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The property clause of article IV[1] grants Congress the authority to regulate federal lands.[2] In referring to that authority, the Supreme Court has observed that "the power over the public land thus entrusted to Congress is without limitations."[3]

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1. Article IV, section three, clause two of the United States Constitution empowers Congress to: "[D]ispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."

2. Congress is given further authority over certain federal property under article I, which provides that Congress shall have the power: "To exercise exclusive 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, dock-Yards, and other needful Buildings . . . ." *Id.* art. I, § 8, cl. 17. In addition to providing Congress with the authority to govern the District of Columbia, this provision authorizes Congress to legislate exclusively for a special category of federal property, generally known as "federal enclaves." Engdahl, *State and Federal Power Over Federal Property*, 18 ARIZ. L. REV. 283, 288-90 & n.17 (1976) [hereinafter cited as Engdahl]. For federal property outside the District of Columbia to qualify as article I property, it must meet two criteria. First, the legislature of the state in which the property is located must consent to the United States' acquisition of legislative authority over the property. *See* Paul v. United States, 371 U.S. 245, 264 (1963); Kohl v. United States, 91 U.S. 367, 371 (1875). Second, the land must be purchased for the erection of "Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." U.S. CONST. art. I, § 8, cl. 17. Over such federal enclaves, Congress possesses exclusive governmental jurisdiction under article I. Engdahl, *supra*, at 288-90. The only limits on congressional discretion under article I, therefore, appear to be those imposed by other provisions of the Constitution, such as the Bill of Rights. *See* PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND 278 (1970). See notes 9-10 & accompanying text *infra*. All federal property that is not article I property is, by definition, article IV property.

3. Kleppe v. New Mexico, 426 U.S 529, 539 (1976). While language in Supreme Court cases thus supports the broadest possible interpretation of the property clause power, other language from the Court supports the narrowest possible interpretation—that the powers of Congress over the federal lands are "only the rights of an ordinary proprietor." Fort Leavenworth R.R. v. Lowe, 114 U.S. 525, 527 (1885). Scholarly analysis similarly has led to sharply divergent views about the extent of the article IV power over federal property. Broad views of the power are found in Coggins & Hensley, *Constitutional Limits on Federal*

The simplicity of the Court's statement is appealing. Its implications, however, are troubling,[4] especially for those states in which a substantial amount of federal property exists.[5] If the property clause power of Congress is "without limitations," the power of some states over a considerable portion of the land within their boundaries is severely limited.[6] For those states, an unlimited property clause power in Congress significantly shifts the balance of powers struck by the federal system.[7] The concerns engendered by a property clause power "without limitations" are further heightened because the power has been used by Congress to regulate conduct on nonfederal property as well as on federal property.[8] Such legislation extends the reach of federal regulation solely on the congressional determination that the legislation is a "needful" rule "respecting" federal property.

No congressional power is limitless. At a minimum, each power is limited by the individual liberties protected by the Bill of Rights.[9] The Court's assertion that the property clause power is "without limita-

Power to Protect and Manage Wildlife: Is the Endangered Species Act Endangered?, 61 IOWA L. REV. 1099, 1135-39 (1976) [hereinafter cited as Coggins & Hensley]; Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239, 250-55 (1976). Narrow views of the power are presented in Engdahl, *supra* note 2, at 296-300; Engdahl, *Some Observations on State and Federal Control of Natural Resources*, 15 HOUS. L. REV. 1201, 1208-11 (1978); Note, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 COLUM. L. REV. 817, 821-25 (1980) [hereinafter cited as *Property Power*].

4. While asserting that the property clause power is "without limitations," the Supreme Court also noted that the "furthest reaches" of that power "have not yet been definitively resolved." Kleppe v. New Mexico, 426 U.S. 529, 539 (1976). This statement implies that the power has limitations not yet ascertained. The property clause power is certainly limited by the Bill of Rights. See notes 9-10 & accompanying text *infra*.

5. In twelve western states, at least 29% of the land is federally owned. *Property Power*, *supra* note 3 at 817-19. Furthermore, the implications of a property clause power "without limitations" are serious even for those states containing little federal property within their boundaries. See note 73 *infra*.

6. This result follows from the Court's further assertion, in Kleppe v. New Mexico, 426 U.S. 529 (1976), that property clause legislation has preemptive effect under the supremacy clause, U.S. CONST. art VI, cl. 2. The Court noted: "Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains power to enact legislation respecting those lands pursuant to the Property Clause. And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause." 426 U.S. at 54. Thus, to the extent Congress validly exercises its property clause power, contrary state law must yield. The Court's conclusion that property clause legislation may thus preempt state law has been subject to scholarly criticism. *See* Engdahl, *supra* note 2, at 354-55.

7. The limitation on the powers of the western states resulting from such federal regulation has led to efforts by those states to seek a reduction of the amount of federal lands. *Property Power*, *supra* note 3, at 819 n.24.

8. See text accompanying notes 17-19, 26-27 & 41-53 *infra*.

9. U.S. CONST. amends. I-X. *See, e.g.*, Leary v. United States, 395 U.S. 6 (1969) (commerce clause power may not be exercised to violate the fifth amendment privilege

tions" could not have been intended to signify an exemption of the exercise of that power from the restraints imposed upon government elsewhere in the Constitution.[10] Instead, the Court referred to the

against self-incrimination); United States v. Jackson, 390 U.S. 570 (1968) (commerce clause power may not be exercised to violate the sixth amendment right to jury trial).

Among such extrinsic constitutional limitations on all uses of the property clause, the "taking" clause of the fifth amendment, U.S. CONST. amend. V, becomes crucial when the property clause power is used to regulate conduct on nonfederal property. To the extent such property clause regulation is deemed a "taking" of private property, "just compensation" to the property owner would be required. In Leo Sheep Co. v. United States, 440 U.S. 668 (1979), for example, the United States claimed an easement across private land to certain federal lands. *Id.* at 678-80. The government argued that such an easement arose by operation of the Unlawful Inclosures Act of 1885, 43 U.S.C. §§ 1061-1066 (1976), *discussed in* text accompanying notes 44-48 *infra*, which prohibited the obstruction of access to the public lands. *Id.* § 1063. Although the Supreme Court rejected the government's construction of the statute, it noted that such an exercise of the federal government's powers over federal lands would require compensation to the private property owner. 440 U.S. at 685, 687-88.

Even the use of the property clause power for regulating conduct on the federal lands to effectuate a policy for the use of those lands might violate the "taking" portion of the fifth amendment. If Congress passed a law, for example, to use a tract of federal lands as a hazardous waste disposal site, the effect of that legislation might be so detrimental to the neighboring nonfederal lands that it would constitute a "taking" requiring compensation under the fifth amendment.

For a discussion of the limits imposed on the exercise of governmental power by the "taking" portion of the fifth amendment, see Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

The reach of the property clause power to conduct occurring outside of the federal lands also raises serious questions of the proper balance of powers in our federal system. *See* Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239, 254-55 (1976). To the extent that such an exercise of the property clause power interferes with powers reserved to the states, the tenth amendment provides a potential limitation. *See* National League of Cities v. Usery, 426 U.S. 833, 851 (1976) (tenth amendment prohibits congressional regulation of interstate commerce that impermissibly interferes with the states' conduct of their integral governmental functions). While no Supreme Court case addresses the subject, one student commentator has proposed that the tenth amendment be viewed as such a limitation on the property clause power. *Property Power*, *supra* note 3, at 828-33. The same commentator presents a novel argument that the equal footing doctrine, generally used to prohibit the imposition of conditions on the admission of a new state to the Union, provides an additional constitutional limit on the property clause power. *Id.* at 833-38. This Article addresses only limitations on the property clause power imposed by the terms of the clause itself, not by other constitutional provisions.

