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INTRODUCTION

Suppose that a single landowner held approximately thirty percent of all land in the United States. With such wealth, the owner might persuade the government to create extraordinary rules to benefit him or her. For example, the owner might demand exemption from the doctrine of adverse possession because of the expense associated with monitoring the boundaries. Further, if the owner held the vast majority of the total land in one state, the state legislature and fellow citizens might react to the demands for special treatment with disdain, if not outright hostility. They might even resort to condemning the lands to break up the owner's monopoly.[1]

There is such a landowner with special rules that benefit it, namely the United States. The United States owns land in every state, approximately thirty percent of all of the land in the United States, and approximately eighty percent of the land in the state of Nevada.[2] Courts have created special rules

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1. *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241-43 (1984).

2. *See* BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, PUBLIC LAND STATISTICS 2000, at 7-10 tbl.1-3 (2001) (showing that in fiscal year 1999 the United States owned 27.7% of the land in the states and 82.9% of the land in Nevada). This figure excludes land that the United States holds in trust for Indian tribes and individual Indians. Because of the unique rules that surround the federal government's relationship with Indian tribes and individual Indians, these problems are for the most part excluded from the analysis pre-

for the United States, relieving it, for example, from the doctrines of adverse possession and prescription.[3] Moreover, the courts have held that the United States may take actions on its lands that an ordinary landowner could not.[4] The rules concerning eminent domain also favor the United States greatly. While the federal government may use its own power of eminent domain to acquire land for any public purpose,[5] including lands owned by a state,[6] its own lands remain free from the state power of eminent domain.[7] Historically, the Supreme Court has described the United States's power over its property as "without limitation,"[8] although more recently the Court acknowledged that the "furthest reaches of [this power] have not yet been definitively resolved."[9] This acknowledgement poses an obvious question: What are the "furthest reaches" of the power that the Court has otherwise described as "without limitation"?

Recent decisions by the Supreme Court make this inquiry especially timely. Until recently, most scholars believed that Congress possessed almost unlimited power under the Commerce Clause,[10] making it unnecessary to explore other constitutional foundations for federal legislation. Then came the Su-

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sented in this Article. The federal government's relationship with Indian tribes is analyzed mostly under the Indian Commerce Clause. *See* U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power to regulate commerce "with the Indian Tribes").

3. *See, e.g.*, United States v. California, 332 U.S. 19, 40 (1947). In that case, the Supreme Court stated,

> The [Federal] Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act.

Id.

4. *See, e.g.*, Hunt v. United States, 278 U.S. 96, 100-01 (1928) (upholding the culling of a deer herd on federal property in violation of state game laws).

5. *See* United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 679 (1896); Kohl v. United States, 91 U.S. 367, 371-72 (1875).

6. *See* United States v. Carmack, 329 U.S. 230, 242 (1946).

7. *See* Minnesota v. United States, 305 U.S. 382, 384-87 (1939) (holding that a state cannot condemn lands that the United States owns in trust for Indians unless authorized to do so by the Secretary of the Interior).

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

9. Kleppe v. New Mexico, 426 U.S. 529, 539 (1976).

10. U.S. CONST. art. I, § 8, cl. 3.

preme Court's decision in *United States v. Lopez*.[11] In that case, the Court invalidated a statute criminalizing the possession of a firearm within 1000 feet of a school.[12] *Lopez* marked the first time that the Court had held an act unconstitutional as exceeding Congress's authority under the Commerce Clause since the New Deal. *Lopez* and its progeny have raised Commerce Clause issues with respect to numerous federal statutes and regulations, including those in the environmental and land-use fields.[13] The District of Columbia and Fourth Circuits recently considered whether applications of the Endangered Species Act exceeded Congress's authority under the Commerce Clause. Both courts eventually upheld the challenged applications of the statute, but only over vigorous dissents.[14]

Curiously, the courts and commentators have paid little attention to the federal government's power over its own property, a power that the Constitution grants to the federal government independent of its power to regulate interstate commerce. The federal government's power over its own property resides primarily in the Property Clause, which provides in full: "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; and nothing in this Constitution shall be so construed as to Prejudice any

11. 514 U.S. 549 (1995).

12. *See id.* at 551.

13. *See, e.g.*, Solid Waste Agency v. United States Army Corps of Eng'rs, 121 S. Ct. 675, 683-84 (2001) (striking down an administrative interpretation of "navigable waters" in the Clean Water Act in part because the interpretation raised significant constitutional questions); *see also* United States v. Morrison, 529 U.S. 598, 617-19 (2000) (invalidating the Violence Against Women Act because it exceeded Congress's power to regulate interstate commerce).

14. *See* Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000), *cert. denied*, 121 S. Ct. 1081 (2001); Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997). Professor John Copeland Nagle reviewed the D.C. Circuit's decision in the *Michigan Law Review* and created a thoughtful Commerce Clause justification for the Endangered Species Act. *See* John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174, 191-214 (1998); *see also* Eric Brignac, Recent Development, *The Commerce Clause Justification of Federal Endangered Species Protection:* Gibbs v. Babbitt, 79 N.C. L. REV. 873 (2001). Other commentators have examined the validity of the Endangered Species Act under the treaty power. *See, e.g.*, Gavin R. Villareal, Note, *One Leg to Stand on: The Treaty Power and Congressional Authority for the Endangered Species Act After* United States v. Lopez, 76 TEX. L. REV. 1125 (1998); Omar N. White, Comment, *The Endangered Species Act's Precarious Perch: A Constitutional Analysis Under the Commerce Clause and the Treaty Power*, 27 ECOLOGY L.Q. 215 (2000).

Claims of the United States or of any particular State."[15] Under this Clause, Congress has the legislative authority to govern its own property as well as the property of others that may affect federal lands.[16] Indeed, the Court has described the power broadly in almost every case discussing the Clause. These cases conclude that the federal government possesses both proprietary and sovereign powers over its property, can regulate activities on privately owned lands that affect its lands, and exercises the equivalent of the police power in this area.[17] The courts of appeals have further extended the reach of the Property Clause to cover private activities that occur on state-owned lands.[18]

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15. U.S. CONST. art. IV, § 3, cl. 2. Although I will refer to this as the "Property Clause," others refer to it as the "Territorial Clause." The Constitution also provides for federal authority over what is now the District of Columbia and other federal enclaves in the so-called "Enclave Clause." This clause provides Congress the power

> [t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.

U.S. CONST. art. 1, § 8, cl. 17. Although I will explore the implications of the differences between these two clauses throughout this Article, there are two primary differences between the Property Clause and the Enclave Clause. First, for land to fall under the Enclave Clause, the affected state must consent. Much of the case law in this area deals with the question of whether the affected state has made a cession sufficient to grant exclusive jurisdiction to the United States or the effect of such a cession on private parties. *See, e.g.*, Paul v. United States, 371 U.S. 245, 263-70 (1963); James v. Dravo Contracting Co., 302 U.S. 134, 141-49 (1937); Surplus Trading Co. v. Cook, 281 U.S. 647, 652 (1930); Arlington Hotel Co. v. Fant, 278 U.S. 439, 454-55 (1929). Second, the Enclave Clause by its terms gives Congress exclusive legislative authority. By contrast, states retain the ability to legislate over federal property not covered by the Enclave Clause, subject, of course, to the Supremacy Clause. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ."). The Supreme Court stated this second conclusion in its decision in *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976), but that conclusion is subject to controversy.

16. *See, e.g.*, United States v. Alford, 274 U.S. 264, 267 (1927); Camfield v. United States, 167 U.S. 518, 528 (1897).

17. *See, e.g., Camfield*, 167 U.S. at 525-26.

18. *See, e.g.*, United States v. Armstrong, 186 F.3d 1055, 1061-62 (8th Cir. 1999), *cert. denied*, 529 U.S. 1018, *and cert. denied*, 529 U.S. 1033 (2000); Minnesota *ex rel.* Alexander v. Block, 660 F.2d 1240, 1249-51 (8th Cir. 1981); United States v. Lindsey, 595 F.2d 5, 6 (9th Cir. 1979) (per curiam).

The breadth of power conferred by the Property Clause as presently interpreted suggests that Congress could, if it wished, become more aggressive in regulating federal property despite otherwise applicable state law. This possibility raises interesting questions. What if Congress decided to authorize an activity on federal lands that would otherwise contravene state law? For example, suppose that the federal government licensed casino gambling on national forests lying within states that prohibit gambling. Could the state object and bar this use? Moreover, what about the ability of the federal government to protect federal property from activities that occur off of, or extraterritorial to, federal lands? Suppose that the federal government enacted a statute much like the one invalidated in *Lopez*, except that it prohibited people from carrying firearms within 1000 feet of a federal building. Or suppose that the federal government regulated pollution wholly outside the provisions of the Clean Air Act[19] because it found such pollution damaging to national parks.[20] Finally, suppose that the United States wished to enhance the visitor experience to an existing national park. What if, to further this goal, Congress directed the National Park Service to preserve the visual corridor leading to the park; expressly banned fast food restaurants, trinket shops, and other unsightly structures; and devised clear aesthetic requirements for nearby buildings that were more restrictive than local zoning laws? With regard to each of these actions—permitting casino gaming on federal lands, banning firearms within 1000 feet of a federal building, regulating air pollution sources directly, or establishing aesthetic zoning to protect the visual corridor to a national park—one can imagine that certain local or state governments would vigorously pro-

19. *See* 42 U.S.C. §§ 7401-7671q (1994). The Clean Air Act has special provisions concerning the air quality for federal lands, but these are not directly germane to the question raised here. For a more thorough examination, see *infra* note 532.

20. As early as 1980, the National Park Service reported to Congress that acid rain was a threat to the future health of the national parks. *See* OFFICE OF SCI. & TECH., NAT'L PARK SERV., STATE OF THE PARKS 1980: A REPORT TO THE CONGRESS 34 (1980). The problems of air pollution in the national parks—including both acid rain and visibility problems—have been discussed in the legal literature as well. *See* Robert L. Glicksman, *Pollution on the Federal Lands I: Air Pollution Law*, 12 UCLA J. ENVTL. L. & POL'Y 1 (1993); William J. Lockhart, *External Threats to Our National Parks: An Argument for Substantive Protection*, 16 STAN. ENVTL. L.J. 3, 40 (1997); Diane M. Dale, Note, *The Boundary Dilemma at Shenandoah National Park*, 16 VA. ENVTL. L.J. 607, 626-27 (1997).

test. If faced with these challenges, a federal court might invalidate these acts under the Commerce Clause. An alternative argument based on the Property Clause, however, suggests that courts should sustain these hypothetical acts.

Despite the potentially sweeping authority that the Property Clause vests in the federal government, scholars of constitutional law have largely ignored the Clause.[21] For example, many took notice when the Fourth Circuit struck down the Violence Against Women Act as exceeding congressional authority under the Commerce Clause.[22] Before the Supreme Court's decision on appeal, law professor and legal commentator Jeffrey Rosen questioned how much the Supreme Court's reanalysis of its Commerce Clause jurisprudence would change the legal landscape:

> [I]f the Supreme Court strikes down the Violence Against Women Act on [Commerce Clause grounds], it will call into question scores of other federal laws and embolden states-rights judges on lower courts to declare war on Congress. The Endangered Species Act, for example, regulates violence against animals, many of whom don't engage in interstate travel. Will it soon be unconstitutional for Congress to prohibit shooting a puma for sport in a national park?[23]

Now that the Supreme Court has affirmed the Fourth Circuit and invalidated the Violence Against Women Act,[24] is the situation as dire as Rosen predicted? Has the Court tipped the scale of federal-state relations so far toward state control that Congress now lacks the authority to "prohibit shooting a puma

21. The leading comprehensive treatises on constitutional law devote scant attention to the Property Clause. *See* 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 3.6, at 362 n.6, § 3.11, at 390-93 (3d ed. 1999); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-8, at 848-50 (3d ed. 2000) (lumping the Property Clause in with congressional power over bankruptcies). The leading casebooks used for teaching constitutional law either devote little or no attention to the subject. Searching four casebooks for a reference to *Kleppe v. New Mexico* in the table of cases picks up no citations. *See* PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 1562 (3d ed. 1992); DANIEL A. FARBER ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW xxxviii (2d ed. 1998); KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW xxxiv (14th ed. 2001); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1572 (4th ed. 2001). One casebook that does reprint an excerpt of *Kleppe* is WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW 210-12 (11th ed. 2001).

22. *See* Brzonkala v. Va. Polytechnic Inst. & State Univ., 169 F.3d 820, 826 (4th Cir. 1999), *aff'd sub nom.* United States v. Morrison, 529 U.S 598 (2000).

23. Jeffrey Rosen, *Hyperactive*, THE NEW REPUBLIC, Jan. 31, 2000, at 20.

24. United States v. Morrison, 529 U.S. 598 (2000).

for sport in a national park?"[25] In a word, no. Rosen's prediction ignored the fact that the Property Clause has always provided and continues to vest Congress with such authority.

This sort of oversight is particularly unfortunate because of the immense physical and legal scope of the Property Clause. Physically, the federal government owns vast landholdings. Although much of this land is concentrated in the western continental United States and Alaska, the federal government owns some real property in all fifty states, and it has the power to acquire property within any state for public purposes.[26] Legally, even if the Property Clause does not confer broad power over extraterritorial activities, it nevertheless empowers the federal government to take action on its own lands in direct contravention of state law. At a time when the judiciary, the academy, and the bar vigorously debate the proper jurisdictional relations between the United States and the states, the federal government's property and related exercises of federal authority in the states should cause great interest. Nevertheless, the Property Clause has escaped widespread attention, especially among scholars of constitutional law.

The academic commentary that does exist concerning the Property Clause has generally taken two approaches. One approach uncritically assumes that the federal government possesses broad power to regulate and protect federal lands, and it contemplates federal regulation of private property within a state and outside the boundary of federal property.[27] This body

25. Rosen, *supra* note 23, at 20.

26. *See* United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 681 (1896) ("It is, of course, not necessary that the power of condemnation for [preserving sites of historical importance like the battlefield at Gettysburg] be expressly given by the Constitution."); *see also* Kohl v. United States, 91 U.S. 367, 374 (1875) (stating that the federal government's right of eminent domain is a plenary power not to be "diminished by a State").

27. *See* Harry R. Bader, *Not So Helpless: Application of the U.S. Constitution Property Clause to Protect Federal Parklands from External Threats*, 39 NAT. RESOURCES J. 193, 201-05 (1999); Eugene R. Gaetke, *The Boundary Waters Canoe Area Wilderness Act of 1978: Regulating Nonfederal Property Under The Property Clause*, 60 OR. L. REV. 157, 167-69 (1981) [hereinafter Gaetke, *Boundary Waters*]; Joseph L. Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239, 250-55 (1976); James J. Vinch, *The Telecommunications Act of 1996 and Viewshed Protection for the National Scenic Trails*, 15 J. LAND USE & ENVTL. L. 93, 126-30 (1999). Two articles that expressly take on the question of the overall scope of the federal property power are Eugene R. Gaetke, *Congressional Discretion Under the Property Clause*, 33 HASTINGS L.J. 381 (1981) [hereinafter Gaetke, *Congressional Discretion*], and Blake Shepard, Comment, *The Scope of Congress' Con-*

of writing—which the Article will refer to as the broad view—typically ignores the history and potential expanse of the Clause. The second category of literature grapples with the history and breadth of the Clause, but argues that courts should construe the power narrowly. This body of works—which the Article will refer to as the narrow view—claims that the federal government's power over its own property is that of a mere proprietor, and not that of a sovereign.[28] This school of thought asserts that, at a minimum, the states should generally control activities on federal lands. It views extraterritorial assertions of federal power skeptically at best. Unfortunately, neither body of writing satisfactorily treats the arguments of the other.[29]

This Article will urge that scholars adopting the broad view reached the correct result, but that the proper basis for their result lies in the historical work analyzed improperly by scholars adopting the narrow view. Contrary to the narrow view, the founders intended the Property Clause as a broad grant of power to the federal government. In recognition of this intent, the Supreme Court has correctly and deliberately inter-

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stitutional Power Under the Property Clause: Regulating Non-Federal Property to Further the Purposes of National Parks and Wilderness Areas, 11 B.C. ENVTL. AFF. L. REV. 479 (1984).

28. *See* Albert W. Brodie, *A Question of Enumerated Powers: Constitutional Issues Surrounding Federal Ownership of the Public Lands*, 12 PAC. L.J. 693, 706-15 (1981); David E. Engdahl, *State and Federal Power over Federal Property*, 18 ARIZ. L. REV. 283, 361-62 (1976); Ronald F. Frank & John H. Eckhard, *Power of Congress Under the Property Clause to Give Extraterritorial Effect to Federal Lands Law: Will "Respecting Property" Go the Way of "Affecting Commerce"?*, 15 NAT. RESOURCES LAW. 663, 678-84 (1982); Robert E. Hardwicke et al., *The Constitution and the Continental Shelf*, 26 TEX. L. REV. 398, 426-32 (1948); Carolyn M. Landever, *Whose Home on the Range? Equal Footing, the New Federalism and State Jurisdiction on Public Lands*, 47 FLA. L. REV. 557, 576-84 (1995); C. Perry Patterson, *The Relation of the Federal Government to the Territories and the States in Landholding*, 28 TEX. L. REV. 43, 60-62 (1949); Louis Touton, Note, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 COLUM. L. REV. 817, 821-25 (1980).

29. Two exceptions to this statement are Eugene R. Gaetke, *Refuting the "Classic" Property Clause Theory*, 63 N.C. L. REV. 617 (1985) [hereinafter Gaetke, *Refuting the "Classic" Theory*], and Dale D. Goble, *The Myth of the Classic Property Clause Doctrine*, 63 DENV. U. L. REV. 495 (1986). Both articles are responses primarily to Engdahl, *supra* note 28. In another context, Professor Charles Wilkinson advocated a broad reading of the Property Clause, but also conceded that Professor Engdahl's argument about its scope "may have been what the framers of the Constitution intended." Charles F. Wilkinson, *The Field of Public Land Law: Some Connecting Threads and Future Directions*, 1 PUB. LAND L. REV. 1, 9 (1980). As the text below demonstrates, I disagree with Professor Wilkinson's assessment.

preted the Clause broadly. The Property Clause, properly understood, recognizes the United States as both proprietor and sovereign over its property.

This conclusion, however, does not fully endorse the analysis associated with the broad view. For the most part, the proponents of the broad view have failed to appreciate fully the implications of their argument. If the Court has properly read the Property Clause broadly, then one must consider its potential reach and limitations. Few have tried to determine the outer limits of the power that the Supreme Court has said is "without limitation."[30]

In attempting to define the outer limits and implications of the Property Clause power, this Article will proceed in three Parts. Part I reviews the history and development of the Clause from its antecedents under the Articles of Confederation, to the debates over the ratification of the Constitution, and through the development of the Supreme Court's jurisprudence interpreting its reach. Using aspects of presently underanalyzed history, this Part refutes the narrow view of the Property Clause that vests the United States only with the powers of an ordinary proprietor. Rather, this Part concludes that the framers intended for the United States to have both sovereign and proprietary power over its property, and that the Court has, with one exception, properly interpreted the Clause broadly in accordance with these basic principles. Readers who accept these propositions readily may wish to skip to Part II, which considers the intrinsic and extrinsic limitations on the federal government's authority under the Property Clause. It concludes that the federal government's power over its own property or activities thereon is most analogous to the spending power.[31] As for federal regulation of extraterritorial activities affecting federal lands, courts should review such actions by drawing analogies to Commerce Clause jurisprudence. Part III then applies this reformulated view of the Property Clause power, briefly sketching its implications for federal land management and the relationship between the federal government and the states.

30. *See* Gaetke, *Congressional Discretion*, *supra* note 27; Sax, *supra* note 27, at 253-55; Shepard, *supra* note 27, at 533-37.

31. U.S. CONST. art. I, § 8, cl. 1 (granting Congress the power to raise taxes and spend for the general welfare).

I. THE HISTORY AND DEVELOPMENT OF THE PROPERTY CLAUSE

Any argument that contends that the federal government has extensive regulatory jurisdiction within the states will necessarily raise some eyebrows. At the very minimum, however, the Property Clause vests sovereign power in the federal government to control activities on and dispositions of its own lands, and exercises of this authority preempt state control. These conclusions stem from the Property Clause itself, which grants to Congress the power "to dispose of" and to make "*all* needful Rules and Regulations respecting the Territory or other Property belonging to the United States,"[32] and from the Supremacy Clause, which provides that the Constitution and laws made pursuant to it are the "supreme Law of the Land."[33] The Property Clause's unconditional wording resembles that of other broadly interpreted clauses, such as the power over immigration,[34] patents,[35] or foreign relations.[36]

Should words alone not prove persuasive, the case law developed under the Property Clause should convince the skeptic of the Clause's broad grant of power. In almost all of its cases—and especially in a series of cases decided after the Civil War—the Supreme Court described the power over federal property granted in the Property Clause in sweeping terms. Although the Court has acknowledged that the "full scope of this paragraph has never been definitely settled," it has nevertheless held that "[p]rimarily, at least, it is a grant of power to the United States of control over its property."[37] This control can take myriad forms. "The United States can prohibit absolutely or fix the terms on which its property may be used. As it can withhold or reserve the land it can do so indefinitely."[38] Indeed, "[t]he power over the public land . . . entrusted to Con-

32. *Id.* art. IV, § 3, cl. 2 (emphasis added).

33. *Id.* art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . .").

34. *Id.* art. I, § 8, cl. 4 (granting to Congress the power "[t]o establish an uniform Rule of Naturalization").

35. *Id.* cl. 8 (granting Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

36. *See, e.g.*, United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936).

37. Kansas v. Colorado, 206 U.S. 46, 89 (1907).

38. Light v. United States, 220 U.S. 523, 536 (1911).

gress [by the Property Clause] is without limitations."[39] This power exceeds those of an ordinary proprietor because it resembles the police power possessed by the states.[40] Finally, the Court has held that the federal government's authority over its own property displaces state and local authority:

> [Although] for many purposes a State has civil and criminal jurisdiction over lands within its limits belonging to the United States . . . this jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use and to prescribe in what manner others may acquire rights in them.[41]

In this regard, the federal government "exercises the powers both of a proprietor and of a legislature over the public domain."[42] While controversy surrounds assertions of federal power over extraterritorial private and state activities, it should be generally accepted that the federal government has broad authority over its own property and can displace conflicting exercises of state authority over activities occurring directly on federal lands.

Nevertheless, holders of the narrow view of the Property Clause assert that the federal government does not have this broad authority, or at least that the federal government would not have this power if not for improper court interpretations. Those who read the Property Clause narrowly range from extremists to more subtle critics. The extremists take several views. Some extremists argue that the United States can only own property within a state if that property falls under the En-

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

40. As the Court stated in *Utah Power & Light Co. v. United States*, 243 U.S. 389 (1917),

> [T]he inclusion within a State of lands of the United States does not take from Congress the power to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them, even though this may involve the exercise in some measure of what commonly is known as the police power.

Id. at 405; *see also* Camfield v. United States, 167 U.S. 518, 525 (1897) ("The general Government doubtless has a power over its own property analogous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case.").

41. *Utah Power & Light*, 243 U.S. at 404; *see also Camfield*, 167 U.S. at 525-26 ("[W]e do not think the admission of a Territory as a State deprives [the federal government] of the power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power . . . .").

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

clave Clause, which provides Congress with the authority to legislate for the District of Columbia and other federal enclaves.[43] Otherwise, the vast public domain that existed in states other than the original thirteen—and which still exists in many western states—should belong to the states and not the United States.[44] Other extremists assert that the United States retains only the power to dispose of its property through sales, but that it cannot retain the property for the long term.[45] More subtle advocates of the narrow view concede that the United States owns the public domain and can retain it indefinitely, but argue that the federal government has, with some exceptions, only the powers of an ordinary proprietor over its property.[46]

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43. *See supra* note 15 (providing the full text of the Enclave Clause).

44. *See* Patterson, *supra* note 28, at 61; *see also* Landever, *supra* note 28, at 605-12 (arguing that the equal footing doctrine appears to require transfer of all retained lands to states, but recognizing that such transfer is presently unworkable). The extreme position that the federal government cannot own any land within a state except for those lands described by the Enclave Clause is frequently associated with the movements variously known as the Sagebrush Rebellion and the County Supremacy Movement. For an extended and thorough argument against this view, see Paul Conable, Comment, *Equal Footing, County Supremacy, and the Western Public Lands*, 26 ENVTL. L. 1263 (1996); *see also* Richard D. Clayton, Note, *The Sagebrush Rebellion: Who Should Control the Public Lands?*, 1980 UTAH L. REV. 505. Although the County Supremacy Movement enjoyed much popularity for a time, it lacks any legal basis. *See* United States v. Gardner, 107 F.3d 1314 (9th Cir. 1997) (holding that the United States validly owns public lands within a state's boundaries and is not required to hold the land in trust for the establishment of future states).

45. *See, e.g.*, Brodie, *supra* note 28, at 721-22.

46. *See* Engdahl, *supra* note 28, at 296-300. Engdahl presented perhaps the most elaborate theory concerning federal and state control of federal lands. According to Engdahl, one could summarize the "classic property clause doctrine" in two propositions:

> [A]s to federal property covered by [the Enclave Clause], the governmental jurisdiction of the United States was by constitutional prescription exclusive; as to federal property covered only by the [Property Clause], however, the states enjoyed general governmental jurisdiction and the United States had only a limited power akin to that of a proprietor.

Id. at 296. Engdahl acknowledged that the United States could own land within the states, and that it could continue to own ungranted or otherwise unceded lands. *Id.* at 295. To take account of certain cases that appear to go against his two propositions, Engdahl subjected his general rules to four exceptions. First, Engdahl conceded that federal law governed private acquisition of interests in federal land. *See id.* at 296. Second, the federal government could exercise legislative jurisdiction over lands covered by the Property Clause (as opposed to the Enclave Clause) if the lands were used to further an enumerated power of Congress. Thus, if the federal government acquired land

All of the narrow readers of the Property Clause rest their claims on history, some case law, the structure of the Constitution, and considerations of federalism. Their history begins with their understanding of the acquisition of lands that some of the original thirteen states claimed in the West.[47] It then turns to an account of cases from the nineteenth and early twentieth century that appear to limit federal authority over federal property. The authorities that they claim bolster their interpretation include *Pollard v. Hagan* and other cases interpreting the equal footing doctrine,[48] *Fort Leavenworth Railroad*

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to run a post office, it could exercise legislative jurisdiction over the post office even though the state had not made the cession of jurisdiction necessary for the Enclave Clause to apply because running a post office furthers an enumerated power. *Id.* at 297-99 (discussing *Kohl v. United States*, 91 U.S. 367 (1875)). Engdahl traced this second exception to his general rule to the Necessary and Proper Clause and the doctrine of intergovernmental immunities, and not to any independent power that the Property Clause may create. *Id.* at 299. Third, Engdahl argued that states could make limited cessions of legislative jurisdiction to the federal government that would not satisfy the Enclave Clause but would confer jurisdiction to exercise authority under the Property Clause. *See id.* at 304-06 (tracing the development of the doctrine that states could cede legislative jurisdiction over lands that the federal government would manage under the Property Clause). Fourth, the federal government could make legislative rules to protect federal property from harm, but only rules that a landowner could obtain through private litigation. *See id.* at 306-08 (discussing *Camfield v. United States*, 167 U.S. 518 (1897)).

47. *See, e.g.*, Brodie, *supra* note 28, at 695-98; Engdahl, *supra* note 28, at 290-91; Patterson, *supra* note 28, at 43-57.

48. 44 U.S. (3 How.) 212 (1845). The equal footing doctrine is the rule that provides that new states are admitted to the Union with the same attributes of sovereignty as the original thirteen states. The principal practical application of the doctrine is that it vests all submerged lands under inland navigable waterways in the new state. *See* United States v. Alaska, 521 U.S. 1, 5 (1997); Utah Div. of State Lands v. United States, 482 U.S. 193, 195-98 (1987). Title to lands beneath the ocean nevertheless remains in the United States absent legislation, *see* United States v. California, 332 U.S. 19 (1947), and the United States can reserve submerged lands or grant them to private parties before statehood, and the submerged lands will consequently not pass to the new state upon its admission. *See* Idaho v. United States, 121 S. Ct. 2135, 2142-43 (2001); United States v. Alaska, 521 U.S. at 34-36 (upholding executive reservation); Shively v. Bowlby, 152 U.S. 1, 48 (1894) (holding that "Congress has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States"). The Court has also extended the equal footing doctrine beyond the submerged lands context. *See* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 203-04 (1999) (discussing the equal footing doctrine in the context of state management of natural resources); Coyle v. Smith, 221 U.S. 559 (1911) (holding unconstitutional the restriction in the state admission act that prohibited the state from relocating the state capital).

Co. v. Lowe,[49] *Ward v. Race Horse*,[50] *Kansas v. Colorado*,[51] *Omaechevarria v. Idaho*,[52] and *Colorado v. Toll*.[53] Structurally, some of these scholars argue that the placement of the Property Clause in Article IV, rather than Article I, supports the narrow view. While Article I enumerates Congress's central powers, Article IV grants Congress authority concerning new states, indicating that the Property Clause power relates only to transferring land to new states, not to land retained by the United States.[54] Their federalism claims center around their concern that the vast landholdings of the United States will give it too much power to control activities within a state. Parts II and III will discuss these arguments more thoroughly.

For supporters of broad federal authority over federal lands, the historical argument takes a different form, to the extent that it is made at all. Although this view also begins with evidence from western land claims and constitutional convention debates, it primarily reinterprets the historical evidence offered by the opponents of a broader interpretation.[55] The proponents of the broad view then turn to the case law following the ratification of the Constitution, especially *United States v. Gratiot*,[56] and then to the post-Civil War cases quoted earlier,[57] relying heavily on such cases as *Camfield v. United States*[58] and *United States v. Alford*.[59] The defense of the broad reading typically concludes with a defense of *Kleppe v. New Mexico*.[60] Usually, however, proponents of the broad view ignore the historical arguments and, relying on the cases that read the Clause broadly, argue for some application of the Clause to a particular situation.[61]

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49. 114 U.S. 525 (1885).
50. 163 U.S. 504 (1896).
51. 206 U.S. 46 (1907).
52. 246 U.S. 343 (1918).
53. 268 U.S. 228 (1925).
54. *See* Brodie, *supra* note 28, at 720-21; Landever, *supra* note 28, at 577-78.
55. *See, e.g*, Gaetke, *Refuting the "Classic" Theory*, *supra* note 29, at 623-38; Goble, *supra* note 29, at 511-32.
56. 39 U.S. (14 Pet.) 526 (1840).
57. *See supra* notes 37-42 and accompanying text.
58. 167 U.S. 518 (1897).
59. 274 U.S. 264 (1927).
60. 426 U.S. 529 (1976).
61. *See, e.g.*, Bader, *supra* note 27 (arguing that the National Park Service does not need additional legislative authority to protect national parks from external threats because of the authority conferred by the Property Clause);

The historical debate concerning the origins and interpretation of the Property Clause properly begins with the disputes over the western territories claimed by some of the states. For the most part, however, scholars on both sides lose the richness of the debates that led to the drafting of the Articles of Confederation and the subsequent role that the western land claims played in the drafting and ratification of the Constitution. These arguments form an important basis for understanding the early case law and any apparent confusion over whether the Property Clause should be read narrowly or broadly. Sadly, the modern Property Clause debate also largely ignores the one case in which the Supreme Court definitively interpreted the Property Clause narrowly, namely the *Dred Scott* decision.[62] That decision provides the Court's sole rejection of the broad reading of the Property Clause, and the Court's subsequent repudiation of the decision supports the broader view. In tracing the development of modern Property Clause doctrine, this Part augments the historical points made elsewhere to show that courts properly interpret the Property Clause broadly.

The historical material that follows will not demonstrate, however, that the founders intended to make a broad grant of power to the federal government to control extraterritorial activities that affect federal lands. The historical documents give little or no evidence as to whether the founders envisioned this application of the Property Clause. This assertion should come as no surprise, for, as the Supreme Court has observed, "[t]he Federal Government undertakes activities today that would have been unimaginable to the Framers . . . ."[63] Nevertheless,

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Gaetke, *Boundary Waters*, *supra* note 27 (arguing that Congress had authority under the Property Clause to create protections for the Boundary Waters Canoe Area Wilderness); Sax, *supra* note 27, at 254-55 (arguing for the use of the Property Clause power to increase protection for national parks from peripheral threats); Vinch, *supra* note 27, at 126-30 (arguing that Congress could, under the Property Clause, authorize the National Park Service to regulate telecommunication towers visible from national trails).

62. Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

63. New York v. United States, 505 U.S. 144, 157 (1992). So that I am not accused of quoting this language out of context, the full quotation is:

> The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses; first, because the Framers would not have conceived that *any* government would conduct such activities; and second, because the Framers would not have believed that the *Federal* Government, rather than the States, would assume such responsibilities. Yet the powers conferred upon the Federal Government by the Constitution were phrased in language broad

the historical setting of the Property Clause, the documentary evidence that survives, and early interpretations of the Clause all confirm that the founders envisioned this power broadly. The following historical examination ultimately demonstrates that a broad view of the Property Clause is not inconsistent with the view of the founders.

A. THE DRAFTING AND EARLY BROAD INTERPRETATIONS OF THE PROPERTY CLAUSE

The Property Clause emerged from the intense debate over the fate of the western land grants of the original states.[64] Some states—Connecticut, Georgia, Massachusetts, New York, Virginia, and the Carolinas—had acquired extensive grants from the British Crown that extended far into the West, even to the Pacific Ocean or the South Seas.[65] The others—Delaware, Maryland, New Hampshire, New Jersey, Pennsylvania, and Rhode Island and Providence Plantations—did not have such grants. Before the Revolutionary War, the British Crown terminated the grants that crossed the continent at the Mississippi after Britain acquiesced to Spain's claim of ownership.[66] Through the Quebec Act of 1774,[67] Parliament further restricted the claims of Massachusetts, Connecticut, New York, and Virginia north of the Ohio River by transferring these lands to the province of Quebec, thus depriving the American colonies of what one scholar estimated to be over 175 million acres.[68] Eventually, the Declaration of Independence cited this transfer of land, as well as other limitations that the British had placed upon alienability of land in the West, among its justifications for severing ties with Britain.[69]

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enough to allow for the expansion of the Federal Government's role.

Id. My contention is that the Property Clause was "phrased in language broad enough to allow for the expansion of the Federal Government's role," at least with regard to federal property. *Id.*

64. For general histories of the western land claims, see THOMAS PERKINS ABERNETHY, WESTERN LANDS AND THE AMERICAN REVOLUTION (1937); PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 49-57 (1968); PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC: JURISDICTIONAL CONTROVERSIES IN THE UNITED STATES 1775-1787 (1983).

65. *See* GATES, *supra* note 64, at 49.

66. *Id.*

67. British North American Act, 1774, 14 Geo. 3, ch. 83 (Eng.).

68. GATES, *supra* note 64, at 49.

69. THE DECLARATION OF INDEPENDENCE para. 22 (U.S. 1776) ("For abolishing the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to

The Declaration of Independence staked out a united front, but in fact the question of land claims and boundary disputes fractured the states. These issues confronted the states and the new union in at least three ways. First, the boundaries between the states were not clear. For example, Pennsylvania faced two major boundary disputes: one with Connecticut over the Wyoming Valley in northeastern Pennsylvania, and another with Virginia over the region near Pittsburgh.[70] Second, the states disputed the boundaries of their western claims. The various charters granted to the states often described the same land, leading states to make grants of the same physical property to conflicting grantees. Third, and most importantly for purposes of this Article, the states without western land grants greatly resented the claims of the landed states. The non-landed states believed that the western lands should constitute a common fund for discharging the debt that the United States incurred to finance the Revolutionary War.[71] Maryland took the lead on this charge, refusing to ratify the original Articles because they did not deal effectively with the western land claims.[72] Not surprisingly, the landed states laid claim to their lands because of the terms of their grants.

Addressing these problems—and the related questions of whether new states could be created and, if so, by what authority—became one of the central concerns of the government under the Articles of Confederation and the subsequent Constitution. After experimenting with state management of the

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render it at once an example and fit instrument for introducing the same absolute rule into these Colonies."); *id.* para. 9 ("He has endeavored to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migration hither, and raising the conditions of new Appropriations of Lands.").

70. *See* ONUF, *supra* note 64, at 49-73.

71. *See* GATES, *supra* note 64, at 50-51; ONUF, *supra* note 64, at 14-15.

