

# HELPLESS GIANTS: THE NATIONAL PARKS AND THE REGULATION OF PRIVATE LANDS

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## I. INTRODUCTION

The national parks are among the few unambiguous triumphs of American public policy. Carved out of a vast public domain that was being cruelly exploited and recklessly given away, the parks stand as a rare monument of national concern for posterity. Yet the decision to establish the parks as distinctive public lands has itself produced difficulties, for, although the parks alone were set aside to be conserved "unimpaired for the enjoyment of future generations,"<sup>1</sup> the parks do not stand alone. On their borders, and sometimes in their midst, are private landholdings, which are subject to no such protective mandate.

While activities on neighboring lands have always created some problems for park managers, as even the earliest reports from Yellowstone reveal,<sup>2</sup> the adverse impact of these activities on the parks has become a major issue only in recent years. The early parks were enclaves within a huge and largely unused public domain; they were protected by their own isolation. Often they were surrounded by national forest land that had itself been set aside for protection by the Forest Service in its halcyon days. Today, however, most new units of the parks system<sup>3</sup> are created in close proximity to major population centers. They are frequently the last fragments of unspoiled scenery that remain easily accessible to millions of urban residents.<sup>4</sup> Even in the West, intensive develop-

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1. Act of Aug. 25, 1916, 39 Stat. 535, ch. 408, § 1 (1916) (codified at 16 U.S.C. §§ 1-460 (1970), as amended by Supp. V 1975).

2. See H. HAMPTON, *HOW THE U.S. CAVALRY SAVED OUR NATIONAL PARKS* 92 (1971). See also J. ISE, *OUR NATIONAL PARK POLICY* 483 (1961); H. JAMES, *ROMANCE OF THE NATIONAL PARKS* 48 (1939).

3. Since the parks range from wilderness to rather intense urban uses, management goals differ significantly within the system. See U.S. Dept. of the Interior, National Park Service, *Management Policies, Introduction* (1975) (mimeo) [hereinafter *Management Policies Report*]. This article will treat the entire system as a unity since the legal problems of regulating private lands are identical.

4. *E.g.*, eastern national seashores such as Cape Cod [Act of Aug. 7, 1961, Pub.

ment and private ownership sometimes exist at the very edges of the parks.<sup>5</sup> Moreover, a number of park units, particularly at some of the newer National Seashores, contain substantial private landholdings within the park boundaries.<sup>6</sup>

This new set of circumstances has spawned a variety of problems. At Redwoods National Park in California, private timber companies own land on the watershed of Redwood Creek, immediately adjacent to the park; their lumbering activities have caused erosion, stream siltation, and blow-down of park timber, in addition to the unsightly visual effects of large-scale clearcutting.<sup>7</sup> Several years ago, a private entrepreneur's plan to build a large tower on private land immediately overlooking the battlefield site at Gettysburg National Military Park led first to a bitter controversy and ultimately to litigation initiated by the Commonwealth of Pennsylvania.<sup>8</sup> More recently, Park Service officials have expressed concern over a proposal by Marriott Corporation to build a so-called theme park next to Manassas National Battlefield Park.<sup>9</sup> At Fire Island National Seashore, where there are substantial private landholdings, intensive homesite development has proceeded with the approval of local zoning authorities;<sup>10</sup> bitter litigation has followed restrictions on ve-

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L. No. 87-126, 75 Stat. 284 (codified at 16 U.S.C. § 459b (1970)); Fire Island [Act of Sept. 11, 1964, Pub. L. No. 88-587, 78 Stat. 928 (codified at 16 U.S.C. § 459e (1970))]; Assateague Island [Act of Sept. 21, 1965, Pub. L. No. 89-165, 79 Stat. 824 (codified at 16 U.S.C. § 459f (1970))]. Some units are in the midst of major urban centers. *E.g.*, Cuyahoga Valley National Recreation Area [Act of Dec. 27, 1974, Pub. L. No. 93-555, 88 Stat. 1784 (codified at 16 U.S.C. § 460ff (Supp. V 1975))]; Gateway National Recreation Area [Act of Oct. 27, 1972, Pub. L. No. 92-592, 86 Stat. 1308 (codified at 16 U.S.C. § 460cc (Supp. V 1975))]; Golden Gate National Recreation Area [Act of Oct. 27, 1972, Pub. L. No. 92-589, 86 Stat. 1299 (codified at 16 U.S.C. § 460bb (Supp. V 1975))].

5. *E.g.*, Redwoods National Park [Act of Oct. 2, 1968, Pub. L. No. 90-545, 82 Stat. 931 (codified at 16 U.S.C. § 79c(3)(e) (1970))]. See *Sierra Club v. Morton*, 400 F. Supp. 610 (N.D. Cal. 1976); *Sierra Club v. Morton*, 398 F. Supp. 284 (N.D. Cal. 1975); *Sierra Club v. Morton*, 376 F. Supp. 90 (N.D. Cal. 1974).

6. See note 4 *supra*; notes 10, 126, 139, 141 *infra*.

7. See authorities cited note 5 *supra*.

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

9. *General and Oversight Briefing Relating to Developments Near Manassas National Battlefield, Hearings Before the Subcomm. on National Parks and Recreation of the House Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess., ser. 93, pt. 9, at 47 (1973). Proposals have been made to locate theme parks on the edges of other parks as well, such as Great Smoky Mountains National Park in Tennessee. Interview with Boyd Evison, Superintendent, Great Smoky Mountains National Park, in Ann Arbor, Michigan (Nov. 16, 1976).

10. *Hearings on S. 867 and Other Bills Before the Subcomm. on National Parks and Recreation of the Senate Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess., ser. 94, pt. 11, at 77 (1975).

hicle use by private landowners.<sup>11</sup> Owners of undeveloped lands near Cape Hatteras National Seashore have demanded utility rights-of-way across federal lands, in order to promote the proliferation of summer homes.<sup>12</sup> A major airport was planned on the drainage above Everglades National Park.<sup>13</sup> A nuclear power plant has been proposed for a site immediately adjacent to the Indiana Dunes National Lakeshore.<sup>14</sup> The list could easily be extended.

While intrusive private activities have increased all around them, park managers have stood by nervously, sensing that they were caring for helpless giants. The Park Service is aware that Congress has given it very little explicit authority to regulate private lands,<sup>15</sup> but underlying Park Service hesitancy to act is a more profound concern about the constitutional power of the federal government to control private land uses near and within the parks. These constitutional doubts, though largely misconceived, arise out of a complex set of issues that need to be clarified. This article first describes current administrative practice and existing legislation pertaining to the regulation of private lands. Next, it reviews the events that have convinced the Park Service that its regulatory authority is severely restricted. There follows an examination of the constitutional questions that increased federal control of private lands would raise. The article concludes by suggesting a method for dealing with the various intrusive private uses that now plague the Park Service.

## II. CURRENT CONGRESSIONAL AND ADMINISTRATIVE REGULATION OF PRIVATE LANDS

There has been very little regulation of private landowners within the parks or on their peripheries. Only a handful of statutes direct

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11. See authorities cited note 139 *infra*.

12. 49 NATL. PARKS & CONSERVATION 26 (Nov. 1975); 50 *id.* 4 (May 1976).

13. L. CARTER, THE FLORIDA EXPERIENCE, LAND AND WATER POLICY IN A GROWTH STATE 187-227 (1974).

14. Izaak Walton League of America v. AEC, 515 F.2d 513 (7th Cir.), *revd. and remanded*, 423 U.S. 12 (1975); *on remand*, 533 F.2d 1011 (7th Cir.), *cert. denied*, 45 U.S.L.W. 3341 (1976).

This article does not consider relations between the Park Service and other federal agencies. See, however, The National Forest Ski Area Bill, S. 2125, 94th Cong., 1st Sess. (1975), *as amended*, S. 2125, 94th Cong., 2d Sess. § 6(a)(3)(D) (1976), requiring that the regulated activity have no adverse impact on nearby national parks. See also note 30 *infra*.

15. Federal regulation of private activity on federally owned lands within the parks is well recognized. See *United States v. Carter*, 339 F. Supp. 1394 (D. Ariz. 1972), and cases cited therein. See notes 65, 86 *infra*.

the Secretary of the Interior to control private users within the parks; none of these anticipate or provide for the general exercise of land use controls. For example, the Secretary is instructed to regulate holders of grazing permits at Kings Canyon National Park,<sup>16</sup> to devise rules controlling fishing by long-standing residents at Cape Hatteras,<sup>17</sup> and to establish a scheme of regulation for hotel and restaurant keepers at Crater Lake.<sup>18</sup> Obviously, the regulation prescribed by such statutes is both sporadic and limited.

In the one instance where Congress has anticipated the need for broad federal land use controls, it has sought to achieve these controls indirectly. A series of statutes, principally involving national seashore areas, contain so-called sword-of-Damocles provisions.<sup>19</sup> Briefly stated, these laws suspend the Secretary's authority to acquire private inholdings by eminent domain if the local governments impose zoning requirements consistent with standards promulgated by the Secretary, and if the landowners comply with them. The provisions do not make the federal standards binding on the landowners, or directly enforceable by the Park Service; they have instead been judicially interpreted to give the Secretary the right to condemn as the sole penalty for noncompliance.<sup>20</sup> While the idea is an imaginative one, it has often been ineffective because of a chronic shortage of condemnation funds.<sup>21</sup> Moreover, because the landowners usually obtain a zoning variance from the local government before commencing uses inconsistent with federal standards, they are not

16. 16 U.S.C. § 80 (1970).

17. 16 U.S.C. § 459a-1 (1970).

18. 16 U.S.C. § 123 (1970). Concessions in the parks are subject to "carefully controlled safeguards against unregulated and indiscriminate use." 16 U.S.C. § 20 (1970). Regulations as to particular parks are collected at 36 C.F.R. §§ 20-31 (1976).

19. See, e.g., 16 U.S.C. § 459b-3(b)(2) (1970) (Cape Cod); 16 U.S.C. 459e-1(e) (1970) (Fire Island). See also 16 U.S.C. § 410j (1970) (Everglades National Park); Eastern Wilderness Act, Act of Jan. 3, 1975, Pub. L. No. 93-622, § 6(b), 88 Stat. 2100-01. These provisions are an extension of an arrangement whereby existing residents are allowed to retain lifetime occupancy rights so long as their uses are consistent with the Secretary's restrictions. See 16 U.S.C. § 459f-1(d) (1970) (Assateague Island); 16 U.S.C. §§ 459g-1(c), (d) (1970) (Cape Lookout); C. CAMPBELL, *BIRTH OF A NATIONAL PARK IN THE GREAT SMOKY MOUNTAINS* 70, 99 (1960).

The sword-of-Damocles laws have been upheld in *Halpert v. Udall*, 231 F. Supp. 574 (S.D. Fla. 1964), *affd.*, 379 U.S. 645 (1965).

