CONSTITUTIONAL LAW

MINNESOTA v. BLOCK: CONGRESS' EXPANSIVE POWER TO REGULATE UNDER THE PROPERTY CLAUSE

INTRODUCTION

The Boundary Waters Canoe Area Wilderness Act of 1978 (BWCAW Act)\(^1\) has sparked controversy over the extent to which Congress can regulate activities on nonfederal property,\(^2\) and at what point such regulation will constitute a “taking” by the federal government.\(^3\)

In Minnesota v. Block,\(^4\) the Eighth Circuit ruled that the regulation of nonfederal land was constitutional under the property clause.\(^5\) It also held that such regulation was not an unconstitutional taking of property without just compensation.\(^6\)

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4. 660 F.2d 1240 (8th Cir. 1981). There are no less than 40 parties to the action. For a comprehensive review of the parties, see National Ass'n of Property Owners v. United States, 499 F. Supp. 1223, 1229-30 (D. Minn. 1980).
5. 660 F.2d at 1248-51. Article IV, § 3 of the Constitution states in part: “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . .” U.S. CONST. art. IV, § 3.

In the district court decision, National Ass'n of Property Owners v. United States, 499 F. Supp. 1223 (D. Minn. 1980), Judge Lord ruled on the following constitutional challenges to various sections of the BWCAW Act:

1. Did Congress unlawfully delegate authority to the Secretary of Agriculture to draw the boundaries of the new Wilderness Area?
2. Does the Act, by limiting motorboat and snowmobile use in the Wilderness, discriminate unconstitutionally against the class of all handicapped persons and the class of all persons less physically fit?
3. Do §§ 4, by limiting motorboat and snowmobile use in the Wilderness, and 5, containing provisions for the purchase of properties around the BWCAW, of the BWCAW Act infringe plaintiffs' Ninth and Fifth Amendment rights?

5. Does alleged selective enforcement of the Act by the United States Forest Service give rise to any rightful claims by these plaintiffs?

Id. at 1227. Judge Lord upheld the constitutionality of all sections of the BWCAW Act. Id. at 1224.

In the instant case, the appellants claimed (1) that Congress, in passing the BWCAW Act, acted outside its authority under the property clause of the United States Constitution, (2) that such action contravened the tenth amendment of the Constitution, (3) that the section of the act that gives the United States the right of
This article will examine the constitutional reach of the seldom used property clause in light of the Eighth Circuit’s decision in *Minnesota v. Block*. First, the background of the BWCAW Act and the facts and holding in *Minnesota v. Block* will be presented. Then, the parts of the decision pertaining to the property clause and takings clause will be analyzed. Finally, it will be suggested that the takings clause of the fifth amendment may serve as one of the few limitations on Congress’ power to regulate activities on nonfederal property under the property clause.

**BACKGROUND**

The Boundary Waters Canoe Area Wilderness (BWCAW), located along the Minnesota-Canadian border, consists of 1,075,000 acres of land and waterways. It is the nation’s only lakeland canoe wilderness. The BWCAW is the most heavily used unit in the national wilderness system, drawing people from across the nation who seek to enjoy the natural beauty and unique experience that the BWCAW has to offer.

Throughout this century, the federal government and the State of Minnesota have sought to protect the boundary waters area. The first Superior Wilderness Area was created by Congress in 1926, assuring that no roads would be constructed in at least 1,000 square miles of the best canoe country. In later years, additional federal and state actions included prohibiting logging within four hundred feet of any lake shore and restricting alteration of any water or water levels, acquiring additional land to protect and enhance the wilderness canoe area, and banning all aircraft from first refusal to certain property in the area violates the takings clause and due process clause of the fifth amendment, (4) that the Act conflicts with two treaties between the United States and Canada, and (5) that the Act cannot be implemented until an environmental impact statement is filed by the Secretary of Agriculture. 660 F.2d at 1244-45, 1254.

This article will be confined to an examination of the property clause and taking clause challenges.

7. 660 F.2d at 1245. The United States owns approximately 792,000 acres of land surface while the State of Minnesota owns approximately 121,000 acres of land in addition to the beds under 160,000 acres of navigable water. Id. at 1247.


9. Id.

10. 660 F.2d at 1245 n.7. The BWCAW was also the subject of international protections extended by the United States and Canada in the Root-Bryce Treaty of 1909. 660 F.2d at 1245 n.6.

