THE PROPERTY CLAUSE AND NEW FEDERALISM

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INTRODUCTION

In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (the "*SWANCC*" decision)[1]—a recent and significant addition to the U.S. Supreme Court's New Federalism revival[2]—the Court cast doubt on Congress's authority to enact federal environmental regulation under the Commerce Clause. The *SWANCC* decision has sent commentators searching for a regulatory hook on which to hang Congress's environmental hat.[3] Professor Goble[4] and others[5] have suggested that Congress and federal agencies should look to the Property Clause, which gives Congress authority "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[6] Professor Goble notes that ecosystems

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1. 531 U.S. 159 (2001) [hereinafter *SWANCC*].

2. The term "New Federalism" is used to describe the Court's recent revitalization of federalism norms on a number of doctrinal fronts, including the Tenth Amendment, the Commerce Clause, the Eleventh Amendment, section 5 of the Fourteenth Amendment, and the canon of statutory construction that instructs courts to avoid interpretations that raise federalism concerns. *See* Allison H. Eid, *Federalism and Formalism*, 11 WM. & MARY BILL RTS. J. 1191, 1198, 1235 (2003).

3. *See, e.g.*, Peter A. Appel, *The Power of Congress "Without Limitation": The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1, 3 (2001); Cyril Robert Emery, *Setting Boundaries for Extraterritorial Applications of the Property Clause: An Assessment of an Alternative Source of Authority for Environmental Regulations*, 79 IND. L.J. 515 (2004); Edward A. Fitzgerald, Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers: *Isolated Waters, Migratory Birds, Statutory and Constitutional Interpretation*, 43 NAT. RESOURCES J. 11, 70-71 (2003).

4. Dale D. Goble, *The Property Clause:* As If *Biodiversity Mattered*, 75 U. COLO. L. REV. 1195 (2004).

5. *See, e.g.*, Appel, *supra* note 3, at 95-102 (arguing for broad congressional authority over nonfederal lands).

6. U.S. CONST. art. IV, § 3, cl. 2. The Property Clause has garnered very little attention from constitutional law commentators in recent years. Larry Tribe's treatise, for example, spends a mere three pages on the subject. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 848-50 (3d ed. 2000). The Stone constitutional law casebook does not even mention it. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW (4th ed. 2001). *See*

on federal lands can extend into nonfederal lands and argues that, in order to protect the federal portion of the ecosystem, Congress must have the authority to regulate the nonfederal portion as well. In other words, he contends that because ecosystems do not recognize boundaries, the Property Clause should not either.[7]

I do not dispute Professor Goble's assertion that ecosystems know no boundaries. Indeed, federal and state regulatory authorities have recognized this fact in their efforts to manage ecosystems that extend beyond federal lands.[8] I do, however, dispute his argument that the Property Clause is similarly boundary-free.

As I sketch out in Part I of this piece, Professor Goble's proposal is inconsistent with Supreme Court precedent interpreting the scope of the Property Clause. While the Court has given the Clause a broad interpretation when the federal government is asserting authority over its *own* lands—describing Congress's power as "without limitations" in such circumstances[9]—it has been careful to limit the Clause's extraterritorial scope to nuisance-like activities that directly threaten the existence of, or access to, federal lands.[10] Professor Goble would take this narrowly drawn authority over nonfederal lands and expand it to permit federal regulation of any activity that "affect[s] the biodiversity on federal lands"[11]— a test that would encompass virtually all activities that occur within the United States.

Not only is Professor Goble's proposal inconsistent with Supreme Court jurisprudence on the Property Clause, it is contrary to the Court's recent revival of federalism principles in the New Federalism. As discussed in Part II, an important, and perhaps the central, message of New Federalism is that constitutional provisions impacting the federal-state relationship must have judicially enforceable limits.[12] Professor Goble is correct in his assertion that the New Federalism's component parts—the

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generally Appel, *supra* note 3, at 3-7 (noting general disregard of the clause).

7. *See* Goble, *supra* note 4, at 1196-1200, 1218.

8. A recent example of a cooperative effort to manage an ecosystem that extends beyond federal boundaries is the Uncompahgre Plateau Project in southwestern Colorado. *See generally* Press Release, Colorado Department of Natural Resources, Uncompahgre Plateau Project Garners National Attention (Apr. 6, 2004), http://dnr.state.co.us/news/press.asp?pressid=2693 (discussing the joint efforts of, inter alia, the Colorado Division of Wildlife, the Federal Bureau of Land Management, the United States Forest Service, and the Public Lands Partnership "to manage entire ecosystems more effectively").

9. *See, e.g.*, Kleppe v. New Mexico, 426 U.S. 529, 539 (1976) (quoting United States v. City & County of San Francisco, 310 U.S. 16 (1940)).

10. *See infra* Part I.A.

11. Goble, *supra* note 4, at 1215.

12. *See infra* Part II.A.

anti-commandeering doctrine of the Tenth Amendment,[13] the Commerce Clause limitations,[14] the boundaries of Section 5 of the Fourteenth Amendment,[15] the Eleventh Amendment,[16] and the federalism canon of statutory construction[17] (the basis of the *SWANCC* decision)—do not speak directly to the scope of the Property Clause.[18] But again, these component parts have a common theme: the Court is defining the outer limits of federal power vis-à-vis the states. Professor Goble is looking for a limitless Property Clause from a Court that is focused on establishing limitations.