20. See *Biderman v. Morton*, 497 F.2d 1141, 1143-44, 1148 (2d Cir. 1974).

21. See U.S. DEPT. OF THE INTERIOR, NATIONAL PARK SERVICE, *GENERAL MANAGEMENT PLAN, FIRE ISLAND NATIONAL SEASHORE* 105 (Draft, June, 1976). For the procedure for obtaining condemnation approval, see H.R. Rep. No. 1395, 90th Cong., 2d Sess. 16 (1968); S. Rep. No. 1275, 91st Cong., 1st Sess. 15 (1968); S. Rep. No. 91-420, 91st Cong., 1st Sess. 11 (1969); S. Rep. No. 91-985, 91st Cong., 2d Sess. 11 (1970).

even subject to local enforcement on the ground of violation of the zoning ordinance.<sup>22</sup>

The Park Service, understandably, has been no more zealous than the Congress. Its recently revised Statement of Management policies reflects its assumption that Congress does not want it to exercise regulatory authority over private inholdings.<sup>23</sup> The only discussion of inholdings appears in a chapter entitled "Land Acquisition," which states that the mission of the Service to protect the parks "in the long range . . . is best achieved when exploitative and private uses are eliminated by acquisition of the property by the Federal Government."<sup>24</sup> The management policy is limited to the following four points: (1) The Park Service welcomes offers to sell private inholdings to the United States; (2) It will not attempt to acquire private lands through condemnation so long as they are devoted to acceptable uses; (3) If there are uses incompatible with park management, the Service will attempt to negotiate with the owner for acquisition; and (4) "In the event all reasonable efforts at negotiation fail, and the owner persists in his efforts to devote the property to a use deemed by the Service to be adverse to the primary purpose for which the area was established, the United States may institute eminent domain proceedings to acquire the property."<sup>25</sup>

The Park Service's published regulations, which are somewhat more far-reaching, contain several provisions that could be used to suppress the most troublesome private uses. They prohibit inholders from building structures in any park area or engaging in any business unless authorized by a valid permit, contract, or written agreement with the United States.<sup>26</sup> Another regulation provides that "the creation or maintenance of a nuisance upon . . . any private lands within a park area under the exclusive legislative juris-

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22. In response to the situation at Fire Island, where the problem of variances has been particularly severe, Senator Javits introduced legislation for direct enforcement (including denial of inconsistent variances) of local zoning laws by the Park Service. However, this provision was stricken from the bill ultimately passed by both Houses of Congress. See S. 867, 94th Cong., 2d Sess. (1976).

The Senate Committee deleted the enforcement provision because "The Park Service has not completed its review for the final master plan for the seashore and the Committee recommends that no action be taken on . . . injunctive authority until the plan is complete." S. Rep. No. 94-735, 94th Cong., 2d Sess. (1976).

23. Management Policies Report, *supra* note 3, at IX-1. In light of the federal statutes noted above, see notes 19, 22 *supra*, that is hardly an unreasonable assumption. See also 16 U.S.C. § 460l-9(a)(1) (1970).

24. Management Policies Report, *supra* note 3, at IX-1.

25. *Id.* at IX-2, IX-3.

26. 36 C.F.R. §§ 5.3, 5.7 (1976).

diction of the United States is prohibited."<sup>27</sup> Despite the potential utility of these regulations, neither has been vigorously enforced with a view to obtaining broad use controls on private lands within the parks.<sup>28</sup>

Regulation of lands beyond park boundaries has been even more restrained. Only once did Congress give the Park Service explicit authority to regulate outside lands; this was a short-lived effort to control activity on Indian Reservation lands near Mesa Verde National Park, authorization for which was repealed in 1913.<sup>29</sup> More recently, Senator Goldwater proposed legislation to permit Park Service control over national forest lands beyond the boundaries of Grand Canyon National Park, but, after substantial opposition arose, the provision was removed.<sup>30</sup>

A few other legislative provisions reveal congressional recognition of the adverse impact on the parks of activities on nearby private lands, but they uniformly abjure the use of noncompensatory governmental regulation. Congress frequently authorizes and encourages park officials to negotiate with municipal officials for the enactment of local regulations that will protect park lands.<sup>31</sup> And, in a number of cases, Congress has expressly given the Secretary special authority to acquire additional lands in recognition of the problems created by private activity on the peripheries of the parks.<sup>32</sup>

Perhaps the best-known provision of this type, and certainly the most litigated,<sup>33</sup> arose out of authority given the Park Service in

27. 36 C.F.R. § 5.13 (1976).

28. For an example of regulatory activity, see *United States v. Carter*, 339 F. Supp. 1394 (D. Ariz. 1972). The Park Service seems to be most rigorous in regulating vehicle use. See text at note 139 *infra*.

29. Act of June 29, 1906, ch. 3607, § 2, 34 Stat. 617, *repealed*, Act of June 30, 1913, ch. 4, § 1, 38 Stat. 84. Cf. Act of Jan. 31, 1931, ch. 79, 46 Stat. 1053 (codified at 16 U.S.C. §§ 8a-8e (1970)) (park access roads).

A novel approach is taken in Senator Kennedy's Nantucket Sound Islands Trust bill, S. 67, H.R. 10307, 94th Cong., 1st Sess. (1975), which is designed to provide a framework for protection of park lands by control of development, without requiring federal acquisition.

30. S. 1296, 93d Cong., 1st Sess. § 6 (1973). See *Grand Canyon National Park, Hearings on S. 1296 Before the Subcomm. on Parks and Recreation of the Senate Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess. (1973); S. Rep. No. 93-406, 93d Cong., 1st Sess. (1973); H.R. Con. Rep. No. 93-1611, 93d Cong., 2d Sess. (1974); H.R. Rep. No. 93-1374, 93d Cong., 2d Sess. (1974). The enacted law is the Act of Jan. 3, 1975, Pub. L. No. 93-620, 88 Stat. 2091 (codified at 16 U.S.C. §§ 227-28 (Supp. V 1975)).

31. See, e.g., 16 U.S.C. § 460ff-3(f) (Supp. V 1975).

32. See, e.g., 16 U.S.C. § 430oo (Supp. V 1975) (Antietam National Battlefield); 16 U.S.C. § 429b (1970) (Manassas National Battlefield). Cf. Act of Oct. 15, 1974, Pub. L. No. 93-444, 88 Stat. 1304, S. Rep. No. 93-1041, 93d Cong., 2d Sess. (1974) (protecting the view from Mount Vernon).

33. See note 5 *supra*.

connection with private lands held by timber companies on the borders of the Redwoods National Park. For all its notoriety, however, the statutory language is not very daring. It simply states:

In order to afford as full protection as is reasonably possible to the timber, soil, and streams within the boundaries of the park, the Secretary is authorized . . . to acquire interests in land from, and to enter into contracts and cooperative agreements with, the owners of land on the periphery of the park and on watersheds tributary to streams within the park designed to assure that the consequences of . . . land use . . . will not adversely affect the timber, soil, and streams within the park . . . .<sup>34</sup>

This provision became the subject of notable litigation not because it gave the Secretary unusual authority over land beyond park boundaries, but because the Sierra Club succeeded in persuading a court that the statute permitted private citizens to sue the Secretary to force him to implement the provision quoted above.<sup>35</sup>

Whether the extremely restrained posture that has thus far characterized the Congress and the Park Service is necessary or appropriate is a question to which we shall soon turn. First, though, it will be useful to examine the legal advice that has shaped the passive role of the Park Service.

### III. CONSTITUTIONAL AUTHORITY OF THE PARK SERVICE: THE VIEW FROM WITHIN

Traditionally, state cessions of jurisdiction have been considered the only basis for federal jurisdiction over private lands. Because

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34. 16 U.S.C. § 79c3(e) (1970).

35. See cases cited note 5 *supra*; *Rockbridge v. Lincoln*, 449 F.2d 567, 570, 572 (9th Cir. 1971): "A permissive statutory term, like 'as he may deem just and proper' . . . is not by itself to be read as a congressional command precluding judicial review. . . . His decisions to regulate or not to regulate in any particular instance, as well as the particular mode of regulation chosen—is to be determined by reference to these [statutory] objectives." See also *Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252 (D.D.C. 1972), discussed in text at note 116 *infra*; *Environmental Defense Fund v. Hardin*, 428 F.2d 1093, 1098 (D.C. Cir. 1970).

In *Biderman v. Morton*, Civil No. 72 C 1060 (E.D.N.Y., Memorandum and Order of Feb. 6, 1973, at 22), the court, in response to a citizen initiated suit seeking to require the Secretary of the Interior to promulgate vehicle regulations at Fire Island National Seashore, concluded,

[The issue] seems an odd one to present to a court . . . it appears to be a matter within the discretion of the Secretary. . . . [T]he action of the Secretary, it is suggested, is based on his belief of his legal incompetency to act in the premises, [but] whether or not such a legal incompetency does exist is a matter which is not determined by the Secretary but by the interpretation of the law to which he is giving effect.

Contrast *Izaak Walton League v. AEC*, 533 F.2d 1011, 1014 (7th Cir. 1976): "But even assuming the Department of Interior, by exercising its statutory power of supervision over the National Lakeshore . . . could obtain injunctive relief against threatened irreparable injury to lands within its custody from sources outside, we could not justify interruption . . . when the Department has not sought such relief."

the so-called cession clause is one of the least-known provisions of the Constitution,<sup>36</sup> some explanation of it is appropriate, and must begin with recognition of the fact that even federal ownership of land does not ipso facto create federal legislative authority over that land. In the absence of a cession, the states retain the general police power over federally owned lands, such as parks, and, consequently, over privately owned lands within and without park boundaries.<sup>37</sup> Of course, the United States may govern its own land to the extent necessary to implement its granted powers—for example, the property power<sup>38</sup> or the war power.<sup>39</sup> To that extent, the federal government may displace inconsistent state law by means of the supremacy clause of the Constitution.<sup>40</sup> This article will show that these granted powers also give it authority over privately owned lands.

Under the cession clause of the Constitution, a state may cede general legislative jurisdiction to the federal government.<sup>41</sup> The states routinely make such cessions for federally owned lands within the parks.<sup>42</sup> The courts have held that if a state makes a cession for a park without retaining jurisdiction over privately owned land, then general legislative jurisdiction for all land, public and private, within the boundaries of the park is ceded to the United States.<sup>43</sup> In such instances, therefore, there is no constitutional problem; the federal government is clearly authorized to exercise the full

36. U.S. CONST. art. I, § 8, cl. 17. See generally REPORT OF THE INTERDEPARTMENTAL COMM. FOR THE STUDY OF JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES, JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES, PART II, A TEXT OF THE LAW OF LEGISLATIVE JURISDICTION (1957).

