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STATE AND FEDERAL POWER OVER FEDERAL PROPERTY

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The constitutional law of federalism is a difficult intellectual domain. This Article traces in sometimes burdensome detail the conceptual development of one of the most confused and confusing branches of federalism law, the law of state and federal governmental power—or legislative jurisdiction—over the various classes of federal property.

The "political safeguards of federalism"[1] are important elements of the American polity, but they are not the only, nor the most important, of the safeguards with which the federal system is endowed by our constitutional tradition. Constitutional federalism, as a set of legal concepts providing organic structure for social and political action, has a vital role of its own. Federalism law cannot be clearly understood, nor constructively used, without patient study of its conceptual history, involving the gradual evolution and deterioration of certain principles and doctrines of constitutional law.[2] When the difficult concepts of

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1. Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

2. The single most significant factor accounting for the changes in the con-

federalism law and their complex interrelationships and historic mutations are ill understood, and when the immediate interests of the federal government are capably advocated by skilled lawyers in the face of unpersuasive rhetoric about states' rights and the tenth amendment, it is to be expected that a Court which is itself a branch of the national government will resolve most of the issues of federalism law which are brought before it in favor of federal governmental power. Benjamin Franklin is reported to have replied to a person who asked what form of government the Constitutional Convention had composed, "A republic . . . if you can keep it." Likewise it could be said that we were given a federation, if we can keep it. To keep the federation requires intellectual effort on the part of lawyers—extraordinary effort in view of the conceptual complexity of federalism law.

There have been those who have argued that federalism is archaic and that a centralized national scheme is more suited to 20th century needs.[3] Renewed interest in the legal issues of federalism during the past several years, however, is an indication of growing awareness that a vigorous constitutional federalism has much to commend it to this and the next generation. The misuse of federalism to obstruct the economic reforms of the thirties and the social reforms of the fifties and sixties is behind us; the opportunity for its constructive utilization as a tool for dealing with critical current ecological, economic, and social problems is at hand. If the constitutional law of federalism is to be useful in this regard, however, its concepts, doctrines, and policies must be examined by lawyers and judges with greater patience and care than has been typical in the past.

Among the more widely misunderstood areas of federalism law is that relating to control of federal property.[4] During the last 22 years the United States government has published two studies concerning the constitutional principles governing use, control, and disposition of federal property. From 1954 to 1957 the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States [Interdepartmental Committee] examined both the practice and the precedents with respect to the exercise of state and federal power over federal property. Its findings were published in a two-volume report.[5]

> stitutional law of federalism over the years has not been responsiveness to changing social needs; it has been intellectual confusion. Occasionally such confusion has facilitated responsiveness to changing needs, but more frequently it has resulted in the announcement of principles which, in the long run, have proven dysfunctional in terms of sound public policy.

D. ENGDAHL, CONSTITUTIONAL POWER: FEDERAL AND STATE ix (1974).

3. Laski, *The Obsolescence of Federalism*, 98 NEW REPUBLIC 367 (1939).

4. In addition to being itself complicated and subject to subtle distinctions, property clause doctrine has developed in the context of other constitutional trends and counter trends which also are widely misunderstood.

5. The first, reporting the factual findings and recommendations of the Interde-

More recently, the Public Land Law Review Commission issued a report which was submitted to the President and Congress in June 1970.[6] The Commission was primarily concerned with that federal property which the Interdepartmental Committee had treated only summarily—property over which the Congress exercises the power granted by article IV, section 3, clause 2 of the Constitution, but which is not included within article I, section 8, clause 17. However, the constitutional issues were only a small part of the Public Land Law Review Commission's concerns, and no comprehensive new research on those issues was undertaken. The Commission's conclusions conform to the views which the Interdepartmental Committee had summarily stated.[7]

