

281. J. Nowak, *supra* note 272, at 162. See, e.g., *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (civil rights); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (civil rights); *Perez v. United States*, 402 U.S. 146 (1971) (criminal loan-sharking activity).

282. See, e.g., *United States v. Ashland Oil & Transp. Co.*, 504 F. 2d 1317 (6th Cir. 1974); *Leslie Salt Co. v. Froehlke*, 578 F. 2d 742 (9th Cir. 1978); *Palila v. Hawaii Dept. of Land & Natural Resources*, 471 F. Supp. 985 (D. Hawaii 1979).

283. *Heart of Atlanta Motel v. United States*, 379 U.S. at 258; *Katzenbach v. McClung*, 379 U.S. at 304.

284. For example, in *United States v. 967,905 Acres of Land*, 305 F. Supp. 83 (D. Minn. 1969). *rev'd*, 447 F. 2d 764 (8th Cir. 1971), *cert. denied*, 405 U.S. 974 (1972), the Court described the Boundary Waters as "one of the last remaining areas of its kind in North America [which] attracts Boy Scouts, campers, sportsmen, Izaak Walton League members and others from the entire United States and Canada, usually for several-day to several-week canoe trips, fishing, outings, etc." 305 F. Supp. at 85 (emphasis added).

285. See e.g., *Sierra Club v. Morton*, 376 F. Supp. 90 (N.D. Cal. 1974); 398 F. Supp. 284 (N.D. Cal. 1975) (Redwood National Park); *Pennsylvania v. Morton*, 381 F. Supp. 293 (D.D.C. 1974) (Gettysburg National Military Park). See *supra* text and notes at notes 6-7.

for the protection of the *quality* of commerce,<sup>286</sup> and for the protection of the ultimate "consumer activity" that occurs after the interstate commerce itself has come to an end.<sup>287</sup> Thus, Congress could impose restrictions on the use of non-federal property located near parks and wilderness areas on the theory that such adverse activity might mar the experience of visiting tourists, thereby discouraging interstate travel to those protected areas.<sup>288</sup>

Aside from the parks and wilderness areas themselves, other resorts, tourist businesses, and outfitters located near such areas derive economic benefit from customers drawn to the parks from around the United States.<sup>289</sup> Congressional measures designed to promote the designated purposes of parks and wilderness area may also have a sufficient nexus with this type of commerce to bring such regulations within the ambit of Congress' broad commerce power.<sup>290</sup>

Thus, a sufficient connection exists between interstate commerce and the kinds of federal regulations at issue in *Brown* and *Block* for Congress to enact such regulations under the Commerce Clause. Given the Supreme Court's great deference to congressional judgment under the Commerce Clause,<sup>291</sup> it is unlikely that federal legislation designed to further Congress' policy respecting the use of federal property, such as the proscription of motorboats within the BWCA, would be struck down on Commerce Clause grounds. Therefore, even if future courts restrict Congress' power to regulate non-federal land under the Property Clause, the federal government could alternatively invoke its

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286. *Morgan v. Virginia*, 328 U.S. 373, 381 (1946).

287. *United States v. Sullivan*, 332 U.S. 689, 697-98 (1948) (federal statute prohibiting the mislabeling of a food, drug, or cosmetic while such article is held for sale *after shipment in interstate commerce* is within Congress' Commerce power). Similarly, Congress could enact protective legislation regarding National Parks and Wilderness Areas to enhance the experience of visiting tourists, even though commerce generated by their interstate travel to the area has come to an end. See also Sax, *Helpless Giants*, *supra* note 1, at 257.

288. Sax, *Helpless Giants*, *supra* note 1, at 257. See generally *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), and *Katzenbach v. McClung*, 379 U.S. 394 (1964), where the Supreme Court recognized that the effect on interstate travel caused by racial discrimination in hotels and restaurants was a constitutional basis for sustaining Title 11 of the Civil Rights Act under the Commerce Clause.

289. See Brief of Sierra Club, *supra* note 198, at 44.

290. *Id.* at 44-45.