In searching for a constitutional source of authority for federal environmental regulation other than the Commerce Clause, it is clear that Professor Goble's work is an important step in the right direction. What is left to explore is the possibility of federal regulation under the Property Clause within the nuisance-like framework already established by the Court—a task I take up briefly in Part III.

I. THE PROPERTY CLAUSE AND THE COURT

Although Professor Goble admits that the Property Clause cannot be a "grant of unrestrained power,"[19] he finds few restraints on its scope. He suggests that the federal government can regulate "activities occurring on nonfederal lands" when they "affect the biodiversity on federal lands."[20] It is hard to imagine what sort of extraterritorial conduct Professor Goble's formulation would exclude, given his view of the interconnectedness of ecosystems.[21] His interpretation of the Property Clause is a broad one indeed.

For support of his expansive interpretation, Professor Goble draws on *Camfield v. United States*[22] and *United States v. Alford*,[23] cases in which the Court examined the question of whether and under what cir-

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

14. *See* United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995).

15. *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

16. *See* Alden v. Maine, 527 U.S. 706 (1999).

17. *See* Gregory v. Ashcroft, 501 U.S. 452 (1991) (instructing courts to avoid statutory interpretations that would create federalism concerns).

18. Goble, *supra* note 4, at 1222.

19. *Id.* at 1214.

20. *Id.* at 1215.

21. *Id.* at 1195-1200.

22. 167 U.S. 518 (1897).

23. 274 U.S. 264 (1927).

cumstances congressional authority under the Property Clause can extend beyond the federal boundary. Yet, as set out below, these two decisions in fact carefully limit Congress's extraterritorial power to the protection of federal lands from nuisance-like activities—that is, activities that directly threaten the existence of, or access to, federal lands. Additionally, Professor Goble fails altogether to discuss *Kansas v. Colorado,*[24] a case in which the Court rejected the very federal environmental police power authority that he now proposes. Finally, he looks for support in *Kleppe v. New Mexico,*[25] which does indeed speak of Congress's broad authority under the Property Clause. But *Kleppe* dealt with congressional authority to regulate activities occurring on *federal* land; the Court in that case was careful to note that such broad authority stops at the federal boundary line. In sum, the Court's Property Clause jurisprudence, as fleshed out in *Camfield, Alford, Kansas v. Colorado* and *Kleppe*, simply does not support the expansive interpretation that Professor Goble puts forward.

A. Camfield, Alford, *and the Question of Extraterritorial Authority*

The Court has, on only two occasions, directly addressed the scope of the Property Clause as applied to conduct on nonfederal land. In the 1897 case of *Camfield*, some clever Coloradans erected a fence that completely blocked access to federal land,[26] in violation of a federal statute banning "all enclosures of public lands."[27] The fence builders argued that Congress's authority to regulate under the Property Clause did not reach their fence because it was built entirely on nonfederal land.[28] Although the Court noted that the fence builders were "ingenious" in building their fence "a few inches inside [their property] line,"[29] such ingenuity would not shield them from Congress's regulatory power. "[I]n passing the act in question," the Court concluded, "[C]ongress exercised its constitutional right of protecting the public lands from nuisances erected upon adjoining property. . . ."[30]

The Court began with a recitation of the common law of nuisance, which provides that "a man has no right to maintain a structure upon his own land, which . . . renders the occupancy of adjoining property dan-

24. 206 U.S. 46 (1907).
25. 426 U.S. 529 (1976).
26. 167 U.S. at 519 (describing the fence as "exclud[ing] the United States and all other persons except [the fence builders]").
27. *Id.* at 525.
28. *Id.* at 522.
29. *Id.* at 525.
30. *Id.* at 528.

gerous, intolerable, or even uncomfortable to its tenants."[31] The Court concluded that "the fence is clearly a nuisance, and that it is within the constitutional power of Congress to order its abatement, notwithstanding such action may involve an entry upon the lands of a private individual."[32] The Court noted that the "general Government doubtless has a power over its own property analogous to the police power of the several states."[33] While the Court would not say that

> Congress has the unlimited power to legislate against nuisances within a State, which it would have within a territory [controlled by the federal government], we do not think the admission of a territory as a state deprives it of the power of legislating [against nuisances] for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power. . . .[34]

Professor Goble reads *Camfield* as authorizing a broad federal police power that would emanate from the Property Clause—a power that would permit Congress to regulate *any* "conduct on nonfederal lands that frustrates the purposes for which the [federal] government holds its lands."[35] Such power, he emphasizes, is not limited to "common-law concepts of 'nuisance.'"[36] Professor Peter Appel, on whose work Professor Goble builds,[37] describes *Camfield* as having "announced that the federal government had police power over activities that harm federal property even when the regulated activities occurred wholly on privately owned land . . . ."[38] He also emphasizes that *Camfield* goes beyond nuisance.[39]

Despite the protestations of Professors Goble and Appel, *Camfield* is, at its core, a case about nuisance. The case permitted the federal government a limited police power to regulate an activity that, according to