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partmental Committee for the Study of Jurisdiction Over Federal Areas Within the States [Interdepartmental Committee], was published in 1956. INTERDEPARTMENTAL COMMITTEE FOR THE STUDY OF JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES, JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES, PART I: THE FACTS AND COMMITTEE RECOMMENDATIONS (1956) [hereinafter cited as INTERDEPARTMENTAL COMMITTEE REPORT, PART I]. The second volume, captioned "A Text of the Law of Legislative Jurisdiction," was published in June, 1957. INTERDEPARTMENTAL COMMITTEE FOR THE STUDY OF JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES, JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES, PART II: A TEXT OF THE LAW OF LEGISLATIVE JURISDICTION (1957) [hereinafter cited as INTERDEPARTMENTAL COMMITTEE REPORT, PART II]. That volume is devoted primarily to the questions of state and federal power over federal enclaves—areas within the states over which Congress enjoys the power granted by article I, section 8, clause 17 of the Constitution. It does include a chapter dealing summarily with other federally owned property, although as to such property the Interdepartmental Committee noted that "the broad scope of this subject, and requirements for brevity here, preclude comprehensive treatment of the subject in this work. . . . In any case, further authorities should be sought in resolving specific questions of law which may arise." *Id.* at 249 n.1.

The Committee was formed and its project undertaken because in the course of preparing for Supreme Court review of one relatively simple school attendance case

> [i]t was found by the Department of Justice that this whole important field of Federal-State relations was in a confused and chaotic state, and that more was needed than a solution of the school problem at hand—there was needed a thorough study of the entire subject of legislative jurisdiction with a view toward resolving as many as possible of the problems which lack of full knowledge and understanding of the subject had bred.

INTERDEPARTMENTAL COMMITTEE REPORT, PART I, *supra*, at 2. While the Committee was at work, Mr. Justice Frankfurter confirmed the Justice Department's observation by noting, in a definite understatement, that "[t]he course of construction of [article I, section 8, clause 17] cannot be said to have run smooth." Offutt Housing Co. v. Sarpy County, 351 U.S. 253, 256 (1956). A fundamental change in Supreme Court doctrine with respect to article I, section 8, clause 17, originated about 18 months before the Interdepartmental Committee began its work. In the years since 1957, that new approach to the problems of federal enclaves has been gradually maturing, leading to results that were not, and hardly could have been, anticipated when the Interdepartmental Committee did its work. As a result of these new developments, the whole of the Committee's work on federal enclaves has been undermined; while many of the rules which the Committee found supported by the old cases have not yet been retested under the Supreme Court's new approach, as they come to be retested the Interdepartmental Committee's work can be expected to become progressively more unreliable and obsolete.

6. PUBLIC LAND LAW REVIEW COMM'N, ONE THIRD OF THE NATION'S LAND (1970). The Commission, created in 1964 by Pub. L. No. 88-606, § 3, 78 Stat. 982 (codified at 43 U.S.C. § 1393 (1970)), was composed of members of the United States Senate and House of Representatives and appointees of the executive branch, and was assisted by a substantial staff as well as an Advisory Council and other consultants.

7. *See* discussion note 5 *supra*. There is a natural tendency to resolve honest conceptual confusion in a fashion hospitable to one's own biases. Hence, it is hardly surprising that the official federal studies by the Interdepartmental Committee and the Pub-

The efforts of the Interdepartmental Committee and the Public Land Law Review Commission represent the only major research inquiries into the subject of state and federal power over federal property. Since completion of its work, the Interdepartmental Committee's conclusions with regard to federal enclaves—property falling within the article I property clause—have become unreliable because

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lic Land Law Review Commission resolved all of the constitutional property clause questions in favor of complete and overriding federal power. *See* INTERDEPARTMENTAL COMMITTEE REPORT, PART II, *supra* note 5, at 251 n.6; PUBLIC LAND LAW REVIEW COMM'N, *supra* note 6, at 278. Somewhat more surprising is the fact that neither any state nor any independent party has heretofore done a creditable job of tailoring the legal uncertainties toward a different bias, or of penetrating the confusion to place constitutional assertions on more solid ground. The conclusions of the federal studies have, for the most part, predominated by default.

