Denver Law Review

Volume 63
Issue 3 *Natural Resources Law Symposium*

Article 3

January 1986

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Recommended Citation
Dale D. Goble, The Myth of the Classic Property Clause Doctrine, 63 Denv. U. L. Rev. 495 (1986).

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THE MYTH OF THE CLASSIC PROPERTY CLAUSE DOCTRINE

DALE D. GOBLE*

INTRODUCTION

As befits its name, the "classic property clause doctrine"[1] is a variation on the ubiquitous Golden Age myth: during some remote age, heroes lived among us and the truth was understood. But the truth has been lost and the scourge we face is punishment for our sin, for failing to be heroes ourselves. The truth from the Golden Age is the "classic property clause doctrine," the thesis that the federal government as a landowner has only limited powers; the sin is slothfulness, the unwillingness "to expend the intellectual effort necessary to comprehend [the] intricacies" of the truth;[2] the scourge is the waning of state authority over the federal lands as highlighted by the *Kleppe* decision.[3]

The classic theory has assumed two different forms. The first concludes that in managing federal lands Congress lacks the power to preempt state laws because its proper constitutional role is that of a mere proprietor. As with other landowners, federal interests as a proprietor

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1. The term was applied by Professor David Engdahl. *See* Engdahl, *State and Federal Power over Federal Property*, 18 ARIZ. L. REV. 283, 288 (1976). The basic tenets of the argument are, however, considerably older. The first detailed statement of the position I have found is an address of Ninian Edward, Governor of Illinois, to the Illinois General Assembly. *See* Address by Governor Edwards, Illinois General Assembly (Dec. 2, 1828), *reprinted in* House Journal, 6th Assembly, 1st Sess. 10-39 (Kaskaskia, Ill. 1829).

A historical basis for the position is set out in two articles prompted by the decision in United States v. California, 332 U.S. 19 (1947), that the federal government had the paramount right to sea floor within three miles of shore. Hardwicke, Illig & Patterson, *The Constitution and the Continental Shelf*, 26 TEX. L. REV. 398 (1948); Patterson, *The Relation of the Federal Government to the Territories and the States in Landholding*, 28 TEX. L. REV. 43 (1949); *cf.* Clark, *National Sovereignty and Dominion over Lands Underlying the Ocean*, 27 TEX. L. REV. 140 (1948) (defending the Supreme Court's decision in *United States v. California*).

More recently, the "Sagebrush Rebellion" prompted a reexamination of the respective authority of federal and state governments over the public lands. *E.g.*, Brodie, *A Question of Enumerated Powers: Constitutional Issues Surrounding Federal Ownership of the Public Lands*, 12 PAC. L.J. 693 (1981); Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics, and Federal Lands*, 14 U.C.D.L. REV. 317 (1980); Note, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 COLUM. L. REV. 817 (1980) [hereinafter cited as Note, *Property Power*]; Note, *The Sagebrush Rebellion: Who Should Control the Public Lands?*, 1980 UTAH L. REV. 505 [hereinafter cited as Note, *Sagebrush Rebellion*].

Finally, after the initial draft of this article was completed, another article covering some of the same ground came to hand. *See* Gaetke, *Refuting the "Classic" Property Clause Theory*, 63 N.C.L. REV. 201 (1985).

2. Engdahl, *supra* note 1, at 384.

3. *Id.* at 349 (referring to Kleppe v. New Mexico, 426 U.S. 529 (1976)).

can be overridden by state law.[4] The second and more extreme variation has most recently been associated with the "Sagebrush Rebellion." Proponents of this variation assert that Congress lacks the constitutional authority to hold lands even as a proprietor and, therefore, is required to transfer title into state or private hands.[5]

Despite their dissimilar conclusions, advocates of both variations of the classic doctrine share a common analysis. Beginning with the proposition that the federal government has only those powers delegated to it in the Constitution, they note that the Constitution contains two separate clauses applicable to real property. The first, in article I, provides for "exclusive legislation" over land acquired with the consent of the state in which it is located.[6] The second, in article IV, grants Congress the power to "make all needful Rules and Regulations respecting the Territory or other Property [of] the United States."[7] For proponents of the classic doctrine, the *presence* of two clauses is decisive. Because the article I clause preempts all state laws, the article IV clause must therefore lack preemptive effect.[8] Advocates of both variations of the classic doctrine thus share a fundamental proposition: the article IV property clause is not a grant of power to govern federal land once that land is

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4. Engdahl, *supra* note 1, at 296.

5. *See, e.g.*, Brodie, *supra* note 1, at 694; Hardwicke, Illig & Patterson, *supra* note 1, at 408, 416-20; Patterson, *supra* note 1, at 58-60. Despite the difference in their conclusions, the classic theorists share a common core of ideas and assumptions, which is the subject of this article.

6. The article I clause grants Congress the power

> to exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may . . . become the Seat of the Government . . . and to exercise like authority over all places purchased by 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. I, § 8, cl. 17.

7. Article IV grants Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2. Although the grant of "exclusive legislation" over article I property has created few difficulties, the grant of power in article IV has been a source of conflict. Professor Engdahl argues that this discord results from the fact that the clause is the source of federal authority over two distinct types of federal property: territory outside of any state and non-article I property within a state. He argues that this divergence has produced confusion because — despite their common source in article IV — the scope of federal power over each type of land is distinctly different. When the United States acquires title by conquest or purchase to land outside any state, it obtains both title to and exclusive governmental jurisdiction over the land *because there is no other sovereign within the territory*. Engdahl, *supra* note 1, at 292. Once the territory becomes a state, however, there is another sovereign and the federal government's powers under article IV necessarily changes as a result of the equal footing doctrine, which limits federal power in new states to the power it had in the original thirteen states. *Id.* at 293-96.

8. Some proponents of the classic doctrine do recognize two situations in which federal law based on article IV preempted state law during the classical period. Engdahl, *supra* note 1, at 296-97, 306-08; Note, *Property Power*, *supra* note 1, at 821. These exceptions are discussed at *infra* notes 55-64 and accompanying text.

In addition, the doctrine's proponents acknowledge that the United States may rely upon an enumerated power as the basis for statutes preempting state control over federal property. The classic theorists' thesis is simply that the article IV clause grants no additional power.

included within a state.[9] Congressional power over property differs fundamentally from its power over commerce,[10] coinage,[11] or road construction[12] because the property power ceases with statehood. The classic doctrine thus resolves into an equal footing argument: because the federal government had no *dominium* or *imperium* over land as land in the original thirteen states, the presence of either in the new states violates equal footing.[13]

Given their rejection of the accepted construction of the article IV clause, classic theorists have a substantial burden. They must demonstrate not only that their interpretation is permissible, but also that it is constitutionally mandated; that is, they must prove that the constitutional text is determinate and that their interpretation is the only permissible one.

There are a host of arguments that they might employ to meet this burden. Proponents of the doctrine might, for example, argue that the clause's language commands their position, that land differs from other possible objects of federal power, therefore, requiring differing interpretive procedures, or, in the alternative, that the history of the drafting or subsequent judicial application of the clause makes their interpretation inescapable.

The proponents of the doctrine unfortunately fail to carry their burden of persuasion. Although attractive,[14] the doctrine is fundamentally misconceived. First, while *imperium* and *dominium* are generally separate in this country, there is no legal or logical requirement for this separa-

9. Brodie, *supra* note 1, at 694, 710-11; Engdahl, *supra* note 1, at 296-300, 384; Hardwicke, Illig & Patterson, *supra* note 1, at 408; Note, *Property Power*, *supra* note 1, at 837.

10. U.S. CONST. art. I, § 8, cl. 3.

11. *Id.* at cl. 5.

12. *Id.* at cl. 7.

13. The classic theorists do not state the dichotomy in terms of *imperium* and *dominium*, though this seems their thrust. Engdahl, for example, distinguishes between "governmental jurisdiction" and the "limited powers of a proprietor." Engdahl, *supra* note 1, at 296. *See also* Hardwicke, Illig & Patterson, *supra* note 1, at 431-32 (federal government becomes an imperial government when it holds property for other than "governmental purposes"). "Dominium" is "perfect and complete property or ownership in a thing"; "imperium" is "the right to command, which includes the right to employ the force of the state to enforce the laws." 1 BOUVIER'S LAW DICTIONARY 605, 990 (Rawle's ed. 1897). The terms have acquired the general meaning of "property" and "sovereignty." *See* United States v. California, 332 U.S. 19, 43-44 (1947) (Frankfurter, J., dissenting). *See generally* United States v. Texas, 339 U.S. 707, 712-13, 719 (1950) (discussing *dominium* and *imperium* as, respectively, "ownership or property rights" and "governmental powers of regulation and control" and noting that they are commonly, though not necessarily, distinct).

14. Because a state's power over land is essentially a power to prohibit instead of a power to requires uses, a state could prohibit a federal use, other than one tied to an "enumerated power," but could not require a specific use. In most cases, the classic doctrine would require that land be used in the least intensive of the potentially different federal and state preferences. As an officially certified "environmental extremist," I find the possibility of increased environmental constraints attractive. *See* J. LASH, K. GILLMAN & D. SHERIDAN, A SEASON OF SPOILS 235-39 (1984).

At the same time, I have a place in the demonology of the proponents of the classic doctrine. The initial research for this article was undertaken while I was employed in the Solicitor's Office at the Department of the Interior, as a lawyer who necessarily advocated "the immediate interests of the federal government . . . in the face of unpersuasive rhetoric about states' rights and the tenth amendment." Engdahl, *supra* note 1, at 284.

tion; governments can hold land in a governmental capacity as well as in a proprietary capacity. Second, in this country *imperium* is divided between state and federal governments in line with the powers granted to the federal government by the Constitution, including the provisions of article IV. Finally, the classic theorists' equal footing argument involves a confusion of factual equality, which is not guaranteed by the doctrine, with political equality, which is guaranteed. Both Congress and the Supreme Court have consistently accorded the property clause an expansive reading that is consistent with this understanding of the clause and the history of the public lands in the period preceding the drafting of the Constitution.

I. THE CONSTITUTIONAL LANGUAGE

Advocates of the classic doctrine begin with the proposition that the article IV property clause differs from other clauses of the Constitution because it is not an "enumerated power."[15] In light of this argument, it is surprising that classic theorists provide no textual analysis of the clause.

This absence of analysis may be due to the language of the article IV clause: "Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[16] The language is verbally indistinguishable from other grants of power to Congress:[17] the statements that "Congress shall have Power . . . To regulate Commerce,"[18] "To coin Money [and] regulate the Value thereof,"[19] and "To make Rules for the Government and Regulation of the land and naval Forces"[20] are each accepted by classic theorists as enumerated powers despite their

15. *E.g.*, Note, *Property Power*, *supra* note 1, at 826. Although this tenet is implicit in all proponents of the doctrine, Mr. Brodie in particular emphasizes the point. Brodie, *supra* note 1, at 715-23. The principle that the government of the United States is a government of enumerated powers assumes unusual shapes in his argument. He insists, for example, that the power to retain lands is not expressly granted and, therefore, is unconstitutional, while simultaneously asserting that "[t]he ability of the United States to acquire territory by gift, conquest, purchase, annexation, or bequest is vested in it by the Constitution . . . ." *Id.* at 718. At best, however, the drafters were remarkably indirect in expressly granting this power. Indeed, the question of the existence of such authority was the subject of sharply divergent views when the United States purchased Louisiana from France. J. ADAMS, THE LIVES OF JAMES MADISON AND JAMES MONROE 78-79 (Boston 1850); E. BROWN, THE CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE, 1803-1812, at 14-35 (1920).

16. U.S. CONST. art. IV, § 3, cl. 2.

17. The clause does not say "Congress shall have Power to make all needful Rules and Regulations respecting disposal of the Territory or other Property of the United States" or "Congress shall not have Power to exercise exclusive Legislation in any case whatsoever." Instead, the language simply empowers Congress to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property [of] the United States." *Id.*

18. *Id.* at art. 1, § 8, cl. 3.

19. *Id.* at cl. 5.

20. *Id.* at cl. 14.

obvious verbal similarities to the article IV clause.[21]

Despite the similar language, classic theorists argue that the language of article IV is either a grant of authority only to dispose of federal lands or that it grants no sovereign power to manage federal lands inconsistently with state law. The article IV clause thus is accorded a special interpretation. The authority to make "rules" and "regulations" respecting land differs from the authority granted when the same terms are applied to money, commerce, or the armed forces. Furthermore, advocates of the doctrine offer no explanation for the unique constitutional status of "Territory or other Property."[22]

The mere fact that federal ownership of land potentially limits state authority is in itself an insufficient basis for differing constitutional results; each of the powers granted to Congress imposes a corresponding limitation on state authority.[23] The question is not whether the power

21. *See, e.g.*, Engdahl, *Preemptive Capability of Federal Power*, 45 U. COLO. L. REV. 51, 56 (1973).

22. Mr. Brodie attempts to meet this difficulty by arguing that the location of the clause "in that area of the founding document that deals with the relative positions of the state and central governments within the federalist system," instead of in article I, the "logical" place, demonstrates that "it was felt that the federal government should own no property for any purpose other than for the implementation of its enumerated functions." Brodie, *supra* note 1, at 720-21. This argument is problematic for several reason:

First, the clause does "deal with the relative position of the state and central government" by specifying that it is to be the federal government which determines the disposition of federal lands. Similarly, the list of congressional powers in article I, section 8, the supremacy clause in article VI, and any number of other provisions also specify the relative positions of the federal and state governments because any delegation of power to the federal government necessarily limits state authority over the same subject.

Second, as Professor Engdahl has noted, enumerated powers "are scattered throughout the body of the Constitution." Engdahl, *supra* note 21, at 56. *See also* Hardwicke, Illig & Patterson, *supra* note 1, at 417 (noting that enumerated powers are found not only in article I, section 8, but also in "such other provisions as Article IV, Section 3"). Article III, for example, grants Congress the power to create inferior federal courts. U.S. CONST. art. III, § 1. Similarly, article IV contain grants of power to Congress, most notably the authority to admit new states.

23. Mr. Brodie simply asserts that "the right to control the property within its own geographical boundaries is implicit in the concept of a 'state' itself. Such power is *an essential component* in the concept of sovereignty." Brodie, *supra* note 1, at 712 (emphasis added). This argument is unpersuasive.

First, states are less than "pure" sovereigns. As King from Massachusetts noted during the debates on the Constitution, much of the discussion of state powers used the term "Sovereignty . . . inaccurately & delusively [because the states] did not possess the peculiar features of sovereignty," such as the ability to make war. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 323 (M. Farrand ed. 1911) [hereinafter cited as vol. CONVENTION RECORDS]. State sovereignty was further limited by the powers granted to the federal government. *See License Cases*, 46 U.S. (5 How.) 504, 588 (1847); Chisolm v. Georgia, 2 U.S. (2 Dall.) 419, 469, 429, 453 (1793) (opinions of Jay, C.J., Iredall & Wilson, JJ., respectively); THE FEDERALIST No. 15, at 93 (A. Hamilton) (J. Cooke ed. 1961); *id.* at No. 39 (J. Madison). One such limitation upon the states is the lack of the power to control federal property located within their borders, a lack recognized during the earliest days of the Constitution. *E.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819). Federal real property is simply another example of this general principle.

