BYU Law Review

Volume 1986 | Issue 1 Article 2

3-1-1986

Inholders: An Endangered Species?

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COMMENTS

Inholders: An Endangered Species?

Article IV of the United States Constitution empowers Congress to regulate federal lands. The scope of this congressional authority has long been a source of concern to private landowners with property located within or adjacent to federal public lands. Judicial interpretation has demonstrated that congressional authority to regulate federal lands is essentially "without limitations."[1] Recent litigation concerning this controversial area of public land law suggests a need to analyze Congress's property clause power to regulate the use of private inholdings within the nation's public wilderness areas.

This comment traces the history and expansion of Congress's property clause power and discusses the limits upon federal regulation of private inholders. It recommends that a heightened standard of judicial review be applied when evaluating federal regulation of nonfederal lands in order to protect the essential rights of inholders and prevent yet another addition to the nation's endangered species list.

I. Historical Development: The Property Clause

The property clause of the United States Constitution empowers Congress to "dispose of and make all needful Rules and Regulations respecting" United States property.[2] Notwithstanding the broad language of this provision, Congress has only infrequently utilized this regulatory power over nonfederal lands. Because few Supreme Court decisions treat the scope of congressional authority to regulate landowners with property located in

1. Kleppe v. New Mexico, 426 U.S. 529, 539 (1976) (citing United States v. San Francisco, 310 U.S. 16, 29 (1940)). *See infra* notes 18-27 and accompanying text. The Court's "without limitations" assertion is directed only at congressional action under the property clause.

2. U.S. Const. art. IV, § 3, cl. 2.

or adjacent to federal lands,[3] the historical context of Congress's regulatory power is important.

A. Early History

Congress has utilized its regulatory powers under the property clause in three basic ways: (1) to regulate acquisition of interests in federal lands, (2) to protect federal lands, and (3) to implement congressional policies concerning the use of federal lands.[4] Each of these uses has served to justify regulation of conduct on nonfederal property.[5]

First, the property clause empowers Congress to "dispose of" federal lands. As proprietor of these lands, Congress may determine the terms and conditions of any such disposition.[6] In *United States v. City of San Francisco*,[7] a federal land grant to the city of San Francisco for water supply development required that all electricity produced on the land be sold directly to consumers rather than to private utilities for subsequent distribution. The United States Supreme Court upheld this conditional disposition of federal land as a valid exercise of property clause power in regulating nonfederal property.[8]

Second, in addition to disposing of federal lands, Congress

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3. It is not surprising that in 1976 Justice Marshall pointed out that "the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved . . . ." Kleppe v. New Mexico, 426 U.S. 529, 539 (1976).

4. This discussion focuses primarily upon Congress's property clause powers to regulate for the protection of federal lands and to effectuate federal land-use policies. A very brief example of Congress's use of this power to regulate the acquisition of interests in federal land will be discussed. *See infra* notes 7-8 and accompanying text.

5. Gaetke, *Congressional Discretion Under the Property Clause*, 33 HASTINGS L.J. 381, 384 (1981) [hereinafter cited as Gaetke, *Congressional Discretion*]; *see also* Gaetke, *The Boundary Waters Canoe Area Wilderness Act of 1978: Regulating Nonfederal Property Under The Property Clause*, 60 OR. L. REV. 157 (1981) [hereinafter cited as Gaetke, *Boundary Waters*].

6. "The United States can prohibit absolutely or fix the terms on which its property may be used. As it can withhold or reserve the land it can do so indefinitely . . . ." Light v. United Stetes, 220 U.S. 523, 536 (1911).

7. 310 U.S. 16 (1940).

8. *Id.* at 29-30; *see* Gaetke, *Congressional Discretion*, *supra* note 5, at 385-86. The *San Francisco* Court stated:

> The power over the public land thus entrusted to Congress is without limitations. "And it is not for the courts to say how that trust shall he administered. That is for Congress to determine." Thus, Congress may constitutionally limit the disposition of the public domain to a manner consistent with its views of public policy.

310 U.S. at 29-30 (quoting Light v. United States, 220 U.S. 523, 537 (1911)); *see* Federal Power Comm'n v. Idaho Power Co., 344 U.S. 17 (1952).

has used the property clause to make "all needful Rules and Regulations respecting"[9] the protection of federal lands. In *United States v. Alford*,[10] the Supreme Court upheld the constitutionality of a federal statute prohibiting fires on private land adjacent to a national forest. The Court stated that "Congress may prohibit the doing of acts upon privately owned lands that imperil the publicly owned forests."[11] Thus, *Alford* extended the property clause power beyond the boundaries of federal property, at least to protect federal land from physical harm.

Finally, Congress has invoked the property clause power to achieve its land use policies. In the landmark case of *Camfield v. United States*,[12] a private proprietor obtained title to odd-numbered sections of land from the Union Pacific Railroad,[13] while the government retained ownership of adjacent even-numbered parcels of land. By skillfully building fences on his own sections near the property boundary lines, the private landowner successfully enclosed not only his own land, but also twenty thousand acres of federal land. The United States brought an action for

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9. U.S. CONST. art. IV, § 3, cl. 2.

10. 274 U.S. 264 (1927).

11. *Id.* at 267. Recognizing that forest fires do not stop at boundary lines of publicly owned forests, the Court stated that

> [t]he purpose of the Act is to prevent forest fires which have been one of the great economic misfortunes of the country. The danger depends upon the nearness of the fire, not upon the ownership of the land where it is built.
>
> . . . The word "near" is not too indefinite. Taken in connection with the danger to be prevented it lays down a plain enough rule of conduct for anyone who seeks to obey the law.