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31. *Id.* at 523.
32. *Id.* at 525.
33. *Id.*
34. *Id.* at 525-26.
35. Goble, *supra* note 4, at 1209.
36. *Id.* Professor Goble suggests that the extraterritorial authority is not so limited because it extends to the "protection of the public." *Id.* (quoting *Camfield*, 167 U.S. at 525). The Court used the "protection of the public" language, however, simply to justify its holding that Congress may forbid all enclosures of public lands—i.e., to protect its land from common law nuisances—not as a justification for a general federal police power emanating from the Property Clause.
37. *See id.* at 1207 n. 77 (citing Appel, *supra* note 3, at 63-66).
38. *See* Appel, *supra* note 3, at 66.
39. *Id.* at 64.

the Court,[40] constituted a common law nuisance—a body of law that traditionally permits a landowner to abate an adjacent landowner's activity that interferes with the use and enjoyment of his or her property.[41] The Court clearly was concerned that if the Property Clause did not give Congress the power to protect federal land from common law nuisances, access to that land could be severely (or altogether) restricted. Professor Goble's proposal goes far beyond the nuisance limitations of *Camfield*; indeed, he hopes the "nuisance" seeds bear general federal police power fruit.

The Court revisited the penumbra of the Property Clause in the 1927 case of *Alford*. The federal statute at issue in the case required that "[w]hoever shall build a fire in or near any forest, timber, or other inflammable material upon the public domain" must "totally extinguish the same" before leaving.[42] Alford was indicted for building a fire off federal land that spread to federal land and burned the "grass and other inflammable material" thereon.[43] Alford challenged his indictment on two grounds: first, he argued that, as a matter of statutory construction, the term "public domain" modified "whoever shall build a fire," so that the statute applied only to fires built on federal lands; second, he argued that, if the statute did apply to fires built on or off federal land, it was unconstitutional.[44] In a four-paragraph opinion written by Justice Holmes, the Court rejected both arguments.

As to the statutory construction question, Justice Holmes held that "public domain" modified "forest, timber, or other flammable material" not "whoever shall build," and that, therefore, the statute applied to Alford's fire. Justice Holmes noted that under the statutory language, "[t]he danger depends on the nearness of the fire [to federal land], not upon the ownership of the land where it was built."[45] Justice Holmes's constitutional analysis—in toto—consisted of a citation to *Camfield* and the following statements: "The statute is constitutional. Congress may

40. My colleague Rick Collins points out that *Camfield* actually involved a question of easement, not nuisance. The result in either case is the same: both easement and nuisance are incidents of ownership that the federal government can enforce through its Property Clause authority.

41. *See* RESTATEMENT (SECOND) OF TORTS § 821D (1979) (defining nuisance as a "nontrespassory invasion of another's interest in the private use and enjoyment of land").

42. United States v. Alford, 274 U.S. 264, 266-67 (1927) (quoting Act of June 25, 1910, ch. 431, 36 Stat. 855, 857) (internal quotation marks omitted).

43. *Id.* at 266.

44. *Id.*

45. *Id.* at 267.

prohibit the doing of acts upon privately owned lands that imperil the publicly owned forests."[46]

Consistent with his interpretation of *Camfield,* Professor Goble concludes from *Alford* that Congress can "statutorily prohibit conduct that interferes with federal objectives on the use of [federal lands]."[47] Similarly, Professor Appel emphasizes the fact that "[t]he activity regulated only had to take place 'near' publicly owned lands."[48] Yet again, as with *Camfield*, Professors Goble and Appel make a substantial leap from the limited holding of the case to a general federal police power. The Court in *Alford* found that the Property Clause permits Congress to regulate fires set near federal lands that could (and in *Alford*, did) "imperil" and destroy them. Taken together, *Camfield* and *Alford* stand for the proposition that Congress can protect federal lands from nuisance-like activities on nonfederal lands that directly threaten the existence of (*Alford)*, or access to (*Camfield*), federal lands. They could, of course, be read to establish the foundation—as proposed by Professors Goble and Appel—of a much broader extraterritorial penumbra around the Property Clause, but such an interpretation requires a substantial expansion of the central holdings of the cases.

B. Kansas v. Colorado *and the Rejection of a Federal Environmental Police Power*

That the Property Clause does not create a broad federal environmental police power is illustrated by *Kansas v. Colorado*,[49] a 1907 case not discussed by Professor Goble. In that case, Congress's attempt to use the Property Clause in the manner suggested by Professor Goble was roundly rejected by the Court.

The case began when Kansas brought an original proceeding against Colorado to enjoin it from diverting too much water from the Arkansas River—the first of many such water disputes between the two states.[50] The United States petitioned to intervene in the dispute. As described by the Court:

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46. *Id.* (citing Camfield v. United States, 167 U.S. 518 (1897)).

47. Goble, *supra* note 4, at 1210.

48. Appel, *supra* note 3, at 66.

49. 206 U.S. 46 (1907).

50. For a historical consideration of the dispute, see Tom I. Romero, *Uncertain Waters and Contested Lands: Excavating the Layers of Colorado's Legal Past*, 73 U. COLO. L. REV. 521, 548-54 (2002).

