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THE PROPERTY CLAUSE: *AS IF* BIODIVERSITY MATTERED

DALE D. GOBLE*

Something there is that doesn't love a wall,
That sends the frozen-ground-swell under it,
And spills the upper boulders in the sun;
And makes gaps even two can pass abreast. . . .
But at the spring mending-time. . . .
I let my neighbor know. . . .
And on a day we meet to walk the line
And set the wall between us once again. . . .
There where it is we do not need the wall:
He is all pine and I am apple orchard.
My apple trees will never get across
And eat the cones under his pines, I tell him.
He only says, "Good fences make good neighbors."
Spring is the mischief in me, and I wonder
If I could put a notion in his head:
"Why do they make good neighbors?"[1]

INTRODUCTION

Assume that biodiversity[2] matters, whether as an end in itself or simply as a means to an end.[3] Conservation of biological diversity thus is an important goal—not the only goal, but an important one. Because the

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1. ROBERT FROST, *Mending Wall*, *in* THE POETRY OF ROBERT FROST 39, 39 (Library of Am. ed. 1995).

2. Biodiversity is the riotous exuberance of life—amoebas, monarch butterflies, blue whales, and old-growth forests—that runs the gamut from genes, to species, to communities, and landscapes. *E.g.*, REED F. NOSS & ALLEN Y. COOPERRIDER, SAVING NATURE'S LEGACY 3-12 (1994).

3. That is, whether biodiversity is something to which we owe an ethical obligation or something that has only utilitarian value. On the former, see, for example, BRYAN G. NORTON, WHY PRESERVE NATURAL VARIETY (1987). On the latter, see Douglas O. Heiken, *The Pacific Yew and Taxol: Federal Management of an Emerging Resource*, 7 J. ENVTL. L. & LITIG. 175 (1992), discussing the Pacific yew, the bark of which produces taxol that is used to treat ovarian cancer, but which was long considered a weed tree. *See also* Gary D. Meyers, *Old-Growth Forests, the Owl, and Yew: Environmental Ethics Versus Traditional Dispute Resolution Under the Endangered Species Act and Other Public Lands and Resources Law*, 18 B.C. ENVTL. AFF. L. REV. 623 (1991). On the medical value of biodiversity, see generally Erin B. Newman, *Earth's Vanishing Medicine Cabinet: Rain Forest Destruction and Its Impact on the Pharmaceutical Industry*, 20 AM. J.L. & MED. 479 (1994).

most significant obstacle to this goal is the alteration of land,[4] the protection of biodiversity requires, at a minimum, that the effect of changes to land be considered before those changes occur. But biodiversity is a sprawling thing; it blithely disregards our Euclidean boundaries, moving in response to gravity and wind, biology and whim.

While biodiversity ignores our boundaries, we humans do not—and boundaries foster myopia. As landowners and others concentrate on an individual parcel, they lose sight of the contextual web in which every bounded tract is embedded. This myopia leads to the loss of biological diversity. Consider, for example, coastal wetlands. Between 1950 and 1970, nearly 50 percent of the wetlands along the coasts of Connecticut and Massachusetts were destroyed, not as a result of a conscious decision, but through the conversion of hundreds of small tracts.[5] The fragmentation of ownership, with its resulting focus on individual decisions to develop individual tracts, obscured the overall impact of those decisions.

This is the Tragedy of Fragmentation: boundaries produce fragmentation, and fragmentation, in turn, fosters myopic decisions; these small decisions, however, eventually aggregate to produce a large decision that is never directly made.[6] Although the Tragedy of the Commons is far better known,[7] it is the Tragedy of Fragmentation that poses a far greater risk to biodiversity.

David Quammen provides a metaphor that captures the problem: take a fine Persian carpet and cut it into thirty-six equal pieces, each one a two-foot by three-foot rectangle:

> When we're finished cutting, we measure the individual pieces, total them up—and find that, lo, there's still nearly 216 square feet of recognizably carpetlike stuff. But what does it amount to? Have we got thirty-six nice Persian throw rugs? No. All we're left with is three dozen ragged fragments, each one worthless and commencing to come apart.[8]

Substitute an ecosystem for Quammen's carpet. The ecosystem-like stuff will also come unraveled and lose diversity over time.

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4. David Wilcove et al., *Quantifying Threats to Imperiled Species in the United States*, 48 BIOSCI. 607 (1998).

5. William E. Odum, *Environmental Degradation and the Tyranny of Small Decisions*, 32 BIOSCI. 728, 728 (1982).

6. *Id. See generally* DALE D. GOBLE & ERIC T. FREYFOGLE, WILDLIFE LAW 1363-65 (2002); Alfred E. Kahn, *The Tyranny of Small Decisions: Market Failures, Imperfections, and the Limits of Economics*, 19 KYKLOS 23 (1966).

7. Garret Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968).

8. DAVID QUAMMEN, THE SONG OF THE DODO 11 (1996).

Quammen's metaphor captures what biologists call "island biogeography." It is a general rule that, as the area of an island decreases, so does its biological diversity. An island, in other words, is not simply a smaller piece of land; it is also less diverse than a similar piece of continent. The limited diversity of islands was recognized when ships' scientists such as Charles Darwin collected and catalogued the flora and fauna of Pacific islands. Biologists have come to understand, however, that island biogeography applies equally to islands of habitat surrounded by seas of suburbs. Isolated blocks of old growth forest or prairie grasslands, for example, lose species like uranium sheds neutrons.[9] As land is increasingly fragmented into islands of habitat, we face an accelerating loss of biodiversity. The red fox, for example, is missing from Bryce Canyon National Park because the park was too small to maintain a viable population of foxes.[10]

Island biogeography reveals a significant problem for traditional approaches to conservation. Historically, the response to declining wildlife populations has been to impose take restrictions, such as closed hunting seasons, and to establish refuges. As our knowledge of the complex interdependencies of life has increased, however, the limitations of refuges as a solution to habitat destruction has become apparent; the lesson of Quammen's Persian carpet is that islands lose diversity—and refuges are islands. Even a refuge as large as Yellowstone National Park is too small to maintain the full suite of wildlife.[11] To preserve biological diversity, we must learn to think of land ecologically and holistically, to practice what Aldo Leopold called "the land ethic."[12]

Although an ethical revolution is the only long-term solution, the first step is to adjust our vision to correct for the myopia of boundaries: we must recombine the fragments and "re-common" the landscape to manage for ecosystems. There are a variety of ways to achieve this holistic, ecosystem perspective. Landowners, of course, have the power to protect or restore habitat on their parcels. But re-commoning often requires managing across human boundaries. For example, on the New England Tablelands in eastern Australia's New South Wales, four graziers have combined their individual holdings and implemented a tradi-

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9. *E.g.*, Ronald L. Westmeier et al., *Tracking the Long-Term Decline and Recovery of an Isolated Population*, 282 SCI. 1695 (1998).

10. William D. Newmark, *Legal and Biotic Boundaries of Western North America National Parks: A Problem of Congruence*, 33 BIOLOGICAL CONSERVATION 197 (1985) [hereinafter Newmark, *Biotic Boundaries*]; William D. Newmark, *Extinction of Mammal Populations in Western North American National Parks*, 9 CONSERVATION BIOLOGY 512 (1995).

11. *See generally* GOBLE & FREYFOGLE, *supra* note 6, at 1081-99.

12. ALDO LEOPOLD, *The Land Ethic*, *in* A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE 201 (1949).

tional grazing regime to reestablish a commons that is both ecologically and economically viable.[13] Similarly, environmental historian Brian Donahue has argued that re-commoning can also proceed through the re-acquisition of common lands. Relying on his experience in the North American New England, he urges "the establishment of one nonprofit *community farm*" in every rural community.[14]

But voluntary approaches to landscape management have their limits. The local conservation group in my hometown, Moscow, Idaho, has been working with landowners to revegetate the riparian zone along Paradise Creek. After several years, the result is a number of parcels with emerging riparian vegetation scattered among the industrial farmland. And Paradise Creek still dries up in summer because restoring a year-around flow requires near-unanimity, and unanimity often requires at least the threat of compulsion. The same lesson can be seen in large-scale mitigation measures such as regional Habitat Conservation Plans ("HCPs"): it is the presence of the Endangered Species Act ("ESA") that provides the impetus for landowners and local governments to adopt such management mechanisms.[15] Similarly, it was the ESA and the Clean Water Act ("CWA") that induced the State of California, local governments, and various private interests to negotiate an ambitious plan, known as the CALFED Bay-Delta Program, designed to preserve and restore the Sacramento-San Joaquin River delta.[16]

This, then, is the problem: biodiversity suffers from fragmented land ownership. Managing landscapes ecologically—re-commoning the land—can ameliorate this tragedy. Examples of such re-commoning include new, collaborative institutional arrangements such as HCPs, the multi-governmental CALFED Program, and new directions in water resource management.[17] In many instances, the collaborators have been brought to the process by the power of the federal statutes such as the

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13. SIMA WILLIAMSON ET AL., REINVENTING THE COMMONS (2003).

14. BRIAN DONAHUE, RECLAIMING THE COMMONS, at xv (1999) (emphasis added).

15. Barton H. Thompson, *Can the Endangered Species Act Manage the "Working Landscape", in* THE ENDANGERED SPECIES ACT AT THIRTY (Dale D. Goble et al., eds. forthcoming 2005).

16. Spring and fall chinook salmon and delta smelt have been listed as threatened under the ESA, and petitions to list other species are pending. The listings, coupled with federal authority for water quality under the Clean Water Act, shifted the locus of power: the national government could have assumed much of the state's authority to allocate water. A federal threat to operate the water system produced a crisis that brought the parties together. *See generally* A. Dan Tarlock, *Federalism Without Preemption: A Case Study in Bioregionalism*, 27 PAC. L.J. 1629 (1996). On the current status of the proposal, see Gary Pitzer, *The CALFED Plan: Making It Happen*, W. WATER, Jan./Feb. 2004, at 4, *available at* http://www.water-ed.org/westernwater.asp.

17. *See, e.g.*, David H. Getches, *The Metamorphosis of Western Water Policy: Have Federal Laws and Local Decisions Eclipsed the States' Role?*, 20 STAN. ENVTL. L.J. 3 (2001).

ESA to restrict land uses. The ESA alone, however, is insufficient to conserve the nation's biodiversity. Although one purpose of the ESA is to conserve "the ecosystems upon which endangered . . . and threatened species depend,"[18] the ESA has two shortcomings. First, it is a relatively blunt tool on private lands that are not undergoing a substantial change in the intensity of use. The Act is triggered by change and the sorts of mundane changes that result from ongoing activities such as farming are largely beyond the statute's reach.[19] Second, the ESA generally comes into play too late: the presence of a threatened or endangered species significantly restricts the options that might otherwise be available if biodiversity conservation became a factor in land-use decision making at an earlier stage. The ESA, in other words, is unlikely to provide an incentive for private landowners to participate in landscape management until it is too late.

There is another group of statutes that can be called upon to fill this gap, the organic acts of the various federal land-management agencies. Each of these agencies has a statutory mandate to protect the ecological values of the lands they manage:[20] the National Forest Service is obligated under the National Forest Management Act to "provide for diversity of plant and animal communities based on the suitability and capability of the specific land area";[21] the National Park Service is directed to "conserve the scenery and the natural and historic objects and the wild life" in the parks;[22] the Bureau of Land Management is directed by the Federal Land Policy and Management Act to "manage[] [lands] in a manner that will protect the quality of . . . ecological . . . values [and] that will provide food and habitat for fish and wildlife";[23] and the Fish and Wildlife Service has a duty to "provide for the conservation of fish, wildlife, and plants, and their habitats . . . [and] ensure that the biological integrity, diversity, and environmental health of the System are main-

18. 16 U.S.C. § 1531(b) (2000).

19. First, the Act's consultation requirement is triggered by federal agency action. 16 U.S.C. § 1536(a)(2) (2000). Although this includes the issuance of a federal permit, new permits are unlikely to be required for most ongoing activities. Second, the section 9 restriction on take is similarly unlikely to provide sufficient incentives because of the burden of proof that the prohibition imposes. *See* Ariz. Cattle Growers' Ass'n v. United States Fish and Wildlife Serv., 273 F.3d 1229 (9th Cir. 2001); Defenders of Wildlife v. Bernal, 204 F.3d 920 (9th Cir. 1999); 50 C.F.R. § 17.3 (2003). Furthermore, the Fish and Wildlife Service lacks funds to police the nation effectively. Thus, even if ongoing activities take a listed species, the landowner is unlikely to face prosecution. *See* Thompson, *Managing the "Working Landscape"*, *supra* note 15; Barton H. Thompson, *People or Prairie Chickens: The Uncertain Search for Optimal Biodiversity*, 51 STAN. L. REV. 1127, 1150-54 (1999).

20. *See* ROBERT B. KEITER, KEEPING FAITH WITH NATURE (2003).

21. 16 U.S.C. § 1604(g)(3)(B).

22. *Id.* § 1.