Id.

12. 167 U.S. 518 (1897).

13. In an effort to induce construction of a transcontinental railroad, Congress passed the Union Pacific Act of 1862, ch. 120, 12 Stat. 489 (codified as amended at 45 U.S.C. §§ 81-83 (1982)), under which the government granted public land to Union Pacific Railroad for each mile of track laid. Land surrounding the railroad right-of-way was divided into "checkerboard" blocks; the odd-numbered lots were given to Union Pacific and the even-numbered lots were retained by the government. The railroad subsequently sold the odd-numbered lots to private landowners. *See generally* Leo Sheep Co. v. United States, 440 U.S. 668 (1979). In Mackay v. Uinta Dev. Co., 219 F. 116, 118 (8th Cir. 1914), the court stated: "[A]ll persons as . . . licensees have an equal right of use of the public domain, which cannot be denied by interlocking land held in private ownership." This land grant scheme promoted the congressional policy of homesteading and settling the West. *See Leo Sheep*, 440 U.S. at 683-84. *Camfield* expressly recognized the congressional policy of open access to public lands: "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 . . . ." 167 U.S. at 525.

removal of the fences, alleging that the fences violated a federal statute prohibiting enclosure of federal lands.[14]

The Court rejected the proprietor's claim that the federal regulation restricting use of fences was unconstitutional. The government could properly compel removal of the fences under the common law theory of nuisance: "[T]he Government has, with respect to its own lands, the rights of an ordinary proprietor, to maintain its possession and to prosecute trespassers."[15] The Court noted the current congressional policy that public lands be settled as soon as possible[16] and held that the fences hindered public use of government land.[17] Thus, *Camfield* affirmed the use of property clause power to regulate activities on private property.

Accordingly, federal regulation of private land under the property clause is permitted only to the extent the regulated conduct can be characterized as a common law wrong (such as trespass or nuisance), imperils the public lands, or impedes the protection of those lands. These early decisions demonstrate a rather narrow interpretation of Congress's property clause power to regulate nonfederal land. Later cases have extended this power over federal and nonfederal lands to encompass regulation of conduct traditionally governed by state law.

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14. Unlawful Inclosures of Public Lands Act of 1885, ch. 149, 23 Stat. 321 (codified as amended at 43 U.S.C. §§ 1061-1066 (1982)). The act was Congress's response to similar fencing schemes whereby private landowners enclosed huge parcels of land along the transcontinental railroad.

15. *Camfield*, 167 U.S. at 524; *see also* Fort Leavenworth R.R. v. Lowe, 114 U.S. 525 (1885) (the United States maintains the rights of an ordinary proprietor).

16. *See supra* note 13. The Unlawful Inclosures of Public Lands Act of 1885, ch. 149, 23 Stat. 321 (codified as amended at 43 U.S.C. §§ 1061-1066 (1982)), protected potential users of the federal property. Referring to the property clause, the Court declared:

> 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.

17. 167 U.S. at 524-25, 527. Unlike the statute in *Alford* prohibiting fires near federal lands, the Inclosures Act had nothing to do with protecting public land from physical harm, but rather was intended to promote the policy of unlimited public use.

B. Expansion of Property Clause Power

The Supreme Court expansively read the property clause in its 1976 decision in *Kleppe v. New Mexico*.[18] The Court sustained a federal statute protecting wild burros and horses that stray from public lands onto private property.[19] The statute directs the secretary of the interior 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."[20] Addressing only federal regulation of public lands, the Court held that under the supremacy clause the federal statute overrides conflicting state law.[21] Thus, the Court upheld Congress's finding that the legislation was "needful" regulation "respecting" federal lands.[22]

Kleppe did not hold that the animals were federal property[23] or that the legislation was an effort to protect federal lands from harm.[24] Instead, Justice Marshall intentionally left open the constitutionality of applying the statute to nonfederal property when he stated:

> While it is clear that regulations under the Property Clause may have some effect on private lands not otherwise under federal control, we do not think it appropriate . . . to determine the extent, if any, to which the Property Clause empowers

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18. 426 U.S. 529, 538 (1976).

19. *Id.* at 531-32. While the statute contemplates animals roaming on private lands, in *Kleppe* all the animals were seized while on public land. *Id.* at 534 n.3.

20. Wild Free-Roaming Horses and Burros Act of 1971, Pub. L. No. 92-195, § 3(a), 85 Stat. 649 (codified as amended at 16 U.S.C. § 1333(a) (1982)).

21. 426 U.S. at 543. The Court held:

> Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the 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.

Id. (citations omitted).

22. "[T]he act is a constitutional exercise of congressional power under the Property Clause." *Id.* at 546.

23. Had the Court treated the animals as federal property, the *Alford* rationale would have applied and Congress would have been protecting federal property from threatened physical harm. *See id.* at 537 n.8.

24. *See id.* at 537 n.7. Consistently with *Alford*, the Supreme Court, in Hunt v. United States, 278 U.S. 96 (1928), directed that congressional legislation pursuant to the property clause displace inconsistent state law when necessary to protect federal land from threatened physical harm. Notwithstanding a violation of state big game laws, *Hunt* upheld a federal program to kill deer that were overbrowsing in a national forest. *Id.* at 100.

