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REFUTING THE "CLASSIC" PROPERTY CLAUSE THEORY

EUGENE R. GAETKE†

In a series of cases the Supreme Court has recognized broad, preemptive federal regulatory power over federally owned land. The Court has based these decisions on the combined effect of the property and supremacy clauses of the Constitution. The scope of this power has been the cause of a heated political and legal debate in western states, which contain extensive federal land holdings. A number of legal commentators have argued that the Court's broad construction of the property clause is a misinterpretation of the Framers' intent and that the clause merely grants the federal government proprietary rights over its land holdings. As support for this contention, these commentators cite the land policies of the British colonial administration, the land claims of the states during and immediately after the American Revolution, the public land debates during the drafting and ratification of the Constitution, and the early decisions of the Supreme Court on public land matters. Professor Gaetke reexamines these early precedents and argues that they support rather than refute the Court's current broad construction of the property clause. He concludes that the modern construction is not a break with precedent, but is the continuation of long-settled doctrine.

The relationship of federal and state governments to federally owned lands is of fundamental importance to the structure of our federal system. Indeed, one of the primary reasons for the 1787 Constitutional Convention was the need to remedy the shortcomings of the Articles of Confederation in respect to the disposition of the unsettled lands lying to the west of the thirteen original states. Nevertheless, nearly two hundred years after ratification of the Consti-

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1. Patterson, The Relation of the Federal Government to the Territories and the States in Landholding, 28 Tex. L. Rev. 43, 43 (1949) ("[The landholding relation] is one of the most basic foundations of our federalism, if, indeed, it is not the corner stone."); see also P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 57 (1968 & photo. reprint 1979) (asserting that "the use of the public lands was to be a vital nationalizing factor in American development"); Sax, Helpless Giants: The National Parks and the Regulation of Private Lands, 75 Mich. L. Rev. 239, 254 (1976) ("Every expansion of the property clause increases the power of the federal government at the expense of the states' authority, and by the traditional jurisprudence of federalism that is cause for unease.").

tion, the respective powers of the states and the federal government over federal lands remain controversial.3


The current controversy regarding federal lands extends beyond the courts and scholarly journals to a popular movement dubbed the "Sagebrush Rebellion." The movement seeks increased state ownership of, or at least greater state management powers over, federal lands. Babbitt supra, at 849-57; Brodie, supra note 2, at 694; Coggins, Evans & Lindberg-Johnson, supra, at 572-77; Leshy, Unraveling the Sagebrush Rebellion: Law, Politics and Federal Lands, 14 U.C.D. L. REV. 317 (1980); Note, The Sagebrush Rebellion, supra, at 505. Several western states have enacted legislation purportedly asserting state ownership of unappropriated federal lands within their boundaries. See, e.g., NEV. REV. STAT. § 321.5971 (1979); UTAH CODE ANN. § 65-11-4 (Supp. 1981). This legislation has been referred to by other interested parties as "The Great Terrain Robbery." Coggins, Evans & Lindberg-Johnson, supra, at 575 n.263.

Such sentiments among the states, however, are not new. During the nineteenth century, as new states were admitted to the Union, several of these states noted their objection to continued federal landholdings within their boundaries. P. GATES, supra note 1, at 9, 30; Patterson, supra note 1, at 69-71. Conversely, some of the 13 original states frequently objected to the federal government's preferential treatment of new states through vast federal land grants on their admission to the Union. P. GATES, supra note 1, at 5-7.

The dispute regarding federal landholdings intensified during the 1930s when the federal government asserted jurisdiction over certain submerged lands that the coastal states had assumed were state property. Hardwicke, Illig & Patterson, supra note 2, at 400-08. In United States v. California, 332 U.S. 19 (1947), the Supreme Court upheld the federal government's position. The matter was reargued strenuously in a series of articles in the Texas Law Review. See Clark, National Sovereignty and Dominion Over Lands Underlying the Ocean, 27 TEX. L. REV. 140 (1948); Hardwicke, Illig & Patterson, supra note 2; Patterson, supra note 1. Federal control of submerged lands remains controversial. See Ball, Good Old American Permits Madisonian Federalism on the Territorial Sea and Continental Shelf, 12 ENVTL. L. 625 (1982).

Recently, the dispute has centered on congressional policies for the retention of federal ownership of public lands, Brodie, supra note 2, at 694, as well as congressional regulation of wildlife on federal lands, see, e.g., Kleppe v. New Mexico, 426 U.S. 529 (1976), and regulation of recreational use of state-owned waters bordered by federal lands, see, e.g., Minnesota v. United States, 660 F.2d 1240 (8th Cir. 1981), cert. denied, 455 U.S. 1007 (1982); United States v. Brown, 552 F.2d 817 (8th Cir.), cert. denied, 431 U.S. 949 (1977). For a discussion of the latter use of the property clause power, see Gaetke, The Boundary Waters Canoe Area Wilderness Act of 1978: Regulating Nonfederal Property Under the Property Clause, 60 OR. L. REV. 157 (1981).

The stakes involved in the control of federal lands are high. See Note, The Sagebrush Rebellion, supra, at 510. The federal lands are said to contain 84.9% of the nation's oil reserves, 72% of its oil shale reserves, 37.4% of its natural gas reserves, 50% of its geothermal energy reserves, 3.7% of its coal reserves, and 37.4% of its uranium ore reserves. Id. at 511. Therefore, in matters of energy regulation, broad, preemptive federal property clause legislation effectively could displace state regulation of considerable natural resources. Such legislation may have a particularly significant effect on state regulation of oil reserves. A federal program that permits heavy drilling on federal lands might deplete a common source of supply shared with wells on neighboring nonfederal property. Thus, a federal program could largely displace a state's restrictions even on private property. Note, Federal Lands, supra, at 225.

Although federal land issues remain controversial, they do not preoccupy Congress as they once did. In 1830, for example, Senator Robert Y. Hayne noted:

More than half our time has been taken up with the discussion of propositions connected with the public lands; more than half of our acts embrace provisions growing out of this
Views about the extent of congressional power under the property clause to dispose of and regulate federal lands persistently range to the extremes. The Supreme Court recently has viewed the power broadly, declaring it not only to be "without limitations," but also to be preemptive of state legislation when exercised. Critics of that broad view perceive the Court's approach to be a break with the Framers' intent and established precedent. The "classic" fruitful source. Day after day the charges are rung on this topic, from the grave inquiry into the right of the new States to the absolute sovereignty and property in the soil, down to the grant of a pre-emption of a few quarter sections to actual settlers. A question that is pressed upon us in so many ways; that intrudes in such a variety of shapes; involving so deeply the feelings and interests of a large portion of the Union; insinuating itself into almost every question of public policy, and tinging the whole course of our legislation, cannot be put aside or laid asleep.

CONG. DEB. 31-32 (1830) (statement of Sen. Hayne).

4. U.S. CONST. art. IV, § 3, cl. 2. The property clause provides:

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 constructed as to Prejudice any Claims of the United States, or of any particular State.

Id.

5. Congress also has power over certain federal lands under article I. It empowers Congress:

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

U.S. CONST. art. I, § 8, cl. 17.

This provision pertains to a narrow category of federal property known as "federal enclaves." Engdahl, State and Federal Power Over Federal Property, 18 ARIZ. L. REV. 283, 288-90 & n.17 (1976). Federal enclaves are those federal lands over which a state has consented to the exercise of federal legislative authority that are used for the erection of "Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." U.S. CONST. art. I, § 8, cl. 17; see Paul v. United States, 371 U.S. 245, 264 (1963); Kohl v. United States, 91 U.S. 367, 371 (1875); infra text accompanying notes 91-95, 108-24. For a brief discussion of congressional authority under this clause, see Note, The Property Power, supra note 3, at 817, 820 & n.25. Federal property that does not meet the two requirements of article I falls under the general article IV authority of Congress over federal property. The meaning of the article I power over federal enclaves is important toward understanding the meaning of the article IV property clause power of Congress, the subject of this Article. See infra notes 118-24 and accompanying text.


7. Id. at 539. The Supreme Court's assertion that the property clause power of Congress is "without limitations" is critically examined in Gaetke, Congressional Discretion Under the Property Clause, 33 HASTINGS L. J. 381 (1981). For further discussion of the limits of the property clause power, see infra text accompanying notes 260-63.

8. Kleppe v. New Mexico, 426 U.S. 529, 543 (1976) ("Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains power to enact legislation respecting those lands pursuant to the Property Clause. And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause.").


property clause theory, the critics assert, correctly limits the role of Congress regarding federal lands, with certain exceptions, to that of a mere proprietor; it recognizes no preemptive capability in property clause legislation. Indeed, the most extreme "classic theorists" maintain that the federal government has no constitutional authority under the property clause even to retain ownership of lands within the states.

Substantively, the scholarly dialogue generated by the controversy has been unfortunately one-sided. The classic theorists have presented their legal arguments cogently, often in painstaking detail. Opposing commentators, urging the correctness of the Supreme Court's broad view, however, usually assume the validity of the Court's current position and applaud its policy applications and implications, rather than refute the specific contentions of the classic theorists. Almost no effort has been expended by those supporting the Court's broad view to reconcile that view with the Framers' intent and the early case law.

This Article is the result of such an effort. It asserts that the Court's current, expansive view of the property clause power is consistent with and supported by the documented intentions of the Framers and the early Supreme Court decisions interpreting that power. Indeed, the broad view of that power has been the true "classic" property clause theory all along.

I. THE CLASSIC PROPERTY CLAUSE THEORY

Two alternative contentions, one more extreme than the other, collectively

12. The term "classic theory" is taken from Engdahl, supra note 5, at 296. It is used throughout this Article to identify the restrictive view of the property clause generally described in the text accompanying notes 22-33.

13. See Brodie, supra note 2, at 710-11; Engdahl, supra note 5, at 296-300; Engdahl, supra note 9, at 1209-10; Engdahl, Preemptive Capability of Federal Power, 45 U. Collo. L. Rev. 51, 79-80 n.120 (1973); Note, The Property Power, supra note 3, at 820-25, 835-37; infra text accompanying notes 24-33, 167-73.

14. See Engdahl, supra note 5, at 303-04, 309-10; Engdahl, supra note 13, at 79 n.120; Note The Property Power, supra note 3, at 822-23.

15. The term "classic theorists" is used throughout this Article to identify generally those commentators who have urged all or part of the restrictive view of the property clause power. The term is not intended to assert or imply that each commentator has embraced all of the components of that restrictive view.

16. See Brodie, supra note 2, at 721-22; Patterson, supra note 1, at 60, 71; infra text accompanying notes 22-23. According to these classic theorists, article I federal enclaves are the only appropriate federal landholdings within the states.

17. The article most notable for its detail is Engdahl, supra note 5.


19. See, e.g., Coggins & Hensley, supra note 18, at 1135-36; Sax, supra note 1, at 245-46, 252-53; Note, Federal Lands, supra note 3, at 216-17; Note, supra note 18, at 147-48.


21. One exception, though somewhat abbreviated in its treatment of this particular subject, is Coggins, Evans & Lindberg-Johnson, supra note 3, at 570-72, 574-75, 594-95.
can be labeled the classic property clause theory. Both contentions may startle those accustomed to an expansive view of federal power. The first and more extreme contention offered by some classic theorists is that the property clause does not authorize federal retention of title to public lands within the boundaries of states. According to these classic theorists, the article IV power of Congress applies only prior to the admission to the Union of the states in which the public lands lie. On admission of the state, the Constitution requires that all such lands must be transferred to state or private ownership.

Even if federal retention of title to lands within the states under article IV is recognized as constitutional, the classic theory's second contention asserts that under the property clause, Congress has only those powers over federal lands that any proprietor has over private property. Since the property clause grants only proprietary powers to Congress, according to this contention the states necessarily possess the same general governmental jurisdiction over the federal lands within their respective boundaries as they possess over the private property located there. Consequently, like other proprietors, Congress can have its

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22. See, e.g., Brodie, supra note 2, at 694, 718-23; Engdahl, supra note 5, at 292-93; Hardwicke, Illig & Patterson, supra note 2, at 431; Patterson, supra note 1, at 58, 60, 71. The only constitutional federal ownership of lands within states, according to this contention, is by purchase with consent of the state for purposes of "Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings" under the article I clause. U.S. CONST. art. 1, § 8, cl. 17, see Patterson, supra note 1, at 71, 72-73.

23. Brodie, supra note 2, at 721-22; Patterson, supra note 1, at 72-73. This argument is a fundamental tenet of the Sagebrush Rebellion. See Note, The Sagebrush Rebellion, supra note 3. Under this contention, most of the federal government's current ownership of land is unconstitutional. By definition, those federal lands that do not qualify as article I lands are necessarily article IV lands. See Engdahl, supra note 5, at 290 n.19. The article I lands (approximately 6 million acres) constitute less than 1% of the total federal landholdings (approximately 755 million acres). See PUB. LAND L. REV. COMM'N, ONE THIRD OF THE NATION'S LAND 277, 327 (1970). Thus, more than 99% of federal lands qualify as article IV lands. According to these more extreme classic theorists, the national parks, forests, wilderness areas, wildlife refuges, and so on, are unconstitutional article IV lands.

24. The most elaborate scholarly statement of this aspect of the classic property clause theory is made by Professor Engdahl. Professor Engdahl, in contrast to the classic theorists who adhere to the first contention discussed above, recognizes that the federal retention of ownership of article IV lands within the states is constitutional. Engdahl, supra note 5, at 366.

25. Brodie, supra note 2, at 710-11; Engdahl, supra note 5, at 294, 296; Engdahl, supra note 13, at 79 n.120.

Thus, Congress may decide whether and on what terms to dispose of the federal lands. See Gaete, supra note 7, at 384-86. Like any proprietor, Congress also may control the use of the federal lands. For a discussion of various statutory restrictions on the use of federal lands, see Gaete, supra note 7, at 387-90, 391-95; Muys, The Federal Lands, in FEDERAL ENVIRONMENTAL LAW 492, 520-31 (Dolgin & Guillebert ed. 1974).

To protect federal lands from harm, however, Congress, unlike a private proprietor, may use its legislative authority to prohibit certain conduct. See Engdahl, supra note 5, at 306-10; Note, Federal Lands, supra note 3, at 821. For example, grazing livestock on federal lands without a permit is prohibited by the Taylor Grazing Act of 1934, 43 U.S.C. §§ 315-315v (1982). Such legislation may be enforced through criminal sanctions. See United States v. Grimaud, 220 U.S. 506 (1911). Private proprietors must rely on various common-law theories to protect their property from the conduct of others. The federal government also may choose to rely on those common-law causes of action to prevent harm to the federal lands rather than enact legislation. "As an owner of property in almost every State of the Union, [the federal government has] the same right to have it protected by the local laws that other persons have." Cotton v. United States, 52 U.S. (11 How.) 229, 231 (1851) (trespass action); see also United States v. Gear, 44 U.S. (3 How.) 120 (1845) (waste).

26. Engdahl, supra note 5, at 296; Engdahl, supra note 13, at 79 n.120.
wishes as a landowner overridden by contrary state law.\textsuperscript{27} Thus, federal property clause legislation generally must yield to conflicting state law.\textsuperscript{28} There are, however, two exceptions to this rather remarkable tenet of the classic theory.\textsuperscript{29} First, in matters pertaining to the acquisition of title to federal land,\textsuperscript{30} congressional legislation controls.\textsuperscript{31} Second, when Congress acts to protect federal lands from harm, conflicting state legislation is precluded.\textsuperscript{32} Only in these two situations, however, do property clause enactments of Congress have preemptive effect under the classic theory.

Thus, even in its more generous form, the classic theory does not treat the property clause as a grant of governmental power at all.\textsuperscript{33} The theory largely views the clause as merely designating which branch of the federal government should act as "owner" of federal lands in disposing of them and controlling their use.

II. THE DEFECTIVE FOUNDATION OF THE CLASSIC THEORY

The classic property clause theory is premised on certain assertions regard-
ing pre-constitutional history\textsuperscript{34} and on language in early Supreme Court cases.\textsuperscript{35} It can be demonstrated, however, that neither history nor precedent conclusively supports the theory.

\textbf{A. The Historical Foundation}

The classic theory originates, according to its proponents, in the landholding relationship between the American colonies and the British Crown.\textsuperscript{36} The colonies were formed through grants of land and governmental authority from the Crown.\textsuperscript{37} Under these grants, the colonies owned and distributed the land within their boundaries.\textsuperscript{38} Consequently, when the Revolution severed the colonies' ties with the Crown, the landholding function remained unchanged.\textsuperscript{39} No Crown lands were transferred to any American national state as a result of those hostilities.\textsuperscript{40} The new states merely continued the role previously played by the colonies in regard to land distribution and title.\textsuperscript{41}

The significance of these facts to the classic theory rests in the colonists' attitudes that they reflect. The long history of colonial control of land understandably resulted in intense feelings regarding such matters by the colonists and in their staunch opposition to subsequent assertions of control over their lands.