> [The United States] rests its petition of intervention upon its alleged duty of legislating for the reclamation of arid lands; alleges that in or near the Arkansas [R]iver, as it runs through Kansas and Colorado, are large tracts of those lands; that the national government is itself the owner of many thousands of acres; that it has the right to make such legislative provision as in its judgment is needful for the reclamation of all these arid lands and for that purpose to appropriate the accessible waters.[51]

In other words, the federal government was arguing that it had a duty to reclaim arid lands, especially those that it owned, and that the water in dispute could assist in its reclamation efforts.

The Court found that the Property Clause did not reach that far. It began by noting that

> [t]he full scope [of the Clause] has never been definitely settled. Primarily, at least, it is a grant of power to the United States of control over its property. That is implied by the words 'territory or other property' . . . . [C]learly it does not grant to Congress any legislative control over the states, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits.[52]

The Court thus rejected the government's argument that Congress could use the Property Clause to regulate activities occurring on nonfederal land (such as state water use) that could impact federal property. The Court closed by reiterating the significance of the Property Clause's geographic boundary. "It does not follow from" the rejection of a broad federal interest in the disputed water, the Court noted, "that the National Government is entirely powerless in respect to this matter."[53] On the contrary, under the Property Clause, Congress "has the power to dispose of and make all needful rules and regulations respecting its property."[54]

There is no question that, as Professor Appel points out,[55] *Kansas v. Colorado* is a case involving water law issues.[56] However, it is also a

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51. 206 U.S. at 86-87.

52. *Id.* at 89.

53. *Id.* at 92.

54. *Id.*

55. Appel, *supra* note 3, at 73-74 (describing the case as involving the question of whether Congress could adopt a particular theory of water law: Kansas's riparian system or Colorado's prior appropriation).

56. For an analysis of the case's impact on water law, see Justice Gregory Hobbs, *The Role of Climate in Shaping Western Water Institutions*, 7 U. DENV. WATER L. REV. 1, 26-27 (2003).

case about the scope of the Property Clause. As such, it expressly rejects the notion that the federal government can reach out and regulate conduct occurring on nonfederal land (in that case, state water use) that interferes with federal objectives (in that case, reclamation of arid federal land)—the precise position taken by Professor Goble. Additionally, it implicitly reaffirms the narrower, nuisance reading of the Clause's reach. Colorado and Kansas were not engaging in conduct amounting to a nuisance; thus, the Court had no reason to rely on *Camfield*, which was decided a decade earlier.

C. Kleppe *and the Limitation on "Without Limitations"*

The only modern authority to have addressed the penumbra of the Property Clause is *Kleppe v. New Mexico*, a 1976 case in which the Court upheld the Wild Free-Roaming Horses and Burros Act (the "Act") as a valid exercise of congressional power under the Clause. The State of New Mexico argued that it could seize stray animals on federal property under its own Estray Law.[57] The Court rejected this argument, holding that "the Property Clause . . . gives Congress the power to protect wildlife on the public lands, state law notwithstanding."[58] It noted that, "while the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved," the power "over the public land thus entrusted to Congress is without limitations."[59]

Both Professors Goble and Appel rely on the "without limitations" language to support their expansive interpretation of the Property Clause.[60] Importantly, however, *Kleppe* plainly involved the question of federal authority over *federal* land. Indeed, the Court expressly rejected New Mexico's reliance on *Kansas v. Colorado*, which it described as standing for the proposition that "[t]he Property Clause is a grant of power only over federal property."[61] Similarly, the Court rejected New Mexico's reliance on *Camfield*, noting that the case dealt with "the scope of congressional power to regulate conduct on Private land that affects the public lands."[62] New Mexico argued that the scope of *Camfield* was

57. Kleppe v. New Mexico, 426 U.S. 529, 532-33 (1976).

58. *Id.* at 546.

59. *Id.* at 539 (quoting United States v. City & County of San Francisco, 310 U.S. 16 (1940)).

60. Appel, *supra* note 3 (using the phrase in the title of his article); Goble, *supra* note 4, at 1211.

61. *Kleppe*, 426 U.S. at 537-38.

62. *Id.* at 538. The Court continued:

> *Camfield* holds that the Property Clause is broad enough to permit federal regulation

at issue in the case because there was a question whether the Act would protect "wild free-roaming horses and burros that stray from public land onto private land."[63] The Court declined to answer based on the case's procedural posture, and expressly left open "the question of the permissible reach of the Act over private lands under the Property Clause."[64]

While *Kleppe* expressly leaves the extraterritorial scope of the Property Clause an open question, it does reiterate the significance of the boundary. Stated differently, Congress's authority under the Property Clause is, in the Court's words, "without limitations" when, and only when, it is regulating federal property. When it reaches beyond federal lands, a different calculus applies. Professor Goble's proposal, which permits Congress to regulate conduct on nonfederal land when it affects federal objectives, comes close to authority "without limitations."

II. NEW FEDERALISM AND ITS IMPACT ON THE PROPERTY CLAUSE

Congress's authority under the Property Clause has profound implications for federalism.[65] Thus Professor Goble's proposal—which, as discussed above, interprets the Clause as reaching any activities that would affect or interfere with federal land objectives—must be considered in light of the Court's recent revitalization of federalism principles. An important, if not central, message of New Federalism is that constitutional provisions that involve federalism must have judicially enforceable limits.[66] In particular, as considered in Part A below, the Court's deci-

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> of fences built on private land adjoining public land when the regulation is for the protection of the federal property. *Camfield* contains no suggestion of any limitation on Congress'[s] power over conduct on its own property; its sole message is that the power granted by the Property Clause is broad enough to reach beyond territorial limits.