Neither the Interdepartmental Committee nor the Public Land Law Review Commission considered desirable the full exercise of the federal property power as they perceived it. The Interdepartmental Committee, for example, summarized its major conclusions by stating:

> [I]n the usual case the Federal Government should not receive or retain any of the States' legislative jurisdiction within federally owned areas, that in some special cases (where general law enforcement by Federal authorities is indicated) the Federal Government should receive or retain legislative jurisdiction only concurrently with the States, and that in any case the Federal Government should not receive or retain any of the States' legislative jurisdiction with respect to . . . a variety of . . . matters, specified in the report, which are ordinarily the subject of State control.

INTERDEPARTMENTAL COMMITTEE REPORT, PART II, *supra* note 5, at viii. The Public Land Law Review Commission, taking as one of its "fundamental premises" the "underlying principle" that the state and local governments' roles in American federalism should be strengthened "to the maximum extent possible," PUBLIC LAND LAW REVIEW COMMISSION, *supra* note 6, at 7, urged in several separate recommendations that as a matter of policy a greater role with respect to federal property than that secured by the supposed constitutional principles should be afforded the states. The following recommendations in the Public Land Law Review Commission's Report illustrate the degree of state authority advocated:

Recommendation 13: "State and local governments should be given an effective role in Federal agency land use planning . . . . As a general rule, no use of public land should be permitted which is prohibited by state or local zoning." *Id.* at 61.

Recommendation 129: "Exclusive Federal legislative jurisdiction should be obtained, or retained, only in those uncommon instances where it is absolutely necessary to the Federal Government . . . ." *Id.* at 278-79.

Recommendation 130: "Federal departments and agencies should have the authority to retrocede exclusive Federal legislative jurisdiction to the states, with the consent of the states." *Id.* at 279.

Such a disparity between what is conceived to be constitutional doctrine and what is perceived to be sound policy does not necessarily indicate that either the conception or the perception is faulty. We are not unaccustomed to law being out of tune with the times. However, this disparity ought at least to prompt more critical constitutional inquiry, and that is the objective of this Article.

Nor should it be assumed that the recent federal studies found the perceived state of the law regarding federal property to be satisfactory. The Public Land Law Review Commission reported that because of the complicated, confused, and paradoxical history and present state of the law thought to apply to this subject, "[t]he jumbled condition of rights, privileges, and obligations created by the confusion of jurisdiction over federally owned properties cannot be corrected under existing legislation." *Id.* at 278. It is true that in many respects the present situation is intolerably and pointlessly complicated, and that legislation could do much to improve it. It is also true that constitutional analysis by itself cannot adequately simplify or rationalize the situation, which has been created by a succession of statutes and agreements appropriate to their own times but in the aggregate inappropriate to present needs. New legislation premised on misunderstandings of constitutional principle, however, could compound the confusion it was intended to erase. For this reason a more critical examination of the constitutional principles affecting federal property is imperative at this time.

of subsequent doctrinal developments. Its conclusions as to other, non-article I federal property were unreliable from the outset because they were based on a highly uncritical and unsophisticated review of the precedents. As a result, several of the propositions endorsed by the Interdepartmental Committee and confidently reasserted by the Public Land Law Review Commission with respect to article IV property are demonstrably unsound, and others are so tenuous that future litigation based on more adequate research and analysis might well reveal their inaccuracy.

There have been some significant recent pronouncements in the field of constitutional property power law by those who hold for the time being the responsibility for maintaining and applying the historic concepts of federalism as the structure of the American constitutional system. The reader will find reason to doubt that the judges making those pronouncements, and the lawyers urging them, have analyzed the precedents with the patience and perceptiveness that is required. It is hoped that the analysis set forth in this Article will provide a basis for better state and federal efforts in the future as lawyers, administrators, and judges strive to deal wisely with contemporary environmental and developmental concerns.