291. See *supra* text and notes at notes 271-83.

commerce power to preserve national parks and wilderness areas for their intended purposes.<sup>292</sup>

## 2. Congressional Power to Regulate Navigable Waters

It is well established that Congress may, as part of its Commerce power, regulate the navigable waters of the United States.<sup>293</sup> The Supreme Court has recognized this power over navigable waters to be plenary.<sup>294</sup> The Court has also recognized that Congress may exercise its authority over navigable waters for purposes other than navigation per se.<sup>295</sup>

Under its power to regulate navigable waters, Congress had enacted legislation to further environmental interests.<sup>296</sup> For example, in *Zabel v. Tabb*,<sup>297</sup> the Fifth Circuit upheld the Secretary of the Army's<sup>298</sup> refusal to authorize a dredge-and-fill project in navigable waters because of its effect on the marine ecology, even though the proposed project admittedly would have had no adverse impact on navigation.<sup>299</sup> The Court in *Zabel* stated that the proper inquiry for determining the validity of a Congressional regulation of wildlife in navigable waters was "whether there is a basis for the Congressional judgement that the activity regulated has a substantial effect on interstate commerce."<sup>300</sup> *The Zabel*

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292. See generally Brief of Sierra Club, *supra* note 198, at 42-45; Sax, *Helpless Giants*, *supra* note 1, at 256-58.

293. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 89 (1824).

294. See *Kaiser Aetna v. United States*, 444 U.S. 164, 173-74 (1979); *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 424 (1940).

295. *Kaiser Aetna v. United States*, 444 U.S. at 174. See also *United States v. Standard Oil Co.*, 384 U.S. 224 (1966)(application of § 13 of the Rivers and Harbors Act of 1899 to discharge of oil on navigable waters that did not obstruct navigation upheld); *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940)(federal license requirement for a private dam on navigable waters that included conditions unrelated to navigable waters upheld); *Zabel v. Tabb*, 430 F. 2d 199 (5th Cir. 1970)(refusal by Army Corps of Engineers to issue permit to dredge and fill in navigable waters because of adverse ecological impact upheld, even though no threat of interference with navigation).

296. See e.g., *Zabel v. Tabb*, 430 F. 2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971); *DiVosta Rentals, Inc. v. Lee*, 488 F. 2d 647 (5th Cir. 1973); *United States v. Stoeco Homes, Inc.*, 498 F. 2d 597 (3d Cir. 1974).

297. 430 F. 2d 199 (5th Cir. 1970).

298. Under the Rivers and Harbors Act of 1899, the creation of any obstruction to the navigable capacity of any waters of the United States is prohibited unless it is authorized by the Secretary of the Army. *Zabel v. Tabb*, 430 F. 2d at 207.

299. *Id.* At 202-03. The Corps of Engineers denied the riparian landowner a permit for the project partially on the basis of the findings of the U.S. Fish and Wildlife Service, Dept. Of the Interior, that the dredging and filling "would have a distinctly harmful effect on the fish and wildlife resources of Boca Raton Bay." *Id.* At 202.

300. *Id.* at 203.

Court found that the potential destruction of marine life and the ecological balance within the navigable waters had a sufficient impact on commerce to sustain the regulation under Congress' Commerce Clause authority.<sup>301</sup> Other courts have similarly allowed the federal government to regulate navigable waters for conservation and environmental purposes under its Commerce power.<sup>302</sup>

Under this theory, a strong argument could be made that the regulations at issue in the *Block* case, while primarily designed to further the wilderness character of the BWCA, are substantially related to commerce.<sup>303</sup> Thus, the regulations could also be sustained as an exercise of Congress' authority to control navigable waters under the Commerce Clause.<sup>304</sup>

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301. *Id.* at 204.

302. *See* *DiVosta Rentals v. Lee*, 488 F.2d 674 (5th Cir. 1973) (Secretary of the Army has authority to refuse to grant permit to fill navigable waters on ground that it would impair the aesthetic qualities of the waters and the marine environment of the shoreline); *United States v. Stoeco Homes, Inc.*, 498 F. 2d 597 (3d Cir. 1974) (Congress' legislative powers under the Commerce Clause are broad enough to encompass federal regulation of any activities affecting the marine ecology). *See also* *United States v. Ashland Oil and Transp. Co.*, 504 F. 2d 1317 (6th Cir. 1974), where the court upheld the validity of the Federal Water Pollution Control Act to prohibit the discharge of pollutants into non-navigable tributaries of navigable waters. The *Ashland Oil* decision is particularly analogous to the BWCA motorboat regulations, inasmuch as the court expressly acknowledged that Congress' authority to control pollution of navigable waters derived in part from the adverse impact of pollution on fishing for commercial purposes and upon the *recreational use and enjoyment of rivers and lakes for fishing, boating, and swimming by interstate travelers*. *Id.* at 1325, 1328-29.