37. See *Paul v. United States*, 371 U.S. 245 (1963). The United States must assent to the cession. 40 U.S.C. § 255 (1970). See also *United States v. Carmack*, 329 U.S. 230, 240-41 n.10 (1946); *Fort Leavenworth R.R. v. Lowe*, 114 U.S. 525, 537-39 (1885); cf. *James v. Dravo Contracting Co.*, 302 U.S. 134, 147-48 (1937); *Mason v. Tax Commr.*, 302 U.S. 186 (1937).

38. U.S. CONST. art. IV, § 3, cl. 2.

39. U.S. CONST. art. I, § 8, cls. 11-14.

40. See *Kleppe v. New Mexico*, 96 S. Ct. 2285 (1976); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 403-05 (1917); *Fort Leavenworth R.R. v. Lowe*, 114 U.S. 525 (1885); *United States v. Thompson*, 41 F. Supp. 13 (E.D. Wash. 1941).

41. See note 37 *supra*. The cession clause, despite its limited language, has been held to apply to national parks. See *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938). It also operates as to land purchased or condemned by the United States, and to the original public domain. See *Kleppe v. New Mexico*, 96 S. Ct. 2285 (1976); *Fort Leavenworth R.R. v. Lowe*, 114 U.S. 525 (1885).

42. State laws enacted whenever a unit of the national park system is established explicitly make such cessions. See, e.g., authorities cited notes 44, 45 *infra*.

43. See *United States v. Unzeuta*, 281 U.S. 138 (1930); *United States v. Peterson*, 91 F. Supp. 209 (S.D. Cal. 1950), *affd.*, 191 F.2d 154 (9th Cir.), *cert. denied*, 342 U.S. 885 (1951); *United States v. Schuster*, 220 F. Supp. 61 (E.D. Va. 1963); *Op. SOL., U.S. DEPT. OF THE INTERIOR*, 60 I.D. 169 (1948), 54 I.D. 483 (1934), *Op. Sol. M-33679* (June 29, 1944).



range of police power jurisdiction, including ordinary zoning, over all land within the park boundaries.

If all cessions made by the states included privately owned land, no question of constitutional authority would arise as to private inholdings, and we would have to consider only the question of federal authority for land beyond park boundaries. This is not the case, however. State cessions vary considerably in their wording. Some clearly do not cede jurisdiction over private inholdings,<sup>44</sup> and some are at best ambiguous.<sup>45</sup> Thus, it must be concluded that the cession clause cannot, in a general sense, be expected to resolve the issue of federal authority even for private lands within park boundaries; of course, it does not affect at all the problem of regulating lands external to the parks.

It is at this point that the question of Park Service authority arises. The Service's own perception of whether it may regulate unceded private lands within and without the parks is instructive. In 1966, it questioned the Solicitor of the Department of the Interior concerning the constitutionality of imposing federal zoning on private lands within an area that had been authorized as a park, but for which no cession of state legislative jurisdiction had yet been made.<sup>46</sup> After referring to a 1936 decision of the Supreme Court that set out a rather rigorous test of "national concern" as a precondition for the valid exercise of federal authority,<sup>47</sup> the Solicitor, in a monument of understatement, conceded that "a certain amount of liberalization in favor of extended Federal power is readily noticeable in subsequent court decisions."<sup>48</sup> Nonetheless, he concluded that the proposed federal zoning would be invalid:

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44. See *Halpert v. Udall*, 231 F. Supp. 574 (S.D. Fla. 1964), *affd.*, 379 U.S. 645 (1965) (Everglades National Park); *Colorado v. Toll*, 268 U.S. 288 (1925) (Rocky Mountain National Park); MASS. ANN. LAWS ch. 777, § 4(1) (1962) (Cape Cod National Seashore).

45. TEX. REV. CIV. STAT. ANN. art. 5247, § 8 (1974) (Big Bend National Park); NEW YORK UNCONSOL. LAWS § 50-a (McKinney 1975) (Fire Island National Seashore).

Exclusive jurisdiction is not uniformly ceded to the United States . . . . Of the 287 areas of the [Park] System, only about 72 have exclusive jurisdiction . . . . When the States cede exclusive jurisdiction, such cession normally covers all lands within the authorized boundary of the park, including private inholdings . . . . In most instances the State acts ceding jurisdiction provide that the cession shall extend to future additions to the park.

Letter from D. Briggie, Acting Director, National Park Service, to Joseph L. Sax, L58-LL, Aug. 12, 1976 (on file at *Michigan Law Review*).

46. The request is described in Memorandum from Associate Solicitor, Parks and Recreation, U.S. Department of the Interior, to Assistant to the Director, National Park Service, Subject, Federal Zoning, File A-66-2057.18, Nov. 17, 1966, at 1 [hereinafter cited as Parks & Recreation Memorandum].

47. *United States v. Butler*, 297 U.S. 1, 74-75 (1936).

48. Parks & Recreation Memorandum, *supra* note 46, at 3.

Since zoning involves a purely local situation, and since it is difficult, if not impossible, to justify the Federal zoning power in connection with any constitutionally granted power, it is our opinion that in the absence of a cession by a State and acceptance by the United States of legislative jurisdiction over a specific area authorized for Federal administration, the zoning statute suggested in your memorandum would be held to be unconstitutional.<sup>49</sup>

In the following years, the Park Service was severely challenged by the projected building of the Gettysburg Tower, which it viewed as a serious desecration of the battlefield site.<sup>50</sup> In 1971, the Service sought its Solicitor's support for a plan to bring suit to enjoin the tower's construction.<sup>51</sup> The Solicitor responded that "[a]fter much study of the problem, we have concluded there is no basis for Federal action in the courts to enjoin the proposed construction."<sup>52</sup>

Interestingly, though the Solicitor was unwilling to recommend court action, he did not specifically say that the Park Service was constitutionally barred from acting. At some point in the early 1970s, constitutional reservations within the Department of the Interior apparently dissipated for, despite its Solicitor's advice, the Department thereafter asked the Department of Justice to consider bringing a common-law nuisance action to enjoin construction of the Gettysburg tower.<sup>53</sup> No such action was ever initiated, however, for reasons that have never been revealed; instead the Park Service later agreed to a compromise under which the tower would be built at a somewhat greater distance from the battlefield site.<sup>54</sup>

In 1976, following rather strong judicial criticism in the Sierra Club's Redwoods National Park case,<sup>55</sup> the Park Service sufficiently overcame its constitutional reservations to ask Congress, relying upon the property clause of the Constitution, to give it explicit authority to regulate private activity beyond the boundaries of the Redwoods National Park.<sup>56</sup> But the bill was never submitted to Congress

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49. *Id.*

50. See note 8 *supra*.

51. The request is noted in Memorandum from Associate Solicitor, Parks and Recreation, U.S. Department of the Interior, to Nathaniel P. Reed, Assistant Secretary, Subject, Gettysburg Observation Tower, File 44552.2817, April 30, 1971, at 1.

52. *Id.*

53. Letter from Mitchell Melich, Solicitor, Department of the Interior, to The Attorney General, June 23, 1971.

54. *Pennsylvania v. Morton*, Civil No. 2188-73, Affidavit of Nathaniel P. Reed, at 13-16 (D.D.C. 1973).

55. See note 5 *supra*.

56. The undated draft of the Interior Department's bill, which exists only in typescript copy, reads as follows:

That the Congress hereby finds and declares that significant examples of the

because the Office of Management and Budget (OMB), which reviews all proposed Department legislation, made the following determination:

During the interagency review of this legislation, a substantive problem was identified which is of concern to us. By attempting to extend the degree to which the Federal Government can regulate the use of private property without creating a compensable taking, the bill would provide for a precedential and major expansion of the property clause of the U.S. Constitution which we believe should not be undertaken.

In light of the above . . . we plan no further action on the draft bill.<sup>57</sup>

The OMB letter is puzzling, to say the least. In contrast to the traditional view, which was that the property clause did not grant authority to regulate lands outside park boundaries, OMB presented a different reason for believing that the proposed Redwoods legislation would be unconstitutional: It suggested that exercise of this

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primeval coastal redwood in that portion of Redwood National Park in Redwood Creek basin, Humboldt County, California, which, pursuant to the Act of October 2, 1968 (82 Stat. 931), were acquired by the United States for purposes of public inspiration, enjoyment, and scientific study, will be irreparably lost unless reasonable timber harvest regulations and other practices, including reasonable restrictions on harvesting of timber, on watersheds tributary to streams within the Redwood Creek portion of the park, and on watersheds tributary to streams entering Redwood Creek above Redwood National Park, are implemented and enforced; that, in order fully to implement the purposes of the Act of October 2, 1968, the full authority of the Congress under Article IV, Section 3, Clause 2 of the Constitution of the United States must be, and by this Act hereby is, exercised to protect the Federal property within that portion of Redwood National Park in the Redwood Creek basin; and, that, § 3(e) of the Redwood National Park Act is amended by adding the following provision:

The Secretary of the Interior is further authorized to identify and establish zones outside the boundary of Redwood National Park but within watersheds tributary to streams within that portion of the park in the Redwood Creek basin, and on watersheds tributary to streams entering Redwood Creek above Redwood National Park, encompassing areas where the Secretary has determined that timber harvest and other practices, if not subjected to reasonable regulations, constitute a threat to federally-owned resources within the park. The Secretary shall promulgate and enforce such reasonable rules and regulations, including reasonable restrictions on harvesting of timber, within such zones as are necessary to provide continuing protection to the lands and other resources within the park. Provided, however, that nothing in this provision shall be considered as authority to acquire lands or interests in lands within such zones through the adoption of such rules and regulations; and, provided further, that any regulation adopted by the Secretary that is deemed by a court of competent jurisdiction to require the taking of a property interest compensable under Article 5 of the Constitution of the United States shall be of no effect. Failure to comply with rules and regulations adopted by the Secretary pursuant to this authority shall be punished as a misdemeanor as provided by 16 U.S.C. § 3. The Secretary is further directed to request that the Department of Justice initiate a suit for injunctive relief for any violation or anticipated violation of regulations adopted hereunder. For state regulation, see 7 ELR 10040 (March 1977).

57. Letter from James M. Frey, Assistant Director for Legislative Reference, Office of Management and Budget (OMB), to Thomas S. Kleppe, Secretary of the Interior, April 7, 1976. OMB's authority is predicated on 31 U.S.C. § 16 (1970), Exec. Order No. 11,541, 3 C.F.R. 141 (1970), and OMB Circular A-19 (1970).

regulatory authority might violate the fifth amendment, which prohibits the taking of private property without just compensation. In light of the far-reaching regulation that has been sustained by the Supreme Court as consistent with that amendment,<sup>58</sup> OMB's implication that the proposed Redwoods bill might fail as an uncompensated taking is at best dubious.<sup>59</sup> Nonetheless, the Park Service at present seems uncertain about its authority under the property clause, reluctant to rely upon the expansion of the commerce clause witnessed by the last four decades, and uneasy about whether regulation of a sort long recognized as well within the police power might be viewed as a violation of the taking clause.