Id.

63. *Id.* at 546.

64. *Id.* at 547.

65. Most recently, for example, the D.C. Circuit rejected Nevada's Property Clause challenge to the federal government's decision to locate a nuclear waste repository on federal land (Yucca Mountain) within the state. Nuclear Energy Institute, Inc. v. Environmental Protection Agency, 373 F.3d 1251 (D.C. Cir. 2004).

66. *See* Steven G. Calabresi, *Federalism and the Rehnquist Court: A Normative Defense*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 25 (2001) (describing New Federalism as a judicial effort to "police the boundary lines of the congressionally enumerated powers"); Richard W. Garnett, *The New Federalism, the Spending Clause, and Federal Criminal Law*, 89 CORNELL L. REV. 1 (2003) (same). Professor Appel seems to agree with this description of New Federalism. *See* Peter A. Appel, *The Power of Congress "Without Limitation" in the Twenty-First Century*, 24 PUB. LAND & RESOURCES L. REV. 25, 25 (2004) (describing the Supreme Court's "current milieu" as "revisiting all of the limitations on congressional power").

sions in the Commerce Clause arena, including its decision in *SWANCC* (in which the Court sought to avoid a Commerce Clause problem), have rejected a boundary-free interpretation of the "substantial effects" test.

The fatal flaw of Professor Goble's proposal, as discussed in Part B, is that it fails to establish a boundary on Congress's power to regulate conduct occurring on nonfederal land. Any conduct, anywhere in the country, could affect the biodiversity of ecosystems on federal lands.[67] His proposal is thus contrary to the general direction of New Federalism—even though it may not run afoul of any specific case holdings. Indeed, in an ironic twist, Professor Goble's proposal to use the Property Clause as an alternative to *SWANCC* actually replicates the problem of limitless authority identified by the Court in that decision.

A. The Commerce Clause and SWANCC*: In Search of Limits*

The Court in 1995 ended more than a half-century of deference to Congress on the scope of the Commerce Clause[68] in *United States v. Lopez*,[69] followed five years later by *United States v. Morrison*.[70] The pre-*Lopez* Court subscribed to the "political safeguards of federalism" theory, first expounded by Professor Herbert Wechsler, under which it was asserted that the states are protected from an overreaching federal government by virtue of the checks built into the structure of government—for example, by the fact that the states are represented in Congress.[71] Professor Jesse Choper applied Wechsler's theory to judicial review: because political safeguards would protect federalism, he reasoned, judicial safeguards—that is, judicial review of federalism issues—was unnecessary.[72] Among other things, the "political safeguards" theory meant that Congress was the judge of the scope of its own power under the Commerce Clause. "In reviewing congressional legislation under the Commerce Clause," Justice Souter wrote in his *Lopez* dissent, "we [traditionally] defer to what is often a merely implicit congressional judgment that

67. *See supra* notes 19-21.

68. *See generally* Eid, *supra* note 2, at 1219.

69. 514 U.S. 549 (1995).

70. 529 U.S. 598 (2000).

71. 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). *See generally* Eid, *supra* note 2, at 1220.

72. Jesse H. Choper, *The Scope of National Powers Vis-à-vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977).

its regulation addresses a subject substantially affecting interstate commerce 'if there is any rational basis for such a finding.'"[73]

In *Lopez*, the Court, by virtue of striking down the Gun-Free School Zones Act as beyond Congress's commerce power, rejected the political safeguards theory. In a 5-4 decision, the Court sought to establish a limit on Congress's authority under the Commerce Clause, but it faced almost sixty years of expansion of congressional authority—expansion that occurred with judicial acquiescence. It thus examined its prior Commerce Clause precedents and found the narrowest possible grounds on which to preserve them—namely, that the prior case law involved "economic activity" that substantially affected commerce.[74] Gun possession near a school was not itself economic activity, so the aggregate impact of that activity—that is, gun violence leads to a poor learning environment, which leads to a less productive citizenry and eventually to a poor national economy—could not be said to substantially affect commerce.[75] In *Morrison*, another 5-4 decision, the Court struck down the Violence Against Women Act on the ground that violence directed toward women flunked the economic activity test.[76]

Justice Thomas, in a concurring opinion, wrote that he would be willing to reconsider the substantial effects test, which was, in his view, "far removed from . . . the Constitution."[77] No one else in the majority joined his opinion, confirming that there were simply too many years of federal regulatory water under the Commerce Clause bridge to go back to Justice Thomas's interpretation of "interstate commerce."[78] The result was the same, however, under either the majority's or Justice Thomas's approach: gun possession and violence directed toward women were neither "economic activity" nor "interstate commerce."