10. The Supreme Court decided Kleppe v. New Mexico, 426 U.S. 529 (1976), in which it asserted that the property clause power is "without limitations," one week before its decision regarding the tenth amendment as a limit on the commerce clause power, National League of Cities v. Usery, 426 U.S. 833 (1976). Arguably, therefore, the Court's assertion of a limitless property clause power in *Kleppe* was unrelated to the possible tenth amendment limitation revealed in *National League of Cities*. This argument, however, does not address the other recognized constitutional limits on all congressional powers. See note 9 *supra*. Thus, the sequence of the Court's decisions in *Kleppe* and *National League of Cities* does not

scope of the property clause power itself.[11]

This Article examines the proposition that the property clause power is "without limitations." It contends that, while the property clause power may be unlimited when exercised to regulate conduct on federal lands, the use of this power to regulate conduct on nonfederal land cannot constitutionally be "without limitations." Finally, the Article suggests a balancing approach, based on a nuisance analogy, that may be useful in determining the proper scope of the property clause power over nonfederal property.

Types of Property Clause Enactments

The property clause power has been used by Congress in three ways: to regulate the acquisition of interests in the federal lands,[12] to protect the federal lands, and to effectuate congressional policies regarding the use of the federal lands. In addition, each of these uses of the property clause power has served to justify the regulation of conduct on nonfederal property.

Acquisition of Interests in Federal Property

The property clause gives Congress the power to "dispose of" the federal lands and to make "needful rules and regulations respecting" them.[13] At a minimum, article IV grants Congress the powers of a proprietor over the federal lands. Like other proprietors, Congress may decide whether, when, and on what terms to dispose of those lands.[14] Certain governmental objectives, such as the rapid settlement of the West and the construction of the transcontinental railroad,[15] have thus been accomplished through the transfer of an interest in the federal lands rather than through the exercise of a governmental regulatory

detract from the assertion that the Court was not addressing constitutional limits extrinsic to the property clause when asserting in *Kleppe* that the property clause power was "without limitations."

11. The Court was asserting that congressional discretion on how to "dispose of" the public lands or on what were "needful rules and regulations respecting" the federal lands is "without limitations." The assertion, therefore, does not address other possible constitutional limitations on congressional action within the limits of the property clause power.

12. The property clause power granted Congress by article IV also applies to federally-owned personal property. *See, e.g.*, Nixon v. Sampson, 389 F. Supp. 107, 137 n.80 (D.D.C. 1975). This Article, however, addresses only congressional property clause power over federal and nonfederal real property.

13. *See, e.g.*, United States v. Gratiot, 39 U.S. (14 Pet.) 526 (1840).

14. The power to "dispose of" the federal lands includes the discretion to retain the federal lands. *See, e.g.*, Light v. United States, 220 U.S. 523, 536 (1911).

15. *See* Leo Sheep Co. v. United States, 440 U.S. 668, 669-77 (1979).

power.[16]

As it is proprietary in nature, congressional power to dispose of the federal lands would appear to have no application to nonfederal property. Congress has, however, used its dispositional power to further policies on nonfederal property by inserting conditions in grants of federal property.

In *United States v. City and County of San Francisco*,[17] Congress conveyed federal lands to the city for water supply and for generating electricity. The grant was conditioned, however, on the requirement that all energy produced at the site be sold by the city to consumers rather than to private utility companies. Noting that "Congress may constitutionally limit the disposition of the public domain to a manner consistent with its views of public policy,"[18] the Supreme Court sustained the condition under the property clause even though the condition affected nonfederal property.[19]

The Court's conclusion is not surprising. Congressional discretion over whether or not to dispose of federal property necessarily encompasses the discretion over whether to condition transfers of interest in the federal lands. Conditional grants of federal property designed to

16. Congress historically has also used its property clause power to prescribe procedures necessary for the acquisition of title to the federal lands. *See* Ross v. Doe *ex rel.* Barland, 26 U.S. (1 Pet.) 655 (1828). Thus federal law determined the priority of settlers' conflicting title claims to the federal lands even after a state's admission to the Union. *See* Ivanhoe Irrig. Dist. v. McCracken, 357 U.S. 275, 294-95 (1958); United States v. California, 332 U.S. 19, 27-29, 35-36 (1947); Utah Power & Light Co. v. United States, 243 U.S. 389, 404-05 (1917); Gibson v. Chouteau, 80 U.S. (13 Wall.) 92, 99-100 (1872); Irvine v. Marshall, 61 U.S. (20 How.) 558, 561-62 (1858); Jourdan v. Barrett, 45 U.S. (4 How.) 169 (1846); Wilcox v. Jackson, 38 U.S. (13 Pet.) 498 (1839); Bagnell v. Broderick, 38 U.S. (13 Pet.) 436 (1839); Ross v. Doe *ex rel.* Barland, 26 U.S. (1 Pet.) 655 (1828). This principle extended to acquisition of lesser interests in federal property as well. In United States v. Gratiot, 39 U.S. (14 Pet.) 526 (1840), for example, the Supreme Court upheld the insertion of certain conditions in a federal license for smelting lead ore on the public lands. The conditions included the requirement that the licensee provide a certain quantity of the smelted ore to the federal government. *Id.* at 536. Once title passed from the United States to the first grantee under federal law, however, subsequent transfers were governed by state law. Wilcox v. Jackson, 38 U.S. (13 Pet.) 498, 517 (1839). Such a view of the property clause power was necessary to ensure that congressional policy on the disposition of the federal lands was not frustrated by the states and to prevent state law from confusing and complicating the steps necessary to acquire title to the federal lands. *See* Engdahl, *supra* note 2, at 296-97.

17. 310 U.S. 16 (1940).

18. *Id.* at 30.

19. *Id.* at 29-30. Similarly, in Federal Power Comm'n v. Idaho Power Co., 344 U.S. 17 (1952), a federal license for the construction and operation of a hydroelectric plant on federal lands was conditioned on the licensee's permission to allow the United States to transmit on the licensee's powerlines power generated by certain federally-owned facilities. *Id.* at 19.

effectuate policies on nonfederal lands, therefore, are merely an application of the proprietary power to dispose of the federal lands, despite the effects of the power beyond the boundaries of those lands.

Protection of the Federal Lands

In addition to the proprietary powers granted Congress to dispose of the federal lands, the property clause also grants Congress the power to make "all needful Rules and Regulations respecting . . . property belonging to the United States."[20] Congress has used this aspect of the property clause power to protect the federal lands from harm by regulating conduct on both federal and nonfederal lands.

As proprietor of the federal lands, the federal government is entitled to use the private rights of action available to protect private property from harm.[21] The property clause, however, also gives Congress the legislative power to protect the federal lands from harmful conduct occurring on them.[22] Legislation enacted pursuant to this power will supersede contrary state law.[23] Thus, although a private proprietor is not able to permit conduct that violates state law on his or her lands,[24] the property clause authorizes Congress to do so.[25]

20. U.S. CONST. art. IV, § 3, cl. 2.

21. *See* Gaetke, *The Boundary Waters Canoe Area Wilderness Act of 1978: Regulating Nonfederal Property Under the Property Clause*, 60 ORE. L. REV. 157, 167 (1981) [hereinafter cited as Gaetke].