> Congress to protect animals on private lands or the extent to which such regulation is attempted by the Act.[25]

Essentially, the Supreme Court in *Kleppe* broadly interpreted Congress's power to regulate conduct on federal property for land-use purposes, notwithstanding preexisting state regulation of the animals.[26]

The earlier decisions in *Alford* and *Camfield*, together with *Kleppe*, support the proposition that under the property clause Congress may implement federal land-use policies through regulations that may affect conduct on nonfederal property traditionally governed by state law. The ultimate scope of Congress's power to regulate nonfederal land is as yet undefined,[27] but the cases suggest that the Supreme Court believes it to be enormous.[28]

Three recent court of appeals decisions have addressed the extent to which property clause regulations can supersede state law regarding nonfederal land. These decisions have perpetuated *Kleppe*'s broad interpretation of congressional power. In *United States v. Brown*,[29] the Eighth Circuit held that Congress has power to regulate conduct on nonfederal land to further federal land-use policies, notwithstanding contrary state law. *Brown* addressed the issue left open in *Kleppe:* "[W]hether the Property Clause empowers the United States to enact regulatory legislation protecting federal lands from interference occurring on nonfederal public lands, or, in this instance, waters."[30]

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25. *Kleppe*, 426 U.S. at 546 (citations omitted). *But see* United States v. Brown, 552 F.2d 817 (8th Cir.), *cert. denied*, 431 U.S. 949 (1977) (upholding regulations prohibiting hunting and possessing loaded firearms as a valid promotion of the purposes of the federal lands within the national park). *See infra* notes 29-33 and accompanying text; *see also* United States v. Lindsey, 595 F.2d 5 (9th Cir. 1979).

26. *Kleppe* cited United States v. City of San Francisco, 310 U.S. 16, 30 (1940), and stated:

> Although the Property Clause does not authorize "an exercise of a general control over public policy in a State," it does permit "an exercise of the complete power which Congress has over particular public property entrusted to it." In our view, the "complete power" that Congress has over public lands necessarily includes the power to regulate and protect the wildlife living there.

426 U.S. at 540-41 (citations omitted). Notwithstanding the appellees' argument that the government lacked jurisdiction to regulate stete-owned animals, the Court stated that a "different rule would place the public domain of the United States completely at the mercy of state legislation." *Id.* at 543 (quoting *Camfield*, 167 U.S. at 526).

27. *See supra* nota 1 and accompanying text.

28. *See Kleppe*, 426 U.S. at 539.

29. 552 F.2d 817, 822-23 (8th Cir.), *cert. denied*, 431 U.S. 949 (1977).

30. *Id.* at 822. The waters in question are located within the park boundaries but

The defendant, while duck hunting on a lake in Voyageurs National Park, was cited for violating a federal regulation prohibiting hunting and possessing a loaded firearm in the park. The central issue concerned the government's assertion of federal jurisdiction in controlling activities on waters within Voyageurs National Park. Although the state had never ceded jurisdiction to the United States over waters in the park, the court upheld the regulations as validly promoting the purposes of the federal lands.[31] *Brown* maintained that congressional power over federal lands includes "the authority to regulate activities on non-federal public waters in order to protect wildlife and visitors on the [federal] lands."[32] The district court had specifically held that hunting on the waters in the park could "significantly interfere with the use of the park and the purpose for which it was established."[33]

Similarly addressing federal regulation of state-owned waterways, the Ninth Circuit, in *United States v. Hells Canyon Guide Service, Inc.*,[34] issued a permanent injunction against a guide who persisted in operating jet and float boats in Hells Canyon National Recreational Area without obtaining a permit from the forest service. The court held that despite state jurisdiction over Snake River water, the secretary of agriculture may regulate activities on nonfederal waters in order to protect archaeological, ecological, historical, and recreational values on the lands.[35]

Finally, in *United States v. Arbo*,[36] the Ninth Circuit fur-

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are owned by the state of Minnesota. *Id.* at 820 n.3.

31. *Id.* at 821-22.

32. *Id.* at 822. *Brown* also noted that "when regulation is for the protection of federal property, 'the Property Clause is broad enough to reach beyond territorial limits.'" *Id.* (quoting *Kleppe*, 426 U.S. at 538). *See* Griffin v. United States, 168 F.2d 457 (8th Cir. 1948) (upholding federal injunction against grazing on federal lands without a permit despite contrary stete law and local ordinances declaring lands to he open range); *see also* United States v. Lindsey, 595 F.2d 5 (9th Cir. 1979).

33. United States v. Brown, 431 F. Supp. 56, 63 (1976). The district court noted that duck hunting poses a potential danger of unwarranted intrusion on public lands, injury to park users, and disruption of wildlife migration patterns. *Id.* at 62.

34. 660 F.2d 735 (9th Cir. 1981); *see also* United States v. Meki, No. 5-78-2M (D. Minn. Apr. 12, 1978) (upholding ban on snowmobiles in the BWCA to promote wilderness purposes).

35. 660 F.2d at 737. The court in New Mexico State Game Comm'n v. Udall, 410 F.2d 1197, 1201 (10th Cir.), *cert. denied*, 396 U.S. 961 (1969), sanctioned killing of deer in a national park as research for the esteblishment of a management plan to preserve the park's scenery and wildlife.

36. 691 F.2d 862 (9th Cir. 1982).

ther expanded federal regulation of nonfederal lands. The defendant was charged with interfering with an inspection by forest service officers on nonfederal property adjacent to federal land. The court, rejecting the defendant's claim of lack of federal jurisdiction, held that it was immaterial that the inspection occurred on nonfederal lands. All that was necessary was that the inspection be "reasonably necessary to protect adjacent federal property."[37]

These decisions exemplify an expanded interpretation of Congress's property clause power to regulate conduct both on and off federal land. Nevertheless, *Kleppe*'s refusal to rule upon the constitutionality of federal regulation of nonfederal land indicates that the Supreme Court may be willing to limit the federal government's ability to regulate nonfederal land.[38]

II. Limitations Upon Congress's Property Clause Power

Recent cases challenging federal regulation of private inholdings have acknowledged the following potential limitations upon Congress's regulatory powers: (1) implied rights of access, (2) the fifth amendment prohibition of takings without just compensation, and (3) international treaties affecting nonfederal lands. The political process also acts as an inherent check on federal power. However, while giving judicial lip service to these limitations, many courts are reluctant to restrain Congress's powers in this area.