23. 43 U.S.C. § 1701(a)(8) (2000).

tained."[24] The agencies thus have the power and the responsibility to preserve the biodiversity of the lands they manage.

But as we have seen, the federal lands are islands that are losing biodiversity. Conservation of the diversity of the federal lands thus can be accomplished only through re-commoning those lands with the surrounding lands. Do the federal land-managing agencies have the authority to reach beyond the federal lands? Can their statutory mandates provide the threat of compulsion that may be necessary to encourage landowners to manage their individual, ecological fragments holistically? Can they constitutionally do so?

Answering these questions requires an examination of the power granted to Congress under the Property Clause[25] as well as the extrinsic limitations on that power. The current understanding of the power delegated by the Clause is a result of a series of conflicts that extend back to the Revolution. A brief examination of this history provides context for an analysis of the case law on the power of Congress to regulate conduct on both federal and nonfederal lands. The black-letter law in both situations is that Congress has "the powers both of a proprietor and a legislature."[26] Although the Supreme Court has repeatedly stated that "this power is vested in Congress without limitation,"[27] no congressional power is truly without limits. Given the Court's resurgent interest in federalism limits on Congress and the fact that the history of the Clause is a history of federalism-based conflict, the most significant potential limitation on the using the Clause to protect biodiversity is the Court's "New Federalism."

What follows thus is a draft of a brief arguing that the Property Clause of the United States Constitution is one source of compulsion to bring land users together to manage ecosystems collaboratively to conserve biodiversity. This brief is divided into three parts. The first discusses the history of the Property Clause to provide context for a synopsis of the current understanding of the Clause that is set out in Part II. The current understanding is that the Clause empowers Congress to act (at a minimum) to protect federal lands and resources from conduct occurring off those lands. Finally, Part III examines both the intrinsic and

24. 16 U.S.C. § 668dd(a)(4)(A)-(B).

25. The Clause states: "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2.

26. Kleppe v. New Mexico, 426 U.S. 529, 540 (1976). *See also* Utah Power & Light Co. v. United States, 243 U.S. 389, 405 (1917); Camfield v. United States, 167 U.S. 518, 525-26 (1897).

27. United States v. Gratiot, 39 U.S. (14 Pet.) 526, 537 (1840). *See also* United States v. City & County of San Francisco, 310 U.S. 16, 29 (1940).

extrinsic limits of the Clause. I conclude that there are no applicable intrinsic limitations because the proposal is needful regulation respecting federal property. The Court's "New Federalism" doctrines are the potentially applicable extrinsic limitations on the reach of the Property Clause. These doctrines also do not appear to preclude federal compulsion designed to protect federal lands from actions on nonfederal lands. This conclusion is more uncertain, however, because the content of New Federalism is itself uncertain.

I. A BIT OF HISTORY

The major constitutional crisis during the American Revolution centered on the issue of whether the states or the central government owned the "back lands" west of the Appalachian Mountains.[28] Indeed, it was not until 1781 when the states with western land claims agreed to cede those claims to the national government that the Confederation came into legal existence with the adoption of the Articles of Confederation.[29] Control over the public domain was again an issue during the drafting of the federal Constitution of 1787.[30] In both instances, the resolution was the same: the public domain was a national, rather than a local, resource. It thus is hardly surprising that the language of the Property Clause is as broad as any clause in the Constitution. The Clause unconditionally states, "The Congress shall have Power to dispose of and make *all* needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[31] Nor is it surprising that the Supreme Court has read the Clause equally unconditionally:[32] "The power over

28. *See generally* MERRILL JENSEN, THE NEW NATION 25-26 (1950); Dale D. Goble, *The Myth of the Classic Property Clause Doctrine*, 63 DENV. U. L. REV. 495, 517-24 (1986).

29. *See generally* PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC 3-20 (1983).

30. *See generally* Goble, *supra* note 28, at 525-32.

31. U.S. CONST. art. IV, § 3, cl. 2 (emphasis added). For example, the Clause does not say "Congress shall have Power to make all needful Rules and Regulations respecting disposal of the Territory or other Property of the United States" or "Congress shall not have Power to exercise exclusive Legislation in any case whatsoever." Instead, the language is verbally indistinguishable from other grants of power to Congress: Congress "shall have Power . . . [t]o regulate Commerce," U.S. CONST. art. I, § 8, cl. 3; "[t]o coin Money, [and] regulate the Value thereof," U.S. CONST. art. I, § 8, cl. 5; or "[t]o make Rules for the Government and Regulation of the land and naval Forces," U.S. CONST. art. I, § 8, cl. 14.

32. The one exception is the *Dred Scott* decision, Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). The Court held: (1) that "Territory" applied only to that land ceded by the states during the Confederation; (2) that "Property" meant only personal property; and (3) that "needful Rules and Regulations" did not confer legislative power. *Id.* at 436-37. *See also* Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845) (broad dicta in discussion of equal footing doctrine). The history is briefly reviewed from a variety of perspectives in Peter A. Appel, *The Power of Congress "Without Limitation": The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1 (2001); David E. Engdahl, *State and Federal Power*

the public land . . . entrusted to Congress is without limit[]"[33] because the federal government "exercises the powers both of a proprietor and of a legislature over the public domain."[34]

Despite the breadth of the constitutional language and the judicial decisions, there is a lengthy history of dissent from the proposition that it is the federal government that is empowered to determine what is to become of the public lands. The more extreme dissenters claim that the federal government cannot constitutionally own land within a state without permission of that state.[35] This claim was first made in 1799 when Tennessee asserted that its admission into the Union acted to transfer the federal lands within its borders to the state.[36] The argument was reiterated in 1828 by the Governor of Illinois, Ninian Edwards, in his state-of-the-state address.[37] It was made again in response to the reservation of lead lands on the upper Mississippi[38] and to the creation of National Forest Reserves at the turn of the past century.[39] Most recently, the claim was the centerpiece of the Sagebrush Rebellion of the 1970s[40] and the county supremacy movement of the 1990s.[41] The claim has been rejected by Congress and the federal courts as often as it has been asserted. Congress bluntly rebuffed Tennessee's claims[42] and the Supreme Court concurred.[43] The Court subsequently turned away Illinois's assertion[44]

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over Federal Property, 18 ARIZ. L. REV. 283 (1976); Eugene R. Gaetke, *Refuting the "Classic" Property Clause Theory*, 63 N.C. L. REV. 617 (1985); Goble, *supra* note 28.

33. United States v. City & County of San Francisco, 310 U.S. 16, 29 (1940).

34. Kleppe v. New Mexico, 426 U.S. 529, 540 (1976).

35. Under this argument, the United States can hold land only when it complies with the Enclave Clause. *See* U.S. CONST. art. I, § 8, cl. 17. *See also* Albert W. Brodie, *A Question of Enumerated Powers: Constitutional Issues Surrounding Federal Ownership of the Public Lands*, 12 PAC. L.J. 693 (1981).

36. Act of Jan. 5, 1799, ch. 24, 2d Tenn. Gen. Assembly, 2d Sess., Acts 54 ("An Act for establishing offices for receiving entries of claims for all vacant lands within the several counties in this state, and ascertaining the method of obtaining titles to the same"). *See also* 10 ANNALS OF CONG. 53 (Humphrey Marshall ed., 1800).

37. Governor Ninian Edwards, Address to the Illinois General Assembly (Dec. 2, 1818), *in* Illinois House Journal, 6th Assembly, 1st Sess. 10-39 (1829). *See generally* DANIEL FELLER, THE PUBLIC LANDS IN JACKSONIAN POLITICS (1984).

38. United States v. Gratiot, 39 U.S. (14 Pet.) 526 (1840).

39. Michael McCarthy, *The First Sagebrush Rebellion: Forest Reserves and States Rights in Colorado and the West, 1891-1907*, *in* ORIGINS OF THE NATIONAL FORESTS 180 (Harold K. Steen ed., 1992).

40. *See, e.g.*, John D. Leshy, *Unraveling The Sagebrush Rebellion: Law, Politics, and Federal Lands*, 14 U.C. DAVIS L. REV. 317 (1980).

41. *See, e.g.*, Christopher A. Wood, *The Lands Everybody Wants*, ENVTL. F., July/Aug. 1995, at 14. *See also* Boundary Backpackers v. Boundary County, 913 P.2d 1141 (Idaho 1996) (rejecting Boundary County's claims of supremacy over federal and state policies).

42. Sale of Lands Acquired by the Cession from North Carolina, S. Rep., 6th Cong., 1st Sess. (May 9, 1800), *in* 28 AMERICAN STATE PAPERS, No. 57, at 108.

43. Burton's Lessee v. Williams, 16 U.S. (3 Wheat.) 529 (1818).

44. Wilcox v. Jackson, 38 U.S. (13 Pet.) 498, 516-17 (1839).

and upheld the federal power to reserve lead lands[45] and National Forests.[46] The Ninth Circuit recently rejected the claims of the county supremacists.[47]

There also is a second, less extreme position: the argument that, when the federal government holds title to lands within a state, it has only the power of a proprietor and thus is subject to state law.[48] This claim also has a lengthy history: it has been made in various guises to the United States Supreme Court in *Bagnell v. Broderick*,[49] *Wilcox v. M'Connel*,[50] *United States v. Gratiot*,[51] *Utah Power & Light Co. v. United States*,[52] and *Kleppe v. New Mexico*.[53] This claim has also been consistently rejected.

The consistent congressional and judicial conclusion reaffirms the fundamental decision embodied in the Constitution: the public lands are a national, rather than a local, resource. It is the national government, rather than the state, that is empowered to decide the disposition of these lands and their resources.

II. THE CURRENT CASE LAW

The current jurisprudence on the Property Clause[54] can be summarized in a frequently iterated statement: Congress has "the powers both of a proprietor and of a legislature."[55] Given our focus on the Tragedy of Fragmentation, it is also helpful to distinguish between conduct that occurs on federal lands and conduct that does not. Thus, what follows is a synopsis of the current case law that separately analyzes the power that Congress has under the Property Clause as a proprietor and as a sovereign to control conduct on federal lands as well as on nonfederal lands.

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45. United States v. Gratiot, 39 U.S. (14 Pet.) 526, 532, 538 (1840).
46. Light v. United States, 220 U.S. 523 (1911).
47. United States v. Gardner, 107 F.3d 1314 (9th Cir. 1997).
48. Engdahl, *supra* note 32, at 296.
49. 38 U.S. (13 Pet.) 436 (1839).
50. 38 U.S. (13 Pet.) 498 (1839).
51. 39 U.S. 526, 532, 538 (1840).
52. 243 U.S. 389 (1917).
53. 426 U.S. 529 (1976). It was also the basis of a decision by the Colorado Supreme Court in 1882. *See* Coffin v. Left Hand Ditch Co., 6 Colo. 443, 446-47 (1882). *See also* Dale D. Goble, *Prior Appropriation and the Property Clause: A Dialogue of Accommodation*, 71 OR. L. REV. 381, 391 (1992).
54. The Property Clause states: "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2.
55. *Kleppe*, 426 U.S. at 540. *See also Utah Power & Light Co.*, 243 U.S. at 405; Camfield v. United States, 167 U.S. 518, 525-26 (1897).

A. Conduct on Federal Lands

An individual who comes onto the public lands can potentially interact with the federal government in its role either as a landowner or as a sovereign. Although it has an air of unreality—even as a landowner, the federal government is still a sovereign—the distinction is nonetheless useful because it demonstrates the range of powers available to the government.

1. The Federal Government as Proprietor

As a proprietor, the federal government can pursue traditional common-law remedies such as trespass to protect its property. In *United States v. Cotton*,[56] for example, the United States brought a common-law action for trespass for cutting and removing trees. The defendant sought to have the case dismissed, arguing that the only remedy available to the United States was by indictment because "the United States have no common law remedy for private wrongs."[57] Rejecting this argument, the Court noted

> the powers of the United States as a sovereign, dealing with offenders against their laws, must not be confounded with their rights as a body politic. . . . As an owner of property in almost every State of the Union, they have the same right to have it protected by the local laws that other persons have.[58]

As the Court subsequently noted in a case challenging the authority of the federal government to institute a suit to set aside a patent obtained by fraud, "[t]he public domain is held by the Government as part of its trust. The Government is charged with the duty and clothed with the power to protect it from trespass and unlawful appropriation."[59]

Furthermore, as the decision in *Cotton* demonstrates, the United States is not restricted to bringing its common-law proprietary claims in state court.[60] Even in its capacity as a proprietor, it can bring such claims in its own courts.

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56. 52 U.S. (11 How.) 229 (1851).

57. *Id.* at 231.

58. *Id. See also* United States v. Gear, 44 U.S. (3 How.) 120 (1845) (trespass for mining and removing lead from public lands).