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\textsuperscript{34} Historical context is critical to understanding any provision of the Constitution. Indeed, Professor Patterson asserts that the "landholding relation [between the federal and state governments] like every other feature of our constitutional system has its roots in historical soil and can be understood only on the basis of its historical evolution." Patterson, \textit{supra} note 1, at 43.

Unfortunately, history frequently is more equivocal than certain. It is necessary, for example, to make certain assumptions to leap from mere historical fact to the classic property clause theory. In such a situation, however, the soundness of one's assumptions is as critical to the validity of the theory as the accuracy of one's view of the historical facts. It is the author's contention that the classic theorists are subject to criticism for both their views of history and their assumptions regarding it. See infra text accompanying notes 61-82, 118-38.

\textsuperscript{35} See infra text accompanying notes 139-222; see, e.g., Colorado v. Toll, 268 U.S. 228 (1925); Omaechevarria v. Idaho, 246 U.S. 343 (1918); Kansas v. Colorado, 206 U.S. 46 (1907); Beacon v. Walker, 204 U.S. 311 (1907); Ward v. Race Horse, 163 U.S. 504 (1896); Fort Leavenworth R.R. Co. v. Lowe, 114 U.S. 525 (1885); Pollard v. Hagen, 44 U.S. (3 How.) 212 (1845); Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367 (1842).

\textsuperscript{36} See, e.g., Hardwicke, Illig & Patterson, \textit{supra} note 2, at 408; Patterson, \textit{supra} note 1, at 43-46.

\textsuperscript{37} P. Gates, \textit{supra} note 1, at 1, 33, 49; 1 J. Story, Commentaries on the Constitution of the United States 10-12 (T. Cooley ed. 1873); T. Watkins & C. Watson, The Land No One Knows 19 (1975); Hardwicke, Illig & Patterson, \textit{supra} note 2, at 408-09; Patterson, \textit{supra} note 1, at 43.

\textsuperscript{38} P. Gates, \textit{supra} note 1, at 35-48; S. Livermore, Early American Land Companies 33-36 (1939); Hardwicke, Illig & Patterson, \textit{supra} note 2, at 408; Patterson, \textit{supra} note 1, at 43-44.

\textsuperscript{39} Patterson, \textit{supra} note 1, at 44-45.

\textsuperscript{40} Hardwicke, Illig & Patterson, \textit{supra} note 2, at 413-14; Patterson, \textit{supra} note 1, at 45, 58. In the Treaty of Peace, the King acknowledged that the 13 colonies now constituted the United States and were "free, sovereign and independent States" and agreed to a definition of their peripheral boundaries. Treaty of Peace, Sept. 3, 1783, United States-Great Britain, arts. I & II, 8 Stat. 80, 81-82, T.S. No. 104. The treaty, however, does not purport to grant to the national government of the United States the lands within that periphery but lying to the west of the settled boundaries of the 13 colonies. Moreover, Congress subsequently rejected an assertion that title to the western lands was vested in the national government because they had been won by the collective efforts of the 13 states during the Revolutionary War. See 25 Journals of the Continental Congress 557-59 (1783); 2 J. Story, \textit{supra} note 37, at 189-90.

\textsuperscript{41} Patterson, \textit{supra} note 1, at 44-46.
by the British Crown.\textsuperscript{42} It was equally natural that such attitudes persisted after the Revolution. State sovereignty on land matters was preferred over control by the newly evolving national government,\textsuperscript{43} which had replaced the British Crown as the perceived threat to that sovereignty.\textsuperscript{44}

Such state sovereignty over land created a substantial impediment to the formation of the Confederation.\textsuperscript{45} After the Revolution, seven states\textsuperscript{46} owned lands beyond their settled boundaries through grants\textsuperscript{47} and conquests.\textsuperscript{48} Fearing unfair treatment by a central government dominated by those landed states, the six states without such western lands, most notably Maryland,\textsuperscript{49} refused to join the Confederation unless the landed states relinquished their claims to these lands.\textsuperscript{50} The eventual compromise offered by Congress called upon the landed

\textsuperscript{42} Id. at 45-46. In 1763 the King asserted control over the settlement of the Ohio territory, despite apparently valid grants to certain colonies. P. GATES, supra note 1, at 1; T. WATKINS & C. WATSON, supra note 37, at 20; Brodie, supra note 2, at 695; Hardwicke, Illig & Patterson, supra note 2, at 412; Patterson, supra note 1, at 45. The action so disturbed the colonists that it has been said to be among the major causes of the Revolution. Bodie, supra note 2, at 695; Hardwicke, Illig & Patterson, supra note 2, at 412; Patterson, supra note 1, at 45.

\textsuperscript{43} This prevailing attitude of state autonomy regarding land is evidenced by the subsequent Articles of Confederation, which granted Congress no landholding authority. P. GATES, supra note 1, at 3; Hardwicke, Illig & Patterson, supra note 2, at 416; Patterson, supra note 1, at 52-53. The Articles of Confederation expressly provided that "no state shall be deprived of territory for the benefit of the United States." ARTICLES OF CONFEDERATION art. IX. The Confederation was granted only one power regarding land. Congress was designated the "last resort on appeal" for boundary disputes between states. Id.

\textsuperscript{44} See Patterson, supra note 1, at 45-47, 50.

\textsuperscript{45} The Articles of Confederation were approved by the Continental Congress and forwarded to the legislatures of the states for ratification in 1777. See E. SCOTT, supra note 2, at 31. Ratification was not complete until 1781, however, because of a dispute between the states regarding certain western lands. Id. at 31-32; 1 J. STORY, supra note 37, at 161-62; Brodie, supra note 2, at 695-96. For a discussion of this dispute and its resolution, see infra text accompanying notes 46-54, 83-107.

\textsuperscript{46} The seven states were Connecticut, Georgia, Massachusetts, New York, North Carolina, South Carolina, and Virginia. P. GATES, supra note 1, at 49; T. WATKINS & C. WATSON, supra note 37, at 19 (New York is not included in this list); Brodie, supra note 2, at 695.

\textsuperscript{47} P. GATES, supra note 1, at 49; T. WATKINS & C. WATSON, supra note 37, at 19; Brodie, supra note 2, at 695; Hardwicke, Illig & Patterson, supra note 2, at 420; Tallman, supra note 2, at 55.

\textsuperscript{48} During the Revolutionary War, Virginia, at its own expense, had conquered certain portions of the northwest territory claimed by the Crown in 1763. Patterson, supra note 1, at 46. Certain claims of the states also were based on Indian treaties. Brodie, supra note 2, at 695; Hardwicke, Illig & Patterson, supra note 2, at 420; Tallman, supra note 2, at 55.

\textsuperscript{49} In 1779 the Maryland legislature directed the state's congressional delegates to communicate to that body the state's contentions regarding the western lands:

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

\textsuperscript{50} See P. GATES, supra note 1, at 3, 50; 2 J. STORY, supra note 37, at 189-90; T. WATKINS & C. WATSON, supra note 37, at 21, 24 (including "New York's somewhat vague claims to the lands under the sway of the Iroquois"); Brodie, supra note 2, at 695; Hardwicke, Illig & Patterson, supra note 2, at 420-21; Patterson, supra note 1, at 46-47; Tallman, supra note 2, at 55-56. The unlanded states feared that the landed states would dominate the national government if they were permitted to create daughter states in the western lands. G. DIETZE, THE FEDERALIST: A CLASSIC ON FEDERALISM AND FREE GOVERNMENT 52-53 (1960); P. GATES, supra note 1, at 50; Tallman, supra note 2, at 55.
states to cede these western lands to the Confederation. They then were to be "disposed of for the common benefit of the United States" and "formed into distinct republican States" that would have "the same rights of sovereignty, freedom, and independence, as the other states."

Two aspects of this compromise are significant to the classic theory. First, because the cessions of the western lands to the Confederation were conditional rather than absolute, the compromise arguably placed Congress in the position of a mere trustee of those lands. The classic theorists assert that these conditions severely limited congressional discretion and thus negate any notion of absolute ownership by Congress that might be construed as a source of plenary power over the western lands. Second, the compromise provided for the admission of new states to the Confederation on equal terms with the original states. Since the Confederation owned no property within the thirteen original states, the classic theorists assert that this "equal footing" requirement pro-

51. P. GATES, supra note 1, at 50-51; 2 J. STORY, supra note 37, at 190; T. WATKINS & C. WATSON, supra note 37, at 24-25; Hardwicke, Illig & Patterson, supra note 2, at 421; Patterson, supra note 1, at 47; Tallman, supra note 2, at 56-57.

The compromise was initiated by a resolution of Congress on September 6, 1780, "that it be earnestly recommended to those states, who have claims on the western country, to pass such laws, and give their delegates in Congress such powers as may effectively remove the only obstacle to a final ratification of the articles of confederation." 17 JOURNALS OF THE CONTINENTAL CONGRESS 807 (1780).

The compromise ultimately was achieved, however, by a subsequent series of congressional and state actions. Following the congressional resolution of September 6, 1780, recommending the compromise, a congressional resolution of October 10, 1780, set forth the terms of the requested cessions. Id. at 915-16. Another resolution of September 13, 1783, agreed to certain conditions proposed by the Virginia legislature for the cession of its western lands. Id. at 554-64. The subsequent deeds of cession from the various landed states to Congress reiterated those terms and conditions. See Deed of Cession from Virginia–1784, in 2 F. THORPE, FEDERAL & STATE CONSTITUTIONS 957 (1909); see also Hardwicke, Illig & Patterson, supra note 2, at 421, 422 (noting that Virginia's deed of cession is "typical" of the deeds given to congress by the land-claiming states); Patterson, supra note 1, at 48-51 (concluding that the effect of the deeds from the seven land-claiming states was to create a trust for the benefit of all the states). Finally, the Northwest Ordinance of 1787, 1 Stat. 51 (1787), purportedly embodied and effectuated the scheme of state-building on which the compromise was premised. See P. GATES, supra note 1, at 72-74; Patterson supra note 1, at 51. For a brief historical account of the compromise, see Tallman, supra note 2, at 55-60.

Maryland, the last state to ratify the Articles of Confederation, did so on March 1, 1781, the same day as the first cession by a landed state (New York) under the compromise. 1 J. STORY, supra note 37, at 162. Congress met for the first time under the Articles of Confederation the next day, March 2, 1781. 19 JOURNALS OF THE CONTINENTAL CONGRESS 223 (1781).

52. 18 JOURNALS OF THE CONTINENTAL CONGRESS 915 (1780) (congressional resolution of October 10, 1780).

53. Id.

54. Id.

55. The lands were transferred for the purpose of being formed into equal states. The compromise also provided that the ceded lands "shall be disposed of," thus arguably compelling complete congressional disposal of the lands. Id.

56. Hardwicke, Illig & Patterson, supra note 2, at 422, 423-24; Patterson, supra note 1, at 49-50.

57. Patterson, supra note 1, at 49-50.

58. See supra text accompanying notes 53-54.

59. See supra text accompanying notes 40-41, 43-44.

60. 32 JOURNALS OF THE CONTINENTAL CONGRESS 334-43 (1787). The "equal footing" term comes from section 13 and article V of the Northwest Ordinance of 1787, 1 Stat. 53 (1787), which ultimately embodied the compromise of 1781. See id.; Patterson, supra note 1, at 51; Tallman, supra note 2, at 60.
hibited the Confederation's retention of ownership of any lands within new states carved from the western lands. Thus, the cessions by the landed states to the Confederation are a crucial foundation for the classic theorists' restrictive view of congressional power under the Constitution.

Three factors, however, suggest caution in basing an interpretation of constitutional powers over federal lands on the cessions under the compromise. First, the classic theorists arguably are wrong in their interpretation of the terms of the compromise. Second, the compromise itself was of questionable legal validity. Third, the terms of the compromise may well have been altered by the subsequent ratification of the Constitution.

The classic theorists' assertion that the terms of the cessions compelled the complete disposal of the western lands by Congress and severely restricted congressional discretion regarding those lands is certainly not beyond debate. Congress proposed that the lands ceded to the Confederation under the compromise "shall be disposed of for the common benefit of the United States," thus evidencing a congressional willingness to serve as a type of trustee over the western lands. Other language used in and deleted from the documents effectuating the compromise, however, compels the conclusion that much broader discretion was vested in Congress regarding the ceded lands. For example, the initial congressional recommendation of the compromise called for a "liberal surrender" by the landed states of their territorial claims. This language suggests a broad relinquishment of state control over those lands. Additionally, the subsequent resolution of October 10, 1780, as originally proposed, provided that the ceded lands "shall be granted and disposed of" for the common benefit of the United States. The "granted and" language was deleted before passage. Since that legislation arguably would have mandated congressional relinquishment of title to the ceded lands, its deletion evidences an apparent congressional desire to retain discretion over such relinquishment. This desire is further evidenced by subsequent language within the same resolution, stating that "the said lands 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, or any nine or more of them."

61. 18 JOURNALS OF THE CONTINENTAL CONGRESS 915 (1780) (congressional resolution of October 10, 1780).
62. The congressional resolution of September 6, 1780, which initially offered the compromise, see supra note 51, can only be considered a request or recommendation. By its own language, the cessions were "earnestly recommended" by Congress. 17 JOURNALS OF THE CONTINENTAL CONGRESS 807 (1780). The Supreme Court later so concluded as well. See Pollard v. Hagan, 44 U.S. (3 How.) 212, 224 (1845); see also Tallman, supra note 2, at 56 (characterizing the resolution as merely a recitation of the "advantages to accrue to the union if all the states claiming western lands" should cede them). Indeed, the Confederation generally lacked any coercive powers and relied upon voluntary cooperation from the states to accomplish all its ends. See Patterson, supra note 1, at 52, 57.
63. 17 JOURNALS OF THE CONTINENTAL CONGRESS 806 (1780) (congressional resolution of September 6, 1780).
64. 18 JOURNALS OF THE CONTINENTAL CONGRESS 915 (1780) (congressional resolution of October 10, 1780) (emphasis added).
65. Id.
66. Id. From the entire resolution of October 10, 1780, therefore, it is apparent that Congress assigned different meanings to the terms "grant" and "dispose." By "grant" one must assume that
Such language is inconsistent with any notion of mandatory congressional disposal of the western lands.67 Furthermore, the landed states' cessions were effectuated by deeds that expressly conveyed "all right, title, and claim, as well of soil as of jurisdiction,"68 consistent with the conditions of the compromise, which included this broad congressional discretion over the actual transfers of land.69 Finally, the Northwest Ordinance of 1787, which incorporated the state-building scheme envisioned by the compromise,70 provided that the 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."71 Thus, considerable discretion was vested in Congress regarding the actual disposal of the western lands. The only express restriction was that the disposal be made for the "common benefit of the United States,"72 rather than for the advantage of some existing state.

The classic theorists' further assertion that the equal-footing requirement of Congress meant actual transfers of title to the lands. Congress apparently intended to exercise broad discretion over such transfers.

The term "dispose" arguably is much broader in its meaning, referring generally to the use of the western lands by Congress. This reading of "dispose" is consistent with the now obsolete usage of the word meaning to regulate, determine, order, or manage. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 654 (1966). It also is consistent with the current usage of "dispose" as meaning "to apportion or allot (as to particular purposes)." Id.

Under this interpretation of the resolution of October 10, 1780, Congress would be required, as a condition of the cessions, to use the ceded lands for the common benefit of all the existing states, thus ensuring that the previously unlanded states would share approximately equally in the benefits of the western lands. Discretion as to the actual "grants" of such lands, however, was to be left with Congress, although, as one form of "disposition," such grants necessarily would be required to be for the common benefit of all the states.