Second, searching for "essential" attributes of sovereignty is a "snipe" hunt. *See generally* Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005, 1015 (1985) ("Neither the governmental/proprietary distinction nor any other that purports to separate out important governmental functions can be faithful to the role of federalism in a

restricts state authority, but whether Congress was granted the power.[24] In the absence of a constitutionally significant distinction between land and other objects of federal power, there is no apparent reason not to give the words used in the clause the same effect that they have in other constitutional clauses, and, therefore, to read the clause as granting the power to regulate federal real property and the activities occurring on it. In short, the proponents of the classic doctrine fail to provide a convincing justification for their conclusion that rules respecting federal lands are subject to state authority while rules regulating commerce are not.[25]

In place of an analysis of either the language of the clauses or the reasons for distinguishing property from other constitutional subjects, advocates of the classic doctrine rely upon a rhetorical device: the exclusivity theorem — the presumption that the grant of complete preemptive power in one clause precludes the grant of any preemptive power in another clause.[26]

It is important to note the nature of this argument. The presence of two clauses concerning federal power over land logically supports the conclusion that they do not grant identical powers because otherwise there would have been no need for both clauses. Because the grant of "exclusive legislation" in the article I clause preempts all state law, the article IV clause logically may not have the same effect. Classic theorists, however, take an additional step by assuming that because article I completely preempts state law, article IV grants Congress *no* preemptive power. This extension lacks any logical basis.

There is no reason why reading article I as a grant of complete preemptive power to the federal government within the territorial confines of one type of lands compels reading article IV as granting no preemptive power over another class of property. To say that article I and article IV are different does not mean that they share nothing in common — only that they are not identical.[27] Acknowledging that article IV does not grant exclusive federal jurisdiction over all activities occurring on

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democratic society."). This is particularly true when the searcher does not set out even a general description of the beast being sought.

24. *E.g.*, Hardwicke, Illig & Patterson, *supra* note 1, at 416-18. The authors state that the tenth amendment was included "[t]o foreclose any argument which might be made for extending powers to the Federal Government by interpretation . . ." and argue that "the prerogative of the Federal Government in regard to land or territory was expressly limited" by the provisions of the article I and article IV property clauses. *Id.* at 417. On the tenth amendment argument, see, for example, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406-10 (1819). On the proposition that grants of power operate negatively, see generally *infra* notes 158-59 and accompanying text.

25. One potentially significant difference has emerged. The Supreme Court in *Kleppe* and the other property clause cases attacked as error by the classic theorists has required congressional action before finding state laws inapplicable. *E.g.*, Wilkinson, *The Field of Public Land Law: Some Connecting Threads and Future Directions*, 1 PUB. LAND L. REV. 1, 7-15 (1980). There does not appear to be a "dormant property clause" akin to the dormant commerce clause.

26. *E.g.*, Engdahl, *supra* note 1, at 296; Hardwicke, Illig & Patterson, *supra* note 1, at 418-20.

27. The negation of *complete preemptive power* is *incomplete preemptive power* instead of *no preemptive power*.

public lands does not therefore mean that federal authority is limited to that of a proprietor. It is at least equally logical to read the article I clause as completely displacing state law by its own force, while the article IV clause is preemptive only to the extent that state law is inconsistent with congressional legislation.[28] That is, the article IV clause merely authorizes Congress to preempt state law. Indeed, because the Constitution is a document that delegates power to the federal government, the latter interpretation logically makes more sense.

Classic theorists do not explicitly state the mutual exclusivity theorem. Instead, they repeatedly contrast federal authority under the two clauses in terms of a dichotomy between the "governmental jurisdiction" — *imperium* — that the federal government exercises over article I lands, and the "limited power" of a proprietor — *dominium* — that it possesses over article IV lands.[29] Much of the analytical confusion in the classic doctrine as well as much of its persuasive power stems from the use of this ambiguous dichotomy.[30] By iterating the thesis as a contrast between proprietary and governmental, advocates of the doctrine play upon a range of similar pairings and the binary nature of common-law analysis.[31] However, the dichotomy is false; the terms obscure instead of enlighten because they do not address the central question.

In this country *imperium* is divided between state and federal governments. That portion of the *imperium* allocated to the federal government is specified in the Constitution; the residue is held by the states. The central question thus is how the Constitution allocates the *imperium* over article IV lands. Given the language of article IV, this is a question of what limitations are imposed upon the grant of power to Congress to make rules and regulations respecting such lands. The governmental-proprietary dichotomy is of no assistance in resolving these questions. Federal authority over article IV lands is limited. Despite the rhetoric of some advocates,[32] the states do exercise a wide range of powers over

28. *See* Omaechevarria v. Idaho, 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."); THE FEDERALIST, *supra* note 23, at No. 32 (A. Hamilton).

29. *E.g.*, Engdahl, *supra* note 1, at 296; Hardwicke, Illig & Patterson, *supra* note 1, at 431-32 (arguing that the federal government becomes an imperial government when it holds lands within states for nongovernmental purposes).

30. *Cf.* Wells & Hellerstein, *The Governmental-Proprietary Distinction in Constitutional Law*, 66 VA. L. REV. 1073 (1980) (concluding that the dichotomy is employed to accommodate conflicting interests in two categories of cases: (1) in deciding whether to deny a state an immunity from suit or from federal taxation and regulation, and (2) in applying federal constitutional limitations to state activities; in both categories, states acting as "proprietors" enjoy less protection from federal action and are, therefore, likely to be treated as private individuals). The Supreme Court has expressed dissatisfaction with this dichotomy. Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005 (1985).

31. Much of the common law proceeds by classifying something as either one thing or the other thing. For example, governmental actions are either ministerial or discretionary. Similarly, an individual is liable in negligence if her unreasonable conduct caused injury but not if her reasonable conduct caused injury. These and other dichotomies are ultimately helpful in resolving the basic legal dichotomy: liable or not liable; guilty or not guilty.

32. *E.g.*, Brodie, *supra* note 1, at 711, ("It is pure sophistry to contend that the states currently have any real ability to govern, implement legislation, or exercise jurisdiction

federal lands within their borders.[33] The limits on federal authority, however, are not captured within the opaque governmental-proprietary dichotomy. As the Supreme Court has repeatedly recognized, the limits are primarily political instead of judicial.[34]

In place of an analysis of the property clause, classic theorists contend that the doctrine has previously been adopted by the Supreme Court. Therefore, they argue that the doctrine *was* the law in the Golden Age.

II. THE CASE LAW: STRAINING JUDICIAL DICTA

Proponents of the classic doctrine base their thesis primarily upon a handful of nineteenth century United States Supreme Court decisions that they contend adopted the doctrine.[35] They argue that the classic theory is implicit in the rationales of the cases as the unstated major premise of the decisions.

There are two fundamental difficulties with this argument. First, the cases upon which the advocates rely did not adopt the doctrine even as an unstated but necessary premise to the holdings. Rather the classic theorists' interpretation is a substantial extension of the equal footing doctrine. Second, the classic theorists have chosen their cases carefully, ignoring a large number of contemporaneous decisions that are inconsistent with their arguments.

A. *The Property Clause*

The most important case for the classic theorists' is *Pollard v. Hagan*,[36] a case involving conflicting titles to a parcel of land. The plaintiff's claim was based upon a federal patent, while the defendant's claim was founded upon a deed from the state. Defendant challenged plaintiff's title, contending that the land in question was not federal property when the patent was issued because the land was below the mean high water line and thus was state property. The United States Supreme Court agreed that the land was state property. The Court had previ-

over the public lands within their geographical limits."); Note, *Property Power*, *supra* note 1, at 824 n.56.

33. *See, e.g.*, Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) (upholding the constitutionality of a state severance tax on coal mined on federal lands); Omaechevarria v. Idaho, 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."); Wilkinson, *Cross-Jurisdictional Conflicts: An Analysis of Legitimate State Interests on Federal and Indian Lands*, 2 U.C.L.A. J. ENVTL. L. & POL'Y. 145, 153-54 (1982) (noting that state laws apply unless specifically preempted by federal statutes).

34. *E.g.*, Kleppe v. New Mexico, 426 U.S. 529, 540-41 (1976); *cf.* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-11, at 254 (1978) (the property clauses as "an area of congressional authority limited primarily by considerations of federalism").

35. *See* Colorado v. Toll, 268 U.S. 228 (1925); Kansas v. Colorado, 206 U.S. 46 (1907); Ward v. Race Horse, 163 U.S. 504 (1893); Fort Leavenworth R.R. v. Lowe, 114 U.S. 525 (1885); Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845). These cases are discussed *infra* note 44 and accompanying text.

36. 44 U.S. (3 How.) 212 (1845). *See* Brodie, *supra* note 1, at 713-14; Engdahl, *supra* note 1, at 293-96; Note, *Property Power*, *supra* note 1, at 833-37.

ously decided that the original thirteen states held title to lands beneath navigable waters within their boundaries *as an incident of sovereignty*[37] and therefore concluded that upon admission into the Union, Alabama "succeeded to all the rights of sovereignty, jurisdiction, and eminent domain [that the original thirteen states possessed] except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States . . . ."[38] Thus, Alabama as a state was entitled to the same degree of sovereignty as the original thirteen states and, consequently, defendant's title, which was based on state law, was valid.

Classical theorists base their argument in large part upon dicta in *Pollard* that does support a restrictive interpretation of congressional authority over article IV lands. The Court stated that "the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a State . . . ."[39] Based largely upon this phrase, the classic theorists interpret the case as establishing three constitutional propositions: first, that states are empowered to exercise "general governmental authority" over all non-article I property within their boundaries; second, that the federal government lacks the power of exclusive legislation within both old and new states under article IV; and therefore, that the federal government loses any "governmental authority" over article IV lands upon admission of a state into the Union.[40]

Although the first two propositions are supported by logic as well as dicta,[41] the advocates' conclusion does not necessarily follow. First, the Court simply did not adopt the classic doctrine even in dicta.[42] In contrasting the federal government's powers over article I property with its

37. Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842). The decision was predicated upon the common law rule that the Crown as sovereign holds title to the beds of navigable waters in trust for the nation. Thus, "when the Revolution took place, the people of each state became themselves sovereign; and *in that character* hold the absolute right to all their navigable waters and the soils under them . . . subject only to the rights since surrendered by the Constitution to the general government." *Id.* at 410 (emphasis added).

38. 44 U.S. (3 How.) at 223.

39. *Id. See also id.* at 221 (iterating dichotomy between "municipal sovereignty" and "right of soil"). Despite this broad language, the Supreme Court subsequently held that the United States did possess the right of eminent domain, either as an inherent "attribute of sovereignty," Boom Co. v. Patterson, 98 U.S. 403, 406 (1878), or as "the offspring of political necessity." Kohl v. United States, 91 U.S. 367, 371 (1875). Both decisions were rendered during Professor Engdahl's classic period.

40. Engdahl, *supra* note 1, at 295-96. The argument continues to obscure the distinction between "exclusive legislation" and *any* "governmental authority."

41. If the first two propositions were incorrect, there would be no need for the article I clause because the article IV clause would be sufficient to meet the presumed goals of the article I clause. Similarly, because there is no contention that the article IV clause preempts state law by its own force, it is undisputed that the state continues to exercise general legislative authority over all land within its borders; such state legislation is preempted only to the extent that it is inconsistent with actual federal legislation. *E.g.*, Omaechevarria v. Idaho, 246 U.S. at 346.

42. Professor Engdahl acknowledges this difficulty but nonetheless argues that "[t]he Court's rationale in *Pollard* . . . carried definite implications for the entire public domain." Engdahl, *supra* note 1, at 295. The "implications" lay in the governmental/proprietary dichotomy:

powers over article IV property, the Court merely stated that Congress lacked general governmental jurisdiction over article IV lands;[43] that is, the federal power under article IV is less than that under article I. The Court did not, however, say either that the state has the same power over article IV federal land as it has over private land or that the federal government has only the powers of a common proprietor over article IV land.

The proponents' conclusion follows only if one is willing to accept the mutual exclusivity theorem in a slightly different guise: because the state has "general governmental authority," the federal government can only be a proprietor. The classic theorists thus argue that general governmental authority necessarily excludes any other governmental jurisdiction. However, the fact that states exercise general jurisdiction does not in of itself preclude federal jurisdiction over a more limited subject. For example, states have general authority to define criminal conduct, but this fact does not preclude the federal government from also defining some conduct as federal crimes. Similarly, the fact that the state possesses general authority over all of the land within the state is not inconsistent with paramount federal authority over federal property located within that state. To reach the opposite conclusion, it is necessary to read *Pollard* for its contrary.

Even granting the classic theorists their interpretation of the rationale in *Pollard* does not necessarily lead to the conclusion they advocate.[44]

> As to [the public domain] land . . . title had to be distinguished from governmental jurisdiction. To hold that the governmental jurisdiction which the United States had enjoyed over a territory could be retained over vast expanses of the public domain when that territory was organized into a state would be to place such a state on a different footing from the original, nonpublic domain states, much more clearly than would the retention of federal jurisdiction over [submerged lands].

Id. Professor Engdahl's argument thus bottoms on the equal footing theory: federal governmental power over article IV lands violates the equal footing doctrine. *See infra* notes 45-53 and accompanying text.

43. The Court's actual language is instructive because it is far less expansive than implied by proponents of the classic doctrine. After quoting the article I property clause, the Court stated that

> these are the only cases, within the United States, in which *all* the powers of government are united in a single government, except in the cases already mentioned of the temporary territorial governments, and there a local government exists. The right of Alabama and every other new state to exercise all the powers of government, which belong to and may be exercised by the original states of the union, must be admitted, and remain unquestioned, except so far as they are, temporarily, deprived of control over the public lands.

Pollard v. Hagen, 44 U.S. (3 How.) at 223-24 (emphasis added). The Court thus distinguished between exclusive and nonexclusive federal jurisdiction, instead of between governmental and proprietary functions.

44. The other cases cited by advocates are similarly inapplicable. Engdahl, for example, states that "[t]he basic proposition . . . that article IV property not being utilized for an enumerated federal governmental purpose was by constitutional reservation subject to the general governmental jurisdiction of the state wherein it lay, was reaffirmed in *Ward v. Race Horse*, [163 U.S. 504] in 1896." Engdahl, *supra* note 1, at 303.

Contrary to Professor Engdahl's reading of the case, *Ward* does not enunciate a "constitutional rule that a state cannot be precluded from exercising and enforcing its general governmental jurisdiction over federal lands within its borders." *Id.* at 357 n.322. *Ward* involved a habeas corpus proceeding on behalf of an Indian who had killed an elk in viola-

The *Pollard* Court may well have assumed that states had complete governmental authority over the public lands within their borders and that the federal government occupied the role of a mere proprietor. At best, however, the Court presumed; it did not decide or clearly state that conclusion. Because the constitutional text provides no explicit support for their conclusion, the assumptions of the *Pollard* Court and the arguments of the classic theorists demonstrate only that the constitutional text is contingent: a dichotomy not stated in the text was read into it in the mid-nineteenth century. In of itself, this provides no reason for preferring the assumptions of the *Pollard* Court to those of the *Kleppe* Court.