A. Implied Rights of Access, Fifth Amendment Takings, and International Treaties

In *Utah v. Andrus*,[39] the district court discussed the implied rights of access and fifth amendment takings clause limitations. The United States brought suit to enjoin Cotter Corporation (Cotter), a uranium mining and exploration company, from constructing an access road across federal land to Cotter's state mineral leasehold.[40] The government maintained that the access road would destroy "primitive, scenic and wildlife characteris-

37. *Id.* at 865; *see also* Free Enter. Canoe Renters Ass'n v. Watt, 549 F. Supp. 252 (E.D. Mo. 1982) (upholding prohibition on use of state roeds within a federal reservation for canoe pickups by canoe renters without a park service permit).

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

39. 486 F. Supp. 995 (D. Utah 1979).

40. *Id.* at 999-1000.

tics" on lands previously designated as a "wilderness study area" pursuant to the Federal Land Policy and Management Act of 1976 (FLPMA).[41] The state of Utah intervened, alleging that denying access to the state land leased to Cotter would violate a federal compact with the state[42] and interfere with its right to fully utilize the school land trust.[43]

The first issue *Andrus* addressed was whether Cotter, as Utah's lessee, had a right of access across federal lands to the state trust lands. The court held that denying access would effectively preclude development and render the lands economically worthless. The entire purpose of the land grant was to provide Utah with an income-generating trust to support its schools; denying access would contravene congressional intent.[44]

In connection with its discussion of implied rights of access, the court addressed the nature and extent of Cotter's right of access. After examining in detail the Bureau of Land Management's (BLM) authority to regulate under the FLPMA,[45] the

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41. Pub. L. No. 94-579, § 201, 90 Stat. 2743, 2747 (codified as amended at 43 U.S.C. § 1711 (1982)). FLPMA was intended to provide the Bureau of Land Management (BLM) a statutory base from which to administer federal lands within its jurisdiction. Under § 201(a), the BLM is directed to inventory all BLM managed lands, their resources, and other values. Section 603(a) directs that all roadless areas of five thousand acres or more that have wilderness characteristics be reviewed pursuant to this inventory process. Recommendations to the president are to be made whether or not each such area should be preserved as wilderness according to provisions of the Wilderness Act of 1964, Pub. L. No. 88-577, 78 Stat. 890 (codified as amended at 16 U.S.C. §§ 1131-1136 (1982)).

42. The government granted federal land to Utah to provide the new state a tax base. However, this grant was not unilateral in nature, but required Utah to use the proceeds for a permanent state school trust fund. *Andrus*, 486 F. Supp. at 1000.

43. At stake were three very important and conflicting interests:

> Tha state of Utah has a clear interest in protecting its rights under the grant of school trust lands and in being able to use those lands so as to maximize the funds available for the public schools. Cotter, of course, has an interest in developing its claims in the most economical way possible. Finally, the Unitad States has an interest in preserving for future generations the opportunity to experience the solitude and peace that only an undisturbed natural setting can provide.

Id. at 1001.

44. *Id.* at 1002. The court noted that at common law a grantor was presumed to include in a conveyance whatever was necessary for the use and enjoyment of the land in question. In other words, the grantee had an easement by implication or by necessity.

45. The statute (FLPMA) appears to be internally inconsistent, reflecting the different concerns of environmentalists, miners, and ranchers. *See id.* at 1002-03. Nevertheless, the court cautioned:

> It is only when the statute is viewed in a dynamic rather than a static context . . . that the conflict can be resolved . . . . It is only by looking at the overall use of the public lands that one can accurately assess whether or not BLM is

court declared that the governing statute imposes two standards for managing public lands. The BLM may "manage public lands so as to prevent impairment of wilderness characteristics, unless those lands are subject to an existing use."[46] If the lands are subject to an existing use, the BLM may regulate so as "to prevent unnecessary or undue degradation of the environment."[47] The court found that the BLM's authority to regulate was not subject to an existing mining use. Thus, Cotter's construction of an access road was subject to the "prevent impairment of wilderness characteristics" standard.

The court pointed out, however, that section 603(c) of the FLPMA contemplates that human activity can take place in wilderness areas as long as the area "generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable."[48] Temporary activities would not "impair" wilderness characteristics under the FLPMA if reclamation procedures could reverse the negative impacts.[49]

Turning to the state of Utah's rights of access under the FLPMA, the court noted that the state's interest in the land did not qualify as an existing use.[50] Nevertheless, the court recognized that the state must be allowed access to its trust lands in a manner that "is not so narrowly restrictive as to render the lands incapable of their full economic development."[51] Even then, "the United States, as holder of the servient tenement, has the right to limit the location and use of Utah's easement of ac-

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carrying out the broad purposes of the statute.

Id. at 1003.

46. *Id.* at 1005. "[U]nder section 603(c) there are two management standards: one that applies to uses of the land existing on October 21, 1976, and one that applies to uses coming into existence after that date." *Id.* at 1003.

The court pointed out:

> The word "impair" would prevent many activities that would not be prevented by the language of "unnecessary or undue degradation." For example, commercial timber harvesting, if conducted carefully, would not result in unnecessary or undue degradation of the environment. But the same activity might well impair wilderness characteristics . . . .