59. United States v. Beebe, 127 U.S. 338, 342 (1887).

60. *Cotton*, 52 U.S. (11 How.) at 229 (case began as an action of trespass *quare clausum fregit* in territorial court; it was subsequently removed to federal district court under a statute authorizing removal "in all cases of federal character," Act of Feb. 22, 1847, Ch. XVII, 9 Stat. 128). *See also Gear*, 44 U.S. (3 How.) at 120 (case filed as an action of trespass *quare*

2. The Federal Government as Sovereign

The United States may also exercise its sovereignty to enact statutes that prohibit conduct affecting public lands or federal policy on the use of those lands.[61] For example, after the designation of forest reserves at the turn of the last century, Congress enacted the Organic Act, which authorized the Secretary of the Interior "to regulate th[e] occupancy and use" of the reserves and "to preserve the forests thereon from destruction."[62] In 1910, two cases reached the Supreme Court challenging the constitutionality of these provisions. In *United States v. Grimaud*,[63] the defendant demurred to an indictment for grazing sheep in a forest reserve contrary to regulations promulgated under the Organic Act. He argued that the facts did not constitute an offense because Congress lacked the power to authorize the Secretary to promulgate regulations that were subject to criminal sanctions. The Court rejected this argument, concluding:

> If, after passage of the act and the promulgation of the rule, the defendants drove and grazed their sheep upon the reserve, in violation of the regulations, they were making an unlawful use of the Government's property. In doing so they thereby made themselves liable to the penalty imposed by Congress.[64]

In a companion case, *Light v. United States*,[65] the Court explicitly stated that the federal government had very broad powers to manage its lands because it was both a proprietor and a sovereign: "The United States can prohibit absolutely or fix the terms on which its property may be used. . . . These are rights incident to proprietorship, to say nothing of the power of the United States as a sovereign over the property belonging to it."[66]

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clausum fregit in the Circuit Court for Illinois).

61. The Clause is, of course, not so limited. *See, e.g.*, United States v. Gliatta, 580 F.2d 156 (5th Cir. 1978) (Property Clause is a constitutional basis for regulations controlling driving at a mail-handling facility); Barrett v. Kunzig, 331 F. Supp. 266 (M.D. Tenn. 1971) (Property Clause provides constitutional authority for regulations requiring individuals entering a federal courthouse to allow inspection of their briefcases and person).

62. Act of June 4, 1897, ch. 2, 30 Stat. 11, 35 (codified as amended at 16 U.S.C. §§ 473-482, 551 (2000)). *See generally* Charles F. Wilkinson & H. Michael Anderson, *Land and Resource Planning in the National Forests*, 64 OR. L. REV. 1, 17-18 (1985).

63. 220 U.S. 506 (1911).

64. *Id.* at 521. *See also* Light v. United States, 220 U.S. 523, 536 (1911) (injunction against pasturing of cattle in national forest reserves affirmed); United States v. Briggs, 50 U.S. (9 How.) 351 (1851) (indictment for cutting timber upheld).

65. 220 U.S. 523 (1911). For the background of the case, see CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN 92 (1992).

66. *Light*, 220 U.S. at 536-37. *See also* McKelvey v. United States, 260 U.S. 353, 359 (1922) ("It is firmly settled that Congress may prescribe rules respecting the use of the public

Furthermore, as with other federal powers, exercise of sovereignty preempts inconsistent state law. In *Light*, the defendant's claim was that the federal government was required to comply with a state law requiring landowners to fence out cattle.[67] The Court summarily rejected the claim that "the Government has no remedy at law or in equity" as "answer[ing] itself."[68]

The confrontation was even more explicit seventeen years later in *Hunt v. United States*.[69] *Hunt* involved overbrowsing by deer in another forest reserve. The Court upheld a federal program to kill the deer, despite the fact that the killing violated state law: "the power of the United States to thus protect its lands and property does not admit of doubt . . . the game laws or any other statute of the state to the contrary notwithstanding."[70]

In sum, the United States, as a proprietor, can rely upon traditional common-law remedies and, as a sovereign, can itself criminalize harmful conduct that occurs on the public lands. In addition, when it chooses to act as sovereign, its actions preempt inconsistent state law.

B. Conduct on Nonfederal Lands

Like other lands, federal lands can also be affected by activities occurring on adjacent parcels. The same proprietor-and-sovereign pattern emerges from the case law on the federal government's power to regulate conduct occurring on nonfederal lands.

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lands. It may sanction some uses and prohibit others, and may forbid interference with such as are sanctioned. . . . The provision now before us is but an exertion of that power. It does no more than to sanction free passage over the public lands and to make the obstruction thereof by unlawful means a punishable offense."). *Cf.* Omaechevarria v. Idaho, 246 U.S. 343 (1918) (in the absence of a federal statute, state law is applicable to conduct on federal lands).

67. *Light*, 220 U.S. at 526 (defendant argued "complainant is without remedy against the defendant at law or in equity so long as complainant fails to fence the reserve as required by the laws of Colorado").

68. *Id.* at 538.

69. 278 U.S. 96 (1928).

70. *Id.* at 100. Aldo Leopold described the scene: "Such a mountain looks as if someone had given God a new pruning shears, and forbidden Him all other exercise." ALDO LEOPOLD, *Thinking Like a Mountain*, *in* A SAND COUNTY ALMANAC AND SKETCHES FROM HERE AND THERE, 129, 130-32 (1949). *See also* New Mexico State Game Comm'n v. Udall, 410 F.2d 1197 (10th Cir. 1969) (extending the rationale in *Hunt* to include killing deer for research purposes); Utah Power & Light v. United States, 243 U.S. 389, 405 (1917) ("The inclusion within a State of lands of the United States does not take from Congress the power to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them, even though this may involve the exercise in some measure of what is commonly known as the police power.").

1. The Federal Government as Proprietor

As a proprietor, the federal government can employ common-law nuisance actions to protect its use and enjoyment of its property from interfering conduct occurring off that property. For example, in *United States v. Luce*,[71] the United States owned a quarantine station on Delaware Bay.[72] Luce Brothers owned a fish processing plant upwind from the station.[73] The odor, noise, and flies from the plant disrupted the work of the federal employees, and the government sought to enjoin the defendants from maintaining a nuisance.[74] The court granted the government's request for an injunction, stating, "there can be no doubt" that "the government . . . has a right to maintain an injunction bill to restrain a nuisance materially and injuriously affecting the occupancy of its own property."[75]

Similarly, in *United States v. County Board of Arlington County*,[76] the district court held that the United States as a proprietor had standing to bring a common-law nuisance action challenging a decision authorizing the construction of office towers that would visually impair the District of Columbia's monuments. Although ultimately rejecting the claim, the court did so on factual, rather than legal, grounds.

Again, the federal government-as-proprietor thus is empowered to bring traditional common-law claims when conduct on nonfederal lands affects the use and enjoyment of the federal lands.

2. The Federal Government as Sovereign

As a sovereign, the federal government also has the power to enact statutes to protect the public lands from harm caused by actions on nonfederal lands. The leading case on this point, *Camfield v. United States*,[77] actually establishes a broader proposition because the federal claim was not predicated upon any physical harm to the lands. *Camfield* involved an enclosure of about 20,000 acres of public lands.[78] By carefully erecting fences on only the privately owned, odd-numbered sec-

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71. 141 F. 385 (C.C.D. Del. 1905).
72. *Id.* at 390.
73. *Id.*
74. *Id.*
75. *Id.* at 419. The decision is within the rule announced in Cotton v. United States, 52 U.S. (11 How.) 229, 231-32 (1851), although that case involved a trespass rather than a nuisance.
76. 487 F. Supp. 137 (E.D. Va. 1979).
77. 167 U.S. 518 (1897). *Camfield* is discussed at length in Appel, *supra* note 32, at 63-66 and Gaetke, *supra* note 32, at 169-74.
78. *Camfield*, 167 U.S. at 519.

tions—the black squares on the checkerboard—defendants effectively enclosed the federally owned even-numbered sections—the red squares—within their fence.[79] When challenged, the defendants argued that, because the fences were located only on their private land, the Unlawful Inclosures Act[80] could not be constitutionally applied to their actions.[81]

The Supreme Court rejected their argument. The Court began with "the general proposition that a man may do what he will with his own [property]," but immediately noted that "this is subordinate to another" principle: no one may use his property to damage another landowner.[82] This fundamental legal principle is embodied in the familiar maxim, *sic utere tuo ut alienum non laedas*, which the Court paraphrased as the "right to erect what he pleases upon his own land will not justify him in maintaining a nuisance."[83] The Court noted, however, that the principle does not prevent a landowner from constructing a fence, "even though the fence be built expressly to annoy and spite his neighbor" because such a fence does not violate any protected common-law interest.[84]

Against this broad and somewhat unfocused background, the Court turned to the Unlawful Inclosure Act.[85] Noting that the government had "the rights of an ordinary proprietor, to maintain its possession and to prosecute trespassers,"[86] the Court reasoned that, if the Act were intended only to prevent fences constructed on the public lands, it would have been unnecessary: "It is only by treating [the Act] as prohibiting all 'enclosures' of public lands, by whatever means, that the act becomes of any avail."[87] Such was the case here. While defendants were "ingenious," their fencing was "too clearly an evasion to permit our regard for the private rights of defendants as landed proprietors to stand in the way of an enforcement of the statute."[88] Therefore, the Act was intended to

79. *Id.* at 519-20.
80. 43 U.S.C. § 1061-1066 (2000).
81. *Camfield*, 167 U.S. at 522.
82. *Id.*
83. *Id.*
84. *Id.* at 523. Although it is permissible, the Court noted, to violate the common-law property right known as the doctrine of ancient lights, the "injustice" of this doctrine was "manifest." It then discussed at some length a statute enacted by the Massachusetts legislature declaring fences in excess of six feet to be nuisances when maliciously erected and the decision of the Massachusetts Supreme Judicial Court holding the statute to be constitutional. *See* Rideout v. Knox, 19 N.E. 390 (Mass. 1889) (Holmes, J.). On the doctrine of ancient lights, see Dale D. Goble, *Comment, Solar Rights: Guaranteeing a Place in the Sun*, 57 OR. L. REV. 94, 108-13 (1977).
85. *Camfield*, 167 U.S. at 524-25.
86. *Id.* at 524.
87. *Id.* at 525.
88. *Id.*

reach the type of fencing scheme before the Court: "the evil of permitting persons, who owned or controlled the alternate sections, to enclose the entire tract, and thus to exclude or frighten off intending settlers, finally became so great that Congress passed [the Unlawful Inclosures Act]."[89]

This conclusion necessarily raised the constitutional issue: Could the statute constitutionally be applied to conduct on nonfederal lands? The Court held that it could, analogizing Congress's power under the Property Clause to a state's police power:[90] although the federal government may not have the "unlimited power" to legislate in a state that it possesses in a territory, the admission of a territory into the Union does not deprive the federal government "of the power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power."[91] A different conclusion, the Court commented, "would place the public domain of the United States completely at the mercy of state legislation."[92] Furthermore, the fact that this result might reduce the value of the private land is immaterial because "[t]he inconvenience, or even damage, to the individual proprietor does not authorize an act which is in its nature a purpresture of government lands."[93]

Thus, the Court held, the federal government as proprietor may avail itself of those remedies available to all landowners under state law. As sovereign it has the further power to enact statutes under the Property Clause that reach beyond the limits of state law to regulate conduct on nonfederal lands that frustrates the purposes for which the government holds its lands. Finally, this power is not limited by common-law concepts of "nuisance" because it extends to "the protection of the public."[94]

The next Supreme Court decision to consider regulation of private conduct on nonfederal lands, *United States v. Alford*,[95] involved a statute enacted by Congress in 1910 that imposed criminal penalties on anyone who "shall build a fire in or near any forest, timber, or other inflammable material upon the public domain" and who does not, "before leaving said

89. *Id.* at 524-25. In a subsequent decision, the Supreme Court cited legislative reports on the Unlawful Inclosure Act to demonstrate that the fencing pattern presented by *Camfield* was in fact a reason that Congress adopted the Act. Leo Sheep Co. v. United States, 440 U.S. 668, 683-84 (1979).

90. *Camfield*, 167 U.S. at 525 ("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.").

91. *Id.* at 525-26.

92. *Id.* at 526.

93. *Id.* at 525.

94. *Id.*

95. United States v. Alford, 274 U.S. 264 (1927).

fire, totally extinguish the same."[96] Alford was indicted for leaving an unextinguished fire on private land near a national forest. The district court dismissed the indictment, holding that it was unconstitutional if it was applied to nonfederal land. Writing for the Court, Justice Holmes tersely disposed of the case: "The statute is constitutional. Congress may prohibit the doing of acts upon privately owned lands that imperil publicly owned forests."[97] "The danger," he noted, "depends upon the nearness of the fire, not upon the ownership of the land where it is built."[98]

Again, case law supports the often-recited conclusion that the federal government has the power of both a proprietor and a sovereign. As such, the government can rely not only upon common-law remedies such as nuisance; it can also statutorily prohibit conduct that interferes with federal objectives on the use of those lands.

C. Another Bit of History: Dual Sovereignty

Even today, the breadth of the decisions in *Camfield* and *Alford* are notable. They were even more so in their day.