B. *Equal Footing*

Ultimately, the classic theorists' case analysis and arguments resolve into claims based upon the equal footing doctrine. Because the federal government had neither *dominium* nor *imperium* over lands within the original states, the classic theorists argue that new states are less than equal if the government retains either *imperium* or *dominium* over lands within their borders: "if either title to or jurisdiction over common lands in the new states could be retained by the United States, those new states would be received into the Union on less than an equal footing with the original states."[45]

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tion of state game laws. The Indian relied upon a treaty that antedated the admission of Wyoming into the Union and "the sole question . . . is whether the treaty . . . gave [the Indians] the right to exercise the hunting privilege . . . within the limits of the State of Wyoming in violation of its laws." 163 U.S. at 507. The Court held that the treaty was impliedly repealed by the admission act. The decision thus is inapposite because it turns upon the treaty clause, instead of the article IV property clause. *Cf.* Hunt v. United States, 278 U.S. 96 (1928) (the United States has a right to protect federal property by killing deer in violation of state game laws). In addition, despite *Ward's* broad equal footing language, it does not state the classic doctrine. Instead, the Court was careful to hold, not that Congress could not have achieved the result urged by the Indians, but instead that it did not purport to do so:

> Nor need we stop to consider the argument advanced at bar, that as the United States, under the authority delegated to it by the Constitution in relation to Indian tribes, has a right to deal with that subject, therefore it has the power to exempt from the operation of state game laws each particular piece of land, owned by it in private ownership within a State, *for nothing in this case shows that this power has been exerted by Congress.*

163 U.S. at 514 (emphasis added). Similarly, the Court noted the "silence of the act admitting Wyoming into the Union, as to the reservation of rights in favor of the Indians" and concluded that "the enabling act not only contains no expression of the intention of Congress to continue the burdens in question . . . but, on the contrary, its intention not to do so is conveyed by the express terms of the act of admission." *Id.* at 515. In fact, the Court noted that equal footing would not be infringed by exempting from state control "rights created by Congress, during the existence of a Territory, which are of such a nature as to imply their perpetuity," despite the silence of the new state's enabling act. *Id.* at 515-16. For an example of such a right, see United States v. Winans, 198 U.S. 371, 382-84 (1905) (upholding against an equal footing challenge the creation of federal fishing rights akin to easements which prevented the state from licensing a fishing machine, to the exclusion of treaty fishers).

Reliance upon similar dictum in Colorado v. Toll, 268 U.S. 228 (1925), Kansas v. Colorado, 206 U.S. 46, 91-92 (1907), and Fort Leavenworth R.R. v. Lowe, 114 U.S. 525, 531 (1885) is equally unavailing without assuming what the advocates seek to prove.

45. Brodie, *supra* note 1, at 712. *See also* Engdahl, *supra* note 1, at 294; Note, *Sagebrush Rebellion*, *supra* note 1, at 520-21 & n.104.

This interpretation requires an extension of the equal footing doctrine far beyond both its traditional scope and the holding of *Pollard*. Traditionally, the equal footing doctrine has been applied to political rights, to sovereignty: Congress may not impose conditions upon a state in its admission act that render the state less than politically equal to the other states.[46]

The classic theorists' argument confuses factual equality (the presence or absence of federal lands) with political equality (the authority of the states over article IV lands).[47] So long as all states have the same authority over article IV lands within their borders, the equal footing doctrine is not offended.[48] Just as Texas is no more sovereign than Rhode Island despite their differences in size, so Connecticut is no more sovereign than Idaho despite the fact that Connecticut has only ten acres

46. Coyle v. Smith, 221 U.S. 559 (1911). *See* Hanna, *Equal Footing in the Admission of States*, 3 BAYLOR L. REV. 519 (1951); Monnet, *Violations by a State of the Conditions of Its Enabling Act*, 10 COLUM. L. REV. 591, 593-94 (1910).

Only Professor Patterson appears to challenge this proposition by arguing that the doctrine "forbids either economic or political limitations on statehood." Patterson, *supra* note 1, at 56. In support of this novel theory, he argues that this result is historically mandated because

> at the time this doctrine was established (1787) the Confederacy had no power whatsoever over the states and, therefore, could not have placed limitations on the admission of new states . . . and that when the Congress of the United States readopted the Ordinance of 1787 in 1789, it pledged itself to the same doctrine, thereby superseding the old Congress as the party to the compact.

Id. at 56.

There are at least three insurmountable difficulties with this argument. First, because the Confederation lacked the power to admit new states other then by amendment to the Articles of Confederation, the statement that the Confederacy could not have placed limitations on the admission of new states is meaningless. Second, the language of the Ordinance — "to provide . . . for [the] admission [of new states] to a share in the federal councils on an equal footing with the original States" — seems limited to political, instead of economic equality. This view is supported by other provisions of the clause that forbid new states from interfering with the disposition of federal land. *See* An Ordinance for the Government of the Territory of the United States north-west of the river Ohio (July 13, 1787), *reprinted in* 1 Stat. 51 n.(a) (1789). Finally, the "readoption" of the Ordinance was by statute and thus lacks constitutional stature. *Id.*

47. Patterson argues that the equal footing doctrine is not a constitutional matter. States do not have equal representation in Congress because of the unequal representation in the House and because Senators are individuals who do not vote as states. Patterson, *supra* note 1, at 63-64. Furthermore, Patterson argues that Congress has imposed conditions on the admission of new states that have violated their political equality vis-a-vis the equal footing doctrine. *Id.* at 64-66. Therefore, he argues, it is only in the area of reserved rights that states are equal. He then appears to conclude that state landholding is a reserved right, though the analysis slips into the cant of an unreconstructed Southerner. *Id.* at 66-71.

Patterson's argument embodies the confusion of factual and political equality. States do not have numerically equal representation in Congress, but they have proportionally equal representation, which is consistent with the fact that the federal government was composed of "We the People of the United States" instead of the earlier and rejected formulation "We the People of the States of . . . ." 2 CONVENTION RECORDS, *supra* note 23, at 163; 1 CONVENTION RECORDS, at 336, 354-58. *Cf.* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 403-05 (1819) (The people rather than the states formed the federal government.).

48. *See, e.g.*, The Kansas Indians, 72 U.S. (5 Wall.) 737, 755-57 (1866) ("There can be no question of State sovereignty" where the state is prohibited from taxing Indians because of a stipulation in its admission act.).

of National Forest land and Idaho has more than twenty million acres.[49] The equal footing doctrine does not require such factual equality. If, on the other hand, Congress were to admit Idaho upon the condition that Idaho not tax or zone federal lands, while simultaneously allowing Connecticut to do so, the equal footing doctrine would be violated. As the Supreme Court has repeatedly stated, "[t]he requirement of equal footing was designed not to wipe out [factual] diversities but to create parity as respects political standing and sovereignty."[50]

The advocates' interpretation of the equal footing doctrine is also more expansive than that adopted in *Pollard*. In *Pollard*, the Court held that Alabama held title to the beds of navigable waters because the original thirteen states possessed such lands as an attribute of their sovereignty.[51] The decision thus was predicated upon the special status of submerged lands as incidents of sovereignty. There is no similar doctrine holding that ownership of fast lands (that land which is above mean high water) is an incident of sovereignty. *Pollard*, therefore, did not establish a general right to title that a state might assert against the federal government as a matter of equal footing.[52]

In *Pollard*, the Court neither adopted nor depended upon the classic theorists' doctrine. Regardless of what the Court may have tacitly as-

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49. 1980 U.S. DEPT. INTERIOR PUB. LAND STATISTICS 13 (1981).

50. United States v. Texas, 339 U.S. 707, 716 (1950). The Court explained that:

> The "equal footing" clause has long been held to refer to political rights and to sovereignty . . . . It does not, of course, include economic stature or standing. There has never been equality among the States in that sense. Some States when they entered the Union had within their boundaries tracts of land belonging to the Federal Government; others were sovereigns of their soil. Some had special agreements with the Federal Government governing property within their borders. *See Stearns v. Minnesota*, [179 U.S. 223], 243-45 [(1900)]. Area, location, geology, and latitude have created great diversity in the economic aspects of the several States.

Id.

In *Stearns*, which was decided during Professor Engdahl's classic period, the Court specifically noted that Congress had the power not to sell the public lands within the state. 179 U.S. at 243. This did not violate the equal footing doctrine because that doctrine forbids "any agreement or compact limiting or qualifying political rights and obligations," but does not apply to agreements "in reference to property." *Id.* at 245. The classic theorists' world is like that Kurt Vonnegut has described where ballerinas wear ankle weights so that they cannot outdance anyone else. K. VONNEGUT, WELCOME TO THE MONKEY HOUSE 8 (Dell ed. 1970).

51. *See supra* note 37 and accompanying text. At the common law, "all navigable rivers and havens were computed among the *regalia*, and were subject to the sovereign." 1 W. BLACKSTONE, COMMENTARIES *264. *See* Martin v. Waddell, 41 U.S. (16 Pet.) 367, 410-11 (1842).

52. Title to nonsubmerged lands was not an incident of sovereignty and thus did not pass to the new states upon admission. Similarly, the old states lacked absolute jurisdiction over federal property, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 428-30 (1819), and the new states thus cannot claim greater authority as an instance of equal footing. United States v. Texas, 339 U.S. 707, 717-18 (1950).

Finally, the holding in *Pollard* has been sharply limited in the *Tidelands Cases*: United States v. Texas, 339 U.S. 707 (1950); United States v. Louisiana, 339 U.S. 699 (1950); United States v. California, 332 U.S. 19 (1947). *See also* United States v. Maine, 420 U.S. 515 (1975). In these cases, the Supreme Court held that the littoral states did not hold title to the sea bed adjacent to their shores even if they had held title to the lands prior to their admission into the Union. Any equal footing claim to nonsubmerged lands stands on an even weaker basis and finds little support even in the dicta of *Pollard*.

sumed, the issue pressed by the classic theorists was not presented to the Court. Similarly, the expansive interpretation of the equal footing doctrine is neither stated in, nor necessary to the decision.[53] The proponents' analysis of the case law thus fails to provide a persuasive justification for accepting the classic doctrine.

C. *The Actual Pattern*

The classic theorists' difficulties are compounded by the fact that the theory is inconsistent with a number of cases decided by the Court during the classic period.[54] Under the classic theory, the federal government has at best only the same rights of any other proprietor and its decisions regarding the land may be overridden by state law. The federal government, therefore, would have the right to control the disposition of its land *only to the extent that it was not inconsistent with state law.* In other words, a state has the power to establish general, nondiscriminatory regulatory requirements applicable to all land within its borders. Under the classic theory, such rules would be applicable to federal as well as private land. This state power includes the right to specify the formal requirements for transfers and to determine what, for example, is to be sufficient evidence of title for an ejectment action brought in state court. It thus is significant that the courts during the classical period consistently held that the states lacked such power: federal land was different from private land because federal rules and not state rules determined when title passed and what was sufficient evidence of vesting.[55]

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53. The equal footing argument is also undercut by the fact that the drafters of the Constitution considered and specifically rejected constitutionally mandating the admission of new states on an equal footing. *See generally infra* notes 127-35 and accompanying text.

54. In addition to cases decided under the property clause, e.g., United States v. Gratiot, 39 U.S. (14 Pet.) 526 (1840); Wilcox v. M'Connel, 38 U.S. (13 Pet.) 498 (1839); Bagnell v. Broderick, 38 U.S. (13 Pet.) 436 (1839), cases construing other constitutional provisions produced results inconsistent with the classic theory. For example, in Green v. Biddle, 21 U.S. (8 Wheat.) 1 (1823), the Court was faced with a challenge to the compact between Virginia and Kentucky under which the latter state was admitted into the Union. One of the articles of the compact provided that the then-existing Virginia property laws were to apply to all property interests derived from Virginia. Henry Clay for Kentucky argued that this was unconstitutional because "there are some attributes of sovereignty, of which a State cannot be deprived, even with the concurrence of Congress and the State itself." *Id.* at 42. The most "indisputable" of these attributes, Clay argued, was the power to act within its own territory: "The sovereignty of a State cannot exist without a territorial domain upon which it is to act." *Id.* Thus, the restriction upon the state's power to pass laws controlling property rights was necessarily unconstitutional as an invasion of the state's inherent sovereignty and the equal footing doctrine. The Court rejected this argument, noting that it was a "trite maxim [that] man gives up a part of his natural liberty when he enters into civil society, as the price of the blessings of that state." *Id.* at 63. It concluded that "[t]here can be no doubt that sovereign States may make pacts with each other, limiting and restraining their rights of sovereignty as to proprietary interests in the soil," citing the agreements by the new states not to tax federal lands as an example. *Id.* at 63-64. The Court's analysis in *Green* is inconsistent with the proposition that the right to regulate all property within its boundaries is an inherent and inalienable attribute of sovereignty.

55. This issue was initially decided in Bagnell v. Broderick, 38 U.S. (13 Pet.) 436, 450 (1839). In the same term, the Court also decided Wilcox v. M'Connel, 38 U.S. (13 Pet.) 498 (1839), where one claimant's case was based in part upon an Illinois statute:

> It has been said, that the state of Illinois has a right to declare by law that a title

Although some classic theorists treat such cases as an exception to the classic doctrine,[56] the "exception" ultimately consumes the theory. During the period when the classic doctrine was ostensibly being enunciated, Congress was almost exclusively engaged in disposing of the public lands.[57] The cases viewed as establishing the classic doctrine thus generally involved situations where title was being transferred. The cases do not establish explicit limitations on congressional conduct. Instead of limiting congressional power, they reflect judicial support for congressional actions by affirming the existing congressional policy of disposing of federal lands. The cases contain no suggestion that Congress was constitutionally limited to the policy it was then following. In fact, when arguments seeking such limits were advanced, the Court rejected them. In *United States v. Gratiot*,[58] for example, the defendant argued that Congress did not have the power to lease lead mines on the public lands because "[n]o authority in the cession of the public lands to the United States is given, but to dispose of them, and to make rules and regulations respecting the preparation of them for sale."[59] The Court rejected this argument, upholding congressional authority to lease:

> derived from the United States, which by [federal] laws is only inchoate and imperfect, shall be deemed as perfect a title as if a patent had issued from the United States; and the construction of her own Courts seems to give that effect to her statute. That state has an undoubted right to legislate as she may please in regard to the remedies to be prosecuted in her Courts, and to regulate the disposition of the property of her citizens by descent, devise, or alienation. But the property in question was a part of the public domain of the United States: Congress is invested by the Constitution with the power of disposing of, and making needful rules and regulations respecting it. Congress has declared . . . by its legislation, that in such a case as this a patent is necessary to complete the title. But in this case no patent has issued; and therefore by the laws of the United States the legal title has not passed, but remains in the United States. Now if it were competent for a state legislature to say, that notwithstanding this, the title shall be deemed to have passed; the effect of this would be, not that Congress had the power of disposing of the public lands, and prescribing the rules and regulations concerning that disposition, but that Illinois possessed it. That would be to make the laws of Illinois paramount to those of Congress, in relation to a subject confided by the Constitution to Congress only. . . . We hold the true principle to be this, that whenever the question in any Court, state or federal, is, whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then that property, like all other property in the state, is subject to state legislation.