#### IV. CONSTITUTIONAL AUTHORITY

The preceding section suggested some serious flaws in the reasoning of Park Service legal advisers, who have concluded that the federal government may not constitutionally regulate private holdings beyond park boundaries. This section addresses the four constitutional questions raised by proposals for Park Service regulation of private land. First, under what provisions of the Constitution may the federal government be said to have authority to regulate private landowners? Second, how far-reaching is that authority—does it, for example, allow exercise of the general zoning power? Third, in so far as federal authority is limited, to what extent is it limited by the rights of private property owners and to what extent by principles of allocation of legislative authority between the states and the United States? And, finally, is there any constitutional basis for distinguishing between regulation of private inholdings within the parks and regulation of private lands beyond park boundaries? These questions will be answered by considering the relevant sources of constitutional authority.

##### A. *The Property Clause*

It is easy enough to demonstrate that fears of an absolute constitutional bar to federal regulation of private lands are misplaced.

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58. See, e.g., *Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369 (1974); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962). See generally Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

59. Perhaps OMB was affected by the Supreme Court's 1911 decision in *Curtin v. Benson*, 222 U.S. 78 (1911), holding that regulation of grazing on private land within Yosemite National Park was a taking. To the extent that the *Curtin* decision retains any vitality, it should be read to emphasize the severe diminution of value that was present in that case. 222 U.S. at 86. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); note 58 *supra*.

Fifty years ago, in *United States v. Alford*,<sup>60</sup> Justice Holmes relied on the property clause to uphold the prosecution, under a federal statute, of an individual who had started a fire on private land adjacent to a national forest. Holmes flatly rejected the argument that a statute regulating conduct engaged in upon private land was unconstitutional: "The statute is constitutional. Congress may prohibit the doing of acts upon privately owned lands that imperil the publicly owned forests."<sup>61</sup> Obviously, as Justice Holmes indicated, forest fires do not stop at the boundary lines of publicly owned forests. While Congress plainly may protect its forests from fire, just as plainly, it cannot be required to insure their protection by extending federal ownership, for unless the public domain is to run from sea to sea there must inevitably be private land just at the edge of the public boundary line. All this Holmes encapsulated in his observation that "[t]he danger depends upon the nearness of the fire not upon the ownership of the land where it is built."<sup>62</sup>

Holmes relied upon an earlier case that had set the tone for a generous interpretation of the property clause. In *Camfield v. United States*,<sup>63</sup> the United States had granted odd-numbered sections of land to a private proprietor and retained for itself the even-numbered sections. By skillfully building fences just on his own sections near the property boundary lines, the proprietor succeeded in enclosing the entire tract. A federal statute prohibited the enclosure of federal lands, and the United States sued to compel removal of the fences. The defense asserted that if the statute were interpreted to prohibit building fences on private property, it must be declared unconstitutional.

The *Camfield* Court recognized that a decision for the government might be read as expanding the property clause to give the United States general police power within the states. But it considered the defendant's conduct to be nothing less than a nuisance under the general principles of the common law, and found intoler-

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60. 274 U.S. 264 (1927).

61. 274 U.S. at 267. Federal regulation of private land external to federal enclaves has also been sustained under the war power, the treaty power, and the commerce power. See *McKinley v. United States*, 249 U.S. 397 (1919) (authorizing the Secretary of War to suppress houses of prostitution within such distance of any military camp as he deemed necessary) (see also 18 U.S.C. § 1384 (1970)); *Bailey v. Holland*, 126 F.2d 317 (4th Cir. 1942) (authorizing the Secretary of the Interior to control hunting on private land adjacent to Back Bay Migratory Waterfowl Refuge in Virginia).

62. 274 U.S. at 267.

63. 167 U.S. 518 (1897).

able the prospect of the federal government having something less than the rights of an ordinary proprietor to abate a nuisance. Equally intolerable would be the incapacity of the federal government to vindicate that right by using its own laws. The Court said:

While we do not undertake to say that Congress has the unlimited power to legislate against nuisances within a State which it would have within a Territory, we do not think the admission of a Territory as a State deprives it 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," so long as such power is directed solely to its own protection. A different rule would place the public domain of the United States completely at the mercy of state legislation.<sup>64</sup>

The *Alford* and *Camfield* cases establish unambiguously that the property clause permits federal regulation of private land; indeed, in 1976 the Supreme Court expressly reaffirmed *Camfield*, stating that "the power granted by the property clause is broad enough to reach beyond territorial limits."<sup>65</sup> To the extent that the conduct in question can broadly be characterized as a common-law type of wrong—such as trespass or nuisance—or can be said to imperil the public lands, or to impede protection of those lands, it is now beyond controversy that federal regulation is appropriate under the property power, whether or not jurisdiction over the regulated land has been ceded by the state. Moreover, it is clear that Congress need not depend upon state law for substantive rules prohibiting such conduct.<sup>66</sup>

Certainly most of the activity on private land that the Park Service needs to regulate would fit comfortably within the holdings of the *Alford* and *Camfield* cases.<sup>67</sup> Even further scope is given the property clause in the Court's recent decision in *Kleppe v. New Mexico*.<sup>68</sup> While that case dealt with regulation of wild animals on

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64. 167 U.S. at 525-26.

65. *Kleppe v. New Mexico*, 96 S. Ct. 2285, 2291 (1976). Other cases are cited in Soper, *The Constitutional Framework of Environmental Law*, in *FEDERAL ENVIRONMENTAL LAW* 20 (E. Dolgin & T. Guilbert eds. 1974).

66. See text at notes 63, 65 *supra*; *United States v. California*, 332 U.S. 19, 40 (1947).

67. See examples in text at notes 7-14 *supra*. For instance, the Solicitor of the Interior Department sent the Department of Justice a memorandum attached to a letter, note 53 *supra*, urging that a common-law nuisance action could be won in the Gettysburg Tower controversy. The Department also has researched a nuisance suit on the Redwoods National Park situation. Letter from Michele B. Metrinko, Associate Solicitor, U.S. Department of the Interior, to John G. Sobetzer, March 11, 1976.

68. 96 S. Ct. 2285 (1976).

publicly owned land, the Court held that the property clause was not limited to regulation required to "protect the public land from damage."<sup>69</sup> Even where no damage is anticipated, the property clause enables Congress to enact a statute, the stated purpose of which is "to achieve and maintain a thriving natural ecological balance on the public lands."<sup>70</sup>

The ultimate reach of the property power as to private lands, however, was left open by *Kleppe*, as it had been by *Camfield*. In *Kleppe* the Court indicated the potential limit of the property clause by expressly reserving judgment on whether federal regulation of wild horses on private land would be proper simply because they had "at any time set foot upon federal land."<sup>71</sup> But this is only to suggest the obvious, that "the Property Clause does not authorize an exercise of a general control over public policy in a State."<sup>72</sup>

The difficult questions that remain may be illustrated by reference to the situation at Fire Island.<sup>73</sup> If Congress had gone beyond the sword-of-Damocles law now in effect and authorized the Secretary to impose routine zoning directly on private owners "by means of acreage, frontage, and setback requirements,"<sup>74</sup> would such regulation be within the constitutional scope of the property power? No satisfactory answer to this question can be drawn simply by analysis of decided cases. Plainly, such regulation would go further than that sustained by the Court in cases like *Alford* and *Camfield*, for it neither presents the obvious peril of the forest fire, nor necessarily embraces the nuisance-like conduct the Court found in *Camfield*.

Nonetheless, it would doubtless be possible for the Park Service to demonstrate that even such routine zoning was appropriate to protect the uses that Congress sought to promote in establishing the park. If Congress itself were to make that determination of needfulness, it is highly unlikely that the Court would interpose its own judgment as to what sort of regulation was appropriate for the protection and maintenance of a national park.<sup>75</sup>

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69. 96 S. Ct. at 2290.

70. 96 S. Ct. at 2287. See also *New Mexico State Game Commn. v. Udall*, 410 F.2d 1197, 1201 (10th Cir.), cert. denied, 396 U.S. 961 (1969); *United States v. Alaska*, 423 F.2d 764, 768 (9th Cir. 1969), cert. denied, 400 U.S. 967 (1970).

71. 96 S. Ct. at 2295.

72. 96 S. Ct. at 2292. The Court, however, studiously ignored New Mexico's effort to base a claim on the tenth amendment. See Appellee's Motion to Dismiss or Affirm at 25.

73. See text at notes 19-22 *supra*; note 19 *supra*.

74. 16 U.S.C. § 459e-2(b) (1970).

75. See *Kleppe v. New Mexico*, 96 S. Ct. 2285, 2290-91 (1976).

Reading congressional power narrowly, so that Congress must buy troublesome lands rather than regulating them, is not a satisfactory solution. Certainly this interpretation is not required as a fifth amendment matter, for the sort of zoning in question is no more a taking of property when imposed by the Congress than it is when imposed by a local government. Moreover, as Justice Holmes noted in the *Alford* case, acquisition is not a practicable solution to these problems, for no matter how much the federal government buys, there will always be problems of conflicting use just at the border of the federal enclave. One can move the situs of the problem by acquisition, but the problem itself will remain.

To read the property clause very broadly, however, also presents a problem—wide-ranging displacement of traditional state land regulation. There is no doubt that federal zoning of inholdings and peripheral lands would invade an area long reserved to state and local regulation. As a practical matter, this concern is mitigated by the fact that the foreseeable needs of the Park Service will not likely rise to the level of “general control over public policy in a State.” Indeed, to the extent that general zoning power of the Fire Island type is limited to private lands within park boundaries,<sup>76</sup> the expansive possibilities of the property clause are self-constraining.<sup>77</sup>

At the broadest level of concern, the question is one of the general relation between the federal government and the states. Every expansion of the property clause increases the power of the federal government at the expense of the states’ authority, and by the traditional jurisprudence of federalism that is cause for unease. But one may ask whether the property clause and the problems of the Park Service provide an appropriate setting in which to seek resto-

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76. The policy proposal set forth below is so limited. See text at note 122 *infra*.

77. Another self-limiting rationale for the use of the property clause to regulate peripheral private uses could be drawn from an analogy to the Court’s evolution of a federal common law of nuisance in cases involving interstate pollution. See, e.g., *Illinois v. Milwaukee*, 406 U.S. 91 (1972); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907). In those cases the Court found that a state, having a sovereign interest in the protection of its natural resources, must be viewed as entitled to protection against threats “by the acts of persons beyond its control.” 406 U.S. at 104. It can hardly be suggested that the United States has less interest in the protection of federal enclaves against such injuries by private landowners “beyond its control” than does one state against a city in another state or a state against a private industry in another state. The constitutional means by which the federal government can protect that interest is an interpretation of the property clause sufficiently broad to ensure “that the forests on its mountains . . . should not be further destroyed” by private action beyond the borders of its own landholdings. See *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907).



ration of a relationship between the states and the federal government that has long been disavowed in the face of other exercises of national authority.