A year after the Court handed down *Morrison*, the "economic activity" test reappeared in the environmental context in the *SWANCC*[79] decision. In *SWANCC*, the Court concluded that an administrative rule giving the U.S. Army Corps of Engineers jurisdiction over intrastate waters used by migratory birds exceeded the Corps's statutory authority under the Clean Water Act, an act that gives the Corps authority over "navigable waters of the United States."[80] The federal government argued that

73. 514 U.S. at 603 (Souter, J., dissenting) (citations omitted).
74. *Id.* at 560.
75. *Id.* at 563-64.
76. 529 U.S. at 613.
77. *Lopez*, 514 U.S. at 601 (Thomas, J., concurring).
78. *Id.* at 585-88.
79. 531 U.S. 159 (2001).
80. *Id.* at 168.

the "Migratory Bird Rule" fell within the commerce power because "the protection of migratory birds is a 'national interest of very nearly the first magnitude,'"[81] and because "millions of people spend over a billion dollars annually on recreational pursuits relating to migratory birds."[82] The Court stated that the government's arguments raised "significant constitutional questions."[83] For example, the Court "would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce."[84] The answer to that query was unclear, according to the Court, for "although the Corps has claimed jurisdiction over petitioner's land because it contains water areas used as habitat by migratory birds"—apparently, a noneconomic activity that would flunk *Lopez* and *Morrison*—the Corps had more recently turned its focus to the fact that "the regulated activity is [a] municipal landfill, which is 'plainly of a commercial nature.'"[85] This post-hoc rationalization for jurisdiction did not seem to satisfy the Court either, for it was "a far cry" from the statutory jurisdictional term of "navigable waters."[86]

The Court held that "the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use."[87] According to the Court, such impingement was contrary to Congress's intent in the Clean Water Act, in which it "chose to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . . .'"[88] The Court, therefore, refused to defer to the government's interpretation of the "navigable waters," which included intrastate waters that serve as migratory bird habitats, and instead chose to "read the statute as written to avoid the significant constitutional and federalism questions raised by the [government's] interpretation."[89] In other words, the government interpreted the statutory term so broadly as to create constitutional concerns; in order to avoid the constitutional concerns, the Court read the statute narrowly. Although the Court did not cite *Gregory v. Ashcroft*,[90] the case credited as ushering in the era of

81. *Id.* at 173 (quoting Missouri v. Holland, 252 U.S. 416, 435 (1920)).
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* (quoting the federal parties' briefs before the Court).
86. *Id.*
87. *Id.* at 174.
88. *Id.* (quoting 33 U.S.C. §1251(b)).
89. *Id.*
90. 501 U.S. 452 (1991).

New Federalism,[91] it applied its constitutional avoidance canon of statutory construction to invalidate the rule at issue.[92]

SWANCC itself is critically important in the interpretation of the Property Clause for two interrelated reasons. First, the case reiterates the Court's view that the states, not the federal government, have "traditional and primary power" over land and water use.[93] The Court made similar statements with regard to education in *Lopez*[94] and family law in *Morrison*.[95] Thus, any congressional regulation under the Property Clause that extends beyond the boundary of federal lands would, like the Migratory Bird Rule, "impinge" on the states' authority. Indeed, the Court said as much in *Kansas v. Colorado*,[96] when it refused to permit the United States to intervene in a "State v. State" dispute over water based on its interest in protecting federal lands.[97]

Second, *SWANCC* indicates that the Court is serious about placing limits on the Commerce Clause.[98] After *SWANCC*, the question is, of course, whether there are other applications of the Clean Water Act that might run afoul of the "economic activity" test.[99] *SWANCC* has put pressure on scholars to look for alternative sources of congressional authority that could support federal environmental regulation.[100] The important question for the Property Clause, however, is how to define the Clause's scope in a post-*SWANCC* world. Ironically, Professor Goble's

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91. *See* Clarence Thomas, *Why Federalism Matters*, 48 DRAKE L. REV. 231, 235 (2000) (suggesting that *Gregory* was the "starting point" of the Court's New Federalism jurisprudence).

92. The Court relied instead on *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1988), which held that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Id.* at 575. *Gregory* applied this constitutional avoidance canon specifically to federalism concerns. Many commentators have criticized the canon because it leaves the constitutional question technically unanswered. *See, e.g.*, Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549 (2000).

93. *SWANCC*, 531 U.S. at 174.

94. 514 U.S. 549, 564 (1995).

95. 529 U.S. 598, 599 (2000).

96. 206 U.S. 46 (1907).

97. *See supra* Part I.B.

98. *See* Eid, *supra* note 2, at 1236.

99. For an extended discussion of the scope of post-*SWANCC* jurisdiction under the Clean Water Act, see David E. Kunz, *A River Runs Through It: An Analysis of the Implications of* Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers *on the Clean Water Act and Federal Environmental Law*, 9 ENVTL. LAW. 463 (Feb. 2003).

100. *See supra* note 3.

proposed interpretation of the Clause raises the same sorts of concerns about limitless authority that the Court expressed in *SWANCC*.