68. Deed of Cession from Virginia, 2 F. THORPE, supra note 51, at 957 (emphasis added); see also Virginia Act of Cession, December 20, 1783, id., at 955-56 (detailing the rights conveyed under Virginia's Deed of Cession). The deeds of cession from the other landed states used similar language. See Patterson, supra note 1, at 49; Tallman, supra note 2, at 57.
69. In response to the congressional resolution of October 10, 1780, the Virginia legislature on January 2, 1781, offered to cede the state's western lands upon certain additional conditions. See 25 JOURNALS OF THE CONTINENTAL CONGRESS 559-62 (1783). By its resolution of September 13, 1783, Congress responded to this counteroffer. Id. at 562-64. Congress viewed certain of these conditions as already provided by the resolution of October 10, 1780. Id. at 562. Thus, it is apparent that Congress, although acceding to some of Virginia's additional conditions, intended that its earlier statement of the cessions remain in force, including the provision that Congress have discretion regarding "grants" of the western lands.
70. P. GATES, supra note 1, at 72-74; Patterson, supra note 1, at 51.
71. 1 Stat. 52 (1877). This language appears to vest broad discretion in Congress regarding actual grants of land. See P. GATES, supra note 1, at 74; Clark, supra note 3, at 149.
72. 18 JOURNALS OF THE CONTINENTAL CONGRESS 915 (1780) (congressional resolution of October 10, 1780). It might be reasonable, in the exercise of that discretion, for Congress to decide that the retention of certain lands within a newly created state was for the "common benefit of the United States." Id. The trust concept inherent in the cessions is a notion common to most natural resource issues of that time. Ownership of common natural resources was considered an attribute of sovereignty. That ownership, however, was "to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of government, as distinguished from the people, or for the benefit of private individuals as distinguished from the public good." Geer v. Connecticut, 161 U.S. 519, 529 (1896) (state ownership of wild animals); see also Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367 (1842) (state ownership of submerged lands).
the compromise mandated complete disposal of the western lands\textsuperscript{73} also is unconvincing. By demanding the divestiture of the western lands, the unlanded states sought to avoid a national government dominated by the landed states and their daughter states that likely would be formed out of the western lands.\textsuperscript{74} This fear motivated the insertion of the requirement that the ceded lands be divided into coequal states for admission into the Union.\textsuperscript{75} The state-building envisioned by the compromise, therefore, was a critical element of the proposal.\textsuperscript{76} It is not inconceivable, however, that such state-building could have been accomplished without complete disposal of the western lands prior to the creation of the new states. Once a new state had been created,\textsuperscript{77} land retained by the Confederation could have been treated just as any other property within the state.\textsuperscript{78} The Confederation, of course, would relinquish to the new state all of the governmental powers it had been ceded by the landed states beyond those contained in the Articles of Confederation\textsuperscript{79} and thus would retain only those powers delegated to it by the Articles. The Confederation’s ownership of property within the new state, therefore, would not reduce that state’s sovereignty at all, even if the original states contained no Confederation-owned property within their boundaries.\textsuperscript{80} Such a reading of the cessions is consistent with the documents effectuating the compromise and permits the full realization of the cessions’ objectives. If the intention of the parties to the compromise was to compel

\textsuperscript{73} See supra text accompanying notes 58-60.

\textsuperscript{74} G. DIETZE, supra note 50, at 52-53; P. GATES, supra note 1, at 50; Tallman, supra note 2, at 55.

\textsuperscript{75} It should be noted that the condition mandating the creation of new states from the ceded lands also insured against the establishment of Confederation “colonies” in the west. See Patterson, supra note 1, at 49-50. Surely such a fear did not motivate the unlanded states, however, in their demand of the cessions. It had been their contention that the western lands already belonged to the Confederation by virtue of the common effort expended in wresting the lands from British control. See Tallman, supra note 2, at 55-56.

\textsuperscript{76} The state-building scheme was to be accomplished by encouraging settlement of the western lands. As eventually incorporated in the Northwest Ordinance of 1787, statehood could be achieved when a territory had 60,000 “free inhabitants,” or earlier if “consistent with the general interest of the confederacy.” 1 Stat. 53 (1787). The sale of the western lands also was intended to raise money to reduce the public debt incurred during the Revolution. See Pollard v. Hagan, 44 U.S. (3 How.) 212, 224 (1845).

\textsuperscript{77} No new states were formed under the Articles of Confederation. Vermont, the first new state, was admitted in 1791, after ratification of the Constitution. P. GATES, supra note 1, at 56.

\textsuperscript{78} The new state could exercise its powers over the Confederation’s land just as it did over the other property within its boundaries. The Confederation, therefore, would act in the role of a mere proprietor regarding its retained land, except for any additional powers delegated to it by the states through the Articles of Confederation.

\textsuperscript{79} Prior to the admission of the new state, all of the governmental power was vested by the cessions in the Confederation because the deeds of cession declared that the grantor states thereby ceded governmental jurisdiction as well as title to the soil. See Tallman, supra note 2, at 57. The grant of such governmental power, however, only was to last until the admission of the new state, at which time all of the governmental powers of the original states were to pass to the new state. See Pollard v. Hagan, 44 U.S. (3 How.) 212, 221-23 (1845).

\textsuperscript{80} There would be a difference between the new states and the original states, namely the presence of federally owned lands within the former. That difference, however, would not affect the governmental sovereignty of the new states.

Each state is subject equally to the exercise of the constitutional powers of the federal government. The probability of the actual exercise of these powers within a particular state, however, will depend on a variety of factual circumstances. See infra text accompanying notes 174-81.
complete congressional disposal of the western lands, as the classic theorists insist, the documents leave that critical matter woefully uncertain.

Even if the classic theorists are accurate in their reading of the terms of the compromise, the cessions nonetheless are weak authority for interpreting constitutional powers because they were wholly unlawful transactions. Even the most vigorous proponents of the classic theory recognize that the Confederation had no authority to assume any land ownership, absolute or conditional. Consequently, any legally enforceable requirements presented by the cessions must have arisen subsequently, presumably under the Constitution.

Finally, even if the restrictive trust concept and equal-footing requirement of the cessions had been unequivocal and legally binding on the Confederation, subsequent ratification of the Constitution may have altered their status. The Constitution, as a grant of governmental authority to the federal government from the states, may have included the grant of greater federal powers over the ceded lands than those expressly contained in the original cessions. It is fruitless to urge a constitutional theory based on the pre- Constitution cessions unless it can be shown conclusively that the terms of those cessions were left intact by the Constitution.

The Confederation failed for several reasons, among them its total lack of authority to accomplish the state-building envisioned by the western land compromise. The controversy between the landed and unlanded states, therefore, was not resolved under the Articles of Confederation and reemerged during the Constitutional Convention.

81. See, e.g., Brodie, supra note 2, at 696; Patterson, supra note 1, at 52-53.

82. See supra note 43. It might well be said that the Confederation's offer of compromise regarding the western lands and the Northwest Ordinance of 1787, being without authority of law, were the first efforts to "develop a flexibility in the exercise of Federal power." P. Gates, supra note 1, at 56. Similarly, it has been noted "that the importance, and even justice, of the title to the public lands, on the part of the federal government, and the additional security which it gave to the Union, overcame all scruples of the people, as to its constitutional character." 2 J. Story, supra note 37, at 191. Justice Story, however, argued that the Confederation's ownership of the western lands after the cessions may not have been illegal. Id. at 190-91.

83. There were numerous difficulties with the Confederation relating to the insufficient power vested in the national government. See G. Dietze, supra note 50, at 50-55. For James Madison's summary of these shortcomings, see E. Scott, supra note 2, at 32-36 and 1 J. Story, supra note 37, at 168-75.

84. The Federalist No. 38, at 248 & No. 43, at 290 (J. Madison) (J. Cooke ed. 1961); P. Gates, supra note 1, at 51, 72-73; E. Scott, supra note 2, at 33; Brodie, supra note 2, at 416, 422 n.74; Harwicke, Illig & Patterson, supra note 2, at 416, 422 n.74; Patterson, supra note 1, at 52-53; Tallman, supra note 2, at 60.

85. At the time of the Constitutional Convention in 1787, the western lands remained controversial for two reasons. First, not all of the landed states had ceded their western lands to the Confederation in accordance with the compromise. See P. Gates, supra note 1, at 51-56; Harwicke, Illig & Patterson, supra note 2, at 422; Patterson, supra note 1, at 54; Tallman, supra note 2, at 57-60. Maryland and the other unlanded states, having been induced to enter the Confederation by the assurances contained in the compromise, understandably felt cheated. Patterson, supra note 1, at 54. Maryland's delegation to the Convention, therefore, was intent on resolving this matter in the Constitution. Id. Second, although the Confederation had accepted cessions of considerable western lands, see P. Gates, supra note 1, at 51-56, the national government lacked authority to act in regard to these lands. See supra notes 43, 82. Thus, the western land issue required further attention at the Constitutional Convention.
Three primary issues concerning land confronted the delegates to the Convention in 1787. First, it was apparent that the national government needed to control certain lands within the states for purposes of national defense. Second, the experience of the Confederation had demonstrated the necessity of a mechanism for the creation and admission of new states. Last, there was a need to provide for national regulation of the lands that had, and hopefully in the future would, come into the possession of the United States.

The first issue was resolved by the inclusion in article I of a congressional power "[t]o exercise exclusive Legislation" over the seat of the national government and "like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . . ." Although broad congressional power over the seat of government caused little concern or debate among the delegates, similar authority over lands acquired within existing states was more controversial. The fear of "exclusive" federal legislative power being used to "enslave" an existing state caused the delegates to require state legislative consent as a prerequisite to the acquisition of such extraordinary federal power.

The delegates also gave considerable attention to the second land issue—the admission of new states. The primary point of contention, however, was the division of large states into smaller states and the merger of two or more states into one. The delegates' concern again reflected a fear of federal action against

86. A fourth land issue concerned the establishment of a seat of government for the federal government and was resolved in U.S. CONST., art. 1, § 8, cl. 17. See infra text accompanying notes 91-93. Under the Articles of Confederation, even the safety and security of Congress itself were subject to the wishes of the host state. See 2 J. STORY, supra note 37, at 123.
87. The Confederation depended on the voluntary cooperation of the individual states to achieve its objectives, including national defense. See Engdahl, supra note 5, at 289 n.12.
88. See supra text accompanying note 84.
89. Certain western lands had not been ceded to the national government at the time of the Convention. See supra note 85. Thus, more cessions of land were expected under the compromise. Furthermore, an expansionist attitude already was prevalent among Americans at the time of the Revolution. See P. GATES, supra note 1, at 75-77. The same attitude was reflected at the Convention as well. See, e.g., 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 578-79 (M. Farrand 2d ed. 1937) [hereinafter cited as THE RECORDS].
90. The various acquisitions of land by the United States are discussed in P. GATES, supra note 1, at 75-86.
91. U.S. CONST. art. I, § 8, cl. 17. This provision provides the constitutional authority for congressional regulation of the District of Columbia.
92. Id.
93. This portion of the article I clause was approved unanimously at the Convention, virtually without discussion. See 2 THE RECORDS, supra note 89, at 508-10; 2 J. STORY, supra note 37, at 122.
94. See 1 THE RECORDS, supra note 89, at 510; see also Brodie, supra note 2, at 697 (discussing the constitutional debate on this provision). For an account of the adoption of the article I property clause, see Hardwicke, Illig & Patterson, supra note 2, at 418-19.
95. 2 THE RECORDS, supra note 89, at 510. The insertion of the state-consent requirement rendered the possibility of such exclusive federal power "unexceptionable." 2 J. STORY, supra note 37, at 126.
96. For a brief account of the Convention's consideration of this issue, see P. GATES, supra note 1, at 73-74.
97. 2 THE RECORDS, supra note 89, at 461-64.
98. Id. at 465.
the sanctity of existing states.\textsuperscript{99} The matter was resolved by requiring the consent of the legislatures of any existing states involved in such division or merger.\textsuperscript{100} In other respects, however, broad discretion on the admission of new states was vested in Congress.\textsuperscript{101}

The third issue, that of national regulation of lands in possession of the United States, received little attention at the Convention. After resolving the matter of the admission of new states, Daniel Carroll, a Maryland delegate, raised the issue of claims to the western lands.\textsuperscript{102} He proposed an express provision that the Constitution would not affect any claims of the United States or of the individual states to the western lands. The proposal also provided that disputes over such claims would be resolved by the Supreme Court.\textsuperscript{103} Gouverneur Morris, a Pennsylvania delegate, successfully moved postponement of the Carroll proposal to allow consideration of a substitute provision which provided that "[t]he Legislature 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 contained, shall be so constructed as to prejudice any claims either of the U.S. or of any particular State. . . ."\textsuperscript{104} An amendment proposed by Luther Martin, another Maryland delegate, to specify that such claims be resolved by the Supreme Court was rejected as unnecessary,\textsuperscript{105} and the Morris proposal was approved by the Convention with Maryland dissenting.\textsuperscript{106} The Morris proposal became the article IV property clause,\textsuperscript{107} almost without debate.

\textsuperscript{99} Id. at 462.
\textsuperscript{100} Id. at 464-65.
\textsuperscript{101} The adopted language provides:

\textit{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.}

\textbf{U.S. CONST. art. IV, § 3, cl. 1} (emphasis added). The emphasized language indicates that the admission of new states, except when carved from an existing state or formed by joining two or more existing states, rests in the broad discretion of Congress. The only apparent limitation on that discretion is that Congress only has the power to admit "states." Congress may not condition admission upon the relinquishment to the federal government of some power not otherwise delegated by the rest of the states through the Constitution. To permit such conditions would allow the admission to the Union of political organizations with lesser authority and dignity than "states." Coyle v. Oklahoma, 221 U.S. 559, 565-68 (1911); see Hardwicke, Illig & Patterson, \textit{supra} note 2, at 426-27 & n.88.

Some classic theorists have suggested that the federal government is entitled to retain ownership and exercise regulatory authority over public lands within the new states only because of state consent that was given as a condition to a state's admission to the Union. See, e.g., Hardwicke, Illig & Patterson, \textit{supra} note 2, at 427-28. Such an argument, based on a conditional admission, runs counter to the holding of \textit{Coyle}. See \textit{Clark}, \textit{supra} note 3, at 150 n.40.

\textsuperscript{102} 2 THE RECORDS, \textit{supra} note 89, at 465-66. Carroll had raised the same issue earlier. \textit{Id.} at 461-62.
\textsuperscript{103} \textit{Id.} at 465-66.
\textsuperscript{104} \textit{Id.} at 466.
\textsuperscript{105} \textit{Id.}
\textsuperscript{106} \textit{Id.}
\textsuperscript{107} In commenting on the adoption of the article IV language, one classic theorist asserts that "Maryland, being afraid that her pound of flesh that she had exacted as a basis of accepting the Articles of Confederation in 1781 might be lost, had made good use of her last opportunity to make her bargain a matter of the supreme law of the land." Patterson, \textit{supra} note 1, at 55. Such a conclu-
The classic theorists make much of the Convention's treatment of the land issues, particularly the implications arising from the relationship between the article I and article IV property powers of Congress. The article I clause, according to the classic theorists, provides the only constitutional mechanism for the acquisition of title to lands within existing states by the national government. They argue that article I evidences the delegates' attitude about federal landholding within the states by restricting it to a few specified governmental purposes and requiring the legislative consent of the state in which the land is located. Article IV, according to the classic theorists, permits congressional regulation of the public domain only prior to its division into new states. To the classic theorists, article IV incorporates the trust concept of federal ownership of the public domain that they claim existed under the Confederation. Thus, Congress was required by article IV to dispose of all federal lands contained within a new state upon its admission to the Union. Thereafter, the federal government could acquire ownership of land within the state only with the consent of the state and for the limited governmental purposes set forth in article I. In the eyes of the classic theorists, the antiimperialistic attitudes of the colonists about the ownership of land not only spawned the Revolution, but survived the ill-fated Confederation and were incorporated into the Constitution by the language of article IV. 

108. See Hardwicke, Illig & Patterson, supra note 2, at 419; Patterson, supra note 1, at 60-62.
110. Id.
111. ENGDAHL, supra note 5, at 292-93; Hardwicke, Illig & Patterson, supra note 2, at 423-24, 426; Patterson, supra note 1, at 55-57.
112. Professor Patterson asserts that the article IV property clause "constitutionalized the plan for the building of a Union of States proposed by the [Northwest] Ordinance of 1787 and bound the nation to its execution." Patterson, supra note 1, at 55.
113. Hardwicke, Illig & Patterson, supra note 2, at 429-30; Patterson, supra note 1, at 55-57. Professor Patterson bluntly asserts:
    If the states had had the slightest notion that the Federal Government could lay claim to the soil or to its resources or could make great reservations of land within their boundaries or of their mineral resources as a price of their admission into the Union, thus destroying the equality of states in the Union, the Constitution would never have been ratified. The fact is that the delegates of the states did not propose such powers, and if they had been proposed, the Convention would not have approved them. Id. at 62. See also SAX, supra note 3, at 313. Even if such a speculative contention were proven, however, it is not preclusive of a broader, modern view of the property clause power. See infra text accompanying notes 135-38.
114. Patterson, supra note 1, at 61. This contention also has arisen periodically in Congress. See TALLMAN, supra note 2, at 78-79.
115. Patterson, supra note 1, at 60-61.
117. This contention is the basis for the classic theorists' argument that the landholding relationship between the British Crown and the American colonies is determinative of the landholding relationship between the federal government and the states under the Constitution. See Patterson, supra note 1, at 43-45. Federal retention of article IV lands within states has been labeled a form of
Although the stark simplicity of this approach is appealing, the classic theorists assume too much in their reading of the article I and article IV property powers. Article I provides the mechanism through which the federal government may obtain not only title to lands within existing states, but the power of "exclusive legislation" over those lands as well. The existence of such a mechanism does not necessarily preclude any other form of federal landholding within the states. Article I, for example, does not expressly prohibit federal acquisition of lands within existing states through purchase or condemnation without the consent of the state legislature. Similarly, article I does not expressly preclude the use of such property for purposes other than those specified.