72. For a charming, but dated, history of Maryland's involvement with this issue, see HERBERT B. ADAMS, MARYLAND'S INFLUENCE IN FOUNDING A NATIONAL COMMONWEALTH (Baltimore, John Murphy 1877). Adams's account is called into question by the work of Merrill Jensen. *See* MERRILL JENSEN, THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 1774-1781, at 150-60, 202-05 (1940) [hereinafter JENSEN, ARTICLES OF CONFEDERATION]; Merrill Jensen, *The Cession of the Old Northwest*, 23 MISS. VALLEY HIST. REV. 27, 27 (1936) [hereinafter Jensen, *Cession*] (attributing Maryland's interest not to "patriotic abstraction and national vision" but to "hopes of the members of speculative land companies"). For a modern response to Jensen, see Lemuel Molovinsky, *Maryland and the American West at Independence*, 72 MD. HIST. MAG. 353 (1977).

western lands, the founders ultimately addressed these concerns by vesting broad authority over these lands in the federal government. The early case law and commentary interpreting the reach of the Property Clause reflected this move from state management to broad federal authority.

1. The Western Land Claims Under the Articles of Confederation and in the Debates over Ratifying the Constitution

The Articles of Confederation did not adequately address the three intertwined problems of interstate boundary disputes, conflicting land grants, and the ultimate disposition of the western lands. The omission was intentional. As originally proposed in the Continental Congress, the Articles provided that boundary disputes between the colonies would be settled by agreement or somehow left for Congress to decide.[73] During the subsequent amendment and adoption of the Articles of Confederation, the drafters stripped the national government of

73. The original draft of the Articles of Confederation as submitted to the Continental Congress on July 12, 1776, contained three provisions concerning the boundaries of the colonies and settling disputes between colonies. Article XV discussed the jurisdiction that the colonies would exercise once the boundaries were agreed to or otherwise ascertained. 5 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 550 (Worthington Chauncey Ford ed., 1906) [hereinafter JOURNALS] (resolutions and deliberations from 1776). Article XVIII granted Congress the power to settle boundary disputes between colonies, to limit the boundary of any colony that claimed its territory extended to the South Sea, to assign territories for new colonies and to dispose "of all such Lands for the general Benefit of all the United Colonies." 5 *id.* at 550-51. Article XX allowed Canada to join the confederation upon its assent to the Articles, but allowed no other colony to be admitted to the confederation unless nine colonies agreed. 5 *id.* at 554. These provisions, especially the proposed Article XVIII power of Congress to limit the boundaries of the colonies, were the subject of intense debate. *See* John Adams, Notes of Debates in the Continental Congress (1776), *reprinted in* 6 JOURNALS, *supra*, at 1076-83. When the Continental Congress considered the second draft of the Articles, it postponed consideration on all of these proposed provisions except the clause allowing Canada to join the union. *See* 5 JOURNALS, *supra*, at 680-82, 688. In the meantime, the article pertaining to the settlement of the boundaries of the states and conflicting land claims was renumbered Article XIV, and it provided that Congress would have the power of "deciding all disputes and differences now subsisting, or that hereafter may arise between two or more States concerning boundaries, jurisdictions, or any other cause whatever." 5 *id.* at 681-82. Contemporary letters of the members of the Continental Congress also reveal that the western land claims and the boundary disputes proved a huge area of contention. *See, e.g.*, 5 *id.* at 616 n.1 (reprinting a portion of a letter from John Adams to Abigail Adams where John Adams raises questions for debate).

much of this proposed authority.[74] Specifically, the Articles, as sent to the states for ratification, limited Congress's powers to settling interstate boundary disputes only upon petition by one of the affected states; settling conflicting private land claims issued by two or more states (but not the extent of any of the claims made by states to land in the West); and admitting a new colony only if nine states agreed. More importantly, no state would lose property to the United States. The proposed Articles did not give Congress the power to acquire, own, or manage land. By implication, the Articles left the western land claims in the hands of the landed states.

The nonlanded states strenuously objected to the disposition of the western land claims in the Articles of Confederation as sent to the states for ratification. Maryland moved to amend the Articles to authorize the United States to appoint commissioners who would "ascertain and restrict the boundaries of such of the confederated states which claim to extend to the river Mississippi, or South Sea."[75] Congress rejected the

74. Specifically, the Continental Congress eliminated the draft language that would have granted Congress the exclusive power to determine the western boundary of the states claiming to the Mississippi or to the South Sea. 9 JOURNALS, *supra* note 73, at 807-08 (Worthington Chauncey Ford ed., 1907) (resolutions and deliberations from 1777). Subsequently, the Continental Congress amended the boundary-settling provisions of the draft to include an elaborate, judicial-like procedure for settling interstate boundary disputes. *See* 9 *id.* at 842-43. The draft also provided that "no State shall be deprived of territory for the benefit of the United States." 9 *id.* at 843. Congress then appointed a committee to make necessary additions to the draft Articles. 9 *id.* at 885. The committee proposed that Congress have the power to settle conflicting private land grants issued by two or more states. 9 *id.* at 890. Congress incorporated this proposal into the draft articles. 9 *id.* at 899-900. The provision allowing Canada into the Confederation upon its accession to the Articles remained, as did the language stating that "no other colony shall be admitted into the same, unless such admission be agreed to by nine states"; these provisions were renumbered Article 12. 9 *id.* at 924. These paragraphs became the final resolution of these matters in the Articles as adopted by the Continental Congress, although the article containing the procedure for settling boundary disputes and conflicting land grants was renumbered Article 9. 9 *id.* at 915-19. New York and Connecticut proposed amendments to the procedure for deciding interstate boundary disputes, but these were rejected. 9 *id.* at 925-28. For a capsule history of the land claim provisions of the Articles, see Eric M. Freedman, *Why Constitutional Lawyers and Historians Should Take a Fresh Look at the Emergence of the Constitution from the Confederation Period: The Case of the Drafting of the Articles of Confederation*, 60 TENN. L. REV. 783, 822-25 (1993).

75. 11 JOURNALS, *supra* note 73, at 632 (Worthington Chauncey Ford ed., 1908) (resolutions and deliberations from 1778).

amendment.[76] Rhode Island unsuccessfully moved to amend the Articles to provide that Crown lands would become property of the United States to be "disposed of and appropriated by Congress for the benefit of the whole confederacy, reserving, however, to the states, within whose limits such crown lands may be, the entire and complete jurisdiction thereof."[77] The New Jersey delegation laid out that state's concerns about the Articles, two of which have relevance here. First, the absence of a means to settle boundary disputes between the states prompted New Jersey to request the establishment of a resolution mechanism within five years after ratification.[78] Second, New Jersey, like Rhode Island, requested the vesting of all crown lands into the common property of the United States, with jurisdiction over each parcel of land remaining in the respective state that ceded it.[79] All of the states, argued New Jersey,

> have fought and bled for it, in proportion to their respective abilities, and therefore the reward ought not to be predilectionally distributed. Shall such states as are shut out by situation from availing themselves of the least advantage from this quarter, be left to sink under an enormous debt, whilst others are enabled, in a short period, to replace all their expenditures from the hard earnings of the whole confederacy?[80]

Despite this plea, the Continental Congress rejected New Jersey's suggested amendment to the Articles.[81]

Although most of the nonlanded states eventually ratified the Articles,[82] Maryland steadfastly refused because of the western lands issue. Maryland's refusal continued even though, as early as September 1778, Congress proposed that the states with western land claims cede them to the United States.[83] On January 6, 1779, Maryland submitted to Congress its lengthy objection to the Articles, focusing entirely on the

76. 11 *id.* at 637.
77. 11 *id.* at 639.
78. 11 *id.* at 649.
79. 11 *id.* at 649-50.
80. 11 *id.* at 650.
81. 11 *id.* at 651.
82. Some of the nonlanded states noted in their ratification the unfairness of how the Articles dealt with the western lands. *See* 12 *id.* at 1162 (Worthington Chauncy Ford ed., 1908) (noting New Jersey's objection to the Articles in the resolutions and deliberations from 1778); 13 *id.* at 187 (noting Delaware's objection to the Articles in the resolutions and deliberations from 1778).
83. *See* 12 *id.* at 931.

lack of provisions requiring the landed states to relinquish their claims for the common good.[84] Like Rhode Island and New Jersey, Maryland believed it unjust that some states could pay off their debts by selling these lands while others had no such resource available.[85] Unlike the New Jersey and Rhode Island suggestions, however, Maryland did not envision that the landed states would retain jurisdiction over the ceded lands. Instead, Maryland argued that allowing such states to retain their lands raised the specter of the landed states setting up new states as loyal lackeys to their parents.[86] To defeat this possibility, Maryland was convinced that

> policy and justice require[d] that a country unsettled at the commencement of this war, claimed by the British crown, and ceded to it by the treaty of Paris, if wrested from the common enemy by the blood and treasure of the thirteen states, should be considered as a common property, subject to be parcelled out by Congress into free, convenient and independent governments, in such manner and at such times as the wisdom of that assembly shall hereafter direct.[87]

Maryland maintained that it would not ratify the Articles until Congress had the authority to govern the western lands free from state interference.[88]

Maryland's refusal to ratify the Articles of Confederation coincided with two acts of landed states that demanded the attention of Congress. First, the Virginia General Assembly issued a remonstrance against the Continental Congress for considering the claims of the Vandalia Company, a private group of land speculators that claimed huge tracts of land in Virginia's western territory.[89] Second, New York enacted a statute

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84. *See* 13 *id.* at 29 (resolutions and deliberations from 1779); *see also* 14 *id.* at 622 n.1.

85. *See* 14 *id.* at 621.

86. 14 *id.*

87. 14 *id.* at 621-22.

88. 14 *id.* at 622.

89. *See* 10 WILLIAM WALLER HENING, THE STATUTES AT LARGE 557 (Richmond, George Cochran 1822); *see also* 15 JOURNALS, *supra* note 73, at 1063-65 (Worthington Chauncey Ford ed., 1909) (setting out a memorial of the Vandalia land company and referring the claim to committee in the resolutions and deliberations from 1779). Virginia claimed in its remonstrance that the United States could not adjudicate the Vandalia claim and that, if it did, the precedent would "establish in congress a power which in process of time must degenerate into an intolerable despotism." HENING, *supra*, at 557. Virginia also urged that "[t]he United States hold no territory but in right of some one individual state in the Union." *Id.* at 558. Land companies like the Vandalia Company were quite common during this period and afforded the opportunity for investors to speculate on vacant lands in the west and elsewhere.

ceding its western territory to the United States in order to "accelerate the federal alliance, by removing . . . [this] impediment to its final accomplishment."[90]

The Continental Congress responded to Maryland's objection to the Articles, the Virginia remonstrance, and the New York cession by appointing a committee that issued a report that Congress subsequently adopted. The report concluded that revisiting the merits of the western land claims would be pointless, and instead called upon

> those states which can remove the embarrassment respecting the western country, a liberal surrender of a portion of their territorial claims, since they cannot be preserved entire without endangering the stability of the general confederacy; to remind them how indispensibly necessary it is to establish the federal union on a fixed and permanent basis, and on principles acceptable to all its respective members.[91]

Congress sent this imploring declaration to all of the states.[92]

Virginia enacted a resolution ceding its lands to the United States in January 1781, although its cession required the United States to treat as void all land grants from Indians and others—i.e., those grants on which land speculators pinned their claims.[93] As a result of Virginia's conditioned cession, New York added a similar proviso to its cession of land to the United States.[94] With Virginia's cession, Maryland lost its principal objection to the Articles of Confederation and ratified them.[95] It took three more years for Congress to formally accept the Virginia cession, a delay that historian Merrill Jensen

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90. Act of Feb. 19, 1780, ch. 38, *reprinted in* 1 LAWS OF THE STATE OF NEW YORK 38 (New York, Thomas Greenleaf 1792). Importantly, in addition to authorizing its delegates to cede the soil, the New York legislature authorized its delegates to cede legislative jurisdiction over the lands. *Id.* at 39. Although the New York claim was not based on its charter and therefore was not the strongest claim, *see* ONUF, *supra* note 64, at 103-04, this proposed cession of jurisdiction answered Maryland's objection to the Articles.

91. 17 JOURNALS, *supra* note 73, at 806 (Worthington Chauncey Ford ed., 1910) (resolutions and deliberations from 1780).

92. 17 *id.* at 807.

93. 10 HENING, *supra* note 89, at 564-66; *see also* Jensen, *Cession, supra* note 72, at 35.

94. *See* 19 JOURNALS, *supra* note 73, at 209-13 (Worthington Chauncey Ford ed., 1912) (resolutions and deliberations from 1781).

95. *See* 19 *id.* at 138-39, 213-14. There is also evidence that pressure from the French ambassador also prompted Maryland's accession to the Articles of Confederation. *See* JENSEN, ARTICLES OF CONFEDERATION, *supra* note 72, at 236-37; EDMUND S. MORGAN, THE BIRTH OF THE REPUBLIC 1763-89, at 112 (3d ed. 1992).

attributed to the continued machinations of the land companies in Congress.[96]

Whether Maryland acted based on principle or a desire to promote the interests of its prominent land speculators bears no relevance to the issues discussed here.[97] Whatever Maryland's motive, the history reveals that the western lands, the question of who should control them, and the eventual decision to vest that authority in the United States rather than the individual states received significant attention from the Continental Congress. Despite the pending war, the leaders of the new country carefully considered these questions because of their immediate importance, regardless of whether that importance stemmed from principle or greed.

After the war ended, the western land issue continued to occupy the attention of the Continental Congress. The lack of express authorization in the Articles of Confederation to govern these lands did not prevent Congress from legislating for the western territories ceded by the landed states. Once it had finalized the receipt of Virginia's cession of territory,[98] Congress enacted three acts now known as the Ordinance of 1784, the Land Act of 1785, and the Northwest Ordinance of 1787. The first of these three statutes established a system to transform the newly acquired territory into subunits with provisional governments that would eventually become states.[99] This ordinance specifically provided that the provisional governments would not interfere with the United States's disposing of the territory or "with the ordinances and regulations which Congress may find necessary" to implement the sale of the western lands.[100] The plan set forth in the Ordinance of 1784 proved

96. *See* Merrill Jensen, *The Creation of the National Domain, 1781-1784*, 26 MISS. VALLEY HIST. REV. 323 (1939).

97. *See* MORGAN, *supra* note 95, at 110-12; Jensen, *Cession*, *supra* note 72, at 27.

98. *See* 26 JOURNALS, *supra* note 73, at 112-17 (Gaillard Hunt ed., 1928) (resolutions and deliberations from 1784). New Jersey had taken up the cause of the land speculators and attempted unsuccessfully to force Congress to adjudicate Virginia's right to the land. *See* 26 *id.* at 110-12. In the end, the New Jersey delegation moved to amend the act accepting the cession, and, when Congress rejected the amendment, New Jersey voted against accepting the land cession from Virginia. 26 *id.* at 116-17.

99. *See* 26 *id.* at 275-79.

100. 26 *id.* at 277. Robert Berkhofer has argued that the draft version of the Ordinance of 1784 that appears in the modern edition of the *Journals of the Continental Congress* suffers from "particularly bad editing," with the result that both parts of the committee reports and the amendments to the act

unworkable and never went into effect.[101] The Land Act of 1785 established a system for surveying and selling the newly acquired territory.[102] This system of surveying land still survives today. Finally, the Northwest Ordinance of 1787 replaced the Ordinance of 1784 and created a system of government for the land acquired from Virginia northwest of the Ohio River.[103] The Northwest Ordinance also anticipated that the federal government would continue to own land in the territory even after portions became states and to make regulations as necessary for its disposal.[104]

Thus, during the period of the Articles of Confederation, the question of the ownership of and governance over the western lands occupied a considerable amount of time of the Continental Congress. In that period, the country saw a complete shift from an express rejection of the notion of federal ownership of the western territories to a complete embrace of it. Moreover, the Continental Congress considered the distinction between simple federal ownership of the land with the states retaining political sovereignty (the New Jersey and Rhode Island proposal) and combined federal ownership and sovereignty (the Maryland view). Although Congress adopted none of the proposed amendments to the Articles, it considered early on whether states would retain jurisdiction over ceded lands. The era of the Articles of Confederation ended with the Continental Congress legislating and creating a system of government for the western territories despite the Articles' lack of express authority for these actions. These early acts to manage the lands the federal government acquired also stipulated that the local

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are combined "into one text so it all appears in a form it never had in actuality." Robert F. Berkhofer, Jr., *Jefferson, the Ordinance of 1784, and the Origins of the American Territorial System*, 29 WM. & MARY Q. (3d ser.) 231, 237 & n.17 (1972). Berkhofer's criticism does not apply to the version of the Ordinance quoted above, and his criticism is part of his larger argument concerning Thomas Jefferson's role in drafting the Ordinance of 1784. The question of the Ordinance's authorship is not central to the argument presented here.

101. *See* Denis P. Duffey, Note, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929, 935-36 (1995).

102. *See* 28 JOURNALS, *supra* note 73, at 375-81 (John C. Fitzpatrick ed., 1933) (resolutions and deliberations from 1785).

103. *See* 32 *id.* at 334-43 (Roscoe R. Hill ed., 1936) (resolutions and deliberations from 1787).

104. *See* 32 *id.* at 341 ("The Legislatures of those districts, or new States, shall never interfere with the primary disposal of the Soil by the United States in Congress Assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the bonâ fide purchasers.").

governments would not interfere with federal authority. Practice, if not law, established federal power over the western lands.

During the Constitutional Convention, the topic of the western lands continued to excite a great deal of interest. The Virginia plan called for each state to retain its territory, except by express consent of the affected state.[105] The convention subsequently rejected this proposal.[106] The New Jersey plan expressly envisioned a government in which all states would "equally participate in the same Privileges and Rights, and in all waste, uncultivated, and back Territory and Lands," by consolidating the land and dividing it "into thirteen or more integral Parts."[107] Obviously, the convention rejected this plan as well. The debate over the power of Congress to admit new states also implicated the western land claims.[108] Moreover, the fight over the fate of the western land claims infused itself into other issues, ranging from the debates over the composition of Congress[109] to the question of whether candidates for Congress would have to be free of debts to the United States.[110] Some delegates also had financial interests in the western lands because of their speculation in these lands.[111]

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105. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 22, 28 (Max Farrand ed., 1937) [hereinafter RECORDS OF THE FEDERAL CONVENTION].

106. *See* 1 *id.* at 193-94, 202, 206. The debate concerned a clause that would guarantee to each state a republican form of government and its territory. 1 *id.* at 202. The resulting clause (without the guarantee of territory) eventually became the Guarantee Clause. *See* U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . ."). This clause had its roots in the western land claims as well. It was accepted at the time that the new states might become vassal states to their parent states. The Guarantee Clause was designed in part to prevent that possibility.

107. 3 RECORDS OF THE FEDERAL CONVENTION, *supra* note 105, at 613. Although the convention rejected this proposal, representatives of smaller states brought up the idea on occasion. *See, e.g.*, 1 *id.* at 202 (reporting the view of George Read of Delaware that the "idea of distinct States . . . would be a perpetual source of discord" and that the only cure would be "doing away [with] States altogether and uniting them all into <one> great Society" (second set of brackets in original)).

108. *See* 2 *id.* at 461-64.

109. *See* 1 *id.* at 405, 463 (reporting the views of Read from Delaware); 1 *id.* at 441 (reporting the views of Luther Martin of Maryland).

110. 2 *id.* at 126 (noting the objection of George Pinkney of South Carolina that such a limitation would "exclude persons who had purchased confiscated property or should purchase Western territory of the public, and might be some obstacle to the sale of the latter").

111. CLINTON ROSSITER, 1787: THE GRAND CONVENTION 143 (1966).

Despite this interest, the question of how to draft the language that would become the Property Clause did not generate much debate, and the Clause itself would not prove controversial during ratification. In the records of the Constitutional Convention, the first mention of the necessity of something like the Property Clause appears on August 18, 1787. The Journal indicates that the founders referred to the Committee of Detail an additional power for the legislature, namely the power "[t]o dispose of the unappropriated lands of the United States."[112] The Journal and Madison's notes indicate that the convention delegates considered and adopted the present language of the Property Clause on August 30, 1787. According to Madison's notes, Gouverneur Morris moved the convention to adopt the language that would become the Property Clause.[113] Notably, Morris's proposal contained much broader language than the issue committed to the Committee of Detail, for it provided the legislature with the power not simply to dispose of unappropriated lands, but with the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the U. States."[114] Morris's proposal thus provided the legislature with power to make needful rules and regulations and also distinguished the territories from other property belonging to the federal government. Of the states present, only Maryland voted against adopting this language.[115] Subsequently, the Committee of Style altered the Property Clause, but only to change the word "Legislature" to "Congress."[116] Thus, the existing records from the Constitutional Convention provide little guidance on the framers' interpretation of this textual grant of power. To some extent, however, they indicate that the framers wanted Congress to have broad authority over the territory and its other property and not simply the power to dispose of federal property.

The controversies over interstate boundaries and the western lands subsequently became an argument that the authors of the *Federalist Papers* used to support ratification of the Con-

112. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 105, at 321. Madison's notes indicate that he proposed referring this item to the committee, but it is unclear whether Madison or Pinkney originally proposed this as an item for the convention to consider. *See* 2 *id.* at 324 & n.3. The distinction is of no importance.

113. 2 *id.* at 466.

114. 2 *id.*

115. 2 *id.*

116. *See* 2 *id.* at 578, 602.

stitution. *Federalist No. 7* featured the disputes most prominently.[117] That paper formed a part of Alexander Hamilton's overall argument for why the states should remain unified. In that paper, Hamilton argued that the states, if disunited, would wage war against each other over the territories. Disputes over territorial claims frequently led to war, observed Hamilton, and the "vast tract of unsettled territory within the boundaries of the United States" would undoubtedly lead to wars among the states because of the "discordant and undecided claims between several of them."[118] The cessions of western territory already made to the United States would only exacerbate these disputes. The states that made the cessions would demand the land back "as a reversion," while the remaining states would claim that the land should be divided among all states.[119] Lest anyone discount this possibility, Hamilton reminded his readers of the dispute between Connecticut and Pennsylvania over the Wyoming Valley and the general dispute over Vermont.[120] Moreover, Hamilton cited the potential dispute over how to divide the war debt if the states disunited.[121] Although Hamilton did not directly discuss the western lands in this portion of his argument, the sale of those lands by the United States provided a means through which the nation as a whole could retire the war debt. Readers of *The Federalist* would doubtlessly make the connection between the war debt and the western land claims.

The Federalist Papers also attacked the Articles of Confederation for establishing a weak and insufficient government for the nation. Madison argued that a chief weakness of the Articles stemmed from the lack of a power analogous to that conferred by the Property Clause. Once some states had ceded their territorial claims to the United States, "Congress . . . proceeded to form new States, to erect temporary governments, to appoint officers for them, and to prescribe the conditions on which such States shall be admitted into the Confederacy. All this has been done; and done without the least color of constitu-

117. THE FEDERALIST NO. 7 (Alexander Hamilton).

118. *Id.* at 60 (Clinton Rossiter ed., 1961).

119. *Id.* at 61.

120. *Id.* at 61-62. On these disputes, see ONUF, *supra* note 64, at 49-73, 103-45.

121. *See* THE FEDERALIST NO. 7, at 64 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The public debt of the Union would be a further cause of collision between the separate States or confederacies.").

tional authority."[122] Although Madison did not object to Congress's actions, he argued that endowing a government with insufficient power to accomplish such tasks would inevitably lead to "dissolution or usurpation."[123]

Despite the importance of the disposition of the western land claims, the sole mention of the text of the Property Clause appears in *Federalist No. 43.* There, Madison argued that the power granted in the Property Clause

> is a power of very great importance, and required by considerations similar to those which show the propriety of the former [clause, dealing with the admission of new states]. The proviso annexed [providing that the clause did not prejudice any claim of any state] is proper in itself, and was probably rendered absolutely necessary by jealousies and questions concerning the Western territory sufficiently known to the public.[124]

This small statement provided Madison's only direct defense of the Property Clause. Yet it fit into his overall description and defense of the powers conferred on the United States in the proposed Constitution.[125]

Madison and his coauthors knew which subjects in the proposed Constitution would prove controversial and spent great amounts of time addressing these issues.[126] They recognized that the western land claims constituted a familiar and contentious subject to *The Federalist*'s target audience. Yet, the authors of *The Federalist* apparently predicted that the power conferred by the Property Clause would not cause great controversy in the debate over ratifying the Constitution, because they spent little time defending it.

As a matter of prediction, the authors of *The Federalist* were right. In the debates concerning ratification, the antifederalists generally ignored the Property Clause and the power of the federal government over the West. This does not mean that the text of the Property Clause escaped attention. In Virginia,

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122. THE FEDERALIST NO. 38, at 239 (James Madison) (Clinton Rossiter ed., 1961).

123. *Id.* at 240.

124. THE FEDERALIST NO. 43, at 274 (James Madison) (Clinton Rossiter ed., 1961).

125. *See* THE FEDERALIST NO. 41, at 256 (James Madison) (Clinton Rossiter ed., 1961) (categorizing the powers conferred on the United States); THE FEDERALIST NO. 43, at 271 (James Madison) (Clinton Rossiter ed., 1961) (reviewing the miscellaneous powers conferred on the United States). The Property Clause fell into the miscellaneous powers conferred on the United States.

126. *See, e.g.,* THE FEDERALIST NOS. 24-28 (Alexander Hamilton) (defending the need for a standing army).

a "Society of Western Gentlemen" published an amended version of the proposed Constitution with the Property Clause eliminated.[127] To the extent that the antifederalists discussed the western lands, they refuted the assertion that the national government functioned poorly under the Articles of Confederation. They argued that the western lands provided a common fund for the United States to repay its war debt, sales proceeded, and the national government was actually repaying its debts.[128] This success rendered the new form of national government unnecessary. Unlike their attacks on the Necessary and Proper Clause, however, the antifederalists did not generally criticize the breadth of power granted by the Property Clause.[129]

Thus, even though the constitutional debates extensively considered the fate of the western lands and the role that they would play in the development of the nation, the text of the Property Clause and the power granted by it came into the Constitution almost without comment. These events left a thin historical record from which to interpret the Clause. Nevertheless, several important principles evidently held wide acceptance among the founding generation. First, the national government should use the territory and other property of the United States to benefit all people, most notably by selling it to retire the collective war debt. Second, the power to legislate and govern for the territory and other federal property was a necessary adjunct of ownership. Congress had to have power to govern these lands and to use them as expected, and continued state authority over these lands would interfere with accom-

127. *See The Society of Western Gentlemen Revise the Constitution, reprinted in* 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 769, 778 (John P. Kaminski & Gaspare J. Saladino eds., 1990) [hereinafter DOCUMENTARY HISTORY]. This objection was not universal among westerners. Another group of westerners in Virginia submitted their objections to the Constitution but did not include the federal government's power over the territories and other property of the United States. *See* Circular Letter to the Fayette County Court, *reprinted in* 8 DOCUMENTARY HISTORY, *supra*, at 433-36.

128. *See, e.g.*, "Agrippa" No. III [James Winthrop], MASS. GAZETTE, Nov. 30, 1787, *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST 74 (Herbert J. Storing ed., 1981); "Agrippa" No. XII [James Winthrop], MASS. GAZETTE, Jan. 14, 1788, *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST, *supra*, at 96.

129. *See* Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 282 (1993) (recounting the debate over the breadth of the Necessary and Proper Clause).

plishing those ends. Further, state power over the lands ceded to the United States would have allowed the ceding states to have more power than the states without such land claims. Collectively, the states could trust only the United States to properly govern and serve as a neutral arbiter of the western lands. Therefore, as first set forth in the constitutional convention, the United States was not merely a proprietor over its property; it had the powers of a sovereign.

2. Early Case Law and Commentary

Early case law interpreting the reach of the Property Clause focused more on Congress's power to govern the territories rather than the other property of the United States, and each case interpreted the Clause broadly. In its first extended discussion of the Clause, the Court considered congressional authority to establish territorial governments and territorial courts.[130] The Court held that Congress had the authority to

130. Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511 (1828). This case is also referred to as *American Insurance Co. v. Canter* after the real party in interest. The Court briefly mentioned the Clause in two other cases: *Serè v. Pitot*, 10 U.S. (6 Cranch) 332 (1810), and *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). The first case involved a suit brought in the federally established territorial court for the Orleans Territory. In deciding that the federal court for the Orleans Territory could hear diversity cases brought by and against citizens of the territory, the Court opined, "[t]he power of governing and of legislating for a territory is the inevitable consequence of the right to acquire and to hold territory." *Pitot*, 10 U.S. (6 Cranch) at 336. Moreover, the presence of the Property Clause in the Constitution expressly conferred this power. *Id.* Arguably, these statements are dicta. The Court held that the federal district court lacked diversity jurisdiction over the underlying action because the plaintiffs, who were foreigners, nevertheless were suing on a chose in action assigned to them by a citizen of the territory. A statute disallowed federal jurisdiction based on assigned choses in action unless the assignor could have brought the action originally in federal court. *Id.* ("It is the opinion of the court, that the plaintiffs had no right to maintain this suit in the district court, against a citizen of the Orleans territory, they being the assignees of persons who were also citizens of that territory."); *see also* 28 U.S.C. § 1359 (1994) (embodying the same principle). The second, more celebrated case involved the constitutionality of the Bank of the United States. Maryland argued that the Bank was not constitutionally created because the Constitution did not expressly vest in Congress the authority to create a corporation. In the course of interpreting Congress's power under the Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18 (granting Congress power to "make all Laws which shall be necessary and proper" for implementing Congress's other enumerated powers), the Court took note of the Property Clause. It stated that

> [t]he power to "make all needful rules and regulations respecting the territory or other property belonging to the United States," is not more comprehensive, than the power "to make all laws which shall be

govern territories pending statehood either by virtue of the Property Clause or some implied power.[131] The Court also held that Congress could vest admiralty jurisdiction in territorial courts that did not meet the standards of Article III courts—i.e., the judges did not have life tenure—even though it could not vest admiralty jurisdiction in non-Article III courts in states already admitted to the Union.[132] The Constitution allowed Congress to create these "legislative Courts" because, when it legislated for territories, Congress exercised "the combined powers of the general, and of a state government."[133] These broad statements clearly vested Congress with a great deal of authority over the territories. More remarkably, these statements assumed that Congress would have this broad power by virtue of the United States having acquired the territory even if the Property Clause did not exist.[134] Later—indeed, on the eve of the notorious *Dred Scott* decision discussed at length below—the Court reaffirmed congressional power over the territories and held that the Constitution conferred authority on the federal government to establish a temporary government for the area.[135]

The earliest case that interpreted the reach of the Property Clause also read its terms broadly. That case, *United States v. Gratiot*, involved the authority of the United States to lease lands it had retained within the boundaries of a state.[136] Con-

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necessary and proper for carrying into execution" the powers of the government. Yet all admit the constitutionality of a territorial government, which is a corporate body.

McCulloch, 17 U.S. (4 Wheat.) at 422. Again, the statement is dicta because the reach of the Property Clause was not at issue in the case. Akhil Amar approvingly explores this discussion in *McCulloch* in his recent article, *Intratextualism*. *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 757-58 (1999).

131. *See Am. Ins. Co.*, 26 U.S. (1 Pet.) at 542-43 (citing the Property Clause but noting that "[t]he right to govern [a territory], may be the inevitable consequence of the right to acquire territory").

132. *Id.* at 546.

133. *Id.*

134. *See id.* at 542-43.

135. *See* Cross v. Harrison, 57 U.S. (16 How.) 164, 193 (1853). This case involved the establishment of a temporary customs collection system for California after the United States captured it from Mexico. The Court held that the Constitution provided for the establishment of such a government under the circumstances. *Id.* at 193-94.

136. 39 U.S. (14 Pet.) 526 (1840). For a historical account of the larger context in which *Gratiot* arose, see CARL J. MAYER & GEORGE A. RILEY, PUBLIC DOMAIN, PRIVATE DOMINION: A HISTORY OF PUBLIC MINERAL POLICY IN

gress had earlier directed the President to reserve lead mines in the Indiana territory and authorized the President to lease the mines for a period not to exceed five years.[137] The Army—to which the President had delegated oversight of the program—also decided to license smelters with the exclusive right to smelt ore drawn from the federally leased mines. Subsequently, Congress created Illinois out of this territory and admitted Illinois—where *Gratiot* arose—to the Union. In *Gratiot*, the United States sought to collect from licensees who had not paid any of the royalties due on the 2,400,000 pounds of pure lead they had smelted out of the ore.[138] Two questions then arose. The first was whether, under the Property Clause, Congress had the authority to dispose of its property through leases, or whether it had to dispose of its property through permanent grants only.[139] Presumably, if the United States lacked authority to enter into leases, then the smelters would owe no royalties to the United States. The second question was whether a statute authorizing the President to enter into leases gave him the authority to enter into the license for the smelter at issue in the case.

In sweeping terms, the Court held that Congress had authority to dispose of federal property in any way it saw fit. The term "territory" in the Property Clause meant land and described only one type of property over which the government wielded power.[140] This power vested in Congress "without limitation," extended to all property belonging to the United States, and provided the foundation upon which the territorial government rested.[141] The Court rejected the notion that the Property Clause authorized Congress to "dispose of" the property of the United States only through sale because "[t]he disposal must be left to the discretion of Congress."[142] Finally, the Court denied the existence of any "apprehensions of any encroachments upon state rights, by the creation of a numerous tenantry within their borders."[143] Congress reserved the land where

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AMERICA 20-39 (1985).

137. Act of March 3, 1807, ch. XLIX, § 5, 2 Stat. 448, 449. Congress enacted another act to reserve lead mines in the Orleans Territory. Act of March 3, 1807, ch. XXXVI, §§ 2, 4, 2 Stat. 440-41.

138. *See Gratiot*, 39 U.S. at 528.

139. *Id.* at 533-34 (describing the argument of counsel for Gratiot).

140. *Id.* at 537; *see also infra* text accompanying note 188.

141. *Gratiot*, 39 U.S. at 537.

142. *Id.* at 538.

143. *Id.*

the lead mines lay before Illinois became a state.[144] Illinois could no more "complain of any disposition or regulation of the lead mines previously made by Congress" than it could "claim a right to the public lands within her limits."[145] The Court thus early recognized that the United States could retain public lands located within the boundaries of newly admitted states and that Congress retained the authority to establish rules and regulations for such land. On the statutory question, the Court held that the license involved in the case qualified as a lease, and that it was valid.

Early commentary on the Property Clause reinforced the understanding that the Clause conferred broad authority to Congress.[146] Joseph Story, the leading early commentator on

144. *Id.*

145. *Id.*

146. Just as some of the earliest case law on the Property Clause arose in the dispute over the constitutionality of the Bank of the United States, *see* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 422 (1819), some of the earliest commentary about the reach of the Property Clause also emerged from this controversy. For example, in his opinion on the constitutionality of the bank, Alexander Hamilton compared the power of Congress to establish a corporation to its power to govern the territories and other federally owned property. Hamilton took as given that Congress had broad authority in the Property Clause, and used that broad grant of authority to argue that the grants of power in the Congress similarly authorized the formation of a bank corporation.

> It is admitted, that, with regard to the Western territory, they give a power to erect a corporation; that is, to constitute a government. And by what rule of construction can it be maintained, that the same words, in a constitution of government, will not have the same effect, when applied to one species of property, as to another, as far as the subject is capable of it? Or, that a legislative power, to make all needful rules and regulations; or to pass all laws necessary and proper, concerning the public property, which is admitted to authorize an incorporation in one case, will not authorize it in another? Will justify the institution of a government over the Western territory, and will not justify the incorporation of a bank for the more useful management of the money of the nation?

Opinion of Alexander Hamilton, On the Constitutionality of a National Bank (February 23, 1791), *reprinted in* LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 109 (Augustus M. Kelley 1967) (M. St. Clair Clarke & D.A. Hall comps., 1832).