22. *Id.* Thus Congress, like any proprietor, may designate what conduct it prohibits on its lands. *See* McKelvey v. United States, 260 U.S. 353, 359 (1922); Light v. United States, 220 U.S. 523 (1911). Unlike other proprietors, however, Congress may enforce such legislation by criminal sanctions. *See, e.g.*, United States v. Grimaud, 220 U.S. 506 (1911) (grazing); United States v. Briggs, 50 U.S. (9 How.) 351 (1850) (logging).

23. *See* Hunt v. United States, 278 U.S. 96 (1928) (federally authorized killing of deer that were over-browsing a national forest upheld even though the killing violated state game laws). For a discussion of *Hunt*, see Gaetke, *supra* note 21, at 167 n.55. This principle is also evidenced in several grazing cases, *id.*, and in cases involving questions of title to the federal lands. State law governing such title questions was required to yield to federal law until such time as title had passed from the United States to a grantee. See note 16 *supra*.

24. A private property owner might forbid hunting on his or her property although state laws permit it. *See* Smith v. Odell, 194 App. Div. 763, 185 N.Y.S. 647, 648 (1921). The private owner, however, may not permit hunting when state laws forbid it, which was the action taken by the federal government and approved by the Supreme Court in Hunt v. United States, 278 U.S. 96, 98 (1928). *See* Engdahl, *supra* note 2, at 317.

25. The rationale of Hunt v. United States, 278 U.S. 96 (1928), *discussed in* note 23 *supra*, was extended in New Mexico State Game Comm'n v. Udall, 410 F.2d 1197 (10th Cir.), *cert. denied*, 396 U.S. 961 (1969). In *Udall*, the killing of deer for mere research purposes within a national park in violation of state game laws was upheld. The research was intended to enable the establishment of a management plan to preserve the scenery and wildlife of the park. The killing thus was related to the protection of the federal lands, although its relation was not as direct as in *Hunt* itself.

Harm to the federal lands may also result from conduct occurring outside their boundaries. In this situation, the federal government may resort to private rights of action to remedy such harm.[26] Furthermore, Congress' property clause power permits direct regulation of the harmful conduct, even though it occurs on nonfederal lands.[27]

Promoting Policy on the Use of Federal Lands

In addition to disposing of the federal lands[28] and legislating for their protection,[29] Congress has employed its property clause power to promote its policy regarding the use of federal lands. The property clause empowers Congress, the proprietor of the federal lands, to determine the policy for the use of these lands. This power has been used, for example, to designate certain federal lands as national forests,[30] national parks,[31] wilderness areas,[32] and wildlife refuges.[33] To promote its land use policy, Congress may regulate conduct occurring on federal lands, even if that conduct does not threaten those lands with harm.

The Supreme Court upheld Congress' power to determine and effectuate its policy for the use of federal lands in *Kleppe v. New Mex-*

26. *See* Gaetke, *supra* note 21, at 168.

27. *See* United States v. Alford, 274 U.S. 264 (1927) (statute prohibiting the careless building of fires near federal lands upheld despite the statute's reach to nonfederal property). For a discussion of *Alford*, see Gaetke, *supra* note 21, at 168-69 & nn.57-61.

More recently, in United States v. Lindsey, 595 F.2d 5 (9th Cir. 1979), federal regulations regarding campfires and camping were held applicable to state-owned riverbeds within a national forest. Similarly, in United States v. Brown, 552 F.2d 817, 821-23 (8th Cir.), *cert. denied*, 431 U.S. 949 (1977), federal regulations prohibiting hunting and the possession of loaded firearms within a national park were held applicable to nonfederal public waters within a national park. Thus, the *Alford* application of the property clause reaches all nonfederal property, public as well as private.

The property clause power also has been used by Congress to protect the federal lands from other dangers. For example, in the Shipstead-Nolan Act, 16 U.S.C. §§ 577-577b (1976), Congress restricted logging within 400 feet of the shorelines of lakes and streams within what is now the Boundary Waters Canoe Area Wilderness in northern Minnesota and alteration of water levels of those lakes and streams that would result in the inundation of the federal lands. While the logging restrictions merely regulate conduct on federal lands, the restrictions on the alteration of water levels regulate conduct beyond the boundaries of the federal lands because those waters are state, not federal, property. *See* Gaetke, *supra* note 21, at 163 & n.37.

28. See notes 13-19 & accompanying text *supra*.

29. See notes 20-27 & accompanying text *supra*.

30. Act of March 3, 1891, ch. 561, § 24, 26 Stat. 1103 (repealed 1976).

31. *See, e.g.*, Yellowstone National Park Establishment Act § 1, 16 U.S.C. § 21 (1976).

32. Wilderness Act of 1964 §§ 2-7, 16 U.S.C. §§ 1131-1136 (1976).

33. National Wildlife Refuge System Administration Act of 1966 §§ 4, 5, 16 U.S.C. §§ 668dd, 668ee (1976).

ico.[34] In *Kleppe*, the Court reviewed property clause legislation protecting wild horses and burros.[35] The Court sustained Congress' determination that the legislation was "needful" regulation "respecting" the federal lands without relying on the possible grounds that the animals were federal property[36] or that the legislation was an effort to protect federal lands from harm.[37] The Court recognized that Congress intended to designate the federal lands as a sanctuary for the animals[38] to preserve an important symbol of "the historic and pioneer spirit of the West."[39] The state's traditional power to regulate wildlife was required to yield to the federal property clause legislation.[40]

Congress also has used the property clause power to promote its policies for the use of federal lands by regulating conduct on nonfederal lands.[41] Thus, Congress has used its property clause power to prohibit otherwise lawful conduct on nonfederal property, although the conduct posed no threat to the federal lands. In 1897, in *Camfield v. United States*,[42] a private landowner devised a fencing scheme that en-

34. 426 U.S. 529 (1976).

35. Wild Free-Roaming Horses and Burros Act §§ 1-10, 16 U.S.C. §§ 1331-1340 (1976). The Act protects those wild horses and burros on the federal lands from "capture, branding, harassment, or death." *Id.* § 1331. The Act also purports to protect such animals that have strayed onto nonfederal property. *Id.* § 1334. The question of the constitutionality of that aspect of the legislation was expressly reserved by the Court for future consideration in Kleppe v. New Mexico, 426 U.S. at 546-47. For further discussion of this aspect of the legislation, see notes 97-108 & accompanying text *infra*.

36. Such an assertion, if sustained, would have brought the legislation within the established rule of *Alford*, because Congress would then be protecting federal property from harm. See text accompanying note 27 *supra*. No such assertion, however, was made in *Kleppe*. *See* Kleppe v. New Mexico, 426 U.S. at 537 n.8.

37. *See* 426 U.S. at 537 n.7.

38. *Id.* at 535.

39. *Id.* at 535-36 (quoting 16 U.S.C. § 1331 (1976)).

40. The Court stated: "[W]here those state laws conflict with . . . legislation passed pursuant to the Property Clause, the law is clear: The state laws must recede." *Id.* at 543. See note 6 *supra*. The state agents had captured and removed 19 burros from federal land under the New Mexico Estray Law, 426 U.S. at 532-34. The Court's conclusion in *Kleppe* that property clause legislation has preemptive effect under the supremacy clause was relied upon in Ventura County v. Gulf Oil Corp., 601 F.2d 1080 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 947 (1980), in which a local zoning ordinance was held to be inapplicable to the federal government's lessee engaged in oil exploration and extraction on federal lands. As in *Kleppe*, the regulation of conduct on the federal lands to effectuate the congressional policy on their use preempted contrary state regulation. *Id.* at 1084. The Court had reached the same conclusion, without referring to the supremacy clause, in Hunt v. United States, 278 U.S. 96 (1928), *discussed in* text accompanying notes 23-25 *supra*, on legislation intended to protect the federal lands from harm.