TABLE OF CONTENTS

I. THE CLASSIC PROPERTY CLAUSE DOCTRINE 288
A. *Constitutional Foundations* 288
B. *The Origin of Tax Immunity for Federal Property* 300
C. *The Prime of the Classic Principles* 303
II. A GENERATION OF CONFUSION AND NEGLECT 310
A. *Utah Power & Light Co. v. United States* 310
B. *The Dagenhart Error* 312
C. *Property Clause Doctrine and Practice Prior to 1937* 315
III. THE FRUITS OF CONFUSION 321
A. *The 1937 Term* 321
B. *The Proprietary-Governmental Distinction* 325
IV. PROPERTY CLAUSE DOCTRINE AND PRACTICE SINCE 1938 329
A. *Confusion and Merger of Property Clause Concepts* 329
B. *Vestiges of the Dagenhart Error* 337
C. *Federal Aggrandizement by Default: The Desuetude of State Jurisdiction Over Article IV Property* 339
V. PRESENT AND FUTURE FEDERAL PROPERTY POWER DOCTRINE 358
A. *Article IV Property Clause Principles* 358

1. *Acquisition of Property* 359
2. *Protection of United States Property* 361
3. *Creation of Rights in United States Property* 362
4. *General Governmental Jurisdiction Over Article IV Property* 362
5. *Article IV Property and the Necessary and Proper Clause* 370
6. *Intergovernmental Immunities* 371
B. *Article I Property Clause Principles* 376
C. *Article IV Property Subject to Jurisdictional Cessions* 382
VI. CONCLUSION 384

I. THE CLASSIC PROPERTY CLAUSE DOCTRINE

A. *Constitutional Foundations*

There are two separate clauses in the Constitution granting power to the federal government over United States property. The first, the article I property clause, provides that Congress shall have the power:

> To exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may . . . 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 . . . .[8]

The use of the phrase, "exclusive Legislation," rather than the much less clumsy phrase, "exclusive jurisdiction," is notable and arguably very significant.[9] As written, the clause could be construed as conferring a power to legislate exclusively—that is, with preemptive effect—with regard to all matters in the "District" and other "Places" covered by the clause.[10] Since this power of exclusive legislation

8. U.S. CONST. art. I, § 8, cl. 17.

9. The meaning of this language was heatedly debated in 1789 when the first Congress considered where to locate the seat of the government. 1 ANNALS OF CONG. 875-80, 926 (1789). There was no such heated debate, however, a few months later when in 1790 the Congress enacted "An Act for the Punishment of certain Crimes against the United States," ch. IX, 1 Stat. 112, which among other things provided for the punishment of certain felonies committed "within any fort, arsenal, dockyard, magazine, or in any other place or district of country, under the sole and exclusive jurisdiction of the United States." The language was again debated in 1801 when Congress considered the Organic Act for the District of Columbia. 10 ANNALS OF CONG. 868-74 (1800).

10. The language of the article I property clause was proposed to the Constitutional Convention by a committee and adopted after only a few minutes of debate, during which the requirement of state consent to federal purchases under the clause was added by amendment. II M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 510 (1911). The committee, of which James Madison was a member, had drafted its proposal after considering alternative drafts which had been presented to the Convention by Madison and by Charles Pinckney a few days before. Pinckney had proposed that the United States "possess the exclusive right of soil & jurisdiction" over the seat of the general government. *Id.* at 325. Madison, on the other hand, had proposed that the general government be given power "[t]o exercise exclusively Legislative au-

extends to "all Cases whatsoever," and not only to those matters within the scope of Congress' other enumerated powers, it authorizes measures, such as ordinary police regulations, which would not otherwise have been valid and preemptive.[11] Construing the clause as conferring a power to legislate exclusively rather than an exclusive power to legislate would make it ample for its apparent purpose, and would comport with the earliest evidence of the drafters' intent.[12]