Constitutional history has been primarily a sometimes-bloody dialogue between the nation-centered federalism of Alexander Hamilton[99] and John Marshall[100] and the state-centered federalism of James Madison[101] and John C. Calhoun.[102] This struggle is mirrored in a central fact of constitutional law, that questions of federal power have nearly always been disputes over slavery and its aftermath of racial segregation.[103]

"Nearly always," because there has been another area of federal-state conflict over resource regulation.[104] Although never as central as the debate on slavery, the history of disputes over the meaning of the Property Clause is an example of the resource-regulation debate. During the antebellum period, these two foci often overlapped and the debate over which government could regulate resource development was sub-

96. Act of June 25, 1910, ch. 431, § 53, 36 Stat. 855 (repealed 1948) (emphasis added).

97. *Alford*, 274 U.S. at 267.

98. *Id. See also* United States v. Lindsey, 595 F.2d 5 (9th Cir. 1979) (per curiam) (holding that Forest Services regulations requiring permits to build fires in national forests are applicable to state-owned land—here, the bed of a navigable river—within a forest).

99. *See, e.g.*, THE FEDERALIST NOS. 9, 16 (Alexander Hamilton).

100. *See, e.g.*, M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

101. *See, e.g.*, THE FEDERALIST NOS. 39, 40 (James Madison).

102. JOHN C. CALHOUN, A DISQUISITION ON GOVERNMENT (Poli Sci Classics 1947).

103. Questions of federal civil rights were, of course, essentially nonexistent until the twentieth century. *See generally* MELVIN I. UROFSKY & PAUL FINKELMAN, A MARCH OF LIBERTY 500-44 (2d ed. 2002).

104. *See, e.g.*, Kleppe v. New Mexico, 426 U.S. 529 (1976); Utah Power & Light Co. v. United States, 243 U.S. 389 (1917); United States v. Gratiot, 39 U.S. (14 Pet.) 526 (1840).

sumed into the debate on slavery. Representative John Randolph of Virginia made the point explicitly in arguing against a bill to authorize surveys for roads and canals: "If Congress possesses the power to do what is proposed by this bill . . . they may emancipate every slave in the United States."[105]

To avoid this "most dangerous doctrine,"[106] the Taney Court crafted the concept of "dual federalism."[107] This theory postulated distinct and exclusive spheres of state and federal authority: if the national government had been delegated power to regulate the conduct, the state was powerless to act, and vice versa. The federal judiciary was responsible for maintaining the line between the respective spheres. As the Supreme Court wrote in *United States v. E.C. Knight Co.*:

> It is vital that the independence of the commercial [*i.e.*, the federal Commerce Clause] power and of the police [*i.e.*, state] power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality.[108]

Maintaining the line required by dual federalism depended upon the Court's ability to define the line, and the dramatic economic and social changes of the post–Civil War era rendered the definitions increasingly unreal. In *E.C. Knight Co.*, for example, the Court held that the federal government could not regulate a monopoly that controlled more than 90 percent of the sugar production in the United States. "Commerce," Chief Justice Fuller wrote, "succeeds to manufacture, and is not part of it. . . .

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105. 41 ANNALS OF CONG. 1308 (1824).

106. *Id.*

107. For a concise summary of the doctrine, see its obituary: Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950). Corwin set out the theory's postulates: (1) The national government is one of enumerated powers only; (2) the purposes which it may constitutionally promote are few; (3) within their respective spheres the two centers of government are "sovereign" and hence "equal"; (4) the relation between the centers is one of tension rather than collaboration. *Id.* at 4. Postulate 2 is perhaps the most important for the present discussion since it served to shift the debate from delegated powers, such as the Property Clause, to objectives. That is, Congress might have power to make rules respecting the property of the United States, but this did not give Congress the power to foster internal improvements because that was an impermissible objective. *See generally* David P. Currie, *The Constitution in Congress: The Public Lands, 1829-1861*, 70 U. CHI. L. REV. 783 (2003).

108. United States v. E.C. Knight Co., 156 U.S. 1, 13 (1895).

The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce."[109]

Camfield was decided two years after *E.C. Knight Co.* In this context, the *Camfield* Court's statement that the national government could exercise "what is ordinarily known as the police power"[110] suggests the breadth of the power delegated to Congress under the Property Clause.

D. Federal Power over Nonfederal Lands

Since the decisions in *Camfield* and *Alford*, the Supreme Court has reaffirmed the broad understanding of the scope of the power delegated to Congress under the Property Clause. In *United States v. City & County of San Francisco*,[111] for example, the Court held that Congress had the power under the Property Clause to condition a grant of land to the City to prohibit it from transferring to a public utility the right to sell electricity produced under the grant: "The power over the public land thus entrusted to Congress," the Court wrote, "is without limitations."[112] Similarly, in *Kleppe v. New Mexico*,[113] the Court noted that, "while the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved . . . the 'complete power' that Congress has over public lands necessarily includes the power to regulate and protect the wildlife living there."[114]

Although the Court has not been presented with a case since *Camfield* and *Alford* that turned on the scope of Congress's power to regulate conduct on nonfederal lands,[115] the issue has appeared before the lower federal courts. These courts have upheld federal regulation of conduct on nonfederal lands. In *Minnesota by Alexander v. Block*,[116] the Eighth Circuit held that the federal government had the power to regulate the use of motorized vehicles on inholdings within a wilderness area. Relying on *Camfield*, the court held that "Congress may regulate conduct off

109. *Id.* at 12-13. *See generally* UROFSKY & FINKELMAN, *supra* note 103, at 500-44.
110. Camfield v. United States, 167 U.S. 518, 525-26 (1897).
111. 310 U.S. 16 (1940).
112. *Id.* at 29.
113. 426 U.S. 529 (1976).
114. *Id.* at 539-41 (quoting *City & County of San Francisco*, 310 U.S. at 30).
115. In *Kleppe*, the Court declined to reach the question, noting:

> While it is clear that regulations under the Property Clause may have some effect on private lands not otherwise under federal control, *Camfield v. United States*, 167 U.S. 518 (1897), we do not think it appropriate in this declaratory judgment proceeding to determine the extent, if any, to which the Property Clause empowers Congress to protect animals on private lands.

Kleppe, 426 U.S. 529, 546 (1976).
116. 660 F.2d 1240 (8th Cir. 1981).

federal land that interferes with the designated purpose of that land."[117] The same court had earlier affirmed a conviction for hunting within the boundaries of a national park, rejecting the argument that the federal power was inapplicable to duck hunting from a boat located on state-owned waters.[118] In *Free Enterprise Canoe Renters Association v. Watt*,[119] the court held that the National Park Service could prohibit the use of state roads on lands adjacent to a national scenic river for canoe pickups by renters lacking a federal permit. Similarly, in *United States v. Arbo*,[120] a conviction for interfering with federal officers was affirmed when the court held that it was immaterial whether the mining claim was on federal or private land because the officers were seeking to protect federal lands. In each case, the federal regulation of conduct occurring on nonfederal lands was held to be constitutional.

E. Some Preliminary Conclusions

The federal courts thus have broadly construed the powers granted to Congress by the Property Clause. In upholding the leasing of lead mines in 1840, the Supreme Court first enunciated its frequently iterated position: "Congress has the same power over [land] as over any other property belonging to the United States; and this power is vested in congress without limitation."[121] This power is that "both of a proprietor and of a legislature."[122] Most significantly for present purposes, Congress's power extends to conduct on nonfederal lands that affect the public lands: "the power of legislating for the protection of the public lands . . . may . . . involve the exercise of what is ordinarily known as the police power."[123] As Justice Holmes aphoristically put it, "The danger depends upon the nearness of the fire, not upon the ownership of the land where it is built."[124]

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117. *Id.* at 1249-50.

118. United States v. Brown, 552 F.2d 817 (8th Cir. 1977). *See also* Stupak-Thrall v. United States, 89 F.3d 1269 (6th Cir. 1996) (en banc) (affirming by an equally divided vote the district court decision that regulation of conduct within wilderness area did not exceed constitutional authority).

119. 549 F. Supp. 252 (E.D. Mo. 1982), *aff'd*, 711 F.2d 852 (8th Cir. 1983).

120. 691 F.2d 862 (9th Cir. 1982).

121. United States v. Gratiot, 39 U.S. (14 Pet.) 526, 537 (1840). *See also* United States v. City & County of San Francisco, 310 U.S. 16, 29 (1940).

122. Kleppe v. New Mexico, 426 U.S. 529, 540 (1976). *See also* Utah Power & Light Co. v. United States, 243 U.S. 389, 405 (1917); Camfield v. United States, 167 U.S. 518, 525-26 (1897).

123. *Camfield*, 167 U.S. at 526.

124. United States v. Alford, 274 U.S. 264, 267 (1927). *See also Lindsey*, 595 F.2d 5 (9th Cir. 1979) (per curiam) (holding that Forest Services regulations requiring permits to build fires in national forests are applicable to state-owned land—here, the bed of a navigable

III. LIMITS ON THE PROPERTY CLAUSE

Although the Supreme Court has frequently stated that "[t]he power over the public lands thus entrusted to Congress is without limitations,"[125] this is, of course, not literally true. The language of the Clause is broad, but it is not a grant of unrestrained power. There are two potential types of limitations: intrinsic, those that are based on the language of the Clause itself, and extrinsic, those that are predicated upon other restrictions on Congress—particularly those that fall under the general rubric of federalism.

A. Intrinsic Limitations

The Property Clause grants Congress the power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[126] Three potential intrinsic limits merit comment: the rules the Clause authorizes must be "needful" rules "respecting" federal "Property."

1. "Needful"[127]

The requirement that the rules and regulations be "needful" imposes minimal restrictions. Presumably, "needful" is no less expansive than the seemingly more restrictive term "necessary." As Chief Justice John Marshall stated in his exposition of the Necessary and Proper Clause:[128] "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[129] This classic test for the existence of a federal power recognizes that Congress is entitled to substantial deference in the choice of means.

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river—within a forest).

125. *E.g.*, *City & County of San Francisco*, 310 U.S. at 29.

126. U.S. CONST. art. IV, § 3, cl. 2.

127. "Needful" also appears in the other clause that refers to federal land holdings, the Enclave Clause. U.S. CONST. art. I, § 8, cl. 17 ("Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings").

128. U.S. CONST. art. I, § 8, cl. 18.

129. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

2. "Respecting"

The requirement that constitutionally permissible rules be "respecting" federal property has not been explicitly addressed by the federal courts. The text suggests, however, that the term requires a relationship between the rule and the federal property. This is a relatively clear and easily satisfied requirement. At the very least, the cases establish that if the rule protects the federal property from harm, as in *Hunt*, or prevents interference with federal policy on the use of the property, as in *Camfield*, the rule is "respecting" the property.

Because biodiversity sprawls across the landscape, ignoring property boundaries, the conservation of biodiversity requires that land uses across the ecosystem be viewed as a whole rather than as fragments.[130] Protecting biodiversity on federal lands thus will often require coordination with the management of nonfederal lands. Applying BLM's or the Forest Service's organic authority to activities occurring on nonfederal lands when those activities affect the biodiversity on federal lands will have the required nexus.[131]

3. "Property"

Unlike "respecting," the meaning of the term "Property" has been considered by the Supreme Court. In 1971, Congress enacted the Wild Free-Roaming Horses and Burros Act,[132] which stated, "All wild free-roaming horses and burros are hereby declared to be under the jurisdiction of the Secretary [of the Interior] for the purpose of management and protection."[133] After initially entering into an agreement recognizing federal management authority, New Mexico revoked the agreement, asserting that the statute was unconstitutional.[134] The state acknowledged that Congress had "the power to protect federal property,"[135] but argued that the horses "are not themselves federal property, and [are] not the public lands."[136]

The Supreme Court rejected the state's argument. In reaching its decision, the Court noted that Congress had found the animals to be "an

130. *See generally* Newmark, *Biotic Boundaries*, *supra* note 10; Odum, *supra* note 5; Westmeier et al., *supra* note 9; Wilcove, *supra* note 4.

131. *See* Appel, *supra* note 32, at 83-84; Eugene R. Gaetke, *Congressional Discretion Under the Property Clause*, 33 HASTINGS L.J. 381, 394 (1981).

132. 16 U.S.C. §§ 1331-1340 (2000).

133. 16 U.S.C. § 1333(a).

134. Kleppe v. New Mexico, 426 U.S. 529, 533 (1976).

135. *Id.* at 536.

136. *Id.* at 536-37.

integral part of the natural system of the public lands" whose protection was "necessary for the achievement of an ecological balance" on those lands; the animals, Congress had found, "contribute to the diversity of life forms."[137] Given these findings, the Court commented that, "it is far from clear that the Act was not passed in part to protect the public lands of the United States"[138] because the animals were to be managed "to achieve and maintain a thriving natural ecological balance on the public lands."[139] As components of the ecosystem, in other words, they were part of the "land," a perspective that Aldo Leopold would applaud,[140] and something that Congress was empowered to protect under the Property Clause.