11. 660 F.2d at 1245 n.7.


the airspace over the region.\textsuperscript{14} In an attempt to preserve the primitive nature of the area, Congress designated the boundary waters as part of the wilderness system established under the Wilderness Act of 1964.\textsuperscript{15} That Act provided a specific exception for the BWCAW:

Other provisions of this chapter to the contrary notwithstanding, the management of the Boundary Waters Canoe Area . . . shall be in accordance with regulations established by the Secretary of Agriculture in accordance with the general purpose of maintaining, without unnecessary restrictions on other uses, including that of timber, the primitive character of the area, particularly in the vicinity of lakes, streams, and portages: \textit{Provided, that nothing in this chapter shall preclude the continuance within the area of any already established use of motorboats.}\textsuperscript{16}

This proviso sparked much litigation over the uses the Secretary of Agriculture permitted.\textsuperscript{17} In response, Congress enacted the Boundary Waters Canoe Area Wilderness Act of 1978 which provided specific regulations.\textsuperscript{18}

\textbf{FACTS \& HOLDING}

The plaintiffs in \textit{Minnesota v. Block} challenged sections four and five of the BWCAW Act.\textsuperscript{19} Section four limits motor boat use,\textsuperscript{20}

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  \item \textsuperscript{14} 499 F. Supp. at 1228.
  \item \textsuperscript{15} 16 U.S.C. §§ 1131-1136 (1974).
  \item \textsuperscript{18} Pub. L. No. 95-495, 92 Stat. 1649 (1978). Congress recognized Minnesota would retain jurisdiction over the waters, but provided that the state could not regulate in a manner less stringent than that mandated by the BWCAW Act. \textit{Id.}, § 15 at 1657.
  \item \textsuperscript{19} 660 F.2d at 1246-47, 1253-54. Three cases were consolidated at the trial level. 499 F. Supp. at 1227. The appeal centered on two of those consolidated cases. One group (snowmobilers and fishermen) challenged section four of the Act, while another group (property and resort owners) challenged section five of the Act. 660 F.2d at 1246-47, 1253-54.
  \item \textsuperscript{20} Boundary Waters Canoe Area Wilderness Act of 1978, § 4(c), Pub. L. No. 95-495, 92 Stat. 1649, 1650-52 (1978), provides:
    \begin{itemize}
      \item (c) Effective on January 1, 1979, the use of motorboats is prohibited within the wilderness designated by this Act, and that portion within the wilderness of all lakes which are partly within the wilderness, except for the following:
      \begin{itemize}
        \item (1) On the following lakes, motorboats with motors of no greater than twenty-five horsepower shall be permitted: [lakes omitted].
    \end{itemize}\
\end{itemize}
permits certain mechanized portages, and restricts the use of snowmobiles to two designated trails in and around the BWCAW. Section five of the Act gives the United States a right of first refusal in certain privately-owned property in the area.

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**Provided:** That, on the following lakes, until January 1, 1984, the horsepower limitations described in this paragraph shall not apply to tow-boats registered with the Secretary: [lakes omitted].

(2) On the following lakes and river, motorboats with motors no greater than ten horsepower shall be permitted: [lakes omitted].

(3) On the following lakes, or specified portions of lakes, motorboats with motors of no greater than ten horsepower shall be permitted until the dates specified: [lakes omitted].

(4) On the following lakes, or specified portions of lakes, motorboats with motors of no greater than twenty-five horsepower shall be permitted until January 1, 1984: [lakes omitted].

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21. Id., § 4(e) at 1650-52 provides:

(e) For the purposes of this Act, a snowmobile is defined as any motorized vehicle which is designed to operate on snow or ice. The use of snowmobiles in the wilderness designated by this Act is not permitted except that the Secretary may permit snowmobiles, not exceeding forty inches in width, on (1) the overland portages from Crane Lake to Little Vermillion Lake in Canada, and from Sea Gull River along the eastern portion of Saganaga Lake to Canada, and (2) on the following routes until January 1, 1984: [lakes omitted].

In addition to the routes listed above, the Secretary may issue special use permits for the grooming by snowmobiles of specified cross-country ski trails for day use near existing resorts.

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22. Id., § 4(d) at 1650-52 provides:

(d) The detailed legal description and map to be published pursuant to section 3 of this Act shall contain a description of the various areas where the motorized uses permitted by this section are located. No provision of this section shall be construed to limit mechanical portages or the horsepower of motors used on motorboats in the following areas within the wilderness: [lakes omitted].

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23. Id., § 5 at 1652 provides:

(a) The owner of a resort in commercial operation during 1975, 1976 or 1977 and located on land riparian to any of the lakes listed below may require purchase of that resort, including land and buildings appurtenant thereto, by written notice to the Secretary prior to September 30, 1985. The value of such resort for purposes of such sale shall be based upon its fair market value as of July 1, 1978, or as of the date of said written notice, whichever is greater, without regard to restrictions imposed by this Act: [lakes omitted].