However, the courts from a very early date construed the language of the article I property clause as conferring exclusive governmental jurisdiction upon the United States. In an 1805 opinion by Chief Justice Marshall, the Supreme Court ruled that residents of the District of Columbia ceased to be residents of Maryland when the United States acquired the District under the article I clause;[13] and Justice Story on circuit in 1820 opined that the grounds of a fort under the article I clause were "not within the body of any county of Rhode Island, for the state had no jurisdiction there. It was as to the state as much a foreign territory, as if it had been occupied by a foreign sovereign."[14] This same view has commonly been expressed by equating the consti-

thority" there. *Id.* The committee, addressing both the seat of the government and other places like forts and arsenals, chose language more nearly resembling that of Madison's proposal, conferring a power "to exercise exclusive Legislation." The use of this grammatically unnatural and rather clumsy terminology in preference to language granting "exclusive jurisdiction" seems inexplicable except as a deliberate rejection of the Pinckney proposal and an attempt to provide for something other than political severance from the state within which the affected areas lay and other than the vesting in the United States of exclusive governmental jurisdiction.

11. The Interdepartmental Committee found the Constitutional Convention's failure to consider the necessary and proper and supremacy clauses sufficient to secure the integrity of the seat of the government to be "somewhat surprising." INTERDEPARTMENTAL COMMITTEE REPORT, PART II, *supra* note 5, at 21. The Committee's surprise, however, merely reflects its members' own failure to comprehend the dependence of federal supremacy upon the doctrine of enumerated powers. See text accompanying notes 62-65 *infra*.

12. The "power to legislate exclusively" construction is adequate and the "exclusive power to legislate" construction unnecessary to support the traditional view of congressional power to legislate for the District of Columbia: "The power is plenary. Not only may statutes of Congress of otherwise nationwide application be applied to the District of Columbia, but Congress may also exercise all the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes." Palmore v. United States, 411 U.S. 388, 397 (1973).

The "power to legislate exclusively" construction would give the national government ample power over forts and other enclaves, and also would prevent the embarrassments occasionally suffered by the national government under the Articles of Confederation, when its institutions were entirely dependent upon a state's protection. Also, under this approach any article I property would remain a part of the state, and therefore, except as provided otherwise by acts of Congress, its residents would continue to enjoy their privileges and immunities and civil rights as citizens of that state.

The apparent intent to leave article I property within the territory of the state where it was located was particularly manifested with regard to the District of Columbia. James Madison, a member of the committee which drafted the article I property clause, assured those who feared that the provision would disenfranchise the residents of the seat of the government that those residents "will have had their voice in the election of the Government which is to exercise authority over them . . . ." THE FEDERALIST No. 43, at 239 (E.H. Scott ed. 1894) (J. Madison).

13. Reily v. Lamar, 6 U.S. (2 Cranch) 344, 356-57 (1805).

14. United States v. Cornell, 25 F. Cas. 650, 653 (No. 14,868) (C.C.D.R.I. 1820).

tutional term "exclusive Legislation" with "exclusive jurisdiction,"[15] and by characterizing the federal power over article I property as "in essence complete sovereignty."[16] The principle of exclusive federal jurisdiction over article I federal property has played a major role in property clause doctrine,[17] although decisions during the last quarter century have clouded the principle with doubt.[18]

Article IV, the second source of federal power over property held by the United States, provides that "[t]he 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 . . . ."[19] Some of the cases construing the Article IV property clause have dealt with the ability of the United States to receive, administer, and dispose of territory outside the boundaries of states.[20] However, it is quite certain that even without the article IV property clause the United States would have ample power to act in regard to such territorial possessions. The Articles of Confederation contained no authorization for the Confederation to acquire, manage, or dispose of territories or provide for their government, yet it was under the regime of the Articles that New York, Virginia, Massachusetts, Connecticut, and South Carolina ceded their Western lands to the United States,[21] and Congress enacted the

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15. *See, e.g.*, James v. Dravo Contracting Co., 302 U.S. 134, 141 (1937); Surplus Trading Co. v. Cook, 281 U.S. 647, 652 (1930); United States v. Bevans, 16 U.S. (3 Wheat.) 336, 388 (1818).