B. Goble's Clause Without Limits

At bottom, Professor Goble's proposal amounts to a plea[101] to Congress to treat the Property Clause as it has treated the Commerce Clause. He suggests that the Property Clause, which gives Congress authority "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States,"[102] merely requires a "relationship" or "nexus" between the proposed regulation and the federal property.[103] "At the very least," he continues, "if the [regulation] protects the federal property from harm . . . or prevents interference with federal policy on the use of the property . . . the rule is 'respecting' the property."[104] Thus, federal regulatory authority reaches "activities occurring on nonfederal lands when those activities affect" federal lands.[105] Professor Goble implicitly borrows the "substantial effects" test from the Commerce Clause and imports it into the Property Clause, but without the "substantial" or any other limitation. Professor Appel makes the borrowing even more explicit. "In both areas of jurisprudence," he writes, "courts should uphold a congressional determination that an activity substantially affects interstate commerce or federal property if Congress could rationally make that conclusion."[106] Thus, Professors Gobel and Appel give an affirmative answer to the rhetorical question Justice Thomas posed in his *Lopez* concurrence—namely, "if a 'substantial effects' test can be appended to the Commerce Clause, why not to every other power of the Federal Government?"[107]

But both Professors Goble and Appel analogize to a pre-New Federalism formulation of the Court's Commerce Clause jurisprudence. Gone are the days that federal regulation could be sustained if Congress had a rational basis for concluding that the regulated activity affected interstate commerce. Indeed, the passing of that test is what the dissenters in *Lopez* and *Morrison* lamented.[108]

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101. He writes, for example, that "Congress likely has the constitutional power. Having power and excising it are, of course, different things." Goble, *supra* note 4, at 1240.

102. U.S. CONST. art. IV, § 3, cl. 2.

103. Goble, *supra* note 4, at 1215.

104. *Id.*

105. *Id.*

106. Appel, *supra* note 3, at 101.

107. 514 U.S. 549, 589 (1995) (Thomas J., concurring).

108. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 628 (2000) (Souter, J., dissenting);

Professor Goble argues, in defense of his proposal, that "[o]bviously, 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."[109] Yet the analogy is a strong one, and the rejection of limitless authority in one context suggests its rejection in the other. He also suggests that the Court has not held that regulation of wildlife is a subject traditionally within the regulatory authority of states, citing the many instances in which Congress has regulated wildlife.[110] That may be true, but the fact that "the protection of migratory birds is a 'national interest of very nearly the first magnitude'"[111] did not save the Migratory Bird Rule from the impact of New Federalism in *SWANCC*, in which the Court noted that the states, not the federal government, have "traditional and primary power" over land and water use.[112]

Professor Appel focuses on the fact that in its recent decisions the Court preserved the "substantial effects" test, and argues that the Court merely limited the kinds of activities that could be aggregated to substantially affect commerce—that is, economic activities.[113] Yet Professor Appel's analysis ignores the Court's rationale for preserving the test. It is clear that the Court wanted to place a limitation on the scope of the Commerce Clause. It could have tossed the substantial effects test altogether and constrained the Clause to its textual boundary of "interstate commerce," as Justice Thomas has suggested. But doing so would have meant casting aside sixty years of unbroken Court precedent and a similar time span of federal regulation created under that precedent. The Court preserved the substantial effects test not necessarily because it was the *right* test; in fact, no one in the Court's majority defended the test on any grounds other than precedent. The question for the Court in the Property Clause arena would be whether to go down the substantial effects path in the first instance, knowing where the test led in the commerce context. Given the difficulties the Court has faced in setting a limitation on the Commerce Clause, it undoubtedly would show some reluctance in adopting a boundary-free interpretation in the Property Clause context.

United States v. Lopez, 514 U.S. 549, 617 (1995) (Breyer, J., dissenting).

109. Goble, *supra* note 4, at 1222.

110. *Id.* at 1236-39.

111. *SWANCC*, 531 U.S. 159, 173 (2001) (quoting Missouri v. Holland, 252 U.S. 416, 435 (1920)).

112. *Id.* at 174.

113. Appel, *supra* note 3, at 98-99 (noting that "[t]he limitation announced in *Lopez* merely required Congress to target activities of an economic nature").

Professor Goble insists that "the Property Clause, like all other clauses, is limited."[114] He stresses that his proposal "is not a conclusion that Congress can regulate everything in the country or that the Clause is a 'general police power.'"[115] Yet nowhere does he establish a stopping point for his formulation that would give Congress the authority to regulate extraterritorial conduct that "affects" federal lands. The limitless nature of federal authority proposed by Professor Goble dooms his formulation under New Federalism.

III. REAFFIRMING A NUISANCE-BASED LIMITATION ON THE EXTRATERRITORIAL REACH OF THE PROPERTY CLAUSE

In many ways, Professor Goble's proposal is inconsistent with New Federalism. New Federalism stands, in part, for the proposition that constitutional provisions impacting federalism must have limits. Professor Goble, in essence, proposes that the Property Clause is an exception to that principle. But in one significant way, Professor Goble's proposal is entirely consistent with New Federalism. He has turned scholarly attention away from the Commerce Clause and toward the Property Clause as a source of regulatory authority.

While New Federalism is about setting limits on congressional power, it is also about signaling Congress to base its regulations in the appropriate enumerated power.[116] For nearly sixty years, the Commerce Clause did all the congressional heavy lifting. It provided a regulatory home that was comfortable, broad, and essentially judicially unreviewable. As a result, there was no incentive for Congress to look elsewhere, and other sources of federal regulatory power remained relatively untouched and underused.