Id. (citation omitted). "A reasonable interpretation of the word 'unnecessary' is that which is not necessary . . . . 'Undue' is that which is excessive, improper, immoderate or unwarranted." *Id.* at 1005 n.13.

47. *Id.* at 1005.

48. *Id.* at 1007 (emphasis omitted).

49. *Id.* The court deferred determination of the appropriateness of the proposed reclamation to the designated administrative agency, BLM. *Id.* at 1008-09.

50. *Id.* at 1010 n.20.

51. *Id.* at 1009.

cess to that which is necessary for the state's reasonable enjoyment of its right."[52]

The *Andrus* court also addressed the fifth amendment takings clause limitation. The federal government asserted that if Utah's right of access were found to impair wilderness values, the government could prevent access altogether. The state countered that that would constitute a taking without just compensation in violation of the fifth amendment.[53] The court, citing *Pennsylvania Coal Co. v. Mahon*,[54] responded that "when regulation reaches the point of seriously impinging on 'investment-backed expectations,' it can constitute a taking."[55] Thus, the BLM could deny access as long as it compensated the state of Utah for the taking.

Andrus established two potential limits upon federal regulation of inholdings. First, regulation of inholdings may be subject to implied rights of access. The court interpreted the governing statute to provide that if access rights are coupled with an existing use, the government may only regulate to "prevent unnecessary and undue degradation of the environment." However, if access rights are not coupled with an existing use, the government may regulate to "prevent impairment of wilderness characteristics." In either situation, the court found a right of access that may be subject to federal regulation in a limited manner.

Second, regulation of inholdings may be subject to the fifth amendment takings clause. The court held that regulation may not restrict full economic development of the property or impinge investment-backed expectations without just compensation. Further, federal regulation, while prescribing a manner of access, must provide necessary access for reasonable use and enjoyment of the private inholding. By recognizing these two limits, *Andrus* demonstrates some judicial awareness that broad federal regulation adversely affects inholders' rights.

In *Montana Wilderness Association v. United States Forest Service*,[56] the Ninth Circuit confirmed the existence of an

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52. *Id.* In other words, BLM may reasonably regulate the manner of access under FLPMA.

53. *Id.* at 1009-11.

54. 260 U.S. 393 (1922).

55. 486 F. Supp. at 1011. The court declared: "[T]here is a substantial question of taking in this case if access to federal claims are [*sic*] indefinitely prohibited or if alternative eccess is unreasonably expensive." *Id.*

56. 655 F.2d 951 (9th Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). *See generally* Lambert, *Private Landholdings in the National Parks: Examples from Yosemite Na-*

implied right of access to inholdings within federally regulated land. The United States Forest Service granted Burlington Northern Railroad a permit to construct an access road across parts of Gallatin National Forest to timber inholdings.[57] The proposed roads traversed previously designated "wilderness study areas" under the Montana Wilderness Study Act of 1977.[58] The plaintiffs appealed from the district court decision upholding the private inholder's right of access,[59] and sought to block further construction of the road.

The wilderness association argued that the proposed logging and road building would disqualify the area as potential wilderness under the act. The Ninth Circuit, after analyzing section 1323 of the Alaska National Interest Lands Conservation Act of 1980 (ANILCA),[60] agreed that Burlington Northern had a right of access across federal lands to its timberland inholdings.[61] Although the court did not provide the standard governing regula-

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tional Park and Indiana Dunes National Lakeshore, 6 HARV. ENVTL. L. REV. 35 (1982).

57. The inholding was originally acquired by Burlington's predecessor, the Northern Pacific Railroad, under the Northern Pacific Land Grant Act of 1864, ch. 217, 13 Stat. 365. 655 F.2d at 952. For an analogous discussion, see *supra* note 13.

58. Montana Wilderness Study Act of 1977, Pub. L. No. 95-150, 91 Stat. 1243. Wilderness study areas are lands designated for administrative study to determine whether the lands are suitable for wilderness. Recommendations are then submitted to Congress, which decides whether the lands should receive statutory protection as wilderness under the Wilderness Act of 1964, Pub. L. No. 88-577, 78 Stat. 890 (codified as amended at 16 U.S.C. §§ 1131-1136 (1982)).

59. After the original suit seeking declaratory and injunctive relief was filed, a temporary restraining order was granted. A subsequent opinion, issued by Attorney General Civiletti, gave deference to the argument that Burlington had an implied easement under the Northern Pacific Land Grant Act of 1864, ch. 217, 13 Stat. 365. Op. Att'y Gen., Slip at 1 (June 23, 1980). After this opinion, the forest service reinstated Burlington's land construction permit and the district court granted the forest service's motion for partial summary judgment in favor of Burlington's access. *See* 655 F.2d at 953. To deny access would contravene the secretary of agriculture's usual discretion in granting access across forest service land. Further, such denial would leave Burlington the remedy of exchanging its lands for other comparable federal lands. *Id.* at 953 n.2.

60. Pub. L. No. 96-487, 94 Stat. 2371 (codified as amended in scattered sections of 16 and 43 U.S.C.). Section 1323 declares "the Secretary [of Agriculture] shall provide such access to nonfederally owned land within the boundaries of the National Forest System as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof." *Id.* § 1323(a), 94 Stat. at 2488 (codified at 16 U.S.C. § 3210(a) (1982)).

61. 655 F.2d at 957. Though not consistent with ordinary principles of statutory construction, the court held Burlington had a right of access based upon legislative history subsequent to ANILCA's enactment. "Three weeks after Congress passed the Alaska Lands Act [ANILCA], a House-Senate Conference Committee considering the Colorado Wilderness Act interpreted § 1323 of the Alaska Lands Act as applying nationwide . . . ." *Id.* This decision is best viewed in the context of its particular facts.

tion of construction and use of this access road, it was willing to find an implied right of access subject to limited federal regulation.