The Court adopted a similar perspective in another decision handed down in 1976, *Cappaert v. United States*.[141] *Cappaert* involved the application of the reserved rights doctrine. This doctrine provides that, when federal lands are "reserved," the amount of water necessary to achieve the purposes of the reservation is also reserved and thus not available for subsequent private use under state law.[142] In 1952, President Truman reserved Devil's Hole, a deep cavern located on the public lands in Nevada. The cavern contained a pool that was the only remaining habitat of a relict population of pupfish. The Cappaerts subsequently began pumping groundwater from the aquifer attached to the pool, causing its water level to drop and threatening the pupfish. The Court held that, since the Presidential Proclamation demonstrated an intent to preserve the pupfish, it reserved sufficient water to do so under the Property Clause.[143] The fact that the injunction sought to protect a fish was as immaterial as the fact that the pumping was occurring on nonfederal lands. Neither precluded reliance on the Property Clause.

Other federal courts have reached similar conclusions, upholding actions intended to protect wildlife under the power granted to Congress by the Property Clause. Perhaps the most interesting is *United States ex rel. Bergen v. Lawrence*,[144] in which the Tenth Circuit extended the holding in *Camfield* to include wildlife conservation among the objectives that Congress could promote.[145] Taylor Lawrence grazed cattle on

137. *Id.* at 535.
138. *Id.* at 537.
139. *Id.* n.7.
140. *See* Leopold, *supra* note 12.
141. 426 U.S. 128 (1976).
142. *See* Arizona v. California, 373 U.S. 546, 595-601 (1963) (applying the doctrine to national forests and recreation areas); Winters v. United States, 207 U.S. 564 (1908) (announcing the doctrine in the context of an Indian reservation). *See generally* Goble, *supra* note 53.
143. *Cappaert*, 426 U.S. at 138-41.
144. 848 F.2d 1502 (10th Cir. 1988).
145. *Id.* at 1509-10.

checker-boarded federal, state, and private lands on the Red Rim in central Wyoming.[146] He constructed a twenty-eight mile fence that enclosed over 20,000 acres, including approximately 9,600 acres of federal lands.[147] The fence disrupted the migration of antelope to their winter range and the federal government sued to require Lawrence to modify the fence to permit the antelope to pass.[148] The Tenth Circuit rejected Lawrence's argument that the Unlawful Inclosure Act "is simply inapplicable to antelope."[149] The Act, the court concluded, "preserves access to federal lands for 'lawful purposes,' including forage by wildlife."[150]

Similarly, the district court in *United States v. Moore*[151] held that federal ownership of 6,000 acres was a sufficient basis for prohibiting the state from spraying to kill black flies within the 60,000 acres designated as the New River Gorge National River. Noting that "the power of the United States to regulate and protect the wildlife living on the federally controlled property cannot be questioned," the court extended the principle to the nonfederal lands when the spraying program would affect the federal lands.[152]

These opinions simply acknowledge the fact that there is no reason to conclude that the term "property" does not include the full range of biological diversity located on the public lands. At the common law, plants are generally part of the soil.[153] Although wildlife is often discussed as a public trust resource that is nominally "owned" by the state in trust for its citizens,[154] that ownership is generally viewed as a fiction that reflected the regulatory jurisprudence of the substantive due process

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146. *Id.* at 1504.
147. *Id.*
148. *Id.*
149. *Id.* at 1508.
150. *Id.* at 1510. *See also id.* at 1509.
151. 640 F. Supp. 164 (S.D. W. Va. 1986).
152. *Id.* at 166.
153. One court outlined the categories thus:

> Vegetation is normally classified as either *fructus naturales* or *fructus industriales*. *Fructus naturales* include any plant which has perennial roots, such as trees, shrubs and grasses. *Fructus industriales* include those plants which are sown annually and grown primarily by manual labor, such as wheat, corn and vegetables. . . .
>
> The major consequence of this somewhat arbitrary classification is that *fructus naturales*, while unsevered, are part of the realty, whereas *fructus industriales* may be real or personal property depending on the circumstances.

Key v. Loder, 182 A.2d 60, 61 (D.C. 1962). *See also* Fisher v. Steward, 1 Smith 60 (N.H. 1804) (trees belong to the owner of the soil for the same reason that all minerals belong to the owner of the soil); Russell D. Niles & John Henry Merryman, *Fixtures and Things Growing on the Land*, *in* 5 AMERICAN LAW OF PROPERTY §§ 19.15-19.16 (1952).

154. *See, e.g.*, Geer v. Connecticut, 161 U.S. 519 (1896); Minnesota v. Rodman, 59 N.W. 1098 (Minn. 1894); Montana v. Fertterer, 841 P.2d 467 (Mont. 1992); O'Brien v. State, 711 P.2d 1144 (Wyo. 1986).

era.[155] As Justice Holmes noted in upholding federal regulation of migratory birds: "To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership."[156] Furthermore, as the Court subsequently noted in Kleppe, "it is far from clear . . . that Congress cannot assert a property interest in the regulated horses and burros superior to that of the State"[157] because of the preemptive federal power to control access to the animals.

4. Conclusions

The intrinsic limitations on federal powers under the Property Clause are minimal. As the courts have repeatedly acknowledged, the biological diversity of the public lands is at the very least sufficiently property-like to fall within the power granted to Congress under the Clause. Thus, there are no intrinsic limitations that would preclude Congress from directing the federal land-managing agencies to protect the federal biodiversity by collaboratively managing ecosystems that include nonfederal lands.

B. Extrinsic Limitations: The New Federalism

As the synopsis of the history of the Property Clause demonstrated, the political flashpoint in public land management has been the federal-state relationship. Federalism thus is likely to be asserted as the primary extrinsic limit on the Property Clause, particularly since "federalism" has become the current, extra-textual ground for judicial activism.

1. From the New Deal to the New Federalism

With the collapse of the Supreme Court's increasingly unrealistic dual federalism jurisprudence in the 1930s,[158] the Court developed a theory of concurrent or cooperative federalism. This theory acknowledged that both the federal and state governments had power to regulate many types of conduct. When all economic activity affects interstate commerce, exclusive spheres of authority would preclude any state regu-

155. *See* Hughes v. Oklahoma, 441 U.S. 322, 333-34 (1979); Douglas v. Seacoast Prods., Inc., 431 U.S. 265, 284-85 (1977); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 420-21 (1948); Toomer v. Witsell, 334 U.S. 385, 402 (1948).

156. Missouri v. Holland, 252 U.S. 416, 434 (1920). *See also* Hughes, 441 U.S. at 335-36 (discussing "the 19th-century legal fiction of state ownership").

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

158. *See supra* Part II.C.

lation of economic activity and would require a massive increase in federal legislation. Policing this "boundary" of overlapping authority led to an increased emphasis on preemption. In place of rigid lines, the Court adopted a deferential stance toward Congress that focused on congressional intent. Intellectually, the shift to preemption as the interpretive strategy came to be understood as reflecting the fact that the political process was itself protection against federal over-reaching.[159]

Since preemption determines the scope of state regulatory powers, it is the most significant federalism doctrine. Sensitive to this fact, the Court in 1947 established a clear-statement rule: when "Congress legislate[s] . . . in a field which the States have traditionally occupied . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[160] The rule has been most honored in the breach.[161]

In 1976, the Court decided *National League of Cities v. Usery*[162] and, for the first time since the New Deal, relied upon federalism to invalidate a federal statute. In a decision that had echoes of the dual federalism theory of cases such as *United States v. E.C. Knight Co.*,[163] the Court held that the federal government lacked the power to regulate the wages and hours of state employees working in areas of "traditional governmental functions" because this intruded on the power of the states to structure their activities.[164] Less than nine years later, a deeply divided Court overruled *National League of Cities*,[165] acknowledging that nei-

159. This, the "process theory," was initially developed in Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954), and elaborated on in JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1960).

160. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

161. For example, arguably the most important federalism case decided in 1999 was not *Alden v. Maine*, 527 U.S. 706 (1999), *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), or *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), but *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999). In *AT&T Corp.*, the Court, in an opinion by Justice Scalia, construed the Telecommunications Act of 1996, 47 U.S.C. § 251 (2000), to preempt state regulation of local telephone service—a core state function for decades—without any discussion of the federalism issues or any mention of preemption. *AT&T Corp.*, 525 U.S. at 366.

162. 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). *National League of Cities* was decided the week after *Kleppe v. New Mexico*, giving additional emphasis to the Court's rejection of the argument that the Horse and Burro Act "wrongfully infringed upon the State's traditional trustee powers over wild animals." *Kleppe*, 426 U.S. 529, 541 (1976).

163. 156 U.S. 1 (1895). *See supra* notes 108-10 and accompanying text.

164. *Nat'l League of Cities*, 426 U.S. at 852.

165. *Garcia*, 469 U.S. at 538-39, 546-47. *Garcia* was a 5-4 decision and Justices Rehnquist and O'Connor promised to revisit the decision. *Id.* at 580 (Rehnquist, J., dissent-

ther the Court itself nor the lower federal court had been able to develop an "organizing principle" that served to distinguish traditional and non-traditional. The Court explicitly adopted "process federalism."[166] As the Court stated in a subsequent decision, "States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity."[167]

In 1991, the Court again changed directions.

2. Clear Statements

Gregory v. Ashcroft[168] was a challenge under the Age Discrimination in Employment Act[169] to the mandatory retirement age imposed on judges by Missouri's constitution. The Court began with a recitation of what "every schoolchild learns" about the "system of dual sovereignty between the States and the Federal Government."[170] Relying primarily on *The Federalist* for textual support, the Court listed the "numerous advantages" of this governmental structure:

> It assures decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.
>
> Perhaps the principal benefit of the federalist system is a check on the abuses of government power.[171]

Turning to the issue before it, the Court emphasized the fundamentally constitutive nature of the question for the state:

> The present case concerns a state constitutional provision through which the people of Missouri establish a qualification for those who sit as their judges. This provision goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort

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ing); *Id.* at 589 (O'Connor, J., dissenting).

166. *Id.* at 554-55. *See also id.* at 551 n.11 (citing CHOPER, *supra* note 159 and Wechsler, *supra* note 159).

167. South Carolina v. Baker, 485 U.S. 505, 512 (1988).

168. 501 U.S. 452 (1990).

169. 29 U.S.C. §§ 621-634 (2000).

170. *Gregory*, 501 U.S. at 457.

171. *Id.* at 458 (citation omitted).

> for a sovereign entity. Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign. . . .
>
> Congressional interference with this decision of the people of Missouri defining the limits on their constitutional officers would upset the constitutional balance of federal and state powers.[172]

The Court, however, chose not to hold the statute to be unconstitutional.[173] Instead, it relied upon the clear-statement interpretational rule. When Congress seeks to "upset the usual constitutional balance of federal and state powers," it must speak with unmistakable clarity.[174] Since the statute did not specifically include state judges, the Court construed the statute not to include them.

More recently, the Court has relied upon the clear-statement requirement to limit the potential reach of a federal arson statute that made it illegal to damage "by means of fire or an explosion, any . . . property used in . . . any activity affecting interstate or foreign commerce."[175] In *Jones v. United States*,[176] the defendant had been convicted under the statute of firebombing a private residence. He appealed, claiming that the statute was beyond Congress's power under the Commerce Clause as applied to the property in question.[177] The government asserted that the statutory predicate was satisfied by three facts: the house was mortgaged to an out-of-state lender, was insured by an out-of-state insurer, and used natural gas from an out-of-state supplier.[178] Concluding that *Lopez* created substantial doubts as to the constitutionality of the application of the statute to such "traditionally local criminal conduct," the Court applied a clear-statement requirement and reversed the conviction.[179]

More significantly for our purposes, the following year the Court employed a clear-statement requirement in deciding *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("*SWANCC*").[180] Concluding that an isolated wetland was not clearly within the scope of the jurisdiction asserted by Congress under the Clean

172. *Id.* at 460.
173. *Id.*
174. *Id. See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).
175. 16 U.S.C. § 844(i) (2000).
176. 529 U.S. 848 (2001).
177. *Id.* at 851-52.
178. *Id.* at 855.
179. *Id.* at 858-59.
180. 531 U.S. 159 (2001) [hereinafter *SWANCC*].

Water Act[181] and that the assertion of such jurisdiction would "raise significant constitutional questions"[182] about the scope of Congress's power under the Commerce Clause particularly given the "significant impingement of the States' traditional and primary power over land and water use,"[183] the Court held the agency's rule beyond the power delegated to it.

The Court's recent clear-statement cases share two arguably contradictory characteristics. First, the requirement that Congress speak clearly is an example of process federalism. By requiring Congress to announce its decisions on federalism issues with clarity, the Court ensures that Congress cannot evade the difficult questions and thus is more likely to weigh carefully the interests of the states. Second, in specifying that the requirement is triggered by statutes that "upset the usual constitutional balance of federal and state powers,"[184] the Court echoes the earlier dual federalism rhetoric. The Court's language and emphases in *Gregory*, *Jones*, and *SWANCC* also suggest that it is moving beyond process federalism and reviving its twice-abandoned search for judicially enforceable limits on federal power.