16. S.R.A., Inc. v. Minnesota, 327 U.S. 558, 562 (1946).

17. *See, e.g.*, Surplus Trading Co. v. Cook, 281 U.S. 647, 649 (1930); Fort Leavenworth R.R. v. Lowe, 114 U.S. 525, 532-39 (1885); Pollard v. Hagan, 44 U.S. (3 How.) 212, 223 (1845); Mayor of New Orleans v. United States, 35 U.S. (10 Pet.) 662, 737 (1836).

Tracts of article I property are commonly referred to as federal enclaves. It is to be noted that while the United States possesses both title and the power of exclusive legislation with respect to most article I property, some property comes under that clause even though the United States does not have title, privately owned property in the District of Columbia being the primary example. *Cf.* Macomber v. Bose, 401 F.2d 545, 546-47 (9th Cir. 1968).

18. *See* Evans v. Cornman, 398 U.S. 419 (1970); Howard v. Commissioners, 344 U.S. 624 (1953).

19. U.S. CONST. art. IV, § 3, cl. 2. While the comprehensive terms of the article IV property clause encompass all federally owned property fitting within the article I property clause, not all article IV property is also article I property. For convenience, property falling within both clauses will be referred to as article I property, and federal property that does not meet the specifications of the article I clause will be referred to as article IV property. By its terms the article IV clause is broad enough to cover not only realty but personalty as well. Although most of the litigation under the clause has dealt with federally owned land, the principles that have developed under the article IV property clause are equally applicable to federally owned personalty. *See* Nixon v. Sampson, 389 F. Supp. 107, 137 n.80 (D.D.C. 1975) (White House tapes); Nuclear Data, Inc. v. Atomic Energy Comm'n, 364 F. Supp. 423 (N.D. Ill. 1973) (patent rights).

20. *See, e.g.*, Hooven & Allison Co. v. Evatt, 324 U.S. 652 (1945); Balzac v. Porto Rico, 258 U.S. 298 (1922); Dorr v. United States, 195 U.S. 138 (1904); United States v. Gratiot, 39 U.S. (14 Pet.) 526 (1840).

21. P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 51-55 (Public Land Law Review Comm'n 1968).

Land Ordinance of 1785[22] and the Northwest Ordinance of 1787.[23] The early plans and resolutions debated in the Constitutional Convention likewise contained no such authorization.[24] The proposition that the federal government's power over territories has a basis outside of the article IV property clause received judicial support in an 1828 Supreme Court opinion asserting that the national government possesses the power of acquiring territory either by conquest or negotiation as a consequence of its powers to make war and to make treaties.[25] The Court added:

> Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a state acquired the means of self-government, may result necessarily from the facts, that it is not within the jurisdiction of any particular state, and is within the power and jurisdiction of the United States.[26]

For lawyers attached to the doctrine of enumerated powers, however, it was preferable to regard the federal power over territories as deriving from the article IV property clause.[27] The fact that this one clause

22. 28 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 375-86 (1928).

23. 2 F. THORPE, FEDERAL & STATE CONSTITUTIONS 957 (1909).

24. On August 22, 1787, the committee of detail reported on some of the matters which had been referred to it. This report contained no recommendation concerning the seat of the government, but it did suggest adding a 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 authority may be competent.

II M. FARRAND, *supra* note 10, at 367. Consideration of the report was postponed, and the next several days were spent debating other matters. On August 30 the Convention discussed a proposal concerning the admission of new states into the Union, with particular concern for the creation of new states by division of the larger, existing states. The agreement they reached became article IV, section 3, clause 1. During that discussion, a point was made of conflicting claims of certain of the states and the United States to the western territory east of the Mississippi River, which had been ceded by Great Britain in the treaty of peace 4 years before. Some of the delegates wished to add a clause which would tend to favor the claims of the Union to such lands, while others wished to protect the claims of the states. As a compromise, Gouverneur Morris moved the language which now constitutes the article IV property clause, and it was agreed to.