The courts have decided many cases more sharply intrusive upon traditional state power than anything one might anticipate in the area of Park Service regulation. Congress has displaced fundamental principles of state water law with the federal reclamation program.<sup>78</sup> A municipal licensee of the Federal Power Commission has been authorized to exercise the power of eminent domain in contravention of state law.<sup>79</sup> States have been barred from applying their conservation laws to a federally licensed dam.<sup>80</sup> Federal criminal laws have become pervasive.<sup>81</sup> The federal government has displaced state literacy requirements for determining voter qualifications.<sup>82</sup> Local governments have been preempted from imposing curfews at airports in their own cities<sup>83</sup> and from applying their own safety standards for nuclear power plants.<sup>84</sup> Of special interest is the whole panoply of national air, water, and noise control laws that have created effective federal land use regulation far more pervasive than any regulatory authority to which the Park Service will conceivably aspire.<sup>85</sup>

Indeed, in assessing the scope of the property clause as it affects our federal system of government, it is necessary to consider the authority the United States has exerted under the commerce power. It is not only anomalous to apply sharply divergent theories of federal-state relations in interpreting the two constitutional provisions, but it must also be remembered that the commerce clause itself is a potential source of federal authority for the regulation of private activity that intrudes upon management of the national parks.

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78. See, e.g., *City of Fresno v. California*, 372 U.S. 627 (1963); *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275 (1958).

79. *Washington v. FPC*, 207 F.2d 391, 396 (9th Cir. 1953); cf. *Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958).

80. *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152 (1946).

81. See, e.g., *Lottery Case (Champion v. Ames)*, 188 U.S. 321 (1903); *Hoke v. United States*, 227 U.S. 308 (1913); *Perez v. United States*, 402 U.S. 146 (1971). See Stern, *The Commerce Clause Revisited—The Federalization of Intrastate Crime*, 15 ARIZ. L. REV. 271 (1973).

82. *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

83. *Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973).

84. *Minnesota v. Northern States Power Co.*, 405 U.S. 1035 (1972), *affg.* 447 F.2d 1143 (8th Cir. 1971).

85. See, e.g., 33 U.S.C. § 1251 (1970); 42 U.S.C. § 1857 (1970); 42 U.S.C. § 4901 (1970).

## B. *The Commerce Clause*

Although the national parks have been established under the property clause,<sup>86</sup> there is no reason to conclude that the federal government is barred from protecting the uses of the parks, which assuredly involve commerce among the states, under the Constitution's commerce clause.<sup>87</sup>

No provision of the Constitution has been read to give more extensive authority to Congress than the commerce clause. With a single distinctive exception,<sup>88</sup> the Supreme Court has not struck down a congressional exercise of power under that clause for four decades. The Court noted explicitly that the exception, involving federal regulation of state employees, is not to be taken as signalling a departure from the Court's long-standing recognition that broad congressional regulation of private enterprise under the commerce clause is constitutional.<sup>89</sup>

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86. The constitutional basis for the establishment of National Parks is actually rather hazy. To the extent that parks were carved out of the original public domain, they have benefited from the long established view that congressional power over the public lands is plenary, and will not be examined by the courts. See *Light v. United States*, 220 U.S. 523, 537 (1911); *United States v. San Francisco*, 310 U.S. 16, 29-30 (1940); *Alabama v. Texas*, 347 U.S. 272 (1954); *Utah Power & Light Co. v. United States*, 243 U.S. 389 (1917). Where the United States must acquire land for the parks, it can rely upon *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950), which sustained the federal reclamation program as an exercise of the power to spend for the general welfare. The closest case factually is *United States v. Gettysburg Elec. Ry.*, 160 U.S. 668, 681, 683 (1896), which upheld the condemnation of land for the Gettysburg battlefield memorial. For a very broad modern view of the federal condemnation power, see *United States ex rel. TVA v. Welch*, 327 U.S. 546, 551-52 (1946). The Supreme Court has never passed on condemnation of land for a "natural" national park.

The laws establishing individual national parks, 16 U.S.C. §§ 21-460 (1970), as amended, (Supp. V 1975), and the organic act creating the National Park Service, 16 U.S.C. § 1 (1970), as amended, (Supp. V 1975) do not invoke any constitutional power of the Congress. However, 16 U.S.C. § 1a-1 (1970), which sets out a declaration of findings and purpose for the national park system, is reminiscent of the sentiments expressed in *United States v. Gettysburg Elec. Ry.*, 160 U.S. 668, 681, 683 (1896).

87. See generally *Soper*, *supra* note 65, at 22-27. In *Kleppe v. New Mexico*, 96 S. Ct. 2285 (1966), the United States argued that the Wild Free-Roaming Horses and Burros Act, which was intended "to achieve and maintain a thriving natural ecological balance on the public lands" was sustainable under the commerce clause. However, the Court found it unnecessary to reach this question because it sustained the Act under the property clause. 96 S. Ct. at 2289.

88. See *National League of Cities v. Usery*, 96 S. Ct. 2465 (1976).

89. In *Usery*, the majority made clear that it adhered to a very expansive interpretation of the commerce clause, and rejected only legislation in which "Congress seeks to regulate directly the activities of States as public employers." 96 S. Ct. at 2469. Nothing in the case suggests that any member of the Court stands ready to question federal regulation of private activity.

Were Congress to regulate land use within or beyond park boundaries based on its commerce power, its action would, upon the following rationale, fall comfortably within the range of regulation sustained by the decided cases. Travel to and use of the parks clearly constitutes substantial interstate commerce.<sup>90</sup> Furthermore, it is rational to find that certain activity carried on within or near park boundaries causes an impairment of the quality of the experience for which interstate travel was undertaken.<sup>91</sup> The use of constitutional power to protect the quality of commerce, as well as its magnitude, is well established.<sup>92</sup> Moreover, Congress may protect the ultimate "consumer activity" that occurs after the interstate commerce itself has come to an end.<sup>93</sup>

The fact that the activity is itself quite local in nature,<sup>94</sup> or is not itself a part of commercial dealings,<sup>95</sup> or is even—when viewed alone—trivial<sup>96</sup> in relation to commerce among the states, does not invalidate the federal power. For the question is not whether the activity itself is an element of interstate commerce, but whether commerce is "pinched" by the activity<sup>97</sup> or by a class of activities of which an individual instance may itself be a trifling part whose contribution has not been proven.<sup>98</sup> It is sufficient if the regulated activity utilizes goods that have been transported in commerce, even though the activity itself does not, in any way, serve the interstate travellers who use the parks.<sup>99</sup> Nor is congressional authority invalid simply

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90. See generally *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

91. See *Sierra Club v. Morton*, 376 F. Supp. 90 (N.D. Cal. 1974); *Sierra Club v. Morton*, 398 F. Supp. 284 (N.D. Cal. 1975) (Redwoods National Park); *Pennsylvania v. Morton*, Civil No. 2188-73 (D.D.C. 1973) (affidavit of Nathaniel P. Reed at 3, 6) (Gettysburg National Military Park). On the limited evidence required to support the finding, see *Katzenbach v. McClung*, 379 U.S. 294 (1964), and *Perez v. United States*, 402 U.S. 146 (1971).

92. See *Morgan v. Virginia*, 328 U.S. 373, 381 (1946). See also *Berman v. Parker*, 348 U.S. 26 (1954). Just as Congress, with plenary power over the District of Columbia, may legislate to sustain the quality of life there, so, it would seem, may Congress, with full authority over the parks and the interstate travel to them, legislate broadly to protect the quality of the park experience. Cf. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974); *St. Paul v. Chicago, St. P., M. & O. R.R.*, 413 F.2d 762 (8th Cir. 1969).

93. See *United States v. Sullivan*, 332 U.S. 689 (1948).

94. *Fry v. United States*, 421 U.S. 542, 547 (1975); *Perez v. United States*, 402 U.S. 146 (1971); *Wickard v. Filburn*, 317 U.S. 111 (1942).

95. *Wickard v. Filburn*, 317 U.S. 111 (1942).

96. *Perez v. United States*, 402 U.S. 146 (1971); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942).

97. *United States v. Women's Sportswear Mfg. Assn.*, 336 U.S. 460, 464 (1949).

98. See *Perez v. United States*, 402 U.S. 146 (1971).

99. See *Katzenbach v. McClung*, 379 U.S. 294 (1964).

because, in fulfilling a legitimate federal purpose, it occupies an area that has traditionally been left to state regulation.<sup>100</sup> Finally, even when a congressional decision seems strained or doubtful, or a particular application seems unwisely included within the congressional scheme of regulation, 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.<sup>101</sup>

It is hardly conceivable that any Supreme Court that has sat in the last four decades would strike down an explicit congressional effort to protect national parks by imposing conventional restraints on the use of land by private owners near park boundaries. Justice Stewart's lonely dissent in the recent *Perez* case, in which he complained that "it is not enough to say that loan sharking has interstate characteristics . . . for interstate business suffers from almost all criminal activity, be it shoplifting or violence in the streets,"<sup>102</sup> indicates just how little attention the Court will pay to a claim that regulation of a particular private activity is traditionally reserved for state regulation.

## V. A PROPOSED FEDERAL POLICY

### A. *Preliminary Considerations*

The preceding pages ought to make clear the ample power of Congress to give the Park Service broad regulatory authority over private lands within and near park boundaries. At the same time, it is apparent that intrusion upon traditional local land use regulation presents practical and political concerns that must be taken into account during the formulation of a policy for the Park Service. The long-standing reluctance of Congress to give significant regulatory authority to the Park Service is a revealing measure of that concern. The problem, then, is to devise a regulatory policy Congress might enact that is both responsive to the needs of the national parks and yet not unwisely incursive upon the traditions of local land use control.

Before turning specifically to proposals for new legislation, however, two preliminary questions should briefly be considered. The first is whether new legislation is actually needed to implement

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100. See text at notes 78-84 *supra*.

101. *Daniel v. Paul*, 395 U.S. 298 (1969); *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 594 (1939); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

102. *Perez v. United States*, 402 U.S. 146, 157-58 (1971).

an appropriate federal program for the regulation of private lands; the second is how the federal government ought to define its responsibilities as the trustee of national park lands.