The reach of the Property Clause also arose in the controversy over the Louisiana Purchase. Some doubted whether the United States had the constitutional authority to acquire territory outside of the boundaries of the United States that existed at the ratification of the Constitution. Eventually, Congress ratified the treaty with France and expanded the boundaries of the United States. In the context of this debate, Gouverneur Morris expressed his opinion that the United States not only could acquire new territory, but that such acquisitions were inevitable.

the Constitution, relied on *American Insurance Co. v. Canter* to argue that the Property Clause embodied a power that the federal government would possess even without the Clause because the right to govern territory and property derived from acquisition through purchase or conquest.[147] Story explicitly connected the territorial part of the Property Clause with the "other property belonging to the United States," urging that Congress's broad authority over the territories "be applied to the due regulation of all other personal and real property rightfully belonging to the United States."[148] According to Story, the power thus conferred "over the public territory is clearly exclusive and universal; and their legislation is subject to no control; but is absolute, and unlimited, unless so far as it is affected by stipulations in the cessions, or by the ordinance of 1787, under which any part of it has been settled."[149] Story recognized that while states could regulate the other property of the United States—unless the state ceded jurisdiction under the Enclave Clause—this state authority remained "subject to the rightful exercise of the powers of the national government."[150]

Story also rejected the notion that extensive federal landholdings would eventually lead to "such immense revenue to the national government, as to make it independent of, and formidable to, the people."[151] Story treated this assertion with scorn.[152] Instead, Story believed that the public lands held out

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> I always thought that, when we should acquire Canada and Louisiana it would be proper to govern them as provinces, and allow them no voice in our councils. In wording the third section of the fourth article, I went as far as circumstances would permit to establish the exclusion. Candor obliges me to add my belief, that, had it been more pointedly expressed, a strong opposition would have been made.

3 RECORDS OF THE FEDERAL CONVENTION, *supra* note 105, at 404. Morris therefore not only believed that the United States could acquire new territory, but that it would have the power that an empire has over colonies, and that the new territories could not be admitted as states. *Id.* When read in full, however, it is clear that Morris did not believe that his views represented those of the convention as a whole. *Id.*

147. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1318, at 193-94 (Da Capo Press 1970) (1833).

148. 3 *id.* § 1319, at 196.

149. 3 *id.* § 1322, at 198.

150. 3 *id.*

151. 3 *id.* § 1320, at 196.

152. Story stated the following with regard to such a proposition:

> What a strange representation is this of a republican government, created by, and responsible to, the people in all its departments! What possible analogy can there be between the possession of large revenues in the hands of a monarch, and large revenues in the pos-

the opportunity to pay off the national debt and provide more revenue for education and internal improvements without burdening the people with taxation.[153] Thus, rather than seeing the United States's extensive landholdings as a threat, Story envisioned them as a great national treasure that would advance multiple aims of the fledgling country.

To be sure, some cases during this period limited federal ownership of certain types of property, notably lands lying beneath navigable inland waterways. Advocates of the narrow view of the Property Clause often cite *Pollard v. Hagan*[154] as the leading pre-Civil War case. That case questioned whether the United States or a state had superior title to submerged lands under inland navigable waterways. In an earlier case, the Court had held that title to submerged lands in the original thirteen states passed from the British crown to the states and not to the United States.[155] The *Pollard* case questioned whether Alabama similarly acquired submerged lands upon its admission to the Union, or whether title remained in the United States. The Court held,

> When Alabama was admitted into the union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States . . . .[156]

Pollard thus marks the Court's first opinion in a line of cases that would develop the equal footing doctrine.[157] The case,

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session of a government, whose administration is confided to the chosen agents of the people for a short period, and may be dismissed almost at pleasure? If the doctrine be true, which is here inculcated, a republican government is little more than a dream, however its administration may be organized; and the people are not worthy of being trusted with large public revenues, since they cannot provide against corruption, and abuses of them. Poverty alone (it seems) gives a security for fidelity; and the liberties of the people are safe only, when they are pressed into vigilance by the power of taxation.

3 *id.* § 1321, at 197.

153. 3 *id.* § 1321, at 197-98.

154. 44 U.S. (3 How.) 212 (1845).

155. Martin v. Waddell, 41 U.S. (16 Pet.) 367, 406-18 (1842).

156. *Pollard*, 44 U.S. (3 How.) at 223.

157. Arguably, the equal footing doctrine had its roots in *Mayor of New Orleans v. United States*, 35 U.S. (10 Pet.) 662 (1836). That case involved the question of ownership of submerged lands in the Louisiana Purchase but appeared to turn on the state of title to the lands under Spanish rule rather than an equal footing rule that operated solely by force of American law. *Id.* at 731-37 (discussing how the Spanish crown held lands). *Pollard v. Hagan*, by con-

however, determined only which lands the federal government owned and did not interpose any limitations on the federal government's authority over its property. Indeed, the Court recognized that the United States could continue to own the other public domain lands in Alabama.[158]

Thus, up until 1857, one could safely conclude that Congress had plenary authority over the territory and other property of the United States, including the power to enact legislation for this property that would displace state law. This conclusion finds support in the history of the adoption of the Articles of Confederation and the activities of the federal government under them; the thin record of the constitutional convention; the arguments surrounding the ratification of the Constitution; and the early case law. Moreover, commentators such as Story saw the Clause as evidence that the Constitution contemplated the United States's possession of vast landholdings as a national resource. Although the Court limited the reach of federal title claims to certain lands, those limitations applied only to submerged lands lying under inland navigable waterways, not the vast western territory as a whole. The Court did not diminish the authority that the federal government had over the lands generally accepted as federal property. The Court's next encounter with the Property Clause would skew this jurisprudence and contribute to changing the course of the nation's history.

B. DRED SCOTT AND THE NARROWING OF THE PROPERTY CLAUSE

The Court's sole narrow interpretation of the Property Clause appears in the deservedly infamous *Dred Scott* decision.[159] That case warrants extended discussion for two rea-

trast, involved lands that Georgia ceded to the United States, and so only American law was at issue. For further discussion of the equal footing doctrine, see *supra* note 48.

158. *Pollard*, 44 U.S. (3 How.) at 223. To be sure, the Court concluded that the power of Congress under the Property Clause "conferred no power to grant to the plaintiffs the land in controversy in this case." *Id.* at 230. That conclusion is hardly surprising because the Court had held that the United States did not own the property; one generally cannot grant what one does not own. This dicta does not undermine the federal government's power under the Property Clause. *See* Gaetke, *Refuting the "Classic" Theory*, *supra* note 29, at 641-45.

159. Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). The defendant's real name was "Sanford," but it was misspelled in the official reports. *See* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW

sons. First, none of the literature on the Property Clause discusses the *Dred Scott* decision at any length. That oversight comes as no surprise. The proponents of the narrow view of the Property Clause would not hinge their argument on such a hated decision,[160] and the proponents of a broad view could therefore avoid the one case that squarely adopts the narrow view. Second, contemporary legal literature criticizing the decision—and there is a wealth of such literature[161]—fails to address the Court's interpretation of Congress's authority under the Property Clause. Thus, the legal academic literature deserves a modern examination and critique of the Court's opinion as it relates to the Property Clause.

The opinions in *Dred Scott* primarily concerned the question of the territorial power created in the Clause and not the issue of control over federal property. The period leading up to the *Dred Scott* decision involved great controversy over whether Congress could ban slavery in the territories. In 1820, Congress enacted the Missouri Compromise, a provision of the act authorizing the people of Missouri to form a state.[162] The Compromise admitted Missouri as a slave state, but it "forever prohibited" slavery or involuntary servitude, except as the pun-

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AND POLITICS 2 & n.* (1978).

160. Some modern articles do reference the Supreme Court's decision in *Dred Scott*. *See* Brodie, *supra* note 28, at 718 n.121, 720 n.126; Landever, *supra* note 28, at 579-83.

161. It would border on the impossible to catalogue all of the literature critical of *Dred Scott*. Professor Mark Graber provides a marvelous catalog of the criticism:

> Commentators across the political spectrum describe *Dred Scott* as "the worst constitutional decision of the nineteenth century," "the worst atrocity in the Supreme Court's history," "the most disastrous opinion the Supreme Court has ever issued," "the most odious action ever taken by a branch of the federal government," a "ghastly error," a "tragic failure to follow the terms of the Constitution," "a gross abuse of trust," "a lie before God," and "judicial review at its worst."

Mark A. Graber, *Desperately Ducking Slavery:* Dred Scott *and Contemporary Constitutional Theory*, 14 CONST. COMMENT. 271, 271-72 (1997) (footnotes omitted). One of the more interesting takes on the case is Alan Watson's argument that the Supreme Court's decision concerning Scott's status could not have arisen were it not for Joseph Story's earlier misreading of a Dutch scholar's work on conflict of laws. *See* ALAN WATSON, JOSEPH STORY AND THE COMITY OF ERRORS: A CASE STUDY IN CONFLICT OF LAWS (1992). For a defense that *Dred Scott* may have been correctly decided or at least that it reached a plausible result from the perspective of any school of modern constitutional thought, see Graber, *supra*.

162. Act of March 6, 1820, ch. XXII, § 8, 3 Stat. 545, 548.

ishment for a crime, in all of the territory lying "north of thirty-six degrees and thirty minutes north latitude."[163] At the time of this compromise, the constitutional question of whether Congress could create this restriction remained dormant. It did not become the topic of intense political debate until the 1840s and 1850s.

During the Mexican-American War, David Wilmot, a Democrat from Pennsylvania, inserted a provision into an appropriation bill that would prohibit slavery in any territory acquired from Mexico.[164] Although the Wilmot Proviso ultimately failed, it raised the question of the extent of congressional authority over slavery in the territories. During the 1840s and 1850s, the debate over congressional power to exclude slavery from the territories would become a surrogate for the debate over slavery itself. This debate culminated in the dispute over the organization of the Kansas and Nebraska territorial governments and the outbreak of civil war in Kansas.

As it unfolded, the constitutional debate divided into roughly four positions. Some, like John C. Calhoun, argued that Congress lacked any authority to ban slavery in the territories and that, in fact, Congress had a duty to protect slaveholders in their property.[165] Others, like Stephen Douglas, advocated popular sovereignty in the territories, under which each territory would decide for itself whether to be slave or free.[166] A third group saw compromise in the idea of simply extending the Missouri Compromise line across the continent.[167] This position had more basis in expediency and compromise than in constitutional principle. Finally, some adhered to a position directly in opposition to Calhoun's and contended that Congress could and must ban slavery in the territories.[168] The Republican Party platform for 1856 embodied this view and declared

> [t]hat the Constitution confers upon Congress sovereign power over the Territories of the United States for their government; and that in the exercise of this power, it is both the right and the imperative duty of Congress to prohibit in the Territories those twin relics of barba-

163. *Id.*

164. FEHRENBACHER, *supra* note 159, at 129; STANLEY I. KUTLER, THE DRED SCOTT DECISION: LAW OR POLITICS? at xi (1967).

165. *See* FEHRENBACHER, *supra* note 159, at 135-47 (describing the various positions held on slavery in the territories).

166. *See id.*

167. *See id.*

168. *See id.*

rism—Polygamy, and Slavery.[169]

Although polygamy had few defenders in Congress, slavery had many, and the Republicans would not enact this legislation until after the Civil War began.

This intense and heated political context gave rise to the legal issues in *Dred Scott*. The basic question underlying the *Dred Scott* decision asked under what circumstances a slave could obtain his or her freedom. Courts had struggled with this question against a variety of fact patterns, such as where the slave escaped into free territory; where the master had taken the slave voluntarily into free territory for a short period but returned with the slave to slave territory; or where the master had lent the slave to another who took the slave into free territory.[170] Free states had an obligation to return fugitive slaves, but what about the cases in which the slave entered free territory at the direction of the master? *Dred Scott* involved one version of these sorts of claims. Scott was at one time owned by Dr. John Emerson and sued his putative master for his manumission. During Emerson's service in the United States Army, he and Scott had traveled from Missouri to Rock Island in Illinois, then to the territory north of Missouri in what is now the state of Minnesota, and finally back to Missouri.[171] Scott's wife similarly traveled from Missouri to free soil and back.[172] Claiming that his time in free territory freed him under Missouri law, Scott unsuccessfully sued Emerson's widow for his freedom.[173] Scott subsequently sued John Sanford—the brother

169. Republican National Convention and Platform of 1856, *reprinted in* Hans L. Trefousse, *The Republican Party 1854-1864, in* 2 HISTORY OF U.S. POLITICAL PARTIES 1141 app. at 1204 (Arthur M. Schlesinger, Jr. ed., 1973) [hereinafter Republican Platform].

170. *See, e.g.*, Strader v. Graham, 51 U.S. (10 How.) 82, 94 (1850) (holding that slaves escaping from slave territory were not rendered free); Jackson v. Bulloch, 12 Conn. 38 (1837) (deciding the effect of temporary relocation of the master and slave); Rankin v. Lydia, 9 Ky. (2 A.K. Marsh) 467 (1820) (discussing the effect on the slave's status of the master changing domicile from slave to free territory); Commonwealth v. Aves, 35 Mass. (18 Pick.) 193 (1836) (discussing the effect on the slave's status where the master voluntarily brought the slave into a free state for a short time).

171. Scott v. Sandford, 60 U.S. (19 How.) 393, 397-98 (1857); *see also* FEHRENBACHER, *supra* note 159, at 243-45 (detailing Scott's travels in and out of slave territory). The Court did not mention that Scott also was in Louisiana and may have returned to Illinois a second time. *See id.* at 245-46.

172. For a thorough biography of Harriet Scott and how her case differed from Dred Scott's case, see Lea VanderVelde & Sandhya Subramanian, *Mrs. Dred Scott*, 106 YALE L.J. 1033 (1997).

173. Scott v. Emerson, 15 Mo. 576 (1852). This was the decision that, ac-

of Mrs. Emerson who had either acquired or controlled the Scotts as the executor of Emerson's estate[174]— in federal court. Sanford was a citizen of New York, and, to establish that the federal courts had diversity jurisdiction over the case, Scott pleaded that he was a citizen of Missouri.[175]

Given the state of slavery law at the time, the Court's decision could have taken any number of turns. The Court could have held that Scott's time on free soil rendered him free. It also could have held that Scott's time on free soil did not render him free because Emerson, his master, did not willingly go to free territory but went only on orders of the army.[176] Instead, the Court focused on the jurisdictional question. In what is now viewed as the main and more odious part of its opinion, the Supreme Court held that because Scott was black he was not a citizen of any state. Therefore, he could not invoke the diversity jurisdiction of the federal courts.[177]

Having ruled that the federal courts could not entertain Scott's lawsuit, the Court could have ended its decision there. The Court nevertheless decided to rule on the merits of Scott's claim that his presence on free soil—and, in particular, free soil that was not part of any state—entitled him to his freedom. Scott's presence on territorial land brought the Missouri Compromise squarely into the Court's focus (albeit unnecessarily as shown below). Because Scott had accompanied his owner at the owner's direction into territory of the United States above the line described in the Missouri Compromise, Scott argued that his presence there granted him his freedom. He also urged that his time in Illinois rendered him free.

In an era when the Court frequently rendered brief opinions and dissents often took the form of a notation,[178] *Dred*

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cording to Alan Watson, resulted from Joseph Story's misreading of the Dutch scholar. *See* WATSON, *supra* note 161, at 61-67. As explained in the text, if this decision had gone the other way, the federal *Dred Scott* case could never have happened.

174. On Sanford's exact legal relationship with Scott, see FEHRENBACHER, *supra* note 159, at 270-71; VINCENT C. HOPKINS, DRED SCOTT'S CASE 23-24 (1951).

175. *Dred Scott*, 60 U.S. (19 How.) at 400.

176. *See* Scott v. Emerson, 15 Mo. at 585 (suggesting that Scott could not be free because the Army had ordered Emerson "to the posts where his slave was detained in servitude").

177. *Dred Scott*, 60 U.S. (19 How.) at 403-29.

178. *See, e.g.*, United States v. Sutherland, 60 U.S. (19 How.) 363 (1857). *Sutherland* is a case of no particular significance except that it is in the same volume of the *United States Reports* as *Dred Scott*. *Sutherland* runs just over

Scott stands out. The decision occupies 240 pages in the official reports, and each justice wrote his own opinion. The Court divided along several lines, some procedural and some substantive. The following discussion presents a summary and criticism of those opinions that discuss the territorial and federal property issue.

The official report's designation of Chief Justice Taney's decision as the opinion of the Court correctly described his opinion with respect to the interpretation of the territorial and property power.[179] To evaluate Scott's claims, Chief Justice Taney decided to begin with the question of whether Scott's presence in the territory of the United States made Scott free (as opposed to the more general question of whether Scott's presence on any free soil would render him free). Because of the order in which he placed the questions, Taney had to address whether Congress had the authority to ban slavery in the territories and therefore to enact the Missouri Compromise.

The Missouri Compromise was not Congress's first attempt to ban slavery in the territories. Congress had previously banned slavery in the Northwest Ordinance, which Congress reaffirmed after the ratification of the Constitution.[180] To distinguish the Northwest Ordinance from the Missouri Compromise, therefore, Taney reviewed the history of the dispute over the western land claims. According to Taney, when Virginia ceded the Northwest Territory to the United States, the United States did not in fact exist.[181] Rather, "what was then called the United States, were thirteen separate, sovereign, independent States," and the meetings of Congress under the Articles of Confederation were "little more than a congress of ambassadors" from these independent states.[182] This congress of

three pages, and closes with the notation that Justice Daniel dissented. *Id.* at 366.

179. Given the length of the opinions and the fractious nature of them, many have debated whether and to what extent *Dred Scott* has an actual holding. *See* FEHRENBACHER, *supra* note 159, at 322-26. For reasons explained in the following text, I contend that a majority adopts Taney's interpretation of the territorial and property power. I will analyze the opinions in the order they appear in the *United States Reports*. Professor Fehrenbacher provided evidence that "[t]he order in which the opinions were published in Howard's *Reports* did not follow the order of their oral delivery on March 6 and 7, but rather was carefully specified by Taney." *Id.* at 390. The order of the opinions does not alter my analysis.

180. Act of Aug. 7, 1789, ch. VIII, 1 Stat. 50.

181. *Dred Scott*, 60 U.S. (19 How.) at 434.

182. *Id.* Of course, the federal government had much power under the Ar-

ambassadors could certainly accept the grant to all from Virginia and the other states and agree to govern them under the terms of the Northwest Ordinance.[183] That prior agreement could not, however, bind the new government formed under the Constitution, nor could it bind the states in the future. Taney's argument ignored the subsequent reaffirmation of the Northwest Ordinance by the Congress formed under the Constitution. Moreover, as shown above, the record of the Constitutional Convention showed that the founders intended the United States to have broad authority over its property.

Against the fanciful historical background he created, Taney concluded that the term "territory" in the Property Clause referred only to the territory that Virginia and other states had ceded to the United States under the Articles of Confederation.[184] This reading would exclude any of the territory ceded by North Carolina and Georgia, and it would exclude any other after-acquired territory such as the Louisiana Purchase (where Scott's owner had taken him), or Florida (where *American Insurance Co. v. Canter*[185] arose), or California (where *Cross v. Harrison*[186] arose). Taney reached this conclusion based on his reading of the plain language of the Clause. The Clause "does not speak of *any* territory, nor of *Territories*, but uses language which, according to its legitimate meaning, points to a particular thing.... [Namely, it points to] a territory then in existence, and then known or claimed as the territory of the United States."[187] The constitutional term "territory" then could refer only to the area ceded by Virginia and New York and covered by the Northwest Ordinance. On this point, Taney ignored the Court's earlier holding in *United States v. Gratiot*, in which the Court held that the term terri-

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ticles. As Professor Fehrenbacher pointedly observed,

> Apparently, Taney did not regard the power to declare war, or the power to make peace, or the power to enter into treaties, or the power to fix the value of coins, or the power to regulate all relations with the Indians, or the power to establish post offices, or the power to grant letters of marque and reprisal, or the power to settle all disputes between two or more states, as constituting an "attribute of sovereignty."

FEHRENBACHER, *supra* note 159, at 371.

183. *Dred Scott*, 60 U.S. (19 How.) at 434.

184. *See id.* at 436.

185. 26 U.S. (1 Pet.) 511 (1828).

186. 57 U.S. (16 How.) 164 (1853).

187. *Dred Scott*, 60 U.S. (19 How.) at 436.

tory "is equivalent to the word lands."[188] Similarly, according to Taney, the property referred to in the Property Clause included only personal property, "that is, the ships, arms, and munitions of war, which then belonged in common to the State sovereignties."[189] Once again, Taney's reading did not comport with *Gratiot*, where the Court held that Congress's power over "other property belonging to the United States . . . is vested in Congress without limitation."[190]

Taney not only read narrowly the reach of what constituted "territory" or "property," but he also suggested that Congress had little authority over these objects.[191] Regarding the power to make needful rules and regulations for these objects, Taney concluded that "every one . . . must admit that they are not the words usually employed by statesmen in giving supreme power of legislation."[192] This argument also carried little weight. The founders had used the terms "rule" and "regulate" (or "regulation") with respect to the rules of each house of Congress,[193] for regulating interstate commerce and commerce with Indian tribes,[194] for making rules of naturalization and bankruptcy,[195] for regulating the value of money,[196] for making rules regarding captures on land and water,[197] and for making rules for the government and the armed forces.[198] Under Taney's reading, these clauses vested minimal power in Congress and did not grant "general powers of legislation"[199] over these subjects. Thus, the Court could ignore any history of the federal government banning slavery in the Northwest Ordinance as irrelevant to whether Congress could ban slavery in land acquired after the ratification of the Constitution. The constitutional text, according to Taney, applied only in the Northwest Terri-

188. 39 U.S. (14 Pet.) 526, 537 (1840).

189. *Dred Scott*, 60 U.S. (19 How.) at 437.

190. *Gratiot*, 39 U.S. (14 Pet.) at 537.

191. *See Dred Scott*, 60 U.S. (19 How.) at 437. This reading is also in tension with the Court's opinion in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), in which the Court relied on the Property Clause to reach its broad reading of the Necessary and Proper Clause. *Id.* at 422.

192. *Dred Scott*, 60 U.S. (19 How.) at 436-37.

193. U.S. CONST. art. I, § 5, cl. 2.

194. *Id.* § 8, cl. 3.

195. *Id.* cl. 4.

196. *Id.* cl. 5.

197. *Id.* cl. 11.

198. *Id.* cl. 14.

199. *Dred Scott*, 60 U.S. (19 How.) at 440.

tory and did not constitute a broad grant of power to the United States.

To reach this conclusion, Taney had to somehow distinguish *American Insurance Co. v. Canter*, in which the Court held that the United States governed Florida—land not included in the original grants of territory—by virtue of the Property Clause.[200] Moreover, if Taney wished to limit Congress's authority under the Property Clause to governing only those territories ceded by the states during the Articles of Confederation, he needed to find another source of authority to allow Congress to legislate for the newly acquired territories. To solve this problem, Taney interpreted the holding of *Canter* as mere dicta, and decided that the true holding was that Congress had an inherent or implied authority to govern the territories by virtue of its authority to acquire property.[201] Taney based this conclusion on language in *Canter* noting that "[t]he right to govern, *may be* the inevitable consequence of the right to acquire territory."[202] In *Dred Scott*, Taney adopted this possibility as the holding of the decision. Taney held that federal authority to legislate for the later-acquired territories stemmed not from the text of the Constitution, but from some inherent power of Congress to acquire (and thus govern) new territory.[203]

The original *Canter* decision also held that in governing the territories Congress exercised "the combined powers of the general, and of a state government."[204] Taney limited this passage from *Canter* to the question of what kinds of courts Congress could establish in a territory.[205] In contrast, Taney described the question before the Court in *Dred Scott* as whether "Congress had a right to prohibit a citizen of the United States from taking any property [i.e. a slave] which he lawfully held into a Territory of the United States."[206]

Thus, Taney eviscerated the one provision of the Constitution that provided a textual basis for the establishment and regulation of territorial governments and narrowly construed the one case that had squarely held that provision to apply to

200. *See* Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511, 542 (1828).
201. *Dred Scott*, 60 U.S. (19 How.) at 442-44.
202. *Am. Ins. Co.*, 26 U.S. (1 Pet.) at 543 (emphasis added).
203. *See Dred Scott*, 60 U.S. (19 How.) at 443.
204. *Am. Ins. Co.*, 26 U.S. (1 Pet.) at 546.
205. *Dred Scott*, 60 U.S. (19 How.) at 445-46.
206. *Id.* at 446.

the newly acquired territories.[207] Liberated from text and precedent, Taney could easily delimit the federal government's implied power over the newly acquired territories. First, Congress did not have the power "to acquire a Territory to be held and governed permanently in that character."[208] Second, "citizens of the United States who migrate to a Territory belonging to the people of the United States, cannot be ruled as mere colonists, dependent upon the will of the General Government, and to be governed by any laws it may think proper to im-

207. Taney further misconstrued *Canter* and Madison's writings in *The Federalist Papers*. As for the former, Taney based his reading of *Canter*—i.e., that federal authority over the territories was an implied, not express, power—on the circuit court opinion of Justice Johnson, who later participated in the case when it reached the Supreme Court. In that opinion Johnson argued that the Constitution addressed only the original territory, and did not expressly provide for "the acquisition or government of territories" beyond the original limits of the United States. *Am. Ins. Co.*, 26 U.S. (1 Pet.) at 517 n.*. Later on, however, Johnson stated, "I see nothing in which the power acquired over the ceded territories, can vary from the power acquired under the law of nations, by any other government, over acquired or ceded territory." *Id.* Thus, Johnson apparently believed that the federal government potentially had more power over the later-acquired territories than over the ceded territories. As for the latter, Taney referred in *Dred Scott* to *Federalist No. 38*, which he characterized as arguing that the establishment of a government for the ceded territory was "an exercise of power not warranted by the Articles of Confederation, and dangerous to the liberties of the people." *Dred Scott*, 60 U.S. (19 How.) at 447. In fact, Madison's argument in *Federalist No.* 38 is that Congress had taken actions to establish governments in the territory "without the least color of constitutional authority." THE FEDERALIST NO. 38, at 239 (James Madison) (Clinton Rossiter ed., 1961). Madison approved of the result, but used the fact that Congress had acted without constitutional authorization as "alarming proof of the danger resulting from a government which does not possess regular powers commensurate to its objects[.]" *Id.* at 240. Madison urged the adoption of the Constitution because it expressly provided such power and would not tempt the federal government into assuming implied powers. In *Dred Scott*, Taney accomplished the exact end that Madison did not want because Taney shifted the federal government's authority to govern the newly acquired territories from the text of the Constitution to some power implied in Congress's power to admit new states to the union. As Professor Fehrenbacher observed, "Taney, in emasculating the territory clause and in insisting that the power to govern the West could be justified only by double implication, was contradicting almost everything that Madison had said on the subject in the Convention and in *The Federalist*." FEHRENBACHER, *supra* note 159, at 376.

208. *Dred Scott*, 60 U.S. (19 How.) at 446. Although this statement is not directly at odds with *United States v. Gratiot*, 39 U.S. (14 Pet.) 526 (1840), it certainly strains against the conclusion in that case. In *Gratiot*, the Court squarely held that the United States could reserve public lands and continue to own them even after the territory in which they lay became a state, *id.* at 538, and it held that Congress could continue to make rules for such reserved lands "without limitation." *Id.* at 537.

pose."[209] Thus, the Constitution followed the flag, and all of the constitutional limitations on federal power applied with equal force in the territories. Congress could not use its authority over a territory to establish a church, to abridge speech or freedom of the press, to deny the right to a jury trial, to quarter soldiers during peacetime, or to take private property for public use without just compensation.[210] Banning slavery took private property without just compensation and without due process of law. Moreover, if Congress itself could not ban slavery, it could not authorize a territorial government to exercise such authority.[211] Because the Court treated slaves as property protected by the Constitution, the only power that the Constitution conferred on Congress was "the power coupled with the duty of guarding and protecting the [slave] owner in his rights."[212]

Purely from an analysis of the legal reasoning, Taney's opinion in *Dred Scott* is disturbing. To reach his conclusion, Taney belittled the text of the Constitution and ignored or misconstrued several key cases interpreting congressional power over the territories. In addition, Taney demeaned congressional power over federal property within states admitted to the Union, even though the case did not directly raise this issue.

Equally disturbing is the fact that the Court's decision holding the Missouri Compromise unconstitutional was doubly unnecessary. In addition to reaching the merits of Scott's claims after denying jurisdiction, the Court also unnecessarily determined specifically whether Scott's presence on territory subject to the Missouri Compromise won him his freedom. Taney's opinion asked first whether Scott's presence on territory of the United States made him free, and, if not, whether his presence in the admitted, free state of Illinois made him free.[213] Temporally, however, Scott entered Illinois before entering the Wisconsin Territory, and no logical rule of precedence would indicate that Taney should take either question first. According to the Court, Scott's presence in Illinois did not grant him his freedom under the applicable choice of law rules.

209. *Dred Scott*, 60 U.S. (19 How.) at 447.

210. *Id.* at 450.

211. *Id.* at 451. This statement undermined the position of those who advocated popular sovereignty in the territories.

212. *Id.* at 452. This statement would galvanize the Southern position that the Constitution forced Congress to recognize slavery in the territories.

213. *Id.* at 431-32.

The Court's earlier decision in *Strader v. Graham*, according to Taney, dictated that the determination of a person's status as free or slave depended on the state law of the person's domicile at the time of the determination.[214] Although *Strader* involved escaped slaves and not slaves that the master had deliberately taken into free states, Taney had no compunction against extending the holding in *Strader* to Scott's status.[215] Since Missouri law (as changed especially for Scott) denied Scott his freedom, the Court must come to the same conclusion.[216] Under this reasoning, Scott could not obtain his freedom whether he traveled to a free state or a territory in which Congress had abolished slavery. Thus, the Court did not need to determine the constitutionality of the Missouri Compromise.

Three justices fully joined Taney's opinion on this subject with little independent analysis.[217] Three justices concurred with Taney and offered their own approaches to the power that Congress had over the territories. Although their analyses differed slightly from Taney's interpretation, they adopted Taney's basic conclusion that the Missouri Compromise violated the Constitution.[218] Thus, at least six justices signed on

214. 51 U.S. (10 How.) 82, 93-94 (1850).

215. *Dred Scott*, 60 U.S. (19 How.) at 452.

216. *Id.* at 453-54. Fehrenbacher criticizes the application of *Strader* to *Dred Scott*, noting that Taney added part of the reasoning only after he had announced his original decision. FEHRENBACHER, *supra* note 159, at 268-69, 386-88. My point is only that the Court did not need to hold the Missouri Compromise unconstitutional to reach the decision that presence on free soil did not render Scott free.

217. I include here Justices Wayne, *Dred Scott*, 60 U.S. (19 How.) at 454 (Wayne, J., concurring), Nelson, *id.* at 457-69 (Nelson, J., concurring), and Grier, *id.* at 469 (Grier, J., concurring).

218. Justice Daniel stressed that the power of Congress over the territories required Congress to act as a trustee over the territories, and that banning slavery would have violated that trust with regard to southern slaveholders. *Id.* at 489-92 (Daniel, J., concurring). Justice Campbell acknowledged the "plenary power in Congress to dispose of the public domain, or to organize a Government over it," but he concluded that this plenary power "does not imply a corresponding authority to determine the internal polity, or to adjust the domestic relations, or the persons who may lawfully inhabit the territory in which it is situated." *Id.* at 501 (Campbell, J., concurring). Campbell reviewed the history of the rules for these lands under the British government, and derived a contrary "American doctrine" which provided that the people of a territory and not the national government possessed the authority to legislate for the territory. *Id.* at 511. The power of Congress under this theory was only that necessary to sell the lands, for the Constitution contained no "annunciation that a consolidated power had been inaugurated, whose subject comprehended an empire, and which had no restriction but the discretion of Congress." *Id.* at 505; *see also id.* at 514 ("[T]he power to make rules and regu-

to Taney's view in some form.

Among the members of the majority, only the concurring opinion of Justice Catron pointed to the obvious flaw in the theories of Taney and the concurring justices. Catron readily accepted that "Congress is vested with power to govern the Territories of the United States by force of" the Property Clause.[219] He reviewed the history of the cession of the western land claims by the original states to reinforce this conclusion.[220] Based on this history, Catron could not accept the idea that the federal government lacked the authority to govern the territories for the most personal reasons:

> It is due to myself to say, that it is asking much of a judge, who has for nearly twenty years been exercising jurisdiction, from the western Missouri line to the Rocky Mountains, and, on this understanding of the Constitution, inflicting the extreme penalty of death for crimes committed where the direct legislation of Congress was the only rule, to agree that he had been all the while acting in mistake, and as an usurper.[221]

Catron had exercised the authority that Taney denied existed in the express terms of the Constitution, namely the federal government's authority to establish regulations for the territory and other property of the United States. Moreover, Catron had exercised this authority in the most extreme possible way.

Nevertheless, Catron, a southerner, found a way to agree that the Missouri Compromise violated the Constitution. He believed that the terms of the land cessions determined whether the land should be slave or free. Reviewing the history of these cessions, Catron concluded that the United States could prohibit slavery from the territory ceded by Virginia only because Virginia agreed to the prohibition, but that Spain and France had not made similar agreements with regard to the Louisiana Purchase.[222] Catron also accepted Taney's theory that the Constitution did not allow the federal government to

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lations, from the nature of the subject, is restricted to such administrative and conservatory acts as are needful for the preservation of the public domain, and its preparation for sale or disposition."). To interpret the clause as vesting such power in Congress would be to read the words "as George III would have understood them," *id.* at 511, and would appeal to the senses of the "Norman lawyers of William the Conqueror," but not to "an American patriot." *Id.* at 513. Campbell issued this opinion undeterred by *United States v. Gratiot* or Story's commentaries.

219. *Id.* at 519-20 (Catron, J., concurring).

220. *Id.* at 521-23.

221. *Id.* at 522-23.

222. *Id.* at 524-26.

prohibit citizens from bringing all manner of property, including slaves, with them if they settled in the territories.[223] In the end, seven justices voted to hold the Missouri Compromise unconstitutional, and six believed that it lay entirely beyond the competence of Congress to enact such legislation for the territories.[224]

Justices McLean and Curtis dissented. On the question of Congress's power over the territories, McLean argued that Taney's opinion contradicted the Court's earlier decision in *American Insurance Co. v. Canter* and that the words "territory and other property" meant that "[i]n both of these senses it belonged to the United States—as land, for the purpose of sale; as territory, for the purpose of government."[225] McLean thus accepted Maryland's view of federal ownership of the western territories as proposed for the Articles of Confederation. The Constitution made the federal government both proprietor of and sovereign over the western lands. Linking the Property Clause to its original purpose, McLean also urged that Congress must have the power to ban slavery in a territory if for no other reason than to protect the value of the lands for their ultimate disposal:

> If Congress should deem slaves or free colored persons injurious to the population of a free Territory, as conducing to lessen the value of the public lands, or on any other ground connected with the public interest, they have the power to prohibit them from becoming settlers in it.... The repugnancy to slavery would probably prevent fifty or a hundred freemen from settling in a slave Territory, where one slaveholder would be prevented from settling in a free Territory.[226]

To the extent that Congress had the authority to repel foreign invasion of the territories and to create a criminal code for them, it could ban slavery.[227]

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223. *Id.* at 527-28.

224. *See* FEHRENBACHER, *supra* note 159, at 404 (providing a useful chart of the reasoning in the majority opinions). Unfortunately, the chart omits from consideration the opinion of Justice Nelson, even though Justice Nelson hinted that he agreed with Taney's reasoning:

> It is perhaps not unfit to notice, in this connection, that many of the most eminent statesmen and jurists of the country entertain the opinion that this provision of the act of Congress, even within the territory to which it relates, was not authorized by any power under the Constitution.

Dred Scott, 60 U.S. (19 How.) at 464 (Nelson, J., concurring).

225. *Dred Scott*, 60 U.S. (19 How.) at 540, 541 (McLean, J., dissenting).

226. *Id.* at 543.

227. *Id.*

Nevertheless, McLean entertained the possibility that Taney correctly interpreted the Constitution:

> What do the lessons of wisdom and experience teach, under such circumstances, if the new light, which has so suddenly and unexpectedly burst upon us, be true? Acquiescence; acquiescence under a settled construction of the Constitution for sixty years, though it may be erroneous; which has secured to the country an advancement of prosperity beyond the power of computation.[228]

In making this plea, McLean himself acquiesced to Taney's reasoning in part. McLean's only response to Taney's due process justification for holding the Missouri Compromise unconstitutional was that Congress did not "forfeit property, or take it for public purposes. It only prohibited slavery ...."[229] McLean's answer referred to an understanding commonly held at the time of *Dred Scott*: Although the law regarded slaves as property, slavery existed only because of positive municipal law that states could choose to abolish.[230] Taney's opinion changed the understanding of congressional power over the territories and whether Congress had municipal authority over them.