303. *See supra* text and notes at notes 271-92. *See also* *United States v. Ashland Oil & Transp. Co.*, 504 F. 2d 1317 (6th Cir. 1974).

304. The BWCA motorboat regulations alternatively could be upheld under the doctrine of the reservation of water rights. *See* *Cappaert v. United States*, 426 U.S. 128 (1976). In *Cappaert* a rancher on private property adjacent to Devil's Hole National Monument pumped water from a well on his land, consequently lowering the water level of an underground pool on the federal land and endangering a rare desert fish that inhabited the pool. The Supreme Court upheld the authority of the government to enjoin the defendant from pumping water from his well, stating:

When the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water thus unappropriated to the extent needed to accomplish the purpose of the reservation.... Reservation of water rights is empowered by the Commerce Clause, Art. I, § 8, which permits federal regulation of navigable streams, and the Property Clause, Art. IV, § 3, which permits federal regulation of federal lands.

*Id.* at 138. While the facts of *Cappaert* are distinguishable from *Block*, it is arguable that the restrictions on motorboat use were regulations over waters appurtenant to federal land withdrawn from the public domain, and that the regulations were needed to accomplish the purpose of the reservation of the federal lands. *See* Brief of Sierra Club *supra* note 198, at 41-42 n. 37.

The arguments above suggest that even if the federal government's power under the Property Clause is restricted in future court decisions, other well-established constitutional grounds already exist upon which to base Congressional regulations of non-federal property. The Commerce Clause clearly bestows upon Congress the constitutional authority to regulate activity on non-federal lands and waters when necessary to protect and enhance national parks and wilderness areas. Thus, the Eighth Circuit decisions in *Brown* and *Block* upheld no federal regulations that could not have been sustained under the Commerce Clause.

Regardless of whether such regulations are sustained under the Property Clause or the Commerce Clause, their enactment will result in an identical displacement of the traditional authority of the states to exercise their police powers over private and state lands within their respective borders. In either case, the question ultimately boils down to a basic issue of federalism: how should the federal government's interest in fostering the declared purpose of its property be reconciled with the states' interest in maintaining their respective sovereignty?

*B. The Tenth Amendment Limitation on Congress' Power under  
the Property Clause*

In the *Block* case, the State of Minnesota contended that the federal government's attempt to regulate motorized traffic within the BWCA constituted a "blatant . . . assault on state sovereignty."<sup>305</sup> Thus, in addition to arguing that those regulations exceeded federal authority under the Property Clause,<sup>306</sup> the State asserted that federal regulation of activity on state-owned property constituted a violation of the Tenth Amendment.<sup>307</sup> The court, however, found that the State had not satisfied the requirements outlined by the Supreme Court necessary to sustain a Tenth Amendment challenge, and therefore upheld the federal statute at issue.<sup>308</sup>

The *Block* court followed the test outlined by the Supreme Court in *Hodel v. Virginia Surface Mining and Reclamation Ass'n*,

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305. Brief of State of Minnesota, *supra* note 228, at 30.

306. See *supra* text and notes at notes 194-232.

307. The Tenth Amendment provides: "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. CONST., Amend X.

308. *Block*, 660 F. 2d at 1253.

309. 452 U.S. 264 (1981).

*Inc.*<sup>309</sup> as the appropriate standard for reviewing Tenth Amendment claims. In *Hodel*, the Supreme Court narrowed the holding of its landmark decision in *National League of Cities v. Usery*,<sup>310</sup> and upheld under the Commerce Clause a federal statute regulating the surface mining industry. In so doing, the *Hodel* Court established the following three-prong test which must be satisfied in order to strike down a federal statute under the Tenth Amendment:

- (1) there must be a showing that the statute regulates the "States as States";
- (2) the regulation must address matters that are indisputably attributes of state sovereignty; and
- (3) the state must show that its compliance with the federal statute would directly impair its ability to structure integral operations in areas of traditional state functions.<sup>311</sup>