Id. at 516-17. The Court's "true principle" sets up a dichotomy between federal lands and other lands that is inconsistent with the classic property clause theory.

56. Professor Engdahl offers inconsistency as a justification for the exception: "As a practical matter . . . a rule [subjecting federal conveyances to state law] would have introduced far more intricacy and confusion into public land affairs than was already present under the federal laws alone." Engdahl, *supra* note 1, at 296. The increased intricacy, however, exists only from the federal perspective because it, like any other proprietor with land in more than one jurisdiction, would be potentially subject to differing requirements in different states. Within any state, the rule which would follow logically if the classic doctrine had actually been the theory relied upon by the Court would have produced less intricacy and confusion because all land would be subject to the same state law instead of two potentially divergent laws. Professor Engdahl's rationalization of the "exception" thus seems particularly weak.

57. *E.g.*, P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 121-463 (1968 & photo. reprint 1979).

58. 39 U.S. (14 Pet.) 526 (1840).

59. *Id.* at 532.

"Congress has the same power over [territory] as over any other property belonging to the United States; and this power is vested in Congress without limitation."[60] As if to demonstrate the absurdity of the defendant's claim, the Court noted that Illinois "surely cannot claim a right to the public lands within her limits."[61] It is difficult to read such unqualified acceptance of congressional action as limiting Congress to its then-current policy of disposal.

This judicial deference to congressional authority is also demonstrated by a second "exception." If the federal government were a mere proprietor subject as all other proprietors to state law, federal management decisions would be restricted by general state laws. Nevertheless, the Supreme Court held during the classical period that federal laws protecting the public lands preempted state laws. This decision was reached initially in a case[62] that arose during a period when Congress had begun to retain federal resources.[63] Disposal was no longer the sole federal policy; retention and management had their place. The Court responded to the shifting policy by upholding congressional authority to protect the federal public lands in the face of inconsistent state law:

> we do not think that the admission of a Territory as a State deprives [Congress] of the power of legislating for the protection of the public lands, *though it may thereby involve the exercise of what is ordinarily known as the police power*, so long as such power is directed solely to its own protection.[64]

The emphasized language is significant because it distinguishes between land ownership rights of private landowners on one hand, and the rights of the federal government as a landowner on the other hand. All landowners may protect their lands, but a private proprietor can neither employ sovereign power, nor override state law.

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60. *Id.* at 537.

61. *Id.* at 538.

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

63. For example, Congress in 1872 set aside Yellowstone Park as a "pleasuring-ground for the benefit and enjoyment of the people." Act of Mar. 1, 1872, ch. 24, 17 Stat. 32. This was followed by the more important General Revision Act of 1891 which repealed the Preemption and Timber Culture Acts and authorized the President to "set apart and reserve . . . any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations." Act of Mar. 3, 1891, ch. 561, § 24, 26 Stat. 1095, 1103 (formerly codified at 16 U.S.C. § 471). The constitutionality of this provision was upheld in Light v. United States, 220 U.S. 523 (1911), against the claims that (1) the federal government "holds title to public lands, not as a sovereign, but as a proprietor merely" and thus the laws of the state preempted inconsistent federal actions, *id.* at 527-28; and (2) the federal government held title to the public lands "in trust for the people, to be disposed of so as to promote the settlement and ultimate prosperity of the States in which they are situated." *Id.* at 530. The Court rejected both arguments as inconsistent with the "rights incident to proprietorship, to say nothing of the power of the United States as a sovereign over the property belonging to it." *Id.* at 537.

64. Camfield v. United States, 167 U.S. 518, 525-26 (1896) (emphasis added). Although noting that this power is less expansive within a state than it is within a Territory, *id.* at 525, the Court justifies the holding by stating that "[a] different rule would place the public domain of the United States completely at the mercy of state legislation." *Id.* at 526.

Thus, during the height of the classic period, the Court consistently upheld congressional actions regarding federal public lands under the article IV clause, disregarding *any* potentially inconsistent state law. The Court's exceptions to upholding congressional actions cited by proponents of the classic doctrine swallow up the doctrine because the exceptions reflect the basic proposition that it is for Congress, instead of the Court, to decide how the federal public lands are to be administered. The actual pattern was a reflection of judicial deference to congressional policy instead of a recognition of constitutional limitations on congressional authority.

III. Historical Arguments: Myth As History

Perhaps recognizing the problems inherent in the case law, some classic theorists have attempted to buttress their argument with a review of the history leading to the drafting of the Constitution's property clauses.[65] Their history, however, is mythology.

The central thrust of the classic theorists' argument is continuity: "[t]he history of the American people since the establishment of the original thirteen colonies to the present date [supports] the conclusion that the colonies during the colonial period, and the states thereafter, have been the land-owning units."[66] The doctrine's proponents thus contend that the basic relationship of the colonial or state governments to the central government remained unchanged through the three constitutionally significant periods: the colonies, the Confederation, and the Constitution.

The classic theorists view the first British Empire as a federation: the colonies were "quasi-sovereign states within the British Empire" sharing a common executive, but with separate legislative bodies.[67] They argue that the constitutional basis of this federation was the fact that "landholding was the exclusive function of the colonial governments . . . ."[68] Given the importance of landholding to the colonies within the Empire, the colonies retained control of the vacant lands when they formed the Confederation. The limited role of the Confeder-

65. Engdahl states the point concisely: "It was not contemplated . . . that by acquiring territory the United States should accumulate and permanently hold a vast national domain. . . . [Instead] both federal title and the federal exercise of governmental jurisdiction in these lands were regarded as temporary — a transitional phase." Engdahl, *supra* note 1, at 292-93. The use of "It" as the subject of the sentence nicely ignores the question of who was "It." His analysis similarly largely ignores the historical background of the clauses. *See id.* at 288 n.10, 289 n.12, 291 n.24. The most detailed historical arguments are presented by Brodie, *supra* note 1, at 695-96, 723-24; Hardwicke, Illig & Patterson, *supra* note 1, at 408-26; Patterson, *supra* note 1, at 43-53.

66. Hardwicke, Illig & Patterson, *supra* note 1, at 408.

67. Patterson, *supra* note 1, at 44. Professors Hardwicke, Illig and Patterson go even further, asserting that "the thirteen American colonies existed under the principle of federalism — as equal partners of Great Britain in a commonwealth of states." Hardwicke, Illig & Patterson, *supra* note 1, at 408.

68. Patterson, *supra* note 1, at 45. *See also* Hardwicke, Illig & Patterson, *supra* note 1, at 408-09 (arguing that the colonies were the land-holding units under the principles of federalism).

ation Congress over the back lands was not expanded by the creation of a federal constitutional government. With their emphasis on continuity,[69] the Revolution and the drafting of the Constitution play almost no role in the classic theorists' analysis.

Structuring their argument in this manner allows the proponents of the classic doctrine to argue from silence. The fact that the Constitution apparently denies the primacy of the states as landholders becomes explicable; apparently inconsistent constitutional provisions can be viewed in a different light and given new meanings. Because the uniform experience had been that the colonies and states were the primary landowners, the drafters of the Constitution simply assumed that the states, instead of the federal government, would continue to play the leading role. The constitution of the Empire thus was affirmed in the constitutional compromise of the Confederation and reaffirmed by the drafters of the Constitution.

Although the classic theorists largely ignore the fact, there was indeed a revolution that separated the colonies from the British Empire and changed the relationship between local and central governments. There was an additional discontinuity when the initial constitutional structure was replaced because it was insufficiently "energetic." Thus, the relationship between state and federal government changed again. Even though the theorists are correct in arguing that much of the United States' history prior to the adoption of the Constitution was shaped by the struggle for political and economic control over the land,[70] the period was one of discontinuity.

Resolving the struggle for control over land and adjusting other governmental relationships across these discontinuities produced the fundamental constitutional compromise of the Confederation. It is largely this compromise which was reaffirmed in article IV, section 3 of the Constitution.[71] Although the classic theorists are correct in their

69. The classic doctrine advocates' arguments emphasize the continuity of the colonies/states from empire through confederation to present constitutional system. For example: "[T]he principle of federalism and the absolute right of the colonies to ownership of land within their boundaries continued undisturbed through the period of confederation." Hardwicke, Illig & Patterson, *supra* note 1, at 416. They later argue that this was unchanged by the adoption of the Constitution: "In establishing the 'more perfect union' provided by the Constitution . . . the states made no concessions therein as to lands or property rights." *Id.* at 416-17.

70. *See, e.g.*, Brodie, *supra* note 1, at 695; Hardwicke, Illig & Patterson, *supra* note 1, at 409. *See generally* P. GATES, *supra* note 57, at 409; P. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC (1983) (recounting the struggle for control of lands during the colonial and Confederation periods).

71.

> New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.
>
> 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 Claims of the United States, or of any particular State.

U.S. CONST. art. IV, § 3.

assessment of the constitutional importance of land issues, the history of these issues in the period preceding the adoption of the Constitution is far more complex and ambiguous than they wish to acknowledge.

A. *The Colonial Background*

The classic theorists begin their history with the assertion that "landholding was the exclusive function of the colonial governments under the Crown."[72] In support of this assertion, they cite the "[t]ypical" Plymouth Charter of 1620 that granted both land and governmental powers to the colony's incorporators.[73]

Instead of being typical, however, the Plymouth charter was actually quite exceptional in two crucial ways. First, it contained grants of both land ownership and governmental powers to the same entity; these two rights could be and often were separated.[74] Second, the charter was granted to a group of incorporators, thus creating a corporate colony.[75] It was only in such colonies that stockholders controlled both the acquisition of individual rights to land and the laws regulating the tenures under which the land was subsequently held. Because only Connecticut, Massachusetts, and Rhode Island were corporate colonies at the time of the Revolution,[76] the discussion of colonial rights presented by the advocates of the classic doctrine — even if accurate — is of limited applicability.[77]

The choice of a "typical" colonial charter was hardly happenstance. In contrast to the popular control that developed in the corporate colonies, the two other generic forms of colonies were far more autocratic.[78]

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72. Hardwicke, Illig & Patterson, *supra* note 1, at 408; Patterson, *supra* note 1, at 45.

73. Hardwicke, Illig & Patterson, *supra* note 1, at 409.

74. For example, the Duke of York sold the territory that became New Jersey to John Lord Berkely and Sir George Carteret in 1664. The indenture conveyed no governmental rights. 6 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 375 (1976). *See generally* M. HARRIS, ORIGIN OF THE LAND TENURE SYSTEM IN THE UNITED STATES 129-32 (1953) (discussing New Jersey's various charters and the resulting land tenure system). In addition, some colonies that began as corporate colonies ended up with a royal government and proprietary or corporate land ownership. *See infra* note 78.

75. Such colonies were political and economic corporations created by the Crown with full rights to the soil and frequently with extensive governmental powers. Blackstone classed such corporations as "[c]harter governments, in the nature of civil corporations, with the power of making bye-laws for their own interior regulations. . . and with such rights and authorities as are specially given them in their several charters of incorporation." 1 W. BLACKSTONE, *supra* note 51, at *108. *See* S. LIVERMORE, EARLY AMERICAN LAND COMPANIES 19-30 (1939).

76. *See generally* M. HARRIS, *supra* note 74, at 98-116 (discussing the charters and land tenure systems of the corporate colonies).

77. For example, it was only in the three corporate colonies that people did not hold land under feudal tenures with quit rents due either to the King or the proprietor. "[T]he absence of quit-rents [in the New England corporate colonies] is a unique feature of the colonial land systems, and had an influence upon the radical political theories held in [those] colonies." B. BOND, THE QUIT-RENT SYSTEM IN THE AMERICAN COLONIES 35 (1919).

78. In addition to these generic types in which both the original ownership of land and control over the government were in the same body or person, in five colonies landholding and government were in different hands. Although their histories differ in details, the general pattern was similar. The colony began with a royal grant of territory either to

Royal colonies, for example, were under the direct administrative control of the Crown: "the constitutions of [royal colonies] depend on the respective commissions issued by the crown to the governors, and the instructions which usually accompany those commissions; under the authority of which provincial assemblies are constituted, with the power of making local ordinances."[79] The governmental authority that controlled both the granting of land and the local land tenure system depended entirely upon royal instructions and commissions; the Crown approved both the granting of rights in land and all statutes adopted by the local assemblies.[80] At the time of the Revolution, New York and Virginia were royal colonies.[81]

The third generic type of colony was the proprietary colony. These were governments "granted out by the crown to individuals, in the nature of feudatory principalities, with all the inferior regalities, and subordinate powers of legislation."[82] The proprietors occupied the position of king in the colony except that they "had more right in the establishment of tenures in their colonies than the King had regarding the land of England."[83] The proprietor, thus, granted land and reviewed colonial statutes. At the time of the Revolution, Delaware, Maryland, and Pennsylvania were proprietary colonies.[84]

Thus, the "typical" corporate charter relied upon by the classic theorists was markedly different from the more autocratic charters held by most colonies. The New England corporate charters are also less prominent in the constitutional compromise of the Confederation than the royal charter of Virginia.[85] Indeed, if one charter ought to be examined, Virginia's charter is the logical choice.

Given its prominence in the land issue, Virginia's colonial experience is instructive. Although the colony began as a speculative joint-stock company under a charter issued in 1612 by James I,[86] the company was stripped of its charter in 1625.[87] Virginia became a royal colony

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a proprietor or to a group of incorporators; generally the grant included governmental powers. At some later point, the Crown resumed governmental authority over the colony, but ownership of the land remained in the royal grantee. In these five colonies — Georgia, New Hampshire, New Jersey, North and South Carolina — the proprietors continued to sell land after the government passed under royal control. *See* M. HARRIS, *supra* note 74, at 127-40.

79. 1 W. BLACKSTONE, *supra* note 51, at *108. Blackstone terms such colonies "provincial establishments."

80. M. HARRIS, *supra* note 74, at 75.

81. *See generally id.* at 82-97 (discussing New York and Virginia charters and the resulting land tenure systems).

82. 1 W. BLACKSTONE, *supra* note 51, at *108. *See* S. LIVERMORE, *supra* note 75, at 30-36; Molovinski, *Maryland and the American West at Independence*, 72 MD. HIST. MAG. 353, 355 (1977); Zimmerman, *James Logan, Proprietary Agent*, 78 PA. MAG. HIST. & BIO. 143 (1954).

83. M. HARRIS, *supra* note 74, at 76.

84. *See generally id.* at 117-26 (discussing the Delaware, Maryland, and Pennsylvania charters and the resulting land tenure systems).