Two district courts have also recognized the fifth amendment takings clause limitation on federal regulation. In *Southern Appalachian Multiple Use Council v. Bergland*,[62] the court ruled that the secretary of agriculture's designation of lands surrounding the plaintiff's property as a "wilderness study" area and closing of the access road to the lands constituted a taking without due process of law.[63]

The second case, *Izaak Walton League of America v. St. Clair*,[64] also recognized the fifth amendment limitation but, like most courts, it disposed of the case on other grounds without reaching the fifth amendment question. The court ordered a permanent injunction against St. Clair, a private lessee of mineral rights underlying approximately 150,000 acres of land within Minnesota's Boundary Waters Canoe Area (BWCA).[65] In 1969, St. Clair entered the BWCA and undertook surface mineral exploration, established base camps, and planned core drilling. The central issue the court addressed was whether the BWCA had been effectively zoned against commercial activity, which includes mining and mining exploration pursuant to federal and state regulations. The court maintained that the federal government had power to "zone" all land within the BWCA by banning mining but did not reach the question whether such action constituted a taking.[66]

The decision in *Minnesota v. Block*[67] combines many of the concepts discussed thus far in this comment and raises another

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62. 11 ENVTL. L. REP. (ENVTL. L. INST.) 20679 (W.D.N.C. Apr. 16, 1981).

63. *Id.* at 20683. On the other hand, Humboldt County v. United States, 684 F.2d 1276 (9th Cir. 1982), upheld the closure of two roads to protect natural values pending a study of the area's wilderness characteristics. *See also* Foundation for N. Am. Wild Sheep v. United States, 681 F.2d 1172 (9th Cir. 1982) (requiring the forest service to prepare an environmental impact statement before issuing a permit allowing mining company to reopen access roads crossing federal lands occupied by a bighorn sheep herd).

64. 353 F. Supp. 698 (D. Minn. 1973), *rev'd*, 497 F.2d 849 (8th Cir. 1974).

65. BWCA is the only wilderness canoe area in the United States. The BWCA is the largest wilderness area east of the Rockies and is the most frequently used unit in the National Preservation System. *See infra* note 69.

66. 353 F. Supp. at 710.

67. 660 F.2d 1240 (8th Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982) (appeal from three consolidated cases involving challenges to the Boundary Waters Canoe Area Wilderness Act of 1978, Pub. L. No. 95-495, 92 Stat. 1649. For a more complete discussion, see Gaetke, *Boundary Waters*, *supra* note 5.

potential limitation on federal power to regulate nonfederal property. The Eighth Circuit held that the property clause authorized congressional regulation of motor vehicle use on nonfederal lands and waters despite challenges under the fifth and tenth amendments, and international treaties.[68] The relevant regulation prohibited use of motorboats in all but a small number of lakes and limited snowmobile use to two routes within the Boundary Waters Canoe Area Wilderness (BWCAW).[69] The plaintiffs asserted that Congress had exceeded its constitutional authority in regulating nonfederal land and water use.[70]

The court first addressed the scope of Congress's property clause power as applied to activity occurring off federal land:[71]

> 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 . . . . Congress must have the ability to insure that these lands be protected against interference with their intended purposes.[72]

After establishing that Congress may regulate conduct on nonfederal land, the court discussed whether Congress had acted within this power in prohibiting motor vehicle use in the BWCAW. The court recognized the deference accorded congressional judgment, noted that Congress's restriction of motor vehi-

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68. 660 F.2d at 1244. The court's disposition of the tenth amendment challenge is discussed *infra* note 80.

While the federal government owns 90% of land within the borders of the BWCAW, the state of Minnesota, in addition to owning most of the remaining 10% (some portions were privately owned), owns the beds of all the navigable lakes and rivers within the BWCAW.

69. *Id.* at 1246 n.9; *see also supra* note 67. In addition, the act prohibits mining, phases out timber harvesting, and expands the area an additional 45,000 acres. 660 F.2d at 1244 n.4.

70. 660 F.2d at 1248.

71. *Id.* at 1249 (footnotes omitted). *Kleppe,* without defining the limits of the power, acknowledged that "it is clear that regulations under the Property Clause may have some effect on private lands not otherwise under federal control." 426 U.S. at 546.

72. 660 F.2d at 1249 (footnotes omitted). The court reiterated: "[Congress] may sanction some uses and prohibit others, and *may forbid interference with such as are sanctioned." Id.* (quoting McKelvey v. United States, 260 U.S. 353, 359 (1922)) (emphasis by the court). Hunting within Voyagers National Park in Minnesota has been prohibited through federal regulation because "hunting on the waters in the park could 'significantly interfere with the *use of the park and the purpose for which it was established.*'" United States v. Brown, 552 F.2d 817, 822 (8th Cir.) (quoting United States v. Brown, 431 F. Supp. 56, 63 (1976)), *cert. denied,* 431 U.S. 949 (1978) (emphasis added).

cle use protected the fundamental purpose of the BWCAW, and held that this restriction was reasonably related to that purpose.[73]

In the second consolidated suit heard in *Block*,[74] the court discussed two possible limitations on federal regulation of nonfederal lands: (1) the fifth amendment's due process and taking clauses, and (2) international treaties. The plaintiffs asserted that the government's right of first refusal constituted a taking of property without just compensation.[75] The court held that in absence of an actual challenge to section 5(c) of the BWCAW Act, it could consider "only whether section 5(c) *on its face* constitutes an unconstitutional taking."[76] The court held that enactment of section 5(c) did not constitute a taking.[77]

Turning to the contention that section 4 of the act violated international treaties with Canada,[78] the court found that the intent of the nations was to assure that the international boundary would remain open and to allow each country wide latitude to regulate conduct on its side of the border. The court beld that

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73. *Block*, 660 F.2d at 1250-51. The court maintained that Congress acted within its power under the Constitution to pass needful regulations respecting public lands. *Id.* at 1251.