41. This discussion is to be distinguished from Congress' use of its property clause power of disposition to regulate conduct on nonfederal lands. See text accompanying notes 17-19 *supra*.

42. 167 U.S. 518 (1897).

closed huge amounts of federal land, although the fences were constructed only on private lands.[43] The United States brought suit to compel the removal of the fences under the Unlawful Inclosures Act of 1885,[44] which prohibited such fencing schemes. The Court rejected the defendant's constitutional claim that the regulation of fences built on private property was outside the scope of the property clause.[45]

The property clause enactment sustained in *Camfield* regulated conduct on nonfederal property solely to promote Congress' federal land use policy. Although it has been interpreted as protecting federal lands from harm,[46] the statute upheld in *Camfield* was enacted to ensure public access to the federal lands for pasturage and settlement.[47] It thus encouraged unlimited public use of the federal lands, rather than their protection from harm.[48]

Congress also has regulated conduct on nonfederal property to promote other federal land policies.[49] Congress has used the property clause power to prohibit the harming of wild horses and burros on pri-

43. *Id.* at 519-20. For an historical discussion of the "checkerboard" land grant scheme that led to the fact situation of *Camfield*, see Leo Sheep Co. v. United States, 440 U.S. 668, 669-77 (1979), and Gaetke, *supra* note 21, at 169 & n.64.

44. 43 U.S.C. §§ 1061-1066 (1976). The statute was Congress' response to a large number of such fencing schemes enclosing enormous tracts of western federal lands along the transcontinental railroad. *See* Leo Sheep Co. v. United States, 440 U.S. 668, 683-84 (1979).

45. The Court concluded: "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 to be necessary for the protection of the public, or of intending settlers, to forbid all enclosures of public lands, the Government may do so, though the alternate sections of private lands are thereby rendered less available for pasturage." 167 U.S. at 525.

46. *See, e.g.*, Kleppe v. New Mexico, 426 U.S. 529, 538 (1976); Engdahl, *supra* note 2, at 306-08; *Property Power*, *supra* note 3, at 821.

47. Gaetke, *supra* note 21, at 170-71.

48. Gaetke, *supra* note 21, at 170-71. Although the *Camfield* holding that Congress may use its property clause powers to regulate conduct on nonfederal property to promote congressional policy for the use of the federal lands fully encompasses the holding in *Alford* that the property clause power may be used to regulate conduct on nonfederal property for the protection of the federal lands from harm, the two holdings are not coextensive. *Id.* at 170-71.

49. The Unlawful Inclosures Act of 1885, 43 U.S.C. §§ 1061-1066 (1976), *discussed in* note 44 *supra*, prohibited other conduct on nonfederal lands in addition to clever fencing schemes. It provided that: "No person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct, or shall combine and confederate with others to prevent or obstruct, any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States, or shall prevent or obstruct free passage or transit over or through the public lands . . . ." *Id.* § 1063. Thus, threats made on nonfederal lands against persons attempting to enter federal lands were made punishable.

vate lands[50] and the use of motors on state-owned lakes and streams within wilderness areas.[51] While such use of the property clause power historically has not been extensive,[52] its potential is enormous, particularly if the power is interpreted to be "without limitations."[53]

Limitations on the Property Clause Power

Despite the Supreme Court's assertion in *Kleppe v. New Mexico* that the property clause power is "without limitations," there probably

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The aspect of the statute was upheld in McKelvey v. United States, 260 U.S. 353 (1922). The threats in *McKelvey*, however, occurred on federal lands. *Id.* at 354-56.

Another statute seeking to effectuate the congressional policy of rapid settlement of the federal lands prohibited the making of false representations regarding those lands. 18 U.S.C. § 1861 (1976). This statute was upheld in United States v. Fisher, 11 F.2d 629 (W.D. La. 1926), apparently as an exercise of the dispositional power under the property clause. *Id.* at 630. See text accompanying notes 13-16 *supra*. The prohibition of false representations regarding the public lands might prevent potentially conflicting title claims to such lands. The statute, however, furthered Congress' rapid settlement policy by promoting confidence in the potential settlers.

50. Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340 (1976). In Kleppe v. New Mexico, 426 U.S. 529 (1976), *discussed in* text accompanying notes 34-40 *supra*, the Supreme Court upheld the statute's protection of animals on the federal lands. The Court expressly reserved judgment, however, on the constitutionality of the statute's reach beyond the federal lands. 426 U.S. at 546-47. For a discussion of the question thus reserved in *Kleppe*, see text accompanying notes 97-106 *infra*.

51. Boundary Waters Canoe Area Wilderness Act of 1978, Pub. L. No. 95-495, § 3, 92 Stat. 1649. For a discussion of the constitutionality of that statute's regulation of motorboats on state-owned waters, see Gaetke, *supra* note 21. A challenge to the Act's regulation of motorboats on property clause grounds was rejected in National Ass'n of Property Owners v. United States, 499 F. Supp. 1223 (D. Minn. 1980), *appeal docketed sub nom.* Minnesota v. Bergland, No. 80-1769 (8th Cir. Sept. 30, 1981). See note 96 *infra*. The Wilderness Act of 1964, 16 U.S.C. §§ 1131-1136 (1976), also regulates the use of motorboats on waters within federal wilderness areas. *Id.* § 1133(c). To the extent those waters are state-owned, this Act also regulates conduct on nonfederal property under the property clause. *See also* 36 C.F.R. §§ 2.11, 2.32 (1979) (prohibiting hunting within the boundaries of a national park); United States v. Brown, 552 F.2d 817 (8th Cir.), *cert. denied*, 431 U.S. 949 (1977) (federal hunting regulations applied to the state-owned waters within Voyageurs National Park in northern Minnesota). For a discussion of the states' ownership of navigable waters and the lands underlying those waters, even within the boundaries of federal lands, and for further discussion of *Brown*, see Gaetke, *supra* note 21, at 162-65, 178 & n.120.

52. This use of the property clause power has remained dormant because Congress generally finds justification for its regulation of conduct on nonfederal lands elsewhere in the Constitution. *See, e.g.*, Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239, 255 (1976). Congress has, however, recently used the property clause power to regulate conduct on nonfederal lands to effectuate its policies on the use of federal lands. See text accompanying notes 49-51 *supra*.

53. Whether the *Alford* and *Camfield* uses of the property clause power may be interpreted as being "without limitations" is discussed in the text accompanying notes 69-74 *infra*.

are as yet unascertained limits within the property clause itself.[54] These potential limitations are best defined by reference to the three different ways in which Congress has used the property clause:[55] the dispositional power,[56] the power to legislate for the protection of the federal lands,[57] and the power to further congressional policy on the use of federal lands.[58]

Federal Lands

Applied within the boundaries of the federal lands, a property clause power "without limitations" is understandable and defensible. This unfettered power can be justified not only for proprietary dispositions of federal lands, but also for the power's use to regulate conduct on such lands.