(b) An owner requiring purchase of a resort under this provision may elect to retain one or more appropriate buildings and lands not exceeding three acres, for personal use as a residence: **Provided,** That the purchase price to the Government for a resort shall be reduced by the fair market value of such buildings and lands, with the same valuation procedures outlined above.

(c) With respect to any privately owned lands and interests in lands riparian to the lakes listed above, and if the Federal Government has been required to purchase a resort on said lake, said lands shall not be sold without first being offered for sale to the Secretary who shall be given a period of one hundred days after the date of each such offer within which to purchase such lands. No such lands shall be sold at a price below the price
In the first case, Minnesota and the intervening plaintiffs asserted that Congress acted in excess of its authority under the property clause when it curtailed the use of power boats and other motorized vehicles on lands and waters not owned by the United States. The Eighth Circuit, citing the expansive reading given the property clause by the Supreme Court in Kleppe v. New Mexico, went on to answer the question left open in Kleppe—the scope of Congress' property clause power over activities occurring on nonfederal lands. The court upheld the constitutionality of the federal regulation by applying the same test used by the Supreme Court in the 1897 case of Camfield v. United States.

In the second case, Minnesota and area resort and property owners contended that section five of the Act, which gives the federal government a right of first refusal on designated property, constitutes a taking of property without just compensation. The appellants claimed that the statute automatically creates an option in real property and thus "takes" private property without compensation.

The court was careful to point out that no challenge to the actual application of section five to particular parcels of land was alleged. Therefore, the court considered only whether section five on its face constituted an unconstitutional taking. Relying on the

at which they have been offered for sale to the Secretary, and if such lands are reoffered for sale they shall first be reoffered to the Secretary: Provided, That, this right of first refusal shall not apply to a change in ownership of a property within an immediate family.

(d) There are authorized to be appropriated such sums as may be necessary for the acquisition of lands and interests therein as provided by this section.

\textit{Id.}


25. 660 F.2d at 1246. Minnesota also argued that if section four of the Act was properly construed, it would not apply to lands and waters under state jurisdiction within the BWCAW. The court declared these arguments to be contradictory to the plain language and purpose of the Act. 660 F.2d at 1246 n.15.


29. See note 19 \textit{supra} and 660 F.2d at 1253.

30. 660 F.2d at 1255.

31. \textit{Id.}

32. \textit{Id.}

33. \textit{Id.} The court noted that if any individual owner believed that, as applied to his particular parcel, section five was an unconstitutional taking, he could bring suit for relief under the appropriate statutes. 660 F.2d at 1255 n.36. \textit{See generally} Kaiser Aetna v. United States, 444 U.S. 164 (1979); Andrus v. Allard, 444 U.S. 51 (1979); Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).
Supreme Court's opinion in *Andrus v. Allard*, the court concluded it did not: "[T]he mere conditioning of the sale of property . . . cannot rise to the level of a taking."  

**ANALYSIS**

**The Property Clause**

In the past, Congress seldom used the property clause as a power source for enacting legislation. Therefore, there are few Supreme Court decisions to look to in determining the extent of Congress' powers under the property clause. However, recent legislation by Congress has been based upon the property clause. In determining the validity of this legislation, courts have been required to determine the extent of the property clause power.

In *Minnesota v. Block*, the Eighth Circuit was presented with what appears to be Congress' broadest attempt to date to regulate under the property clause: regulation of motor boats and other motorized vehicles on property not owned by the United States. In upholding the constitutionality of the regulation, the court relied on three cases that interpreted the extent of Congress' power under the property clause: *Kleppe v. New Mexico*, *Camfield v. United States*, and *United States v. Brown*.

In *Camfield*, the Supreme Court upheld a federal regulation prohibiting the erection of fences on private property adjoining property owned by the United States. The private property was located in alternating tracts next to the federal lands, and the fences in effect closed off public lands in such a way as to give the private owner sole use of federal lands. In upholding the constitutionality of the federal regulation prohibiting the fences, the Court stated:

While we do not undertake to say that Congress has the unlimited power to legislate against nuisances within a

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35. 660 F.2d at 1255.
36. Id. at 1256.
37. See *Regulating Nonfederal Property*, supra note 2, at 166.
38. Id.
40. See notes 42 and 44 infra.
42. 426 U.S. 529 (1976).
43. 167 U.S. 518 (1897).
44. 552 F.2d 817 (8th Cir.), cert. denied, 431 U.S. 949 (1977).
45. 167 U.S. at 528.
46. Id. at 519.
State . . . , we do not think the admission of a Territory as a State deprives [Congress] 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.47