85. It was Virginia's claim that the other states sought to discredit or buttress since it was viewed as the paradigm. *See* P. ONUF, *supra* note 70, at 75-102.

86. 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 37 (1979).

87. Virginia Company, 2 Rolle 455, 81 Eng. Rep. 913 (K.B. 1624).

ruled by royal governors under a series of imperial orders.[88] These orders were often concerned with land and with securing the Crown's income from it.[89] The Crown, however, was an absentee landowner and was forced to rely upon its local representatives.[90] The authority to make grants of land was, therefore necessarily delegated to the King's representative, the governor, in conjunction with a body of local "gentlemen," the Council, which was appointed by the Crown.[91] Although governor-in-council acted as agent for the Crown, they frequently violated their principal's instructions, often accumulating baronial holdings.[92] As one commentator has noted, "English authority, even though the crown right was clear, did not prevail."[93] The fact that the Crown often tolerated such fraud on the part of the local royal officials[94] hardly supports the claim of an independent colonial right to parcel out land.

Furthermore, the colony never disputed the Crown's *right* to control the disposition of land.[95] It was not until the Revolution that the

88. The colony's basic political structure evolved from an "Ordinance and Constitution" adopted in 1621 by the Virginia Company. 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 46 (1979). The King continued the basic governmental structure following the recall of the Company's charter. *See generally* R. BEVERLY, THE HISTORY AND PRESENT STATE OF VIRGINIA 237-42 (London 1705).

89. *See, e.g.*, 2 ROYAL INSTRUCTIONS TO BRITISH COLONIAL GOVERNORS, 1670-1776, at 533-55, 588-91 (L. Labaree ed. 1935) [hereinafter cited as ROYAL INSTRUCTIONS].

90. Compare the situation in the proprietary colony of Pennsylvania. Zimmerman, *supra* note 82.

91. R. BEVERLY, *supra* note 88, at 239, 241; Voorhis, *Crown Versus Council in the Virginia Land Policy*, 3 WM. & MARY Q. (3d Ser.) 499, 500-01 (1946).

92. Governor Spotswood, for example, ended his service to the Crown and retired to his estate of some 86,650 acres. *See* Report from Committee Staff to Lords of the Committee of the Privy Council (June 20, 1729), in Public Records Office, Colonial Office, Class 5, vol. 1366, at 26 [hereinafter cited as vol. Colonial Records]; Voorhis, *supra* note 91, at 511. Council members often did at least as well. P. GATES, *supra* note 57, at 36-37.

93. Voorhis, *supra* note 91, at 513. Initially, land was not sold, but instead was granted under a "headrights" system intended to encourage importation of people by allowing the importer 50 acres for each person he brought into the colony at his expense. Headrights applied to all persons, free, bonded, or slave. R. BEVERLY, *supra* note 88, at 277; M. HARRIS, *supra* note 74, at 194-209. "Extensive grants of land thus went to those rich and influential men who stood at the center of large clusters of dependents bound to work at their bidding." R. ISAAC, THE TRANSFORMATION OF VIRGINIA, 1740-1790, at 20 (1982). The society thus created was a feudalistic patriarchy.

The headrights system also encouraged fraud, often with the active assistance of the imperial officials. P. GATES, *supra* note 57, at 35-36; M. HARRIS, *supra* note 74, at 207-08; Kammen, *Virginia at the Close of the Seventeenth Century: An Appraisal by James Blair and John Locke*, 74 VA. MAG. HIST. & BIO. 141, 143-44, 154-55 (1966); Voorhis, *supra* note 91, at 500-02. The widespread abuses of the headright system led to the adoption of a procedure under which the governor-in-council sold headright certificates for 5 shillings per 50 acres, approximately 1 penny per acre. 3 W. HENING, THE STATUTES AT LARGE 305 (Richmond, Va. 1812). Although this act was disapproved by the Crown, the practice of selling certificates continued and gradually replaced the headright system. M. HARRIS, *supra* note 74, at 245; Voorhis, *supra* note 91, at 505-07.

94. The Crown tended to be forgiving of the transgressions, approving many questionable transactions after the fact. *See* Report from the Board of Trade to the Lords Committee for Plantation Affairs of the Privy Council (June 20, 1729), in 1366 COLONIAL RECORDS, *supra* note 92, at 26, 31 (noting that the King in Council had ordered "that no advantage should be taken of the Invalidity of [Spotswood's] Grants, and that for the better confirmation of such of them as were defective, the [new] Governor . . . should pass new & Authentick Patents to the said Col. Spotswood or his Assigns").

95. There was no protest, for example, of the subsequent grants that created Mary-

Crown's complete discretion over land was challenged. Even then the Declaration of Independence's challenge goes not to the Crown's right, but to the effect of its policy: one of the "repeated injuries and usurpations" of which the Crown was accused was endeavoring "to prevent the population of these states [by] raising the conditions of new appropriations of lands."[96]

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land, Pennsylvania, and North Carolina and that abrogated the colony's charter boundaries. Virginia similarly did not dispute the right of the Crown to create new colonies within its trans-Appalachian claims. For example, in 1770 when the Colonial Secretary, Lord Hillsborough, wrote asking the colony's response to the request for a grant of 2.4 million acres, the President of the Virginia Council responded that the colony did "not presume to say to whom our gracious sovereign shall grant the vacant lands." Letter from William Nelson to Lord Hillsborough (Oct. 18, 1770), *reprinted in* 1348 COLONIAL RECORDS, *supra* note 92, at 321, 328. Although he obviously was not happy with the proposal and raised numerous logistical problems, President Nelson did not question the Crown's right to make the grant. Indeed, the major portion of the letter was taken up with a detailed justification of earlier colonial grants that was intended to demonstrate that they had complied with the then-existing royal instructions.

Furthermore, Virginians sought specific grants directly from the Crown when the grant seemed nonroutine. Thus, when the symbolic barrier of the Appalachian Mountains was to be crossed, the lieutenant-governor advised the Board of Trade. Noting that he had received requests for grants of land "lying on the Western Side of the Great Mountains," he informed the Board that "he did not think proper to comply therewith untill he had receiv'd His Majesty's Orders thereupon." Letter from Gooch to Board of Trade (Nov. 6, 1747), *reprinted in* 1326 COLONIAL RECORDS, *supra* note 92, at 277. At the same time, a group organized as the "Ohio Company" petitioned the King for a grant of 500,000 acres "on the Waters of the Mississippi." Petition of John Hanbury to King in Council, *reprinted in* 1327 COLONIAL RECORDS, *supra* note 92, at 31. The King assented and the Governor was instructed to issue the desired grant. Report of King in Council (Mar. 16, 1748), *reprinted in* 1937 COLONIAL RECORDS, *supra* note 92, at 57; also in 2 ROYAL INSTRUCTIONS, *supra* note 89, at 645. *See also* Additional Instruction to the Lieutenant Governor of Virginia (Dec. 13, 1748), in 1327 COLONIAL RECORDS, *supra* note 92, at 39 (authorizing Gooch to make the grant to the Ohio Company). *See generally* T. ABERNETHY, WESTERN LANDS AND THE AMERICAN REVOLUTION 7-9 (1937); K. BAILEY, THE OHIO COMPANY OF VIRGINIA AND THE WESTWARD MOVEMENT, 1748-1792, at 15-82 (1939); 2 L. GIPSON, THE BRITISH EMPIRE BEFORE THE AMERICAN REVOLUTION 5-8 (rev. ed. 1960); 4 *id.* at 225-68; (rev. ed. 1967); A. HENDERSON, DR. THOMAS WALKER AND THE LOYAL COMPANY OF VIRGINIA (1931); P. JOHNSON, JAMES PATTON AND THE APPALACHIAN COLONISTS (1973); S. LIVERMORE, *supra* note 75, at 75-82 (discussing various aspects of the pre-Revolutionary history of the lands west of the Appalachian Mountains and the effects of the struggle to control those lands on the politics of the period).

96. The Declaration of Independence para. 12 (U.S. 1776). Some revolutionaries did challenge the authority of the Crown. Initially the claim was that the Crown could not change "the Law and Constitution of this Country . . . by any proclamation, Instruction, or other Act of Government" because "the King [is] as much bound by the Act of his Royal Predecessors, as any Private Subject." T. JEFFERSON, Petition of George Mason (June, 1774), in 1 THE PAPERS OF THOMAS JEFFERSON 112, 115 (1950) [hereinafter cited as vol. JEFFERSON PAPERS]. The petition apparently was never delivered. *Id.* at 115-16. *See* Letter from George Mason to Martin Cockburn (May 26, 1774), in K. ROWLAND, THE LIFE OF GEORGE MASON, 1725-1792, at 168 (1892); Sioussat, *The Breakdown of the Royal Management of Lands in the Southern Provinces, 1773-1775*, 3 AGRIC. HIST. 67 (1929).

The next step came quickly. In *A Summary View of the Rights of British America*, Jefferson argued that land in America was allodial instead of feudal and thus the king "has no right to grant lands of himself;" only society as a collective has that right. *A Summary View of the Rights of British America* (July, 1774), in JEFFERSON PAPERS, *supra*, at 121, 133. Jefferson sought to explain the previous failure to protest this usurpation on the ground that "[o]ur ancestors . . . were laborers, not lawyers . . . . And while the crown continued to grant for small sums and on reasonable rents, there was no inducement to arrest the error and lay it open to public view." *Id.* These more radical views were not expressed in the Declaration of Independence.

Thus, the simple picture of the colonies as the "exclusive" landholding unit is myth. It refuses to acknowledge that in all but three colonies the authority to create any rights in land was held by the local imperial or proprietary officials instead of the popularly controlled unit of government. Such centralized control over land is hardly surprising because land was the dominant source of private wealth and governmental revenue: fees were required for a grant and the Crown or proprietor retained annual quit rents.[97] Thus, the argument from silence actually undercuts advocates of the classic doctrine because the most common experience was with centralized control over the acquisition of rights to land, a system that would not seem alien to those creating a new government.

The fact that it was generally the central government that held the ultimate right to grant private rights to land does not resolve the central question. Instead, the fact that the Crown or proprietor was the source of rights in land and that this authority passed from the Crown at the time of the Revolution simply shifts the question: to whom did authority pass? Resolution of this dispute was the fundamental constitutional issue of the Confederation.

B. *The Confederation: Creation of the Public Domain*

The existence of large tracts of unsettled lands presented the newly independent states with a major political and constitutional problem: what was to be done with the back lands? There was a general consensus, though not unanimity, that the lands would eventually be carved into states;[98] the revolutionary ideology would permit no less.[99] The

97. *E.g.*, ROYAL INSTRUCTIONS, *supra* note 89, at 553-55, 588-91.

98. For example, the Virginia constitution of 1776 provided for the establishment of "one or more governments westward of the Alleghany mountains." VA. CONST. (1776), *reprinted in* 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 51, 56 (1979). The first draft of the Articles of Confederation similarly provided for the formation of new western states. 5 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 551 (1776) [hereinafter cited as vol. JOURNALS (date)]. In the same year, Silas Deane proposed that some of the back lands be sold to finance the war and that the portion sold be formed into a "distinct state." Letter from Silas Deane to Secret Committee (Dec. 1, 1776), in 3 AMERICAN ARCHIVES (5th Ser.) 1021 (P. Force ed. Washington, D.C. 1853). In opposing Virginia's land claims, Maryland argued that the back lands should be laid out "into separate and independent states." 9 JOURNALS, *supra* at 807 (1777). The Finance Committee suggested in 1778 that "it be covenanted with the States that the Lands set off shall be erected into separate independent States . . . ." 12 JOURNALS, *supra*, at 931 (1778). Richard Lee also advocated settling the lands north of the Ohio River "for the common good and made a new State." Letter from Richard Henry Lee to Patrick Henry (Nov. 15, 1778), in 1 THE LETTERS OF RICHARD HENRY LEE 451, 452-53 (1911) [hereinafter cited as LEE LETTERS].

99. In addition to the obvious inconsistency of claiming independence while subjecting others to colonial control, the prevailing political theory held that a republic had to be small. As Richard Henry Lee noted in a letter to Patrick Henry, Virginia's western claims were too large given "the difficulty of republican laws and government piercing so far from the seat of governmen[t]." Letter from Richard Henry Lee to Patrick Henry (Nov. 15, 1778), in LEE LETTERS, *supra* note 98, at 453. *See* Letter of Joseph Jones to Thomas Jefferson (June 30, 1780), in 3 JEFFERSON PAPERS, *supra* note 96, at 472; G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 499-506 (1969). *But see infra* note 156.

dispute thus centered on who was to control and thus profit from the state-making process.

During the Confederation, these problems were debated in terms of three questions. The first was the question of who was to control development of the lands; this was generally stated as a question of property: who owned the back lands? The second and third questions focused on constitutional structures. The consensus that the land would eventually be carved into states left unresolved the internal structure of the governments and their relationship to Congress. Would such lands be independent self-governing political units or would they be held at least transitionally as colonies? Finally, if the back lands were to become self-governing political units, would they be admitted into the Union; and if so, would they be the equals of the original thirteen states?

The final two questions were largely dependent upon the first. Thus, the major political issue that initially confronted the members of the proposed Confederation was who was to control the disposition of the back lands: to whom did title pass? Virginia and the other states with sea-to-sea charters argued that it passed to the states severally; that is, to the state within whose charter boundaries the land was located.[100] These claims were opposed by the six landless states led by Maryland[101] and by a number of speculative land companies formed near the end of the colonial period.[102] The landless states argued that title passed to the states collectively, either legally or equitably.

100. At the time of the Revolution, seven colonies asserted some claim to the lands west of the Appalachians: Connecticut, Georgia, Massachusetts, New York, North and South Carolina, and Virginia. Connecticut based its claims upon its 1662 corporate charter from Charles II that had granted the incorporators all lands "to the *South* Sea on the *West*." 2 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 131, 136 (1973). Georgia's claim was predicated upon its sea-to-sea charter issued by George II in 1732. *See id.* at 433. The Massachusetts claim was predicated upon the charter it received following the Glorious Revolution of 1689. The charter was issued by William and Mary in 1691 and reaffirmed the 1620 charter of James I. The new charter restated the bounds of the 1620 charter, granting all the territory between the fortieth and the forty-eighth latitude "throughout all the Main Lands from Sea to Sea." 5 *id.* at 75 (1975). The North and South Carolina title was founded upon the same charter, a sea-to-sea grant by the restored Charles II in 1663 to eight of his most loyal followers. *See* 7 *id.* at 357 (1978). The Virginia claim was predicated upon the sea-to-sea limits in its third charter (1612) from James I to "The Treasurer and Company of Adventurers and Planters of the City of London for the first Colony in Virginia." 10 *id.* 37 (1979). New York's claim differed from the other claimants because it was based upon its feudal status as suzerain for the Iroquois Confederacy dating from a 1701 treaty with the Confederacy which included a deed to the King of the Confederacy's beaver hunting ground. The Treaty Utrecht (1713) between France and Great Britain terminating the War of Spanish Succession/Queen Anne's War recognized this relationship. Conference of Lieutenant Governor Nansan with the Indians (1701), in 4 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 896, 908 (Albany 1854); Report of Governor William Tyron on the State of the Province of New York (1774), in 1 DOCUMENTARY HISTORY OF THE STATE OF NEW YORK 737, 741-43 (Albany 1849).