Applying this test to the federal statute at issue in *Block*, the Eighth Circuit Court of Appeals held that the restrictions on motorboats and snowmobiles regulated the activities of *private individuals*, not the state itself.<sup>312</sup> The court recognized a distinction made by the Supreme Court in *Hodel* "between congressional regulation of private persons and businesses "necessarily subject to the dual sovereignty of the government of the nation and of the state in which they reside," and federal regulation "*directed not to private citizens but to the states as states.*"<sup>313</sup> The court acknowledged that the restriction on motorized travel in the BWCA did interfere with the State's freedom to regulate the waters in that area.<sup>314</sup> The court stated, however, that the mere assumption of

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310. 426 U.S. 833 (1976). *National League of Cities* is the only decision in the last four decades in which the Supreme Court has used the Tenth Amendment to invalidate a federal statute. In that case, decided within one week of *Kleppe*, the Supreme Court struck down Congress' extension of the Fair Labor Standards Act to cover employees of the state and local governments. The Court held that application of that Act impinged upon the states' ability and discretion to carry out their sovereign functions even though the regulation in question was within the scope of congressional authority under the Commerce Clause. *Id.* at 851-52.

The reach of the Tenth Amendment as defined in *National League of Cities*, however, was narrowed significantly in *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), which held that federal regulation of surface mining did not constitute a sufficient interference with state sovereignty to invoke the ban of the Tenth Amendment. For a discussion of *Hodel*, see *infra* text and notes at notes 311-13.

311. *Hodel*, 452 U.S. at 286-87.

312. *Block*, 660 F. 2d at 1252.

313. *Id.* (quoting *Hodel*, 452 U.S. at 286) (emphasis added).

314. *Id.* at 1252.

the State's traditional police power by the federal government was not in itself sufficient grounds for a Tenth Amendment violation.<sup>315</sup> Finding that the motorboat restrictions at issue applied to activity occurring both on and off federal property,<sup>316</sup> the court held that the statute did not regulate the State as a State.<sup>317</sup> Therefore, the court concluded that the State had failed to meet the first requirement of the *Hodel* test necessary to sustain a Tenth Amendment claim.<sup>318</sup>

Although the *Block* court found no Tenth Amendment infringement under the narrow test outlined in *Hodel*, its opinion did not entirely preclude the possibility of invoking the Tenth Amendment in future Property Clause cases. In *Block*, the State argued that the federal regulation of activity on state waters constituted a regulation of the State as a State.<sup>319</sup> The court rejected this argument on the rather narrow ground that the State did not "own" the waters in the same manner as it owned the land under them, but merely controlled their use as an aspect of its sovereignty.<sup>320</sup> The court reasoned that this authority, like the state's other police powers, must yield to a valid exercise of federal authority.<sup>321</sup> The court therefore held that the federal relation of conduct on state waters did not amount to a regulation of the State as a State.

The court noted in a footnote, however, that federal regulation

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315. The court quoted the Supreme Court's declaration in *Hodel* that, "the Court long ago rejected the suggestion that Congress invades areas reserved to the states by the Tenth Amendment simply because it exercises its authority in a manner that displaces the states' exercise of their police powers." *Id.* (quoting *Hodel*, 452 U.S. at 291).

316. *Block*, 660 F. 2d at 1252.

317. *Id.*

318. *Id.* See *supra* text at note 311. A final important factor in the Eighth Circuit Court's rejection of the State's Tenth Amendment claim was that the regulation in question did not entirely preempt the State's jurisdiction over the waters in the BWCA. *Id.* at 1253. The Act explicitly reserves to the State the authority to exercise its police powers with respect to the waters so long as the exercise of that power is *not less stringent* than the federal regulations regarding motorboat and snowmobile use. Boundary Waters Canoe Area Wilderness Act of 1978, Pub. L. No. 95-495, § 15, 92 Stat. 1649 (1978), § 15. The Act also protects the State's jurisdiction with regard to fish and wildlife in the wilderness area, *id.*, § 14, establishes joint state/federal administration and protection of the mining protection area and of the lands adjacent thereto owned or controlled by the state, *id.*, § 16, and protects the state's right to exercise civil and criminal jurisdiction within the wilderness area and impose land use and environmental health controls on the non-federal areas within the area. See generally *Block*, 660 F. 2d at 1253.

319. *Block*, 660 F. 2d at 1252.

320. *Id.* See *supra* text and note at note 260.