"domestic imperialism." Hardwicke, Illig & Patterson, supra note 2, at 431-32; Patterson, supra note 1, at 45-46.

Some support for the classic theorists' view of the Framers' intent in adopting the articles IV and I property clauses can be found in Fort Leavenworth R.R. Co. v. Lowe, 114 U.S. 525, 530-31 (1885). The Lowe Court, however, noted that this was never the prevailing view. Id. at 530. Since no article I property was involved in that case, the discussion is dictum. For further discussion of this case, see infra text accompanying notes 208-20.

118. Some writers have noted that the classic theory is based, in part, upon mere assumptions regarding the Framers' intent. Coggins, Evans & Lindberg-Johnson, supra note 3, at 570.

119. The extraordinary character of the article I power of "exclusive legislation" also was noted by the Supreme Court in Pollard v. Hagan, 44 U.S. (3 How.) 212, 223-24 (1845) (emphasis added):

Within the District of Columbia, and the other places purchased and used for the purposes above mentioned, the national and municipal powers of government, of every description, are united in the government of the union. And 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 . . . of the temporary territorial governments, and there a local government exists.

120. "If the national government owns a fort, arsenal, hospital, or light-house establishment, over which exclusive jurisdiction has not been acquired by cession of the state, the general jurisdiction of the State is not excluded in regard to the site, but, subject to the rightful exercise of the powers of the national government, it remains in full force." 2 J. Story, supra note 37, at 200; see Silas Mason Co. v. Tax Comm'n, 302 U.S. 186, 207-08 ("The mere fact that the Government needs title to property within the boundaries of a State, which may be acquired irrespective of the consent of the State . . . does not necessitate the assumption by the Government of the burdens incident to an exclusive jurisdiction"); see also Laurent, Federal Areas Within the Exterior Boundaries of the States, 17 Tenn. L. Rev. 328, 332-33 (1942) (The federal government can decline exclusive jurisdiction over a federal area acquired for a constitutional purpose with a state's consent and leave the area under the ordinary jurisdiction of the state.).

Although not expressly mentioned in the Constitution, the power of Congress to purchase or condemn property was affirmed in Kohi v. United States, 91 U.S. 367 (1875), in which the statute authorizing purchase or condemnation of a post office site was held constitutional. State consent to such acquisition is not necessary. Chappell v. United States, 160 U.S. 499, 509-10 (1896) (condemnation for lighthouse site under federal statutory procedures contrary to state procedures upheld).

121. United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 680-83 (1896) (condemnation for preservation of battlefield and creation of memorial upheld). Certain classic theorists curiously have admitted that the federal government may be justified in retaining ownership of lands within states for purposes other than those listed in the article I clause, see Hardwicke, Illig & Patterson, supra note 2, at 431, while nonetheless asserting that such retention violates "the fundamental principles of the Union and its development in accordance with the principle of federalism," Id., and asserting that it "is in disregard of Constitutional intentions." Id. at 429.
Certainly nothing in article I prohibits federal retention of ownership of lands within new states carved from the public domain.122 In each of these situations, the effect of article I is merely to negate the existence of a congressional power of exclusive legislation over such federal lands within the states.123 The article I clause, so read, narrowly circumscribes the acquisition of this disquieting congressional power, while leaving unaddressed and unrestricted other forms of federal property ownership within the states.124

The classic theorists' view that the article IV property clause power incorporates the trust concept of federal ownership is even less convincing.125 Article IV contains no hint of a requirement that Congress must dispose of all federal lands within the boundaries of states admitted from the public domain.126 Indeed, the equal-footing concept, upon which the classic theorists premise such a requirement, was considered and expressly rejected by the delegates.127 Rather

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122. The article I property clause refers only to new acquisitions of property and the power of exclusive legislation within existing states rather than to property retained by the federal government after the admission of a state, since the latter category of property is not purchased with the consent of a state.

123. Rather than possessing the power of "exclusive legislation" over such areas under the article I clause, Congress may only utilize its enumerated powers, which include those contained in the article IV property clause, since the areas are still "property belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2. In other respects, however, "the State jurisdiction still remains complete and perfect." 2 J. STORY, supra note 37, at 127.

124. Such a reading of the article I clause is consistent with the concerns expressed by the delegates to the Convention. Several delegates feared the federal government's total displacement of state authority over areas within existing states and they successfully urged the requirement of state legislative consent to the acquisition of federal power of "exclusive legislation." See supra notes 91-100 and accompanying text. The delegates probably did not fear such displacement of state authority through nonarticle I acquisition of federal property, presumably for two reasons. First, within existing states, such acquisitions, as well as the exertion of federal authority over those acquired lands, would have to be accomplished under the enumerated powers of Congress. Indeed, when the power to purchase lands for forts, magazines, and other needful buildings was proposed to the Convention, some delegates thought that the provision was unnecessary because the enumerated powers included such federal actions. 2 THE RECORDS, supra note 89, at 510. Since the states by ratifying the Constitution would be granting certain powers to the federal government, it is reasonable to assume that the delegates foresaw the necessity and likelihood of federal acquisition of property within existing state boundaries to effectuate those powers. To acquire the extraordinary power of "exclusive legislation" over such lands, however, the consent of the state legislature was required. Second, the delegates showed little concern about broad federal authority over new states to be admitted to the Union. Congress was to determine the terms of their admission and to exercise broad discretion over federal lands within their retained boundaries.

125. Brodie, supra note 2, at 704.

126. It also is noteworthy that the provision in the Articles of Confederation "that no state shall be deprived of territory for the benefit of the united states," ARTICLES OF CONFEDERATION art. IX, is conspicuously absent from the Constitution.

Certain classic theorists have admitted that federal retention of public domain lands within new states may be justified. See supra note 121. Professor Patterson, however, has asserted that the article IV property clause grants Congress the power to dispose, but "not to keep" the federal lands. Patterson, supra note 1, at 58; see also Brodie, supra note 2, at 721-22 (article IV constitutes a "mandate" to dispose of the public lands). That assertion is inaccurate. Although article IV grants the power to dispose, it does not mandate disposal. The mere grant of a power obviously includes the discretion regarding whether and when to exercise the power. Cf. Light v. United States, 220 U.S. 523, 536 (1911) (article IV power is discretionary).

127. When the matter of the admission of the states was brought before the Convention, Gouverneur Morris moved to strike the Committee of Detail's proposal that, "[i]f the admission be consented to, the new States shall be admitted on the same terms with the original States." 2 THE RECORDS, supra note 89, at 188, 454. The sentence obviously embodied the equal-footing concept. Morris argued that the Constitution should not "bind down the Legislature to admit Western States
than embodying the trust theory urged by the classic theorists, the language of article IV indicates that the delegates instead chose to grant broad congressional discretion regarding property belonging to the United States. Furthermore, there is no evidence that property clause legislation was intended to be accorded a lesser status under the supremacy clause and not given preemptive effect.

on the terms here stated." *Id.* at 454. The Morris motion was approved by a nine-to-two vote. *Id.* Thus, the Convention clearly rejected the effort to constitutionalize the equal-footing concept. See Hardwicke, Illig & Patterson, *supra* note 2, at 427 n.88.

It is difficult, therefore, to understand the contention that the article IV property clause adopts the equal-footing concept. Some classic theorists nevertheless assert that the equal-footing doctrine is a constitutional principle, despite its glaring absence in the document itself and despite the unequivocal rejection of the doctrine at the Convention. See, e.g., Haslam, *supra* note 3, at 156-57. Other classic theorists, however, correctly perceive the doctrine to be something less than a constitutional imperative. See, e.g., Hardwicke, Illig & Patterson, *supra* note 2, at 427 n.88; Patterson, *supra* note 1, at 62-69.

To the extent the Constitution includes an equal-footing concept, it relates only to political equality, not proprietary equality. See Clark, *supra* note 3, at 150; Hardwicke, Illig & Patterson, *supra* note 2, at 424-25 n.83, 427 n.88. But see Patterson, *supra* note 1, at 62-64 (equal-footing doctrine not encompassed within Constitution). Each state is deemed to have delegated to the federal government the same powers and, therefore, retains the same powers.

A statutory equal-footing concept, as embodied in the Northwest Ordinance of 1787, was adopted by Congress in 1789 after the ratification of the Constitution. 1 Stat. 50 (1789) (statute to provide for the government of the territory northwest of the Ohio River). This enactment made the equal-footing concept the statutory policy of Congress, but not a constitutional imperative.

128. Certainly the only express constitutional limits on the article IV regulatory power are that the legislation must be "needful" and "respecting" the federal property. For a discussion of those limitations, see Gaetke, *supra* note 7, at 390-98. Unfortunately, little guidance is offered about the meaning of these limits by the Convention's proceedings. See *The Federalist* No. 43, at 291 (J. Madison) (J. Cooke ed. 1961) ("This is a power of very great importance . . . ."); see also supra text accompanying notes 102-07 (discussing Convention's attention to regulation of lands in possession of the United States).

Regardless of the breadth of the article IV power of Congress regarding federal property within existing states, that power is not "exclusive" by virtue of article IV alone. The states enjoy general governmental jurisdiction over the article IV federal lands within their boundaries subject to the exercise of the federal government's enumerated powers and the operation of the supremacy clause. As noted by Justice Story:

[T]he power of Congress to regulate the other national property [within existing states] (unless it has acquired by cession of the States exclusive jurisdiction) is not necessarily exclusive in all cases. If the national government own a fort, arsenal, hospital, or light-house establishment, not so ceded, the general jurisdiction of the State is not excluded in regard to the site, but, subject to the rightful exercise of the powers of the national government, it remains in full force.

J. Story, *supra* note 37, at 200.


129. The assertion that property clause legislation is somehow inferior to other federal legislation is a primary claim of the classic theorists. See *supra* text accompanying notes 25-32. This assertion is at least based partially on the classic theorists' view that the property clause merely designates which of the three federal branches is to act as "owner" of the federal lands and thus grants Congress only proprietary powers. See *supra* text accompanying notes 40-41.

That view is undermined, however, by the placement of the property clause power in article IV. The property clause is one portion of the so-called "States' Relations Article." Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 379 (1978). That article contains the privileges and immunities clause, U.S. CONST. art. IV, § 2, cl. 1, the full faith and credit clause, id. § 1, cl. 1, the guarantee clause, id. § 4, cl. 1, the provisions for the admission of new states, id. § 3, cl. 1, and other provisions governing relations among the states and between the states and the federal government. This for-
Carefully read, the Convention's treatment of the three land issues reflects

mat explains the presence of the property clause power in article IV rather than in article I. Its placement in article IV, however, does not necessarily relegate the property clause power to some inferior, nongovernmental status for preemption purposes. Surely no language of the Constitution itself supports the assertion that the article IV power is inferior to other congressional powers. Similar assertions have been made about the article I power of Congress over federal enclaves. In Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821), the Supreme Court rejected that contention. Speaking of the article I power, the Court noted:

Congress is not a local legislature, but exercises this particular power, like all its other powers, in its high character, as the legislature of the Union. The American people thought it a necessary power, and they conferred it for their own benefit. Being so conferred, it carries with it all those incidental powers [including that of the supremacy clause, which was under discussion], which are necessary to its complete and effectual execution.

Id. at 429 (emphasis added). Further, in reference to the article I power, the Court noted:

This power, like all others which are specified, is conferred on Congress as the legislature of the Union; for, strip them of that character, and they would not possess it. In no other character can it be exercised. In legislating for the District, they necessarily preserve the character of the legislature of the Union; for, it is in that character alone that the constitution confers on them this power of exclusive legislation. This proposition need not be enforced.

The 2d clause of the 6th article declares, that "This constitution, and the laws of the United States, which shall be made in pursuance thereof, shall be the supreme law of the land."

The clause, which gives exclusive jurisdiction is, unquestionably, a part of the constitution, and, as such, binds all the United States. Those who contend that acts of Congress, made in pursuance of this power, do not, like acts made in pursuance of other powers, bind the nation, ought to show some safe and clear rule which shall support this construction, and prove that an act of Congress, clothed in all the forms which attend other legislative acts, and passed in virtue of a power conferred on, and exercised by Congress, as the legislature of the Union, is not a law of the United States, and does not bind them.

Id. at 424-25 (emphasis added). No "safe and clear rule" can be shown why article IV property clause legislation is of lesser quality than other congressional legislation.

One classic theorist has made an additional argument about the special status of the property clause power and its general lack of preemptive capability, except in very limited situations. During the Convention the Committee of Detail proposed the addition of a legislative power:

...to provide, as may become necessary, from time to time, for the well managing and securing the common property and general interests and welfare of the United States in such manner as shall not interfere with the Governments of individual States in matters which respect only their internal Police, or for which their individual authorities may be competent.

2 THE RECORDS, supra note 89, at 367 (emphasis added). Professor Engdahl has asserted that the article IV power "to dispose of and make all needful Rules and Regulations" regarding federal property "was apparently intended to and did cover the same ground as the [above quoted] provision which had been suggested by the committee of detail . . . for the committee's proposal was not revived once Morris' proposal [about the article IV power] had been approved." Engdahl, supra note 5, at 291 n.24. This assertion maintains that the article IV power of Congress, as an alleged substitute for the committee's proposal, must be limited in the same manner as if the emphasized language had been adopted expressly by the Convention.

The argument, however, is weak. The language of the article IV power and the committee proposal are so markedly different that it is unreasonable to conclude that the purpose and meaning of the two are coextensive. Furthermore, the general tenor of the committee's proposal, as well as certain of its language, eventually was adopted by the Convention and embodied in the Constitution. "The Congress shall have Power to . . . provide for the general Welfare of the United States . . . ." U.S. CONST. art. I, § 8, cl. 1. The original proposed draft of the Constitution, however, contained no similar provision. See 2 THE RECORDS, supra note 89, at 181. Thus, the committee's proposal apparently was intended to address this perceived deficiency in the general legislative power of Congress and not the question of the western lands. It also must be noted that the above emphasized language of the committee proposal never was adopted by the Convention.

What Professor Engdahl urges, therefore, is that a portion of the committee proposal, never adopted expressly or even discussed by the Convention, was incorporated implicitly into another radically different provision, the article IV property clause. See Engdahl, supra note 5, at 291 n.24. That assertion is unconvincing.
two definite underlying themes. One theme is the protection of existing states from unrestrained interference by the federal government. This theme is evidenced by the requirement of legislative consent by affected states both for the acquisition of the power of exclusive legislation under the article I property clause and for their division or merger in the formation of new states. The second theme is a distinct and pronounced preference for broad congressional power over all other public land matters regardless of its effect on new states. This theme is evidenced both by the broad discretion vested in Congress over the admission of new states and by the vaguely limited power of Congress over federal property in general under article IV. The delegates thus showed little concern for the protection of future states from the same broad congressional authority that the existing states so greatly feared.

There are, therefore, two primary reasons for concluding that the historical foundation of the classic theory is defective. First, the cessions under the Confederation, upon which the classic theorists so heavily rely, are not as restrictive as the theory's proponents maintain. Second, regardless of the degree of restrictions imposed on Congress by those cessions, there is nothing in the actual language of the article I and article IV property clauses or in the Convention's deliberations on the clauses that supports the classic theorists' assertion that a restrictive congressional trusteeship over the western lands was left intact by the Constitution. On the contrary, the delegates chose extremely broad language in stating congressional powers over federal property. Rather than imposing a

130. See supra text accompanying notes 91-95.
131. See supra text accompanying notes 96-101.
132. See supra text accompanying note 101. This congressional power has been described as "ambiguous." F. DONOVAN, MR. MADISON'S CONSTITUTION 69-70 (1965).
133. See supra note 128 and infra text accompanying notes 260-263.
134. Certain delegates to the Convention expressed considerable animosity toward the inhabitants of the western lands. See F. DONOVAN, supra note 132, at 69. In referring to those lands, Gouverneur Morris stated:

[I]t must be apparent they 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 [sic] 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.