101. In addition to Maryland, the colonies with fixed western boundaries were New Hampshire, Rhode Island, New Jersey, Pennsylvania and Delaware.

102. These land companies generally predicated their claims upon grants secured from Indian tribes. Most members of the land companies were drawn from the landless states and it is often difficult to determine whether a particular position was a result of principle or interest. *See generally infra* note 109.

The Confederation presents classic theorists with a major problem because the dispute was resolved when the Confederation Congress accepted quit claim cessions from the landed states while it carefully avoided acknowledging the validity of any of the ceded rights. Thus, the landed states achieved formal confederation, while the landless states achieved their stated goal of ensuring that the back lands would be used in the national interest. In this manner, the Confederation received the first public domain. The classic theorists attempt to avoid this difficulty by emphasizing continuity, arguing that the compromise was not intended to change the status of the states as the primary landholding units.[103] In their analysis, the Confederation resolved the three questions by transferring title to Congress, but so limited that body's authority through answers to the second and third questions that the states' position remained fundamentally unaltered.[104] Thus, the fact that the members of the Confederation decided that it was the central government that was to control the uses of the back lands is comparatively unimportant.[105] The classic theorists base their contentions on the language of the congressional resolution of October 10, 1780, calling upon the landed states to cede their unappropriated lands[106] and the

103. *See* Brodie, *supra* note 1, at 695-96; Hardwicke, Illig & Patterson, *supra* note 1, at 414-16; Patterson, *supra* note 1, at 46-53.

104. There is only one conclusion that can be drawn from both the resolutions of the Congress and the deeds of cession of the seven landed states: these lands were to be disposed of by the Congress for the benefit of the states and this trust was so specifically conditioned that Congress could not convert it into an ownership without changing the entire character of the proposed scheme of the distribution of these lands and hence the process of the further development of the Union of States.

Patterson, *supra* note 1, at 50. *Cf.* Hardwicke, Illig & Patterson, *supra* note 1, at 416 ("the principle of federalism and the absolute right of the colonies to ownership of land within their boundaries continued undisturbed thought the period of confederation").

105. Patterson, *supra* note 1, at 50. There is an inherent contradiction in Professor Patterson's analysis. He begins by recognizing that "the Congress of the Confederation was only the agent of the states." *Id.* at 46. Nevertheless, it is "axiomatic" that if ownership were transferred to the Confederation, "Congress could do as it pleased with its own lands." *Id.* Thus, a compact was necessary: by accepting the Virginia cession with its conditions, "Congress was estopped from denying or violating its terms or conditions." *Id.* at 49.

But Congress as an agent could do only what the states that constituted it wanted it to do — a fact that remained unchanged by any extra-constitutional compact that the Congress might have made — so unless the terms of the cession had been embodied in the Articles of Confederation, Congress was no more bound by its provisions than by any other statute.

106. Patterson points in particular to the resolution adopted on October 10, 1780, by the Congress. The resolution stated in part

> [t]hat the *unappropriated lands* that may be ceded or relinquished to the United States, by any particular states, pursuant to the recommendation of Congress the 6 day of September last, *shall be disposed of for the common benefit of the United States, and be settled and formed into distinct republican States, which shall become members of the federal union, and shall have the same rights of sovereignty, freedom and independence, as the other states* . . . .

18 JOURNALS, *supra* note 98, at 915 (1780), *as quoted in Patterson*, *supra* note 1, at 47 (emphasis added by Patterson). Professor Patterson then states that this quote embodies "the essence of the writer's contention that here is found the basis for only a trusteeship of territory by Congress, [that is] for the exclusive purpose of statehood." *Id.*

"typical" Virginia deed of cession.[107]

Congress requested "a liberal surrender of a portion of their territorial claims"[108] and resolved that any ceded lands "shall be disposed of for the common benefit of the United States, and be settled and formed into distinct republican states, which shall become members of the federal union, and have the same rights of sovereignty, freedom and inde-

107. Professor Patterson points to the Virginia cession, concluding that it specified four conditions and arguing that

> [t]he same conditions. . . were placed in the deeds of cession of the other states: (1) "that the territory so ceded shall be laid out and formed into states"; (2) "that the states so formed shall be distinct republican states, and admitted members of the Federal Union, having the same rights of sovereignty, freedom, and independence as the other states"; (3) "that all lands within the territory so ceded . . . shall be considered as a common fund for the use and benefit . . . of the United States . . ."; and (4) that they "shall be faithfully and bona fide disposed of for that purpose, and for no other use or purpose whatsoever."

Patterson, *supra* note 1, at 48-49 (quoting 2 THORPE, FEDERAL AND STATE CONSTITUTIONS 955-56 (1909)).

Contrary to Patterson's assertion, the conditions "typical" of the Virginia cession were not typical of those employed in the other cession acts. For example, the New York cession that covered the same area as the Virginia cession provided only that the territory "shall be and enure for the use and benefit of such of the United States . . . and for no other use or purpose whatsoever; [that the land was] to be granted, disposed of and appropriated in such manner only, as Congress of the United or confederated States shall order and direct." New York Deed of Cession (Mar. 1, 1781), in 2 TERRITORIAL PAPERS OF THE UNITED STATES 3, 4-5 (C. Carter ed. 1934) [hereinafter cited as TERRITORIAL PAPERS]. *See* 19 JOURNALS, *supra* note 98, at 208-13 (1781). Similarly, the Massachusetts and Connecticut cessions provided only that the ceded territory was "for the common benefit" of the Confederation. 28 *id.* at 281 (1785) (Massachusetts: "to be disposed of for the common benefit of" the United States); 31 *id.* at 655 (1786) (Connecticut: "for the common use and benefit of said states"). None of these cessions impose any obligation that the land be disposed of, "formed into distinct republican states," or that any states actually created be admitted into the Union on an equal footing. They required only that the land be used for the common good and specified that Congress was the judge of the common good. If the Connecticut, Massachusetts, or New York cessions were viewed as containing the terms of the trust, Congress would have been justified in renting the territory and using the proceeds to sink the revolutionary war debt, a recurrent topic apparently first suggested by Silas Deane in 1776, more than two years before the Articles of Confederation were finally drafted. Letter from Silas Deane to Secret Committee (Dec. 1, 1776), in 3 AMERICAN ARCHIVES (5th Ser.), *supra* note 98, at 1020-21, 1051.

The fact that not all the cessions constrained Congress as the Virginia cession attempted to do is perhaps the reason that Professor Patterson asserts that one of the significant results of the conditions was that "Congress recognized Virginia as the sole owner of these lands." Patterson, *supra* note 1, at 49. The statement is simply incorrect. First, the Confederation made no determination on the validity of any of the cessions. A determination that Virginia had been the sole owner of the territory would also have been a determination that the Connecticut, Massachusetts, and New York claims were without merit. For the Confederation to have made such a decision would have involved it in precisely the type of disputes over limiting state charter rights that it wisely refused to consider. *E.g.*, 17 JOURNALS, *supra* note 98, at 806 (1780) (refusing to consider the respective claims of right of Maryland and Virginia "as they involve questions, a discussion of which was declined on mature consideration, when the articles of confederation were debated.") *See* P. ONUF, *supra* note 70, at 94-102. Second, if Congress recognized Virginia as the sole prior owner of the land ceded, the subsequent acceptance of Connecticut's cession is puzzling because that state reserved lands totaling some 6 million acres west of Pennsylvania. *See* 30 JOURNALS, *supra* note 98, at 299-301, 307-08, 310-11 (1786); 31 *id.* at 654-55. Letter from William Grayson to James Madison (May 28, 1786), in 8 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 372-75 (E. Burnett ed. 1936) [hereinafter cited as vol. CONFEDERATION LETTERS]; Letter from James Monroe to Richard Lee (May 24, 1786), in *id.* at 365-66; Letter from William Grayson to George Washington (May 27, 1786), in *id.* at 371-72.

108. 17 JOURNALS, *supra* note 98, at 806 (the proposal of Sept. 6, 1780).

pendence, as the other states."[109] In conjunction with this language,

109. 18 *id.* at 915. *See* Patterson, *supra* note 1, at 47. The resolution of October 10, 1782, was a political solution to an unacceptable stalemate; it was achieved only after a lengthy process of conciliation involving the colonial land companies as well as the landed and landless states.

In June, 1778, Congress narrowly rejected a resolution to empower Congress to fix the western boundaries of states claiming the "South Sea". 11 JOURNALS, *supra* note 98, at 631-32, 636-37 (1778). Maryland responded by declaring that it would ratify the Articles only if they were amended, "giving full power to the United States in congress assembled to ascertain and fix the western limits of the states claiming to extend to the Mississippi, or South Sea." 10 W. HENING, *supra* note 93, at 549, 551 (Richmond 1822); 13 JOURNALS *supra* note 98, at 29 (1779). Maryland's actions are subject to differing interpretations; many leading Maryland politicians were financially interested in the land companies and the state in many instances seemed more concerned with the potential speculative gain of the companies than with the common benefit of the states. *Compare* H. ADAMS, MARYLAND'S INFLUENCE UPON LAND CESSIONS TO THE UNITED STATES (1885) (arguing that Maryland's actions are traceable to altruistic motives) *with* T. ABERNETHY, *supra* note 95, at 169-74, 230-46, 270-72; M. JENSEN, THE ARTICLES OF CONFEDERATION 150-56, 198-238 (1940); Jensen, *The Cession of the Old Northwest*, 23 MISS. VALLEY HIST. REV. 27 (1936); Jensen, *The Creation of the National Domain*, 1781-1784, 26 *id.* 232 (1939) (arguing that Maryland's actions were traceable to the economic interests of its leading politicians). Some complex mix of motives seems likely. *See also* Molovinski, *supra* note 82; Sioussat, *The Chevalier de la Luzerne and the Ratification of the Articles of Confederation by Maryland*, 1780-81, 60 PA. MAG. HIST. & BIO. 391 (1936).

Maryland's refusal meant that the thirteen states were unable to form a government; Congress was simply a caucus of thirteen independent nations that lacked any *de jure* relationship, a fact many felt was hampering the war effort. *E.g.*, Letter from James Duane to George Washington (May 4, 1780), in 5 CONFEDERATION LETTERS, *supra* note 107, at 125; M. JENSEN, THE ARTICLES OF CONFEDERATION 228. It was apparent that unanimity was impossible without some compromise. The deadlock was broken in September and October, 1779, when Congress accepted the petitions of land companies whose claims had been declared invalid by Virginia and referred them to a committee for consideration. 15 JOURNALS, *supra* note 98, at 1064-65, 1155, 1223-24, 1226-30 (1779). The North Carolina delegates reported that for many members of Congress

> the question respecting the justice or injustice of the claims of the [land] companies is not so much in View as that of laying down some principle or pursuing such a line of conduct as may be most likely to obtain the main object, namely that Congress shall have the disposal of all the unappropriated lands on the Western frontiers of these States and that such lands may become the common property of the whole.

Letter from the North Carolina Delegates to the Governor of North Carolina (Nov. 4, 1779), in 4 CONFEDERATION LETTERS, *supra* note 107, at 507. In December 1779, the Virginia's General Assembly issued a remonstrance, asserting that a congressional assumption of jurisdiction would be "expressly contrary to the fundamental principles of the confederation" and would create a precedent that could be used "to deprive of territory or subvert the sovereignty" of any of the states. 10 W. HENING, *supra* note 93, at 557. In February 1780, the New York legislature authorized its representatives to Congress to cede its western claims, and shortly thereafter a committee was appointed to consider Maryland's declaration, Virginia's remonstrance and New York's proffered cession. 17 JOURNALS, *supra* note 98, at 559-60 (1780). The committee reported that it was "unnecessary to examine into the merits or the policy" of the respective positions because such an examination had been "declined on mature consideration, when the articles of confederation were debated [and could not now be] revived with any prospect of conciliation." *Id.* at 806. Instead, the committee recommended that Congress "press 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." *Id.* The report was made on June 30, 1780, *id.* at 580; it was read on July 3, *id.* at 586, and was approved without intervening formal consideration on September 6. *Id.* at 806-07. With the adoption of the committee report, Congress was fully committed to the nationalization of the western lands.

Immediately following approval, Jones and Madison of Virginia moved that any land so ceded "shall be laid out in separate and distinct States at such time and in such manner

the classical theorists emphasize the language of the Virginia cession that echoed it. The cession act provided that the territory ceded "shall be laid out and formed into states . . . and the states so formed shall be distinct republican states, and admitted members of the Federal Union, having the same rights of sovereignty, freedom and independence, as the other states."[110] The classic theorists contend that the language of these two documents forbids the retention of any lands because the cessions were made and accepted on the promise that the ceded lands would be "disposed of" by creating "distinct republican states [with] the same rights of sovereignty, freedom, and independence, as the other states."[111]

The classic theorists' historical arguments thus rest upon the same untenable assumptions as their equal footing analysis: the argument resolves into the contention that when the Confederation agreed that new states carved from the ceded land were to have the "same rights of sovereignty, freedom and independence, as the other states" they necessarily meant that new states would either have title to or complete control over all the vacant land within their borders. The classical theorists again seek to equate "sovereignty" with "complete governmental authority over land."[112]

This interpretation is, however, undercut by other parts of the congressional resolution. The ceded lands, the document states, "shall be granted and settled at such times and under such regulations as shall hereafter be agreed on by the United States in Congress assembled . . . ."[113] Such an independent congressional determination is at least anomalous if the resolution was intended to create a trust requiring complete and immediate divestiture of federal control. This anomaly is compounded by Congress's actions when it finally adopted regulations for the settling of the ceded lands. The statute specifically provided for

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as Congress shall hereafter direct"; the ceded land "shall be considered as a common fund for the use and benefit" of the members of the Confederation and "therefore all purchases and deeds [by the land companies] from . . . any Indian Nation . . . shall be deemed and taken as absolutely void." *Id.* at 808. On October 10, 1780, Congress adopted a resolution pursuant to the committee report and the subsequent motion by the Virginia delegates. *Id.*

110. Act of Jan. 2, 1781, 10 W. HENING, *supra* note 93, at 564, *reprinted at* 25 JOURNALS, *supra* note 98, at 560.

111. 18 JOURNALS, *supra* note 98, at 915.

> [I]t is of the essence of the writer's contention that [this resolution is] the basis for only a trusteeship of territory by Congress for the exclusive purpose of statehood . . . and that it forbids the holding of territory by Congress within a state by declaring that states created from such territory shall be admitted into the Union on an equality with the original states in which at this time Congress did not own one single foot of land.

Patterson, *supra* note 1, at 47-48.