321. *Id.*

of state *land* may require a "slightly different analysis" than regulation of state water.<sup>322</sup> The court failed to indicate what this "slightly different analysis" entailed. Instead, it declared that even though the regulations at issue affected the State as a landowner, they still remained essentially regulations of private conduct.<sup>323</sup> The court further stated that even if the BWCAW Act did regulate the State as a State, Minnesota had failed to meet the second and third requirements of the *Hodel* test.<sup>324</sup> The implication of this footnote, despite the court's holding, is that federal regulation of state land may, in some circumstances, constitute a regulation of the State as a State.<sup>325</sup>

Moreover, the Tenth Amendment could serve as an effective limit on Congress' Property power if the Supreme Court were to establish a different test for federal regulations under the Property Clause. The test outlined by the Supreme Court in *Hodel* has only been applied to congressional provisions made under the Commerce Clause.<sup>326</sup> The Court has explicitly reserved for future determination the extent to which the Tenth Amendment bars federal legislation under constitutional provisions other than the Commerce Clause.<sup>327</sup> Whether a different and less rigid standard for Tenth Amendment claims should be applied to Property Clause legislation is a question which the Supreme Court must eventually resolve.<sup>328</sup>

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322. *Block*, 660 F.2d at 1252 n.28.

323. *Id.*

324. *Id.*

325. *Id.* See *supra* text at note 311.

326. The Supreme Court has examined the Tenth Amendment issue in four cases since its landmark decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976). Each of these cases involved federal legislation enacted pursuant to the Commerce Clause. See *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264 (1981); *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742 (1982); *United Transp. Union v. Long Island R.R.*, 455 U.S. 678 (1982); and *EEOC v. Wyoming*, \_\_\_ U.S. \_\_\_, 103 S. Ct. 1054 (1993).

327. *National League of Cities v. Usery*, 426 U.S. at 852 n.17; *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 454 U.S. at 287 n.28.

328. In an amicus brief in support of Minnesota's petition for certiorari in *Block*, the State of South Dakota argued that the *Hodel* test was inappropriate for examining federal regulations under the Property Clause. Brief of Amicus Curiae in support of Petition for Writ of Certiorari to United States Court of Appeals for the Eighth Circuit, at 4, *Minnesota v. Block*, 660 F. 2d 1240 (8th Cir. 1981), *cert. denied*, 456 U.S. 944 (1982). The State asserted that application of the *Hodel* test to Property Clause legislation created the possibility that "Congress could effectively strip a state of substantially all of its police powers." *Id.* at 11. The State therefore suggested that federal regulation of

Barring the establishment of an independent Tenth Amendment standard for legislation enacted pursuant to the Property Clause, however, it appears unlikely that the Tenth Amendment will impose any meaningful limitations on Congress' Property power. The *Block* case suggests that its only conceivable application would be to prohibit the federal regulation of *state activity on state lands*.<sup>329</sup> However, in its most recent Tenth Amendment decision, *EEOC v. Wyoming*,<sup>330</sup> the Supreme Court cast doubt upon the power of a state even to resist a federal regulation of *state activity*.<sup>331</sup> This decision, coupled with other Supreme Court decisions since *National League of Cities v. Usery*; suggests that the Court is in the process of cutting back on the Tenth Amendment as an affirmative limit on federal power.<sup>332</sup> As a result, there is no meaningful limitation on Congress' Property power expressly contained in the Constitution.

There is, however, one constant check on Congress' Property Clause powers that arises outside the framework of the Constitution--the political power of the states and their constituencies. A proper constitutional analysis of the scope of Congress' power under the Property Clause suggests that the political process provides the only real check on this vast grant of constitutional authority.

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non-federal property should be declared violative of the Tenth Amendment when any one of the *Hadel* factors are met, not all three factors as in a Commerce Clause case. *Id.* at 14-15. The State felt that such a distinction between Tenth Amendment analysis under the Commerce Clause and Property Clause was justified by the relatively superior position of the Commerce Clause in the Constitutional framework. *Id.* at 16.

329. *See supra* text and notes at notes 309-25.

330. \_\_\_ U.S. \_\_\_, 103 S. Ct. 1054 (1983).