1 THE RECORDS, supra note 89, at 583. Morris later offered the language that became the article IV property clause. See supra text accompanying notes 102-07.

The question might be raised why the delegates to the Convention did not fear the utilization of the broad article IV property clause power within their own states. Several reasons are possible. First, there was at the time no apparent need for large-scale federal acquisition of land within the existing states other than for the purposes set forth in the article I property clause. See supra text accompanying notes 87, 91-95. Uses such as national parks or wildlife refuges simply were not contemplated at that time. Second, even if the federal government decided to pursue a policy of large-scale acquisition of land within existing states, it would be hampered by the expense of extensive purchases or eminent domain acquisitions. This practical limitation was aggravated by the sizeable national debt left from the Revolutionary War. Third, the delegates may have believed that large-scale federal land acquisition within existing states would be politically untenable, since the existing states would dominate Congress for some time and would be alert to such schemes.

Whatever the reasons, it is likely that the delegates perceived little threat to their own established states from the broad congressional power set forth in the article IV property clause. Its primary effect was expected to be felt, and has been felt, in the states carved from the western lands. It should be noted, however, that the federal government has acquired certain large-scale landholdings in the original 13 states for national parks and wildlife preserves. See infra note 178.
duty on Congress to dispose of that property, the delegates vested Congress with broad discretion to do so. Rather than inserting any narrow restrictions on the objectives of congressional management of the property, the delegates chose to allow Congress to do what was “needful.” Thus, whatever restrictions were imposed on Congress by the cessions during the Confederation, the states chose to relax them considerably by their ratification of the Constitution.

It must be conceded that no delegates could foresee the vast retention of federal land ownership that has occurred in states subsequently carved from the public domain. It even may be conceded that the delegates would have opposed such retention if it had been foreseen. What is controlling, however, is the distribution of power chosen by the delegates and incorporated in the Constitution. The language employed by the Convention certainly permits congressional implementation of the policies of rapid disposal of federal lands and of the equal-footing doctrine. Both policies subsequently were pursued by Congress. That language, however, does not elevate these policies to constitutional imperatives.

The history urged as the basis for the classic theory, therefore, is less supportive than the theory’s proponents would have us believe. A more plausible and persuasive reading of that history supports a much broader view of congressional authority under the article IV property clause.

B. The Case-Law Foundation

The classic theorists rely on more than their interpretation of history to support their criticism of the Supreme Court’s broad view of the property clause power. They also insist that the Court’s current view totally disregards early, well-settled case law that embraced the classic theory as constitutional doctrine. Regardless of the deficiencies in the classic theory’s historical founda-

135. In 12 western states, at least 29% of the land has been retained in federal ownership. See Note, The Property Power, supra note 3, at 817 & n.1.
136. For a classic theorist’s assertion to this effect, see supra note 113.
137. For a description of the disposal of federal lands, see Hardwicke, Illig & Patterson, supra note 2, at 428; Tallman, supra note 2, at 67-68; Note, The Property Power, supra note 3, at 818-19; Note, The Sagebrush Rebellion, supra note 3, at 506-08. See generally T. WATKINS & C. WATSON, supra note 37, at 45-71 (history of western land system from 1785 to 1841).
138. See Patterson, supra note 1, at 64-66.
139. The most exhaustive presentation of the classic theory’s case-law foundation is offered in Engdahl, supra note 5, at 293-310. Professor Engdahl maintains that the Court’s abandonment of the classic theory is the result of intellectual confusion spawned by a mismatch of counsel: competent, knowledgeable attorneys on behalf of the federal government sought expansion of the federal power over federal lands; incompetent, unprepared attorneys on behalf of the private parties and states sought restriction of that power. Id. at 283-84 n.2, 287, 304 n.89, 314-15 n.142, 329, 339-40, 342-44, 346-48, 351-58; Engdahl, supra note 9, at 1210-11; see also Note, The Sagebrush Rebellion, supra note 3, at 530 (referring to Engdahl’s view that the Supreme Court in Kleppe v. New Mexico, 426 U.S. 529 (1976), ignored precedent). One might conclude that Professor Engdahl’s indignation is directed at the Court’s careless and confused departure from established precedent. In another context, however, Professor Engdahl applauds certain confusion and “poor analysis” on the part of the Court when it led to the abandonment of the old federal preemption doctrine that displaced far more state authority than the modern doctrine. See Engdahl, supra note 13, at 54-55 & n.10. Thus, there exist grounds for reasonable suspicion that Professor Engdahl is less concerned about judicial intellectual confusion and departure from established precedents than he is about their resulting
tion, therefore, it also is imperative to examine its case-law foundation.

The case-law basis of the classic theory, according to its proponents, can be traced to the 1845 Supreme Court decision in Pollard v. Hagan. To understand that decision, however, it is necessary to go back even further to the 1842 case of Martin v. Waddell's Lessee. The Martin Court considered the ownership of certain lands lying under navigable waters in New Jersey, one of the thirteen original states. The Court concluded that prior to the Revolution, the Crown had held title to such submerged lands. That title, however, was not absolute in the proprietary sense, but rather was held by the Crown in its sovereign capacity as a representative of the people and in trust for them. When the Revolution ended, the states, as the representatives of the people, succeeded to all of the incidents of sovereignty formerly held by the Crown. Thus, the Court held in Martin that the thirteen original states owned the lands lying under the navigable waters within their boundaries as an attribute of their sovereignty.

effect on states' rights, despite his assertion that he is not a states' rights proponent. See Engdahl, supra note 9, at 1204. The classic theorists' view of history, this author believes, is unconvincing and does not compel the conclusion that the classic theory was made a part of the Constitution by the Framers. This conclusion does not preclude the possibility that the Supreme Court formerly adhered to the classic theory as the proper constitutional interpretation of the property clause. See infra notes 221-22 (author's assertion that the Supreme Court never adhered to the theory).

See, e.g., Brodie, supra note 2, at 710-11, 713; Engdahl, supra note 5, at 293-96.

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


The action was one of ejectment for lands lying under the tidal waters of Raritan Bay and the Raritan River. Id. at 407. The primary subject of dispute was the right to an oyster fishery in the waters. Id. Plaintiff asserted title through grants running to the initial charters granted by King Charles II to the Duke of York in 1664 and 1674. Id. Defendant claimed title through state law. Id. at 408.

Id. at 409, 416. Since Magna Carta, the British Crown was deemed to own title to all navigable waters and the lands lying under them, not as private property, but in a governmental capacity as a public trust for the benefit of the people. Id. at 410-11. King Charles II, in his charters of 1664 and 1674, transferred to the Duke of York all proprietary and governmental powers over the lands that now constitute New Jersey to facilitate the establishment of a colony there. Id. at 407, 411-12. Subsequently, the Duke of York transferred his interest in the lands to 24 proprietors. Id. at 415. In 1702, however, those proprietors surrendered all powers of government to the Crown. Since title to the lands lying under the navigable waters originally had passed to the Duke of York as an incident of the powers of government, id. at 413-14, this surrender again vested title to the lands in question in the Crown, id. at 416, where it remained until the Revolution. Id. at 410, 416.

Id. at 415.

Id. at 411-13.

In the Court's words:

[W]hen the people of New Jersey took possession of the reins of government, and took into their own hands the powers of sovereignty, the prerogatives and regalities which before belonged either to the crown or the Parliament, became immediately and rightfully vested in the state. Id. at 416. The Court noted: "For 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 for their own common use, subject only to the rights since surrendered by the Constitution to the general government." Id. at 410.

The Court noted in its opinion that its conclusion applied not just to New Jersey, but to all of the original states. Id. at 410-11.

As a result of this conclusion, defendant, as the state's grantee, was held to have better title to the lands in question than plaintiff, whose title derived from the charters to the
Pollard v. Hagan\textsuperscript{151} raised the issue whether this principle was applicable to states other than the original thirteen. The case involved the question of title to certain lands in Mobile at the time Alabama became a state.\textsuperscript{152} These lands were regularly submerged by the Mobile River at high tide. Unlike the thirteen original states, Alabama was not the immediate institutional successor of the Crown. Instead, a period of federal sovereignty had intervened between the Crown’s rule and the creation of the State.\textsuperscript{153} The contention was made in Pollard, therefore, that the federal government had acquired title to the lands lying under the navigable waters as an attribute of its sovereignty and had retained that title even after Alabama was admitted to the Union.\textsuperscript{154} The Supreme Court disagreed, however, and extended the holding of Martin to states admitted after the thirteen original states.\textsuperscript{155} The Court reasoned that the federal government’s title to submerged lands was temporary only and in trust for the new states to be formed in the future.\textsuperscript{156} When Alabama was admitted to the Union, the State acquired all the attributes of sovereignty possessed by the thirteen original states, including title to lands lying under navigable waters\textsuperscript{157} as established in Martin.\textsuperscript{158}

Duke of York, but originated in a grant made after the surrender of governmental powers back to the Crown. \textit{Id.} at 407-08.

\textsuperscript{151} 44 U.S. (3 How.) 212 (1845).

\textsuperscript{152} Alabama was admitted to the Union on December 14, 1819. Act of Dec. 14, 1819, ch. 157, 3 Stat. 608. Testimony for defendant established that the lands in question were submerged at high tide until at least 1822 or 1823. \textit{Pollard}, 44 U.S. (3 How.) at 220. \textit{Pollard} was the last of a line of Supreme Court cases involving questions of title to the same lands. \textit{See id.} at 230-31 (Catron, J., dissenting).

\textsuperscript{153} Alabama was formed out of lands acquired by the federal government from three sources. The northernmost 12 to 14 miles of what is now Alabama were ceded to the Confederation by South Carolina in 1787. \textit{See T. Donaldson, The Public Domain} 68 (1884); Tallman, supra note 2, at 58. The area to the south of this narrow strip and north of latitude 31 degrees was ceded to the Confederation by Georgia in 1788. Tallman, supra note 2, at 59. The remaining part of Alabama, that portion south of latitude 31 degrees, arguably came into federal possession under the treaty effectuating the Louisiana Purchase in 1803. \textit{See id.} at 61-62. A dispute over the extent of that acquisition was resolved by the subsequent acquisition of Florida in 1819. \textit{Id.} at 62. Thus, title to the public lands in Alabama was held by the federal government at the time of the state’s formation and admission to the Union.

\textsuperscript{154} \textit{Pollard}, 44 U.S. (3 How.) at 220-21. Plaintiffs claimed title to the lands in question through a patent from the United States confirmed by two acts of Congress. \textit{Id.} at 219. They argued that the federal government by treaty had obtained title and jurisdiction over the lands to the same extent as previously held by the King of Spain. \textit{Id.} at 220, 225. When Alabama was admitted to the Union, plaintiffs argued, the State agreed to disclaim any right to the waste or unappropriated lands within the State and further agreed that the navigable waters within the State would remain public highways. \textit{Id.} at 220-21. Thus, according to plaintiffs, the State had relinquished voluntarily any claim to the submerged lands as a condition to its admission to the Union. Defendant, on the other hand, apparently was a mere trespasser in possession of the lands in question. \textit{Id.} at 232 (Catron, J., dissenting).

\textsuperscript{155} \textit{Id.} at 228-29.

\textsuperscript{156} \textit{Id.} at 221, 223, 224.

\textsuperscript{157} \textit{Id.} at 228-30. The Supreme Court has followed this holding consistently in numerous cases involving title to such lands. \textit{See Gaetke, supra} note 3, at 162-64.

\textsuperscript{158} \textit{Pollard}, 44 U.S. (3 How.) at 229. Plaintiffs’ grant from the United States occurred after Alabama became a state. The United States, therefore, was without title to the submerged lands at the time of the grant, \textit{id.} at 229-30, and plaintiffs’ title was worthless. The Court thus rejected plaintiffs’ two primary contentions. The first was that the federal government might obtain greater powers than those enumerated in the Constitution by acquiring them from a foreign government via a treaty. \textit{Id.} at 220. The Court concluded that a nation “ac-
The classic theorists make two primary assertions about *Pollard*. That case, they insist, evidences the Court's commitment to the concept of the equal-footing doctrine, which compelled the Court to extend the holding of *Martin* to new states admitted after the original thirteen. Furthermore, the classic theorists emphasize that the Court in *Pollard* expressly recognized a federal power of exclusive legislation within the states, both old and new, only in regard to article I property, not article IV property.

These assertions of the classic theorists cannot be criticized. Clearly the holding of *Pollard* is that, to equate the sovereignty of a new state with that of the original states, title to lands lying under navigable waters within a new state's boundaries must be vested in the state upon its admission. Having concluded that the submerged lands were not federal property, the Court's further assertion that article IV provides no grant of exclusive federal jurisdiction over federal property within a state is relegated to mere dictum. Nevertheless, this dictum cannot be challenged. Indeed, if article IV did provide such exclusive federal power, it would be difficult to imagine the function of the article I property clause power over that more limited category of federal property used for forts, arsenals, and so on, with the consent of the states.

The conclusion that the classic theorists derive from these assertions, however, is subject to criticism. They conclude that the Court in *Pollard* adopted the classic theory as constitutional doctrine, and emphasize that the Court established that a new state, upon its admission to the Union, acquires general governmental jurisdiction over all lands within its boundaries, the federal property to the same extent as the private. Consequently, when Congress merely acts in respect to federal lands under its article IV powers of disposal and regulation, the classic theorists conclude that *Pollard* authorizes the states to interfere

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162. *Id*.
163. The Supreme Court has noted directly that *Pollard* is not a limit on the article IV power of Congress. See *Arizona v. California*, 373 U.S. 546, 597-98 (1963); *see also* Coggins, Evans & Lindberg-Johnson, *supra* note 3, at 572 (*Pollard* is not controlling in the area of regulation of federal lands.).
165. *Id*.
This remarkable conclusion is not expressly stated by the Supreme Court in *Pollard*, as the classic theorists do and candidly must admit.\(^\text{167}\) Rather, they insist that the conclusion is implicit in the Court’s opinion.\(^\text{168}\) It is imperative to note, however, that their conclusion is implicit in *Pollard* only if the classic theorists’ view of the equal-footing doctrine is accepted. According to that view, the equal-footing doctrine precludes congressional use of a preemptive property clause power within a new state because no federal public domain lands subject to such a power existed within the thirteen original states.\(^\text{169}\) The equal-footing doctrine can be effectuated, according to the classic theorists, only by adherence to one of their two basic propositions. Either the federal government must relinquish all public domain lands when a new state is admitted to the Union,\(^\text{170}\) or the article IV power over retained public domain lands within a new state must be viewed as equivalent to the power of any private proprietor over land, a power subject to overriding state legislation.\(^\text{171}\) The first proposition would ensure that the new states are in the same factual situation regarding federal property as the original states, since no article IV property would lie in either.\(^\text{172}\) The second proposition would allow the federal government to retain article IV

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\(^{166}\) See id. at 296, 303. The classic theorists, however, recognize certain exceptions to this principle. See *supra* text accompanying notes 29-32; *infra* text accompanying notes 223-42.

\(^{167}\) Engdahl, *supra* note 5, at 295.

\(^{168}\) Id.


\(^{170}\) Patterson, *supra* note 1, at 57. Professor Patterson seems to suggest that such total disposal of federal lands was universally accepted as mandatory at the time of the cessions and ratification of the Constitution. Id. at 48-49. At least by the time of *Pollard*, however, there was legitimate dispute. Justice Catron, in his dissent in that case, noted that the federal government could retain lands within states. *Pollard*, 44 U.S. (3 How.) at 232 (Catron, J., dissenting).

\(^{171}\) Engdahl, *supra* note 5, at 295-96.

\(^{172}\) This more extreme proposition of the classic theorists views the article IV property clause to be merely a temporary grant of power to Congress. They maintain that Congress may exercise its authority over public lands only until the new state in which those lands lie is admitted to the Union. See, e.g., Patterson, *supra* note 1, at 55.

Certain language used by the Court in *Pollard* lends support to this contention. The *Pollard* Court stated:

> When Alabama was admitted into the Union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the deed of cession and the legislative acts connected with it . . . .

> Whenever the United States shall have fully executed these trusts, the municipal sovereignty of the new states will be complete, throughout their respective borders, and they, and the original states, will be upon an equal footing, in all respects whatever.