74. *Id.* at 1254.

75. *Id.* Under § 5(c) privately owned lands and interests in lands riparian to certain listed lakes cannot be sold without first being offered for sale to the secretary of agriculture, subject to an exception for changes of ownership within an immediate family. Boundary Waters Canoe Area Wilderness Act of 1978, Pub. L. No. 95-495, § 5(c), 92 Stat. 1649, 1652.

76. 660 F.2d at 1255.

77. *Id.* The court noted:

> [T]he mere conditioning of the sale of property . . . cannot rise to the level of a taking. Even if some diminution in value results from the passage of section 5(c), any affect [sic] on the landowner's aggregate property rights would be minimal. Section 5(c) does not interfere with the owner's use or enjoyment of his property; it does not compel the surrender of the land or any portion thereof; it does not affect the owner's ability to give his property or to transfer it in any manner to members of bis immediate family. Section 5(c) may affect slightly an owner's ability to alienate property, but it has little effect on even that "strand" in the bundle of property rights.

Id. at 1256.

For scholarly comment on the takings clause limitation on Congress's exercise of property clause power, see Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

78. *See* Webster-Ashburton Treaty of 1842, Aug. 9, 1842, United States-Great Britain, 8 Stat. 572, T.S. No. 119; Root-Bryce Treaty of 1909, Jan. 11, 1909, United States-Great Britain, 36 Stat. 2448, T.S. No. 548.

despite the argument that the federal regulation obstructed the free flow of commerce by inhibiting motorboat use, the provisions of the BWCAW Act were consistent with both treaties.[79]

C. State Autonomy and the Political Process

Given the massive federal land holdings in many states, unlimited congressional property clause power could threaten the state/federal balance of power. The states' police power is challenged by federal regulation of conduct on nonfederal property traditionally regulated by state law. These state autonomy concerns are fundamental to imposing certain limitations upon federal regulation.

States wishing to assert their autonomy have in the past argued that the tenth amendment prevents the federal government from encroaching on areas of traditional state regulation.[80] With the Supreme Court's recent decision in *Garcia v. San Antonio Metropolitan Transit Authority*,[81] however, the states may be left to assert their tenth amendment concerns to Congress and to hope the political process will effectively check federal power.[82]

The judiciary has long recognized the political process as an inherent check upon Congress. As early as 1824, the United States Supreme Court, in *Gibbons v. Ogden*,[83] stated:

> 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

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79. 660 F.2d at 1257.

80. For example, the plaintiffs in *Minnesota v. Block*, 660 F.2d 1240 (8th Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982), asserted that congressional regulation of motor vehicle use on nonfederal lands violated the tenth amendment. The court, however, rejected this argument. Relying on the Supreme Court's enunciation of the appropriate test for determining tenth amendment challenges in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 287-88 (1981), the court held that the law regulated private individuals rather than "States as States," and was thus valid.

81. 105 S. Ct. 1005 (1985).

82. In suggesting possible limits on Congress's commerce clause power, the majority opinion did not even list the tenth amendment. The dissent stated that "today's decision effectively reducee the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the Commerce Clause." *Id.* at 1022 (Powell, J., dissenting). However, Justice Rehnquist's dissent affirms that the *National League of Cities* approach will "in time again command the support of a majority of this Court." *Id.* at 1033 (Rehnquist, J., dissenting).

83. 22 U.S. (9 Wheat.) 1 (1824).

> which the people must often rely solely, in all representative governments.[84]

Garcia, by overruling the 1976 decision in *National League of Cities,*[85] has returned to this basic premise of *Gibbons v. Ogden. Garcia* recognized the effectiveness of the federal political process in preserving the state's interests and maintained that "the model of democratic decisionmaking [set forth in *National League of Cities*] underestimated, in our view, the solicitude of the national political process for the continued vitality of the States."[86]

> [W]e continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position. But the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated.[87]

III. Recommendation

Whatever the merits of the Court's solicitude for the political process's ability to protect the states from intrusive federal regulation under the property clause, the effectiveness of that process to protect private inholders is problematic. Private inholders are relatively small in number and for them the political process as a check upon the federal government is basically ineffective. Furthermore, the states will frequently have no incentive to use their political power to protect private landowners. This inherent disadvantage justifies the courts' exercise of increased judicial scrutiny when determining the property rights of inholders. This increased scrutiny should take the form of strict application and heightened judicial awareness of the basic limitations on federal regulation discussed earlier in this comment.

A. Balancing Interests

The history of property clause regulation suggests that pri-

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84. *Id.* at 197.

85. 426 U.S. 833 (1976) (holding that the tenth amendment precludes Congress from enacting legislation regulating "States as States").

86. 105 S. Ct. at 1021.

87. *Id.* at 1020.

vate landowners' constitutional right to use and enjoy their property is being seriously eroded. A balancing approach has been suggested to ameliorate the inholder's disadvantaged position.[88] Under such an approach, the court would weigh the utility of federal land-use policy 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 federal policy. The value of the challenged regulation to federal lands is compared with the degree of imposition on private inholders. If the balance indicates that congressional interference with ownership of nonfederal property is beyond that justified by federal policy, the court must conclude that it is not "needful" regulation "respecting the federal lands."