Justice Curtis's dissent dealt more thoroughly with Taney's opinion. Curtis began with two historical points on the cessions of the public domain. First, because the Constitutional Convention met as Congress was enacting the Northwest Ordinance, the founders must have intended to authorize Congress to administer the lands that the landed states had ceded and would cede to the United States.[231] Second, North Carolina and

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228. *Id.* at 546. Carolyn Landever quotes this language from Justice McLean's dissent to suggest that states might have to accept continued federal authority over federal lands within their borders, as if McLean agreed with the proposition that the states should receive such lands under the equal footing doctrine. *See* Landever, *supra* note 28, at 607. There is no evidence that McLean believed anything of the kind or that he actually believed that the construction of the Constitution he urged was erroneous. Rather, McLean offered this reading as a last line of defense against Taney's reasoning.

229. *Dred Scott*, 60 U.S. (19 How.) at 547.

230. *See, e.g.*, Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 611 (1842) ("The state of slavery is deemed to be a mere municipal regulation, founded upon and limited to the range of the territorial laws."); Commonwealth v. Aves, 35 Mass. (18 Pick.) 193, 215 (1836) ("[S]lavery is a relation founded in force, not in right, existing, where it does exist, by force of positive law, and not recognized as founded in natural right...."); Somerset v. Stewart, 98 Eng. Rep. 499, 510 (K.B. 1772) ("The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political... it's so odious, that nothing can be suffered to support it, but positive law.").

231. *Dred Scott*, 60 U.S. (19 How.) at 606-08 (Curtis, J., dissenting). Justice Curtis stated,

> Keeping these facts in view, it may confidently be asserted that there

Georgia had not ceded their western lands until after the adoption of the Constitution, but the members of the convention fully expected those states to cede their lands.[232] Therefore, the founders must have intended the Constitution to provide authority to the federal government to govern lands acquired after the adoption of the Constitution.[233] Curtis found this authority in the Property Clause.[234] The early acts of the first Congress and Congress's subsequent actions confirmed Curtis's reading that Congress could ban slavery in the territories.[235]

The *Dred Scott* decision immediately elicited strong reaction from both antagonists and defenders. Antagonistic contemporary commentaries came out swiftly after the decision and focused on the territorial aspect of the decision.[236] This focus of criticism was not surprising from a strategic perspective. Although the Court's decision that Scott was not a Missouri citizen caused great stir, most northern states did not treat blacks as citizens, opening critics of *Dred Scott* to the charge of hypocrisy by southerners and Democrats.[237] The question of

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> is very strong reason to believe, before we examine the Constitution itself, that the necessity for a competent grant of power to hold, dispose of, and govern territory, ceded and expected to be ceded, could not have escaped the attention of those who framed or adopted the Constitution....

Id. at 608.

232. *Id.* at 610.

233. *Id.* at 611.

234. *Id.* at 612-14. To the extent that the Constitution forbade Congress from enacting legislation, such as the prohibition on ex post facto clauses, Curtis recognized that the Property Clause did not extend to that situation. *Id.* at 614. Curtis also believed that the question of whether a regulation is "needful" rested in the exclusive province of Congress. *See id.* at 614-15.

235. *See id.* at 616-19. Curtis summarizes,

> [I]f the practical construction of the Constitution contemporaneously with its going into effect, by men intimately acquainted with its history from their personal participation in framing and adopting it, and continued by them through a long series of acts of the gravest importance, be entitled to weight in the judicial mind on a question of construction, it would seem to be difficult to resist the force of the acts above adverted to.

Id. at 619.

236. *See, e.g.*, FEHRENBACHER, *supra* note 159, at 429-31.

237. *See id.* The northern publication *Harper's Weekly Journal of Civilization* ran an editorial reflecting this fact:

> Nor does it appear that the question of the citizenship of our free black population is a question likely to take any practical shape capable of profoundly agitating the public mind. We are indeed a consistent and reasonable people! We have among us a small representation of a tropical race of human beings, marked off from us by the

Congress's power over the territories thus presented a more attractive target to attack, especially given the paucity of the Court's reasoning.

Thomas Hart Benton, senator from Missouri and John C. Calhoun's frequent opponent, issued a notable critique of *Dred Scott* on the eve of his death.[238] In Benton's view, Taney correctly concluded that the Constitution did not give Congress legislative power over the territories. Where Taney erred, according to Benton, was in concluding that the Constitution applied to the territories at all. The senator's somewhat tortured argument on this point probably stems from the fact that Benton had argued *United States v. Gratiot* on behalf of the private landowners, and he believed that Congress lacked power over the territories other than to dispose of them through sales. Other critiques of *Dred Scott* appeared in everything from pamphlets[239] to treatises.[240]

The *Dred Scott* decision also complicated the politics of the Democratic Party and ultimately led to its defeat in the presi-

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> unmistakable line of color, if by nothing else, and over whom we daily arrogate to ourselves of the Caucasian stock a complete and absolute superiority. We will not marry with them, we will not eat with them, as a general rule we do not let them vote, we will let them hold no office. We do not allow them to kneel beside us to worship the Great Father of all; not even when we approach the end of our weary journey will we allow our miserable dust to repose side by side with theirs in the common receptacle of humanity. And yet, when half a dozen old lawyers at Washington, after racking their heads for two years over a question that has bothered the Robe for half a century, announce as their decision that *free blacks are not citizens of the United States*, and as such not permitted to sue in certain courts of limited and special jurisdiction, we fume, and fret, and bubble, and squeak, as if some dreadful injustice and oppression were committed. It really does not seem to us that this part of the Dred Scott decision is likely to produce any very serious practical results.

The Dred Scott Case, 1 HARPER'S WKLY. J. OF CIVILIZATION 193, 193 (1857), *reprinted in* KUTLER, *supra* note 164, at 49.

238. HISTORICAL AND LEGAL EXAMINATION OF THAT PART OF THE DECISION OF THE SUPREME COURT OF THE UNITED STATES IN THE DRED SCOTT CASE, WHICH DECLARES THE UNCONSTITUTIONALITY OF THE MISSOURI COMPROMISE ACT, AND THE SELF-EXTENSION OF THE CONSTITUTION TO TERRITORIES, CARRYING SLAVERY WITH IT (photo. reprint 1969) (1857).

239. *See, e.g.*, GEORGE TICKNOR CURTIS, THE JUST SUPREMACY OF CONGRESS OVER THE TERRITORIES (Boston, A. Williams & Co. 1859). Curtis served as one of Scott's attorneys. *Dred Scott*, 60 U.S. (19 How.) at 399.

240. *See, e.g.*, 1 JOHN CODMAN HURD, THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES §§ 493-501, 506-523 (photo. reprint 1968) (1858). Professor Fehrenbacher accurately observed that "Hurd's treatise did not so much attack the Dred Scott decision as pass over it like a glacier, with devastating effect." FEHRENBACHER, *supra* note 159, at 427.

dential election in 1860. Northern Democrats like Stephen Douglas hoped to soothe anti-slavery activists with the promise of popular sovereignty in the territories. The *Dred Scott* decision threw a monkey wrench into this promise. If Congress lacked the authority to ban slavery in the territories, how could Congress vest a territorial government with such authority? In a lengthy article that appeared in *Harper's* magazine, Douglas laid out his view that a territorial government could do so because it reflected the direct will of the people.[241] Douglas's article immediately generated nasty attacks in pamphlet form, one from President Buchanan's attorney general, Jeremiah Black, and another from Reverdy Johnson, a southern Democrat who had served as President Taylor's attorney general and as Sanford's counsel before the Supreme Court in *Dred Scott*.[242] Emboldened by the implications of the *Dred Scott* decision, southerners and their northern allies began to suggest that if the Constitution prohibited Congress from banning slavery in the territories, then it also mandated that Congress must positively institute slavery in the territories.[243] Indeed, if Taney correctly concluded that a congressional ban on slavery in the territories constituted a deprivation of private property without due process of law, free state bans on slavery violated state constitutions containing similar due process provisions.[244] According to this argument, slavery was a legal institution everywhere in the United States.

Meanwhile, leaders of the Republican Party treated the decision on the territorial question as mere dicta. After all, the Court's denial of diversity jurisdiction over Scott's case rendered the rest of the opinion superfluous. The decision in *Dred Scott* also thoroughly undermined the Republican Party platform calling for the extirpation of the "twin relics of barba-

241. Stephen A. Douglas, *The Dividing Line Between Federal and Local Authority*, 19 HARPER'S NEW MONTHLY MAG. 519, 537 (1859).

242. The pamphlet OBSERVATIONS ON SENATOR DOUGLAS'S VIEWS OF POPULAR SOVEREIGNTY, AS EXPRESSED IN HARPERS' MAGAZINE, FOR SEPTEMBER, 1859 (Washington, Thomas McGill 1859) is attributed to Attorney General Jeremiah Black, and the pamphlet REMARKS ON POPULAR SOVEREIGNTY, AS MAINTAINED AND DENIED RESPECTIVELY BY JUDGE DOUGLAS, AND ATTORNEY-GENERAL BLACK (Baltimore, Murphy & Co. 1859) is attributed to Reverdy Johnson. Douglas then wrote his own pamphlet responding to these attacks, entitled POPULAR SOVEREIGNTY IN THE TERRITORIES (Washington 1859).

243. *See* FEHRENBACHER, *supra* note 159, at 431-37 (describing reaction to the decision in state legislatures).

244. *See id.*

rism—Polygamy, and Slavery."[245] Abraham Lincoln called for simply ignoring the decision. A legal solution to the problems that the Court created in *Dred Scott* probably lay out of reach.

The nation collapsed into civil war. In 1862, the Republicans made good on their promise to eliminate polygamy and slavery in the territories.[246] Congress also enacted many of the statutes that would govern the shape of the public lands for the next one hundred years.[247] Politically, however, the issue of congressional authority over the territories and other property of the United States disappeared as the much more immediate and wrenching issues of secession, union, and reconstruction garnered the nation's attention.

Dred Scott thus provides the only clear authority narrowly interpreting the Property Clause. Neither logic nor prior precedent supported it. The most plausible reading of the opinions holding the Missouri Compromise unconstitutional is that politics and sectionalism motivated the justices involved. Nevertheless, the *Dred Scott* decision warrants an extended reading. Because the decision represents the Supreme Court's only definitively narrow reading of the Property Clause, advocates of the narrow view must defend its reasoning. Thus far, they have not, perhaps because of the general embarrassment that the case causes any commentator on the American legal system. It is not entirely unfair, however, to charge that any advocate of a narrow reading of the Property Clause must argue that the Court decided the Missouri Compromise portion of *Dred Scott* correctly.[248] The paucity of Taney's reasoning, however, shows that even this relatively early attempt to construe the Property Clause narrowly does not withstand scrutiny. The legal authority that existed at the time—the records of the federal government's behavior under the Articles of Confederation,

245. Republican Platform, *supra* note 169, at 1204.

246. Act of June 19, 1862, ch. CXI, 12 Stat. 432 (banning slavery in the territories); Act of July 1, 1862, ch. CXXVI, 12 Stat. 501 (banning polygamy in the territories).

247. *See, e.g.*, General Mining Act of 1872, Act of May 10 1872, ch. CLII, 17 Stat. 91 (codified as amended at 30 U.S.C. §§ 21-40 (1994)); Act of July 26, 1866, ch. CCLXII, 14 Stat. 251 (recognizing rights-of-way across public lands); Homestead Act, Act of May 20, 1862, ch. LXXV, 12 Stat. 392. Professor Charles Wilkinson has traced the origins of the still-existing Mining Act of 1872 from the acts of 1866 and 1870. *See* CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN 40-43 (1992).

248. Curiously, Professor Engdahl—who argued that the classic view of the Property Clause is a narrow one and who thoroughly catalogued the cases—does not discuss or even cite *Dred Scott*. *See* Engdahl, *supra* note 28.

the records of the Constitutional Convention, early case law, and early commentary—did not support Taney's conclusion.[249] Indeed, the Court's own behavior regarding the decision reveals its weaknesses. Soon after the embarrassment of *Dred Scott* the Court would return to the broad construction of the Property Clause that had prevailed in other cases.

C. THE JURISPRUDENCE FOLLOWING *DRED SCOTT* AND THE RAPID REEMERGENCE OF THE BROAD AUTHORITY IN THE PROPERTY CLAUSE

After *Dred Scott*, the Court rarely invoked the decision as authority for its Property Clause jurisprudence. Two key considerations can explain this lack of citation. First, to the extent that people blamed the outcome in *Dred Scott* for the Civil War, any citation to the decision obviously would lack authoritative or persuasive power. Second, because the *Dred Scott* decision dramatically deviated from the Court's earlier Property Clause jurisprudence, the Court could easily ignore it. Thus, the Court's use of *Dred Scott*—or, more precisely, its refusal to confront the decision—reveals itself in both the territorial context and in the context of other federal property. The territorial

249. Professor Graber's attempt to defend the reasoning in *Dred Scott* from a historical perspective is unavailing. *See* Graber, *supra* note 161, at 302-10. For the most part, Graber focuses on defending Taney's ruling that banning slavery in the territories would constitute a deprivation of property without due process of law. *See id.* Only at the end of his account does Graber attempt to defend the portion of the opinion in which Taney argues that Congress lacked authority to ban slavery in the territories not because of the application of an external prohibition (the due process clause) but because the Property Clause did not vest sufficient authority in Congress over the territories. *See id.* at 308-10. Graber asserts that, at the time that the Court decided *Dred Scott*, sufficient debate existed over the proper interpretation of the term "needful" and the analogous term "necessary" in the Necessary and Proper Clause to justify Taney's reading. *Id.* at 308-09. "The late twentieth-century legal mind," asserts Graber, "regards elected officials as having the power to regulate property in any way that might plausibly be regarded as a rational means to a legitimate government end," *id.* at 308, implying that legal minds at the time of *Dred Scott* did not so regard the power of elected officials. Graber's argument overlooks such decisions as *United States v. Gratiot*, and the broad language in such decisions as *American Insurance Co. v. Canter* and *Cross v. Harrison* in which the Court ratified broad power of Congress over federal property and the territories. Whether Graber is correct that, at the time of the *Dred Scott* decision, one could plausibly argue that a legislated ban on slavery constituted a deprivation of property without due process is irrelevant to the question of whether Congress otherwise had the legislative jurisdiction to enact such legislation for the territories and other property belonging to the United States.

cases show the Court's retreat from its stance in *Dred Scott* and shed light on the Court's overall treatment of the power granted in the Property Clause. Nevertheless, these cases will receive less attention below than the cases involving other federal property.

1. The Territorial Cases

One of the first cases upholding congressional legislation for the territories after *Dred Scott* involved the ban on polygamy that the Republicans had moved through Congress during the Civil War.[250] The composition of the Court had changed completely from the time of *Dred Scott*, and the Court's holding in the later case reflected this change. In the challenge to the polygamy statute, the Court unanimously held that "the statute immediately under consideration is within the legislative power of Congress," without mention of *Dred Scott*.[251] In just one stroke, the Court had reversed the holding of *Dred Scott* without even acknowledging the fact.

The Court still had to deal with the source of Congress's power over the territories. After all, *Dred Scott* held that the Property Clause granted Congress power only over the territory ceded by the states before the adoption of the Constitution. Rather than expressly overrule *Dred Scott* on this point, however, the Court relied on the inherent authority theory of congressional power and eventually paired it again with the text of the Constitution. At first, the Court timidly found authority in the Property Clause. One case, with amazing *sangfroid*, stated that "[t]here have been some differences of opinion as to the particular clause of the Constitution from which the power [to govern the territories] is derived, but that it exists has always been conceded."[252] In upholding Congress's decision to repeal

250. Reynolds v. United States, 98 U.S. 145 (1878).

251. *Id.* at 166. Justice Field concurred in the majority opinion except for one point unrelated to the territorial power issue. *See id.* at 168 (Field, J., concurring).

252. Nat'l Bank v. County of Yankton, 101 U.S. 129, 132 (1879); *see also* Murphy v. Ramsey, 114 U.S. 15, 44-45 (1885) (upholding a statute banning bigamy and polygamy in the territories, failing to identify the source of power, and unusually, citing *Dred Scott*); *Nat'l Bank*, 101 U.S. at 132 ("It is certainly now too late to doubt the power of Congress to govern the Territories."). The Court has also stated,

> [T]his power of Congress to organize territorial governments, and make laws for their inhabitants, arises not so much from the clause in the Constitution in regard to disposing of and making rules and regulations concerning the Territory and other property of the United

the articles of incorporation for the Mormon Church in the Utah Territory, the Court held that the power of Congress over the territories "is general and plenary, arising from and incidental to" the power of the federal government to acquire the territories and from the power conferred in the Property Clause.[253] Thus, however derived, Congress had plenary authority over the territories once again.

Moreover, contrary to Taney's opinion in *Dred Scott*, the Court did not limit Congress's inherent authority over the territories. Throughout the last decade of the nineteenth century and the first decade of the twentieth, the Court not only returned to the original spirit of *American Insurance Co. v. Canter* and held that Congress possessed plenary power over the territories, but it also authorized governmental structures and practices not contemplated by the Constitution. In one of the more important controversies, the Court determined whether the territories were incorporated into the United States and to what extent the Constitution would apply to them. In a group of cases known as the *Insular Cases*, the Court held that not all constitutional protections applied to inhabitants of territories without express legislative action.[254] Although these cases assumed that Congress had broad power over the territories, they did not expressly overrule *Dred Scott* on this point. Indeed, in one of the *Insular Cases*, the Court simply noted about *Dred Scott* that "[i]t is sufficient to say that the country did not ac-

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States, as from the ownership of the country in which the Territories are, and the right of exclusive sovereignty which must exist in the National Government, and can be found nowhere else.

United States v. Kagama, 118 U.S. 375, 380 (1886).

253. Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 42 (1890).

254. The *Insular Cases* include *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (holding that the Sixth Amendment right to a trial by jury is inapplicable in Puerto Rico); *Ocampo v. United States*, 234 U.S. 91 (1914) (holding that the Fifth Amendment right to an indictment by a grand jury is inapplicable in the Philippines); *Dorr v. United States*, 195 U.S. 138 (1904) (holding that the right to a trial by jury is inapplicable in the Philippines); *Hawaii v. Mankichi*, 190 U.S. 197 (1903) (holding that the rights to an indictment by grand jury and to a trial by jury are inapplicable in Hawaii); and *Downes v. Bidwell*, 182 U.S. 244 (1901) (holding that Congress can place a duty on goods shipped from Puerto Rico to other parts of United States despite the Ports Preference Clause). Professor Levinson has recently called for instructors of constitutional law to add consideration of the *Insular Cases* to their classes. *See* Sanford Levinson, *Why the Canon Should Be Expanded to Include* The Insular Cases *and the Saga of American Expansionism*, 17 CONST. COMMENT. 241 (2000).

quiesce in the opinion, and that the civil war, which shortly thereafter followed, produced such changes in judicial, as well as public sentiment, as to seriously impair the authority of this case."[255] These cases would likely have satisfied Thomas Hart Benton, because they held that the Constitution did not apply to the territories by its own force. Although this conclusion understandably finds few supporters among the modern commentators,[256] it nevertheless demonstrates the Court's comfort with broad federal power at least when the interests of a state are not involved.

2. The Federal Property Cases

Just as the post-Civil War Court recognized broad congressional authority over the territories and eventually relinked that authority with the constitutional text, it also recognized broad congressional authority over the real property of the federal government as if *Dred Scott* had never happened. One of the first of these decisions is *Gibson v. Chouteau*, a case involving the disposition of federal property.[257] Two parties claimed the same tract of land located in Missouri's public domain, one through a patent from the United States and the other through the operation of the state statute of limitations and the doctrine of equitable conversion. The Court held for the party claiming the property through the federal patent. This result flowed from the Property Clause:

> With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No State legislation can interfere with this right or embarrass its exercise . . . .[258]

Thus, without any reference to *Dred Scott*, the Court restored broad congressional authority over the disposition of federal property, including property lying outside of the original land ceded to the United States prior to the ratification of the Constitution.

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255. *Downes*, 182 U.S. at 274.

256. *See, e.g.*, Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CAL. L. REV. 853 (1990); Robert A. Katz, Comment, *The Jurisprudence of Legitimacy: Applying the Constitution to U.S. Territories*, 59 U. CHI. L. REV. 779 (1992).

257. 80 U.S. (13 Wall.) 92 (1872).

258. *Id.* at 99.

Other cases of this era similarly held in sweeping terms that the Property Clause vested vast power in Congress to make rules for the nation's property and to dispose of, to enhance the value of, and to protect federal property as Congress saw fit.[259] In upholding early administrative regulations that governed grazing on public lands, the Court held in *Light v. United States* that "[t]he United States can prohibit absolutely or fix the terms on which its property may be used. As it can withhold or reserve the land it can do so indefinitely."[260] The federal government possessed this authority by virtue of its dual roles as proprietor and sovereign.[261] As a sovereign, the federal government could create crimes for violating the terms of use imposed on public property.[262] Federal law designed to protect federal lands, control their use, and prescribe the means through which people acquired rights to them displaced all contrary state law.[263]

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259. *See, e.g.*, Ruddy v. Rossi, 248 U.S. 104 (1918) (upholding an act exempting homesteads from serving as security for debts undertaken prior to the issuance of the patent for the homestead).

260. 220 U.S. 523, 536 (1911). For some background on Fred Light, the rancher who challenged these regulations, see WILKINSON, *supra* note 247, at 92.

261. *Light*, 220 U.S. at 537 ("These are rights incident to proprietorship, to say nothing of the power of the United States as a sovereign over the property belonging to it.").

262. *See* McKelvey v. United States, 260 U.S. 353, 359 (1922). Ordinary proprietors cannot create criminal law.

263. Utah Power & Light Co. v. United States, 243 U.S. 389, 404 (1917). There, the Court stated,

> True, for many purposes a State has civil and criminal jurisdiction over lands within its limits belonging to the United States, but this jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use and to prescribe in what manner others may acquire rights in them.

Id. Broadly construing this power, the Court continued:

> [T]he inclusion within a State of lands of the United States does not take from Congress the power to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them, even though this may involve the exercise in some measure of what commonly is known as the police power.

Id. at 405. State laws on this subject were irrelevant "save as they may have been adopted or made applicable by Congress." *Id.*

Justice Van Devanter wrote *Utah Power & Light*. In a later decision, the Supreme Court noted that Justice Van Devanter "as Assistant Attorney General for the Interior Department from 1897 to 1903[] did more than any other person to give character and distinction to the administration of the public lands . . . ." Best v. Humboldt Placer Mining Co., 371 U.S. 334, 336-37 (1963).

Moreover, the federal government's authority over its property did not extend solely to the public domain, the national parks, and the forest reserves. In *Ashwander v. Tennessee Valley Authority*, the Court upheld the constitutionality of the Tennessee Valley Authority acquiring transmission lines to market hydroelectric energy produced at one of its dams.[264] The Court reasoned that the Property Clause authorized the government to lease out its lands for mineral development in addition to selling them outright.[265] Surely, if the government could lease its lands for mineral development, "it could mine and obtain profit from its own sales."[266] By analogy, because the United States owned the "water power and electric energy generated at the dam,"[267] the United States could sell the electricity itself as its property.[268]

During the post-Civil War era, the Court also affirmed that the federal government could use its power to grant federal lands for accomplishing arguably nonfederal ends. For example, the Court upheld the federal government's conditional grant that allowed San Francisco to generate electricity at the Hetch-Hetchy valley in Yosemite National Park, but only if a municipal entity, and not a private utility, sold the electrical power.[269] Because the Court found that the Property Clause power was "without limitations," it upheld the grant as constitutional.[270] Under this limitless authority, "Congress may constitutionally limit the disposition of the public domain to a manner consistent with its views of public policy," including a policy "designed to avoid monopoly and to bring about a wide-

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This observation undermines Professor Engdahl's assertion that the justices deciding *Utah Power & Light* "were seriously deficient in their understanding of the property clause precedents." Engdahl, *supra* note 28, at 311; *see also id.* at 314 n.142 (questioning Van Devanter's reasoning in *Utah Power & Light*).

264. 297 U.S. 288 (1936). *Ashwander* is known more for Justice Brandeis's concurring opinion and its view that courts should avoid reaching constitutional questions if possible. *See id.* at 346-48 (Brandeis, J., concurring). Although three justices joined Brandeis, *id.* at 356, Brandeis also made it clear that he agreed with Chief Justice Hughes's opinion on the merits of the constitutional question. *See id.* at 341 ("I do not disagree with the conclusion on the constitutional question announced by the Chief Justice . . . .").

265. *See id.* at 331-32.

266. *Id.* at 333.

267. *Id.*

268. *See id.* at 333-35.

269. United States v. City of San Francisco, 310 U.S. 16, 18-19 (1940).

270. *Id.* at 29.

spread distribution of benefits."[271] This holding followed from *Ashwander*, where the Court rejected the notion that Congress could only sell electricity generated at federally owned dams to further an enumerated power. Instead, the decision to sell lay "in the discretion of the Congress . . . to determine of how much of the property it shall dispose."[272]

During this period, the Court also upheld federal actions taking place on federal land that directly contravened state statutes. For example, in *Hunt v. United States*, the Court held that the Forest Service could authorize its agents to shoot deer that were overbrowsing a national forest, even though the hunting violated state game laws.[273] Similarly, the Court held that federal agents could take actions that directly violated state law even when the state had originally ceded jurisdiction to the United States under the Enclave Clause and the federal government subsequently ceded the exclusive jurisdiction back to the state.[274]

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271. *Id.* at 30.

272. Ashwander v. TVA, 297 U.S. 288, 336 (1935).

273. 278 U.S. 96, 100 (1928) ("The direction given by the Secretary of Agriculture was within the authority conferred upon him by act of Congress. And the power of the United States to thus protect its lands and property does not admit of doubt."). One twist to the *Hunt* decision is that the district court held that the United States could not license private hunters to cull the herds on behalf of the Forest Service, *id.*, and that the Supreme Court, under the circumstances of the case, required that the Secretary of Agriculture promulgate regulations requiring the Forest Service to specially tag the carcasses of all deer taken. *Id.* at 101. Nevertheless, these interesting twists are of no special importance, because the Court's opinion makes clear that these provisos are unique to the case. *See id.* at 100-01. No commentator has attempted to use these comments to undermine the overall reasoning of *Hunt* or has argued that they are necessary to the decision.

274. *See* Ohio v. Thomas, 173 U.S. 276 (1899) (approving of federal officials serving oleomargarine at a military hospital without warnings required by state law). Professor Engdahl interprets *Ohio v. Thomas* as reinforcing his theory that under the classic doctrine "although the state enjoyed general governmental jurisdiction [over federal property], if federal property were used to effectuate one of the enumerated federal governmental powers, that enumerated governmental power would invoke the supremacy clause so as to override state law." Engdahl, *supra* note 28, at 304. In Engdahl's view, the specific enumerated power involved in *Ohio v. Thomas* is the power of Congress over the military. Nevertheless, *Ohio v. Thomas* evidences a broader understanding that actions taken pursuant to the Property Clause on federal lands can override otherwise applicable state law even if the federal government is not exercising what Engdahl would call an enumerated power. First, the Court spoke generally in *Ohio v. Thomas* and did not limit its language to the exercise powers enumerated in Article I.

> Federal officers who are discharging their duties in a State and who

The Court also determined to what extent Congress could delegate this power to the executive. The Court upheld criminal prosecutions for violations of grazing regulations issued under the Forest Reserve Act because the statute contemplated such regulations generally, even though it did not specifically provide for them.[275] The Court also upheld the President's withdrawal of public lands from otherwise applicable laws authorizing the disposal of such lands simply because of the long-standing practice.[276] These holdings arguably extended the Court's jurisprudence in the delegation of legislative power to the executive. Similarly, the Court upheld mining laws that subjected mining on federal lands to state law as well as federal law, a holding that arguably went beyond the Court's delegation jurisprudence in other areas.[277]

> are engaged . . . in superintending the internal government and management of a Federal institution . . . are not subject to the jurisdiction of the State in regard to those very matters of administration which are thus approved by the Federal authority.

Thomas, 173 U.S. at 283. Second, the decision in *Hunt v. United States*—which upheld the decision of the United States to cull a deer herd that was overbrowsing a national forest—is incomprehensible under Engdahl's theory. It is coherent only under a theory that recognizes that the Property Clause is itself an enumerated power, not an authority that Congress must use to further some other enumerated power if it seeks to preempt contrary state legislation. According to Engdahl, that decision involved the exercise of no enumerated power. Engdahl, *supra* note 28, at 314 n.140 ("Making provision for public recreation or for future timber needs is not an objective within the scope of any enumerated federal power."). In Engdahl's view, if the federal government is not exercising a power enumerated in Article I, the federal government is limited to the powers of a mere proprietor and is "subject to the governmental jurisdiction of the state wherein the particular land lay, without the possibility of federal preemption." *Id.* at 310. Generally, a private landowner cannot kill animals in violation of state game laws even if the wildlife has injured the landowner's property. Engdahl dismissed *Hunt* in two ways. First, he conceded that the "United States enjoyed as a proprietor . . . certainly a somewhat greater right of self-help than that which a private proprietor could claim." *Id.* at 317. Second, cases like *Hunt* spelled the beginning of the end of what Engdahl conceived was the "classic" Property Clause doctrine. *See id.* at 318 n.157 (arguing that although "classic principles still prevailed in the Supreme Court, [this] by no means indicates that they were universally understood and consistently applied by all lawyers, government officers, and inferior courts"). Engdahl's argument concerning *Hunt* is baroque. A cleaner and more coherent view is that the control of federal property is an enumerated power, and that the federal officials in *Hunt* acted with the same authority as those in the earlier *Ohio v. Thomas* case.

275. United States v. Grimaud, 220 U.S. 506 (1911).

276. United States v. Midwest Oil Co., 236 U.S. 459 (1915).

277. Butte City Water Co. v. Baker, 196 U.S. 119 (1905). The Court's reasoning does evince a sense that the Property Clause power may not be a power

For the purposes of this Article, however, *Camfield v. United States* provides the most notable Property Clause case that the Court decided in this period.[278] That case deserves close attention for two reasons. First, *Camfield* involved a question of the federal government's power to regulate private activities on private lands located within a state (as opposed to a territory). Second, the Court's approach provides some insight into possible limits on the Property Clause power.

Camfield involved an attempt by private parties to fence in approximately 20,000 acres of public lands that lay within the state of Colorado.[279] Congress had enacted a statute making the enclosure of public lands in any state or territory unlawful, unless the party erecting the fence had a claim or color of title to the land.[280] The individuals in *Camfield* apparently had no such claim, but they devised an ingenious means to fence in approximately seventy-two square miles of land, with about half of that owned by the federal government. Their scheme rested on a common pattern of land ownership in the West. The individuals owned the odd-numbered sections within the two townships in question, and the United States owned all of the even-numbered sections.[281] To avoid erecting a fence on public lands, the individuals erected fences only on odd-numbered sections.[282] Although this pattern enclosed the even-numbered sections of land as well,[283] the private individuals

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as extensive as other powers granted in the Constitution.

> While the disposition of these lands is provided for by Congressional legislation, such legislation savors somewhat of mere rules prescribed by an owner of property for its disposal. It is not of a legislative character in the highest sense of the term, and as an owner may delegate to his principal agent the right to employ subordinates, giving to them a limited discretion, so it would seem that Congress might rightfully entrust to the local legislature the determination of minor matters respecting the disposal of these lands.

Id. at 126. Despite the fact that the Court says that statutes enacted under the Property Clause are perhaps "not of a legislative character in the highest sense of the term," the holding of the case is only that Congress could incorporate state law in its disposition of public lands, not that the Property Clause power is a lesser congressional power. *Id.*

278. 167 U.S. 518 (1897).

279. *Id.* at 519.

280. Act of Feb. 25, 1885, ch. 149, § 1, 23 Stat. 321 (codified at 43 U.S.C. § 1061 (1994)).

281. *Camfield*, 167 U.S. at 519.

282. *Id.*

283. The Court's opinion includes a helpful diagram that shows how the defendants erected their fences. *Id.* at 520.

argued that they had fenced in only their own lands. Therefore, their actions lay beyond the reach of the legislative authority of the federal government because the actions took place solely on privately owned lands.[284]

In rejecting the defendant's view, the Court held that the federal government had both proprietary and sovereign powers over its lands. Indeed, the Court intertwined its discussion of these two aspects of federal ownership. To address the proprietary aspect of federal ownership, the Court first questioned whether the fences would qualify as a nuisance.[285] If so, the United States, like any private landowner, could seek to enjoin the fences even if they were not erected directly on federal land.[286] In the case of an established nuisance, "no legislation was necessary to vindicate the rights of the Government as a landed proprietor."[287] This holding was consistent with the Court's earlier decision giving the United States all the remedies available to an ordinary proprietor for instances of trespass.[288]

In relation to the sovereign aspect of federal ownership, the Court analogized to the state police power. States could, under their police power, legislate against the erection of injurious fences even if they did not qualify as a nuisance.[289] This legislation had a basis in the state police power because it advanced and sufficiently safeguarded the public interest and did not merely vindicate private values.[290] If the fences involved in *Camfield* did not qualify as a nuisance, this would prevent the federal government from enjoining them in its capacity as proprietor.[291] Nevertheless, the federal government could legislate against such fences because they interfered with the congres-

284. *Id.* at 522.

285. *Id.* at 522-23.

286. *Id.* at 524 ("While the lands in question are all within the State of Colorado, the Government has, with respect to its own lands, the rights of an ordinary proprietor, to maintain its possession and to prosecute trespassers.").

287. *Id.*

288. *See* Cotton v. United States, 52 U.S. (11 How.) 229, 231-32 (1851).

289. *Camfield*, 167 U.S. at 522-24; *see also* Rideout v. Knox, 19 N.E. 390 (Mass. 1889) (Holmes, J.), *cited in Camfield*, 167 U.S. at 523.

290. *Camfield*, 167 U.S. at 524.

291. The defendants erected the fences wholly on private lands and without spite. *See* Gaetke, *Boundary Waters, supra* note 27, at 172. Therefore, an ordinary proprietor probably could not have obtained an injunction against these fences under the common law then prevalent. Indeed, no evidence suggested that these fences were anything other than ordinary agricultural fences typically built on the range in the intermountain West at the time.

sional policy for these lands.[292] This legislation withstood scrutiny even though it "may involve an entry upon the lands of a private individual."[293]

In reaching this conclusion, the Court declared that the "general Government doubtless has a power over its own property analogous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case."[294] It made no difference to the Court that the federal lands lay within a state. Even though Congress did not have general power over property within a state as it would over property within a territory, this distinction dissolved when dealing with federal prop-

292. *Camfield*, 167 U.S. at 525. Professor Gaetke persuasively argues that the rule in *Camfield* extends beyond protecting the public lands from common law nuisances. Gaetke, *Boundary Waters*, *supra* note 27, at 169-74. Analyzing *Camfield* closely, he concludes that "if *Camfield* is to be cited merely for the proposition that Congress may prohibit the maintenance of nuisances on property adjoining the public lands, it must be recognized that 'nuisance' includes a use of private property that frustrates a congressional policy for the use of federal property." *Id.* at 172. Nevertheless, Professor Gaetke relies too heavily on the Court's conclusion that "the fence is clearly a nuisance." *Camfield*, 167 U.S. at 525. Professor Gaetke draws on this language to argue that courts should determine the extent of the federal government's authority to control extraterritorial activities in a manner similar to the way in which they determine whether the activity is a nuisance. Gaetke, *Congressional Discretion*, *supra* note 27, at 397 & n.87. In particular, Professor Gaetke relies on language in the opinion suggesting that the Court would have found the defendants' conduct lawful if they had fenced in each individual privately owned section. *Id.* at 397 n.87 (citing *Camfield*, 167 U.S. at 527-28). This argument is flawed. The opinion in *Camfield* makes clear that this language is dicta. *Camfield*, 167 U.S. at 528 ("It may be added, however, that this is scarcely a practical question . . . ."). In addition, it is unclear from the Court's opinion whether nuisance set an outward boundary of federal government regulation of extraterritorial activity. The Court stated that "[s]o long as the individual proprietor confines his enclosure to his own land, the Government has no right to complain, since he is entitled to the complete and exclusive enjoyment of it, regardless of any detriment to his neighbor. . . ." *Id.* Although the Court may have been commenting on the outer boundaries of congressional authority under the Property Clause, an equally plausible reading is that the Court was simply interpreting the terms of the statute, which only forbade fencing in public lands. The presence of individual fences on private lands "was a contingency which the Government was bound to contemplate in granting away the odd-numbered sections." *Id.* The *Camfield* decision thus does not set an outer boundary of federal regulation of extraterritorial activities. Even though Gaetke understands the Court's use of the term "nuisance" in *Camfield* to extend beyond mere common law nuisance, *see* Gaetke, *Boundary Waters*, *supra* note 27, at 172, he nevertheless uses nuisance as a basic model in determining the extent of federal authority.