*Pollard*, 44 U.S. (3 How.) at 223-24 (emphasis added). It must be remembered, however, that at the time of *Pollard*, total disposal of federal lands still was the policy of the day. That policy was expressed in a 1789 statute adopting the terms of the Northwest Ordinance of 1787, thus statutorily committing the federal government to such disposition. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50. It would not be cautious, however, to ascribe constitutional significance to this language since the Court did not expressly do so. As an expression of constitutional doctrine the language at best is ambiguous dictum.
lands within the new states, but would prevent the application of a preemptive congressional power merely as a result of that federal retention. Under both propositions the preemptive exercise of the property clause power within a state is precluded, thus rendering the original and new states absolutely equal in respect to such power.

The classic theorists, however, ascribe to the equal-footing doctrine a far broader meaning than is necessary or is warranted by the Pollard decision. As used by the Pollard Court, the doctrine requires only that the sovereign powers of new states equal those of the original states. It does not require that the factual context for the application of federal powers be the same within the states. The states differ greatly in the extent to which certain federal powers actually are used and usable within their boundaries. Some states, for example, contain vast navigable waters rendering them more susceptible than other states to the congressional exercise of the commerce clause power. Similarly, some states have greater populations of Indians than others, presenting a greater probability of congressional use of its power over such persons in the former than in the latter. Numerous other examples could be listed to illustrate that the states were not and could never have been intended to be equal in the extent to which the enumerated powers of the federal government would apply within

173. Of course other enumerated powers of Congress could be exercised preemptively in regard to the retained public lands. The mere federal ownership of lands within the state, however, would provide no preemptive article IV power.

174. Pollard, 44 U.S. (3 How.) 228-29; see also United States v. Texas, 339 U.S. 707, 716 (1950) ("The requirement of equal footing was designed not to wipe out those diversities [in the economic aspects of the states] but to create parity as respects political standing and sovereignty."); Clark, supra note 3, at 150 ("The powers and rights so reserved to the original states, and vested in the subsequently admitted states under the 'equal footing' clause, are political and not proprietary in character."); Coggins, Evans & Lindberg-Johnson, supra note 3, at 575 ("The doctrine was formulated to assure political parity, not economic or geophysical equality.").

175. See Note, The Sagebrush Rebellion, supra note 3, at 522-23. No federal public domain lands existed within the 13 original states at the time of the ratification of the Constitution. Thus, the article IV property clause power had no application within those states at that time. The classic theorists equate this factual situation with the quantum of sovereignty possessed by the original states. In other words, the classic theorists maintain that the original states must not have given up any aspect of their sovereignty in regard to federally owned public domain lands because no such lands existed within those states at the time of the states' ratification of the Constitution. The classic theorists' view of the equal-footing doctrine, therefore, is based on the unstated premise that the extent of the 13 original states' sovereignty is determined by the factual applicability of federal powers within those states at the time of the ratification of the Constitution. See supra note 169.

Another more plausible premise is possible. Although no federal public domain lands existed within the 13 original states in 1787, those states relinquished to Congress under article IV the power to dispose of and to regulate lands that were then in the possession of the federal government, all lying outside of existing states at the time, and any lands that might in the future come into its possession, which might well include article IV lands acquired within the 13 original states. See infra note 178. This premise permits full implementation of the equal-footing doctrine since all states are subject to valid use of the property clause power to the extent it is or becomes factually applicable within their boundaries.

176. U.S. CONST. art. I, § 8. The State of Minnesota contains more than 15,000 lakes, most of them navigable, as well as numerous navigable rivers. It is probable, therefore, that congressional commerce powers over navigable waters may be exercised to a greater extent in Minnesota than in some arid states. It cannot be said, however, that Minnesota is less than coequal with those arid states in terms of sovereignty because its factual circumstances warrant greater application of certain federal powers.

177. Id. Federal power over Indians is found in U.S. CONST. art. I, § 8.
their boundaries. The mere existence of these differences in the factual applicability of federal power among the states in no way detracts from the degree or quality of the sovereignty residing in each of the states.\textsuperscript{178} To the extent each state has relinquished to the federal government only those powers enumerated in the Constitution and has retained the remaining attributes of sovereignty, each state's sovereignty by definition is equal. The Court's use of the equal-footing doctrine in \textit{Pollard} merely precludes the relinquishment of any further powers by new states\textsuperscript{179} and ensures that they are "states" possessing all the attributes of sovereignty enjoyed by the original states.\textsuperscript{180} That conclusion, of course, became the rationale of a whole line of subsequent Supreme Court cases denying Congress the power to condition the admission of a new state on its relinquishment of powers possessed by existing states.\textsuperscript{181}

The classic theorists fail to provide any convincing justification for accepting their broad view of the equal-footing doctrine, which is essential to the

\textsuperscript{178} Each state is subject to the property clause power of Congress. Even the 13 original states, which contained no article IV property within their established boundaries at the time of the ratification of the Constitution, were subject to that power. At that time, however, the factual circumstances did not exist for the utilization of the power. That is not to say, however, that the governmental sovereignty of the 13 original states is any greater than that of the western "public domain" states. When the federal government subsequently obtained article IV lands within those original states, the factual circumstances then required the utilization of the property clause power there as well. See, e.g., 16 U.S.C. § 459f-1 (1982) (acquisition of lands within New York for creation of the Fire Island National Seashore); id. § 459f-1 (1982) (acquisition of lands within Maryland and Virginia for creation of the Assateague Island National Seashore); id. § 459g-1 (1982) (acquisition of lands within North Carolina for creation of the Cape Lookout National Seashore).

\textsuperscript{179} The Court concluded in \textit{Pollard v. Hagan}: "Then to Alabama belong the navigable waters, and soils under them, in controversy in this case, subject to the rights surrendered by the Constitution to the United States: and \textit{no compact that might be made between her and the United States could diminish or enlarge these rights}". \textit{Pollard}, 44 U.S. (3 How.) at 229 (emphasis added).

The Court viewed title to the submerged lands to be a significant aspect of sovereignty that might be used to the great detriment of a state if vested in the federal government. \textit{Id.} at 230.

\textsuperscript{180} \textit{Pollard} resolves a critical question on the extent of federal title to lands within new states and is an important property clause case. It decides what is and what is not federal property within a new state. The case is perhaps more significant, however, as an interpretation of the congressional power to admit new states. U.S. CONST. art. IV, § 3, cl. 1.

There was considerable potential for conflict between the two constitutional provisions. If the property clause was interpreted to permit a compact that deprived the new state of its title to submerged lands, then the new states admitted under such a compact would be something less than "states" when compared to the 13 original states. On the other hand, if the power to admit new states was interpreted to prohibit such compacts, the congressional power to deal with the federal property under the property clause would be restricted.

The Court's decision in \textit{Pollard} soundly resolved the conflict. It implicitly recognized that other constitutional provisions place restrictions on the power of Congress to "dispose of and make all needful Rules and Regulations" respecting federal lands. In summarizing its conclusions the Court stated:

First, the shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively. Secondly, the new states have the same rights, sovereignty, and jurisdiction over this subject as the original states. Thirdly, the right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy in this case.


Congress, therefore, must exercise the property clause power consistently with other provisions of the Constitution. To that extent, the Court in \textit{Pollard} decided a property clause issue beyond the mere title question.

\textsuperscript{181} See Coyle v. Oklahoma, 221 U.S. 559, 570-77 (1911).
inference they wish to draw from Pollard.\textsuperscript{182} Their historical justification based on the cessions during the Confederation already has been shown to be, if not totally erroneous, at least open to substantial doubt.\textsuperscript{183} No reliance can be placed on the Framers' intent because the record of the Constitutional Convention clearly indicates that they considered and expressly rejected the very notion of the equal-footing doctrine as a limit on congressional power to admit new states.\textsuperscript{184} Finally, there is no hint even in the most casual dictum of Pollard that the Court intended to ascribe such a broad meaning to the equal-footing doctrine. Pollard, therefore, provides a strikingly weak foundation for the argument that the classic property clause theory once was established constitutional doctrine.\textsuperscript{185}

The classic theorists offer no better support. Even the post-Pollard cases

\textsuperscript{182} The Court in three places in Pollard makes statements that arguably lend some support to the classic theorists' view that the mere federal retention of land within a new state reduces that state's sovereignty. In discussing the admission of Alabama to the Union, the Court noted:

When Alabama was admitted into the union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the deed of cession and the legislative acts connected with it.

Pollard, 44 U.S. (3 How.) at 223 (emphasis added). The Court also stated:

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.

Id. at 224 (emphasis added). Similarly, the Court stated: "Whenever the United States shall have fully executed these trusts, the municipal sovereignty of the new states will be complete, through their respective borders, and they and the original states will be on an equal footing, in all respects whatever." Id. (emphasis added). The emphasized language in each of these quotations may be read as endorsements of the classic theorists' strict principle that the mere existence of article IV property within a new state reduces its sovereignty.

Because the Court decided that the lands in question were not federal property, the quoted language is dictum. It should be noted further, however, that the emphasized language within that dictum also may be read as carefully avoiding any conclusion by the Court on the principle asserted by the classic theorists. The Court merely states that new states are equal in sovereignty to the original states "except so far as" the retention of federal lands reduces that sovereignty, without declaring that such retention indeed does reduce it.

\textsuperscript{183} See supra text accompanying notes 61-82, 118-38.

\textsuperscript{184} See supra text accompanying note 127.

\textsuperscript{185} There is strong language in Pollard which supports a conclusion that the Court expressly recognized a preemptive property clause power in Congress. The Court, in discussing the provision within the act admitting Alabama into the Union whereby the State agreed "[t]o disclaim all right and title to the waste or unappropriated lands lying within the said territory; and that the same shall be and remain at the sole and entire disposition of the United States," stated that such a provision, cannot operate as a contract between the parties, but is binding as a law. Full power is given to Congress "to make all needful rules and regulations respecting the territory or other property of the United States." This authorized the passage of all laws necessary to secure the rights of the United States to the public lands, and to provide for their sale, and to protect them from taxation.

And all constitutional laws are binding on the people, in the new states and the old ones, whether they consent to be bound by them or not. Every constitutional act of Congress is passed by the will of the people of the United States, expressed through their representatives, on the subject-matter of the enactment; and when so passed, it becomes the supreme law of the land, and operates by its own force on the subject-matter, in whatever state or territory it may happen to be. The proposition, therefore, that such a law cannot operate upon the subject-matter of its enactment, without the express consent of the people
they cite fall short of adopting the classic theory. The classic theorists main-
tain\textsuperscript{186} that the Court's adoption of their theory in \textit{Pollard} was reiterated in 1896 in \textit{Ward v. Race Horse}.\textsuperscript{187} That case involved a treaty between the United States and a tribe of Indians which had been executed before formation of the Wyoming Territory. The treaty granted the tribe the right to hunt "upon the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts."\textsuperscript{188} The issue that the case presented was whether the hunting rights under the treaty continued after the admission of Wyoming to the Union.\textsuperscript{189} An affirmative conclusion would have deprived the State of the power to control the taking of game within a substantial portion of its territory.\textsuperscript{190} The Court concluded, however, that the act admitting Wyoming to the Union showed no congressional intention to continue the Indian hunting rights within the newly admitted State.\textsuperscript{191} The Court held, therefore, that the hunting rights had been terminated by that act.\textsuperscript{192}

There are two primary difficulties in relying on \textit{Race Horse} to support the classic property clause theory. First, the property clause power of Congress was not at issue in the case. \textit{Race Horse} was a case involving the interpretation of the treaty power and the power to admit new states.\textsuperscript{193} Second, even if one wishes to apply by analogy the Court's reasoning in \textit{Race Horse} to an exercise of the property clause power, the decision falls far short of enunciating anything like the classic theory. The Court merely held that Congress had not used its treaty power to restrict the state's power over the killing of game, leaving unad-
dressed whether Congress could do so.\textsuperscript{194}

\begin{footnotesize}
of the new state where it may happen to be, contains its own refutation, and requires no further examination.
\end{footnotesize}

\textit{Pollard}, 44 U.S. (3 How.) at 224-25 (emphasis added). Since the only congressional power under discussion at this point in the opinion is the property clause power, it would appear that the Court is referring to it when discussing the supremacy clause and preemption.

\textsuperscript{186} See, e.g., Engdahl, \textit{supra} note 5, at 303, 357 n.332.

\textsuperscript{187} 163 U.S. 504 (1896).

\textsuperscript{188} \textit{Id.} at 505.

\textsuperscript{189} \textit{Id.} at 507.

\textsuperscript{190} \textit{Id.} at 510, 514. Less than three months before its decision in \textit{Race Horse} the Court had held that the states owned the wild game within their boundaries as an attribute of their sovereignty. See \textit{Geer v. Connecticut}, 161 U.S. 519, 527-28 (1896).

\textsuperscript{191} \textit{See Race Horse}, 163 U.S. at 515-16.

\textsuperscript{192} \textit{Id.}

\textsuperscript{193} \textit{Id.} at 507, 511.

\textsuperscript{194} \textit{Id.} at 515-16. The Court noted:

\begin{footnotesize}
[T]his case involves a question of whether where no reservation exists a State can be stripped by implication and deduction of an essential attribute of its governmental exist-
ence. Doubtless the rule that treaties should be so construed as to uphold the sanctity of the public faith ought not to be departed from. But that salutary rule should not be made an instrument for violating the public faith by destroying the words of a treaty, in order to imply that it conveyed rights wholly inconsistent with its language and in conflict with an act of Congress, and also destructive of the rights of one of the States.
\end{footnotesize}

\textit{Id.} at 516 (emphasis added). The Court also stated:

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
The classic theorists also view *Kansas v. Colorado* as indicative of the Court's adherence to the classic theory. That case involved a dispute between two states regarding the flow of the Arkansas River and its use for reclamation of arid lands. The United States had intervened to assert that the federal government possessed the inherent power to resolve this dispute legislatively. The Court rejected this contention, however, concluding that the matter was not within the enumerated powers of the federal government. One of the constitutional powers claimed by the United States as authority for such federal control was the property clause power. The Court emphasized that the extensive power of Congress under that clause did not authorize legislation which "can override state laws in respect to the general subject of reclamation."

The classic theorists assert that this language from *Kansas v. Colorado* evi-

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. The enabling act declares that the State of Wyoming is admitted on equal terms with the other States, and this declaration . . . repels any presumption that in this particular case Congress intended to admit the State of Wyoming with diminished governmental authority.

Id. at 514-15 (emphasis added). The Court undoubtedly was concerned about a conclusion that would render Wyoming inferior to the other states in terms of sovereignty. The Court's nearly contemporaneous decision in *Geer v. Connecticut*, 161 U.S. 519 (1896), was clearly in mind. See *supra* note 190. The *Geer* and *Race Horse* opinions both were written by Justice White. The Court was able to avoid this troubling issue, however, only by its careful construction of the terms of the treaty and the act admitting the State to the Union. An assertion that *Race Horse* is not merely a case of interpretation of the treaty and statute, see Engdahl, *supra* note 5, at 303 n.86, 357 n.332, therefore, is inaccurate. Because of the Court's construction of the treaty and statute, the troublesome constitutional issue was avoided.

That issue already had been decided in a related context, however, in *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866). The question presented there was whether Kansas could constitutionally tax lands owned by Indians under patents issued pursuant to certain treaties with the United States. Id. at 737. The act admitting Kansas into the Union, contrary to that of Wyoming interpreted in *Race Horse*, expressly had conditioned admission upon the continuation of the rights of the Indians. *Id.* at 754, 756. According to the Court:

> While the general government has a superintending care over [the tribe's] interests, and continues to treat with them as a nation, the State of Kansas is estopped from denying their title to it. She accepted this status when she accepted the act admitting her into the Union . . . . As long as the United States recognizes their national character they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of State laws.

*Id.* at 757; *see also* *The New York Indians*, 72 U.S. (5 Wall.) 761 (1866) (in accord with a previous treaty, Court rules State of New York cannot tax the Alleghany and Cattaraugus Indian reservations as long as they remain the property of the Seneca Indian nation). Thus, the Court at the time of *Race Horse* already had held in other contexts that a state might consent to conditions on its admission if those conditions were within the enumerated powers of Congress to impose. *See also* Pollard, 44 U.S. (3 How.) 219, 224-25 (1844) (Consent of newly admitted state to federal power over navigable waters was constitutional.). It does not seem likely, therefore, that the Court would have hesitated to hold similarly in *Race Horse* had it interpreted the treaty and act of admission as imposing such a condition.