Decisions regarding whether, when, and on what terms to dispose of federal lands are the same as decisions made by any proprietor. Article IV designates Congress as the "agent" authorized to make such proprietary decisions regarding federal property on behalf of the federal government.[59] To subject such measures to judicial review would be to divest Congress of its role as agent. Judicial deference to the judgment of Congress about the disposition of the federal lands is a necessary consequence of the proprietary nature of such decisions. As the Supreme Court is without guidance from the property clause for the

54. The Supreme Court implied this in Kleppe v. New Mexico, 426 U.S. 529, 539 (1976). See note 4 *supra*.

55. See note 12 & accompanying text *supra*.

56. See notes 13-19 & accompanying text *supra*.

57. See text accompanying notes 20-27 *supra*.

58. See text accompanying notes 28-53 *supra*. In *Kleppe*, for example, the Supreme Court was reviewing legislation that was an exercise of the property clause power to effectuate congressional policy on the use of federal lands by regulating conduct on those lands. See text accompanying notes 34-40 *supra*. The Court's assertion in that case that the property clause power is "without limitations," however, was supported only by citations to cases in which the property clause had been used to control the acquisition of interests in the federal lands. 426 U.S. at 539.

59. That such decisions are regarded as being different in kind from others made by Congress is illustrated by the Supreme Court's treatment of congressional delegations of the dispositional power. Such delegations have been reviewed under a common law agency approach rather than under the stricter requirements generally imposed by the doctrine of separation of powers. *See, e.g.*, United States v. Midwest Oil Co., 236 U.S. 459, 474-75 (1914); Butte City Water Co. v. Baker, 196 U.S. 119, 125-26 (1905). Legislation delegating the dispositional power over the federal lands to the executive branch has been treated as "not of a legislative character in the highest sense of the term." United States v. Midwest Oil Co., 236 U.S. 459, 474 (1914). Rather, such legislation "savors somewhat of mere rules prescribed by an owner of property for its disposal." Butte City Water Co. v. Baker, 196 U.S. 119, 126 (1905).

review of such proprietary matters, the dispositional power of Congress over the federal lands thus may be interpreted as being "without limitations."[60]

The conclusion that congressional discretion under the dispositional power of the property clause is without limitations does not compel a conclusion that such judicial deference extends, or should extend, to all uses of the property clause power.[61] Nondispositional uses of the power must be justified, under the express terms of the property clause, as "needful Rules and Regulations respecting" federal lands.[62]

Property clause regulation of conduct occurring only on the federal lands, however, falls easily within the express terms of the clause. Whether intended to protect the federal lands from harm[63] or to effectuate congressional policy regarding their use,[64] such regulation is clearly "respecting" federal lands because its reach is confined to them. The "needful" character of this type of regulation is unquestionable when it is designed to protect federal lands from harm.[65] In addition, the regulation of conduct appears to be the only device available to Congress to effectuate its policy for the appropriate use of federal lands. Thus, the regulation of conduct occurring on federal lands appears to be within the express limits of the property clause.[66] When the

60. The only limitations, therefore, would be those limitations imposed elsewhere in the Constitution. See note 9 & accompanying text *supra*.

61. In Kleppe v. New Mexico, 426 U.S. 519, 539 (1976), the Court cited only dispositional cases for the general proposition that congressional discretion under the property clause is "without limitations." The Court thus incautiously leaped from the specific dispositional power to the general property power without expressly considering the differences in the applicable constitutional language. *See* Engdahl, *supra* note 2, at 351-52.

62. U.S. CONST. art IV, § 3, cl. 2. *See* Kleppe v. New Mexico, 426 U.S. at 536.

63. See notes 22-25 & accompanying text *supra*.

64. See text accompanying notes 30-40 *supra*.

65. Whatever power Congress may have over the federal lands, including its dispositional power, would be greatly diminished if Congress could not act to protect those lands from destruction and impairment. Even advocates of a more restrained, proprietary view of the property clause power recognize the necessity and existence of congressional authority to legislate for the protection of the federal lands and to displace contrary state law in doing so. *See* Engdahl, *supra* note 2, at 306-09.

66. See text accompanying note 62 *supra*. Moreover, the Court is unlikely to review such property clause legislation. In *Kleppe*, for example, the Court noted: "The question under the Property Clause is whether this determination can be sustained as a 'needful' regulation 'respecting' the public lands. In answering this question, we must remain mindful that, *while courts must eventually pass upon them, determinations under the Property Clause are entrusted primarily to the judgment of Congress*." 426 U.S. at 536 (emphasis added). Although the Court recognized that judicial review of such legislation exists, its decision evinces no consideration of the "needful" and "respecting" aspects of the legislation under review. The review in *Kleppe* was merely an assertion of the unlimited power of Congress over federal lands, not an evaluation of the legislation under the express limits of the prop-

property clause power to dispose of federal lands or to make needful regulations respecting those lands is confined to the reaches of the federal property itself, therefore, the Supreme Court's characterization of that power as being "without limitations" is justified.

Nonfederal Lands

While the exercise of the property clause power within the boundaries of the federal lands may be without limitations, judicial deference should not necessarily extend to its exercise beyond those confines. The disturbing specter of an unlimited property clause power not confined to the geographic limits of the federal lands warrants caution in the further extension of that judicial deference.[67]

The dispositional use of the property clause to promote congres-

erty clause. The review engaged in, and apparently envisioned by, the Supreme Court in *Kleppe* for such property clause legislation, therefore, is perfunctory. A court following the lead of the Supreme Court in *Kleppe* would be unlikely to probe a congressional decision to regulate conduct on the federal lands to decide judicially whether the legislation was in fact "needful" or "respecting" federal lands.

Besides apparently falling within the express limits of the property clause, such regulation frequently is no more than the exercise of the powers of any proprietor to control the conduct occurring on his or her land. A proprietor of private property may act to prohibit certain conduct on his or her land to protect it from harm or to further the owner's policy regarding its use. Of course, state and local law may limit the private proprietor's decisional power through zoning legislation and other regulatory hurdles. In passing such legislation, Congress exceeds the powers of ordinary proprietors of land only when that legislation conflicts with state law. *See, e.g.*, Kleppe v. New Mexico, 426 U.S. 520 (1976); Hunt v. United States, 278 U.S. 96 (1928). While a proprietor of private land may not override contrary state law to protect his or her land or to accomplish some policy regarding its use, Congress may do so under the property clause. *See* Ventura County v. Gulf Oil Corp., 601 F.2d 1080 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 947 (1980). See note 40 & accompanying text *supra*.

Even when the regulation exceeds such proprietary powers, however, judicial review would be merely an evaluation of Congress' determination of the existence and extent of the threatened harm to the federal lands or to Congress' policy for their use. In other constitutional contexts, the Court appropriately abstains from such factual second-guessing and is also likely to do so in regard to the property clause. *See, e.g.*, Perez v. United States, 402 U.S. 146, 154-57 (1971) (commerce clause authorizes regulation of intrastate loan sharking). The Court looks only for some rational basis to support the congressional judgment. *See* J. NOWAK, R. ROTUNDA, J. YOUNG, CONSTITUTIONAL LAW 118, 158-59 (1977). The improbability of such judicial review and the obvious compliance with the express language of the property clause supports a limitless congressional power to regulate conduct on the federal lands.

To the extent that Congress so legislates, it also displaces state authority over matters within the power of the states to regulate. Any limit on such disruption of the regulatory role of the states, however, is provided by the tenth amendment, not the property clause. Such congressional interference with state regulatory power does not detract from the nature of such legislation as "needful" regulation "respecting" federal lands.