Thus, the Supreme Court was clear in dictating that the federal government can regulate private property—and state owned property—when the conduct on nonfederal land affects federal property.48

The Court, relying on its decision in Camfield, again acknowledged that the property clause may have some effect on private lands not otherwise under federal control in Kleppe v. New Mexico.49 In Kleppe, a rancher who held a permit to graze cattle on federal lands complained that free-roaming burros were interfering with his livestock operations.50 When the Federal Bureau of Land Management, which administers the Wild Free-Roaming Horses and Burros Act,51 refused to remove the burros, he complained to the New Mexico Livestock Board.52 The Livestock Board rounded up and removed nineteen animals and sold them pursuant to New Mexico's Estray Law.53 The Supreme Court reversed a lower federal court's declaratory judgment allowing the removal of the burros by the Livestock Board.54

The Court in Kleppe made it clear that great deference should be given congressional regulations under the property clause: "[W]e must remain mindful that, while courts must eventually pass upon them, determinations under the Property Clause are entrusted primarily to the judgment of Congress."55 The Court expanded on Camfield by ruling that Congress' power to regulate under the property clause relates not only to the land itself, but

47. Id. at 525-26.
48. Id.
50. 426 U.S. at 533.
52. 426 U.S. at 533.
53. Id.
54. Id. at 547.
also to animals that roam on the land. However, the Court declined to rule on whether the federal protection would continue if the burros wandered onto nonfederal lands. The Court, citing Camfield, did admit that regulations under the property clause may affect nonfederal lands.

The Eighth Circuit had previously interpreted the decisions in Camfield and Kleppe in the case of United States v. Brown. Defendant Brown was charged with violation of national park regulations prohibiting possession of a loaded firearm and hunting in national parks. Brown contended that the State of Minnesota held deed to the lands he was hunting on, and that the federal government had no power to regulate activities on state property. The Eighth Circuit affirmed the conviction.

The court affirmed the district court's approval of the regulations as necessary because "hunting on the waters in the park could 'significantly interfere with the use of the park and the purpose for which it was established.'" Thus, the court expanded the property clause power to allow Congress to regulate activities on nonfederal lands that interfere with the designated purposes of federal lands.

The court in Minnesota v. Block used these three decisions to uphold the constitutionality of federal regulation of nonfederal property provided by the BWCAW Act. Minnesota v. Block differs from previous property clause cases in that it involved federal regulations that were much more extensive than those previously challenged. The only limit the court placed on Congress' power was that it "must demonstrate a nexus between the regulated conduct and the federal land, establishing that the regulations are necessary to protect federal property." The court stated: "[I]f Congress enacted the motorized use restrictions to protect the fundamental purpose for which the BWCAW had been reserved, and if the restrictions in section four reasonably relate to that end, we must conclude that Congress acted within its constitutional pre-

56. 426 U.S. at 546-47.
57. Id.
58. Id.
60. 552 F.2d at 819.
61. Id.
62. Id. at 822-23.
63. Id. at 822 (emphasis added).
64. Id.
65. 660 F.2d at 1248-50.
67. 660 F.2d at 1249 n.18.
The court had no trouble finding that the regulation was reasonably related to Congress' stated purpose of protecting against activities that threaten the integrity of the BWCAW's wilderness character.\(^{69}\) Thus, the decision in \textit{Minnesota v. Block} gives little aid in determining what restrictions there are to Congress' power under the property clause. If broad deference continues to be extended to congressional regulation of nonfederal property under the property clause, it is difficult to see any real limitation on Congress' power.\(^{70}\)

\textbf{The Fifth Amendment "Takings" Clause}

In \textit{Minnesota v. Block}, the court relied on the recent Supreme Court decision in \textit{Hodel v. Virginia Surface Mining and Reclamation Association}\(^{71}\) to limit its inquiry to whether section 5(c) \textit{on its face} constitutes an unconstitutional taking.\(^{72}\) In a "facial" challenge, the court must determine whether the mere enactment of the statute constitutes a taking.\(^{73}\) The test to be applied is whether the statute regulating the use of the land denies an owner "economically viable use of his land."\(^{74}\) In making this determination, the Eighth Circuit relied on the Supreme Court's reasoning in \textit{An

The plaintiffs in \textit{Allard} challenged the constitutionality of the Eagle Protection Act and the Migratory Bird Treaty Act.\(^{77}\) These acts restricted the import, export, purchase, or sale of any birds or their eggs listed under the Acts.\(^{78}\) Although the Court recognized