### 1. *The Need for Legislation*

It might be argued that congressional passivity in the face of serious threats to the parks constitutes an abdication of a fundamental legislative responsibility to preserve park and seashore lands that are held in trust by the federal government on behalf of all present and future citizens. Some support for this argument may be found in the nineteenth century case of *Illinois Central Railroad v. Illinois*,<sup>103</sup> where the Supreme Court invalidated the Illinois legislature's extensive grant to a private company of submerged lands along the Chicago waterfront.<sup>104</sup> The Court declared that the legislature could not relinquish management and control of "property in which the public has an interest,"<sup>105</sup> which in this case was free navigation and commerce over Lake Michigan. Although the case lends support to the doctrine of public trust, it does not provide a conclusive precedent for regarding Congress as constitutionally bound to legislate to protect the parks. There is a good deal of difference between invalidating a dubious state land grant and forcing the Congress to enact protective regulation; indeed, the judiciary has already demonstrated its reluctance to impose constitutional duties on the Congress with respect to its management of the public lands.<sup>106</sup>

Alternatively, it might be argued that the public trust argument, whatever its merits, is academic because the Park Service has *already* been granted authority to protect the parks from private uses. Yet the authority that Congress intends the Service to have is, at best, uncertain. The conventional view is that Congress has manifested an intent not to regulate private lands, and there is abundant evidence to support that proposition.<sup>107</sup> At the same time, the broad protective mandate given in the National Parks Organic Act<sup>108</sup> indicates that Congress does not intend to leave the parks wholly at the

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103. 146 U.S. 387 (1892).

104. A discussion of this case and its implications is included in Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 489-91 (1970).

105. 146 U.S. at 453.

106. See authorities cited note 86 *supra*.

107. See text at notes 19-32 *supra*.

108. 16 U.S.C. § 1 (1970), as amended, (Supp. V 1975).

mercy of private landowners.<sup>109</sup> Nor is there anything in the statutory law to suggest that resort to litigation, which produced victories in the *Alford*<sup>110</sup> and *Camfield*<sup>111</sup> cases, was meant to be disavowed.

Thus, the congressional intent, as best it can be discerned, seems to be that acquisition is the preferred solution for conflicts between the Park Service and private landowners, but that the parks should not be worse off than a private landowner would be when faced with traditional problems such as trespass and nuisance. Specifically, the Service seems free to litigate to abate such problems if other solutions fail. The Redwoods Park law<sup>112</sup> and the sword-of-Damocles laws,<sup>113</sup> for all their restrictive language, are consistent with this interpretation. Indeed, it has already been noted that the Park Service believed it could have initiated a lawsuit to prevent construction of the Gettysburg Tower.

Whatever the current status of congressional authorization, legislation is certainly desirable, both to clarify the Service's authority to litigate and to establish its power to promulgate regulations governing private conduct of the sort that regularly harms the parks. Litigation can provide only an interim remedy for a problem that clearly needs legislative attention.

## 2. *The Responsibilities of a Trustee of the Public Lands*

In order to enact legislation, Congress must decide the scope of responsibility it wishes to impose upon the Secretary of the Interior as trustee of the national park lands.<sup>114</sup> Precedents are not abundant in this area of the law,<sup>115</sup> but a recent Indian trust case provides a striking parallel to the national parks problem. While Indian law is distinctive, based as it is upon a sense of profound obligation to those native Americans whose lives and culture the

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109. While the Organic Act was enacted at a time when federal powers were thought to be very limited, the reach of an Act may expand along with expanding notions of congressional authority. See *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 96 S. Ct. 1848, 1852 n. 2 (1976).

110. *United States v. Alford*, 274 U.S. 264 (1927), discussed in text at notes 60-62 *supra*.

111. *Camfield v. United States*, 167 U.S. 518 (1897), discussed in text at notes 63-65 *supra*.

112. See note 5 *supra*.

113. See note 19 *supra*.

114. *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917).

115. See generally E. PEPPER, *THE CLOSING OF THE PUBLIC DOMAIN* 112-13 (1951); Montgomery, *The Public Trust Doctrine in Public Land Law: Its Application in the Judicial Review of Land Classification Decisions*, 8 WILLAMETTE L.J. 135, 136.

federal government utterly overwhelmed, the case of *Pyramid Lake Paiute Tribe v. Morton*<sup>116</sup> nonetheless provides an example that Congress might profitably follow.

The Indians' traditional livelihood as fishermen was dependent upon the water in Pyramid Lake, a desert water body within the Reservation that was fed almost exclusively by inflow from the Carson River. Upstream on the Carson were many farmers who used the river's water for irrigation under contracts made with the Secretary of the Interior as part of the federal reclamation program. Over the years, as more and more water was taken for irrigation, the level of Pyramid Lake dropped severely, threatening the Indian uses.

In a suit brought against the Secretary, the Indians claimed that he had violated his trust obligation to assure water to the Reservation. The plaintiffs conceded that the irrigators had property rights under their water supply contract with the Secretary, but claimed that he was giving the farmers more water than they needed, and more than they were legally entitled to get under either their contract or the applicable principles of western water law. The Secretary sought to compromise the case by reducing irrigation uses somewhat, but the Court held that the Secretary had a legal duty to the Indians that he could not blunt with a politically expedient effort to placate the contending users.

The decision was striking in a number of respects, including its discussion of the Secretary's duty, which is of particular interest for our purposes. First, the Court held that the Secretary was duty-bound to act for the benefit of the Reservation against the private users.<sup>117</sup> Second, it held that the Secretary must take advantage of available legal doctrine, which, under the general theory of water law, gives no right to waste water, even if specific amounts are included in a water supply contract. Third, the Court compelled the Secretary to pursue this argument not only against his judgment, but in a situation where the legal rights in question are very rarely exercised, for the rules against waste are among the least-enforced strictures in water law.<sup>118</sup> Finally, the Court determined for itself that the irrigators' uses were wasteful and that the Secretary had taken no steps to reduce irrigation uses to nonwasteful levels; in making these

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116. 354 F. Supp. 252 (D.D.C. 1972).

117. For the limits of Secretarial discretion, see note 35 *supra*.

118. C. MEYERS & D. TARLOCK, *WATER RESOURCE MANAGEMENT* 108 (1971); J. SAX, *WATER LAW, PLANNING AND POLICY* 271-80 (1968).

determinations the Court enforced the principle much more rigorously than is usual under state law.<sup>119</sup>

The decision in the *Pyramid Lake* case is fully in accord with the tradition established in the Supreme Court's early public domain cases, such as *Alford* and *Camfield*.<sup>120</sup> An explication of this tradition begins with the proposition that the federal government should not hesitate to regulate private property owners for the protection of the public domain. The specifics of that protection ought to be contained in federal rules designed for the reasonable protection of the public lands. In fairness, those federal rules ought to draw upon established principles of American law. Administrative officials should uphold this trust with the full rigor that these principles permit, and their duty is enforceable by those who use the lands should there be a slackening of vigorous implementation of the protective mandate by federal officials.<sup>121</sup>

### B. *Characteristics of the Proposed Federal Policy*

A workable federal policy must include rules for the regulation of private land both within and without park boundaries; it must also include a rationale for determining how those boundaries ought to be defined. Finally, such a policy should contain guidelines for determining when the United States ought to acquire, rather than regulate, private lands.

The plan to be proposed here would allow the federal government to exercise the police power over private lands within park boundaries to the full extent necessary to protect and maintain park lands and uses included in the laws establishing the park.<sup>122</sup> Beyond park

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119. The usual cases allow appalling amounts of water to be wasted. See, e.g., *State ex rel. Cary v. Cochran*, 138 Neb. 163, 292 N.W. 239 (1940); *Corpus Christi v. Pleasanton*, 154 Tex. 289, 276 S.W.2d 798 (1955). Even in the rare cases where waste is enjoined, only the most blatant departures from good husbandry have usually been prevented. See, e.g., *Doherty v. Pratt*, 34 Nev. 343, 124 P. 574 (1912). A recent California case may foretell a much-needed change in judicial attitudes on waste, but it is certainly not yet the standard state approach. See *Environmental Defense Fund v. East Bay Mun. Util. Dist.*, 8 ERC 1535 (Cal. Ct. App., 1st App. Dist., Div. 1, 1975).

120. See text at notes 60-65 *supra*.

121. See note 35 *supra*. The Congress should make clear that the protective mandate is not unfettered discretion, but is instead law to be applied. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971).

122. For the authority to delegate rule-making to administrative officials, see *United States v. Grimaud*, 220 U.S. 506 (1910). For an unconventional and unpersuasive view of possible limits on that authority, see Williams, *The National Park Service's Master Plan: An Unconstitutional Delegation of Legislative Power?*, 11 N.E.L. REV. 7 (1975).



boundaries, the federal government ought to regulate private lands only to restrain conduct that broadly can be characterized as nuisance-like activity. In order to understand this distinction, it is necessary first to say something about the significance of park boundaries.

### 1. *The Problem of Park Boundary Lines*

Because the early national parks were carved out of a larger public domain, in which virtually all the land was owned by the United States,<sup>123</sup> park boundaries originally represented a decision to withdraw certain areas from the general rules of settlement and mining that governed federal lands.<sup>124</sup> Later, as parks were established in areas where substantial private holdings existed, the boundary lines identified those areas that were to be acquired by the United States for inclusion in a park.<sup>125</sup>

As more park units were established in which significant private landholdings seemed likely to remain,<sup>126</sup> there arose a need to develop a managerial policy for private inholdings and to rationalize that policy with one for private holdings outside park boundaries. Unfortunately, this need has never been satisfied, and the result is administrative chaos. The managerial and legal rules that apply to inholdings are different from those that govern peripheral lands, and the rules applicable to private inholders differ among the various parks. As noted earlier, the states have ceded exclusive legislative authority to the United States over private inholdings in some parks; there the federal government recognizes its right to exercise directly

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123. There were some early exceptions, such as the Rocky Mountain National Park, where there were "many thousands of acres in the park owned by private persons." *Colorado v. Toll*, 268 U.S. 228, 229 (1925). See 16 U.S.C. § 194 (1970).

124. See, e.g., 43 U.S.C. §§ 161-302 (1970) (Homestead Act); 43 U.S.C. §§ 321-39 (1970) (Desert Land Act); 30 U.S.C. §§ 21-54 (1970) (General Mining Law).

125. E.g., Shenandoah and Great Smoky Mountain National Parks, 16 U.S.C. § 403 (1970); Everglades National Park, 16 U.S.C. § 410 (1970); Isle Royale National Park, 16 U.S.C. § 408 (1970). It was also a policy to eliminate private holdings in established parks. See 16 U.S.C. § 164 (1970).