293. *Camfield*, 167 U.S. at 525.

294. *Id.*

erty.[295] Recognizing the federal government as a sovereign over public lands in addition to being a proprietor avoided the risk of "plac[ing] the public domain of the United States completely at the mercy of state legislation."[296] Thus, without any hesitation, the Court announced that the federal government had police power over activities that harm federal property even when the regulated activities occurred wholly on privately owned lands within states admitted to the Union.[297] This recognition will later prove important in evaluating the extent to which principles of federalism restrict the federal government's authority over public lands.

The Court's second notable case concerning the authority of the United States to regulate private activities on nonfederal lands that threaten public lands is *United States v. Alford*.[298] In that case, Alford built a fire on nonfederal lands, did not extinguish the fire, and ended up setting fire to federal lands.[299] The United States indicted Alford for violating a statute that subjected to criminal punishment any person who builds a fire in or near any federal lands without totally extinguishing the fire.[300] The district court dismissed the indictment, and the Supreme Court reversed in a characteristically terse opinion by Justice Holmes. The Court held the statute constitutional, reasoning that "Congress may prohibit the doing of acts upon privately owned lands that imperil the publicly owned forests."[301] The activity regulated only had to take place "near" publicly owned lands.[302]

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295. *Id.* at 525-26. As the Court held,

> 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.

Id.

296. *Id.* at 526.

297. *Id.* at 525-26.

298. 274 U.S. 264 (1927).

299. *Id.* at 266.

300. *Id.* at 266-67 (quoting Act of June 25, 1910, ch. 431, § 6, 36 Stat. 855, 857).

301. *Id.* at 267.

302. *Id.* Professor Gaetke has pointed out that the rule of *Camfield*, properly read, comprises the rule of *Alford*. Gaetke, *Boundary Waters*, *supra* note 27, at 170 n.69. *Alford* is nevertheless important to buttress the proposition that the federal government can regulate activities off federal lands.

This litany of cases stands out in an era during which, at least until the New Deal, the Court acted with disdain or outright hostility to the exercise of federal power within the states. The Court's Commerce Clause jurisprudence at this time made fine distinctions between "local" activities such as manufacturing that Congress could not regulate and interstate commerce that Congress could regulate.[303] The Court also held that the civil rights amendments could not be enforced with broad federal enactments.[304] The federal government certainly did not have anything resembling the police power within states admitted to the union.[305] Yet, in the context of the Property Clause, the Court held that the federal government had broad power over the administration of its lands, one akin to the general police power.

One must assess the cases from this era relied on by the proponents of the narrow view against this background. These proponents often attempt to turn the dicta from these cases into holdings. These cases usually involved a dispute between an individual and a state with the individuals claiming freedom from state regulation because of their presence on federal land. From early times, however, the Court and commentators recognized state authority to enact legislation for federal property in the absence of a federal statute.[306] These decisions, therefore, do not accurately represent the Court's view on the federal government's authority over its property. The more central inquiry to determine the extent of Congress's power under the Property Clause asks whether the federal government can enact legislation for its property that trumps otherwise applicable state law.

The most important case of this era on which the advocates

303. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936) (invalidating a provision of the act setting minimum wage and maximum hours requirements in the coal mining industry); Hammer v. Dagenhart, 247 U.S. 251 (1918) (invalidating a statute prohibiting interstate shipment of goods made with child labor as an unconstitutional regulation of manufacturing), *overruled in part by* United States v. Darby, 312 U.S. 100 (1941); Adair v. United States, 208 U.S. 161 (1908) (invalidating an act that criminalized discharging an employee based on membership in a labor organization), *overruled in part by* Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941); United States v. E.C. Knight Co., 156 U.S. 1 (1895) (construing an antitrust act narrowly to exempt manufacturing activities).

304. *See* The Civil Rights Cases, 109 U.S. 3, 25 (1883).

305. *See, e.g.*, *In re* Heff, 197 U.S. 488, 505-06 (1905), *overruled in part by* United States v. Nice, 241 U.S. 591 (1916).

306. *See, e.g.*, 3 STORY, *supra* note 147, § 1322, at 198.

of the narrow view rely is *Fort Leavenworth Railroad Co. v. Lowe*,[307] which provides the best textual support for the view that the United States has only the rights of an ordinary proprietor over its lands. In *Fort Leavenworth Railroad*, the federal government owned a military base in Kansas and did not obtain a cession of jurisdiction to the base under the Enclave Clause when Congress admitted Kansas to the Union.[308] A railroad company claimed that Kansas could not tax any of its property that lay within the federal reservation.[309] If Kansas had ceded jurisdiction and the United States had accepted the cession, the case would be easily decided under standard Enclave Clause jurisprudence: The United States would have the exclusive power to make laws for the area, and Kansas tax law would not apply.[310] Because Kansas had not made such a complete cession, however, the railroad's claim to an exemption from state taxation rested on its presence within a federal reservation.[311] To the extent that Kansas had made a cession of jurisdiction to the United States, the cession expressly retained authority to tax railroads within the military reservation.[312] Thus, for the railroad to win, it had to show that such a retention of the authority to tax somehow violated the Constitution.[313] The Supreme Court rejected this argument, holding that states retained jurisdiction over private parties on federal reservations unless the state had ceded all jurisdiction to the federal government.[314]

The holding of *Fort Leavenworth Railroad* does not itself interfere with a broad reading of the Property Clause. It simply held that where a state expressly reserves the authority to

307. 114 U.S. 525 (1885). *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845), the principal authority from before the Civil War on which the opponents of a broad reading of the Property Clause rely, is discussed *supra* notes 154-58 and accompanying text.

308. *Fort Leavenworth*, 114 U.S. at 526-27.

309. *Id.* at 526.

310. *Id.* at 533-38.

311. *Id.* at 526-27.

312. *See id.* at 528.

313. *See id.* Even this argument was weak. If Kansas could not make a partial cession of jurisdiction under the Constitution, "the jurisdiction of the State would then remain as it previously existed," and the state could tax the railroad. *Id.* at 540. Thus, the railroad was in the unenviable position of arguing that the only cession of jurisdiction that a state can make is one that complies with the Enclave Clause, and that the Court should construe the partial cession as a complete one.

314. *Id.* at 542.

tax people within a federal reservation, the tax subsequently imposed is valid.[315] This holding said nothing about conflicting federal and state legislation applying to the same federal property. Those critics who read the Property Clause narrowly therefore do not turn their argument on the holding of *Fort Leavenworth Railroad.*

Instead, these critics seize on the Court's repetition of the statement in *Fort Leavenworth Railroad* that the federal government has "only the rights of an ordinary proprietor" with regard to land that it regulates under the Property Clause.[316] A full reading of the opinion, however, demonstrates that the Court used this phrase solely to emphasize the existence of state authority over private parties on federal lands where no controlling federal statute displaced state authority. The Court did not conclude that the federal government lacked legislative authority over its own property. In the better reading of its opinion, the Court recognized the unique sovereign attributes of the federal government as a landowner, despite the "ordinary proprietor" language. Three pieces of evidence support this view. First, immediately after equating federal government land ownership with that "of private individuals," the Court described the right of eminent domain that the United States has over land within the states.[317] Ordinary proprietors lack this power.[318] Second, in emphasizing that states retain their legislative jurisdiction over federal lands subject to the Property Clause, the Court incompletely quoted Story's *Commentaries*, leaving out the language indicating that this state power was

315. *Id.*

316. *Id.* at 527; *see also id.* ("So far as the land constituting the Reservation was not used for military purposes, the possession of the United States was only that of an individual proprietor."); *id.* at 531 (stating that where lands are not acquired under the Enclave Clause, possession by the United States "is simply that of an ordinary proprietor"); *id.* (stating that federal property "is subject to the legislative authority and control of the States equally with the property of private individuals"). For how this language fits into a narrow reading of the Property Clause, see Brodie, *supra* note 28, at 710-11; Engdahl, *supra* note 28, at 298-99.

317. *Fort Leavenworth*, 114 U.S. at 531.

318. In reaching this conclusion, the Court cited its earlier cases, which held that the right of eminent domain was an inherent attribute of sovereignty. *See id.* at 532 (citing United States v. Jones, 109 U.S. 513, 518 (1883) ("The power to take private property for public uses, generally termed the right of eminent domain, belongs to every independent government.")); *id.* at 531 (citing Kohl v. United States, 91 U.S. 367, 371-73 (1875)).

subject to overriding federal legislation.[319] The Court probably omitted this language because it did not have to address this matter in the case at hand.

Finally, and most importantly, the Court recognized a new form of cession of jurisdiction not set forth in the Constitution. This cession of jurisdiction would not suffice to bring the area in question under the Enclave Clause, but would operate as a cession of exclusive jurisdiction under the Property Clause.[320]

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319. *See id.* at 538. For the complete quotation including the proviso about the federal government retaining its authority, see *supra* notes 149-50 and accompanying text.

320. It was not clear from the case whether the affected state must make such a cession expressly; Kansas did in the *Fort Leavenworth* case, but the Court's language recognizing this new form of cession leaves the question open. The Court stated the following conclusion:

> Where, therefore, lands are acquired [by any means other than the provisions of the Enclave Clause, the United States] will hold the lands subject to this qualification: that if upon them forts, arsenals, or other public buildings are erected for the uses of the general government, such buildings, with their appurtenances, as instrumentalities for the execution of its powers, will be free from any such interference and jurisdiction of the State as would destroy or impair their effective use for the purposes designed.... But, when not used as such instrumentalities, the legislative power of the State over the places acquired will be as full and complete as over any other places within her limits.

Fort Leavenworth, 114 U.S. at 539; *see also id.* at 542 ("It is necessarily temporary, to be exercised only so long as the places continue to be used for the public purposes for which the property was acquired or reserved from sale. When they cease to be thus used, the jurisdiction reverts to the State."). Professor Engdahl has read *Fort Leavenworth* to stand for the proposition that exercise of federal legislative power over federal property subject to the Property Clause is "constitutionally permissible only as to property that was being utilized to effectuate some constitutionally enumerated federal power, and only insofar as the possession of such jurisdiction might be said to facilitate such use," this type of cession being only "an application of the necessary and proper clause." Engdahl, *supra* note 28, at 306. Professor Engdahl's reading, however, has at least two flaws. First, Engdahl's reading fails to account fully for how the Court could recognize the partial cession of legislative jurisdiction. If the federal government had the power of an ordinary proprietor under the Property Clause, then Engdahl does not identify another provision of the Constitution under which the United States could accept the cession of legislative jurisdiction. Engdahl would likely argue that the Necessary and Proper Clause would provide such authority because Congress can legislate for, say, a military installation to further its powers over the military. If that were the case, however, a cession of jurisdiction from the state would be unnecessary. Second, Engdahl's reading fails to account for the Court's language immunizing from state control not just "forts, arsenals, or other public buildings," but also "all instrumentalities created by the general government," *Fort Leavenworth*, 114 U.S. at 539, including "places [that] continue to be used for the public purposes for which the property was acquired or *reserved from sale*."

If the Court had adhered to the narrow view, then the Kansas cession in *Fort Leavenworth Railroad* could not have conferred any authority to the United States because it did not satisfy the terms of the Enclave Clause.[321] Yet the Court made clear that the federal government possessed legislative authority that would oust state authority at least where the exercise of state jurisdiction would "destroy or impair" the "effective use" of the federal lands for their designated purposes.[322]

The larger body of tax immunity cases also supports the proposition that the federal government has sovereign authority over its property, not merely the powers of an ordinary proprietor. Ordinary proprietors cannot confer tax immunity on people who perform work on their property.[323] Thus, if an ordinary proprietor contracts with a timber harvesting company and the state in which the land lies has a severance tax for timber, someone must pay the tax. If, however, the federal government conducts the same activity on its own property, it is immune from that tax.[324] Under some circumstances, even private activities that take place on federal land are so linked to the federal government that they escape state taxing authority. The exact contours of the doctrine that immunizes certain private activities that occur on federal property escape easy definition.[325] Nevertheless, the Court has held that Congress

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Id. at 542 (emphasis added). The italicized language would include national forests and national parks, which Engdahl has claimed does not further any enumerated power. *See* Engdahl, *supra* note 28, at 314 n.140.

321. Of course, as previously noted, this holding would not have assisted the railroad. *Fort Leavenworth*, 114 U.S. at 540. Nevertheless, the Court gave the partial cession of Kansas full effect in the case immediately following *Fort Leavenworth* in the reports. *See* Chicago, Rock Island & Pac. Ry. Co. v. McGlinn, 114 U.S. 542, 547 (1885) (holding that a tort suit in Fort Leavenworth is controlled by tort law in effect at the time Kansas ceded jurisdiction, not later-enacted Kansas tort law, because of cession of jurisdiction).

322. *Fort Leavenworth*, 114 U.S. at 539.

323. Although private parties can agree to an allocation of tax liabilities among themselves, such agreements do not bind the taxing authority. *See, e.g.*, Lucas v. Earl, 281 U.S. 111, 114-15 (1930) (disregarding a contract that attempted to reallocate salary to avoid federal income tax).

324. The leading case for this proposition is *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 328 (1819), and the principle is firmly established in *Van Brocklin v. Tennessee*, 117 U.S. 151, 155-58 (1886).

325. For example, activities that take place within lands governed under the Enclave Clause generally escape state taxation, unless the state has reserved the power to tax within the enclave. *See, e.g.*, United States v. Tax Comm'n, 412 U.S. 363, 371 (1973) (holding the state liquor tax inapplicable to sales within military reservation); Paul v. United States, 371 U.S. 245, 255-62 (1963) (holding that a state cannot apply its price-fixing regulations to pur-

can extend the federal government's immunity to private activities if it acts through express legislation.[326] This rule, if applied to construction projects for forts and magazines, might just extend the reach of the Necessary and Proper Clause.[327] The Supreme Court, however, has strongly suggested that Congress can extend federal immunity from state taxation to activities not covered by any enumerated power other than the Property Clause.[328]

Advocates of the narrow view also heavily rely on *Ward v. Race Horse*, which held that state game laws governed hunting by Indians on federal land subject to the Property Clause, even though these laws conflicted with an existing treaty.[329] The treaty provided that the Indians would "have the right to hunt on the unoccupied lands of the United States, so long as game may be found thereon, and so long as peace subsists among the

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chases of milk for military consumption when the regulations are in conflict with federal law); Collins v. Yosemite Park & Curry Co., 304 U.S. 518, 530-39 (1938) (upholding some state taxes on activities within Yosemite National Park, a federal enclave, but not others depending on wording of state cession of jurisdiction); Silas Mason Co. v. Tax Comm'n, 302 U.S. 186, 206-09 (1937) (upholding application of occupation tax within enclave where state reserved power to tax in cession); James v. Dravo Contracting Co., 302 U.S. 134, 148-50 (1937) (upholding gross receipts tax on work performed for the federal government where cession of jurisdiction reserved power to tax); Surplus Trading Co. v. Cook, 281 U.S. 647, 656-57 (1930) (holding that a state may not tax personal property within enclave). Activities that take place within lands governed under the Property Clause are generally subject to state taxation. *See, e.g.*, Wilson v. Cook, 327 U.S. 474, 487-88 (1946) (holding that activites in federal forest reserve lands are subject to state tax if cession of jurisdiction has not occurred). Two cases decided the same day explain the differences in state regulation over federal enclaves and other federal property. *Compare* Pac. Coast Dairy, Inc. v. Dep't of Agric., 318 U.S. 285, 295-96 (1943) (holding state minimum price for milk inapplicable within federal enclave), *with* Penn Dairies, Inc. v. Milk Control Comm'n, 318 U.S. 261, 275 (1943) (upholding state minimum price for milk sold within military reservation not subject to Enclave Clause).

326. *See* United States v. City of Detroit, 355 U.S. 466, 474 (1958) (suggesting that Congress could confer immunity on private parties beyond immunity constitutionally conferred on federal government); *Penn Dairies*, 318 U.S. at 269 (assuming that Congress could confer tax immunity on sales to federal government); *see also* Alabama v. King & Boozer, 314 U.S. 1, 8 (1941) (distinguishing constitutional immunity from taxation from congressional power to immunize federal contractors from state taxation). Professor Engdahl argued that the ability of Congress to confer immunity from state taxation flows from the power of Congress to act through the Necessary and Proper Clause. Engdahl, *supra* note 28, at 374.

327. Engdahl, *supra* note 28, at 299-300.

328. *See* cases cited *supra* note 326.

329. 163 U.S. 504, 514-16 (1896).

whites and Indians on the borders of the hunting districts."[330] The Court held that the treaty did not give the Indians hunting rights on all public lands in Wyoming but "only lands of that character embraced within what the treaty denominates as hunting districts."[331] This language, the Court held, conferred only a temporary right that the admission of Wyoming to the Union repealed.[332] In reaching that conclusion, the Court held that to read the treaty to apply to all federally owned lands in the state would violate principles of equal footing by depriving the state of the power to regulate hunting generally.[333] *Race Horse* therefore only involved the interpretation of a particular treaty and the effect of an act of admission on that treaty; it did not involve the extent to which the United States could have granted Indians hunting rights on federal lands that would conflict with otherwise applicable state law.[334]

The other cases frequently cited in narrow readings of the Property Clause weakly support this view. At most these cases stand for the proposition that state laws of general application apply to federal lands. The cases do not hold that the federal government lacks broad authority to legislate for its lands, including displacement of otherwise applicable state law. In *Kansas v. Colorado*,[335] for example, the Court held that the United States could not intervene in an interstate dispute over the allocation of water in a non-navigable river. The federal government sought to participate based on its interest in the reclamation of arid lands. In denying intervention, the Court held that the Property Clause "does not grant to Congress any legislative control over the States, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits."[336] Read in full context, this statement does not limit the reach of the Property

330. *Id.* at 507.

331. *Id.* at 508.

332. *Id.* at 514.

333. *See id.* at 511-12, 514-15.

334. Professor Engdahl argues that *Race Horse* "cannot be dismissed as merely involving judicial construction of the terms of the Indian treaty and the subsequent act admitting the state into the Union," because the Court had rested its decision on equal footing grounds. Engdahl, *supra* note 28, at 357 n.332. The Supreme Court has recently expressly repudiated this portion of the *Race Horse* decision. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 203-04 (1999).

335. 206 U.S. 46 (1907).

336. *Id.* at 89.

Clause. The Court instead held that the Constitution did not grant the United States unbridled authority to regulate reclamation of federal lands simply because the problem implicated a national concern.[337] This holding embraced the principles of the Tenth Amendment and blocked the possible assertion that Congress could force a particular type of water law—either riparianism or prior appropriation—on a state.[338] Nevertheless in reaching this conclusion the Court recognized the United States's power over its own land. The Court also emphasized that its decision did not erode earlier precedent that interpreted the Property Clause broadly.[339]

The Court in *Omaechevarria v. Idaho* upheld a state law banning sheep ranching on any rangelands (including federal lands) where cattle had been grazed, but it did so only because a federal law did not exist at the time to govern ranching on the public lands.[340] *Colorado v. Toll* involved the question whether a state retained jurisdiction over highways through a national park, where a park superintendent allegedly asserted the authority to determine who could use the highway.[341] The Court expressly held that the statute creating the park did not "attempt to give exclusive jurisdiction to the United States, but on the contrary the rights of the State over the roads are left unaffected in terms."[342] All of these cases stand only for the proposition that, unless the federal government acts, state law still governs actions on federal lands subject to the Property Clause. They do not address situations in which the federal government acts contrary to state law or in which the federal government has relied on its sovereign power over its lands in adopting laws.

Thus, even in the period after *Dred Scott*, the Court continuously read the Property Clause broadly. The cases advanced by the advocates of the narrow view do not necessarily

337. *See id.* at 92 ("[I]t may well be that no power is adequate for their reclamation other than that of the National Government. But if no such power has been granted, none can be exercised.").

338. *See id.* ("We do not mean that [federal] legislation can override state laws in respect to the general subject of reclamation."); *see also id.* at 90 (citing the Tenth Amendment).

339. *See id.* at 89.

340. 246 U.S. 343, 346 (1918) ("The police power of the State extends over the federal public domain, at least when there is no legislation by Congress on the subject.").

341. 268 U.S. 228 (1925).

342. *Id.* at 231.

apply to the situation at hand and run contrary to the Court's repeated affirmation of the dual relationships that the federal government has with its lands, that of proprietor and that of sovereign. This period of the Property Clause's history continued to support rather than supplant the traditional broad view.[343]

D. THE CURRENT APPROACH TO THE PROPERTY CLAUSE

The most recent exposition of the Property Clause from the Supreme Court came in *Kleppe v. New Mexico*.[344] That case involved a constitutional challenge to the Wild Free-Roaming Horses and Burros Act,[345] which protects these animals both on and off the public range. The dispute in *Kleppe* involved wild burros spotted near a water source on federal lands. Someone with a permit to graze cattle on those lands complained.[346] The federal government would not remove the burros, so the rancher complained to the New Mexico Livestock Board—a state agency of New Mexico—and that agency rounded up the burros and sold them at auction.[347] When the federal government protested this action, the state sued the federal government and argued that the act was unconstitutional. The district court so held, but the Supreme Court reversed in sweeping terms.[348]

To be sure, *Kleppe* applied to the federal government's regulation of activities that took place entirely on federal lands. The rancher used public lands by permission of the United States and the state seized the burros on federally owned lands. Much like its earlier cases, however, the Court spoke in sweeping terms in upholding the constitutionality of the act as a valid exercise of the federal government's power under the Property Clause. To find a valid exercise of that power, the Court said that it needed to determine only whether the act constituted "a 'needful' regulation 'respecting' the public

343. This conclusion refutes Engdahl's position. *See supra* note 46 (describing Engdahl's position). Rather than representing a period in which an upstart reading supplanted a now-lost classic reading, this period reflected the continued classic, i.e., broad, reading of the Property Clause.

344. 426 U.S. 529 (1976).

345. 16 U.S.C. §§ 1331-1340 (1994).

346. *Kleppe*, 426 U.S. at 533.

347. *Id.* at 533-34.

348. *Id.* at 542-47.

lands."[349] The Court then limited its role in making this determination because such a determination should be "entrusted primarily to the judgment of Congress."[350]

The Court also rejected the contention that the presence of the Enclave Clause somehow limited the federal government's authority under the Property Clause.[351] The Court recognized that the federal government could acquire exclusive authority and jurisdiction over lands ceded under the Enclave Clause.[352] The Court also recognized that "[a]bsent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory . . . ."[353] Nevertheless, the Court continued, "Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause."[354] In comprehensive language, the Court summed up the relationship between the federal government and the states in the management of public lands falling outside of the Enclave Clause. The states could enforce their criminal and civil laws on the public lands, but Congress could oust state law through express legislation.[355]

Moreover, the Court rejected the argument from the principles of federalism that federal regulation of conduct on federal lands constituted an unwarranted intrusion into an area traditionally reserved to the states, such as the control of wildlife.[356] Although the opponents to the broad view criticize *Kleppe* as a rogue misinterpretation of older case law,[357] the decision reads as if written by Joseph Story himself. Story argued that states had authority to regulate activities on federal property "subject

349. *Id.* at 536.

350. *Id.*

351. *See id.* at 541-43.

352. *Id.* at 542.

353. *Id.* at 543.

354. *Id.* (citations omitted).

355. *See id.*

356. *See id.* at 545. The argument that states traditionally regulated the taking of wildlife rested on *Geer v. Connecticut*, 161 U.S. 519 (1896). *Geer* held that a state prohibition of interstate transportation of wildlife otherwise legally taken in the state did not violate the Commerce Clause. *See id.* at 529-32. Three years after it decided *Kleppe*, the Supreme Court overruled this aspect of *Geer* in *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

357. *See, e.g.*, Engdahl, *supra* note 28, at 349-58; Landever, *supra* note 28, at 597-600; Touton, *supra* note 28, at 823-25.

to the exercise of the power of the national government."[358] The Court in *Kleppe* made an almost identical statement.

In fairness to those who advocate the narrow view, *Kleppe* involved the regulation of nonfederal activity on public lands, and the Court did not address the regulation of activities on nonfederal land.[359] Nevertheless, the courts of appeals have consistently reaffirmed the broad power that the federal government has over its own property.[360] They uniformly conclude that the federal government has broad power to control extraterritorial private activities that might adversely affect federal property. Thus, the courts have upheld federal regulations that restrict businesses lying outside of a national park because they affected neighboring federal lands.[361] The courts have upheld federal regulation of waters owned by the State of Minnesota that lie within the federally owned Boundary Waters Canoe Area Wilderness as a valid exercise of power under the

358. 3 STORY, *supra* note 147, § 1322, at 198.

359. *See Kleppe*, 426 U.S. at 546 ("We need not, and do not, decide whether the Property Clause would sustain the Act in all of its conceivable applications.").

360. *See, e.g.*, Diamond Bar Cattle Co. v. United States, 168 F.3d 1209, 1214 (10th Cir. 1999) (holding that despite a state statute purporting to grant possessory grazing interests on national forest land, such interests were not enforceable against the United States); Branson School Dist. RE-82 v. Romer, 161 F.3d 619, 635-36 (10th Cir. 1998) (upholding the authority of the federal government to place land in trust for schools), *cert. denied*, 526 U.S. 1068 (1999); United States v. Gardner, 107 F.3d 1314, 1319 (9th Cir. 1997) (distinguishing, for the purposes of the equal footing doctrine, a state's political sovereignty from its economic and physical characteristics); Duncan Energy Co. v. United States Forest Serv., 50 F.3d 584, 591 (8th Cir. 1995) (holding a state mining law inapplicable to mining within a national forest), *on appeal after remand*, 109 F.3d 497 (8th Cir. 1997); Nevada v. Watkins, 914 F.2d 1545, 1553 (9th Cir. 1990) (holding that Congress may examine suitability of federal land for nuclear waste depository, despite contrary state law); United States v. Vogler, 859 F.2d 638, 641-42 (9th Cir. 1988) (relying on *Kleppe* to affirm the federal government's authority to regulate access and mining within Alaska's national parks); United States v. Gliatta, 580 F.2d 156, 158-60 (5th Cir. 1978) (upholding traffic regulations for a post office area despite the federal government's failure to secure state legislative cession).

361. *See* United States v. Armstrong, 186 F.3d 1055, 1061-62 (8th Cir. 1999), *cert. denied*, 529 U.S. 1018, *and cert. denied*, 529 U.S. 1033 (2000); Free Enter. Canoe Renters Ass'n v. Watt, 711 F.2d 852, 855-56 (8th Cir. 1983) ("[T]he United States acted within its constitutional authority in [regulating] business activities of the members of the Association as they affect the [park], even though the members themselves may never enter federally owned property, but strictly keep to state or county roads and rights-of-way within the [park]."); United States v. Richard, 636 F.2d 236, 240 (8th Cir. 1980) ("[F]ederal regulation may exceed federal boundaries when necessary for the protection of human life or wildlife or government forest land or objectives.").

Property Clause.[362] The courts have even upheld federal regulation of recreational activities occurring on state-owned lands that affected the surrounding federal lands.[363] Finally, the courts have held that extensive federal regulation of federal lands can preempt local regulation of the same land.[364] These cases, and others, indicate a broad acceptance of federal regulation at least of private activities that occur off of federal lands.[365]

362. *See* Minnesota *ex rel.* Alexander v. Block, 660 F.2d 1240, 1249 (8th Cir. 1981) ("Under this authority to protect public land, Congress' power must extend to regulation of conduct on or off the public land that would threaten the designated purpose of federal lands."). The court also upheld the regulation against a Tenth Amendment challenge, reasoning that the regulation did not govern the activities of a state but only of private persons. *See id.* at 1251-53.

363. *See, e.g.*, United States v. Arbo, 691 F.2d 862, 865 (9th Cir. 1982) (upholding the power of federal officers to inspect a mine partially on allegedly state property); United States v. Lindsey, 595 F.2d 5, 6 (9th Cir. 1979) (per curiam) ("It is well established that [the Property Clause] grants to the United States power to regulate conduct on non-federal land when reasonably necessary to protect adjacent federal property or navigable waters."); United States v. Brown, 552 F.2d 817, 822 (8th Cir. 1977) ("[W]e view the congressional power over federal lands to include the authority to regulate activities on non-federal public waters in order to protect wildlife and visitors on the lands.").

364. *See, e.g.*, Ventura County v. Gulf Oil Corp., 601 F.2d 1080, 1086 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 947 (1980).

365. Two other recent cases implicate a broad reading of the Property Clause. First, an equally divided Sixth Circuit, sitting en banc, held that the federal government could regulate private activities that occurred on the surface of a lake even when littoral owners asserted that the lake surface constituted their private property. *See* Stupak-Thrall v. United States, 89 F.3d 1269 (6th Cir. 1996) (en banc). The concurring and dissenting opinions agreed that the federal government had constitutional authority to promulgate this regulation, but disagreed on whether the federal agency—in that case, the Forest Service—had statutory authority to implement it. *See id.* at 1269-72 (Moore, J., concurring) (arguing that the Forest Service had such statutory authority); *id.* at 1277 (Boggs, J., dissenting) (agreeing that the federal government has constitutional power to regulate private activities). Second, the Fourth Circuit upheld a Fish and Wildlife Service regulation prohibiting the taking of red wolves on private property as a legitimate regulation under the Commerce Clause. *See* Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000). Judge Luttig dissented, on the grounds that the regulation was neither sufficiently broad in character nor economic in nature and thus beyond the federal government's power to regulate interstate commerce. *See id.* at 506 (Luttig, J., dissenting). Nevertheless, Judge Luttig argued that the activity was one "that Congress could plainly regulate . . . under its power over federal lands." *Id.* at 509. It is unclear from this single comment the extent to which Judge Luttig believed the Property Clause power extends.

II. LIMITATIONS ON THE FEDERAL PROPERTY POWER

Even a power described as plenary and limitless must have bounds. Just as Congress could not use its tax and spending power—which the Court has read broadly[366]—to establish a church, the federal government could not use its Property Clause power to do the same. The Court has described congressional authority over Indian tribes, the military, and immigration as plenary,[367] but the Court has recognized that the exercise of each of these powers is subject to other limitations in the Constitution, such as the Due Process Clause.[368] This section focuses on the limitations applicable to the federal government's exercise of its Property Clause power. Before turning to the extrinsic limitations, however, this Article will first explore the intrinsic limits to the exercise of Property Clause power, with particular regard to the regulation of activities that occur extraterritorial to but nevertheless affect federal lands.

A. INTRINSIC LIMITATIONS

The Property Clause gives the federal government power to make "all needful Rules and Regulations respecting . . . Property belonging to the United States."[369] This language appears to have four limitations that a court might rely on to restrict

366. On the spending power, see *South Dakota v. Dole*, 483 U.S. 203 (1987). The spending power stems from the clause of the Constitution that authorizes Congress to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1. As interpreted by the Court, this power allows Congress to achieve aims beyond those enumerated in Article I by conditioning grants of federal money on compliance with the terms of the grant. *See, e.g.*, South Dakota v. Dole, 483 U.S. at 203 (involving the establishment of a national minimum drinking age). Arguably, the Twenty-First Amendment gives to the states the authority to regulate liquor and thus establish the minimum age to consume it. *See* U.S. CONST. amend. XXI. Instead of simply establishing such an age, Congress limited the receipt of federal highway funds to those states that enacted the desired minimum drinking age. *See* South Dakota v. Dole, 483 U.S. at 205 (describing the grant limitation). The Court held that Congress's chosen means of achieving a minimum drinking age was an appropriate use of its spending authority. *See id.* at 208-11.

367. *See, e.g.*, South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998) (Indians); Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 201 (1993) (immigration); Chappell v. Wallace, 462 U.S. 296, 301 (1983) (military).

368. *See, e.g.*, Weiss v. United States, 510 U.S. 163, 176 (1994) (military); McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 494-96 (1991) (immigration); Del. Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 83-84 (1977) (Indians).

369. U.S. CONST. art. IV, § 3, cl. 2.

assertions of federal power. First, the enactment must be a rule or regulation. Second, the rule or regulation must involve property belonging to the United States. Third, the rule or regulation must be needful. Fourth, and finally—and most important in determining the constitutionality of a rule or regulation of extraterritorial application—the rule or regulation must be one "respecting" federal property.

Before analyzing these four possible limitations, the Article will discuss three of the hypothetical laws identified in the Introduction that will help illustrate the analysis. First, suppose that Congress decides that it wants to relieve the tax burden on all citizens and that it will enter the casino gaming business to raise revenue. Congress decides to open casinos in five national forests under a hypothetical statute called the Forest Gaming Act, and coincidentally the states wherein those forests lie forbid all forms of gambling.[370] Second, suppose that Congress enacts a law like the Gun-Free School Zones Act held unconstitutional in *United States v. Lopez*,[371] but that applies only to people who carry a firearm or explosives within 1000 feet of a federal building.[372] For ease of reference, this hypothetical statute will be called the Gun-Free Federal Building Zones Act. Suppose finally that Congress enacts a broad statute regulating the emission of sulfur dioxide (SO_2) and oxides of nitrogen (NO_x) because these emissions are precursors to acid rain, which harms national parks.[373] Instead of relying on the provisions of the federal Clean Air Act[374]—which has its own special provisions regarding air quality in the national parks[375]—Congress seeks to regulate sources of specified pollution both within and outside of the state in which federal lands lie. It

370. This possibility is raised as a concern in Touton, *supra* note 28, at 825.

371. 514 U.S. 549 (1995).

372. It is presently unlawful to knowingly carry a firearm into a federal building. 18 U.S.C. § 930 (1994). The act hypothesized here would extend that zone 1000 feet from a federal building, and would, like § 930, require that the defendant know that he or she was within 1000 feet of a federal building, just as the statute invalidated in *Lopez* required that the defendant know that he or she was within 1000 feet of a school. *See* 18 U.S.C. § 922(q) (1994).

373. It is documented that acid rain resulting from these pollutants has damaged trees in eastern national parks. *See, e.g.*, SUSAN BUFFONE & CAROLYN FULCO, ACID RAIN INVADES OUR NATIONAL PARKS 3-5 (1987). For a popular account of this phenomenon, see BILL BRYSON, A WALK IN THE WOODS 93, 138 (1998).

374. 42 U.S.C. §§ 7401-7671q (1994).

375. 42 U.S.C. §§ 7491-7492 (1994) (creating visibility protections for certain federal lands).

also imposes a level of regulation that would exceed the level produced through a nuisance-abatement action. For ease of reference, this hypothetical statute will be called the National Parks Clean Air Act.

These hypothetical examples should provide clear archetypes of potential regulations. The Forest Gaming Act provides a clear instance of the federal government managing its own lands in direct conflict with state law. Moreover, instead of seeking more stringent regulation than the state, the federal government purposefully attempts to become a haven from state regulation. The Gun-Free Federal Building Zones Act provides an example of a federal decision to regulate activity off of federal property that reaches far beyond common law nuisance principles. In addition, it presents an example of federal regulation that Congress probably could not enact pursuant to its Commerce Clause powers under *United States v. Lopez*.[376] Finally, the National Parks Clean Air Act involves direct federal regulation of activities that occur far from federal lands. These activities have traditionally led to nuisance suits directed at air polluters. While these examples will aid and explicate the arguments, less hypothetical and more difficult examples will appear in Part III.

To evaluate claims that these three hypothetical acts exceed Congress's Property Clause authority, a reviewing court would have to parse the language of the Clause to find its internal limitations. Two of these potential limitations can be easily dismissed. First, congressional acts obviously constitute rules or regulations. In the examples just imagined, each of the laws—the Forest Gaming Act, the Gun-Free Federal Building Zones Act or the National Parks Clean Air Act—would therefore qualify as a rule or regulation. Second, the rules and regulations must relate to property belonging to the United States, and not some other person or entity. Again, this requirement minimally restricts Congress's power to regulate so long as an identified legislative objective concerning federal property exists.[377] In the case of the three hypothetical statutes, the for-

376. 514 U.S. 549 (1995).

377. For that reason, the attempts by some critics to argue that cases such as *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845), and *Kansas v. Colorado*, 206 U.S. 46 (1907), limit the federal government's authority under the Property Clause are incorrect. *See, e.g.*, Engdahl, *supra* note 28, at 293-96, 303-04; Landever, *supra* note 28, at 573-75. Those cases only point out the federal government does not own submerged lands or lands within the states generally; they say little or nothing about the power the federal government has

ests, federal buildings, and national parks obviously qualify as federal property.