331. In *EEOC*, the Supreme Court examined a federal statute prohibiting employers from discriminating against any employee or potential employee between the ages of 40 and 70 on the basis of age. The Court upheld the statute as applied to the State of Wyoming as an employer. Despite the similarity of the facts of this case to the facts in *National League of Cities*, 426 U.S. 833 (1976), *see supra* note 347, the Court distinguished the latter case and held that application of the federal regulation to the State did not constitute a violation of the Tenth Amendment. The Court's decision in *EEOC* casts considerable doubt upon the vitality of the doctrine announced in *National League of Cities*, and suggests at the very least that the latter case will be construed narrowly in the future.

332. In each Tenth Amendment case decided since *National League of Cities*, 426 U.S. 933 (1976), the Supreme Court has rejected the plaintiff's assertion of a Tenth Amendment violation. *See supra* cases cited at note 326. Moreover, the Court has taken every possible opportunity to narrow the holding of *National League of Cities*. *See supra* text and notes at notes 310-11, 331.

*C. Defining the Limitations of Congress' Property Power: The Rational Basis Test and the Role of the Political Process*

As a matter of policy, some check must be placed upon Congress' Property power to prevent it from displacing completely the police power authority of those states that contain vast areas of federal land.<sup>333</sup> Clearly, Congress should not make broad legislative policy decisions in a state solely on the basis of its extensive property interests in that state.<sup>334</sup> As one commentator has noted, it would be unreasonable for Congress to "nullify the sales tax in eighty-seven percent of Nevada, or permit gambling in sixty-five percent of Utah."<sup>335</sup> On the other hand, it would be equally inappropriate for the judiciary, in its attempt to impose a limit on Congress' Property Clause power, to inquire into the motive or wisdom of a particular congressional determination regarding federal property. Past Supreme Court decisions have made clear that courts should not exercise broad judicial discretion in reviewing express congressional determinations under the Property Clause.<sup>336</sup> Thus, circumscription of the federal property power must not be achieved at the expense of judicial deference to Congress' legislative judgments. Some commentators have proposed a judicial balancing of competing federal, state, and private interests to determine the validity of Property Clause regulations.<sup>337</sup> Such a test, however, would invariably permit substantial judicial discretion in reviewing Congress' decisions and produce speculative results.<sup>338</sup>

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333. See *supra* text and notes at notes 19-23.

334. See *United States v. San Francisco*, 310 U.S. 16, 30 (1940).

335. Note, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 COLUMBIA L.R. 817, 825 (1980).

336. *Kleppe*, 426 U.S. at 536. See *supra* text and notes at notes 108-13.

337. Professor Gaetke suggests that the law of nuisance provides a basis for determining when Property Clause regulations of conduct on non-federal lands constitute "needful" regulations "respecting the federal lands." The ultimate objective of such a test is to weigh the utility of the congressional policy for the use of federal lands and the effectiveness of the particular regulation in accomplishing that policy against the utility of the regulated conduct and the likelihood of its interference with the congressional policy. See Gaetke, *supra* note 96, at 395-402 (1981).

Similarly, Professor Sax proposes that the National Park Service should be limited to curbing conduct which may be described as "nuisance-like." He suggests that Congress should grant the Park Service the authority to define nuisance-like activity for itself, and to develop a federal common law of nuisance for the parks through litigation. See Sax, *Helpless Giants*, *supra* note 1, at 266-67.

338. For example, in applying his suggested balancing test to the facts in *Kleppe v. New Mexico* 426 U.S. 523 (1976), Professor Gaetke finds that Congress' policy of providing

more, any such limitation of congressional authority would be inherently inconsistent with the extremely broad judicial construction of the federal Commerce power.<sup>339</sup> In light of the pervasive federal intrusions upon traditional state police power matters that have been recently upheld under the Commerce Clause,<sup>340</sup> it is questionable whether federal regulations regarding federal property, particularly those enacted to protect national parks and wilderness areas, are appropriate places to begin to redress the balance of state and federal power.<sup>341</sup>

Judicial construction of the federal Commerce power suggests an appropriate model for defining the limits of Congress' authority under the Property Clause. Under modern constitutional doctrine, reviewing courts will only strike down a legislative determination under the Commerce Clause if it is found to have no rational basis.<sup>342</sup> With one exception, a federal regulation enacted under the Commerce Clause has not been struck down by the judicial branch in over forty years.<sup>343</sup>