67. See text accompanying notes 69-73 *infra*.

sional policy on nonfederal lands[68] is solely an exercise of congressional proprietary powers. Congress thus asserts no greater governmental jurisdiction in making such conditional transfers than in making unconditional transfers. Moreover, as such conditional transfers are voluntary, they do not infringe upon the rights of owners of nonfederal property except insofar as they consent to the infringement by being transferees. As this use of the dispositional power is only proprietary, to limit such transfers would be to place Congress at a disadvantage relative to other proprietors. The use of the dispositional power to promote congressional policy on nonfederal lands, therefore, is appropriately regarded as being without limitations.

The nondispositional use of the property clause to regulate conduct on nonfederal lands to protect federal lands[69] or to promote congressional policy for their use,[70] however, raises two significant concerns. First, such a nondispositional application of the property clause power constitutes nonconsensual "governmental" regulation of conduct beyond the boundaries of federal land.[71] Federal governmental regulation of conduct thus may be imposed upon nonfederal land merely because of the proximity of that land to federal property.[72] The rights of the owner of nonfederal property so located,[73] therefore, are diminished as a result of such an exercise of the property clause power. Second, the property clause regulation of conduct on nonfederal property encroaches upon the state's traditional regulatory role. The state's power over the property within its boundaries thereby is diminished, not only to the geographical extent of the federal lands found there, but

68. See notes 17-19 & accompanying text *supra*.

69. See text accompanying notes 26-27 *supra*.

70. See notes 41-53 & accompanying text *supra*.

71. This regulation should be distinguished from the voluntary "proprietary" regulation resulting from the exercise of the dispositional powers of Congress under the property clause through conditional transfers of interests in federal lands. See notes 17-19, 68 & accompanying text *supra*.

72. Such regulation of conduct on nonfederal property would not need to be justified under one of the traditional, enumerated powers of Congress.

73. If the property clause power to regulate conduct on nonfederal property is "without limitations," the proximity of that nonfederal property to the federal lands presumably will be irrelevant. Although the greatest impact of such use of the property clause would likely fall upon lands adjoining the federal lands, a property clause power "without limitations" would not be so circumscribed. All nonfederal property could be subjected to the exercise of the property clause power. The present discussion, therefore, is relevant even for those states containing little federal land within their boundaries. Hypothetically, a state containing no federal lands could be subjected to such federal regulation if the conduct regulated was for the purpose of protecting or effectuating congressional policy for the use of federal lands wherever situated.

also to the extent that Congress decides to regulate conduct beyond the federal lands.

Concern for the rights of states and individual property owners may discourage the courts from extending the deference shown Congress' exercise of its property clause power to nondispositional property clause regulation of conduct on nonfederal lands. The "needfulness" of such legislation may be questionable simply because of its direct regulatory effect on nonfederal lands. Similarly, when a property clause enactment regulates conduct on nonfederal property, its nature as regulation "respecting the federal lands" is obscured. Thus, judicial review of such property clause legislation is useful and necessary.[74] The connection between the conduct regulated on nonfederal property and the protection or use of federal property may become so tenuous that it requires a judicial conclusion that the legislation is neither "needful" nor "respecting the federal lands."

A Suggested Theory

There is no explicit judicial guidance on when property clause regulation of conduct occurring outside federal lands ceases to be "needful" regulation "respecting the federal lands." In 1976, the Supreme Court noted that "the furthest reaches of the power granted by the property clause have not yet been definitively resolved."[75] The Supreme Court, however, suggested a possible approach to the problem in *Camfield v. United States*,[76] the first case in which the Court approved nondispositional property clause regulation of conduct occurring beyond the boundaries of federal lands. Concluding that Congress could, under its property clause power, prohibit the construction of fences on private lands to enclose federal lands, the Court reasoned:

> Considering the obvious purposes of this structure, and the necessities of preventing the enclosure of public lands, *we think the fence is clearly a nuisance*, and that it is within the constitutional power of Congress to order its abatement, notwithstanding such action may involve an entry upon the lands of a private individual.[77]

To justify its conclusion in *Camfield*, the Court interpreted the abatement legislation as intended only to abate a nuisance.[78] Thus, the law

74. This is to be contrasted with the pro forma judicial review provided in *Kleppe*, a case limited by its facts to the regulation of conduct on the federal lands. For a discussion of the judicial review provided there, see note 66 *supra*.

75. Kleppe v. New México, 426 U.S. at 539.

76. 167 U.S. 518 (1897).

77. 167 U.S. at 525 (emphasis added).

78. The Court stated: "[I]n passing the act in question, Congress exercised its constitu-

of nuisance provides a basis for a test to determine when property clause regulation of conduct on nonfederal lands is not "needful" regulation "respecting the federal lands."[79]

Under *Camfield*, Congress may transform an otherwise lawful use of nonfederal property into an enjoinable nuisance by legislating for a particular use of the public lands. Thus, the Court in *Camfield* invoked a nuisance theory as a justification for the prohibition of the fences under the property clause.[80] Agricultural fences constructed solely on private property in an agricultural area generally are not considered to be a nuisance.[81] In *Camfield*, however, Congress' policy for the use of

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tional right of protecting the public lands from nuisances erected upon adjoining property . . . ." 167 U.S. at 528.

The Court also perceived the property clause power of Congress as "analogous to the police power of the several States," noting that "the extent to which [Congress] may go in the exercise of such power is measured by the exigencies of the particular case." 167 U.S. at 525. The *Camfield* Court's assertion that the property clause power of Congress is "analogous to the police power," however, must be read cautiously today in light of the broader modern view of the police power, which exceeds the mere abatement of nuisance. *See* Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 40-46 (1964). At that time, the prevalent view on the limits of the police power was tied to the notion of nuisance abatement. Thus, a police power regulation abating a noxious use of property by a private landowner was valid against a claim of "taking." *See id.* at 38-40 & 48-50. In 1897, however, police power enactments beyond such nuisance abatement efforts were suspect. *Id.* That the Court apparently felt a need to bring the prohibition of the fences in *Camfield* within a nuisance theory to justify the legislation as analogous to the police power, is further evidenced by its discussion of a Massachusetts statute that had prohibited the construction of spite fences and had been upheld as constitutional by the Massachusetts Supreme Court. 167 U.S. at 523-24.

79. *Camfield* has been cited as standing merely for the proposition that Congress may legislate under the property clause to protect the federal lands from harm. See text accompanying notes 46-48 *supra*. Such an interpretation of *Camfield* implies a narrow definition of "nuisance." "Nuisance" thus would be limited to situations in which the use of nonfederal property physically threatened the federal lands. A careful reading of *Camfield*, however, supports a broader definition of the property clause power than that limited merely to the protection of the federal lands from harm, see text accompanying notes 46-48 *supra*, and a less rigid view of nuisance, see notes 81-84 & accompanying text *infra*. *See also* Gaetke, *supra* note 21, at 170-73 & nn.68-80.

80. Such an interpretation of nuisance extends beyond the protection of the federal lands from physical harm. See text accompanying notes 46-48, 79 *supra*.