195. 206 U.S. 46 (1907).
196. *See*, e.g., Engdahl, *supra* note 5, at 303-04.
198. *Id.* at 49, 54-57.
199. *Id.* at 85-94.
200. *Id.* at 86-87, 88-89.
201. *Id.* at 92. The Court's most crucial language regarding the property clause is as follows:

> At the time of the adoption of the Constitution within the known and conceded limits of the United States there were no large tracts of arid land, . . . . [T]he Constitution,
dences the Court’s commitment to the classic theory’s primary contention that the property clause gives Congress no greater power over federal lands than that possessed by an ordinary proprietor. Their assertion, however, again reads too much into the dictum of the Court. The Court’s discussion of the property clause was in response to the contention that the clause implicitly conferred on Congress the power totally to displace state law concerning the acquisition of water rights. The Court was unwilling to subscribe to such a reading of the property clause. The Court’s language, however, is not necessarily an adoption of the classic theory. It expressly recognized the congressional power under the property clause to regulate reclamation of the arid federal lands, both within territories and new states, although it expressed no opinion about the preemptive effect of such legislation. Kansas v. Colorado merely rejected the notion that the property clause inherently vests the federal government with the authority to dictate to the states the acceptable system of water law.

The Supreme Court case most supportive of the classic theory is Fort Leavenworth Railroad Co. v. Lowe. At issue was the power of Kansas to tax the private property of a railroad located within the confines of a military post. The post was situated on public domain lands retained by the federal government, therefore, makes no provision for a national control of the arid regions or their reclamation.

... It does not follow from this that the National Government is entirely powerless in respect to this matter. These arid lands are largely within the Territories, and over them by virtue of the second paragraph of section 3 of Article IV heretofore quoted, or by virtue of the power vested in the Government to acquire territory by treaties, Congress has full power of legislation, subject to no restriction other than those expressly named in the Constitution, and, therefore, it may legislate in respect to all arid lands within their limits. As to those lands within the limits of the States, at least of the Western States, the National Government is the most considerable owner and has power to dispose of and make all needful rules and regulations respecting its property. We do not mean that its legislation can override state laws in respect to the general subject of reclamation. While arid lands are to be found, mainly if not only in the Western and newer States, yet the powers of the National Government within the limits of those States are the same (no greater and no less) than those within the limits of the original thirteen, and it would be strange if, in the absence of a definite grant of power, the National Government could enter the territory of the States along the Atlantic and legislate in respect to improving by irrigation or otherwise the lands within their borders. Nor do we understand that hitherto Congress has acted in disregard to this limitation.

Id. at 91-92.

203. The classic theorists recognize that the Court’s discussion of the property clause power is dictum. Id. at 304 n.89. No exercise of the property clause power was under review in that case.
204. The Court, referring to the property clause power, stated:

[C]learly it does not grant to Congress any legislative control over the States, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits. Appreciating the force of this, counsel for the Government relies upon "the doctrine of sovereign and inherent power," adding "I am aware that in advancing this doctrine I seem to challenge great decisions of the court, and I speak with deference."

Kansas v. Colorado, 206 U.S. at 89 (emphasis added).
205. Id.
206. Id. at 92.
207. Id. at 89, 92.
208. 114 U.S. 525 (1885).
209. Id. at 525.
ment after Kansas was admitted to the Union,\textsuperscript{210} and, therefore, was article IV rather than article I property.\textsuperscript{211} Thus, the power of the State in relation to article IV property was directly in controversy.\textsuperscript{212} Since no property clause legislation of Congress was at issue in the case, however, the Court's discussion relating to the classic theory is dictum. Nevertheless, some of that dictum is quite consistent with the classic theory. The Court noted that within the states the federal government retains over article IV lands "only the rights of an ordinary proprietor,"\textsuperscript{213} and that the State "could have exercised . . . the same authority and jurisdiction which she could have exercised over similar property held by private parties."\textsuperscript{214} The inference that the classic theorists would have us draw from this language is that the Court is professing that state legislation prevails over property clause legislation as much as over the wishes of private proprietors.\textsuperscript{215}

It is not clear from the opinion in Lowe, however, that the Court had anything quite so extraordinary in mind. The issue being discussed was the effect of the state's retention, contained in its purported cession of jurisdiction to the federal government, of the power to tax private property on the military post.\textsuperscript{216} The Court, therefore, had two issues before it: whether the state's qualified cession converted the military post into article I property\textsuperscript{217} and, if not, whether the mere ownership of federal lands precluded the exercise of state powers

\textsuperscript{210} Id. at 526.
\textsuperscript{211} Although the lands were used for a fort, one of the uses specified in the article I clause, they were not purchased with the consent of the state legislature. The lands, therefore, did not qualify as federal enclaves subject to the "exclusive legislation" of Congress. See supra note 5.
\textsuperscript{212} Fourteen years after Kansas was admitted to the Union, the state legislature ceded jurisdiction over the military post back to the federal government. Lowe, 114 U.S. at 527-28. In that cession, however, the State expressly reserved "the right to tax railroad, bridge, and other corporations, their franchises and property, on said Reservation." \textit{Id.} at 528. The railroad nevertheless contended that the cession vested "exclusive legislation" in Congress, \textit{id.} at 528, 542, and the state tax consequently was invalid. \textit{Id.} at 542. The Court disagreed, however, upholding the reservation of the power to tax. \textit{Id.} Since the reservation of taxation jurisdiction did not interfere with the use of the lands for a military post, it preserved the state's power to tax the property described. \textit{Id.}
\textsuperscript{213} \textit{Id.} at 527.
\textsuperscript{214} \textit{Id.} The Court also stated:

[T]he possession of the United States [of article IV lands], unless political jurisdiction be ceded to them in some other way, is simply that of an ordinary proprietor. The property in that case, unless used as a means to carry out the purposes of the government, is subject to the legislative authority and control of the States equally with the property of private individuals.

\textit{Id.} at 531. Similarly, the Court declared: "[W]hen not used as . . . instrumentalities [for the execution of its enumerated powers], the legislative power of the State over the places acquired will be as full and complete as over any other places within her limits." \textit{Id.} at 539. Furthermore, the Court viewed the state's cession of jurisdiction over the article IV lands in question to be temporary only: "It is necessarily temporary, to be exercised only so long as the places continue to be used for the public purposes for which the property was acquired or reserved from sale. When they cease to be thus used, the jurisdiction reverts to the State." \textit{Id.} at 542. The opinion, however, does not discuss whether the article IV property clause power to regulate the federal lands is one of the "purposes of government." If the article IV power is of equal stature with the other enumerated powers of Congress, the states' authority over federal lands may be displaced by contrary article IV legislation, even under the language quoted above.

\textsuperscript{215} See Brodie, \textit{supra} note 2, at 710-11; Engdahl, \textit{supra} note 5, at 298-300.
\textsuperscript{216} Lowe, 114 U.S. at 526-28.
\textsuperscript{217} \textit{Id.} at 528.
within the boundaries of those lands.\textsuperscript{218} The Court answered both in the negative.\textsuperscript{219} Taken in the factual context of the case, therefore, the Court’s language is not so striking. Certainly the states possess the power to regulate conduct on federal lands in the absence of any congressional legislation. In such situations federal lands are no different than private lands, and Congress is a mere proprietor.\textsuperscript{220} Should Congress use the property clause power in a manner contrary to the state law, however, quite a different situation is presented. There is no hint in \textit{Lowe} that the Court contemplated that situation when it used its broad dictum regarding article IV lands.

The cases cited by the classic theorists are exceedingly weak evidence that the Supreme Court once was committed to their theory.\textsuperscript{221} The classic theorists are unable to identify a single Supreme Court opinion that incorporates the classic theory in its holding. This is the most serious shortcoming of the argument that the classic theory once was established constitutional doctrine and that the Supreme Court’s present broad view of the clause is a break with that doctrine. Furthermore, even the dicta cited by the classic theorists are ambiguous at best. Although those dicta certainly are susceptible of interpretations consistent with

\begin{itemize}
  \item 218. \textit{Id.} at 539-42.
  \item 219. \textit{Id.} at 537-38, 542.
  \item 220. \textit{Id.} at 527.
  \item 221. The classic theorists point to three other Supreme Court cases as indicating the Court’s prior adherence to the classic theory. \textit{See}, e.g., \textit{Engdahl}, \textit{supra} note 9, at 1209 n.45. One is \textit{Bacon v. Walker}, 204 U.S. 311 (1907). In \textit{Bacon} the Court considered the constitutionality of a state statute prohibiting the grazing of sheep on another’s land within two miles of a dwelling. \textit{Id.} at 314. The statute was challenged, however, under the fourteenth amendment, not the property clause, which is never mentioned in the opinion. The decision, therefore, is at most indicative of the Court's adherence to the principle that state police power legislation applies to conduct on article IV lands. Without gross assumptions based on the Court’s lack of discussion of the property clause, the case cannot be read as an endorsement of the classic theory’s contention that state law overrides contrary property clause legislation. No such issue was raised or discussed.

  Similar state legislation was reviewed in \textit{Omaechevarria v. Idaho}, 246 U.S. 343 (1918). That legislation outlawed the grazing of sheep on ranges previously occupied by cattle. \textit{Id.} at 345. Among other objections, the appellant asserted that the state legislation conflicted with the Unlawful Inclosures of Public Lands Act of 1885, 43 U.S.C. §§ 1061-1066 (1982), enacted by Congress under the property clause. \textit{Omaechevarria}, 246 U.S. at 349; \textit{see infra} note 238 (further discussion of this statute). The Court disagreed. It concluded that the federal legislation was intended solely to prohibit the assertion of exclusive rights to the use of public lands by fencing or force. \textit{Omaechevarria}, 246 U.S. at 351. Since the state legislation did not purport to grant a right to use the public lands to any individual, \textit{id.} at 352, the Court held that the legislation was not in conflict with the federal statute. \textit{Id.} at 351-52. \textit{Omaechevarria}, therefore, does not reach the classic theorists’ contention that state law supersedes conflicting congressional property clause enactments. The Court found no conflict to exist.

  The third additional case cited by the classic theorists is \textit{Colorado v. Toll}, 268 U.S. 228 (1925). Colorado challenged the assertion by the superintendent of the Rocky Mountain National Park of exclusive jurisdiction over the roads within the park. \textit{Id.} at 229-30. Those roads had been built by the State and its subdivisions prior to the creation of the park. \textit{Id.} at 230. The state’s bill in equity alleged that the federal legislation creating the park failed to assert such exclusive jurisdiction. \textit{Id.} at 231. The Court agreed and concluded that “the rights of the State over the roads are left unaffected in terms” under the congressional enactments. \textit{Id.} Thus, the Court apparently agreed with the state’s contention that the federal legislation did not authorize the assertion of such broad authority by the superintendent. Since the State additionally alleged that it had not ceded such exclusive jurisdiction to the federal government, \textit{id.}, the Court concluded that the district court erred in dismissing the state’s bill for want of equity. \textit{Id.} at 230, 231-32. Because of the Court’s conclusion that the federal legislation did not attempt to displace state authority over the roads, there is no indication in the opinion on the constitutional result if such an attempt had been made by Congress.
\end{itemize}
the classic theory, they are equally susceptible of other less expansive readings. What the classic theorists fail to offer, however, is a convincing reason for accepting their broad interpretation of these dicta. What they do offer as their reason, of course, is their view of the historical setting preceding the cases. Their view of history, however, is itself suspect. Unless one is convinced by their assertions regarding history, the case-law foundation of the classic theorists fails as well.

III. THE EXCEPTIONS TO THE CLASSIC THEORY

The classic theorists recognize certain exceptions to their primary assertion that the property clause grants Congress only those powers of a private proprietor. Those exceptions, however, considerably undermine the persuasiveness of the theory. First, the reasoning used by the classic theorists to justify the exceptions also justifies the Supreme Court's current broad view of the property clause power, which the classic theorists so strenuously criticize. Second, the exceptions, when carefully read, are so extensive in scope that they largely consume the classic theory.

The classic theorists recognize that congressional exercises of the property clause power have preemptive effect in two instances. First, when Congress

222. See Engdahl, supra note 5, at 292-95.

223. The classic theorists also recognize that article IV property might be utilized to effectuate some other enumerated power of Congress. See supra note 29. Contrary state law must yield to such federal utilization of article IV property, not because of the property clause power, but because of the other enumerated power exercised. Id. The classic theorists, it must be remembered, do not perceive the property clause to be an "enumerated power" of Congress, but rather a mere proprietary power. See supra text accompanying notes 33, 108-17, 169-73.

Moreover, the classic theorists recognize that states may cede further jurisdiction over article IV property to the federal government. See supra note 29. They insist that this power is limited to cessions regarding the exercise of some enumerated, nonproperty clause power of Congress. Id. The Supreme Court, however, has not restricted such cessions in this manner. See Collins v. Yosemite Park & Curry Co., 304 U.S. 518, 528-30 (1938). The classic theorists maintain that the Court's approach is a rejection of the established classic theory. See Engdahl, supra note 5, at 324-25.

Some of these state cessions were contained in acts relating to the admission of new states to the Union. Montana, for example, ceded exclusive jurisdiction over Yellowstone National Park to the federal government upon its admission. See Act of Feb. 14, 1891, 1891 MONT. LAWS 262. Such cessions and their judicial acceptance, see Yellowstone Park Transp. Co. v. Gallatin County, 31 F.2d 644 (9th Cir.), cert. denied, 280 U.S. 555 (1929), undermine the classic theorists' contention that superior state jurisdiction over article IV lands is a mandatory component of state sovereignty. The Supreme Court has interpreted the admission power of Congress under article IV, § 3, cl. 1, as authorizing the admission only of "states" with all aspects of sovereignty possessed by the 13 original states. See Coyle v. Smith, 221 U.S. 559, 570-77 (1911). If superior state jurisdiction over article IV lands was a matter of state sovereignty, as urged by the classic theorists, cessions like Montana's would violate the Court's view of the power of Congress to admit new states. That such cessions are deemed acceptable underscores and supports the contention that the absence of article IV lands within the 13 original states did not define their sovereignty in regard to such lands. See supra text accompanying notes 174-81. Cessions such as that made by Montana did not cede any authority that the federal government did not already possess, even if not exercised, regarding federal lands. In this respect, Montana's cession was similar to that contained in the acts admitting the states of Alabama, discussed in Pollard v. Hagan, 44 U.S. (3 How.) 212, 224-25 (1843) (condition regarding navigable waters within the state), and Kansas, discussed in The Kansas Indians, 72 U.S. (5 Wall.) 737, 754-756 (1866) (condition regarding Indian tribes within the state).

Judicial acceptance of cessions such as Montana's also underscores the fact that the property clause power is indeed an enumerated power of Congress. The cession of jurisdiction by the state relinquishes nothing more than what was permissible as an exercise of power granted Congress by
acts merely to control the acquisition of title to article IV lands, the states are precluded from acting. Second, when Congress legislates to protect article IV lands from harm, contrary state law must yield.

The Supreme Court held in 1839 that Congress controls the acquisition of title to federal lands notwithstanding contrary state law. That authority is derived from the property clause power “[to dispose of]” federal lands. The classic theorists are willing to recognize this preemptive use of the property clause power, but only as an exception to their theory. A contrary rule, they reason, would engender considerable inconsistency and confusion. It is not immediately apparent, however, why a similar concern does not justify a preemptive congressional power to make “all needful Rules and Regulations” respecting federal lands. Certainly the variations in state laws on such regulatory matters could cause considerable confusion as well. No explanation is offered by the classic theorists, however, to justify this bifurcated constitutional approach to the powers granted by the property clause.

The second exception recognized by the classic theorists pertains to congressional property clause legislation intended to protect federal lands from harm. The leading case upholding this power is Camfield v. United States. In Camfield the Court upheld property clause legislation that prohibited the use of fences to enclose federal lands, even though that fencing was erected on private lands. That legislation directly conflicted with state common law which the Constitution. A contrary contention renders invalid cessions made by virtually all states admitted at least since 1819. The admission of all states since then has been conditioned on the states' agreement not to interfere with unappropriated federal lands. If superior state authority over such land is a matter of state sovereignty, it would appear that such agreements violate the principle of Coyle v. Smith, 221 U.S. 559 (1911).


225. Wilcox v. Jackson, 38 U.S. (13 Pet.) 498, 516-17 (1839). Professor Engdahl asserts that this exception is based solely on language in the Northwest Ordinance of 1787 and the subsequent enabling legislation admitting new states into the Union. Engdahl, supra note 9, at 1209 & n.45. The language prohibited state interference with the disposal of federal lands. In light of the congressional property clause power “to dispose of” the federal lands, it is not apparent why reliance need be placed on legislative language to justify broad congressional discretion.