The scope of Congress' authority under the Property Clause should be similarly defined. Like the Commerce Clause, the Property Clause is a plenary grant of constitutional authority to Congress, and has been interpreted extremely liberally by the courts.<sup>344</sup> For purposes of determining an appropriate level of judicial review, there is no difference between a complete grant of

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a sanctuary for wild animals is a "commendable public objective for the use of the federal lands," and that the statute in question is a rational method of furthering that policy. Nonetheless, he finds that these interests are outweighed by the utility of capturing wild animals on federal land and the interference with the interests of private landowners. Gaetke, *supra* note 96, at 400-01. Exactly how Professor Gaetke arrives at this conclusion is unclear. His example illustrates that the application of such a balancing test to determine the constitutionality of a regulation of non-federal property would permit the judiciary to substitute its judgment concerning the needfulness of certain legislation for that, of Congress. Professor Gaetke concedes that the results under such a test would be "speculative" and would permit the judiciary "considerable leeway in resolving the conflict between competing uses." He states that in most situations, however, "it would appear that the judicial deference shown Congress regarding other uses of the Property Clause is likely to extend to judiciary review of its use to regulate conduct on non-federal lands." *Id.* at 401.

339. See *supra* text and notes at notes 271-92.

340. See, e.g., *Perez v. United States*, 402 U.S. 146 (1971) (regulation of loan-sharking activities); *Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973) (federal regulation pre-empting local governments from imposing curfews at airports in their own cities).

341. See Sax, *Helpless Giants*, *supra* note 1, at 254-55.

342. See *supra* text and notes at notes 277-83.

343. See *National League of Cities v. Usery*, 426 U.S. 833 (1976). See *supra* text and notes at notes 273, 310.

344. See *supra* text and notes at notes 108-13, 151-57.

power to regulate commerce and a complete grant of power to make needful rules and regulations respecting federal property. Judicial review of congressional enactments pursuant to the Property Clause should therefore be limited to determining whether there exists a rational basis for Congress' action.<sup>345</sup> Only if it is *irrational* for Congress to conclude that the legislation in question constitutes a "needful" rule or regulation "respecting" federal property should a federal statute be struck down as exceeding the scope of the Property Clause.<sup>346</sup>

Under this standard of review, Congress admittedly would enjoy broad authority to regulate activity *on federal property*. However, federal authority under this standard certainly would be no greater than Congress' current constitutional power over federal property, which the Supreme Court has declared to be "without limitations."<sup>347</sup>

This constitutional test would also permit Congress to regulate activity on *non-federal property* in certain circumstances. Congress should be permitted to regulate activity on non-federal property in order to protect federal lands from physical harm.<sup>348</sup> A regulation necessary to prevent physical damage to federal property is clearly "needful." Similarly, such regulations do not cease to be regulations "respecting" federal property merely because they affect activity on non-federal land.

In the absence of a threat of *physical harm* to federal property, however, the nexus between a regulation of non-federal property and the federal property itself is not so obvious. In such cases, reviewing courts must scrutinize federal legislation more closely to determine whether it is a "needful" regulation "respecting" the federal property. In such situations, a declaration of congressional *purpose* regarding the use of federal property should be required to sustain a federal statute under the Property Clause.<sup>349</sup> In the absence of an express congressional declaration of policy regarding the use of federal property, there is no nexus between the regulation of non-federal lands and federal property per se. Without a declaration of purpose, therefore, Congress'

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345. *See supra* text and notes at notes 277-83.

346. *Id.*

347. *See, e.g., Kleppe v. New Mexico*, 426 U.S. at 536 (1976). *See supra* text and note at note 86.

348. *See supra* text and notes at notes 131-36.

349. *See supra* text and notes at notes 173-232, 248-58.

determination that a regulation of non-federal property is a "needful" regulation "respecting" federal property would be irrational. Under this interpretation of the Property Clause, Congress would be permitted to regulate non-federal property in and around national parks, wilderness areas, and other specially reserved federal enclaves to insure their protection and preservation.<sup>350</sup> Such authority to regulate activity on non-federal property antithetical to the designated purposes of such federal reserves is essential to fulfilling Congress' intent underlying their creation.<sup>351</sup> Moreover, the extension of federal Property Clause jurisdiction to these areas constitutes only a limited intrusion on the sovereignty of the states. Under the construction of the Property Clause proposed above, Congress' power to regulate non-federal property would not apply to non-federal lands located near *all* federal property; rather, it would apply only to those non-federal lands located adjacent to federal enclaves reserved for a specific purpose.<sup>352</sup>

Furthermore, far from upholding an unlimited federal power to regulate non-federal property, this analysis would only permit Congress to exercise authority beyond the boundaries' of federal property for specific statutorily designated purposes.<sup>353</sup> Given the federal government's strong interest in preserving these enclaves for their intended uses and the substantial public benefits to be derived therefrom, the resulting additional infringement on state sovereignty is relatively insignificant.