112. *See supra* notes 45-53 and accompanying text. Patterson, for example, takes the most extreme position, stating that "it was intended that when a territorial government was created it would be given the right to distribute the undeveloped lands within its borders just as the American colonies had done." Patterson, *supra* note 1, at 49. He cites no authority for his statement and it is amply refuted by the wording of the very documents upon which he relies. *See infra* note 114 and accompanying text.

113. 18 JOURNALS, *supra* note 98, at 915 (1780).

retention of lands by the central government after the admission of a state "to a share in the federal councils on an equal footing with the original States" and prohibited any state interference with or taxation of such federal lands.[114] Thus, Congress saw nothing inconsistent with retention of land by the federal government and compliance with the compromise. Indeed, Congress adopted a far more restrictive and imperialistic land policy than the states during the same period.[115] Again, the equation of state sovereignty with ownership or political control of land is untenable.

The participants' primary concern was not with specific uses for the ceded lands; the language of the various resolutions, cessions, and ordinances contain only general statements on the future uses of the ceded lands.[116] Instead, the primary issue was determining who would make the specific decisions. The compromise was the determination that the decision would be made on a federal, instead of a state basis. Henceforth, the western lands would be held for the common good with no particular state's citizens to be preferred. The essence of the compromise was the specification of the decision maker, not the specification of a decision.[117] There was general agreement that the ceded lands would not be held in perpetual colonial status, but this decision could not be

114. An Ordinance for the Government of the Territory of the United States northwest of the river Ohio (July 13, 1787), *reprinted at* 1 Stat. 51 n.(a) (1789). The Ordinance provides that "[t]he 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 bona fide purchasers." *Id.* This provision was initially included in Resolutions for the Government of the Western Territory (Apr. 23, 1784), in T. DONALDSON, THE PUBLIC DOMAIN 148, 149 (1884). *See* B. HINSDALE, THE OLD NORTHWEST 247-69 (rev. ed. 1899); Berkhofer, *Jefferson, the Ordinance of 1784, and the Origins of the American Territorial System*, 29 WM. & MARY Q. (3d. Ser.) 231 (1972).

115. *See* Tatter, *State and Federal Land Policy During the Confederation Period*, 9 AGRIC. HIST. 176 (1935).

116. *E.g.*, 30 JOURNALS, *supra* note 98, at 654-55 (Connecticut deed of cession); 28 *id.* at 281 (Massachusetts deed of cession); 19 *id.* at 208-13 (New York deed of cession); 18 *id.* at 915 (Congressional resolution on disposition of ceded lands).

117. "[I]t was understood before adoption [of the Articles of Confederation] that the tremendously important matter of the ownership of the back lands, and the administration of the back settlements — in other words the extension of the empire — was to be in the hands of Congress." McLaughlin, *The Background of American Federalism*, 12 AM. POL. SCI. REV. 215, 239 (1918).

Furthermore, there is no indication in the debates surrounding the compromise or in the terms of the compromise that the *imperium/dominium* dichotomy was considered a crucial aspect of the dispute. The participants were aware of the distinction: the deeds of cession, for example, conveyed all claims to "soil" and "jurisdiction." The New York legislature authorized its representatives to limit the state's boundaries "either with respect to the Jurisdiction as well as the Right . . . of Soil; or Reserving the Jurisdiction in part or in whole over the Lands which may be ceded." 2 TERRITORIAL PAPERS, *supra* note 107, at 4 (New York). *See id.* 7, 9 (Virginia's deed); *id.* 11 (Massachusetts' deed). The question simply attracted no particular attention. In part this is traceable to the fact that to have done so would have required consideration of the nature of the interests actually conveyed by the deeds and of the right of the various states to convey. Because the rights asserted by the various states were inconsistent, such an examination was something that "by the acts of Congress it appears to have been their intention . . . to avoid all discussion of the territorial rights of individual states, and only to recommend and accept a cession of their claims, whatsoever they might be, to vacant territory." 25 JOURNALS, *supra* note 98, at 563 (1783).

made binding on the Congress. The specifics of the state-building process and the relationship of the new states to the Union were spelled out with even less clarity in the compromise.[118] These questions were necessarily left for future resolution.[119]

C. *Drafting the Constitution: Creating a More Energetic Government*

It was against the background of the Confederation's compromise and its evolving statutory thought on state-building that the delegates to the Federal Convention met during the summer of 1787. The Convention was called in part because of the problems associated with the western lands: the Confederation Congress lacked the express power to hold the public domain it owned as a result of the state cessions, to create new states, or to admit those states into the Union.[120] Given these

118. The lack of agreement on the specific nature of the state-building process and of the relationship of the new states to Congress is demonstrated by the changing requirements adopted in the various Confederation land ordinances. In the 1784 ordinance, Congress was to mark off the boundaries of the new states that were to have immediate self-government and were to be admitted into the Union when they had a population equal to that of the least populous of the original states. 26 JOURNALS, *supra* note 98, at 277-78 (1784). By 1786, Congress was considering a colonial government "similar to that which prevail'd in these States previous to the revolution" followed by admission into the Union when they achieved the previously specified population. Letter from James Monroe to Thomas Jefferson (May 11, 1786), in 9 JEFFERSON PAPERS, *supra* note 96, at 511. The Ordinance of 1787 wound up somewhere between the earlier positions: appointed territorial officials with a popular assembly. *See* Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51 n.(a) (reenactment of Ordinance of 1787). For differing interpretations, compare M. JENSEN, THE NEW NATION 352-59 (1950) (arguing that the ordinance of 1787 repealing that of 1784 was an antidemocratic victory for the land speculators and their political supporters) with Berkhofer, *supra* note 114 (the 1787 ordinance was the fruition of the 1784 ordinance because both accepted the need for a preliminary period of central control).

119. There is an additional problem with the classical theorists' argument. Even assuming that their interpretation is correct and that the congressional resolution and the state cessions created a legally binding (if somewhat nebulous) compact that the Confederation Congress was incapable of violating, the advocates of the classical doctrine face a final hurdle: the Confederation Congress was replaced by the current constitutional government. Thus, unless the compromise retains constitutional stature, the advocates of the classic doctrine are in the striking position of arguing that the compromise has a supraconstitutional effect and remains valid despite the fact that it is the arguably unconstitutional product of a defunct government.

Patterson attempts to circumvent this difficulty by arguing that "when the Congress . . . readopted the Ordinance of 1787 in 1789, it pledged itself to the same [equal footing] doctrine, thereby superseding the old Congress as the party to the compact." Patterson, *supra* note 1, at 56. Congressional readoption of the ordinance, however, actually undercuts the classical argument. First, the first Congress concluded that it was necessary to readopt the ordinance, that it did not survive the change in government. Second, because the readoption was by simple statute, Congress is not bound by the terms of the Ordinance if it decides to change policy. Finally, some classic theorists argue that the Confederation Congress acted unconstitutionally in adopting the Ordinance of 1787. *E.g.*, *id.* at 52 (quoting 3 E. CHANNING, A HISTORY OF THE UNITED STATES 546 (1912)). If the Confederation's ordinances were illegal, it is difficult to see how the compromise retains continuing vitality. Either the compromise amended the Articles of Confederation and thus validated the Ordinance, or it did not and the entire process was unconstitutional. If the latter, the statutory adoption of the Ordinance lacks constitutional stature and was repealed at the latest by those provisions of the Federal Land Policy and Management Act of 1976 formally ending the policy of disposing of the fee in federal land. *See* Federal Land Policy and Management Act of 1976 (codified at 43 U.S.C. §§ 1701(a)(1), 1713 (1982)).

120. *E.g.*, THE FEDERALIST, *supra* note 23, at No. 43, (J. Madison) at 290-91; *id.* No. 7, at

shortcomings in the Confederation, the classic theorists' insistence on continuity through the governmental change is surprising.

Despite the alleged constitutional stature of the classic doctrine, its advocates devote remarkably little attention to the events of the Convention.[121] For classic theorists, the lack of explicit statement authorizing the federal government to hold property within states is conclusive: because both the colonies and the states under the Confederation had been the exclusive landholding entities, the lack of specific constitutional authorization to manage land — in conjunction with the terms of the enclave clause of article I — means that Congress lacks the power to do so.[122]

As we have seen, this argument from silence is false.[123] The colonies were not the exclusive landholding unit and the states ceded their land claims to the Confederation in order to nationalize decision making on the future of the ceded lands. In addition, the advocates' argument is one of misdirection. The members of the Convention, like those of the Confederation, were concerned with determining what institution would make decisions regarding the territory acquired or to be acquired by the federal government. Thus, the lack of explicit provisions for future uses of the public domain reflects the fact that these questions were left for subsequent political resolution. Article IV, section 3 simply reaffirmed the Confederation's decision that the future of the public domain was a national question rather than a state question.

The fact that the Convention chose largely to avoid specific decisions regarding the disposition of the back lands does not mean that the issues were of no concern. In fact, the Convention debated the issues that had plagued the Confederation: ownership of the back lands and the concomitant guarantees of the existing states' territorial integrity,[124] the political status to be accorded the western territory, and the conditions under which the new states would be admitted into the Union.

36-39 (A. Hamilton); Brodie, *supra* note 1, at 696; Hardwicke, Illig & Patterson, *supra* note 1, at 422 n.74; Patterson, *supra* note 1, at 52, 53.

121. Brodie, *supra* note 1, at 724; Engdahl, *supra* note 1, at 288 n.10, 291 n.24; Hardwicke, Illig & Patterson, *supra* note 1, at 422-23; Patterson, *supra* note 1, at 57-60.

122. *E.g.*, Patterson, *supra* note 1, at 57-59.

123. In most colonies, land was controlled by either the Crown or the proprietor rather than a popularly elected body of colonists. *See supra* notes 74-97 and accompanying text. Furthermore, the central constitutional compromise of the Confederation involved a transfer of control over the back lands from some of the states to the Confederation Congress, a transfer intended to shift decision making from the state to the national level. *See supra* notes 108-119 and accompanying text.

124. Although New York (1782), Virginia (1784), Massachusetts (1785), and Connecticut (1786) had made cessions, Connecticut retained claims to the Western Reserve in what is now northeastern Ohio, Massachusetts continued to control Maine, and Virginia retained its claims south of the Ohio River. In addition, Georgia and the two Carolinas had not made final cessions. These retained claims figured in the debates. For example, in the debate on whether new states would be allowed equal representation with the existing states, Morris of Pennsylvania expressed fears that North and South Carolina and Georgia would soon be the majority because of their "great interior Country." 1 CONVENTION RECORDS, *supra* note 23, at 605. Luther Martin, a delegate from Maryland, stressed the same points in his subsequent Anti-Federalist pamphlet. L. MARTIN, GENUINE INFORMATION (Baltimore, Md. 1787-88), *reprinted in* 3 *id.* at 172, 187, 189.

These questions on the disposition of the western lands were also part of a constellation of issues central to the Convention's compromise on representation. The effect of the public domain on the precarious balance between North and South was a recurrent concern because most delegates to the Convention assumed that the back lands would eventually become states. Although the general principle that Congress should have the power to admit new states prompted little debate,[125] the details presented more difficulties because they were intertwined with the representation issue and the more pervasive problems of sectionalism.[126]

1. The Admission of New States: Equality or Congressional Discretion?

One of the troublesome details was the question of whether new states were to be admitted into the Union on an equal footing with the original states or whether Congress was to be given discretion in the matter. Many delegates feared that if new states were admitted on the basis of political equality they would soon come to dominate the national government; they, therefore, argued against proportional representation and sought to prevent the new states from ever achieving a majority in the proposed Congress.[127] Morris of Pennsylvania was the

125. Resolutions stating the general proposition were adopted unanimously every time they were proposed. *E.g.*, 3 CONVENTION RECORDS, *supra* note 23, at 117, 245; 2 *id.* at 39.

126. As Madison recognized:

> [T]he States were divided into different interests not by their difference of size, but by other circumstances; the most material of which resulted partly from climate, but principally from [the effects] of their having or not having slaves. These two causes concurred in forming the great division of interest in the U[nited] States. It did not lie between large and small States: it lay between the Northern & Southern.

1 CONVENTION RECORDS, *supra* note 23, at 486. Sectionalism was intrinsically intertwined with the debate on the western lands because states formed from such lands would necessarily affect the delicate balance that existed between Northern and Southern states.

The debate on proportional representation is exemplary. Although delegates from other sections spoke in favor of proportional representation, the southern states were the most vocal in support of such representation and thus the interests of the proposed new states. The reasons for their support was succinctly stated by Mason of Virginia when he noted that

> the objection was that the Legislature would cease to be the Representatives of the people. It would continue so no longer that the States now containing a majority of the people should retain that majority. As soon as the Southern & Western population should predominate, which must happen in a few years, the power w[oul]d be in the hands of the minority, and would never be yielded to the majority, unless provided for by the Constitution.

Id. at 586. Morris of Pennsylvania acknowledged that this was the central issue, stating that "the South[er]n Gentlemen will not be satisfied unless they see the way open to their gaining a majority in the public Councils"; if they do so "and be joined as they will be with the interior Country they will inevitably bring on a war with Spain for the Mississippi" to the ruin of the commercial Northern states. *Id.* at 604. Butler of South Carolina acknowledged that "[t]he people & strength of America are evidently bearing Southwardly & S[outh] westw[ar]dly." *Id.* at 605. The Convention rejected the use of wealth as a measure of representation. *Id.* at 606. *See* C. WARREN, THE MAKING OF THE CONSTITUTION 593 (1928).

127. *E.g.*, 1 CONVENTION RECORDS, *supra* note 23, at 533-34 (Morris PA); *id.* at 534 (Rutledge SC); *id.* at 559-60 (Gorham MA); *id.* at 571 (Morris PA); 2 *id.* at 2-3 (Gerry MA).

Despite an initial rejection, the issue returned in an altered from in a motion by Gerry of Massachusetts to limit the number of western states so "that they should never be able

most persistent opponent of equality for the new states, arguing that

> [a]mong other objections it must be apparent [that the West] would not be able to furnish men equally enlightened, to share in the administration of our common interests. The Busy haunts of men not the remote wilderness, was the proper School of political Talents. If the Western people get the power into their hands they will ruin the Atlantic interests. The Back members are always most averse to the best measures.[128]

Others argued for the inclusion of wealth as a method of at least initially limiting the power of the new states.[129]

In late August when the Committee on Detail presented its report, the clause on admission of new states provided that they were to be admitted "on the same terms with the original States."[130] When this provision came up for debate, Morris of Pennsylvania moved to strike the requirement, not wishing "to bind down the Legislature to admit Western States on the terms here stated [because he did not want] to throw the power into their hands."[131] Langdon of New Hampshire agreed, arguing that "he did not know but circumstances might arise which would render it inconvenient to admit new States on terms of equality."[132] Williamson of North Carolina "was for leaving the Legislature free."[133] Despite the argument of Madison and Mason of Virginia that "the best policy is to treat them with that equality which will make them friends not enemies,"[134] Morris's motion was adopted by a nine-to-two vote.[135]

The convention thus specifically debated and rejected a constitutional requirement that new states be admitted on an equal footing with

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to outnumber the Atlantic States." 2 *id.* at 3. The motion was only narrowly defeated, five-to-four with one state divided. *Id.*

128. 1 *id.* at 583. Madison of Virginia tartly responded that Morris apparently "determined human character by the points of the compass." *Id.* at 584. If so, Morris was not alone. In his journal, Patterson of New Jersey noted that it was "[n]ecessary, that the Atlantic States should take Care of themselves; the Western States will soon be very numerous." *Id.* at 562. In fact, the view that the initial settlers on the frontier were at best halfway between "tractable people" and "Indians" — in Jefferson's phrase — was commonly held. Letter from Thomas Jefferson to James Madison (July 9, 1786), in 10 JEFFERSON PAPERS, *supra* note 96, at 112-13; Letter from Thomas Jefferson to James Madison (Dec. 16, 1786), *id.* at 603; Letter from the Virginia Delegates to the Governor of Virginia (Nov. 1, 1783), 7 CONFEDERATION LETTERS, *supra* note 107, at 365 (settlers as "lawless banditii and adventurers"); Letter from New York Delegates to the Governor of New York (Sept. 19, 1783), *id.* at 300-01 (settlers as "lawless men"). *See generally* Berkhofer, *The Republican Origins of the American Territorial System*, in THE WEST OF THE AMERICAN PEOPLE 152, 159-60 (1970) (arguing that republican legislators in Congress were in fundamental agreement that frontiersmen were not immediately ready for complete political rights).