Third, a court may also consider whether the rule or regulation is a "needful" exercise of federal power undertaken pursuant to the Property Clause. Upon careful reflection, however, this requirement also provides little content to a reviewing court. In *McCulloch v. Maryland*, the Supreme Court held that, in determining whether a federal action is "necessary" for purposes of the Necessary and Proper Clause, it would defer to the judgment of Congress.[378] In reaching this conclusion, the Court pointed to the term "needful" in the Property Clause as allowing Congress great discretion over what laws to pass pursuant to that Clause.[379] Thus, if it adheres to this reading—and no one has contended that the Court should abandon it—a court reviewing the hypothetical acts should defer to the judgment of Congress. The court will thus consider the regulation needful provided that Congress could envision a sufficient means-end relationship between the legislation and the end envisioned.[380]

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over lands that everyone concedes the federal government owns.

378. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

379. *See id.* at 422.

380. The Court developed the means-end relationship to determine the extent of congressional power under the Necessary and Proper Clause. This relationship would apply in the Property Clause context as well. Although all of the legislation hypothesized in this Article has an appropriate means-end fit, not all imaginable legislation would. For example, legislation that would prohibit the possession of a deck of cards or a pair of dice near federal lands on which Congress authorized gambling would not be "needful" simply because Congress wanted to prevent any gambling off federal lands and preserve its profits from gambling. The object regulated would be too attenuated from the interest that Congress sought to vindicate.

Arguably, a court could be more lenient with review of enactments pursuant to the Property Clause, because it has no limitation that the regulation be proper, as does the Necessary and Proper Clause; regulations enacted under the Property Clause must only be needful, and not proper. Nevertheless, the Constitution provides that the Necessary and Proper Clause applies not only to the powers listed in Article I, Section 8 of the Constitution, but also to "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18. This language controls all grants of power to the federal government in the Constitution, not just those in Article I. Thus, whatever limitations stem from the word "proper" in the Necessary and Proper Clause would apply to enactments pursuant to the Property Clause. The text of the Necessary and Proper

The most serious limitation intrinsic to the Property Clause questions whether the act qualifies as a rule or regulation "respecting" the property of the United States. This requirement means that the federal government must demonstrate a nexus between the rule or regulation and the federal property being protected. That case could easily be made for the Forest Gaming Act. Such an act clearly dictates what can and cannot occur on federal lands. If Congress establishes casino gambling on federal lands, that statute is one "respecting" federal property in two ways: It regulates the use of federal land per se, and it represents a decision by Congress of how to use its property to generate revenue for the public fisc.[381] Even an act of extraterritorial application such as the Gun-Free Fed-

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Clause also makes it difficult to take seriously the argument that the Property Clause is not an enumerated power or is somehow a lesser enumerated power because it is in Article IV and not Article I. *Contra* Brodie, *supra* note 28, at 720-21; Landever, *supra* note 28, at 577-78. The clause itself refers to the powers granted in Article I and all other powers granted to the federal government.

For his part, Professor Engdahl makes little of the placement of the Property Clause in Article IV. He nevertheless has argued that the Property Clause "is itself an enumerated power, but according to classic property clause doctrine it was unique among the enumerated powers in that it was inherently subordinate to state law." Engdahl, *supra* note 28, at 371. Part I provides a refutation to Engdahl's argument that the Property Clause is unique among the enumerated powers: Neither the text of the clause, nor the history of the drafting of the clause, nor the historical context in which it arose, nor the early judicial interpretation, nor the early commentary supports his argument. Given this lack of support, it is hard to see what theoretical or practical advantage Engdahl's postulation of a federal power "inherently subordinate to state law" provides.

Some of Professor Engdahl's subsequent scholarship shows that he may no longer adhere to the notion that the Property Clause is unique among the enumerated powers as being inherently subordinate to state law. Engdahl attributes the federal government's spending power to the Property Clause, not to the Taxing Clause, as most courts and commentators do. *See* David E. Engdahl, *The Basis of the Spending Power*, 18 SEATTLE U. L. REV. 215 (1995) [hereinafter Engdahl, *Basis of the Spending Power*]; David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 50 (1994) [hereinafter Engdahl, *The Spending Power*]. Although Engdahl disputes that federal expenditures by their own force override otherwise applicable state regulations, *see* Engdahl, *The Spending Power*, *supra*, at 62-78, he does not argue that state law can otherwise govern federal expenditures. In other words, Engdahl does not argue that a state could veto federal expenditures, although he earlier argued that the federal government had only the power of an ordinary proprietor over its lands. Thus, if the spending power comes from the Property Clause, Engdahl may have revised his earlier views to account for his reading of the spending power cases.

381. *See* Ashwander v. TVA, 297 U.S. 288, 330-40 (1936).

eral Building Zones Act would fall squarely into old Supreme Court case law such as *Camfield v. United States*[382] and *United States v. Alford*[383] because it regulates activity that takes place sufficiently near and can realistically damage federal property.[384] Finally, although the National Parks Clean Air Act does not regulate activities that take place on or even necessarily near federal land, such an act should pass constitutional muster. It regulates activities that, in the aggregate, harm federal lands in a demonstrable way, despite the fact that the act exceeds the level of regulation that the common law of nuisance would produce.

The limits just discussed allow Congress more authority than the limits previously suggested by advocates of the broad view. These advocates argue that the Property Clause is limited by a geographic nexus or a limitation like that found in the common law of nuisance. Professor Joseph Sax has urged that the Property Clause should incorporate zoning-like regulations for the national parks, but cautioned against broad expansion of this principle.[385] Limiting the federal government to regulating nuisance and nuisance-like activities unintentionally re-

382. 167 U.S. 518 (1897).

383. 274 U.S. 264 (1927).

384. For the same reasons that the hypothetical Gun-Free Federal Building Zones Act is constitutional, the present criminal prohibition on firearms in federal buildings, 18 U.S.C. § 930 (1994), is constitutional as an exercise of the federal government's Property Clause power. To be sure, *Alford* involved activity that had a more obvious connection to harming federal property, i.e., building a fire near federal lands. But the Court did not require the nearby activity to cause actual harm to the federal lands for Congress to reach it through legislation, only that it could pose a threat to federal lands. Likewise, the Court in *Camfield* did not require that the federal government show actual harm to its lands through the extraterritorial conduct; it could reach the conduct if it reasonably interfered with the federal government's use. The federal government's interest in protecting its own buildings would extend to banning firearms within 1000 feet of a federal building. Naturally, courts would have to draw possible boundaries on this power if Congress acted too broadly. Congress could not ban possession of all firearms within the boundaries of the United States simply to create a super buffer zone around federal buildings. Such legislation might fail as not being "needful" even if Congress declared in the legislation how it was "respecting" the property of the United States.

385. *See* Sax, *supra* note 27, at 253-55. Sax's article was concerned with how the Park Service could achieve better protection for the national parks, and therefore did not analyze the Property Clause limitations as closely as the works of other scholars. In a footnote, Sax suggested that a "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." *Id.* at 254 n.77.

stricts the government in its regulatory reach. Although Sax suggested that the boundaries of federal regulation could exceed traditional nuisance law prohibitions,[386] nuisance and the sorts of activities it usually addressed—air and water pollution, noise, or imminent threats of harm to property—remained the baseline of regulation. Such a limited scope of federal regulation would doom an act such as the hypothetical Gun-Free Federal Building Zones Act. After the bombing of the Alfred P. Murrah Federal Building in Oklahoma City, threats to Forest Service and Bureau of Land Management personnel in the West, and the incidences of postal workers shooting coworkers or former coworkers, Congress could easily conclude that a rational policy to protect federal buildings would include banning all firearms and other weapons within 1000 feet of a federal building.[387] Because carrying a firearm alone does not usually rise to the level of a nuisance, Sax's theory would appear insufficient to authorize this sort of legislation.[388]

Subsequently, Professor Eugene Gaetke made a two-fold argument concerning the reach of the Property Clause. Gaetke argued that congressional regulation or disposal of its own lands or "[t]he use of the dispositional power to promote congressional policy on nonfederal lands . . . is appropriately regarded as being without limitations."[389] When Congress used federal regulatory power over nonfederal lands, however, Gaetke expressed concern about the Court's treatment of this power as "without limitation" for two reasons. First, the use of

386. *See id.* at 253.

387. This section deals only with limitations intrinsic to the Property Clause power. The question of whether such a regulation would run afoul of the Second Amendment is irrelevant to this discussion. *See* U.S. CONST. amend. II; *see also* Printz v. United States, 521 U.S. 898, 937-39 (1997) (Thomas, J., concurring) (arguing that the Second Amendment may bar congressional efforts to require reporting of firearm transactions). As stated below, *see infra* note 466 and accompanying text, the provisions of the Bill of Rights can forbid exercises of the Property Clause power.

388. Such legislation would also appear to lie beyond the federal government's authority under the Commerce Clause. A court may conclude that the effects of guns near federal buildings has the same relationship to commerce as the guns near schools did in *United States v. Lopez*, 514 U.S. 549 (1995). One distinction between the hypothetical legislation and the legislation invalidated in *Lopez* is that federal workers are actually engaged in the work of the federal government which includes, among other things, regulating the channels and instrumentalities of commerce. A court may nevertheless hold this connection too attenuated to commerce to justify it. The Property Clause justification would still be superior.

389. Gaetke, *Congressional Discretion*, *supra* note 27, at 394.

such authority "constitutes nonconsensual 'governmental' regulation of conduct beyond the boundaries of federal land."[390] Gaetke's second objection—that extraterritorial application of the Property Clause "encroaches upon the state's traditional regulatory role"[391]—appears to have its basis in principles of federalism, a subject treated below as a possible extrinsic limitation on the Property Clause power.[392]

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390. *Id.* By placing the word "governmental" in quotation marks, Gaetke seeks to distinguish it "from the voluntary 'proprietary' regulation resulting from the exercise of the dispositional powers of Congress under the property clause through conditional transfers of interests in federal lands." *Id.* at 394 n.71. The paradigmatic case for this latter exercise of power would be *United States v. City of San Francisco*, 310 U.S. 16 (1940), where Congress conditioned the conveyance of public lands to be used for electrical generation on the condition that the electricity be sold directly to city residents and not to a private utility. *See* Gaetke, *Congressional Discretion*, *supra* note 27, at 385, 394 n.71. Here and elsewhere, *see infra* note 468, Gaetke makes too much of the distinction between the federal government as an owner that makes proprietary regulations, and the federal government as a sovereign that makes governmental regulations. Federal regulation such as that involved in *United States v. City of San Francisco* is unquestionably governmental, even when it involves the federal government as proprietor. Such regulations are enacted by Congress, presented to the President, and are public laws.

Moreover, Gaetke's conclusion that the regulation of nonfederal lands by the federal government is nonconsensual deserves two criticisms. First, many forms of land use controls are nonconsensual, regardless of the regulating authority, and the Court has repeatedly upheld them. *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (upholding a local zoning ordinance as constitutional against the landowner's consent). The lack of consent in these contexts is just as real as in the federal regulatory context. Second, Gaetke's characterization of federal decisions as nonconsensual goes too far. The decisional nexus for federal decisionmaking may be further removed than that for state or local decisionmaking, but that does not make the decisionmaking less consensual. On the federal level, the fact that representatives from Georgia may have a say about land management in Montana, for example, does not render the decision nonconsensual, just as representatives from Montana will have a say in decisions that affect Georgia. In some regards, Joseph Story refuted Gaetke's concern in his *Commentaries*. *See* 3 STORY, *supra* note 147, § 1321, at 197.

391. Gaetke, *Congressional Discretion*, *supra* note 27, at 394.

392. In his article, Gaetke expressly disclaimed relying on other constitutional principles in constructing limits for the Property Clause. *See id.* at 383 n.9 ("This Article addresses only limitations on the property clause power imposed by the terms of the clause itself, not by other constitutional provisions."). Federalism principles lie outside of the grants of power to Congress and are therefore better considered an extrinsic limitation to the Property Clause power, not a limitation "imposed by the terms of the clause itself." To be fair to Gaetke, the Supreme Court has used the question of federalism concerns to determine the intrinsic limitations on other powers in the Constitution. *See, e.g.*, New York v. United States, 505 U.S. 144, 155-57 (1992) (discussing how federalism principles may inform the intrinsic reach of the

To overcome these problems, Gaetke suggested that courts should use a rough calculus like that used in nuisance cases to assess the constitutionality of federal regulation of extraterritorial activities. Under his proposed test,

> the value of the challenged regulation to the public lands should be compared to the degree of imposition on the owners of nonfederal property. Should the balance indicate that the regulation interferes with the ownership of nonfederal property more than is warranted by Congress's stated policy, a court justifiably could conclude that it is not a "needful" regulation "respecting the federal lands."[393]

Gaetke meant only that a court should use the same balancing process that it would in a nuisance case. Unlike Sax's theory, common law nuisance itself would not form the basis or extent of the federal government's Property Clause power. Gaetke derived this theory from his understanding of the definition of "nuisance" as used in *Camfield*. "Under *Camfield*," Gaetke argued, "Congress may transform an otherwise lawful use of nonfederal property into an enjoinable nuisance by legislating for a particular use of the public lands."[394] Thus, Congress could, by legislative fiat, determine certain uses for designated public lands, and the courts would weigh the proposed regulation to determine whether it "interferes with the ownership of nonfederal property more than is warranted by Congress' stated policy."[395]

Under his proposed test, Gaetke suggested that the prohibition against fencing upheld in *Camfield*[396] and the prohibition against setting fire near federal lands upheld in *Alford*[397] would easily pass muster, as would federal regulation of motorboats in wilderness areas.[398] Fences interfere with free access to and settlement of federal lands, fires near forests interfere with the

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Commerce Clause). Nevertheless, this Article will address federalism concerns in the context of extrinsic limitations to the Property Clause. *See infra* notes 472-522 and accompanying text.

393. Gaetke, *Congressional Discretion*, *supra* note 27, at 398. Professor Gaetke did not draw a hard distinction between whether an unconstitutional act would be unconstitutional because it was not a "needful" rule or regulation or because it was not "respecting" the property of the United States. The distinction appears unimportant for his analysis. Given the discussion of the term "needful" in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), I believe that the term "respecting" is the crucial one in this context, not the term "needful."

394. Gaetke, *Congressional Discretion*, *supra* note 27, at 396.

395. *Id.* at 398.

396. Camfield v. United States, 167 U.S. 518 (1897).

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

398. Gaetke, *Congressional Discretion*, *supra* note 27, at 398-99 & n.96.

congressional policy of maintaining forests, and motorboats interfere with the congressional policy of preserving wilderness free from motorized uses.[399] Gaetke expressed doubt about the constitutionality of the provisions of the Wild Free Roaming Horses and Burros Act[400] that protect these animals on private property.[401] Although Gaetke believed that Congress could lawfully prohibit taking wild horses and burros near federal property because such takings would "frustrate the policy of providing sanctuary" to these animals on federal lands, the "prohibition of such taking on all nonfederal lands . . . is unnecessarily broad, for it reaches conduct other than that which interferes with the congressional policy for the use of the federal lands."[402]

Both Sax's and Gaetke's theories have flaws. Sax's theory incorporates the inherent weaknesses of substantive nuisance law and fails to define the outer boundary of congressional authority under the Property Clause. Gaetke's more considered balancing approach transfers authority over the ultimate wisdom of policy decisions concerning federal property from Congress to the judiciary. Although the judiciary can ultimately review congressional action undertaken pursuant to the Property Clause, the Court's approach in analogous situations suggests that it will defer to Congress.[403] In contrast, Gaetke's ap-

399. On the last restriction, see 16 U.S.C. § 1133(c) (1994) (prohibiting all mechanical transportation within wilderness areas). The exception for motorboat use within wilderness areas that the Forest Service oversees points to a potential flaw in Gaetke's theory. Congress allows the Forest Service to permit motorboat use within a wilderness area where the use is established before Congress declares the area to be wilderness. 16 U.S.C. § 1133(d)(1) (1994). Congress has, however, banned other motorized and mechanized transport within a wilderness area. This means that the Forest Service can maintain motorboats but must ban sailboats as mechanized transportation. *See* 36 C.F.R. § 293.6(a). A court invited to weigh the wisdom or utility of the federal government's policy might find this to be irrational. I believe that this sort of regulation, while somewhat absurd in result, is entirely constitutional.

400. 16 U.S.C. §§ 1331-1340 (1994).

401. *See* Gaetke, *Congressional Discretion*, *supra* note 27, at 399-401. Gaetke conceded, however, that these provisions would easily pass muster if the animals were considered federal property. *Id.* at 400 nn.102, 105.

402. *Id.* at 401.

403. At some points, Gaetke's primary concern appeared to be that courts will take statements such as "[t]he power over the public land thus entrusted to Congress is without limitations," United States v. City of San Francisco, 310 U.S. 16, 29 (1940), to mean that congressional action will escape judicial review altogether. *See* Gaetke, *Congressional Discretion*, *supra* note 27, at 395 ("[J]udicial review of... property clause legislation [regulating conduct on private lands] is useful and necessary."); *id.* at 402 n.110 (legislation should

proach expressly invites the judiciary to second-guess the policy judgments of Congress and to weigh the "value of the challenged regulation to the public lands . . . [against] the degree of imposition on the owners of nonfederal property."[404]

Two of Gaetke's own examples show the potential for mischief arising from his test. First, in determining whether the extraterritorial application of the Wild Free Roaming Horses and Burros Act is constitutional, Gaetke concluded that the federal interest of "providing a sanctuary for the remaining wild horses and burros . . . . is a commendable public objective for the use of the federal lands."[405] Moreover, the extraterritorial bans on harming the animals rationally further this congressional policy.[406] Gaetke ultimately concluded, however, that protecting the wild horses and burros wherever found did not sufficiently advance the congressional policy and interfered too much with private interests. Others would strenuously disagree with all of these assertions.[407] Second, Gaetke suggested

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not escape "probing judicial review . . . that the property clause power is 'without limitations.'"). I agree with Gaetke that courts can review congressional enactments pursuant to the Property Clause. The more germane question is the purpose and limits of judicial review.

404. Gaetke, *Congressional Discretion*, *supra* note 27, at 398; *see also id.* (inviting courts "to weigh the utility of the congressional policy for the use of federal lands and the effectiveness of the particular regulation in accomplishing that policy against the utility of the regulated conduct and the likelihood of its interference with the congressional policy"). To be sure, Gaetke predicts that courts will likely defer to the judgment of Congress under his proposed test. *Id.* at 401-02 ("A judicial conclusion that such legislation is not 'needful' regulation 'respecting the federal lands' presumably will be quite unusual even under the . . . [proposed] balancing approach.").

405. *Id.* at 400.

406. *See id.*

407. The controversy surrounding wild horses in the West is longstanding and legendary. Some believe that the wild horses should be protected wherever found. This group would likely have included Velma Johnston, otherwise known as "Wild Horse Annie," who championed the protection of the wild horses and burros and lobbied for legislative protection for them. *See* RICHARD SYMANSKI, WILD HORSES AND SACRED COWS 4-11 (1985). Others are extremely critical of the cost and effectiveness of the present wild horse program. *See, e.g.*, *Range Issues and Problems with the Wild Horse and Burro Act and Its Implementation: Field Hearing Before the Subcomm. on Nat'l Parks & Pub. Lands, House Comm. on Res.*, 105th Cong. 13-16 (1998) (statements of Dean Rhoads, Chairman of the Senate Natural Resources Committee, Nevada Legislature, and John Carpenter, Nevada Assemblyman). For criticism of the tactics of some environmental lawyers and wild horse advocates over this issue, see Richard Symanski, *Dances with Horses: Lessons from the Environmental Fringe*, 10 CONSERVATION BIOLOGY 708 (1996). Recent scientific research has detailed the effects that wild horses have on the range, including

that banning motorboats on nonfederal waters within federal wilderness areas would be constitutional, because "although motorboat usage generally is a legitimate use of waterways, its enjoyment on every lake is not essential."[408] Again, others would strenuously disagree.[409] The question is not whether Gaetke correctly assessed the wisdom or utility of congressional policy; the question is whether a court should engage in the balancing of utility that Gaetke suggests and revisit the rationale underlying Congress's decision. Gaetke's approach invites federal courts to place congressional judgments over the public lands literally on trial to compare "the value of the challenged regulation to the public lands" to "the degree of imposition on the owners of nonfederal property."[410]

In determining whether congressional legislation is "respecting" federal property, however, Professor Gaetke made a valuable contribution. Gaetke correctly suggested that courts should distinctly review regulations that control the disposition of federal property and activities that take place on federal lands, on the one hand, and extraterritorial applications of the Property Clause, on the other. Gaetke incorrectly concluded, however, that exercises of the former power should escape any judicial review, while exercises of the latter should lead to nuisance-like balancing. Instead, two analogous provisions of the

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decreased diversity in species of plants and animals. *See* Erik A. Beever & Peter F. Brussard, *Examining Ecological Consequences of Feral Horse Grazing Using Exclosures*, 60 W.N. AM. NATURALIST 236 (2000). For his part, Gaetke concluded that, although horse preservation is a worthwhile objective, the extraterritorial prohibition on killing wild horses and burros "is unnecessarily broad, for it reaches conduct other than that which interferes with the congressional policy for the use of the federal lands." Gaetke, *Congressional Discretion*, *supra* note 27, at 401. The Tenth Circuit upheld the extraterritorial application of the prohibition on killing wild horses, but primarily against the challenge that the statute constituted an uncompensated taking of private property. *See* Mountain States Legal Found. v. Hodel, 799 F.2d 1423, 1430-31 (10th Cir. 1986) (en banc).

408. Gaetke, *Congressional Discretion*, *supra* note 27, at 399 n.96; *see also* Gaetke, *Boundary Waters*, *supra* note 27, at 175-82 (justifying a ban on motorboats within portions of the Boundary Waters Canoe Area Wilderness).

409. For example, a motorboat regulation on one lake that lies in one wilderness area in the Upper Peninsula of Michigan has spawned a series of lawsuits. *See, e.g.*, Stupak-Thrall v. Glickman, 226 F.3d 467 (6th Cir. 2000); Stupak-Thrall v. Glickman, 988 F. Supp. 1055 (W.D. Mich. 1997); Stupak-Thrall v. United States, 843 F. Supp. 327 (W.D. Mich. 1994), *aff'd*, 70 F.3d 881 (6th Cir. 1995), *vacated*, 81 F.3d 651 (6th Cir.), *aff'd by an equally divided court*, 89 F.3d 1269 (6th Cir. 1996) (en banc). I participated as counsel for the United States in some of this litigation.

410. Gaetke, *Congressional Discretion*, *supra* note 27, at 398.

Constitution present useful guides for interpreting the reach of the Property Clause in these two instances. For regulation of activities that take place directly on federal land or involve the use or disposal of federal property to further congressional policy on nonfederal lands, a court might analogize such enactments to actions taken pursuant to the spending power.[411] For regulation of extraterritorial activities that affect federal lands, a court might analogize such enactments to actions taken pursuant to the Commerce Clause.[412]

Congressional actions under the Property Clause to manage or to control the direct disposition of federal property should receive the same deferential review given to exercises of the spending power. In both instances, a reviewing court would find itself in the awkward position of telling a coequal branch how best to manage its resources—money, in the case of the spending power, and real or personal property, in the case of the Property Clause power. The Court itself has linked the two powers in the context of evaluating conditions that the federal

411. *See* U.S. CONST. art. I, § 8, cl. 1. Professor Engdahl has claimed that this constitutional text, which gives Congress the power to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States," does not actually create the spending power. *See supra* note 380 (discussing Engdahl's position). Instead, Engdahl argued that the spending power stems from the Property Clause. *See* Engdahl, *Basis of the Spending Power*, *supra* note 380, at 243-58. I accept for purposes of this Article the common understanding that the spending power stems from Article I and not Article IV.

412. U.S. CONST. art. I, § 8, cl. 3. The approach I suggest is similar but not identical to Amar's theory of intratextualism. Amar argued that in interpreting one word or phrase in the Constitution, courts should look at similar terms and words in the text and how they have been interpreted. Amar, *supra* note 130, at 748-49 (describing the theory briefly). This interpretive method would mirror the rule of statutory construction that statutes should be interpreted in pari materia, with the same word being read with the same meaning in each place. *See* NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 51.01 (5th ed. 1992); *see also* Adrian Vermeule & Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble with* Intratextualism, 113 HARV. L. REV. 730, 730 (2000) (describing Amar's theory with reference to rule of statutory construction). Using Amar's method, one might compare the term "regulation" in the Property Clause to the term "regulate" in the Commerce Clause or the term "needful" in the Property Clause to the term "necessary" in the Necessary and Proper Clause. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 422 (1819); *see also* Amar, *supra* note 130, at 757-58 (discussing this use of intratextualism). My approach to the Property Clause, by contrast, looks at possibly analogous clauses that may provide guidance in finding the reach of the Property Clause. The clause that best suggests itself for this purpose is the Commerce Clause, because it implicates many of the same concerns as extraterritorial uses of the Property Clause.

government sought to impose on a federally funded irrigation project using federal lands.[413] With regard to the spending power, Congress may spend public money to further the general welfare to accomplish almost any end, not just those specific powers enumerated in the Constitution.[414] The decisions of Congress on how to spend public moneys do not escape judicial review, but the review that they receive is extremely deferential.[415] Applying these limitations to the hypothetical Forest Gaming Act—which regulates activities occurring directly on federal lands—a reviewing court should find the act constitutional unless forbidden by some external limitation of the Constitution. The act constitutes a use of federal power to advance a simple aim: raising money for the federal treasury.

The Court has developed more scrutinizing rules to review congressional spending in the context of conditional grants to the states—i.e., grants that require states to take or refrain from action in order to receive federal funds—but these boundaries do not greatly limit congressional discretion. First, Congress must clearly state the conditions on the receipt of federal funds.[416] Second, the Court requires that the condition be related "'to the federal interest in particular national projects or programs.'"[417] Third, "other constitutional provisions may provide an independent bar to the conditional grant of federal

413. *See* Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 294-95 (1958).

414. *See* South Dakota v. Dole, 483 U.S. 203, 207 (1987) (reaffirming that "'the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution'" (quoting United States v. Butler, 297 U.S. 1, 66 (1936)).

415. *See id.* ("In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress.").

416. *See id.*

417. *Id.* (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion)). In the quoted case, the Court upheld the application of a nondiscriminatory federal user fee imposed on state aircraft. It is unclear from the opinion, however, what force the plurality put on this language, because it cites *United States v. City of San Francisco*, 310 U.S. 16 (1940), as support for the statement, and that case involved a limitation in a grant that did not advance a specific enumerated power of the federal government but a general policy in favor of public distribution of electricity.

Professor Lynn Baker has argued that the Court should revisit its jurisprudence on conditional grants because the ability of Congress to use as a "'back door'" its spending power threatens to undermine the positive limits on congressional authority that the Court has created. Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911, 1919 (1995).

funds."[418] Finally, the Court has "recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"[419] Thus, with regard to actions undertaken pursuant to the spending power, the regulation of individuals will withstand scrutiny so long as it does not violate an express limitation in the Constitution. If a state receives federal funds, Congress must speak clearly and advance a national interest through the use of the conditional grant.

These rules should also apply in the case of conditional grants of lands to the states. Clearly, Congress can impose conditions on grants of its property to private parties or municipalities.[420] Congress has also imposed conditions on grants of lands to the states, and the courts have properly upheld them as exercises of the Property Clause power. For example, in *Branson School District RE-82 v. Romer*,[421] the Tenth Circuit considered whether Congress could impose a trust condition on federal lands granted to the State of Colorado in the act admit-

418. South Dakota v. Dole, 483 U.S. at 208. For example, Congress could not use conditional grants to establish a church.

419. *Id.* at 211 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)). In the quoted case, the Court upheld the unemployment insurance portions of the Social Security Act of 1935 against the challenge that these provisions coerced the states "in contravention of the Tenth Amendment or of restrictions implicit in our federal form of government." *Steward Mach. Co.*, 301 U.S. at 585. The challenged statute required states to enact specific provisions in their unemployment schemes to receive federal funds. The Court held the requirements constitutional. "Nothing in the case," wrote Justice Cardozo, "suggests the exertion of a power akin to undue influence, if we assume that such a concept can ever be applied with fitness to the relations between state and nation." *Id.* at 590. Thus, the principal authority that the Court cited in *South Dakota v. Dole* for the rule that there might be a point beyond which a conditional grant becomes coercive expresses doubt on the point. Nevertheless, the dissenting opinion in a recent Eighth Circuit case argued that requiring states to waive their sovereign immunity upon pain of losing educational funds constituted an unconstitutionally coercive conditional grant. Jim C. v. United States, 235 F.3d 1079, 1082-83 (8th Cir. 2000) (Bowman, J., dissenting).

420. *See, e.g.*, United States v. City of San Francisco, 310 U.S. 16, 28-30 (1940) (upholding a condition in a grant to a municipality that hydroelectric power be distributed only by the municipality and not by a private company); Ruddy v. Rossi, 248 U.S. 104, 107 (1918) (upholding a condition on a grant of lands to a private party that the lands could not be used to satisfy debt incurred prior to patenting the land); Utah Power & Light Co. v. United States, 243 U.S. 389, 404-05 (1917) (upholding a condition that a private party obtain a permit prior to the use of federal land); Light v. United States, 220 U.S. 523, 536-37 (1911) (upholding a similar condition).

421. 161 F.3d 619 (10th Cir. 1998).

ting Colorado to the Union.[422] The court properly held that Congress could impose such a condition on lands granted to the state after statehood, and that creating the condition in the act of admission posed no constitutional problem.[423] Similarly, the conditions imposed on lands granted to Hawaii, requiring the state to hold the land for the benefit of native Hawaiians, would not run afoul of the Property Clause.[424] Although the ultimate means of establishing government for those lands may run afoul of other constitutional provisions,[425] the Property Clause itself does not limit the creation of trust conditions on a state when the United States transfers property to the state upon admission to the Union. The United States can impose trust conditions on lands granted after statehood, and nothing about the event of admission disables the United States from imposing such conditions on lands transferred at statehood. Indeed, the lands transferred at statehood by virtue of the equal footing doctrine come with a form of trust impressed upon them as a matter of law.[426]

For extraterritorial applications of the Property Clause, the spending power does not provide such a clear analogy. Unlike the spending cases—in which Congress bestows bounty on those who wish to avail themselves of it—extraterritorial regulation under the Property Clause necessarily involves another sovereign that normally would have authority over the affected area even if Congress speaks. In cases such as the hypothetical Gun-Free Federal Building Zones Act or National Parks Clean Air Act, the jurisprudence arising under the Commerce Clause provides an analogous federal power.[427] The

422. Colorado Enabling Act, ch. 139, §§ 7, 14, 18 Stat. 474, 474-75 (1875).

423. *Branson Sch. Dist.*, 161 F.3d at 635-36.

424. *See* Act of March 18, 1959, Pub. L. No. 86-3, §§ 4, 5(b)-(d), 73 Stat. 4, 5.

425. *See* Rice v. Cayetano, 528 U.S. 495 (2000) (holding unconstitutional a limitation in voter qualification for elections to the Office of Hawaiian Affairs, which manages Hawaiian homelands).

426. *See, e.g.*, Shively v. Bowlby, 152 U.S. 1, 57-58 (1894) (holding that states may control land below the high-water mark bordering on land granted to individuals by Congress prior to statehood); Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892) (holding that states may control lands under tidal waters, but that regulations are subject to the obligation of states to uphold the public interest).

427. Blake Shepard also suggests the analogy of the Property Clause to the Commerce Clause. Shepard, *supra* note 27, at 533-37. Shepard argues that the analogy should apply to activities on federal lands, as well as to actions with the potential to damage federal property that take place on non-federal lands. *See id.* at 535. Although the basic idea is sound, as I will argue in the

text, Shepard's account has two flaws. First, in some ways Shepard misses the fullness of the Commerce Clause analogy by emphasizing that, under this analogy, "Congress admittedly would enjoy broad authority to regulate activity *on federal property*." *Id.* Conceivably, one could argue that if the Property Clause were compared solely to the Commerce Clause, then federal regulation of activities on federal land would be like those cases that unquestionably involve interstate commerce and are subject to congressional regulation. *Cf.* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824) ("[The Commerce Clause] power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."). Such a rule might escape judicial review. The second problem with Shepard's argument is that he states that his Commerce Clause analogy would yield a rule that "[o]nly if it is *irrational* for Congress to conclude that the legislation in question constitutes a 'needful' rule or regulation 'respecting' federal property should a federal statute be struck down as exceeding the scope of the Property Clause." Shepard, *supra* note 27, at 535. This conclusion probably resulted in part from the state of Commerce Clause jurisprudence at the time that Shepard wrote; his article notes that "[w]ith one exception, a federal regulation enacted under the Commerce Clause has not been struck down by the judicial branch in over forty years." *Id.* at 534. Shepard provides no idea of the kind of nexus between the regulated activity and the federal lands that would satisfy the Property Clause. Looking to the spending power cases to review regulations of disposals of federal lands or of activities on federal lands has two advantages. First, the spending power better resembles this area of the property power; in both instances, Congress is charged with managing a federal resource, be it money or property. Second, the spending power cases provide a window, albeit small, for a court to ensure against instances of outright federal coercion of states, which conceivably the federal government may try to do through conditional grants under the property power.

For his part, Professor Sax devotes insufficient attention to using the Commerce Clause for guidance in interpreting the reach of the Property Clause and the protection it might provide for the national parks. *See* Sax, *supra* note 27, at 255. Sax argues that it would be "anomalous to apply sharply divergent theories of federal-state relations in interpreting the two constitutional provisions." *Id.* Sax also argues 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." *Id.* Although Sax's second argument may be true—and the scope of Congress's Commerce Clause authority to protect federal property lies beyond the scope of this Article—his first argument rings hollow. In interpreting the line between federal and state authority, a holistic approach that looks at all of the federal government's powers is preferable to a disjointed one that separates the powers into different pigeonholes. Although the nature of federal-state relations will doubtlessly change depending on which power Congress exercises—Congress will have more leeway in exercising its war powers or the power over immigration than, say, in exercising its Commerce Clause power in attempting to ban purely local, noneconomic crime—the overall relationship between the federal government and the state governments has its roots in the underlying understanding of the division between federal and state powers. Sax himself recognizes this conclusion, because he refers to "many cases more sharply intrusive upon traditional state power than anything one might anticipate in the area of Park Service regulation" to bolster his case for more aggressive Park Service

Supreme Court recognizes plenary congressional authority where the Commerce Clause definitely applies, but much of its jurisprudence consists of determining whether the federal government has authority over the targeted activity in its efforts to regulate commerce.[428]

The Court has described the power of Congress under the Commerce Clause as extending to "three broad categories."[429] The first two broad categories—which include the channels and instrumentalities of commerce[430]—have no readily apparent analogous application in the Property Clause context.[431] The third area of federal authority, however, provides a proper analogy to explore the potential reach of the Property Clause. Under this rubric, "Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.* those activities that substantially affect interstate commerce," even if they occur wholly within one state.[432] Thus, Congress can aggregate intrastate economic activities to show an effect on commerce.

Simply asserting that the aggregation principle should apply to extraterritorial regulations enacted under the Property Clause does not clearly identify which activities Congress can aggregate to show a substantial effect on federal lands. Take the hypothetical National Parks Clean Air Act. Congress could easily regulate a stationary source of SO_2 in an area right next

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regulation under the Property Clause. *Id.* Harmonizing the reach of the Commerce Clause and the Property Clause would address what Sax called the anomaly of "apply[ing] sharply divergent theories of federal-state relations in interpreting the two constitutional provisions." *Id.*

428. *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294 (1964) (upholding public accommodation provisions of the Civil Rights Act of 1964); Wickard v. Filburn, 317 U.S. 111 (1942) (upholding the regulation of consuming agricultural products grown at home); United States v. Darby, 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding the National Labor Relations Act).

429. United States v. Lopez, 514 U.S. 549, 558 (1995).

430. *Id.*

431. As suggested above, however, one might analogize these areas of federal authority to the Property Clause power. *See supra* note 427. One might analogize the first area of congressional power, regulating the use of the channels of interstate commerce, to federal control of activities that take place on federal lands, and the second, regulating the instrumentalities of interstate commerce or persons or things in interstate commerce, to the federal government using the disposition of federal property to effectuate other ends. Nevertheless, I believe the spending power cases provide a cleaner analogy for these exercises of federal power.