This current search has focused on four constitutional provisions: the Commerce Clause, and the Tenth, Eleventh, and Fourteenth Amendments. Of these, only the Tenth Amendment cases are directly applicable to the Property Clause. Obviously, the Court's decisions on the permissible scope of Congress's power under the Commerce Clause are relevant, if at all, only by analogy to questions about the scope of its power under the Property Clause. Equally obviously, neither the Eleventh Amendment's restrictions on suits against states nor the Fourteenth Amendment's delegation of power to Congress to protect civil rights can be applied directly to the Property Clause. Nonetheless, the sum of the Court's New Federalism decisions may be greater than their parts and a brief review of the Court's recent federalism decisions may suggest potential extrinsic limitations on the Property Clause.

181. *See* 33 U.S.C. §§ 1344, 1362(7) (2000).

182. The constitutional issue is what "precise object or activity . . . in the aggregate, substantially affects interstate commerce." *SWANCC*, 531 U.S. at 173. This question is discussed *infra* at notes 193-94, 199-200 and accompanying text.

183. *SWANCC*, 531 U.S. at 173-74.

184. *Gregory*, 501 U.S. at 460.

3. The Commerce Clause[185]

In 1937, the Supreme Court ushered in the modern era of Commerce Clause jurisprudence when it decided *NLRB v. Jones & Laughlin Steel Corp.*[186] The case held that the previous, increasingly artificial line between "direct" and "indirect" effects on interstate commerce was not constitutionally significant. "The question," the Court wrote, "is necessarily one of degree."[187] It was nearly sixty years before the Court again held a statute to be beyond Congress's power to regulate interstate commerce.

In *United States v. Lopez*,[188] Alfonso Lopez was convicted of taking a handgun to school in violation of the Gun-Free School Zones Act.[189] The Fifth Circuit held the statute unconstitutional[190] and the Supreme Court affirmed in a 5-4 decision.[191] The Court began by categorizing its prior cases:

> [W]e have identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things moving in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress'[s] commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.[192]

After concluding that only the third category was potentially applicable to the case before it, the Court held that its prior decisions all involved the regulation of intrastate economic activities in which those activities in the aggregate substantially affected interstate commerce.[193] The statute before the Court, on the other hand, had "nothing to do with

185. "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art I, § 8, cl. 3.

186. 301 U.S. 1 (1937).

187. *Id.* at 37. *See also* Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100, 118 (1941).

188. 514 U.S. 549 (1994).

189. 18 U.S.C. § 922(q) (2000).

190. United States v. Lopez, 2 F.3d 1342, 1367-68 (5th Cir. 1993).

191. *Lopez*, 514 U.S. at 552.

192. *Id.* at 558-59.

193. The third category is the constitutional basis for most federal natural resource conservation and environmental protection statutes.

'commerce' or any sort of economic enterprise, however broadly one might define those terms."[194]

The Court indicated that its decision was driven at least in part by federalism concerns. In refusing to aggregate the economic impacts of criminal activity because of the tenuous causal relationship to the proscribed activity, the Court stated that to do otherwise "we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[195] This, the Court stated, would destroy the "distinction between what is truly national and what is truly local."[196]

Five years later, the Court held a second federal statute, the Violence Against Women Act,[197] unconstitutional as beyond the power delegated by the Commerce Clause. In *United States v. Morrison*,[198] the Court reiterated its conclusion that the Clause delegated Congress power to regulate only activity that is economic in nature.[199] "[I]f we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate."[200] This, the Court wrote, would in turn destroy the "distinction between what is truly national and what is truly local."[201] And one area that is truly local, the Court stated, is "intrastate violence."[202]

It is possible to discern three concerns in *Lopez* and *Morrison*. First, the Court held that the Commerce Clause delegated power to regulate economic activity and, therefore, to invoke the Clause, the activity to be aggregated must itself be economic. Although the proscribed activity in the two cases—carrying a gun in a school zone and violent crimes motivated by gender—had economic effects, this was an insufficient relationship to the power delegated by the Commerce Clause. Second, the Court's concern with the aggregation of noneconomic activities was that the approach could lead to unlimited federal power because of the tenuous causal linkage. Third, this in turn would allow the federal government to intrude into areas of traditional state concern. More generally, the Court's concern was that the aggregation of effects unrelated to the

194. *Lopez*, 514 U.S. at 561.
195. *Id.* at 567.
196. *Id.* at 567-68.
197. 42 U.S.C. § 13981 (2000).
198. 529 U.S. 598 (2000).
199. *Id.* at 613.
200. *Id.* (quoting *Lopez*, 514 U.S. at 564).
201. *Id.* at 617-18.
202. *Id.* at 618. *See also* Jones v. United States, 529 U.S. 848 (2000).

Clause could allow essentially unlimited expansion of the power and an intrusion into the states' constitutional realm.

4. Tenth Amendment[203]

A second constitutional provision implicated in the search for judicially enforceable federalism is the Tenth Amendment—a provision that several generations of law students had been taught was only a tautology.

In *New York v. United States*,[204] the state challenged the constitutionality of the Low-Level Radioactive Waste Policy Amendments Act of 1985.[205] The Court held that one of the three incentives Congress provided to encourage states to provide for the disposal of low-level radioactive waste was unconstitutional because it "commandeer[ed] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."[206] The Court contrasted commandeering with the constitutional power under the Spending Clause to condition the receipt of federal funds upon compliance with federal objectives ("conditional spending") and under the Commerce Clause to offer states the choice between regulating an activity pursuant to federal standards or facing federal preemption ("conditional preemption").[207] As the Court explained, although Congress may offer the states choices, it may not simply command them to act.[208] The Court predicated its decision on the Tenth Amendment:

> In some cases the Court has inquired whether an Act of Congress is authorized by one of the powers delegated to the Congress by Article I of the Constitution. In other cases the Court has sought to determine whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment. In a case like these, involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. If the power is delegated to Congress by the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if the power is an attribute of state sovereignty reserved by the

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203. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people." U.S. CONST. amend. X.

204. 505 U.S. 144 (1992).

205. 42 U.S.C. §§ 2021b-2021j (2000).

206. *New York*, 505 U.S. at 161 (quoting Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)).

207. *Id.* at 167, 173-74.

208. *Id.* at 161, 166, 168.

> Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.[209]

Acknowledging that the Tenth Amendment "is essentially a tautology," the Court embarked on a non-textual approach. The limit the Amendment imposes on Congress

> is not derived from the text of the Tenth Amendment itself. . . . Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on Article I power.[210]

The *New York* rationale was extended in *Printz v. United States*.[211] Jay Printz, the sheriff and coroner of Ravalli County, Montana, challenged the Brady Handgun Violence Prevention Act,[212] which required him to provide background checks on gun purchasers.[213] The Court held this requirement unconstitutional, noting that "[t]he Federal Government may not compel the states to enact or administer a federal regulatory program."[214] Furthermore, the Court noted, "Congress cannot circumvent that prohibition by conscripting the States' officers directly."[215]

In its Tenth Amendment cases, the Court has drawn a bright line: Congress may encourage state participation in federal regulatory programs through conditional spending or conditional preemption because these allow the states to opt out; it may not, however, command state involvement. The constitutionally significant difference, the Court has concluded, is between "encouraging" and "commandeering."

5. The Eleventh Amendment

As with its Tenth Amendment cases, the Court's recent decisions on state sovereign immunity and the Eleventh Amendment also impose limits on federal power beyond the language of the Constitution. The Eleventh Amendment—adopted by Congress and the states to overrule the Court's 1793 decision in *Chisholm v. Georgia*[216]—specifies that "[t]he

209. *Id.* at 155-56 (citations omitted).
210. *Id.* at 157.
211. 521 U.S. 898 (1997).
212. 18 U.S.C. §§ 921-930 (2000).
213. *Id.* § 922(s)(2).
214. *Printz*, 521 U.S. at 933 (quoting *New York*, 505 U.S. at 188).
215. *Id.* at 935.
216. 2 U.S. (2 Dall.) 419 (1793).

Judicial power of the United States shall not be construed to extend to any suit . . . commenced . . . against one of the United States by Citizens of another State."[217] In 1890, the Supreme Court significantly extended the Eleventh Amendment (or created a federal common-law of state sovereign immunity) in *Hans v. Louisiana*.[218] In *Hans*, the Court held that an individual could not assert a federal right against a state without the state's consent, even if the plaintiff was a resident of the state being sued.[219] While acknowledging that the Amendment was not literally applicable, the Court nonetheless concluded that the Amendment reflected the far broader principle of state sovereign immunity: "The suability of a State without its consent was," the Court wrote, "a thing unknown to the law."[220]

The first of the current cases, *Seminole Tribe v. Florida*,[221] went even further beyond the constitutional language. The case presented the question of whether Congress had the power to subject a state to suits in federal court by Indian tribes located within the state's borders. While acknowledging that Congress had the power to abrogate state sovereign immunity in some situations,[222] the Court held that the Indian Commerce Clause was not such a situation.[223] Indeed, the Court's statement of its holding proscribed all of Congress's powers under Article I.[224]

Three years later, the Court extended the rationale of *Seminole Tribe* to hold unconstitutional a federal statute authorizing suits against a state by its citizens in that state's courts. In *Alden v. Maine*,[225] the Court began by noting that "the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather . . . the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before ratification of the Constitution, and which they retain today."[226] In support of this proposition, the Court returned to the Tenth Amendment which, it wrote, "confirms the promise implicit in the original" Constitution to preserve the "sovereign status" of the states.[227] It does so, the Court concluded, in two ways.

217. U.S. CONST. amend. XI.
218. 134 U.S. 1 (1890).
219. *Id.* at 21.
220. *Id.* at 16.
221. 517 U.S. 44 (1996).
222. *Id.* at 59.
223. *Id.* at 72.
224. *Id.* at 72-73 ("The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.").
225. 527 U.S. 706 (1999).
226. *Id.* at 713.
227. *Id.* at 714.

First, "it reserves to [the states] a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status." Second, "even as to matters within the competence of the National Government," the Constitution created a structure in which the national government acts directly on the people rather than through the state governments.[228] State sovereign immunity thus is a "separate and distinct structural principle [that] . . . inheres in the system of federalism established by the Constitution."[229] The decision, in short, was based upon the same concerns that motivated the Tenth Amendment decisions: the need to secure the independent status of the states by restricting Congress.

The Court's Eleventh Amendment cases thus reiterate the rationales of the Tenth Amendment cases. Both lines of cases hold that the federal government is constitutionally prohibited from commandeering the states; that is, from acting through state governments. The two groups of cases also share an interpretational strategy: both rely upon implicit, background "postulates" of inherent "state sovereignty."[230] In *Seminole Tribe*, the Court relied upon "the background principle of state sovereign immunity embodied in the Eleventh Amendment."[231] The decision in *Alden* was similarly predicated on principles inherent in the federal structure.[232] Thus, although the Eleventh Amendment is stated as a limitation on the jurisdiction of the federal courts, the Court held that the spirit of the Constitution imposed a more far-reaching limitation on the power of Congress.

6. The Fourteenth Amendment

The Fourteenth Amendment was ratified in 1868 to constitutionalize the Civil War and to ensure that Congress had the power to protect the civil rights of the nation's citizens against the states—which time had demonstrated were capable of gross violations of human rights. The first four sections of the Amendment set out substantive provisions, most significantly those in section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law

228. *Id.*
229. *Id.* at 730.
230. Seminole Tribe v. Florida, 517 U.S. 44, 68 (1996) (quoting Principality of Monaco v. Mississippi, 292 U.S. 313, 322 (1934)).
231. *Id.* at 72.
232. *Alden*, 527 U.S. at 730.