This balancing test provides some protection against federal abuse of private inholder rights. But because inholders lack significant political input to help shape that policy, the balancing test alone does not provide the needed safeguard against Congress's broad powers. Thus, for the balancing test to work, greater deference must be given the private landowner.

B. Heightened Judicial Scrutiny

The disadvantaged position of private inholders warrants a heightened standard of judicial review when courts are called upon to balance the rights of private inholders against the utility of federal land-use regulations. This heightened standard of review is needed to offset the political imbalance and to counter judicial reluctance in applying tenth amendment, due process, and other limitations on federal property clause regulation.

The new interventionism theory promulgated in the wake of Justice Stone's decision in *United States v. Carolene Products Co.*[89] lends support to such a position. The *Carolene Products* Court upheld a congressional prohibition on interstate shipment of filled milk. In doing so, the Court discussed guidelines for deferential "rational basis" review of economic legislation challenged under the due process clause.[90] In the course of the opinion, Justice Stone stated in a now famous footnote:

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88. *See* Gaetke, *Congressional Discretion*, *supra* note 5, at 395-402.

89. 304 U.S. 144 (1938). For a more detailed discussion, see Ball, *Judicial Protection Of Powerless Minorities*, 59 IOWA L. REV. 1059 (1974).

90. [T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally as-

> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation . . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities, *whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.*[91]

The *Carolene Products* footnote offers the starting point for most arguments urging special judicial solicitude for minorities.[92] Commentators have indicated that those minorities to whom a more searching judicial inquiry may be afforded include groups not readily placed within traditional minority categories.[93] These authorities argue that "[t]hose minorities who are the special subject of judicial protection are 'powerless minorities'. . . . It is those who cannot defend themselves who are to be shielded by the courts."[94]

Justice Stone's test for heightened judicial scrutiny might

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sumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.

304 U.S. at 152.

91. *Id.* at 152 n.4 (citations omitted) (emphasis added). The footnote is deemed "famous" in Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 933 (1973):

> [T]he interests to which the Court can responsibly give extraordinary constitutional protection include not only those expressed in the Constitution but also those that are unlikely to receive adequate consideration in the political process, specifically the interests of 'discrete and insular minorities' unable to form effective political alliances. There can be little doubt that such considerations have influenced the direction, if only occasionally the rhetoric, of the recent Courts.

Id. at 933 (footnotes omitted). For an application and extension of this footnote, see J. ELY, DEMOCRACY AND DISTRUST 75-77 (1980).

92. Professor Karst examines Justice Douglas's apparent move toward selective intervention in Karst, *Invidious Discrimination: Justice Douglas and the Return of the 'Natural-Law-Due-Process Formula,'* 16 UCLA L. REV. 716 (1969); see also Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972), which calls for a means-focused assessment of legislative purposes based on actuality and articulation, rather than mere judicial conjecture.

93. *See* Ball, *supra* note 89, at 1059 n.3.

94. *Id.*

appropriately be applied to inholders. Private inholders, as a small class of citizens, are a relatively powerless minority.[95] Inholders' inability to form effective political alliances makes adequate consideration of their interests in the political process unlikely. Further, legislative expansion of federal regulation of nonfederal inholdings and judicial reluctance to limit such regulation illustrates the potential for federal indifference and prejudice when basic property rights of a small number of private inholders are at issue. Since adequate representation of the interests of nonfederal property owners would require them to attend national forums, inholders are becoming increasingly vulnerable to expansion of federal regulation in traditionally state regulated arenas.[96]

Given the disadvantageous political position of inholders, more searching judicial inquiry should be applied when adjudicating their essential property rights. Federal intrusion into private nonfederal inholdings, as well as into areas of traditional state and local land-use regulation, demonstrates a need for such a heightened judicial scrutiny. This deference may take the form of judicial relaxation of the requirements for finding a taking under the fifth amendment, as well as more conservative interpretation of federal regulation pertaining to private inholders rights. Certainly, the federal government should continue regulating private inholders to protect federal lands and maintain congressionally intended uses of those lands. However, the proposed more searching judicial inquiry would not only preserve the basic right of inholders to use and enjoy their property, but would also allow Congress to more effectively control the use and enjoyment of federal lands.[97]

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95. For detailed discussion, see *id.* at 1080-94.

96. Federal regulation of traditionally state-governed property would require many, if not all, inholders to expend more time and money to attend and participate in land-use planning affecting their properties. Although *Carolene Products* is arguably distinguishable because it dealt with state regulations that hindered the political process, the expansion of federal regulation to encompass traditionally state-governed property nevertheless similarly inhibits the political viability and access of private inholders as citizens in a representative government.

97. This comment does not attempt to distinguish all private inholders from other economic minorities. Indeed, a heightened standard of judicial review may well be applied to many similarly situated groups. Nevertheless, consideration should be given to the obviously vulnerable position of the private inholder. A fact oriented inquiry of each so-called "discrete and insular" minority is therefore imperative.

IV. Conclusion

Although Congress's power to regulate federal land under the property clause has heen described as being "witbout limitation," this expansive interpretation should be restricted when private property rights are involved. Recent case law illustrates judicial awareness of certain limitations on federal regulation of nonfederal land; nevertheless, the inholder is in a vulnerable and disadvantaged position. Given the limited political influence of the relatively few inholders in this country, the courts should not only afford greater consideration to the interests of the private landowner in balancing the propriety of federal regulation, but also exercise heightened judicial review in examining federal property regulations that affect nonfederal land. Enforcing existing limitations upon federal regulation, as well as applying a higher standard of judicial review, are necessary to rectify the endangered status of inholders.

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