81. The cases cited by the Court support the contention that a private landowner may construct any sort of fence on his or her own land. 167 U.S. at 523. The Court's discussion of the maxim, *sic utere tuo ut alienum non laedas*, also provides little support for its conclusion that the fences in *Camfield* were a nuisance. *Id.* at 522-23. The Court stated: "[I]t has been the settled law, both of this country and of England, that a man has no right to maintain a structure upon his own land, which, by reasons of disgusting smells, loud or unusual noises, thick smoke, noxious vapors, the jarring of machinery or the unwarrantable collection of flies, renders the occupancy of adjoining property dangerous, intolerable or even uncomfortable to its tenants. No person maintaining such a nuisance can shelter himself behind the sanctity of private property." *Id.* Presumably, the fences in *Camfield* were typical of those used at that time and were not within the evils described by the Court.

neighboring federal lands caused the fences to be deemed a nuisance. Congress had determined that the federal lands were to remain open and accessible to settlers for settlement and pasturage.[82] These fences frustrated that congressional policy,[83] and, for that reason alone, were regarded as a nuisance.[84]

The law of private nuisance attempts to reconcile discordant uses of land by property owners.[85] Even a noxious use of property will become a nuisance only when it substantially interferes with another property owner's use of his or her property.[86] The reference to nuisance in *Camfield* suggests a similar process of judicial balancing to resolve the conflict between Congress' policy on the use of federal lands and the use of nonfederal lands.[87] The Court's use of such a balancing

82. *Id.* at 524-25, 527.

83. *Id.* at 525, 528.

84. *Id.* at 525. The Court expressly noted that identical fences built only to enclose the private tracts within the "checkerboard" pattern, see note 43 *supra*, would not be regarded as a nuisance, even though their effect would be to preclude, as completely as the actual fences in *Camfield*, access to the federal tracts. 167 U.S. at 527-28.

85. Thus, it is not unusual under the *Camfield* approach based on nuisance theory that the congressional policy on the use of the federal lands renders some conflicting use of nonfederal property a nuisance. Moreover, it is not unusual under this nuisance approach that the use of one's property can render an otherwise lawful use of another's property a nuisance. What is unusual about the *Camfield* Court's use of nuisance theory is that Congress, by establishing its policy for the use of the federal lands, may regulate as a nuisance conduct on nonfederal property that is not only lawful, but is also completely appropriate where it occurs. See text accompanying note 81 *supra*.

86. *See, e.g.*, W. PROSSER, THE LAW OF TORTS § 89, at 596 (4th ed. 1971).

87. The balancing process used in *Camfield* is indicated by the Court's conclusion that the fences were a constitutionally regulated nuisance specifically because of "the obvious purpose of this structure, and the necessities of preventing the enclosure of the public lands . . . ." 167 U.S. at 525.

The Court's balancing in *Camfield* is further illustrated by its hypothetical discussion of the outcome had the fences been built to enclose only the private parcels within the "checkerboard" pattern. See note 84 *supra*. The Court's dicta indicated that such fences could not constitutionally be prohibited under the property clause. The Court noted that "it is no answer to say that, if such odd-numbered sections were separately fenced in, *which the owner would doubtless have the right to do*, the result would be the same as in this case, to practically exclude the Government from the even-numbered sections . . . . So long as the individual proprietor confines his enclosure to his own land, *the Government has no right to complain*, since he is entitled to the complete and exclusive enjoyment of it, regardless of any detriment to his neighbor . . . ." 167 U.S. at 527-28 (emphasis added). For such fences, therefore, the Court apparently recognized that the balance shifted in favor of the nonfederal property owner's use of his or her land. The distinction drawn by the Court between the actual and hypothetical fences in *Camfield* seems based, at least in part, on the culpability of the private landowner's conduct. The actual fences in *Camfield* were intended to frustrate the congressional open lands policy. The hypothetical fences, however, constructed only to enclose the private lands, would not be the product of such intent, although their actual effect would be the same.

process indicates both that the judicial deference accorded other congressional exercises of the property clause power[88] was not accorded the legislation reviewed in *Camfield* and that there are limitations to the property clause power of Congress when used to regulate conduct on nonfederal lands.

Application of the Theory

The specific factors to be weighed in the balancing test suggested by *Camfield*, however, are unclear.[89] The ultimate objective presumably 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. Thus, the value of the challenged regulation to the public lands should be compared to the degree of imposition on the owners of nonfederal property. Should the balance indicate that the regulation interferes with the ownership of nonfederal property more than is warranted by Congress' stated policy, a court justifiably could conclude that it is not a "needful" regulation "respecting the federal lands."[90] Thus, the regulation would not derive its authority from the property clause.

This balancing approach is easily applied to property clause regulation of conduct on nonfederal lands for the protection of federal lands from harm because the utility of the policy is clear. In *United States v. Alford*,[91] the Court sustained an exercise of the property clause power to prohibit the careless use of fire "near" federal lands. The *Alford* Court did not expressly use a balancing test, but the result under such a test is obvious. The legislation at issue in *Alford* was enacted to protect federal forests and grasslands from destruction by fire. Its purpose was specifically to protect federal lands, which is a goal of high utility.[92] Moreover, the prohibition of the careless use of fire on or near federal lands[93] is crucial for the prevention of the threatened

88. See notes 59-62 *supra*.

89. For a discussion of the numerous factors used by the courts in private nuisance actions to weigh the gravity of harm to the plaintiff against the utility of the defendant's conduct, see W. PROSSER, THE LAW OF TORTS § 89, at 596-600 (4th ed. 1971).

90. The *Camfield* balancing process would thus allow a court to prevent congressional efforts to attain federal policy objectives merely by disguising legislation as property clause enactments. See note 110 *infra*.

91. 274 U.S. 264 (1927). For a discussion of *Alford*, see note 27 *supra*.

92. See note 65 *supra*.

93. Act of June 25, 1910, ch. 431, § 6, 36 Stat. 857 (current version at 18 U.S.C. § 1856 (1976)).

harm.[94] In comparison, the careless use of fire has no utility and is directly contrary to the congressional policy of preserving the federal lands from harm. The balance weighs heavily in favor of sustaining the legislation in *Alford* as "needful" regulation "respecting the federal lands."[95]

Applying the test to legislation other than that designed to protect federal lands from harm, however, is more difficult because the factors defining the utility of the policy are more tenuous.[96] In *Kleppe v. New Mexico*,[97] reviewing the Wild Free-Roaming Horses and Burros Act,[98] the Court sustained the Act's regulation of conduct on federal lands,[99] but expressly reserved the question of the constitutionality of the Act's reach beyond federal lands.[100]

The Act provides:

> If wild free-roaming horses or burros stray from public lands onto privately owned land, the owners of such land may inform the nearest federal marshall or agent of the Secretary, who shall arrange to have the animals removed. In no event shall such wild free-roaming horses and burros be destroyed except by the agents of the Secretary.[101]

94. "The danger depends upon the nearness of the fire, not upon the ownership of the land where it is built." United States v. Alford, 274 U.S. at 267.

95. The lack of any express balancing process in the Court's opinion in *Alford* could be explained by the obvious outcome of such a process under those facts. That obviousness may also explain the brevity of the Court's discussion of the property clause issue in *Alford*, which was presented in only two sentences. *Id.* at 267.

96. For an application of this approach to the Boundary Waters Canoe Area Wilderness Act of 1978, Pub. L. No. 94-495, 92 Stat. 1649 (1978), see Gaetke, *supra* note 21, at 177-78. The balancing process set forth here, see text accompanying notes 89-90 *supra*, was suggested but not discussed in the author's earlier work. Gaetke, *supra* note 21, at 183 n.131. In that article, the author asserts that legislation regulating the use of motorboats on state owned waters within a federal wilderness was within the holding of *Camfield*. The use of motorboats was found to conflict directly with the congressional wilderness policy. *Id.* at 177-78. The nuisance approach suggested here, however, requires a balancing of the utility of the federal wilderness policy and the effectiveness of the motorboat restrictions in accomplishing that policy against the utility of the use of motorboats in the area and the likelihood of the interference of the motorboats with that wilderness policy. Thus, although motorboat usage generally is a legitimate use of waterways, its enjoyment on every lake is not essential. The vast availability of lakes for motorboat usage outside the wilderness area reduces the utility of the regulated conduct within the wilderness area. Moreover, the use of motorboats on the lakes within and partly within the area appears totally to frustrate the wilderness policy of Congress. *See* Gaetke, *supra* note 21, at 177. Thus, under the balancing approach, the regulation of motorboats should be sustained under the property clause. The Eighth Circuit recently so held. Minnesota v. Bergland, No. 80-1769 (8th Cir., Sept. 30, 1981).