432. *Lopez*, 514 U.S. at 558-59 (citations omitted).

to a national park, even under a nuisance theory.[433] A more difficult question is whether Congress could regulate stationary sources of air pollution located several states away if it could reasonably conclude that these sources damaged federal property. An even more difficult question is whether Congress could directly regulate all sources of SO_2 or NO_x across the country because they collectively contribute to a problem that affects federal property. Such regulation could extend to all sources of these air pollutants from large factories to automobiles and trucks.[434]

Applying the Court's present Commerce Clause jurisprudence analogously to the Property Clause, even this far-reaching version of the National Parks Clean Air Act should survive constitutional challenge. When the Court has determined that Congress could rationally conclude that the aggregation of regulated activities substantially affects interstate commerce, it substantially defers to the judgment of Congress.[435] For example, the Court has permitted congressional

433. *See, e.g.*, Georgia v. Tenn. Copper Co., 206 U.S. 230 (1907) (allowing sovereign to sue smelter that produced sulfur dioxide on nuisance theory).

434. Of course, the federal government does directly create emission standards for automobiles and trucks in the Clean Air Act. *See* 42 U.S.C. §§ 7521–7544 (1994). These provisions have their basis in the Commerce Clause, and one might wonder about the advantage of creating an elaborate Property Clause justification for such regulation. After all, the justification for such standards under the Commerce Clause is relatively straightforward: Automobiles move or are capable of moving in interstate commerce, and Congress can create standards of general applicability for merchandise that moves or is capable of moving in interstate commerce. *See* United States v. Darby, 312 U.S. 100 (1941) (upholding congressional prohibition of the interstate sale of goods manufactured in violation of federal law). I offer the Property Clause justification for two reasons. First, it helps determine the farthest reaches of the Property Clause. The hypothetical Gun-Free Federal Buildings Zone Act is an easy regulation to justify under the Property Clause and difficult if not impossible to justify under the Commerce Clause (at least after *Lopez*). Likewise, a broadly drafted National Parks Clean Air Act may have provisions that are difficult—although I do not think impossible—to justify under the Property Clause but that are relatively easy to justify under the Commerce Clause. Second, as the Court adjusts limits of the Commerce Clause, the limits of the Property Clause may take on new importance, and figuring out the outer limits of the Property Clause may prove useful in environmental regulation. Unlike the Commerce Clause, where the Court had a history of limiting the reach of federal power until the 1930's, the Court has routinely interpreted the Property Clause broadly, with the notable exception of *Dred Scott*.

435. Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981); *see also* Fry v. United States, 421 U.S. 542, 547 (1975) ("Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects com-

regulation of an individual farmer's consumption of homegrown wheat where the aggregate impacts on the wheat market affect interstate commerce.[436] Similarly, seemingly local activity like the air emissions of a factory can, when aggregated, affect federal property and warrant congressional legislation under the Property Clause.

If the foregoing characterization of the Court's Commerce Clause jurisprudence applies analogously to the Property Clause, then both of the hypothetical extraterritorial exercises of Property Clause power introduced above—the Gun-Free Federal Building Zones Act and the National Parks Clean Air Act—should pass constitutional muster. As suggested earlier, Congress could rationally conclude in a Gun-Free Federal Building Zones Act that wise policy dictates a ban on firearms within 1000 feet of any federal building. Firearms within 1000 feet of a federal building can cause death and serious injury, limit worker productivity, and create increased security costs for the federal government to protect its property. For the National Parks Clean Air Act, Congress could rationally conclude that increased emissions of SO_2 and NO_x in the Midwest harm national parks and forests in the East in the form of blighted trees, acidified lakes, and diminished wildlife.[437] Congress could also reasonably conclude that state regulation of these sources of air pollution insufficiently protected the federal interest.[438]

The Court's two most recent Commerce Clause decisions—*United States v. Lopez*[439] and *United States v. Morrison*[440]—do not change this analysis. These cases did not concentrate on the question most appropriate for application to the Property Clause Context, namely the circumstances under which Congress can aggregate intrastate activity as a basis for federal regulation of interstate commerce. The Court continued to recognize in *Lopez* that Congress could regulate under the Commerce Clause activities that, in the aggregate, substantially affected interstate commerce even if the individual activity

merce among the States or with foreign nations.").

436. Wickard v. Filburn, 317 U.S. 111, 127-28 (1942).

437. *See supra* note 373.

438. Such a finding would not necessarily form a component of the exercise of federal authority, but it would certainly bolster the case supporting such an enactment.

439. 514 U.S. 549 (1995).

440. 529 U.S. 598 (2000).

regulated had an insubstantial effect. The limitation announced in *Lopez* merely required Congress to target activities of an economic nature.[441] The regulation of guns in school zones simply did not meet this standard.[442] Congress did not provide an adequate factual basis for federal regulation, and its proffered justifications—that violent crime hampered interstate commerce, and that the presence of guns at school hampered the educational process thus hampering national productivity—were too attenuated from commerce and economic activity. Further, because the states historically regulated areas such as family law, criminal law, and education, these areas should not become subject to congressional control under the Commerce Clause.[443] This holding reinforced the accepted notion that the Constitution does not grant to "Congress a plenary police power."[444]

In *United States v. Morrison*, the Court's most recent case striking down a congressional exercise of Commerce Clause authority, the Court further refined its test for considering whether an activity substantially affects interstate commerce.[445] That case involved a challenge to the Violence Against Women Act, which created a private right of action in federal court against perpetrators of violent crimes motivated by gender. The Court reviewed this act to determine whether the underlying problem addressed—violent crime against women based on gender—had a substantial relationship to interstate commerce. Despite extensive congressional hearings and findings made within the legislation,[446] the Court concluded that Congress lacked the power to regulate these activities. Although the Court declined to "adopt a categorical rule against aggregating the effects of any noneconomic activity," it carefully reasoned that all previous regulations withstanding Commerce Clause scrutiny involved economic activity.[447] The Court also expressed grave doubt about the application of the aggregation principle to any noneconomic activity. After all,

441. *Lopez*, 514 U.S. at 559-60.

442. *See id.* at 567 ("The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.").

443. *See id.* at 564.

444. *Id.* at 566.

445. 529 U.S. 598 (2000).

446. *See id.* at 614; *id.* at 628-36 (Souter, J., dissenting) (cataloguing findings from congressional hearings).

447. *Id.* at 610-11.

"the but-for causal chain from the initial occurrence of violent crime . . . to every attenuated effect upon interstate commerce," if accepted as a basis for congressional regulation, "would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption."[448] The potential far-reaching extension of federal power greatly concerned the Court because it would subsume many areas traditionally regulated by the states.[449] The Court also reiterated its concern from *Lopez* that such a broad reading of the Commerce Clause would vest in the federal government a general police power, "which the Founders denied the National Government and reposed in the States."[450]

Attempting to summarize the present state of the Court's Commerce Clause jurisprudence after the decisions in *Lopez* and *Morrison* may prove risky. The Court has demonstrated its willingness to rethink what many regarded as the settled law. Moreover, Justice Thomas has, in concurring opinions, urged the Court to further limit application of the Commerce Clause solely to interstate activities, such that even intrastate activities of an economic nature would lie beyond the reach of congressional authority.[451] Despite the current period of flux, however, some basic principles appear settled in the Court's jurisprudence. First, Congress has broad authority over economic activity, even if that activity occurs solely intrastate. The statutes at issue in *Lopez* and *Morrison* failed primarily because they aggregated noneconomic intrastate activity in an effort to show interstate economic effect.[452] Second, where Congress regulates economic activity, it appears that the Court will defer to Congress's determination that the activity involved substantially affects interstate commerce.[453]

448. *Id.* at 615.

449. *See id.* at 615-16 (identifying "family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant").

450. *Id.* at 618.

451. *See id.* at 627 (Thomas, J., concurring); United States v. Lopez, 514 U.S. 549, 584 (1995) (Thomas, J., concurring); *see also* Printz v. United States, 521 U.S. 898, 937 (1997) (Thomas, J., concurring) (arguing that the Commerce Clause "does not extend to the regulation of wholly *intra*state, point-of-sale transactions").

452. *See Morrison*, 529 U.S. at 617; *Lopez*, 514 U.S. at 560, 567.

453. *See* Preseault v. ICC, 494 U.S. 1, 17 (1990); Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981). Because the opinions in *Morrison* and *Lopez* focus on whether the activity regulated was economic or

Assuming that these principles continue to guide the Court in determining whether Congress may reach intrastate activities under its Commerce Clause authority, the analogy to extraterritorial applications of the Property Clause then comes into focus. Under the Commerce Clause, courts limit intrastate federal regulation to those activities of an economic nature. Analogously, under the Property Clause, courts should permit federal regulation of extraterritorial activities only when substantially related to federal property. In both areas of jurisprudence, courts should uphold a congressional determination that an activity substantially affects interstate commerce or federal property if Congress could rationally make that conclusion. Unlike in the Commerce Clause context, however, courts should not fear the exercise of police powers under the Property Clause. The Court long ago held that "[t]he general Government doubtless has a power over its own property analogous to the police power of the several States."[454] Although the Court expressed the concern in both *Morrison* and *Lopez* that extensive regulation of local activity under the Commerce Clause would unduly supplant state authority, in the Property Clause context, the opposite concern prevails. Prohibiting the exercise of federal police power to protect its lands within a state "would place the public domain of the United States completely at the mercy of state legislation."[455] This prohibition would upset the balance between federal and state authority, giving too much authority to the states.[456] Congress may lack a general police power, but it fully possesses a police power over its own lands.

Another possible limit on federal authority may affect the suggested analogy of the Property Clause to the Commerce Clause. The Court enunciated in *Lopez*,[457] repeated in *Morrison*,[458] and more recently hinted at in *Solid Waste Agency v. United States Army Corps of Engineers* its concern that con-

not, they do not address the standard that the Court will use to review congressional determinations that a particular intrastate economic activity will substantially affect commerce.

454. Camfield v. United States, 167 U.S. 518, 525 (1897).

455. *Id.* at 526.

456. *See id.* at 525-26.

457. *Lopez*, 514 U.S. at 564 (expressing concern about the federal regulation of "criminal law enforcement or education where States historically have been sovereign").

458. United States v. Morrison, 529 U.S. 598, 615 (2000) (expressing concern about federal regulation of "family law and other areas of traditional state regulation").

gressional regulation of matters long controlled by the states might run afoul of the Commerce Clause.[459] This concern dovetails with the discussion below of the Court's federalism jurisprudence. Nevertheless, the lack of federal regulation in an area does not mean that the power does not exist, but only that the federal government has not pursued it. Thus, with regard to the hypothetical Forest Gaming Act, although states have historically regulated casino gambling, the federal government has addressed the general question of gambling from early times.[460] Further, the federal government has historicially determined how best to use federal property to enhance the overall revenue to the public fisc.[461] The hypothetical Gun-Free Federal Building Zones Act would regulate firearm possession, a subject of federal regulation from early times, and it would seek to protect federal property from outside harm, just like the statute upheld in *Camfield*.[462] Finally, the hypothetical National Parks Clean Air Act would offer protection for national parks, which have existed since the founding of Yellowstone National Park in 1872.[463] Moreover, the protection of federal lands from external threats dates from the earliest times.[464] Therefore, all three of the hypothetical acts should fall within the intrinsic limitations of the Property Clause.[465]

459. Solid Waste Agency v. United States Army Corps of Eng'rs, 121 S. Ct. 675, 683-84 (2001) (rejecting the administrative construction of the statute in part because it "would result in a significant impingement of the State's traditional and primary power over land and water use"). The *Solid Waste Agency* case did not involve the constitutionality of a statute, but the Court invoked constitutional concerns to strike an administrative interpretation of a statute. *See id.* at 683-84.

460. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).

461. *See* United States v. Gratiot, 39 U.S. (14 Pet.) 526 (1840).

462. *See* Camfield v. United States, 167 U.S. 518, 525-26 (1897).

463. *See* Act of March 1, 1872, ch. 24, 17 Stat. 32 (codified as amended at 16 U.S.C. § 21 (1994)). The traditional date that most scholars use for the establishment of the first national park is 1872, although Hot Springs National Park in Arkansas was reserved for its natural wonders in the 1830's. *See* RONALD A. FORESTA, AMERICA'S NATIONAL PARKS AND THEIR KEEPERS 12, tbl. 2-1 (1984); BOB R. O'BRIEN, OUR NATIONAL PARKS AND THE SEARCH FOR SUSTAINABILITY 20-21 (1999).

464. The Supreme Court recognized by 1851 that common law protection existed for damage to public lands. Cotton v. United States, 52 U.S. (11 How.) 229, 231 (1850).

465. The provision that Congress must draft the legislation clearly avoids the clear statement rules of *Solid Waste Agency v. United States Army Corps of Eng'rs*, 121 S. Ct. 675, 683-84 (2001), and *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991). If the hypothetical acts I describe had to stand or fall on their constitutional merits, I believe that they would constitutionally stand.

B. EXTRINSIC LIMITATIONS

As stated in the introduction to this section, many extrinsic limitations on the federal government's general powers should also apply to the Property Clause power. The exercise of the Property Clause power would not excuse Congress from otherwise applicable requirements, such as the provisions of the Bill of Rights.[466] After the Supreme Court's decision in *INS v.*

Undoubtedly, one may wonder what sort of enactment would fall outside the intrinsic limitations on congressional authority under the Property Clause under the proposed reading. Congress could broadly conceive of its property rights, just as private landowners sometimes do. This potential flaw does not plague my argument alone. Even those theories that find limits to the Property Clause power in the law of nuisance—whether it be Gaetke's theory which borrows the balancing analysis, Gaetke, *Congressional Discretion*, *supra* note 27, at 397 (comparing limits on Property Clause to balancing court will perform in nuisance cases), or Sax's theory, which relies on the substantive law of nuisance, Sax, *supra* note 27, at 254 n.77 (suggesting that common law of nuisance for interstate cases might provide "self-limiting rationale for the use of the property clause to regulate peripheral private uses")—could run into difficulties finding such a limit. The term nuisance "has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 86, at 616 (W. Page Keeton ed., 5th ed. 1984) (footnotes omitted); *see also* Wilson v. Parent, 365 P.2d 72, 77-78 (Or. 1961) (holding defendant, who was son-in-law of plaintiff, liable for nuisance by making lewd and obscene gestures to plaintiff). Although Gaetke and Sax would likely disclaim these broad readings of nuisance law as part of Congress's authority under the Property Clause, this ignores the possibility that nuisance law can be as limitless as other areas. Nevertheless, one can devise an example that all would agree is beyond the authority of Congress to regulate under the Property Clause because of an insufficient nexus to federal property. Congress could not, under its Property Clause power, ban all violent crime that took place within a thousand miles of every piece of federal property. That sort of regulation goes far beyond the need of the federal government to protect its property. Nevertheless, Congress could ban such crime if it found that such crime affected the use and enjoyment of federal land, even under the nuisance theory. Congress could also use its Property Clause powers to criminalize acts that take place off federal lands that intentionally interfere with or attempt to interfere with the use and enjoyment of public lands, especially if Congress made the intent to interfere with the use and enjoyment of public lands a jurisdictional element of the crime. *See* McKelvey v. United States, 260 U.S. 353, 359 (1922) (upholding criminal statute that prohibited attempts to interfere with use and enjoyment of public lands); *see also* United States v. Lopez, 514 U.S. 549, 562 (1995) (suggesting that the presence of jurisdictional element may help in sustaining legislation as legitimate exercise of Commerce Clause power).

466. As suggested above, congressional action undertaken pursuant to the Property Clause is subject to the Bill of Rights. *See supra* note 387. The question of whether the Bill of Rights applied to the territories—whether, as some put it, the Constitution follows the flag—occupied the Court for a considerable time in the post-*Dred Scott* era of the territorial aspects of the Property

Chadha, in which the Court held the legislative veto unconstitutional,[467] several authors argued that the decision should not apply to public lands.[468] Nevertheless, the Court has strongly

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Clause. *See supra* notes 250-256 and accompanying text. I accept that the provisions of the Bill of Rights apply to congressional exercises of the Property Clause power within the states. There are some suggestions to the contrary in the Court's jurisprudence, at least on the question of whether individuals can obtain standing to challenge actions that allegedly establish religion if the federal government undertakes the challenged action under the Property Clause. *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 480 (1982) (rejecting plaintiffs' Establishment Clause challenge to a transfer of property from the United States to a religious school for lack of standing).

One limitation in the Bill of Rights that some might think of as limiting congressional authority is the Takings Clause of the Fifth Amendment. *See* U.S. CONST. amend. V. As with enactments undertaken pursuant to the Commerce Clause, the Takings Clause would not limit congressional actions undertaken pursuant to the Property Clause provided that Congress provided a means for the affected people to recover just compensation. *See* Preseault v. ICC, 494 U.S. 1, 11-17 (1990) (holding that a just compensation remedy is available against the federal government unless Congress clearly states the contrary).

467. 462 U.S. 919, 959 (1983).

468. *See, e.g.*, Eugene R. Gaetke, *Separation of Powers, Legislative Vetoes, and the Public Lands*, 56 U. COLO. L. REV. 559 (1985) [hereinafter Gaetke, *Separation of Powers*]; Roger M. Sullivan, *The Power of Congress Under the Property Clause: A Potential Check on the Effect of the* Chadha *Decision on Public Land Legislation*, 6 PUB. LAND L. REV. 65 (1985); Timothy R. Baker, Comment, Chadha *and the Public Lands: Is FLPMA Affected?*, 5 PUB. LAND L. REV. 55 (1984). Many public land statutes used the legislative veto as part of the management scheme. *See, e.g.*, 43 U.S.C. § 1714(c), (e). The defenders of the legislative veto over public land decisions based their argument on two basic theories. First, the long history of congressional accommodation of presidential authority in the area somehow authorized the legislative veto in this context. Second, the proprietary nature of the government's relationship with its property allowed for a different legislative structure over federal lands. *See* Gaetke, *Separation of Powers*, *supra*, at 564-74. I disagree with these conclusions, and not simply as a capitulation to subsequent authority. *See* Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991). Professor Glicksman has also reviewed this question, concluding cautiously that legislative vetoes are likely unconstitutional in the public lands context. *See* Robert L. Glicksman, *Severability and the Realignment of the Balance of Power over Public Lands: The Federal Land Policy and Management Act of 1976 After the Legislative Veto Decisions*, 36 HASTINGS L.J. 1, 51-65 (1984). I have reached my conclusion for two reasons. First, the long history of the President exercising power over public lands without the express authority of Congress says nothing about the way that Congress itself must exercise its authority under the Property Clause when it chooses to do so; rather, that history of congressional acquiescence to executive action goes, if anything, to the nondelegation doctrine. Also, if the Property Clause is an enumerated power—and I believe that Professor Gaetke and I agree that it is—then there are few persuasive reasons to treat it differently from other

suggested that if Congress wishes to enact legislation for federal property, it must proceed through the constitutionally established procedures of bicameralism and presentment using constitutionally composed boards.[469] Similarly, the nondelegation doctrine applies to the exercise of the Property Clause power,[470] although the Supreme Court has applied that doc-

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enumerated powers. The *Chadha* decision itself arose in the immigration context, where the Court has proven quite acquiescent to the will of Congress otherwise. Dicta from the Supreme Court supports the view that if Congress intends to dispose of lands, it must do so through bicameralism and presentment. *See* United States v. California, 332 U.S. 19, 28 (1947) (holding that a congressional joint resolution vetoed by the President "does not represent an exercise of the constitutional power of Congress to dispose of public property under [the Property Clause]").

The second theory makes too much of the proprietary aspects of the federal government's ownership of its lands. For example, Gaetke emphasizes that exercises of the Property Clause power are legislative and proprietary in nature and that the President acts as the agent of Congress when he acts concerning the public lands. *See* Gaetke, *Separation of Powers*, *supra*, at 570-71. He argues that the legislative veto might be constitutional for proprietary decisions but not for regulatory decisions. *Id.* at 579. Just as Professor Engdahl errs in concluding that, under what he termed the "classic Property Clause doctrine," the United States had the power of a mere proprietor over its lands (with limited exceptions), *see supra* note 46 (explaining Engdahl's argument), Gaetke makes too much of the proprietary nature of the federal government's relationship with its lands when he concludes that the proprietary nature provides an exception to the usual way that the government must exercise its authority. Although the federal government is proprietor of the lands, it is also a sovereign, as Gaetke would agree. Just as that sovereignty gives the United States the power to enact legislation and take other measures to protect its lands that a private proprietor could not, the United States must exercise that authority through the means established by the Constitution. *See* C. Peter Goplerud, III, *Federal Coal Leasing and Partisan Politics: Alternatives and the Shadow of* Chadha, 86 W. VA. L. REV. 773, 793 (1984) ("[T]he legislative/proprietary dichotomy is stated to indicate the expanse of the Property Clause powers, not the use or nonuse of article I procedures to implement it."); *see also* Brodie, *supra* note 28, at 711 (lamenting that "[t]he difference between the United States as 'sovereign' and 'proprietor' has been whittled away to the point where it is now a distinction without substance"). In other contexts, the Supreme Court has questioned the validity of the distinction between a government as sovereign and a government as proprietor or market participant. *See* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 679-87 (1999); *see also* Michael Wells & Walter Hellerstein, *The Governmental-Proprietary Distinction in Constitutional Law*, 66 VA. L. REV. 1073 (1980).

469. *See* Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 270-71 (1991) (holding that management of airports formerly owned by the federal government could not use an unconstitutionally composed board).

470. The Eighth Circuit held unconstitutional certain provisions of the Indian Reorganization Act that authorized the Secretary of the Interior to take land into trust for Indians, but the Supreme Court vacated the decision. *See*

trine less rigorously to federal actions involving public lands because of a tradition of inter-branch accommodation and congressional acquiescence to exercise of executive authority.[471] These extrinsic limitations affect only which branch may exercise the Property Clause power and how that branch may exercise it; they do not affect the reach of the power itself.

Given the suggested Commerce Clause analogy, the most important extrinsic limitation on federal authority over its own property that lies within a state is the Tenth Amendment and the associated principles of federalism. Dividing sovereign authority between the federal government and state governments vindicates several important objectives. The Supreme Court set forth several of these goals in *Gregory v. Ashcroft*.[472] There, the Court argued that the division of power between the states and the federal government

> assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.[473]

The division of power between the states and the federal government also protects individual liberty by creating "a healthy balance of power [that] will reduce the risk of tyranny and abuse from either front."[474] Nevertheless, the Supremacy Clause deals the federal government the ultimate trump card

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South Dakota v. United States Dep't of the Interior, 69 F.3d 878, 883-85 (8th Cir. 1995), *vacated*, 519 U.S. 919 (1996).

471. *See* United States v. Midwest Oil Co., 236 U.S. 459, 469-73 (1915) (citing the extensive history of congressional acquiescence to presidential withdrawals of public land in upholding such a reservation); United States v. Grimaud, 220 U.S. 506, 521 (1911) (upholding regulation banning grazing on public lands to nondelegation challenge). Professor Gaetke argued that this history of looser rules for nondelegation in the public lands area reflects the notion that rules for public lands are not like other laws. *See supra* note 468. To be sure, Gaetke has case support for this argument. *See Midwest Oil*, 236 U.S. at 474 (holding that public land laws "are not of a legislative character in the highest sense of the term . . . 'but savor somewhat of mere rules prescribed by an owner of property for its disposal'" (quoting Butte City Water Co. v. Baker, 196 U.S. 119, 126 (1905)). Nevertheless, I believe that *Midwest Oil* and its progeny are best viewed not as commentary on the Property Clause power so much as reflecting a tendency of the Court to recognize executive power if it has been repeatedly exercised and acquiesced in by Congress. *See, e.g.*, United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319-22 (1936).

472. 501 U.S. 452 (1991).

473. *Id.* at 458.

474. *Id.*

in this relationship.[475]

As with the Commerce Clause, the Supreme Court has recently proven quite active in the area of federalism, in no small part because of the relationship between the Commerce Clause and the Tenth Amendment.[476] Although the Court's Commerce Clause jurisprudence might now need clarification, that case law provides a model of clarity as compared to the Court's Tenth Amendment jurisprudence. Translating the general principles behind federalism announced in cases such as *Gregory v. Ashcroft* into judicially enforceable rules has proven nearly impossible.[477] The Court's decision in *National League of Cities v. Usery*[478]—its first modern attempt to devise a judicially enforceable principle of federalism to limit the reach of the federal government—proved unworkable, and the Court overruled it within a decade.[479] *Gregory v. Ashcroft* itself did not yield a rule of constitutional limitation, but instead a rule of statutory construction: The Court will read particularly invasive congressional enactments to apply to state governments only if Congress clearly stated this intent.[480]

More recently, the Court held unconstitutional two acts of Congress because they over-regulated the states and thus infringed on state sovereignty. In *New York v. United States*,[481] the Court struck down a requirement that states take title to radioactive waste generated within their borders. In the

475. *Id.* at 460 ("As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States.").

476. As the Court has stated, in cases

> involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.

New York v. United States, 505 U.S. 144, 156 (1992).

477. *See* H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 864-68 (1999).

478. 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

479. *Garcia*, 469 U.S. at 529.

480. *See* Gregory v. Ashcroft, 501 U.S. at 460-61 (describing a clear statement rule for determining when congressional enactments regulate states); *see also* Solid Waste Agency v. United States Army Corps of Eng'rs, 121 S. Ct. 675, 683-84 (2001) (reading the reach of the Clean Water Act narrowly to avoid a potential federalism problem).

481. 505 U.S. 144 (1992).

Court's view, this required the state government to enact legislation against its will. In *Printz v. United States*,[482] the Court held that certain provisions of the Brady Handgun Violence Protection Act—which required the local chief law enforcement officer to perform a background check on anyone who wished to purchase a handgun—unconstitutionally ordered state officials to administer a federal program in derogation of the Tenth Amendment.[483] Both of these cases made clear that congressional legislation should properly target private parties; Congress cannot commandeer the state legislative or executive branch to implement federal policy thereby interfering with the relationship between the citizens of the state and their state government.[484]

Nevertheless, the Court recently allowed Congress to limit the activities of state officials if the federal regime treated the state officers like private individuals and did not single out states as the target of regulation.[485] The Court has also upheld federal statutes giving states the choice between having state regulation of individual conduct according to federal standards or having direct federal regulation of the individual conduct that would altogether bypass state law.[486] Older cases, sometimes grouped with the equal footing cases, hold that Congress cannot dictate the internal affairs of state government.[487] Thus, the Court's modern federalism jurisprudence draws a few clear boundaries for federal action: Congress must speak clearly if it intends to regulate the states; it cannot dictate legislation that a state legislature must pass; it cannot commandeer state officials; and it cannot deprive a state of the ability to control the central attributes of its government. The Supreme Court continues to recognize, however, that the federal

482. 521 U.S. 898 (1997).

483. *Id.* at 918-22, 925-33.

484. *See id.* at 925-28; New York v. United States, 505 U.S. at 168-69.

485. *See* Reno v. Condon, 528 U.S. 141 (2000) (upholding provisions of the Driver Privacy Protection Act, which makes unlawful the release of information from state drivers license records); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); *see also* New York v. United States, 505 U.S. at 160 (acknowledging that the Court's jurisprudence on the question of Congress's power to subject states to generally applicable laws "has traveled an unsteady path").

486. FERC v. Mississippi, 456 U.S. 742 (1982); Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).

487. *See, e.g.*, Coyle v. Oklahoma, 221 U.S. 559, 574 (1911) (holding that Congress may not dictate the location of the state capital in an act admitting a state to the Union).

government has a broad role in the governance of national life.

Under these principles, the three hypothetical acts introduced above would pass muster under the Court's current federalism jurisprudence. None of the hypothetical acts commands a state to enact legislation or to enforce federal legislation, and none limits a core function of state government.[488] Nevertheless, larger concerns about the proper role between the states and the federal government motivate many opponents to a broadly construed Property Clause. It has not escaped attention, for example, that the Court decided *National League of Cities v. Usery*[489] only a week after it decided *Kleppe v. New Mexico*.[490] Now that the Supreme Court has overruled *National League of Cities*, however, it is unclear exactly how the principles of federalism limit the Property Clause power.

Most advocates of the narrow view of the Property Clause do not analyze the federalism limitations based on the Court's most recent jurisprudence; rather, their concerns reflect the general principles articulated in *Gregory v. Ashcroft*. These critics argue that allowing the federal government to own and manage land in the states (apart from those small tracts described in the Enclave Clause) undermines the very notion of a state government free from federal interference.[491] Such a

488. The federal government could not, however, require a state to police its lands. Thus, if the hypothetical Forest Gaming Act required states to provide police and security for federal casinos, that provision would fail under *Printz*.

489. 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

490. 426 U.S. 529 (1976); *see also* Landever, *supra* note 28, at 600; Touton, *supra* note 28, at 828. This coincidence in the Court's calendar signifies little about the role that federalism principles actually play in the Property Clause context for two reasons. First, the Court overruled *National League of Cities*. Second, the opinion in *National League of Cities* makes clear that the federalism limitations it found limited congressional action under the Commerce Clause, not other powers of the United States. *Nat'l League of Cities*, 426 U.S. at 852 n.17, 854 n.18 (leaving open the question of whether the principle it announced would affect congressional regulation of integral state functions under the war power, the spending power, or the power to protect civil rights). The Court later made clear that its federalism limitations did not apply to congressional acts made under the Fourteenth Amendment. City of Rome v. United States, 446 U.S. 156 (1980). Arguably, then, the federalism limitations of *National League of Cities* did not apply to congressional enactments authorized by the Property Clause even when that case had vigor. *See* Minnesota *ex rel.* Alexander v. Block, 660 F.2d 1240, 1251 n.26 (8th Cir. 1981) (leaving open the question of whether *National League of Cities* applies to exercises of Congress's Property Clause power).

491. *See* Brodie, *supra* note 28, at 724-25; Landever, *supra* note 28, at 638;

state would be, in words that the critics borrow from Laurence Tribe, a "gutted shell" incapable of providing the services that its citizens have come to expect.[492] In its strongest statement, the argument opposes any federal authority over lands located within a state, using reasoning that either echoes or comes directly from the equal footing doctrine. These critics urge that the federal government should not subject certain states to an immense federal presence by virtue of large federal landholdings in those states. In weaker versions, proponents of the narrow view raise the concern that federal decisions would prevail even when contrary to state policy and economic interests. "For example," wrote one critic, "the citizens of Utah undoubtedly expect the state to protect them from the evils of gambling, and federal frustration of that state's ability to prohibit gambling may so discredit the state as to deprive it of the support of its citizens."[493] Similarly, Nevada should be able to charge sales tax on federal lands within its borders to raise needed revenues.[494] Other critics urge that management of federal lands will improve with cooperative participation between the states and the federal government, and allowing state authority simply provides a good check on federal authority.[495]

These arguments, however, do not withstand scrutiny, as courts have properly rejected the equal footing notion that states with large federal landholdings are somehow lesser than other states because of an increased federal presence.[496] Many states have an increased federal regulatory presence within their borders because of activities undertaken in those states.

Touton, *supra* note 28, at 825.

492. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-20, at 381 (2d ed. 1988), *quoted in* Landever, *supra* note 28, at 638; LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-20, at 302 (1978), *quoted in* Touton, *supra* note 28, at 832.

493. Touton, *supra* note 28, at 832. By "depriv[ing the state] of the support of its citizens," *id.*, the author does not mean that civil war would break out in Salt Lake City if the federal government permitted gambling on federal lands in Utah. Rather, the author raises a common refutation to the argument that the political structure of the federal government adequately protects the state interest in being free from federal interference, namely that overarching federal authority might weaken the bonds that state citizens feel toward their state government. *See id.* at 828-33.

494. *See id.* at 825.

495. *See* Landever, *supra* note 28, at 612-36.

496. *See, e.g.*, United States v. Gardner, 107 F.3d 1314, 1319 (9th Cir. 1997) (explaining that the purpose of the Equal Footing Doctrine is not to establish equality of economic or physical characteristics among the states; rather, it pertains to political rights and sovereignty).

No one questions the power of the federal government to regulate a national market in securities or commodities. Despite concerns about federalism, no one questions the fact that federal securities laws have greater bite in New York and Illinois because the major stock exchanges and commodities markets are in New York City and Chicago. No one questions the plenary authority that Congress wields over immigration. As a result of that power, Florida, Texas, and other border states have greater federal presence within their borders. Similarly, a state like Nevada or Utah might experience increased federal regulation because of the presence of federal land.[497] Furthermore, although increased state participation in federal decisionmaking might, as a policy matter, lead to substantively better outcomes,[498] that possibility does not negate the federal government's constitutional authority over its property and over extraterritorial activities that affect its lands.

The scholarship of Professor Deborah Jones Merritt,[499] whose work the Court has cited,[500] provides a thoughtful model for approaching modern federalism problems that recognizes both the increased role of the federal government and the role that the Constitution established for the states. Merritt has argued that the current model used by the Supreme Court protects the autonomy of state governments against incursion by the federal government.[501] Merritt contrasted this model with the territorial model—under which the federal government and the states each control some sphere or subject matter—and the federal process model—under which the courts rely on the political process to protect the states.[502] In Merritt's view, so long as the actions of the federal government do not interfere with

497. *See* Touton, *supra* note 28, at 825.

498. *See* Milner S. Ball, *Good Old American Permits: Madisonian Federalism on the Territorial Sea and Continental Shelf*, 12 ENVTL. L. 623, 654-63 (1982).

499. *See, e.g.*, Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988) [hereinafter Merritt, *Guarantee Clause*]; Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563 (1994) [hereinafter Merritt, *Three Faces*].

500. *See* Printz v. United States, 521 U.S. 898, 930 (1997) (citing Merritt, *Three Faces*, *supra* note 499); New York v. United States, 505 U.S. 144, 157 (1992) (citing Merritt, *Guarantee Clause*, *supra* note 499).

501. *See* Merritt, *Three Faces*, *supra* note 499, at 1570-73.

502. *See id.* at 1564-70; *see also* Herbert Wechsler, *The Political Safeguards of Federalism: The Rôle of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546 (1954).

state autonomy—meaning in this context "tamper[ing] with the independent relationship between a state government and its voters"[503]—then the federal government may generally regulate the activity.

Assuming that the Supreme Court now embraces an autonomy model and has dealt "fatal blows to both the territorial and federal process models,"[504] then the suggested reach for the Property Clause should not run afoul of any principle of federalism. In the hypothetical acts examined thus far, the federal government directly regulates individuals, not states. Moreover, the prospect of using federal lands as a haven from state regulation—such as the hypothetical Forest Gaming Act—does not interfere with the relationship between citizens and their states. Any interference resulting from federal authorization of activities occurring on federal lands that would otherwise be banned by the relevant state should be no greater than the federalism concerns raised by Indian reservation gambling.[505] Despite the presence of federal operations, these activities do not force state governments "to respond to the commands of Congress rather than to the dictates of their vot-

503. Merritt, *Three Faces*, *supra* note 499, at 1571.

504. *Id.* at 1572.

505. In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 204-07 (1987), the Court held that states that permitted some forms of gambling could not prohibit bingo played on Indian reservations because Congress had not consented to the application of state regulatory law in that instance. Following this decision, Congress enacted the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (1994 & Supp. V 1999). Under § 2710(d) of that Act, Indian tribes seeking to host certain types of gambling must enter into a cooperative agreement with the state in which the gambling will take place. The Supreme Court reviewed provisions of the Indian Gaming Regulatory Act in *Seminole Tribe v. Florida*, 517 U.S. 44, 72-73 (1996), and held unconstitutional the provisions that waived the sovereign immunity of the states to lawsuits brought by tribes. The states also raised an argument based on federalism, namely that requiring a state to enter into a cooperative agreement constituted forcing them to enact legislation in violation of the Court's federalism jurisprudence. *See id.* at 61 n.10. The Court did not consider this argument because it had not been raised below. *Id.* Whatever the merits of this argument, the states did not contend in *Seminole Tribe* that the mere presence of gaming on Indian reservations within their states violated the Constitution, and the Court's jurisprudence suggests that the presence of Indian reservations within a state does not raise federalism concerns, even though these reservations are generally free from state regulation. *See* Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 791 (1991) (Blackmun, J., dissenting) ("Despite the States' undeniable interest in regulating activities within its borders, and despite traditional principles of federalism, the States' authority has been largely displaced in matters pertaining to Native Americans.").

ers."[506]

Present case law makes it more difficult to justify extraterritorial regulations that attempt to control state use of state land in order to protect federal property. Some cases, however, have already upheld federal regulation of private use of state lands where that use affects federal property.[507] These cases find support under the Court's present jurisprudence, which concludes that direct federal regulation of private-party conduct does not implicate federalism principles.[508] To the extent that any of the hypothetical statutes might involve regulation of individuals on state-owned property—such as the National Parks Clean Air Act—the Court's federalism jurisprudence should not affect that regulation.