126. At some parks, like Acadia and Cape Hatteras, it was thought desirable to retain examples of traditional communities. F. DARLING & N. EICHORN, *MAN AND NATURE IN THE NATIONAL PARKS* 18-19 (1967). See also C. CAMPBELL, *supra* note 19, at 148-49 (Great Smoky Mountains National Park). See 16 U.S.C. § 459a-1 (1970): "That the legal residents of villages . . . shall have the right to earn a livelihood by fishing within the boundaries . . . subject to such rules and regulations as the . . . Secretary may deem necessary . . ." At other parks, established residents were permitted to remain on compassionate grounds, or because highly developed settlements already existed, see note 19 *supra*.

the general police power.<sup>127</sup> In other parks, sword-of-Damocles type laws are in effect, and the Park Service indirectly asserts the general police power.<sup>128</sup> Elsewhere, there is only sporadic regulation over private lands within park boundaries.<sup>129</sup> For private lands outside park boundaries, there is generally no regulation, though the Park Service may exert indirect influence either by negotiation with local officials, by threatening to institute nuisance litigation, or, if statutory authority exists, by threatening to condemn the land. Yet boundary lines have sometimes been drawn according to no discernible principle (except the obvious expedient of response to contending political forces), and thus some lands outside park boundaries seem at least as needful of federal regulation as many private inholdings.<sup>130</sup>

Obviously, if it were possible to begin anew, free of political pressures, the establishment of rational park boundary lines would be the logical first step. In such an ideal situation, park boundaries would be established according to principles of intelligent ecological management. They would respect watershed lines, viable wildlife habitats, natural landscape divisions such as ridge lines and valleys, and those land contours that describe the ordinary limits of phenomena such as erosion, stream siltation, and flooding. These boundaries would represent an intelligible managerial principle—that is, they would delimit areas within which comprehensive, integrated federal management would be routinely required for the safeguarding of park values.

Lamentably, no such ideal situation exists or is likely to develop, although the deplorable experience with the Redwoods National Park should suggest to Congress the true cost to the nation of manipulation of park boundary decisions based on expediency. The practical problem, then, is to compose a coherent managerial program, given the park boundaries as they presently exist.

The difficulties of the Park Service would be minimized if it were allowed to regulate private lands both within and without the parks to the fullest extent of federal constitutional authority. But there are other important considerations, which suggest that Park Service authority should not extend to its constitutional limits. The prospect of federal agencies as land-use czars would be most

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127. See notes 41, 42 *supra*.

128. See note 19 *supra*.

129. See text at notes 16-18 *supra*.

130. See note 77 *supra*.

unpopular politically, however clear their constitutional authority may be. Moreover, outside the parks there are established communities with legitimate interests of their own; it would be unwise summarily to displace those interests in favor of the Park Service. Further, however irrationally drawn some park boundaries may be, the Park Service has greater responsibilities within the parks than it has beyond park boundary lines. Finally, Congress cannot give the Park Service full police powers outside its boundaries without deciding where that power should end, for the problems of troublesome private land uses may arise hundreds of miles from a park, as demonstrated by the recent Kaiparowits controversy over a proposed power plant in Utah.<sup>131</sup>

## 2. *A Proposal for the Limits of Regulatory Authority*

Congress can achieve an appropriate balancing of the competing interests by giving the Park Service two different mandates for the exercise of regulatory authority, one for private inholdings and the other for private land beyond park boundaries. Regarding private inholdings, it is suggested that the Park Service be given authority to exercise the general police power to the full extent necessary to maintain the parks for the purposes for which Congress established them. Because it is sharply limited in physical extent, such a mandate should not even arguably fall afoul of the decided cases on the property and commerce powers; these decisions have shown that the judiciary becomes uneasy only at the prospect of "an exercise of a general control over public policy in a State."<sup>132</sup>

Such a policy for regulating inholdings would be desirable because it would permit the Park Service to exercise similar powers in those parks in which exclusive jurisdiction has been ceded and those in which it has not. Still, the significance of a cession would not be lost, for federal authority would only be exercised in nonceded parks to the extent that a need is found for broad federal *protective* regulation under the property and commerce clauses. In parks over which state jurisdiction has been ceded, the federal government would exercise the general police power for all purposes. In either case, this approach would permit needed direct federal regulation of inholdings at places like Fire Island and would free the Park

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131. N.Y. Times, Sept. 16, 1975, at 24, col. 1.

132. *Kleppe v. New Mexico*, 96 S. Ct. 2285, 2292 (1976), *quoting* *United States v. San Francisco*, 310 U.S. 16, 30 (1940).

Service from reliance on the demonstrably inadequate sword-of-Damocles approach.

As for land beyond park boundaries, no general police power regulation is likely to be necessary. In regulating these lands, the Park Service should be limited to curbing the kinds of activities that gave rise to the *Camfield* and *Alford* cases; this sort of conduct may be described very broadly as nuisance-like. The term "nuisance" is used here descriptively, rather than technically, and two qualifications must be noted to avert misunderstanding. First, Congress should allow the Park Service by regulation to define nuisance-like activity for itself, rather than having slavishly to follow existing state law.<sup>133</sup> And, second, some accommodation must be made for the peculiar circumstances in which government as a landowner finds itself.<sup>134</sup>

For example, while aesthetic nuisance is still recognized only sporadically in American law, protection against visual intrusion is central to the mission of the Park Service. Thus Congress ought to grant explicit authority to control, and to prohibit, structures like the Gettysburg Tower and the high rise hotel that has been built on the outskirts of Great Smoky Mountains National Park but is strikingly visible from many places within the Park. Similarly, authority should be given to control the development, on external lands, of massive amusement parks that would bring major land clearings, substantial structures and hordes of patrons within sight and sound of park visitors. At the same time, it should not be necessary to prevent all commercial activity or to restrain very tightly residential growth and highway building outside the parks in the same

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133. An example of the judiciary defining nuisance-like activity without regard for a particular state's limited concepts is provided in *Camfield v. United States*, 167 U.S. 518 (1897), other aspects of which were discussed in the text accompanying notes 63 and 64 *supra*. There, a Colorado landowner who had totally enclosed a portion of public land by building fences on his own land claimed that neither the common law nor Colorado law prohibited such conduct. The Court admitted this, but noted that one state, Massachusetts, had recently legislated against spite fences. After drawing analogies to established common-law principles and considering the responsibilities of being a good neighbor, the Court found for the government, thereby establishing a new sort of federal common law of nuisance. The Park Service should be allowed to apply such diverse principles when it fashions regulations.

134. Such circumstances were present in *Light v. United States*, 220 U.S. 523 (1911), where the federal government sued to bar trespassing cattle from a national forest. The defense was that state law prohibited a trespass action unless a plaintiff had fenced his land. The government had not fenced the forest, but the Court implied that this law should not be applied against the United States because it was unreasonable to expect the government to fence a vast tract of open forest. This view was affirmed in *Kleppe v. New Mexico*, 96 S. Ct. 2285 (1976).

way that such restraints should be applied to private lands within park boundaries.

### 3. *Regulation and Litigation*

If the sort of legislation proposed here is enacted, the Park Service will have authority to issue wide-ranging regulations. Regarding land beyond park boundaries, such legislation could broadly, but specifically, identify conventional problems such as degradation of the park's air and water, siltation of streams, endangerment by winds, landslides, mudslides, erosion, land subsidence, noise, congestion, visual obstructions and intrusions upon the experience of park visitors, unreasonable uses of toxic substances that endanger plants and wildlife within the park, and activity in the nature of trespass upon park lands. The Park Service would periodically issue regulations to meet these problems.

Is that authority enough, or should Congress also empower the Park Service to initiate litigation and seek judicial development of a federal common law of nuisance for the parks? There will inevitably arise unanticipated problems that are not reached by the language or obvious intent of the regulatory statute. In addition, there are always distinctive, individual situations that cannot be covered by regulations of general application. It is desirable that the Park Service have supplemental authority to go into court with a nuisance-type claim when confronted with such unforeseen circumstances.

While one is inherently disadvantaged in specifying problems that cannot be anticipated, certainly it is possible to imagine a statute similar to that suggested here, enacted in 1930, that failed to say anything about radioactive hazards. And it might be imagined that industrial processes of the future will produce unreasonable intrusions not easily encompassed within contemporary notions of noise, pollution, toxicity, or trespass. Rather than attempting to deal with every possible problem by enacting a statute that gives the Secretary open-ended authority to promulgate regulations, Congress ought to empower the Park Service to litigate whenever unanticipated activities may endanger a park. The courts will thus have the opportunity to examine thoroughly both the alleged danger to the parks and the social need for the activities in question.

A provision for litigation to develop federal common-law nuisance should be advantageous both to the Park Service and to landowners. The existence of a potential judicial remedy should help to

discourage the Park Service from formulating vague, all-encompassing regulations designed to guard against every possible contingency. From the landowner's perspective, a nuisance action provides a greater opportunity to put forward the substantive merits of a particular case, rather than being limited to the narrow arguments that a regulation exceeded the authority granted in the statute or that it is arbitrary and capricious.<sup>135</sup>

It is desirable that those potentially affected by publicly imposed constraints have a significant opportunity to express their concerns. If regulations are proposed to govern recurrent problems involving substantial numbers of people, it is reasonable to anticipate that sufficient numbers of the affected group will forcefully voice their objections at the time the regulations are proposed, thereby having some influence on the outcome. The more individualistic or vague the regulations, the less that opportunity realistically exists. For such circumstances, the Park Service should be authorized, and encouraged, to institute litigation so that landowners can obtain a full hearing. While it will not be possible for legislation to define exactly those situations in which litigation rather than regulation is appropriate, Congress can certainly give the Park Service guidance through a careful development of legislative history.

It would also be wise explicitly to limit the Park Service to a judicial federal nuisance remedy for all conduct beyond a specified distance from the park. There is little need for control by regulation, even over common nuisance-like activities, as one moves away significantly from park boundaries. Moreover, the further one moves from the park, the greater is the likelihood of intruding upon the extensive land regulation of established cities and towns. A mileage limitation would minimize the potential for conflict, confusion, and duplicative efforts among the various governments. It would be undesirable to require large numbers of people at some distance from the parks to study park regulations before they could vary the uses of their land. Beyond this, there is much to be said for blunting the perception that the Park Service will, if permitted, seek to become an ubiquitous land manager. A sensible limitation might be to require litigation of problems arising on land more than two or three miles from the park, or on closer lands outside the park boundaries if the land is within a sizeable city (50,000

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135. For the effect of the Administrative Procedure Act on the Park Service, see Williams, *supra* note 122, at 22 n.36.

population or more), which is likely to have its own elaborate land use controls.

#### 4. *Choosing Between Acquisition and Regulation*

There remains the question of when the federal government ought to buy, rather than merely regulate, land whose uses potentially conflict with park purposes. The preceding pages imply clearly enough that present congressional and administrative policies go too far in the direction of acquisition, but in formulating a new policy care must be taken to avoid excessive reliance on regulation.

Obviously, the federal government should, and must, buy interests when attempts to regulate them would be unconstitutional takings of property. There is, however, a further consideration. The United States is, for purposes of these cases, both the sovereign and a neighboring landowner. Limited only by constitutional prohibitions against uncompensated takings, the federal government may be in a position to constrain quite unfairly the uses to which its private neighbors put their land. It ought, therefore, to adopt a policy for fair dealing that goes beyond the bare bones of its constitutional duty to compensate.