129. *E.g.*, 1 CONVENTION RECORDS, *supra* note 23, at 446 (Williamson NC); *id.* at 542 (Butler SC); *id.* at 582 (Rutledge SC). Initially a majority favored allowing new states an equal representation in Congress and the Convention rejected a proposal to include wealth as one basis for representation. *Id.* at 534 (Mason VA); *id.* at 560 (Williamson NC); *id.* at 584-85 (Madison VA); 2 *id.* at 3 (Sherman CT). The issue, however, was not dead.

130. 2 *id.* at 188.

131. *Id.* at 454.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

the existing states. Because the arguments of the classic theorists ultimately distill into equal footing claims, it is perhaps not surprising that they largely ignore the Convention's work.

2. The Admission of New States: Guaranteeing the Territory of the Existing States

Another of the troublesome details that produced recurrent debate was whether Congress would be granted the power to admit new states within the territory of an existing state without that state's consent. One of the original resolutions offered by Virginia Governor Randolph "provided that a Republican Government & the territory of each State . . . ought to be guaranteed by the United States . . . ."[136] The territorial guarantee was removed when Read of New Jersey objected that "[t]he guarantee will confirm the assumed rights of several states to lands which do belong to the confederation."[137]

Given the remaining western claims of some states[138] and the boundary disputes among others,[139] the issue was not so easily avoided. It returned when the Convention took up the Committee of Detail's report. The report provided that new states "may be admitted" upon approval of a two-thirds majority in Congress and the consent of the state legislature if the new state "shall arise within the limits of any of the present States . . . ."[140] Morris moved to amend the language so that "no new State shall be erected within the limits of any present States, without the consent of the Legislature of such State, as well as of the Gen[era]l Legislature."[141] Martin of Maryland objected that the resolution guaranteed the boundaries of the landed states.[142]

The tenuousness of the Confederation's compromise was evident in

136. 1 *id.* at 22. When the resolution came up for debate on June 5, it was deferred on the motion of Patterson of New Jersey who wanted the representation question settled first. *Id.* at 121.

137. *Id.* at 206. Following adoption of this resolution, the question of guaranteeing territorial integrity became intertwined with the question of admitting new states. The guarantee of a republican government became article IV, section 4 of the Constitution.

138. Virginia had ceded only its claims north of the Ohio River and thus retained what became Kentucky. Georgia, North and South Carolina had not made any cessions of the transmontane claims. Connecticut asserted a shadowy claim to lands west of Pennsylvania. *See* B. HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES 7-14 (1924).

139. The most troublesome dispute concerned Vermont, which was claimed by New York. *See* 2 CONVENTION RECORDS, *supra* note 23, at 455 (Martin MD); *id.* at 463 (Morris PA).

140. *Id.* at 188. The article originated in Governor Randolph's tenth resolution, which hedged on the territorial guarantee issue by stating only that "provision ought to be made for the admission of States lawfully arising within the limits of the United States, whether from a voluntary junction of Government and Territory or otherwise." 1 *id.* at 22. It was subsequently adopted without recorded debate. *Id.* at 121; 2 *id.* at 46. The ambiguous phrase "lawfully arising within the limits of the United States" is clarified by a draft from the Committee on Detail which defines the phrase as either "in the territory of the united states, with the assent of the legislature [Congress]" or "within the limits of a particular state, by the consent of a major part of the people of that state." *Id.* at 147. This definition was the basis of the Committee of Detail's report of August 6, which triggered the debate on August 29th.

141. 2 *id.* at 455.

142. *Id.*

the ensuing debate as both sides rehearsed well-worn arguments. Delegates from the landless states of the mid-Atlantic urged "the unreasonableness of forcing . . . the people of Virginia beyond the Mountains, the Western people, of N[orth] Carolina & of Georgia, & the people of Maine, to continue under the States now governing them, without the consent of those States to their separation."[143] Their opponents countered that "[w]hen the *majority* of a State wish to divide they can do so. The aim of those in opposition to the article . . . was that the Gen[era]l Government should abet the *minority*, & by that means divide a State against its own consent."[144] Williamson of North Carolina reminded the delegates that "compulsion was not the policy of the U[nited] S[tates]."[145] The Maryland delegates' motions to strike the guarantee and to give Congress the power to erect New States "within as well as without the territory claimed by the several States" were both easily defeated.[146] The Convention then approved Morris's resolution.[147]

Carroll of Maryland then sought at least to preserve his state's argument that the West was a common resource by adding a proviso that "nothing in this Constitution shall be construed to affect the claim of the U[nited] S[tates] to vacant lands ceded to them by the Treaty of peace." He noted that this was to be understood as applying to "lands not claimed by any particular State [as well as] some of the claims of particular States."[148] Wilson of Pennsylvania objected that there was nothing in the Constitution affecting any claims and it was best to leave it that way.[149] Madison of Virginia also thought it best to be silent on the subject, but suggested that "to make it neutral and fair, it ought to go farther & declare that the claims of the particular States also should not be affected."[150] Carroll accepted this suggestion and amended his motion.[151] Morris of Pennsylvania then proposed a substitute:

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143. *Id.* at 463 (Martin). Carroll of Maryland noting that "such was our situation with regard to the Crown lands . . . that he perceived we should be at sea, if no guard was provided for the right of the U[nited] States to the back lands" ominously suggested that "all risks would be run by a considerable minority, sooner than give their concurrence" to the proposed guarantee. *Id.* at 461-62. *See also id.* 456 (Dickenson) (arguing that it was improper for the small states to guarantee the large states "their extensive claims of territory"). *See generally* L. MARTIN, *supra* note 124, at 223-27 (rehearsing Maryland's arguments against extensive state land claims).

144. 2 CONVENTION RECORDS, *supra* note 23, at 456 (Wilson). Rutledge of South Carolina noted that the thrust of the proposal was that "the States are to be cut up without their own consent." *Id.* at 462. Morris added that "[i]f the forced division of the the States is the object of the new System" those states would soon leave the Union. *Id.* at 456. *See also id.* at 455 (Butler) (arguing that if a new state could be created without the approval of the existing state that demagogues would seize upon fancied grievances to dismember the states).

145. *Id.* at 462. He was careful to point out that his state was "well disposed to give up her Western lands." *Id.*

146. *Id.* at 464.

147. *Id.* Dickinson of Delaware moved to add language covering the conjunction of two states; the proposal was approved without counting votes. *Id.* at 465.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 465-66.

> The Legislature shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the U[nited] States; and nothing in this constitution contained, shall be so construed as to prejudice any claims either of the U[nited] S[tates] or of any particular State.[152]

Morris' motion was adopted without informative debate and with only Maryland in opposition.[153] The Convention then turned to another article.

The central dispute among the members of the Convention thus mirrored the constitutional compromise of the Confederation. Again there was a general agreement that Congress should have the discretion to admit new states. The primary dispute centered on how states were to be created and on their relationship to the new federal government. Two specific issues in the dispute divided the Convention's delegates. The first was whether the new Congress was to have unilateral authority to admit states from lands within the claims of existing states, an issue that echoed the ownership question of the Confederation's debates. The landless states again sought to give the federal government this power because they believed that the back lands had been gained "by the blood and treasure of all, and ought therefore to be a common estate to be granted out on terms beneficial to all the United States."[154] The landed states, on the other hand, favored state consent when a new state was to be formed from part of an old state. The landed states' position was ultimately adopted: state consent was required.

The second divisive issue was whether to mandate admission of the new states on terms of equality with the original states. The Convention was split on this issue between those who feared the West — because its inhabitants were not refined, because its emerging economy would draw away capital and population, or because ultimately it would change the precarious balance among the existing states — and those who viewed the West as the future, a perspective that eventually seized the imagination of the country. Although the members of the Convention were unable to bridge their divergent perceptions, they did agree that the decision was a political question for the new Congress and refused to impose a constitutional equal footing requirement.

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152. *Id.* Martin proposed adding a provision stating that such claims were to be decided by the Supreme Court. *Id.* Morris argued that this was unnecessary since the Supreme Court was to decide all cases in which the federal government was a party. *Id.* Martin's motion was defeated.

153. *Id.* It has been suggested that possible sources of this language were two proposals made by Madison. C. WARREN, *supra* note 126, at 599-600. On August 18, he had presented a list of nine additional powers that he felt the Congress should be granted. Among these were the power "[t]o dispose of the unappropriated lands of the U[nited] States [and] [t]o institute temporary Governments for New States arising therein." 2 CONVENTION RECORDS, *supra* note 23, at 324. This list along with another offered by Pinkney of South Carolina was referred to the Committee of Detail. *Id.* at 325. The provisions were never formally reported from the Committee.

154. Declaration of the Maryland General Assembly (Dec. 15, 1778), *reprinted in* 10 W. HENING, *supra* note 93, at 540, 541.

Having determined that state boundaries would be guaranteed and that Congress would have discretion to both admit new states and set the terms of their admission, Morris proposed the "Territory or other Property" clause to complete the necessary congressional authority: that Congress be given the power to dispose of the public domain and to make those rules and regulations it deemed necessary to govern and manage the lands. In light of the broad discretion that the Convention chose to vest in Congress over the entire state-building process, the classic theorists' argument that the Convention denied Congress any discretion as to the future uses of the public domain is nonsensical.

Because of his role in the adoption of the language of article IV, section 3,[155] Morris' subsequent interpretation of its meaning is informative. In response to a question on whether Congress could admit a state formed from territory not belonging to the United States at the time of the adoption of the Constitution, Morris wrote:

> 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.[156]

Those who would argue that the language of the property clause necessitates divestiture of federal title or state control over federal lands within a state must thus contend with the fact that its author believed that it carried the opposite meaning. The point is not that Morris's construction is required, but that the language is capable of supporting a range of interpretations: the constitutional text is almost as uncertain as the text of the Confederation's compromise.

The debates in the Federal Convention reiterated the debates of the Confederation Congress and the solution that the convention reached echoed the compromise that the Confederation Congress had achieved. The central government was to be the recipient of voluntary state cessions; compulsion was not to be used. As in other areas where it was unable to resolve strongly held opposing views,[157] the Convention

155. The final language in article IV, section 3 came almost exclusively from Morris. It was his language with the addition of the phrase from Dickinson that became the first clause providing for the admission of new states only with the approval of Congress and an existing state or states if the land was within one of more states. Morris also provided the "Territory or other Property" language of the second clause. Only the savings provision which ends the second clause, which was provided by Carroll and Madison, is not Morris's. *See supra* notes 141-53 and accompanying text.

156. Letter from Gouveneur Morris to Henry Livingston (Dec. 4, 1803), 3 CONVENTION RECORDS, *supra* note 23, at 404. *But see generally* Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (arguing that the Farmers intended the Constitution to be interpreted in terms of objective rather than individualistic intent).

157. The classic example of this process was the decision to grant Congress the power to determine whether to create "inferior tribunals." A majority of the states were unwilling to create such tribunals within the body of the Constitution, but were willing to authorize Congress to make the decision. 1 CONVENTION RECORDS, *supra* note 23, at 104-05, 119, 124-25; 2 *id.* at 45-46. *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND

passed the dispute along to the Congress it was creating. Thus, it did not impose a constitutional equal footing requirement, nor specify the uses to be made of the back lands. The delegates chose instead to decide who would decide.

CONCLUSION

In the final analysis, the arguments of the advocates of the "classic" property clause doctrine on each point are unpersuasive. They fail to provide a textual analysis to support their contention that the operative terms in the article IV property clause must be given different effect when used in other parts of the document. Furthermore, they offer no justification for their presumption that land is necessarily different than other subjects of federal preemptive authority. Their analysis of the case law is equally unpersuasive: a straining of dicta that relies upon a never-accepted equation of state sovereignty with state control. The history they offer is mythology.

These problems result from the fact that the classic theorists' proposition is inconsistent with the very structure of the Constitution.[158] The Constitution is foremost a grant of powers to the federal government, allocating the authority to decide. As Chief Justice John Marshall noted, because these are grants from all of the people, it is illogical to assume that people residing in one state have the authority to frustrate the decisions of all the people: "They did not design to make their government dependent upon the States."[159] Just as the power to tax federal instrumentalities is necessarily inconsistent with structure of the Constitution, so is the power to regulate the uses of federal land. The determination of the Constitutional Convention that decisions on the use of the back lands were to be national decisions, not state decisions, means precisely that a state may not control or frustrate those decisions.

The inconsistency between the classic theorists' proposition and the structure of the Constitution is ultimately the fatal flaw in their theory. It seeks to redefine the very structure of the government, to resuscitate a position rejected at the very outset of the current constitutional government. The argument that the language granting the power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property [of] the United States"[160] restricts instead of expands federal authority is inconsistent with the basic structure of the federal government as an institution and with its relationship with the states. Thus, it is hardly surprising that since the earliest days of this govern-

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WECHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 11-12 (1973); C. MCGOWAN, THE ORGANIZATION OF THE JUDICIAL POWER OF THE UNITED STATES 18-20 (1969).

158. *See generally* C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969) (the very structure of the document necessarily implies certain federal relationships).

159. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 432 (1819). *See id.* at 404-06, 431-32.

160. U.S. CONST. art. IV, § 3, cl. 2.

ment the Supreme Court has consistently held that the federal power over article IV lands "is vested in Congress without limitation."[161]

161. United States v. Gratiot, 39 U.S. (14 Pet.) 526, 537 (1840). *See also* Kleppe v. New Mexico, 526 U.S. 529, 539 (1976); United States v. California, 332 U.S. 19, 27 (1947); United States v. San Francisco, 310 U.S. 16, 29 (1940); Light v. United States, 220 U.S. 523, 537 (1911) (quoting the same language).