The existing case law provides no instances in which the federal government instructs the states themselves on how to manage their own lands. The Supreme Court has described a state's relationship with its lands—especially submerged lands, which pass to the state under the equal footing doctrine—as "an essential attribute of sovereignty."[509] The Court, however, did not clearly define this statement. It has also recognized that, prior to admitting a state, the United States can convey submerged lands to others or retain them and defeat title from passing to the state under the equal footing doctrine.[510] If Con-

506. Merritt, *Three Faces*, *supra* note 499, at 1571. By contrast, if Congress required state officials to provide police or fire protection for casinos on federal property, that requirement would probably run afoul of the Court's anti-commandeering jurisprudence. *See* Printz v. United States, 521 U.S. 898, 933 (1997); New York v. United States, 505 U.S. 144, 188 (1992).

507. *See, e.g.*, United States v. Armstrong, 186 F.3d 1055, 1061 (8th Cir. 1999) (upholding a federal ban on operating a business on a lake in a national park without a permit where the state ceded jurisdiction over the waters to the federal government), *cert. denied*, 529 U.S. 1018, *and cert. denied*, 529 U.S. 1033 (2000); Minnesota *ex rel.* Alexander v. Block, 660 F.2d 1240, 1251-53 (8th Cir. 1981) (upholding a federal ban on the use of motorboats and snowmobiles on state-owned waters); United States v. Lindsey, 595 F.2d 5, 6 (9th Cir. 1979) (per curiam) (upholding a federal ban on camping and building fires without a permit within a national recreation area when the activities took place on state property, namely the bed and banks of the river); United States v. Brown, 552 F.2d 817, 820-21 (8th Cir. 1977) (upholding a hunting ban in Voyageurs National Park when the activity took place on state waters).

508. *See* Printz v. United States, 521 U.S. 898, 920 (1997); New York v. United States, 505 U.S. 144, 166 (1992) ("In providing for a stronger central government . . . the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.")

509. Utah Div. of State Lands v. United States, 482 U.S. 193, 195 (1987).

510. *See* Idaho v. United States, 121 S. Ct. 2135, 2142 (2001); United States v. Alaska, 521 U.S. 1, 61 (1997); Shively v. Bowlby, 152 U.S. 1, 48

gress can by clear legislation enacted prior to statehood deprive a state of these lands, they must not represent "an essential attribute of sovereignty" in the same way that other attributes are essential. For example, Congress could not enact legislation before admitting a state to the Union to deprive that state of fair representation in the House of Representatives.[511] Congress also could not dictate to a state the location of its state capital without interfering with an essential attribute of state sovereignty.[512] Thus, although the principle that passes submerged land to the states upon admission has constitutional force, its application in this context is uncertain. Similarly, a state's relationship with its lands generally does not prevent the federal government from exercising its authorized power to acquire them by condemnation.[513] Although states have a special relationship with their lands, that relationship does not create a complete barrier to federal regulation.

For that reason, courts should hold many applications of Congress's power under the Property Clause constitutional even if the United States regulates state use of state lands. In this context, the role of the federal government as proprietor as well as sovereign makes a difference. In the context of the Commerce Clause—where the Court has held that Congress can regulate the conduct of state governments provided that it legislates clearly without targeting the states[514]—the relationship of Congress to the subject regulated is more amorphous and theoretical. By contrast, in the context of federal property,

(1894). The Court decided *United States v. Alaska* four days before it decided *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997), in which the Court held that the Eleventh Amendment barred a suit brought by Indians against a state where the Indians sought to establish title to submerged lands. The Court noted that such lands have "a unique status in the law and [are] infused with a public trust the State itself is bound to respect." *Id.* at 283. More recently, the Court held in *Idaho v. United States* that Idaho did not in fact own the lands at issue in *Coeur d'Alene Tribe*. 121 S. Ct. at 2146-47.

511. *See* U.S. CONST. amend. XIV, § 2. Similarly, the Constitution expressly prohibits Congress from amending equal representation in the Senate or from depriving a state of two senators without its consent. U.S. CONST. art. V. Congress could not admit a state on the condition that it receive only half of its otherwise allowed representation in the House because that would interfere with an inherent attribute of sovereignty.

512. *See* Coyle v. Smith, 221 U.S. 559, 579-80 (1911) (holding unconstitutional the requirement that Oklahoma maintain its capital in Guthrie).

513. *See* Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 534 (1941) ("The fact that land is owned by a state is no barrier to its condemnation by the United States.").

514. *See* Reno v. Condon, 528 U.S. 141, 150-51 (2000).

a tangible relationship exists between the regulated activity and the federal interest. If the federal government regulates state activity on state land to protect federal land, the Supremacy Clause dictates that the federal regulation must prevail. Moreover, in most instances, Congress will regulate private parties rather than the state.

A comparison of several factual settings helps clarify the reach of this principle. Suppose that federal law prohibits setting a fire in a national forest. The law of a given state does not bar lighting campfires. If a visitor to a national forest within this state lights a campfire on federally owned lands, no one argues that the federal government cannot reach this conduct. Indeed, many of those who read the Property Clause narrowly would concur, arguing that as a proprietor the federal government can make more stringent rules than a state could.[515] Just as a private owner of a campsite could forbid lighting fires, so can the federal government. Suppose however that the Forest Service wishes to prosecute an individual who camped within the external boundaries of the national forest but on land that belonged to the state and lit a campfire. The courts have held that the federal government may regulate the camper's conduct.[516] Finally, the federal government can criminally prosecute an individual who lights a fire outside of the boundaries of national forests if the fire threatens to injure a national forest, even if the fire is lit on state lands.[517]

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515. *See* Engdahl, *supra* note 28, at 316-17.

516. *See, e.g.*, United States v. Arbo, 691 F.2d 862, 865-66 (9th Cir. 1982) (explaining that federal officers can inspect private activities on state land to protect adjacent federal land); United States v. Lindsey, 595 F.2d 5, 6 (9th Cir. 1979) (per curiam) (upholding a conviction for camping and building a fire without a permit when the activity occurred on state land adjacent to a national forest).

517. United States v. Alford, 274 U.S. 264, 267 (1927). Although the opinion is not altogether clear, *Alford* apparently involved privately owned lands. *See id.* ("Congress may prohibit the doing of acts upon *privately owned* lands that imperil the publicly owned forests." (emphasis added)). The principle should apply even if a state is igniting fires on state land. For example, suppose that a state decided to use controlled burning as a management technique for a state forest that lies next to a national forest in which the Forest Service has decided to suppress all fires. If the state lit a fire near the national forest, the United States could, in my view, sue to enjoin this conduct on the principle announced in *Alford*. The federal government can reach the conduct and its prohibition on fires set near the boundaries of a national forest would be of general applicability, rather than one that targets states exclusively. *See* Reno v. Condon, 528 U.S. 149, 150-51 (2000); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 554 (1985). If the United States could

By contrast, instead of suppressing extraterritorial activity, federal legislation might actively implement a program off of federal property to protect federal lands. Such a program might raise different concerns. Suppose that the federal government determines that it needs to cull a herd of deer because of overbrowsing in a national forest. Suppose further that the otherwise applicable state law forbids hunting deer out of season, and that a private proprietor facing a similar threat could not generally hunt deer that threatened his or her trees. Supreme Court precedent holds that the federal government could direct federal employees to kill the deer on federal lands even if that would violate state game laws.[518] Suppose that a Forest Service employee shoots a deer off federal property in an effort to reduce the deer population but in compliance with a clear federal legislative or regulatory mandate. Again, the Supreme Court case law would suggest that this activity is within the constitutional reach of the federal government.[519]

Suppose, further, that rather than relying on federal employees, the Forest Service allows private hunters to hunt for deer on its land. The hunt falls outside of the established state game season, and the Forest Service requires the private hunters to obtain a federal special use permit rather than a state hunting license. Again, this situation poses no difficulty under federalism principles. The federal government can regulate the taking of game on federal lands. Moreover, the special hunting rules for federal lands do not interfere with the autonomy of the state. The state can regulate hunting everywhere else in the state, and the citizens of the state have the opportunity to maintain their relationship with their state government.

Suppose finally that one of these private hunters spots a deer on neighboring state lands and shoots it in a federally authorized effort to protect federal lands. This case poses the most difficulty from the federalism perspective, because the state's citizens may have a strong view against hunting as expressed in legislation. Supreme Court precedent would nevertheless suggest that the private hunter should obtain immunity

prohibit Weyerhauser or Georgia-Pacific from using controlled burning as a management technique on their lands, similarly the United States should, without violating any principle of federalism, have the power to prohibit a state from using this technique under similar circumstances.

518. Hunt v. United States, 278 U.S. 96, 100 (1928).

519. *See Alford*, 274 U.S. at 267; Camfield v. United States, 167 U.S. 518, 528 (1897).

from state regulation because he or she acted pursuant to a federal program.[520]

These hypothetical situations spell out the application of the judicially enforceable principles of federalism in the Property Clause context. The fact that these situations remain hypothetical supports the belief that the federal government's exercise of its Property Clause power will not trample the legitimate interests of the states. Herbert Wechsler and others have argued that the values of federalism should be protected primarily through the political processes,[521] and the Supreme Court embraced this view in *Garcia*.[522] Although the Court has since retreated from this position, the claim that procedural protections will safeguard federalism has force in the evidence provided by Congress's use of its Property Clause power. Until now, Congress has not tried to directly regulate state conduct off of federal lands in any significant way. Furthermore, while the states containing the most federally owned lands often have smaller populations, they maintain political clout in the Senate and often obtain representation on congressional committees that oversee public lands and natural resources. Although the process might not in all cases provide adequate protections for the interests of states, it has in the context of the Property Clause.

III. THE IMPLICATIONS OF A BROADLY READ PROPERTY CLAUSE

The first two Parts of this Article demonstrate that the Court has, at almost every opportunity, correctly interpreted the Property Clause broadly. Further, the proper analogue to guide the jurisprudence for extraterritorial applications of the Property Clause power is the jurisprudence arising under the Commerce Clause to determine when Congress may regulate intrastate activities that substantially affect interstate commerce. If this analysis is correct, it remains to be determined how such a reading of the Property Clause would affect the dis-

520. *See* Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1, 469 U.S. 256, 269-70 (1985) (barring a state from regulating how local government must use money received from the federal government).

521. *See* Wechsler, *supra* note 502, at 558-60.

522. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552 (1985) ("State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.").

position of cases involving the environment. Environmental issues seem the most appropriate area for looking at possible expansions or affirmations of federal power in light of the nature of the Clause. If Congress lacked the constitutional authority to enact the Violence Against Women Act under the Commerce Clause, the Property Clause will not provide supplemental authorization for that act. Nevertheless, as courts have begun to turn a searching eye to congressional authority over environmental issues,[523] shoring up the potential Property Clause justification for such acts may well serve the cause of federal regulation of environmental problems.

A. IMPLICATIONS FOR FEDERAL LAND MANAGEMENT

The options available to federal land managers will expand under the proposed reading of the Property Clause. Presently, federal land management agencies—notably the United States Forest Service, the Bureau of Land Management, and the National Park Service—exercise jurisdiction over millions of acres of federally owned lands. They also have become more assertive about regulating their neighbors in an effort to protect the resources under their command.[524] These agencies have, however, historically shied away from broader regulation. Their reluctance to reach out further may reflect, in part, a belief that they lack the constitutional or statutory authority to promulgate extraterritorial regulations to protect their resources.[525]

The historical reluctance of these federal agencies to reach beyond federal land boundaries also probably reflects wise politics. A tenuous relationship has always existed between the local representatives of federal agencies and local landowners, but recent incidences such as the Sagebrush Rebellion and the

523. *See, e.g.*, Solid Waste Agency v. United States Army Corps of Eng'rs, 121 S. Ct. 675 (2001); Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000), *cert. denied*, 121 S. Ct. 1081 (2001); Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997).

524. *See, e.g.*, Michael Janofsky, *Private Acres in Public Parks Fuel Battles on Development*, N.Y. TIMES, Nov. 2, 1999, at A1; Stephen Steubner, *Wilderness vs. Houses In the Idaho Mountains*, N.Y. TIMES, Oct. 20, 1996, at A25.

525. *See* Sax, *supra* note 27, at 241 ("While intrusive private activities have increased all around them, park managers have stood by nervously, sensing that they were caring for helpless giants."). To be sure, Sax's account is somewhat dated, and more recent evidence suggests that the National Park Service especially has proven less shy about extraterritorial regulation, at least where a specific act has directed it to consider the possibility. *See supra* note 524.

more recent County Supremacy movement have made federal land management personnel scared for their lives and safety. One of the most notorious examples of this threat comes from the forced opening of a Forest Service road in Nye County, Nevada. On July 4, 1994, Richard Carver, a Nye County commissioner, mounted a bulldozer and "repaired" a Forest Service road lying wholly upon national forest land despite a direct order from a forest service officer to stop.[526] Forest Service and BLM workers have received threats and bombs have detonated in their offices.[527] In this hostile environment, where the federal government's authority to control even its own lands remains controversial, strict federal regulation of extraterritorial activities could lead to disaster.

Nevertheless, wise politics does not necessarily dictate the legal range of actions that an agency could possibly take. These federal agencies should at least contemplate regulating extraterritorial activities when making decisions on how best to protect the lands under their control. The procedures established by the National Environmental Policy Act (NEPA)[528] and its implementing regulations[529] provide one important opportunity for federal land management agencies to consider the scope of their regulatory jurisdiction under the Property Clause. NEPA requires federal agencies to take a hard look at the environmental impacts of actions that they undertake, authorize, or approve.[530] In evaluating alternatives for action, the regulations require agencies to consider not only alternatives within their jurisdiction but also "reasonable alternatives not within the jurisdiction of the lead agency."[531] An expanded view of a federal agency's jurisdiction will broaden the number of alternatives that agencies will consider when conducting the review required under NEPA. Although this expanded review

526. *See* Keith Schneider, *County's Move on Land Use Draws Suit by Washington*, N.Y. TIMES, Mar. 9, 1995, at A12.

527. *See* Jeff DeBonis, *Buffaloed by the Land-Use Bullies*, N.Y. TIMES, July 7, 1995, at A25 (quoting an Idaho rancher about Forest Service ranger Don Oman, who enforced grazing regulations: "'If I get Oman alone . . . I'll slit his throat.'"); Timothy Egan, *Federal Uniforms Become Target Of Wave of Threats and Violence*, N.Y. TIMES, Apr. 25, 1995, at A1; *see also* Robert L. Glicksman, *Fear and Loathing on the Federal Lands*, 45 U. KAN. L. REV. 647, 647-49 (1997) (detailing similar episodes).

528. 42 U.S.C. §§ 4321-4370d (1994).

529. 40 C.F.R. pts. 1500-1508 (2000).

530. *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989); Kleppe v. Sierra Club, 427 U.S. 390, 409-10 (1976).

531. 40 C.F.R. § 1502.14(c) (2000).

will not necessarily translate into substantive results, it may encourage more far-reaching action.

B. IMPLICATIONS FOR OTHER LEGISLATIVE OBJECTIVES

If the federal government extensively exercised its Property Clause power, many other areas in addition to land management could experience dramatic changes. At least three areas of congressional legislation lend themselves to reanalysis through the lens of the Property Clause: air pollution control, species preservation, and wetlands conservation.

As the hypothetical National Parks Clean Air Act suggests, Congress could potentially use the Property Clause to directly control emissions from air pollution sources. The present provisions of the Clean Air Act rely heavily on the states to achieve clean air in the parks, and even then make special provisions only for visibility protection for certain federal lands, namely those designated in the Act as Class I lands.[532] Thus, many federal lands go unprotected under the Act, and the remaining lands receive only visibility protections that fail to prevent the larger problems created by air pollution. Moreover, the Clean Air Act, as it stands, places primary responsibility on the states to achieve its substantive provisions.[533] Because air pollution

532. As part of the overall statutory scheme to prevent significant deterioration in areas that meet the National Ambient Air Quality Standards (NAAQS), the Clean Air Act designates the following lands as Class I lands: "(1) international parks, (2) national wilderness areas which exceed 5,000 acres in size, (3) national memorial parks which exceed 5,000 acres in size, and (4) national parks which exceed six thousand acres in size," that were in existence by August 7, 1977. 42 U.S.C. § 7472(a) (1994). Other federal lands and other nonfederal areas that meet the NAAQS are initially designated Class II lands, but the state has the discretion to designate some lands as Class III lands. Some, but not all, federal lands can be designated only Class I or Class II. 42 U.S.C. § 7474(a) (1994) (providing that "an area which exceeds ten thousand acres in size and is a national monument, a national primitive area, a national preserve, a national recreation area, a national wild and scenic river, a national wildlife refuge, a national lakeshore or seashore," or "a national park or national wilderness area established after August 7, 1977, which exceeds ten thousand acres in size" may be designated only Class I or Class II). The Clean Air Act then requires states to establish a baseline of pollution in these areas and to make sure in their plans to implement the Clean Air Act that pollution in lands does not increase over certain levels. Class I lands have the most stringent limitations, and Class III lands the least restrictive. 42 U.S.C. § 7473(b) (1994). Despite these provisions, no standard is set for national forests or the public domain. The Clean Air Act also makes special provisions to protect visibility in federal lands that must be designated Class I. 42 U.S.C. § 7491 (1994).

533. *See* Train v. Natural Res. Def. Council, Inc., 421 U.S. 60, 64 (1975)

can lead to detrimental interstate effects without harming the lands in the state where the pollution is generated, federal lands may not receive the protection they need. Under these circumstances, the states with the sources producing the pollution have little or no incentive to regulate those sources if they otherwise attain the nationally required levels of air cleanliness. As the Court predicted in *Camfield*, entrusting protection of the public lands to the states in this context will leave them at the mercy of unsympathetic state legislatures.[534] Direct federal regulation of pollution sources that harm federal lands may help achieve clean air nationwide without the delays encountered in relying exclusively on state regulation.[535]

Second, some applications of the Endangered Species Act (ESA)[536] might survive judicial scrutiny as being applications of the Property Clause. That act prohibits, among other things, the "taking" of an endangered or threatened species, with taking including every action from actually killing a member of the species to making modifications to a species' habitat that harms the species.[537] The present protection afforded to endangered and threatened species is grounded in the Commerce Clause and, to some extent, the Treaty Clause, but not the Property Clause.[538] Nevertheless, if the logic of *Kleppe v. New Mexico*[539] applies—in which the Court upheld congressional use

(noting that, although Congress reacted to slow progress on air pollution by "taking a stick to the States" in the 1970 Clean Air Act Amendments, the act places "primary responsibility" on states to implement national standards).

534. *See* Camfield v. United States, 167 U.S. 518, 526 (1897) (upholding extraterritorial federal regulation because to do otherwise would "place the public domain of the United States completely at the mercy of state legislation").

535. For suggestions on how to improve present air pollution protection for federal lands, see Glicksman, *supra* note 20, at 38-39, 54-59. Professor Glicksman does not, however, suggest that the federal government directly regulate sources of air pollution.

536. *See* 16 U.S.C. §§ 1531-1544 (1994).

537. *See* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 704-08 (1995) (upholding regulatory definition of "take" and "harm" as applying to habitat modification).

538. *See* 16 U.S.C. § 1531(a)(1), (3), (4) (1994) (finding that endangered and threatened species have become so "as a consequence of economic growth and development," that these species "are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people," and that the United States has pledged itself to the preservation of endangered and threatened species through various international treaties and conventions).

539. 426 U.S. 529, 535-41 (1976).

of the Property Clause to protect animals Congress believed were an "integral part of the natural system of the public lands"[540]—then the federal government has a legitimate interest in maintaining endangered and threatened species on its property.[541] More importantly, because the government did not assert ownership over the wild horses protected in *Kleppe*,[542] the case implies that Congress's ability to protect these animals is independent of ownership. Therefore, Congress could prohibit individuals from harming endangered and threatened species off federal property if members of those species sometimes occupy federal lands and if Congress reasonably concludes that extraterritorial preservation of such species preserves the overall value of federal lands.[543]

Finally, certain types of wetlands protections and other watershed protections may survive scrutiny as applications of the Property Clause rather than applications of other federal

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540. 16 U.S.C. § 1331 (1994).

541. *See* Holly Doremus, Comment, *Patching the Ark: Improving Legal Protection of Biological Diversity*, 18 ECOLOGY L.Q. 265, 292 (1991) (arguing that the reasoning of *Kleppe* "could justify federal protection of virtually any biological resource").

542. *See* Kleppe v. New Mexico, 426 U.S. 529, 537 n.8 (1976) (noting that the United States made no ownership claim over the protected animals); *cf.* Villareal, *supra* note 14, at 1150-53 (suggesting that the Property Clause justification for endangered species protection would become problematic if the federal government sought protection by claiming ownership in species).

543. *See Kleppe*, 426 U.S. at 546. Villareal, *supra* note 14, at 1151-53, argues that such protection of endangered and threatened species on private lands would likely result in an uncompensated taking of that private property. Villareal's conclusion founders on two grounds. First, Villareal assumes that, in order for the federal government to invoke its Property Clause power, it would have to assume ownership over the species involved, thus interfering with some ownership claim others might make. *See id.* at 1150. As just demonstrated, the United States need not assert that it owns a species to protect it under the Property Clause, provided it demonstrates how the protected species enhances the value of the federal property. Second, Villareal's conclusion that protecting endangered and listed species would result in an uncompensated taking of private property says nothing about the federal government's Property Clause power. The literature that Villareal cites discussing whether endangered species protection constitutes a taking of private property, *see id.* at 1151 n.201, does not discuss this possibility only if the federal government is exercising its Property Clause power. Presumably, if the protections of the ESA result in a taking of private property—and I need not express an opinion on whether they do—then the government's duty to compensate arises regardless of the constitutional authorization for the ESA, be it the Commerce Clause, the Treaty Clause, or the Property Clause. *See also supra* note 466 (arguing that Fifth Amendment protection against takings only guarantees compensation in most cases, not invalidation of federal legislation).

powers. The Clean Water Act prohibits the discharge of pollutants into navigable waters, which the act defines as "waters of the United States, including the territorial seas."[544] The Army Corps of Engineers has defined this term to include certain types of wetlands.[545] The Supreme Court has upheld these regulations as they apply to wetlands adjacent to waters used or potentially used for navigation,[546] but recently invalidated the regulations to the extent that they applied to ponds and other wetlands "that are *not* adjacent to open water."[547] Although the Court rested its conclusion on an interpretation of the statutory text, it also resolved this issue against the agency in part because of the "significant constitutional questions" implicated by the agency's broader reading of the statute.[548] This recent decision does not vitiate the Commerce Clause potential for reaching isolated wetlands—Congress could, after all, respond to the Court's decision by enacting clear federal legislation reaching the previously regulated conduct—but the Court has nonetheless indicated its doubts that the federal government can reach these waters under the Commerce Clause.

A Property Clause justification for wetlands protection would not necessarily protect all wetlands reached by the regulation but would protect some. Clearly, the federal government could apply this regulation to isolated wetlands on its own property. Moreover, like the Property Clause justification for the ESA, Congress could in clear legislation indicate that migratory birds constitute an essential attribute of the beauty and value of public lands; that migratory birds rely on isolated wetlands for their habitat and breeding; and that filling such wetlands would damage the property of the United States. This would provide justification for the broad reach of federal authority against challenges to the federal government's power under the Commerce Clause.

C. IMPLICATIONS FOR FEDERAL-STATE RELATIONS

Expanding the federal government's role within the states, as a broadly read Property Clause would, necessarily entails

544. 33 U.S.C. § 1362(7) (1994).

545. *See* 33 C.F.R. § 328.3 (1999).

546. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 129-31 (1985).

547. Solid Waste Agency v. United States Army Corps of Eng'rs, 121 S. Ct. 675, 680 (2001).

548. *Id.* at 683-84.

contemplation of the relationship between the federal government and the governments of the affected states. It also raises the possibility that the Property Clause, standing alone, may preempt state regulation of federal lands in certain instances.

1. Federalism Concerns

The previous section addressed the federalism implications of a broadly read Property Clause. This next section will discuss how federalism principles may affect not just the hypothetical statutes considered in Part II, but also the last hypothetical statute introduced at the beginning of this Article and until now set aside. In that hypothetical statute, Congress enacts a clear statute that dictates land-use planning within a certain radius around a national park. The Park Service directly regulates everything from the presence of fast food restaurants and trinket shops to the color and style of buildings in order to protect the visual corridor leading to a national park.

This Article reserved consideration of this hypothetical statute until now for three reasons. First, the earlier-discussed hypothetical statutes provided more straightforward constitutional applications to explain the Article's proposed Property Clause theory. Second, in the context of this hypothetical act, the various strains of the Court's jurisprudence governing the relationship between the federal government and the states come together. Although Professor Merritt has argued that the Court's federalism jurisprudence primarily preserves state autonomy,[549] the Court's Commerce Clause jurisprudence still echoes of the territorial model of federalism, i.e. the belief that certain subject matters belong to the federal government and others to the states.[550] Finally, unlike the earlier-discussed hypothetical acts, some evidence exists that Congress has attempted to extend the reach of its Property Clause power to this extent.[551]

549. *See* Merritt, *Three Faces*, *supra* note 499, at 1572.

550. *See Solid Waste Agency*, 121 S. Ct. at 684 (noting constitutional difficulties in extending federal regulation in a manner that "would result in a significant impingement of the States' traditional and primary power over land and water use"); United States v. Morrison, 529 U.S. 598, 618 (2000) ("[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims."); United States v. Lopez, 514 U.S. 549, 564 (1995) (expressing concern about extending the reach of federal regulation to family law and education).

551. In the Columbia River Gorge National Scenic Area Act, 16 U.S.C. §§

Provided that Congress speaks clearly and makes the general parameters of the regulations known, such legislation should pass muster under the Property Clause. The Commerce Clause may not provide authorization for this kind of local zoning regulation around a specific park. After all, the hypothetical act regulates wholly intrastate conduct that falls within the ambit of activities traditionally regulated by states and local governments. Nevertheless, the tangible presence of federal property—rather than the abstract concern that Congress may have with interstate commerce—provides a sufficient nexus between the federal concern and the activity regulated. Although the outer limits of this regulatory authority remain uncertain, this specific hypothetical act should fall within the Property Clause's reach.[552]

2. The Dormant Property Clause?

In further extending the analogy between the Commerce Clause and the Property Clause, one might even conclude that the very existence of the Property Clause preempts certain state actions. In other words, just as the Court has developed the notion of the dormant Commerce Clause—an area of federal authority that the states may not enter, at least not without express federal permission[553]—the Property Clause might

544-544p (1994), Congress decided to protect the scenic vistas of the Columbia River Gorge. The Gorge consists of the river itself and public, state, and private lands on either side of the river. Congress established a commission to create a land use plan for the area. The Ninth Circuit upheld the Act as a valid exercise of the Commerce Clause power, noting, but not deciding, that Congress might have the authority to enact the legislation under the Property Clause. *See* Columbia River Gorge United—Protecting People & Property v. Yeutter, 960 F.2d 110, 113-14 (9th Cir. 1992).

552. As suggested earlier, Congress could not directly require the states to enact legislation to protect the national parks in the manner described in the text, nor could Congress require state officials to enforce federal requirements. Such means of enforcing federal law would run afoul of the Court's decisions in *New York v. United States* and *Printz*. Nevertheless, Congress could induce the states into enacting such protections using its spending power. For example, Congress could withhold payments in lieu of taxes on federal lands if states did not create regulations that minimized visual impacts on national parks. This restriction would be germane to the federal interest and would not likely be too coercive in effect.

553. The dormant Commerce Clause limits state actions that discriminate against or unduly burden interstate commerce on the theory that such discrimination or burdens would interfere with the plenary authority of Congress to regulate interstate and foreign commerce. *See* Wardair Canada, Inc. v. Fla. Dep't of Revenue, 477 U.S. 1, 7 (1986) ("In cases involving the . . . dormant Commerce Clause, both interstate and foreign, the Federal Government has

contain a dormant Property Clause. At first blush, such a suggestion may appear contrary to received precedent. After all, even in the *Kleppe v. New Mexico* decision, which involved the federal government regulating its own land, the Court appeared to hold that the Property Clause standing alone would not preempt otherwise applicable state law absent explicit federal legislation.[554] The Court has also recognized in other cases that states can regulate federal property through otherwise applicable state law.[555] Moreover, the existence of a dormant Property Clause power would appear to empower the federal government with exclusive authority over federal property. This would conflate the terms of the Enclave Clause (which supplies an express means through which the federal government can achieve exclusive authority to make legislation for an area) and the Property Clause (which is silent on the matter).

Nevertheless, support does exist for the proposition that the Property Clause has dormant emanations that limit state action. Perhaps the clearest suggestion of this possibility came in a largely overlooked decision, *United States v. Little Lake Misere Land Co.*[556] Although the decision does not even cite the Property Clause, two aspects of its reasoning present evidence for the existence of a dormant Property Clause. *Little Lake Misere* involved a private claim to minerals that underlay a migratory bird refuge in Louisiana. Louisiana law provided that whenever the United States acquired land in Louisiana, mineral rights retained in the land were not subject to extinguishment but would persevere; mineral rights lying under private lands would ordinarily lapse after the passage of time.[557] The Court's decision holding the Louisiana law inapplicable to federal lands took several steps. First, the Court held that, as a general rule, federal common law, not state law, governed the acquisition and vindication of federal property rights.[558] The Court then asked whether local law could supply the federal

not affirmatively acted, and it is the responsibility of the judiciary to determine whether action taken by state or local authorities unduly threatens the values the Commerce Clause was intended to serve.").

554. *See* Kleppe v. New Mexico, 426 U.S. 529, 543 (1976); *see also* Omaechevarria v. Idaho, 246 U.S. 343 (1918).

555. *See, e.g.*, Colorado v. Toll, 268 U.S. 228, 231 (1925); *Omaechevarria*, 246 U.S. at 346 ("The police power of the State extends over the federal public domain, at least when there is no legislation by Congress on the subject.").

556. 412 U.S. 580 (1973).

557. *See id.* at 582 n.2, 584 (describing Louisiana law).

558. *Id.* at 590-94.

rule of decision. In answering this question no, the Court held that Louisiana law was unsuitable to apply in this instance because, among other things, it discriminated against the federal government.[559]

Undoubtedly, some would dismiss the *Little Lake Misere* decision as simply reflecting the more general rules concerning federal lands. These rules provide that federal lands must pass through express grant; that courts will construe grants in favor of the United States and against the grantee; and that the doctrines of adverse possession, easements by prescription, easements by implication, and easements by necessity do not apply to the public lands of the United States. These doctrines, which apply specifically to federal lands, displace otherwise applicable state law, and advocates of the narrow view might concede their viability because the United States can set the rules for the disposition of its land.

These assertions, however, do not fully explain the decision in *Little Lake Misere*. An ordinary landowner cannot refuse to participate in otherwise-applicable state law of adverse possession and the like. Moreover, this possible explanation by those advocating the narrow view overlooks the justification that the courts have given for these rules: Different rules apply to the sovereign in its ownership of land than to private parties. Whatever one might feel about the validity of these particular rules, they nevertheless stem not from the federal government's role as proprietor of these lands alone; they have their roots in the fact that the federal government is a sovereign and has sovereign powers over its lands. These doctrines, along with the equal-treatment doctrine enunciated in *Little Lake Misere*, suggest that the property power of the United States as embodied in the Property Clause may have dormant emanations, areas that the states cannot touch even through positive legislation.

CONCLUSION

Legal commentators have largely ignored the Property Clause to the detriment of both constitutional scholarship and the Clause itself. This oversight stems from three interrelated factors. First, one can easily relegate study of the federal government's relationship with its property into the specialized, abstruse, rarified, and sometimes-boring field of public lands

559. *See id.* at 594-604.

law. Scholars of constitutional law should not have to distract themselves with this more specialized area, for the same reason that they should not have to ponder the federal government's power to establish a uniform rule for bankruptcies, for example,[560] or the power of Congress to grant letters of marque and reprisal. Second, the natural tendency of lawyers and legal scholars to plough already well-ploughed fields has contributed to ignoring the Property Clause. It is more useful—or, perhaps, more publishable—to contribute to the ongoing debate about the extent of congressional power under the Commerce Clause, the reach of the dormant Commerce Clause, and how these issues interact with federalism concerns, than to ponder the fate and management of nearly one-third of the real property in the United States.[561] Third, because Congress and federal agencies have not pushed the limits of the federal government's authority under the Property Clause, interesting and hard cases have not arisen to challenge scholars of constitutional law. Instead, these scholars ponder the extent of the federal government's power where Congress has attempted to flex its muscle.

Thus, the debate about the reach of the Property Clause has limited itself to the margins. The debate has taken place only between those who adopt an unsupportable, narrow interpretation of the Clause, and those who superficially adopt a broader interpretation without appreciating the full extent of

560. I have picked the example deliberately, for Professor Tribe's most recent treatise has lumped the Property Clause into the same section discussing the federal power over bankruptcies. *See* TRIBE, *supra* note 21, § 5-8.

561. In a recent article, Professor Eric Freyfogle has observed that successful environmental law scholarship—successful, that is, as measured by placement in prestigious law reviews—has skirted important bedrock principles relating to principles of environmental protection and has tended to focus on peripheral issues such as environmental federalism. *See* Eric T. Freyfogle, *Five Paths of Environmental Scholarship*, 2000 U. ILL. L. REV. 115, 132-34. If Freyfogle is correct, then my efforts here could be seen as falling into the same pattern. Nevertheless, I believe that successful environmental legal scholarship still has much to offer in linking environmental and natural resources law to other areas of law, such as constitutional law. In the introduction, I showed that the Property Clause escapes the thinking of most scholars of constitutional law. My hope in writing this Article is that scholars of constitutional law will start thinking about this power and its implications seriously. Professor Richard Lazarus has argued that some justices on the Supreme Court do not view environmental law as a distinct area of law, but as merely a factual context for the raising of more important issues. Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 706 (2000). Making the Property Clause more a part of the standard introduction to and thought about constitutional law generally may help with the phenomenon that Lazarus documented.

the Property Clause power. The advocates of the narrow interpretation assert either that the United States cannot legally own any property within the admitted states, or that, if it does, it has only the powers of an ordinary proprietor. The advocates of the broader interpretation fail to grasp the potentially rich authority that the Clause vests in the federal government. Those scholars who have examined the potential limits of the Property Clause turn not to the Constitution for possible guidance, but to the common law of nuisance, either for substance or for a balancing mechanism to evaluate the extent of the federal government's authority. Use of this analogy, albeit a start, overlooks the potential richness of this federal power and reflects a silent agreement with those who read the Property Clause narrowly that this Clause is not fully a part of the Constitution.

The overlooking of the Property Clause in constitutional scholarship is inexcusable in the end. In a time when the relative powers of the federal and state governments have received thorough analysis and examination and reanalysis and reexamination, one would think that the federal government's ownership of land within every state—and prominent ownership in some states—would attract attention. If the effect that intrastate wheat consumption has on interstate commerce or the limitations on state authority to regulate the interstate traffic in garbage can occupy the attention of legal scholars, surely the federal regulation of a few million acres within a state should as well.

The Property Clause should also occupy the attention of legal scholars because of the rich history and broad authority associated with the Clause. The Clause's history spans some of the most momentous constitutional events of the country's history, including the debates over the Articles of Confederation, the debates over ratifying the Constitution, the decision in *Dred Scott*, and the more recent constitutional tension between federal and state power. Remarkably, the scope of a power that the Supreme Court has repeatedly described as limitless has received little analysis. Looking at analogous provisions of the Constitution, this Article concludes that the federal government's power to dispose of and to govern activities on its property most resembles the spending power. Therefore, courts should rarely, if ever, hold such acts unconstitutional. Similarly, the federal government's regulation of extraterritorial activities to protect federal lands most resembles its efforts to

regulate intrastate commerce under its Commerce Clause authority. Therefore, Congress can regulate extraterritorial activities under the Property Clause when substantially related to federal property. If this analogy holds, some state regulation, standing alone, may also unconstitutionally tread on the dormant emanations of the Property Clause.

This Article attempts to raise the Property Clause as a topic worthy of discussion among scholars of constitutional law, but also as one worthy of continued and more thorough discussion among scholars in the fields of environmental, natural resources, and public lands law. This Clause has always formed a bedrock principle for federal protection of federal natural resources and may emerge as an important constitutional basis for environmental regulation generally. At a time when the Court has begun to restrict Congress's authority under the Commerce Clause, advocates of greater environmental protections should explore the Property Clause as an alternative source of congressional authority.