> which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[233]

The fifth section, the Enforcement Clause, specifies that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[234]

In the first test of these provisions, the Court (comprised of men born and grown to maturity before the Civil War) held that the Enforcement Clause did not authorize Congress to enact "general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing."[235] The distinction, the Court wrote, was between a power to "legislate generally upon" the rights of life, liberty, and property and the "power to provide modes of redress" for invasions of those rights by the states.[236]

In 1996, the Court added a further requirement in *City of Boerne v. Flores*.[237] The case involved a challenge to a zoning decision based on the Religious Freedom Restoration Act of 1993.[238] In holding the statute to be beyond Congress's power under section 5, the Court sought to reinforce the distinction between "measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law."[239] It did so by mandating that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[240] The *Flores* decision, although involving both federalism and separation-of-powers, emphasized the latter. In fact, the case might be read simply as judicial peevishness. The Court was upset that Congress had attempted to overrule one of its prior decisions.[241] But given the state-action requirement for invocation of the Fourteenth Amendment, federalism is never far below

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233. U.S. CONST. amend. XIV, § 1.
234. *Id.* § 5.
235. The Civil Rights Cases, 109 U.S. 3, 13-14 (1883).
236. *Id.* at 15.
237. 521 U.S. 507 (1997).
238. 42 U.S.C. §§ 2000bb(1)-2000bb(4) (2000).
239. *Flores*, 521 U.S. at 519.
240. *Id.* at 520.
241. The prior decision was *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990). In the Religious Freedom Restoration Act of 1993, Congress explicitly stated that its objective was to "restore" the compelling interest test of the pre-*Smith* case law. *See* 42 U.S.C. § 2000bb(1).

the surface. Solicitude for state autonomy was a subtext as the Court focused on its power to interpret the Constitution.[242]

Federalism played a more visible role in *Kimel v. Florida Board of Regents*.[243] The case was a challenge to the abrogation of state sovereign immunity in the Age Discrimination in Employment Act.[244] Beginning its analysis with the text of the Eleventh Amendment, the Court reasserted its "presupposition" that sovereign immunity was "confirm[ed]" by the Amendment.[245] Thus, despite its conclusion that Congress "unequivocally expressed its intent to abrogate the State's Eleventh Amendment immunity," the Court held that it could not do so because the provision failed to satisfy the "congruence and proportionality test."[246] This holding was based on the Court's conclusion that it was the entity empowered to decide the constitutionality of conduct. Therefore, because the Court had previously held that age need only be "rationally related to a legitimate state interest,"[247] Congress was precluded from outlawing such discrimination under the Fourteenth Amendment where it has not established that there was "widespread and unconstitutional age discrimination by the States."[248] Given the de minimis justification required for state action under the rational basis standard ("an age classification is presumptively rational"[249]), the Court set Congress a nearly impossible task. And since the Court had previously determined that the Fourteenth Amendment was the sole congressional power that could justify the abrogation of state sovereign immunity,[250] its restrictive application of the congruence-and-proportionality test expanded the

242. The same text-subtext was present in *United States v. Morrison*, 529 U.S. 598 (2000). In addition to arguing that the Violence Against Women Act was justified by the Commerce Clause, the government also argued that the statute was predicated on Congress's power under section 5. *Id.* at 619. The Court began its analysis by noting that, despite the power-granting language of section 5, "the language and purpose of the Fourteenth Amendment place certain limitations on . . . Congress . . . . These limitations are necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government." *Id.* at 620.

243. 528 U.S. 62 (2000).

244. 29 U.S.C. §§ 621-634 (2000).

245. *Kimel*, 528 U.S. at 73.

246. *Id.* at 78, 82.

247. *Id.* at 83.

248. *Id.* at 91 (emphasis added).

249. *Id.* at 84.

250. Seminole Tribe v. Florida, 517 U.S. 44, 59-60 (1996) (noting that the only Commerce Clause abrogation of the Eleventh Amendment was a plurality opinion). In *Seminole Tribe*, the Court held that none of Congress's Article I powers supported abrogation. *Id.* at 72-73. The Court also noted that "the Fourteenth Amendment, by expanding federal power at the expense of state autonomy, had fundamentally altered the balance of state and federal power struck by the Constitution," and thus could justify abrogation. *Id.* at 59.

states' ability to immunize their actions against individuals asserting that a state had impermissibly discriminated.

The Court's decisions since *Kimel—College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,[251] *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[252] *Board of Trustees of the University of Alabama v. Garrett*,[253] *Nevada Department of Human Resources v. Hibbs*,[254] and *Tennessee v. Lane*[255]—have reinforced the method of analysis outlined in *Kimel*: the Court looks to its precedents to determine "with some precision the scope of the constitutional right at issue."[256] Once the "metes and bounds" of the constitutional right have been determined, the Court turns to "whether Congress identified a history and pattern of unconstitutional . . . discrimination by the States."[257] If Congress has compiled a sufficient record of unconstitutional state discrimination, the Court will determine whether the statutory remedy is congruent and proportional to the discrimination.[258]

While the recent section 5 decisions have focused on separation of powers issues, they have a subtext shaped by the Court's drive to shield the states-as-states from federal domination. As in the Tenth and Eleventh Amendment cases, the section 5 decisions rely upon structure to create "limitations . . . necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between States and the National Government."[259] And, as with the Tenth

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251. 527 U.S. 666 (1999) (holding that the Trademark Remedy Classification Act, 15 U.S.C. §§ 1122, 1125(a) (2000), was beyond Congress's power under section 5 of the Fourteenth Amendment in authorizing private actions against states for patent infringement).

252. 527 U.S. 627 (1999) (holding that the Patent and Plant Variety Protection Act, 35 U.S.C. §§ 271(h), 296(a) (2000), exceeded Congress's power under § 5 of the Fourteenth Amendment to the extent that it abrogated state sovereign immunity).

253. 531 U.S. 356 (2001) (holding that Title I of the Americans with Disabilities Act, 42 U.S.C. §§ 12111-12117 (2000), exceeded Congress's power by authorizing private actions against states).

254. 538 U.S. 721 (2003) (holding that Congress constitutionally abrogated state sovereign immunity under the Family and Medical Leave Act, 29 U.S.C. § 2612(a)(1)(C) (2000)). Because gender-based discrimination is subjected to "heightened scrutiny" and Congress has compiled sufficient findings of "the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic § 5 legislation," the Act was a valid exercise of Fourteenth Amendment power. *Id.* at 735.

255. 124 S. Ct. 1978 (2004) (holding that Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132 (2000), did not exceed Congress' power as applied to cases involving the fundamental right of access to the courts).

256. *Garrett*, 531 U.S. at 365.

257. *Id.* at 368. *See also Hibbs*, 538 U.S. at 729-35; *Kimel*, 528 U.S. at 91; *Fla. Prepaid*, 527 U.S. at 640-44.

258. *See Kimel*, 528 U.S. at 86; City of Boerne v. Flores, 521 U.S. 507 (1997).

259. United States v. Morrison, 529 U.S. 598, 620 (2000). The relevance of "the Framers"

and Eleventh Amendment decisions, the Court's focus is on the states-as-states and Congress consequent inability to intrude.

7. Sums and Parts

With this background on the Court's New Federalism decisions, we can return to the Tragedy of Fragmentation. Recall the problem: biodiversity suffers from fragmented land ownership. Managing landscapes ecologically—re-commoning the land—can ameliorate this Tragedy of Fragmentation. Although there are increasing examples of collaborative management structures, often some compulsion is necessary to provide incentives for cooperation. The various federal land managing agencies have statutory mandates to protect biodiversity. Does New Federalism prevent the use of these mandates to create collaborative structures that will re-common federal and nonfederal lands and mitigate the Tragedy?

The Court's New Federalism decisions have not enunciated a single, coherent vision of the federal-state relationship. There are, however, two recurrent themes. The first and far more prevalent theme is the protection of states-as-states from federal commandeering. The second theme is the Court's apparent concern that the aggregation of effects unrelated to the constitutional clause cited as the basis for the action[260] could allow essentially unlimited expansion of federal power[261] and an intrusion into the states' constitutional realm.[262]

a. State Immunity

In litigation under the Tenth,[263] Eleventh,[264] and Fourteenth Amendments,[265] as well as some of the clear-statement cases,[266] the Court has focused on shielding states-as-states from congressional com-

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to the post-Civil-War amendments is never discussed.

260. *Morrison*, 529 U.S. at 613; United States v. Lopez, 514 U.S. 549, 561 (1994).

261. *Morrison*, 529 U.S. at 613 (quoting *Lopez*, 514 U.S. at 564); *Lopez*, 514 U.S. at 564, 567.

262. *Morrison*, 529 U.S. at 617-18; *Lopez*, 514 U.S. at 567-68.

263. *E.g.*, Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992).

264. *E.g.*, Alden v. Maine, 527 U.S. 706 (1999); Seminole Tribe v. Florida, 517 U.S. 44 (1996).

265. *E.g.*, Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 666 (1999); Fla. Prepaid Postsecondary Ed. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999); City of Boerne v. Flores, 521 U.S. 507 (1997).

266. *E.g.*, *SWANCC*, 531 U.S. 159 (2001); Jones v. United States, 529 U.S. 848 (2001); Gregory v. Ashcroft, 501 U.S. 452 (1990).

mandeering. The Court has found commandeering in two circumstances: "compel[ling] the states to enact or administer a federal regulatory program"[267] and abrogating state sovereign immunity.[268] The crucial line is crossed, the Court has stated, when states do not have the option to refuse to participate. Hence, the cooperative federalism tactics of conditional funding and conditional preemption remain constitutional because the states may choose not to participate.[269] This perspective on federalism might be categorized for convenience as "immunity federalism."

Reliance on the Property Clause to conserve biodiversity by regulating conduct on nonfederal lands is extremely unlikely to violate immunity federalism as it has been enunciated in these cases. First, the Court has been careful to note that "Congress may legislate in areas traditionally regulated by the States."[270] In *New York v. United States*, the Court wrote: "[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States."[271] Similarly, the Court has emphasized that its decisions are intended to insure that "a State's government will represent and remain accountable to its own citizens."[272] That is, the concern is with preserving the "sovereign status" of the states.[273] To that end, it is the power "directly to compel the States to require or prohibit . . . acts"[274] that raises constitutional problems. For example, if Congress were to enact a statute directing the states to prepare and implement biodiversity plans, it would contravene the Constitution unless it did so through a program that depended upon either conditional spending or conditional preemption.[275] The constitutionally significant difference, the Court has written, is between "encouraging" and "commandeering."

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267. *Printz*, 521 U.S. at 933 (quoting *New York*, 505 U.S. at 188).

268. *E.g.*, *Hibbs*, 538 U.S. 721; *Garrett*, 531 U.S. 356; *Kimel*, 528 U.S. 62; *Coll. Sav. Bank*, 527 U.S. 666; *Flores*, 521 U.S. 507.

269. *New York*, 505 U.S. at 167-68.

270. *Gregory*, 501 U.S. at 460.

271. *New York*, 505 U.S. at 166. *See also* Alden v. Maine, 527 U.S. 706, 714 (1999); *Printz*, 521 U.S. at 919-20.

272. *Printz*, 521 U.S. at 920. *See also Alden*, 527 U.S. at 715; *Gregory*, 501 U.S. at 461.

273. *Alden*, 527 U.S. at 714.

274. *New York*, 505 U.S. at 166. *See also Alden*, 527 U.S. at 759.

275. *See* Department of the Interior and Related Agencies Appropriations Act, 2004, Pub. L. No. 108-108, 117 Stat. 1241, 1248 (2003) ("That no State, territory, or other jurisdiction shall receive a grant unless it has developed, or committed to develop by October 1, 2005, a comprehensive wildlife conservation plan, consistent with criteria established by the Secretary of the Interior, that considers the broad range of the State, territory, or other jurisdiction's wildlife and associated habitats, with appropriate priority placed on those species with the greatest conservation need and taking into consideration the relative level of funding available for the conservation of those species.").

Simply put, conserving biodiversity by relying upon the land-managing agency's authority to conserve that diversity will not commandeer state governments. It will, at most, regulate conduct of individuals on nonfederal lands.[276] The focus is on actors who are determined by their location and the effects of their conduct on the federal lands. While some of the landowners are likely to be states—given the checker-boarded state school lands—the federal action does not target states-as-states or intrude into the relationship between the state and its citizens. Thus, regulation by the federal land-managing agencies of conduct on nonfederal lands to protect biodiversity on the federal lands is not prohibited by the Court's current immunity federalism jurisprudence.

b. The Search for Traditional State Powers

In its desire to protect the traditional divisions of authority between state and federal governments, the Court has focused on statutes that impinge upon traditional areas of state authority. It has adopted an analysis that has three steps. The Court has expressed concern that, if the activity that is sought to be regulated is insufficiently related to the clause that is relied upon to justify the regulation,[277] there is no limit to federal power[278] and intrusion into the states' constitutional realm is likely.[279] Thus, in its Commerce Clause decisions the Court insisted that the regulated activity had to be economic.

Might the Court's concerns arise in the context of an action predicated upon the Property Clause? Just as the Commerce Clause is concerned with the regulation of commerce and hence things economic, so the Property Clause is concerned with the property belonging to the United States. The scope of the Clause thus is as broad as the term "property" since that is its object. As we have seen, the federal courts have implicitly construed the term "property" to include biodiversity.[280] At some point, presumably, the connection between conduct occurring on nonfederal lands and the effects on federal lands might become too tenuous so that the conclusion that the activity was in fact harming federal biodiversity would require a court "to pile inference upon inference

276. The Court has been careful to distinguish between federal actions directed at citizens and those directed at states. It is the latter that raise constitutional federalism issues. *See, e.g.*, *New York*, 505 U.S. at 162.

277. United States v. Morrison, 529 U.S. 598, 613 (2000); United States v. Lopez, 514 U.S. 549, 561 (1994).

278. *Morrison*, 529 U.S. at 613 (quoting *Lopez*, 514 U.S. at 564); *Lopez*, 514 U.S. at 564, 567.

279. *Morrison*, 529 U.S. at 617-18; *Lopez*, 514 U.S. at 567-68.

280. *See supra* notes 132-157 and accompanying text.

in a manner that would bid fair to convert congressional authority under the [Property] Clause to a general police power of the sort retained by the States."[281] But such as-applied concerns are not an argument against the constitutional authority to apply the federal land-managing agency's organic authority to activities occurring on nonfederal lands when those activities cause harm to the biodiversity on federal lands. Instead, they illustrate the fundamental fact of constitutional law: the Property Clause, like all other clauses, is limited.[282] The conclusion that the power delegated by the Property Clause is sufficient to protect federal biodiversity from conduct on nonfederal lands thus is not a conclusion that Congress can regulate everything in the country or that the Clause is a "general police power."