In order to fulfill both its constitutional duties and to conform with reasonable standards of fair dealing, the federal government should acquire an ownership interest in private land within or near park boundaries if one of the following conditions obtains:

- a. The land is needed for occupancy by the Park Service or by park visitors.
- b. The land, though not needed for occupancy, requires the acquisition of interests in land which, under the established law of eminent domain, constitutes a taking of property.
- c. The federal government imposes constraints which, even if not a taking under constitutional doctrine, go beyond the sorts of regulation that have become familiar under the general police power in American law or in the resolution of conflicts between neighbors.

Unless the constraint falls within one of these three categories, the Park Service should be free to regulate private land in accordance with the approach suggested above. Each of these standards will now be explained specifically.

a. *Land needed for occupancy.* A simple rule of thumb applicable to most situations that are traditionally and literally a taking

of property is that they involve the acquisition of physical possession. There is no significant ambiguity in this category.

b. *Nonoccupancy interests that constitute a taking.* The imposition of nondevelopment easements entailing severe economic loss to the owner, even though the desired uses do not impair the use of the federally owned land, would generally be treated as a taking. For example, if farming were prohibited in order to preserve the land's wild appearance, or if all structures and roads were ordered removed from the land, acquisition with compensation would probably be necessary.<sup>136</sup> A flat prohibition upon all timber harvesting would normally fall within this category, as would a requirement that the land be managed unprofitably in order to provide browse for wildlife indigenous to the park.<sup>137</sup> In general, the imposition of affirmative duties, such as the construction and maintenance of fire towers for the benefit of park lands, would also be considered nonoccupancy takings.

c. *Constraints that go beyond familiar police power or conflict accommodation between neighbors.* This third standard for acquisition is designed to impose upon the federal government a requirement of fairness more generous than the Constitution demands, so that the private neighbors of national parks will not be disadvantaged merely because the federal government is their neighbor. The principle might be stated this way: It is *unreasonable* for a private property owner to demand that he not be disadvantaged at all because a national park is his neighbor, but it is *reasonable* for him to demand that he not be disadvantaged by restrictions outside the scope of those that have become conventional American law for the resolution of conflicts between neighboring landowners.

One can readily conceive of circumstances where regulation without compensation would be at least arguably constitutional, but where considerations of fairness ought to prevail and require payment. The Park Service should not, out of a desire to maintain

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136. The exact limits of constitutional constraint under the fifth amendment are far from clear, and it is not the purpose of this article to review those questions in detail. The examples given are simply by way of broad illustration. For a detailed analysis of the constitutional issue, see the articles cited in note 58 *supra*. For a case suggesting that even the restrictions used as illustrations in the text might pass constitutional muster, see *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

137. It should be noted that this is, in essence, the situation in which the Supreme Court reserved judgment under the property power in *Kleppe v. New Mexico*, 96 S. Ct. 2285, 2295 (1976).



the ecological purity of the park area, prohibit agricultural landowners from using pesticides that are generally accepted on agricultural lands elsewhere, unless it is willing to pay for the losses that such restraints may entail. Nor should it bar private owners from using conventional fire-fighting techniques, even in park areas where the Service has decided upon a strategy of letting fires burn themselves out. Despite its special concern for maintaining wildlife populations in a park, the Park Service should not impose upon its neighbors land management strategies for the maintenance of wildlife that are more onerous than those applicable to open or agricultural lands generally.<sup>138</sup> Of course, the Service may freely employ all these constraints if it is willing to compensate the landowners.

A case study that illuminates the proper application of this principle is the bitterly contested battle over automobile regulation at Fire Island National Seashore.<sup>139</sup> The Seashore Superintendent has called the controversy "perplexing . . . emotion laden, sensitive — . . . a can of worms."<sup>140</sup> In brief, the problem arises from the fact that Fire Island seashore includes a number of intensively developed resort communities, as well as a fragile dune ecosystem on a small barrier island. Traditional access to the island had been by boat, but two automobile bridges were built, one of them in 1964, the same year the National Seashore was established. The Park Service established a regulation forbidding vehicular traffic across the federal lands in the Seashore. Private housing development mushroomed in the following decade and residents have applied intense pressures, including litigation, in an effort to secure permission

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138. Under the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. § 1334 (Supp. V 1975), private landowners are permitted, but not required, to maintain such animals on their lands.

139. See *Neilson v. Gotbolt*, Mem., No. 75-C-1283 (E.D.N.Y. Aug. 15, 1975); *Biderman v. Morton*, 507 F.2d 396 (2d Cir. 1974), *affg.* Mem., No. 72-C-1060 (E.D.N.Y. July 19, 1974). See also *Lighthouse Shores Inc. v. Town of Islip*, — N.Y.2d —, 372 N.Y.S.2d 995, — N.E.2d — (1976); *Long Island Beach Buggy Assn. v. Town of Islip*, 58 Misc. 2d 295, 295 N.Y.S.2d 268, *affd.*, 35 App. Div. 2d 739, 316 N.Y.S.2d 430 (1970); *Hodges v. Town of Islip*, N.Y.L.J. July 27, 1964 (Sup. Ct. Nassau Co.); *Faulhaber v. Village of Saltaire*, Mem., June 8, 1970, Index No. 192005 (Sup. Ct. Suffolk Co.); *Thornberg v. Town of Islip*, Mem., Dec. 11, 1975, Index No. 74-9379 (Sup. Ct. Suffolk Co.).

A similar controversy over the use of vehicles has arisen at Back Bay National Wildlife Refuge, managed by the U.S. Fish and Wildlife Service. See *Coupland v. Morton*, 526 F.2d 588, 7 ERC 2127, 5 ELR 20507 (4th Cir. 1975); *National Audubon Socy. v. Kleppe*, No. 76-589-N (E.D. Va., filed Sept. 28, 1976); Note 5 ELR 10148 (1975).

140. Letter from Richard W. Marks, Superintendent, to Congressman Thomas J. Downey, File W46 FIIS, Feb. 25, 1976, at 1, 12.

to drive through the National Seashore to reach private property.<sup>141</sup>

Several courts have concluded that very strict vehicle use constraints imposed by the Park Service<sup>142</sup> (as well as by a local municipality) are constitutional, within statutory authority and reasonably appropriate to protect the Seashore lands.<sup>143</sup> But there remains the painful and politically sensitive<sup>144</sup> question whether the rigorous restraints the Park Service imposed are unfair to the residents subject to them. Without doubt the regulation is onerous: "The only permit which [the Park Service has] granted . . . is a permit authorizing [a year-round resident] to drive to mainland Long Island once each week for medical reasons. Beyond that she can travel by automobile only upon the receipt of a specific permission which must be obtained by specific application covering a particular occasion as occasions arise."<sup>145</sup>

How are we to analyze the propriety of imposing such a regulation without compensation? Plainly this is a much more restrictive rule than that to which homeowners are routinely subjected by local governments. And plainly it disappointed expectations the owner might have had in 1969 when she acquired her property. At the same time, a person who moves to Fire Island cannot expect to enjoy all the usual urban amenities, particularly in light of the clear mandate of preservation and limited development under which the Seashore was established in 1964.<sup>146</sup> In these respects, the claims of the property owner are neither clearly unreasonable nor clearly meritorious; the case is a hard one.

Despite the apparent difficulties, an appropriate solution can be discerned through application of traditional legal principles to the owner's claims. She does not qualify for an easement of necessity under conventional property notions, for while denied the most convenient form of access, she has not been denied all access to her property; she continues to have the use of boats and footpaths, which have been traditional on the island.<sup>147</sup> Nor have her expectations

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141. The background of the Fire Island controversy is set out in U.S. DEPT. OF THE INTERIOR, NATIONAL PARK SERVICE, GENERAL MANAGEMENT PLAN, FIRE ISLAND NATIONAL SEASHORE (Draft, June 1976). See also notes 10, 35, 139 *supra*.

142. 36 C.F.R. § 7.20 (1976).

143. See cases cited note 139 *supra*.

144. See note 140 *supra*.

145. Neilson v. Gotbolt, Mem., 75-C-1283, at 3-4 (E.D.N.Y. Aug. 15, 1975).

146. See 16 U.S.C. §§ 459e to 459e-12 (1970).

147. See 3 R. POWELL, THE LAW OF REAL PROPERTY ¶ 410, at 428, 439 n.34, 444 (1975). Cf. 43 U.S.C. § 959 (1970), 43 U.S.C. § 946 (1970) (authority to limit rights-of-way over federal lands).

developed into rights through compliance with the rules of prescription or adverse possession that are routinely recognized under state law.<sup>148</sup> Moreover, she is no more disadvantaged by the Park Service than she might be had her neighbor been a private landowner. Assume, for example, that a major recreational developer had been the owner of the Fire Island land over which vehicle access is sought. If, despite a previous owner's permission to drive over that land, the developer had decided to build a summer resort free of motor vehicle traffic (similar to that on Mackinac Island, Michigan), she would surely have been subject to the same sort of inconvenience that the Park Service has now imposed upon her.

These factors should be decisive against the resident, for while she has been disadvantaged by being a neighbor of the Park Service, she has not been "disadvantaged by restrictions outside the scope of those that have become conventional in American law in resolving conflicts between neighboring landowners."<sup>149</sup> The Park Service should be free to impose such regulations on landholders without compensation.

A final observation on this subject is that Congress need not legislate explicitly on the question of when acquisition is required. Congress can make clear in a statute setting out Park Service regulatory authority, and in the legislative history, that the regulatory power is not meant to include the imposition of restrictions outside the scope of those that have been enacted by local governments or have become conventional in the resolution of disputes between neighboring landowners. Thus, should the Park Service attempt to regulate beyond that scope, an affected landowner could properly challenge the regulation as beyond the power Congress intended to confer. If the landowner prevails, the Park Service would have no choice but to seek funds to acquire the interest in question. Or Congress could, in any given instance, reject the judicial interpretation of its intent by refusing to allow acquisition and by stating explicitly its desire to permit uncompensated regulation in the particular situation.

## VI. CONCLUSION

Before the general suggestions made in the preceding pages can be converted into specific statutory language, a number of difficult

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148. See 3 R. POWELL, *supra* note 147, ¶ 413, at 493 n.58, 497, ¶ 416 at 520 n.10, 521-23; RESTATEMENT OF PROPERTY § 479 (1944).

149. See text following note 137 *supra*.

issues must be resolved. Among them is whether a single statute could adequately speak to the variety of managerial issues that face the Park Service, which has charge of hundreds of seashores, monuments, parks, and historic sites. Another is the ever perplexing question of the degree of specificity with which Congress should instruct administrative officials.

It is not the purpose of this article to provide the answers to all these, and many other, questions, which will require the knowledge and experience of Park Service personnel. It is hoped that this article will commend itself as the beginning of an inquiry into proposals for much needed legislation. The outcome of that inquiry cannot be predicted with exactitude here. But certainly enough has been said in this article to suggest that the giants can properly be roused from their long sleep.