97. 426 U.S. 529 (1976). See notes 34-40 & accompanying text *supra*.

98. 16 U.S.C. §§ 1331-1340 (1976).

99. 426 U.S. at 540-41.

100. *Id.* at 547.

101. 16 U.S.C. § 1334 (1976).

This passage provides direct regulation of conduct on nonfederal property: on nonfederal property, persons may not destroy wild free-roaming horses or burros that have strayed from federal lands.[102] By this legislation, Congress intended to protect the remaining wild horses and burros.[103] To further that purpose, Congress designated the federal lands as a sanctuary for the animals.[104] Thus, under a balancing approach, the policy for the use of federal lands, providing a sanctuary for the remaining wild horses and burros, must be coupled with the effectiveness of the particular regulation. This policy is a commendable public objective for the use of the federal lands.[105] Moreover, the extension of the protection of the animals beyond the boundaries of the federal lands is a useful and rational method of furthering the congressional policy.

The utility of the policy and the regulation's ability to carry out the policy must then be weighed against the utility of the regulated conduct and the likelihood that the conduct will interfere with the policy.

The Act regulates the taking of wild horses and burros on nonfederal property. Taking in accordance with state law and in a humane manner[106] may be useful, however, for it also may serve generally accepted goals, such as allowing the freedom to hunt and protecting private lands from harm. Moreover, although taking wild horses and burros on nonfederal lands may reduce the number of ani-

102. Other congressional powers may authorize this regulation. *See* Coggins & Hensley, *supra* note 3, at 1122-43; Engdahl, *supra* note 2, at 350. The protection of wild horses and burros on federal and nonfederal lands under the property clause, however, would be easily sustained under the theories of *Hunt* and *Alford* if the animals were treated as federal property. *See* Coggins & Hensley, *supra* note 3, at 1137; Engdahl, *supra* note 2, at 350. No such assertion was made by the federal government in *Kleppe*. 426 U.S. at 537 n.8. Thus, the Court there affirmed the Act's property clause protection of the animals on the federal lands solely as a way to effectuate the congressional policy on the use of those lands, not as a way to protect federal property. *See* Engdahl, *supra* note 2, at 349-50.

103. The Act provides that: "It is the policy of Congress that wild free-roaming horses and burros shall be protected from capture, branding, harrassment, or death; and to accomplish this 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 (1976) (emphasis added). *See* 16 U.S.C. § 1333 (1976).

104. 16 U.S.C. §§ 1331, 1333 (1976).

105. This policy is commendable, but is not as compelling as the policy of protecting federal lands from harm. Arguably, the policy of protecting federal property from harm could justify the limits on the taking of the animals on nonfederal lands, if the animals are considered federal property. Such an assertion, however, was not made in *Kleppe*. 426 U.S. at 537 n.8. See note 102 *supra*.

106. The inhumane and otherwise illegal taking of such animals, however, is not useful. The Wild Free-Roaming Horses and Burros Act was largely a response to such senseless, cruel slaughter of the animals. *See* American Horse Protection Ass'n v. United States Dep't of Interior, 551 F.2d 432, 438 (D.C. Cir. 1977); Coggins & Hensley, *supra* note 3, at 1100-02.

mals, this reduction may not interfere significantly with the congressional policy of protecting the remaining wild horses and burros.

After weighing the competing interests, the court should consider whether the regulation interferes with the ownership more than is warranted. As the animals freely pass between unfenced federal and nonfederal lands,[107] taking wild horses and burros near the boundaries of the federal lands may frustrate the policy of providing sanctuary. The prohibition of such taking on all nonfederal lands, however, is unnecessarily broad, for it reaches conduct other than that which interferes with the congressional policy for the use of the federal lands. Under a *Camfield* balancing process, therefore, the prohibition of the killing of wild horses and burros on nonfederal lands may not be "needful" regulation "respecting the federal lands" and thus may not be authorized by the property clause.[108]

Predicting the precise application of the balancing test suggested by *Camfield* is speculative. Like private nuisance law, the review of legislation under such a test is a highly flexible process permitting the judiciary considerable leeway in resolving the conflict between competing uses. In most situations, however, it would appear that the judicial deference shown Congress regarding other uses of the property clause[109] is likely to extend to judicial review of its use to regulate conduct on nonfederal lands. A judicial conclusion that such legislation is

107. Coggins & Hensley, *supra* note 3, at 1132 n.248. In their ability to move freely across the boundaries of federal property, the animals resemble the fires prohibited by the legislation reviewed in *Alford*. See notes 91-95 & accompanying text *supra*. The free movement of the horses and burros creates substantial difficulty in determining which animals are protected once they have strayed from federal lands. *See* American Horse Protection Ass'n v. United States Dep't of Interior, 551 F.2d 432, 435-37 (D.C. Cir. 1977).

108. Rather than seeking to effectuate a policy for the use of the federal lands, the legislation appears to be intended to achieve a much broader objective: the protection of wild horses and burros wherever found. While that objective is commendable, and while the property clause may be exercised to assist in its achievement, the property clause power of Congress does not justify such extensive regulation of conduct on nonfederal property.

The designation of the federal lands as sanctuary for the animals, as was done in the legislation, 16 U.S.C. §§ 1331, 1333 (1976), is one way to further the objective of protection of the animals through the use of the property clause power. The property clause might also authorize the extension of that protection a reasonable distance beyond the boundaries of the federal lands to insure that the free movement of the animals to nonfederal lands would not permit the frustration of the sanctuary policy through the taking of animals at those boundaries. Such a limited extension of the protection might be more easily justified under the *Camfield* balancing approach than the assertion of property clause regulation of the taking of the animals wherever found. For a discussion of other constitutional bases for the federal protection of wild horses and burros, see Coggins & Hensley, *supra* note 3, at 1122-43.

109. See notes 59-62 & accompanying text *supra*.

not "needful" regulation "respecting the federal lands" presumably will be quite unusual even under the *Camfield* balancing approach.[110]

Conclusion

The use by Congress of the property clause power to regulate conduct on nonfederal property, unrelated to a disposition of federal lands, cannot be said to be "without limitations." In addition to limitations imposed by other constitutional provisions, the property clause itself appears to provide some restraints on its use outside the boundaries of federal lands. Although the parameters of those restraints are unclear, the balancing approach implicitly suggested by the Supreme Court in *Camfield* presents a theory that might serve to bring them into better focus.

110. Efforts to accomplish nationwide policy objectives should not escape judicial review solely because they are labelled as legislation pertaining to the federal lands. For example, Congress might choose to prohibit nationwide the sale of beverages in nonreturnable containers. Such legislation may be sustainable under the constitutional powers of Congress, such as the commerce clause. U.S. CONST. art. I, § 8, cl. 3. A congressional assertion that such regulation is necessary to alleviate litter on the federal lands, however, should not insulate that legislation from probing judicial review under a mere assertion that the property clause power is "without limitations." The nuisance analogy approach of *Camfield* would ensure that such regulation of conduct on nonfederal lands bears a sufficient relationship to the federal lands to warrant its enactment under the property clause.