Finally, it is far from clear that the protection of biological diversity should trigger the Court's apparently heightened scrutiny for (some) areas of traditional state authority. In *SWANCC*, the Court wrote that it was applying the clear-statement rule at least in part because the agency's regulation impinged on "the States' traditional and primary power over land and water use."[283] Conserving biodiversity clearly requires managing the uses of land and water. Does that mean that federal regulation of nonfederal land would be constitutionally suspect?

Three points should be noted. First, the regulation of the use of lands and waters is not an assertion of power to act as either a zoning or a property-allocating authority. As the Supreme Court has elsewhere noted, there is a distinction between land-use planning and environmental regulation: "Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but only requires that, however the land is used, damage to the environment is kept within prescribed limits."[284] Protection of biodiversity falls on the environmental regulation side of the line. It is not zoning because it does not specify land uses; it simply requires that the permissible land uses not damage the diversity of federal lands beyond the prescribed limits—the core function of environmental regulation.

Second, even if biodiversity protection were like zoning, that fact does not mean that the federal government is constitutionally barred. In *Gregory v. Ashcroft*, the Court has explicitly recognized that "Congress may legislate in areas traditionally regulated by the States."[285] Examples

281. *Lopez*, 514 U.S. at 567.
282. *See* Appel, *supra* note 32, at 83-84; Gaetke, *supra* note 131, at 394.
283. *SWANCC*, 531 U.S. 159, 174 (2001).
284. Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 587 (1987).
285. 501 U.S. 452, 460 (1990).

abound. Federal resource conservation and environmental statutes often affect land and water use. The Surface Mining Control and Reclamation Act imposes substantial restrictions on the use of land for surface coal mining, including requiring miners to restore the land to its prior condition and its approximate original contour, to re-vegetate the land, and prohibiting all mining within specified distances of certain land uses.[286] In *Hodel v. Virginia Surface Mining & Reclamation Ass'n*[287] and *Hodel v. Indiana*,[288] a unanimous Supreme Court upheld the Act. The *Hodel* decisions were later cited by the Court in *Lopez*[289] and *Morrison*[290] as examples of permissible federal regulation. Similarly, the CWA significantly affects both land and water use.[291] Thus, the fact that Congress has chosen to regulate in an area of traditional state authority in some cases heightens the care with which the Court evaluates the statute, but that does not, for that reason alone, mean that the statute is unconstitutional.

Third, and most fundamentally, as with its earlier decision in *National League of Cities*,[292] the difficulty is that "traditional" is at best an often murky standard, particularly given the inevitable reality of overlap between federal and state powers in the interconnected present.[293] "Traditional" ain't what it used to be. Wildlife law provides a classic example of this interconnectedness problem.

During the nineteenth century, the management of wildlife was a matter of state law.[294] The metaphor the courts employed was drawn from property: the states were said to "own" the wildlife within their borders. The state ownership doctrine, as the metaphor was known, provided a clear line between national and state spheres. As property own-

286. 30 U.S.C. §§ 1201-1328 (2000).

287. 452 U.S. 264 (1981).

288. 452 U.S. 314 (1981).

289. 514 U.S. 549, 557, 559 (1994).

290. 529 U.S. 598, at 609 (2000).

291. *E.g.*, Pronsolino v. Marcus, 91 F. Supp. 2d 1337 (N.D. Cal. 2000), *aff'd sub nom.*, Pronsolino v. Nastri, 291 F.3d 1123 (9th Cir. 2002), *cert. denied*, 539 U.S. 926 (2003).

292. 426 U.S. 833 (1967), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 538-39, 546-47 (1985).

293. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. at 538-39, 546-47 (1985).

294. Despite the national government's power to regulate interstate and foreign commerce and despite the commercial importance of oysters, the federal judiciary decided that oysters were not articles of commerce because they were the produce of land owned by the states in their sovereign capacity in trust for their citizens. McCready v. Virginia, 94 U.S. 391 (1876); Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 345, 367 (1842); Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230); Arnold v. Mundy, 6 N.J.L. 1 (1821). Thus, the harvesting of oysters like the harvesting of corn was beyond the reach of federal regulatory authority. Subsequent decisions extended this division to all wildlife. Geer v. Connecticut, 161 U.S. 519 (1896), *overruled by* Hughes v. Oklahoma, 441 U.S. 322, 335-36 (1979).

ers, the states had sole power to regulate the taking of wildlife.[295] Since the early twentieth century, the Supreme Court has repeatedly rejected the ownership metaphor. As Oliver Wendell Holmes famously wrote:

> To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership. The whole foundation of the State's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away.[296]

The objective of conserving migratory birds was, he noted, "a national interest of very nearly the first magnitude," and one that could be achieved "only by national action."[297]

Subsequent decisions have reinforced the point. In *Toomer v. Witsell*,[298] the Court rejected the state's ownership argument as a basis for avoiding the Privileges and Immunities Clause:

> The whole ownership theory . . . is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource. And there is no necessary conflict between that vital policy consideration and the constitutional command that the State exercise that power, like its other powers, so as not to discriminate without reason against citizens of other States.[299]

In a companion case, *Takahashi v. Fish Commission*,[300] the Court held that the Fourteenth Amendment's Equal Protection Clause prohibited California from barring resident aliens from harvesting wildlife.[301]

The decisions in *Toomer* and *Takahashi* reflect a distinction that the Court has frequently iterated. While "ownership" is a legal fiction, it is a fiction that nonetheless reflects the importance of wildlife to the people

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295. Since state property was not interstate commerce, the federal government could not intervene. *Geer*, 161 U.S. 519, *overruled by Hughes*, 441 U.S. at 335-36.

296. Missouri v. Holland, 252 U.S. 416, 434 (1920).

297. *Id.* at 435.

298. 334 U.S. 385 (1948).

299. *Id.* at 402.

300. 334 U.S. 410 (1948).

301. Justice Black wrote for the majority:

> To whatever extent the fish in the three-mile belt off California may be "capable of ownership" by California, we think that "ownership" is inadequate to justify California in excluding any or all aliens who are lawful residents of the State from making a living by fishing in the ocean off its shores while permitting all others to do so.

Id. at 421.

of a state.[302] Although the "importance" of the state's interest does not trump federal regulation, some justices have suggested that it may be sufficient in the absence of direct federal regulation or constitutionally protected rights. Justice Rehnquist, concurring in *Douglas v. Seacoast Products, Inc.*, argued that, because states do not "own" wildlife, "[i]t is . . . no answer to an assertion of federal pre-emptive power that such action amounts to an unconstitutional appropriation of state property. . . . [Nonetheless, b]arring constitutional infirmities, only a direct conflict with the operation of federal law—such as exists here—will bar the state regulatory action."[303] He offered an even more expansive statement in dissenting from a subsequent decision:

> In recognition of this important state interest, the Court has upheld a variety of regulations designed to conserve and maintain the natural resources of a State. To be sure, a State's power to preserve and regulate wildlife within its borders is not absolute. But the State is accorded wide latitude in fashioning regulations appropriate for protection of its wildlife. Unless the regulation directly conflicts with a federal statute or treaty, allocates access in a manner that violates the Fourteenth Amendment, or represents a naked attempt to discriminate against out-of-state enterprises in favor of in-state businesses unrelated to any purpose of conservation, the State's special interest in preserving its wildlife should prevail.[304]

This "special interest" in regulating access to wildlife within its borders is insufficient to constitute a sphere of unregulable state activity. While there may be some dispute about the reach of federal power in the absence of a federal statute, there has been no dissent from the proposition that Congress has power to preempt state wildlife law when it chooses to do so. The volume of congressional activity in the area[305]—the Marine Mammal Protection Act,[306] the Wild and Free-Roaming

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302. *See* Hughes v. Oklahoma, 441 U.S. 322, 334 (1979) (quoting *Toomer*); Baldwin v. Mo. Fish & Game Comm'n, 436 U.S. 371, 386 (1978) (quoting *Toomer*); Douglas v. Seacoast Prods., Inc., 431 U.S. 265, 284 (1977) (quoting *Toomer*).

303. *Douglas*, 431 U.S. at 287-88 (Rehnquist, J., concurring). *See also Baldwin*, 436 U.S. at 386 ("The fact that the State's control over wildlife is not exclusive and absolute in the face of federal regulation and certain federally protected interests does not compel the conclusion that it is meaningless in their absence.").

304. *Hughes*, 441 U.S. at 342-43 (Rehnquist, J., dissenting) (citations omitted). Among the cases cited for the proposition that federal statutes preempted inconsistent state law was *Kleppe v. New Mexico*, 426 U.S. 529 (1976), the feral horses and burros case that held that the Property Clause gave Congress power to regulate wildlife on public lands regardless of state law.

305. Congress has enacted nearly fifty wildlife statutes since 1900. *See* DALE D. GOBLE & ERIC T. FREYFOGLE, FEDERAL WILDLIFE STATUTES app. at 639-42 (2002).

306. 16 U.S.C. §§ 1361-1407 (2000).

Horses and Burros Act,[307] and the Endangered Species Act,[308] for example—and the Court's repeated validation of that activity, indicate that federal regulation of biodiversity is constitutionally permissible.[309]

Whether this special interest is of sufficient weight to prompt the invocation of a clear-statement rule is a closer question. To the extent that the Court invokes a clear-statement requirement to avoid "grave and doubtful constitutional questions,"[310] the rule is inapplicable in the case of wildlife law given the cases discussed above. To the extent that the requirement is predicated upon less than constitutional concerns,[311] the state interest in regulating wildlife seems both less weighty and of a different nature than the challenge to the state constitutional provision at issue in *Gregory*,[312] the request for injunctive relief against state officials presented in *Pennhurst State School & Hospital v. Halderman*,[313] the action for monetary damages for past acts of discrimination by the state raised in *Atascadero State Hospital v. Scanlon*,[314] and the 1983 action against the state police for denying a promotion for improper reasons as asserted in *Will v. Michigan Department of State Police*.[315] As the *Gregory* Court noted, Missouri's constitutional provision was "a decision of the most fundamental sort for a sovereign entity."[316] What was involved was the state's definition of itself.

This points to a crucial aspect of the Court's recent clear-statement cases: they share a core similarity with the immunity and anti-commandeering cases because the federal action intrudes into the state's role as a state rather than its role as a regulator of private conduct. In contrast, the use of the land management statutes to protect biodiversity on the public lands by regulating private conduct on nonfederal lands does not intrude upon the state as a state.

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307. *Id.* §§ 1331-1340.

308. *Id.* §§ 1531-1544.

309. *See, e.g.*, GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622 (5th Cir. 2003) (upholding constitutionality of the Endangered Species Act against challenge of exceeding Congress's power under the Commerce Clause); Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000) (same); Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997).

310. Jones v. United States, 529 U.S. 848, 857 (2001).

311. The Court in *Gregory* did not suggest that application of the Age Discrimination in Employment Act to state judges raised constitutional questions; rather, the Court predicated its application of the rule as "nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." 501 U.S. at 461.

312. *Id.* at 451.

313. 465 U.S. 89 (1984).

314. 473 U.S. 234 (1985).

315. 491 U.S. 58 (1989).

316. *Gregory*, 501 U.S. at 460.

CONCLUSION

The conservation of biodiversity requires re-commoning of the management of the landscape to overcome the Tragedy of Fragmentation. Although voluntary approaches are clearly preferable, unity is often difficult to obtain in a purely voluntary situation. Current landscape-planning processes—HCPs and Candidate Conservation Agreements, for example—are most commonly the result of the threat of compulsion posed by the ESA. The problem with continuing to rely upon the ESA is that the Act has relatively little application to private land and comes into play too late. By the time that species are sufficiently at risk to be listed as either threatened or endangered, much of the possible management flexibility has been lost.

The organic acts of the major federal land-management agencies—the Bureau of Land Management, Forest Service, Fish and Wildlife Service, and the National Park Service—include mandates that the agencies conserve biodiversity. These statutes offer one possibility for overcoming the inflexibility of the ESA—if the management mandates extend to activities occurring on nonfederal lands that harm the diversity of the federal lands and if those mandates can constitutionally be applied off the federal lands.

The Supreme Court has interpreted the Property Clause to include the power to regulate conduct on nonfederal lands that affect federal lands. The Court's renewed interest in federalism as an extrinsic limitation on federal authority raises questions about the permissibility of using the Property Clause in this manner. The proposal raises no significant concerns under the immunity federalism branch of the Court's New Federalism. The question is closer under the traditional state powers branch. While it is possible to construct hypotheticals under which the relationship between federal property and the activity to be regulated because too tenuous, such hypotheticals are not arguments against the existence of the power, but only recognition of its limits. Furthermore, the question of whether the conservation of biodiversity is even an example of a traditional state power is open to question.

On balance, Congress likely has the constitutional power. Having power and exercising it are, of course, different things.