226. See supra note 31; see also Engdahl, supra note 5, at 351-52 (discussing recognition “from the outset” that federal power over federal lands is an exception to the governmental jurisdiction of the states).


228. Presumably their view of history and the adoption of the property clause provides the rationale for this approach. Since the classic theorists are convinced that the Framers intended article IV to grant Congress only the powers of a private proprietor over federal lands, the recognition of a preemptive congressional power in the title cases certainly must be a mere exception. The title cases themselves, however, contain no language supporting this approach. See Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275 (1958); United States v. California, 332 U.S. 19 (1947); Utah Power & Light Co. v. United States, 243 U.S. 389 (1917); Gibson v. Chouteau, 80 U.S. (13 Wall.) 92 (1872); Irvine v. Marshall, 61 U.S. (20 How.) 558 (1858); Jourdan v. Barrett, 45 U.S. (4 How.) 169 (1846); Wilcox v. Jackson, 38 U.S. (13 Pet.) 498 (1839); Bagnell v. Broderick, 38 U.S. (13 Pet.) 436 (1839); Ross v. Doe ex reL Barland, 26 U.S. (1 Pet.) 655 (1828).

229. Engdahl, supra note 5, at 306-08.
permitted the fencing of private lands. The classic theorists view the preemptive power of Congress affirmed in *Camfield* as an exception to their theory that congressional property clause legislation must yield to contrary state law. Necessity and practicality again seem to be the justification for this exception. They stress that the preservation of federal lands from destruction and harm is essential to the maintenance of those lands. Thus, according to the classic theorists, the *Camfield* exception is a narrow one, applicable only to the necessary circumstances of physical threats to the land. It is not clear, however, why congressional property clause legislation that is "needful" to protect federal lands from harm should be given preemptive effect whereas legislation deemed "needful" for other reasons should not be given such effect. The classic theorists, of course, read the power affirmed in *Camfield* as narrowly as possible to maintain as much of their theory as possible. Their practical justification, however, applies equally to all regulation of federal lands considered "needful" by Congress.

The reasoning offered by the classic theorists for the exceptions to their theory undercuts the theory itself. That reasoning applies to other, much broader uses of the property clause power. No language of the Court expressly declares these examples of preemptive property clause legislation to be exceptions to a general, more restrictive rule. Furthermore, no compelling reason is offered for inferring such a result from the cases other than that the recognition of a preemptive property clause power in these instances conflicts with the classic theorists' basic historical view that the property clause was not intended to convey such a power. For those unconvinced by the classic theorists' view of history, however, there is no reason not to apply the rationale for the "exceptions" to all exercises of the property clause power.

The true breadth of the exceptions recognized by the classic theorists also goes far toward undermining their theory by effectively consuming the general rule. The admitted power of Congress to legislate preemptively regarding the acquisition of title to federal lands encompasses a significant portion of property clause legislation. For the first century of this nation's existence, such legislation appears to be the nearly exclusive use of the property clause power.

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232. *Id.* at 523. The Court noted that a private proprietor is entitled to construct a fence on his land. *Id.* Although the Court discussed certain legislation in other states prohibiting "spite fences"—excessively high fences intended to annoy neighbors—there is no indication that the fences in *Camfield* were such fences. *Id.* Presumably they were typical range fences built on private property. See *id.* at 520-21 (describing the fencing scheme).


234. Some classic theorists see the exception as merely the application of the necessary and proper clause. See, e.g., *id.* at 307-08. It is not immediately apparent, however, why the property clause power might thus benefit from the necessary and proper clause, U.S. Const. art. I, § 8, cl. 18, and not the supremacy clause, U.S. Const. art. VI, cl. 2, as the classic theorists contend.


236. See generally T. Watkins & C. Watson, *supra* note 37, at 45-71 (discussing the history of the western land system from 1785 to 1841); Tallman, *supra* note 2, at 67-78. It was only in the late nineteenth century that federal policy toward the public domain substantially reflected concerns other than disposition, such as conservation. See *id.* at 78-81; Note, *The Sagebrush Rebellion,* supra note 3, at 506-09.
Although the classic theorists view this exception as conceptually narrow, as a practical matter it represents a major limitation on the efficacy of their theory.

Similarly, the exception for protective legislation, when properly perceived, substantially consumes the remainder of the theory. The classic theorists' reading of Camfield is far too restrictive. The statute under review was not intended to protect federal lands from harm, but rather to encourage further public use of those lands. Congress was protecting its policy for the use of federal lands, not the federal lands themselves. Thus, Camfield affirms a much broader preemptive use of the property clause power than the classic theorists admit. When Congress legislates under the property clause to further its policy for the use of federal lands, Camfield declares that contrary state law must yield. Properly read, the Camfield holding apparently displaces all of the classic theory not already displaced by the acquisition-of-title exception.

The narrow reading of Camfield adopted by the classic theorists preserves their theory, but is a serious misreading of that case.

The exceptions recognized by the classic theorists are quite detrimental to the credibility of their theory. In fact, given the underlying rationale and breadth of the exceptions, one reasonably may ask whether those "exceptions" do not themselves constitute the real "classic" theory of the property clause.

IV. THE REAL "CLASSIC" THEORY

The Supreme Court's current view of the power vested in Congress by the

237. The classic theorists read Camfield as merely authorizing, under the property clause, legislation that protects federal lands from nuisances arising from conduct on neighboring nonfederal land. See Engdahl, supra note 5, at 316-17. For a criticism of that narrow reading of Camfield, see Gaetke, supra note 3, at 170-74; Gaetke, supra note 7, at 395-98.

238. The Unlawful Inclosures of Public Lands Act of 1885, 43 U.S.C. §§ 1061-1066 (1982), was enacted to secure open access to public lands for pasturage and settlement. It was the congressional response to a number of fencing schemes that took advantage of the checkerboard land ownership created by the grants of land to railroads for the construction of the transcontinental railroad. See Leo Sheep Co. v. United States, 440 U.S. 668, 683-84 (1979); Gaetke, supra note 3, at 169 n.64.


241. The federal legislation prohibiting the fences was held in Camfield to override state common law regarding the propriety of such fences. Camfield, 167 U.S. at 523, 525. In fact, the holding in Camfield goes much further. The Court expressly declared that the property clause power reaches beyond the federal lands to permit prohibition of conduct on nonfederal lands that interferes with congressional policies for the use of federal lands. Id. at 522; see Gaetke, supra note 3, at 172-73; Gaetke, supra note 7, at 396-97.

242. Whenever Congress utilizes its property clause power to make "needful" rules and regulations to declare a policy for the use of federal lands, contrary state law must yield. Camfield, 167 U.S. at 525-26. Except when Congress is utilizing its power to "dispose of" federal lands, it is difficult to conceive of property clause legislation that would not fall within the confines of the properly read Camfield holding. There remains some question, however, about the extent of that holding when applied to conduct off of federal lands. See Gaetke, supra note 7, at 392-93, 394-95. For further discussion of this issue, see infra text accompanying notes 260-63.
property clause is quite broad. The Court's most recent pronouncement on that power describes it as "without limitations" and preemptive of contrary state law when exercised. This view obviously is inconsistent with the classic theorists' perception that the power is limited to that of a mere proprietor. The classic theorists would have us conclude that this broad view is an unfortunate and misguided break with the judicially established classic theory. When carefully examined, however, the classic theorists' arguments fail. Their view of history, which serves as the underlying premise of their entire theory, is questionable when compared to the available historical evidence. The case law that they cite to support their theory never expressly adopts that theory and is susceptible to a much broader interpretation which is consistent with the Court's expansive view. Finally, the recognized exceptions to the theory completely undermine its efficacy. What, therefore, is the proper view of the property clause power? In fact, the Court's expansive view of that power is the real "classic" theory.

The broad view of the property clause actually was established in the earliest cases that considered the provision. Those cases, decided in the early part of the nineteenth century, involved the power of Congress to determine questions of title to federal lands under the disposition portion of the property clause. In these first efforts by the Court to interpret the property clause power, the Court did so quite broadly. The Court also declared in these cases that contrary state law must yield to congressional legislation of this type.

The first Supreme Court cases to consider expressly the property clause power of Congress outside of the dispositional context were those involving protective legislation. Significantly, the Court viewed such exercises of the prop-

244. Id. at 539 (quoting United States v. San Francisco, 310 U.S. 16, 29 (1940)).
245. Id. at 543.
246. The classic theorists' assertion that recent, broad views of the property clause power are rejections of earlier precedents confuses historical practice with constitutional doctrine. It is true that Congress largely utilized its article IV powers merely to dispose of the public lands, rather than to regulate conduct, until the latter part of the nineteenth century. See supra text accompanying notes 137-38. Thus, the early use of that power was consistent with the classic theory. See Coggins, Evans & Lindberg-Johnson, supra note 3, at 570-71. This early practice, however, did not establish the classic theory as constitutional doctrine. In fact, when Congress began utilizing the property clause power to regulate conduct directly during the latter 1800s, the Supreme Court broadly approved. See infra text accompanying notes 251-53.
248. See supra text accompanying notes 224-228 (discussing these cases as allegedly constituting a mere exception to the classic theory).
249. It is from this line of cases that the Court derives its "without limitations" description of the property clause power. It should be noted that the Court cites only disposition cases for this proposition in Kleppe v. New Mexico, 426 U.S. 529, 539 (1976).
251. See, e.g., United States v. Alford, 274 U.S. 264 (1927); Camfield v. United States, 167 U.S. 518 (1897). "Protective" is meant to include protection of the lands themselves and the policy for the use of the lands. Alford sustained legislation that outlawed the careless use of fire near federal lands. Alford, 274 U.S. at 266-67. Thus, the case clearly stands for the proposition that Congress may legislate under the property clause to protect federal lands from harm. Camfield upheld legislation that prohibited the construction of fences that enclosed federal lands. Camfield, 167 U.S. at 521-22, 528. Camfield, however, goes beyond the principle of Alford and stands for the proposition
By the early twentieth century, the actual holdings of the Supreme Court on the power of Congress under the property clause had affirmed the broadest of discretion regarding both the disposition of federal lands and the regulation of conduct in respect to them. Furthermore, in both categories of cases the Court had affirmed the preemptive use of that power to override contrary state law. Thus, the Supreme Court consistently has viewed the property clause power as similar to any other enumerated power of Congress and never as an inferior power merely akin to that of a private proprietor.

The real "classic" property clause theory, therefore, as defined by the actual holdings of Supreme Court cases, can be summarized briefly. In the absence of congressional property clause legislation, state governmental authority applies to article IV lands as well as private property within the boundaries of the state. When Congress uses its property clause power, however, contrary state law is displaced. This conclusion holds whether the property clause power is used to provide for the disposition of an interest in federal lands, to regulate conduct to further a policy for the use of those lands, to protect them from harm, or to accomplish any other legitimate objective of Congress. That Congress may regulate conduct under the property clause to further congressional policy for the use of federal lands. See supra text accompanying notes 238-41. Both Alford and Camfield additionally affirm the use of the property clause power to regulate conduct outside of federal lands. Alford, 274 U.S. at 267; Camfield, 167 U.S. at 524-26.

252. The Court deferred to the judgment of Congress on the necessity of the legislation, even though "needfulness" of the regulation appears to be a constitutional limitation on such uses of the property clause power. See Light v. United States, 220 U.S. 523, 537 (1911); Camfield, 167 U.S. at 525-27. Additionally, such property clause enactments were viewed as constitutionally applicable to conduct on nonfederal property. Id. at 510, 525-27. Furthermore, such property clause enactments were viewed as displacing contrary state law. In Camfield there apparently was no contrary state legislation, but the Court described the generally prevailing state common law, which authorized the disposal of Supreme Court cases, can be summarized briefly. In the absence of congressional property clause legislation, state governmental authority applies to article IV lands as well as private property within the boundaries of the state. When Congress uses its property clause power, however, contrary state law is displaced. This conclusion holds whether the property clause power is used to provide for the disposition of an interest in federal lands, to regulate conduct to further a policy for the use of those lands, to protect them from harm, or to accomplish any other legitimate objective of Congress. That Congress may regulate conduct under the property clause to further congressional policy for the use of federal lands. See supra text accompanying notes 238-41. Both Alford and Camfield additionally affirm the use of the property clause power to regulate conduct outside of federal lands. Alford, 274 U.S. at 267; Camfield, 167 U.S. at 524-26.

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The limits on that power are not yet clear. No Supreme Court decision has held a property clause enactment unconstitutional. The Supreme Court's adherence to the assertion that the power is "without limitations," however, seems to answer the inquiry directly. Although that assertion ultimately may prove to be overly broad, limitations on the power are not yet discernible.

Even with its precise limits undefined, the broad view of the property clause power espoused by the Supreme Court has much to commend it over the classic theory as sound constitutional doctrine. It is supported by the history preceding the Constitution and by the records of the Framers' intentions in adopting the provision. It is expressly enunciated by numerous, undeniable holdings of the Supreme Court stretching back to the early nineteenth century. Finally, it represents a coherent and consistent approach to the powers conveyed by the property clause rather than a bifurcated and strained theory largely devoured by doctrinally immense exceptions.

V. CONCLUSION

The classic theorists maintain that the property clause power of Congress was intended to be essentially the same as the power of a private proprietor. Their argument is premised on a view of history that is at least subject to substantial doubt. Their further assertion that the Supreme Court's expansive view of the property clause power or the other enumerated power in such situations would appear to be inconsequential.

260. Various terminology has been used by the writers to describe the breadth of the property clause power. See, e.g., Coggins, Evans & Lindberg-Johnson, supra note 3, at 596 ("plenary and virtually uncontrolled"); Note, supra note 18, at 149 ("virtually limitless"); Note, supra note 271, at 186 ("almost boundless"). When one considers that the Supreme Court has upheld property clause legislation reaching conduct beyond federal lands, this supposedly unlimited power is particularly disquieting. Some writers have suggested a limit based on reasonable distances from federal lands. See Sax, supra note 1, at 265-69. Others have suggested a more flexible approach. See Gaetke, supra note 7, at 395-402 (offering a balancing approach analogous to that used in nuisance cases); Note, Federal Protection of Endangered Wildlife Species, 22 STAN. L. REV. 1289, 1297-98 (1970) (offering a flexible approach based on the precise purpose of the federal regulation imposed).

261. The Supreme Court, however, has not uniformly affirmed all federal action allegedly premised on the property clause. The Court has found certain federal regulatory efforts to be beyond the power conferred by Congress. See Colorado v. Toll, 268 U.S. 228 (1925). Similarly, the Court has found that the assertion of an easement across private lands to reach public lands was not authorized by Congress. See Leo Sheep Co. v. United States, 440 U.S. 668 (1979). The Court has also noted that property clause regulation may constitute a taking. See Curtin v. Benson, 222 U.S. 78, 86 (1911). Furthermore, the Court has concluded that the property clause does not authorize the total displacement of state authority over the subject of reclamation. See Kansas v. Colorado, 206 U.S. 46 (1907). Nevertheless, the Court has not held unconstitutional any legislation of Congress enacted under its power "to dispose of" federal lands or "to make all needful Rules and Regulations" regarding them. Thus, the limits of the article IV power remain a matter of speculation.

262. Kleppe v. New Mexico, 426 U.S. 529, 539 (1976) ("[W]hile the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved, we have repeatedly observed that '[t]he power over the public land thus entrusted to Congress is without limitations.' ") (quoting United States v. San Francisco, 310 U.S. 16, 29 (1940)).

263. The Court's assertion that the property clause power is "without limitations" is too broad when applied to property clause legislation regulating conduct outside federal lands. See Gaetke, supra note 7, at 393-95. It seems likely that should Congress broadly use the property clause power to regulate such conduct because of some tenuous effect on public lands, the Court might find some limits to the power. See id. at 402 n.110. A suggested theory for such limits, based on an analogy to nuisance law, is offered in id. at 395-402.
of the property clause power is a break with earlier precedent and the Framers' intent is not supported by case law. Indeed, they are unable to point to a single Supreme Court holding that adopts their theory. Finally, the recognized exceptions to their theory totally undermine the persuasiveness of their contentions. Even if their theory was convincing, these exceptions leave little, if any, room for the theory to operate.

The Supreme Court views the property clause power as being much broader than the powers of a private proprietor and as being preemptive of contrary state law when exercised. That view is consistent with a justifiable reading of history and an unbroken line of Supreme Court holdings. Furthermore, the Court's view more rationally treats the classic theorists' broad exceptions as the rule. Rather than being a break with the old precedents, the Court's expansive view is itself the real "classic" property clause theory.