The real threat to state sovereignty lies not in the exercise of federal regulatory authority over non-federal property adjacent to parks and wilderness areas, but in the exercise of the federal government's *unlimited* power over its own property.<sup>354</sup> Under the latter power, Congress has a potentially devastating reach of power over the Western states.<sup>355</sup> The mere existence of this bare constitutional power, however, does not in itself affect the balance of state and federal power; it only becomes a threat to state sovereignty if it is exercised indiscriminately. It is the responsibil-

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350. *See supra* text and notes at notes 248-58.

351. *Id.*

352. *Id.* *See also* text and notes at notes 2-5.

353. *See supra* text and notes at notes 2-5. 248-58.

354. *See generally* *Kleppe v. New Mexico*, 426 U.S. 529 (1976). *See supra* text and notes at notes 137-61.

355. *See supra* text and notes at notes 19-35.

ity of the states, both individually and collectively, to use their political powers to insure that Congress does not wield its broad constitutional authority inappropriately.

For years, Congress has possessed the bare constitutional authority under its Commerce power to reach virtually every aspect of state activity.<sup>356</sup> Thus far, it has refrained from exercising that power so as to emasculate completely the sovereignty of the states. The restraints of political pressure have succeeded in preventing Congress from using this vast authority to destroy the balance of state and federal power. The Supreme Court has long recognized that the notion of a *political* check on Congress' express constitutional powers is inherent in our basic constitutional structure.<sup>357</sup> In *Gibbons v. Ogden*,<sup>358</sup> Chief Justice Marshall articulated this very concept:

The power over commerce is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. *The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are ... the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.*<sup>359</sup>

Effective restraints on the exercise of Congress' Commerce power must proceed from political rather than from judicial processes.<sup>360</sup> Similarly, it is the political process, not the judicial process, that should restrain Congress from abusing its constitutional power under the Property Clause.

## V. CONCLUSION

It is inevitable that America's national parks and wilderness areas will in the future be subject to the effects of adverse activity occurring on nearby non-federal property. If the public policy underlying the establishment of these treasured national reserves is to be truly upheld, Congress must possess the authority

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356. See *supra* text and notes at notes 271-92.

357. See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824); *Wickard v. Filburn*, 317 U.S. 111, 120 (1942).

358. 22 U.S. (9 Wheat.) 1 (1824).

359. *Id.* at 197.

360. *Id.* See also *Wickard v. Filburn*, 317 U.S. at 120.

to regulate activity on non-federal property that threatens their intended purposes. When enacted to further the congressional policy regarding the use of specific federal lands, such regulations constitute "needful" regulations "respecting" federal property, and should be upheld as a valid exercise of Congress' plenary power under the Property Clause. The Eighth Circuit Court of Appeals appropriately recognized the federal government's authority to enact such legislation in *United States v. Brown* and *Minnesota v. Block*.

The Property Clause is a plenary grant of authority to Congress and as such, should be construed as broadly as the Commerce Clause. Admittedly, such a broad interpretation of the Property Clause empowers Congress with the potential authority to exercise vast legislative control over the states, particularly those in the West. However, the appropriate restraints upon this vast constitutional, power should stem from the political process, and not from the courts.

It is important for Congress to be cognizant of the states' individual and collective interests in retaining their sovereignty over matters within their boundaries. It is even more important, however, that Congress have the bare constitutional power to enact certain legislation respecting federal property when the federal interest in preserving the parks and wilderness areas outweighs the particular local interests which threaten these national resources. It is the role of Congress, not the judiciary, to determine when such regulations respecting federal property are needful. Congressional regulation of non-federal property adjacent to national parks and wilderness areas should therefore be upheld under the Property Clause when such regulations are necessary to promote the purposes for which such federal reserves were established.