The Commerce Clause behemoth effect seems to have stunted the scholarly efforts in the area as well. For example, a quarter of a century ago, Joseph Sax wrote a piece that briefly considered the Property Clause as a source of authority for federal regulation of nonfederal land adjoining the national parks, but then quickly moved to the Commerce Clause, about which he said "[n]o provision of the Constitution has been read to give more extensive authority to Congress."[117] Indeed, "[w]ere Congress to regulate land use within or beyond park boundaries based on its

114. Goble, *supra* note 4, at 1235.

115. *Id.*

116. *Cf.* Eid, *supra* note 2, at 1231.

117. Joseph L. Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239, 256 (1976).

commerce power," he continued, "its action would . . . fall comfortably within the range of regulation sustained by the decided cases."[118] As to judicial review of such regulation, Professor Sax commented that "the role of the courts in assessing the judgment of Congress is extraordinarily limited; the judiciary will intervene only where the legislative decision is regarded as irrational."[119] With regard to the possible federalism implications of such regulation, the Court would pay "little attention . . . to a claim that regulation of a particular private activity is traditionally reserved for state regulation."[120]

The world that Professor Sax describes has been fundamentally altered by *Lopez*, *Morrison*, and *SWANCC*. The time has come, as Professor Goble suggests, to reexamine the Property Clause as a source of regulatory authority. In my view, the logical place to begin the reexamination is with the ground the Court has already covered[121]—that is, with Congress's ability, as described above, to regulate nuisance-like conduct on nonfederal land that directly threatens the existence of, or access to, federal lands. Professor Goble does not explore whether this particular authority would be sufficient for his ends; he assumes that it would not be and argues for a much broader interpretation.[122] Professor Appel, without discussion, makes a similar assumption.[123] But perhaps it is time for this assumption to be tested.

By no means is this piece designed to put forth a complete discussion of a nuisance-like regime; instead, my purpose is to steer scholarly attention in this direction. That being said, some preliminary thoughts are in order. Just over a decade ago, the Court embarked on a course similar to the one I am suggesting in the Takings Clause[124] context. In *Lucas v. South Carolina Coastal Council*,[125] the Court held that compensation for a regulatory "taking" of private property would not be due if the same result could have been achieved "in the courts—by adjacent

118. *Id.* at 257.

119. *Id.* at 258.

120. *Id.*

121. Another starting point might be the original understanding of the Property Clause. But given that scholars are divided on the question of whether, under the original understanding, the Clause empowers Congress to own land in the long term, it is doubtful that the original understanding would shed much light on the Clause's extraterritorial scope. *See generally* Robert G. Natelson, *Federal Land Retention and the Constitution's Property Clause: The Original Understanding*, 76 U. COLO. L. REV. (forthcoming Spring 2005).

122. *See* Goble, *supra* note 4, at 1210.

123. *See* Appel, *supra* note 3, at 84-85 (arguing for an interpretation of the Property Clause that is broader than nuisance).

124. U.S. CONST. amend. V (requiring "just compensation" for the taking of private property by the government).

125. 505 U.S. 1003 (1992).

landowners . . . under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally . . . ."[126] The Court noted, for example, that "the owner of a lake-bed . . . would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land."[127] Such action would not, in the Court's view, "proscribe a productive use that was previously permissible under relevant property and nuisance principles."[128]

Lucas is thus consistent with the Court's holdings in *Camfield* and *Alford*. The federal government has the power to protect itself against nuisance-like activities and, in the case of *Lucas*, such protection would not require the payment of compensation. To the extent that activity occurring on nonfederal land poses a direct threat of destruction to federal lands and the ecosystems thereon, it satisfies this nuisance-like test. A classic example, suggested by *Lucas*, would be the flooding of federal land from sources outside the federal boundary. Again, Professor Goble's proposal reaches much farther, and would empower the federal government to regulate any extraterritorial conduct—no matter the proximity to federal lands—that threatens biodiversity on those lands.

Of course the nuisance-like formulation has its uncertainties. Nuisance is a notoriously slippery legal subject.[129] Indeed, in the takings context, scholars continue to debate the line between uncompensated nuisances and compensated takings.[130] Defining the scope of the Property Clause penumbra by reference to nuisance law may not be an easy task, but the Court's Property Clause jurisprudence and New Federalism both support that task.

CONCLUSION

If the Property Clause is to serve as an alternative source of congressional authority in the environmental arena, the critical challenge is to define the Clause's scope. Professor Goble suggests that the Clause should be as boundary-free as ecosystems. But constitutional provisions impacting the federal-state relationship, especially in the age of New

126. *Id.* at 1029.

127. *Id.*

128. *Id.* at 1030.

129. *See generally* G. Nelson Smith, *Nuisance and Trespass Claims in Environmental Litigation: Legislative Inaction and Common Law Confusion*, 36 SANTA CLARA L. REV. 39 (1995).

130. *See, e.g.*, David A. Thomas, *Finding More Pieces for the Takings Puzzle: How Correcting History Can Clarify Doctrine*, 75 U. COLO. L. REV. 497 (2004).

Federalism, must have boundaries. Thus far, the Court has been careful to limit Congress's extraterritorial authority under the Clause to nuisances that directly threaten the existence of, or access to, federal land. It is with this nuisance-like limitation that we must begin any exploration of the Property Clause as a source of federal environmental power.