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\item 68. \textit{Id.} at 1250.
\item 69. \textit{Id.} at 1250-51.
\item 70. \textit{See Regulating Nonfederal Property, supra note 2, at 183.}
\item 71. 101 S. Ct. 2352 (1981). \textit{In Virginia Surface Mining}, an association of coal producers brought a pre-enforcement challenge to the constitutionality of the Surface Mining Control and Reclamation Act. \textit{Id.} at 2354. The association's takings argument claimed that the Act's performance standards for "steep-slopes" (which required an operator to return a site to its "approximate original contour"), and provision prohibiting mining in certain locations, violated the fifth amendment's just compensation clause on its face. \textit{Id.} at 2370. The Supreme Court rejected the association's argument, since the Act did not deny the owners the economically viable use of their land. \textit{Id.}
\item 72. 660 F.2d at 1255.
\item 73. 101 S. Ct. at 2370.
\item 75. 444 U.S. 51 (1979).
\item 76. 660 F.2d at 1256.
\item 77. 444 U.S. at 52-52.
\item 78. \textit{Id.} at 53-54.
\end{itemize}
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this could substantially affect the value of this property, it stated: The regulations challenged here do not compel the surren-
der of the artifacts, and there is no physical invasion or restraint upon them. Rather, a significant restriction has been imposed on one means of disposing of the artifacts. But the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full “bundle” of property rights, the destruction of one “strand” of the bundle is not a taking, because the ag-
gregate must be viewed in its entirety.\textsuperscript{79}

It follows from \textit{Allard} that the mere conditioning of the sale of property would be only “one strand” in the property owners’ “full bundle of rights,” and the Eighth Circuit was correct in refusing the takings challenge in \textit{Minnesota v. Block}.

\textbf{The Takings Clause as a Limitation on Congress’ Property Clause Power?}

As demonstrated in \textit{Minnesota v. Block}, Congress has broad powers to regulate under the property clause. Given the extent of this power, it is easy to predict that Congress will use the property clause as a power source for regulation with increasing frequency. With such increased federal regulation, courts will be forced to begin defining the limits of Congress’ power under the property clause.\textsuperscript{80} One such limitation on Congress’ power may be the takings clause.\textsuperscript{81}

For example, in \textit{Minnesota v. Block} the court viewed the conditioning of the sale of property as only one “strand” in a “full bundle” of property rights.\textsuperscript{82} The court did not consider other rights that were taken from private property owners, including the right to use snowmobiles and motor boats. If the court had considered these factors, perhaps a different result would have been reached. The question that remains after \textit{Minnesota v. Block} is the extent to which Congress can regulate activities on private property under the property clause without violating the takings clause of the fifth amendment. \textit{Minnesota v. Block} suggests the Congress’ power will have few restrictions.\textsuperscript{83}

\begin{footnotes}
\item[79.] Id. at 65-66.
\item[80.] \textit{Regulating Nonfederal Property}, supra note 2, at 183.
\item[81.] U.S. \textsc{Const.} amend. V. When a state complains of federal regulation of state-owned property, the Supreme Court has stated that federal legislation under the property clause necessarily overrides conflicting state law. Kleppe \textit{v. New Mexico}, 426 U.S. 529, 543 (1976); see also McKelvey \textit{v. United States}, 260 U.S. 353, 359 (1922). Thus, the supremacy clause serves as no real limitation on Congress’ power under the property clause.
\item[82.] 660 F.2d at 1256.
\item[83.] Id. at 1248.
\end{footnotes}
CONCLUSION

*Minnesota v. Block* extends the line of cases that give Congress broad powers under the property clause. The court allowed federal regulation of activities on nonfederal property when such regulation furthers the purpose for which Congress designated the federal lands. The court declined to hold that such regulation constituted a taking under the fifth amendment.

If Congress continues to pass even more extensive regulations using the property clause, the courts will be forced to rule on the limits of that power. Given the expansive interpretation the Eighth Circuit and other courts have given the property clause in the past, one of the only real limitations on Congress' power to regulate nonfederal property may be the takings clause of the fifth amendment. Thus, in the future the courts will have to determine what degree of federal regulation will constitute a taking under the fifth amendment. The decision in *Minnesota v. Block* suggests that the courts will tolerate even more extensive regulation under the property clause in the future.

*Gary D. Blackford—'82*

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84. See notes 45-66 and accompanying text *supra*.

85. Professor Eugene R. Gaetke (Assistant Professor of Law at the University of Kentucky) stated that the problems of defining the limits of *Camfield* will be the subject of a later article. See *Regulating Nonfederal Property, supra* note 2, at 183.