Morris' proposal arose out of discussion concerning the ceded British territory, and apparently the Convention was most interested in its second part, saving the claims of both Union and states from prejudice by the Constitution; for there was no discussion of the first part of the provision, giving a power "to dispose of and make all needful Rules and Regulations respecting" federal property. That part of Morris' proposal, however, was apparently intended to and did cover the same ground as the provision which had been suggested by the committee of detail on August 22, and postponed; for the committee's proposal was not revived once Morris' proposal had been approved. The circumstances of its origin serve to explain why this grant of power to Congress appears in the finished Constitution in article IV rather than in article I.

25. American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 541 (1828).

26. *Id.* at 542-43.

27. It has been observed that particularly in the late 19th century, as acceptance of early political theories based on natural rights and a social compact waned, courts were less willing to accept inherent rights and powers, preferring instead to tie their decisions to express provisions of the Constitution. *See* Note, *Municipal Self-Determination: Must Local Control of Growth Yield to Travel Rights?*, 17 ARIZ. L. REV. 145, 149-51 (1975).

is taken as the source both of federal power over property not within the borders of any state, and of federal power over property that is within a state which has constitutional powers of its own, has given rise to considerable confusion.

To understand the cases which have construed the article IV property clause, the nature of the interest acquired by the United States in the territories must first be examined. Some of the land within these territories was occupied by settlers who claimed title to the land under grants either from the native Indians or from a state or European power that had previously claimed the territory. Private titles based on grants from the Indians were held invalid on the ground that European and hence United States civilized law recognized no property rights in the natives that would enable them to transfer title.[28] However, terms of treaties and cessions by which the United States acquired territories from states or European nations commonly provided for recognition of private property rights established under the prior civilized regime. These private claims, plus certain tracts reserved by some of the states when they ceded their Western lands, amounted to only a small proportion of the total land in the territories, and title to the vast remainder vested in the United States. In addition to title, the United States also acquired sole and exclusive governmental jurisdiction over all of the territories, since there was no other sovereign in such areas. It was because of this unshared governmental jurisdiction, and not because of federal proprietorship of most of the land, that "[i]n legislating for [the territories], Congress exercises the combined powers of the general, and of a state government."[29]

It was not contemplated, however, that by acquiring territory the United States should accumulate and permanently hold a vast national domain outside the bounds of the states which constituted the Union. The cessions of state claims to the lands westward to the Mississippi explicitly contemplated the creation of new states from that territory,[30] and when land was later acquired from France and Spain the plan for its future disposal was the same.[31] In short, both federal title and the

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28. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 603 (1823). *See also* United States v. Rogers, 45 U.S. (4 How.) 567, 571 (1846).

29. American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828); *see* text accompanying note 26 *supra*.

In the absence of any other sovereign, Congress enjoyed by default the same power in the territories that it enjoyed in federal enclaves by virtue of the traditional construction of the article I property clause. This rule is still followed. *See* United States v. Husband R. (Roach), 453 F.2d 1054, 1058-59 (5th Cir. 1971), *cert. denied*, 406 U.S. 935 (1972) (canal zone); HMW Indus., Inc. v. Wheatley, 368 F. Supp. 915, 917 (D.V.I. 1973).

30. *See* Pollard v. Hagan, 44 U.S. (3 How.) 212, 221-23 (1845).

31. *See* Mayor of New Orleans v. United States, 35 U.S. (10 Pet.) 662 (1836).

federal exercise of governmental jurisdiction in these lands were regarded as temporary—a transitional phase. This sentiment was expressed in the form of public pressure for land policies which would expedite transfer of title to settlers and developers. The same sentiment was expressed in regard to governmental jurisdiction by the organization of territorial governments and the movements toward statehood, and it had a significant influence on the development of article IV property clause doctrine.

The most important early expressions of article IV property clause doctrine appear in a series of cases concerning certain lands in Louisiana and Alabama. All of Louisiana, as well as the Gulf Coast areas of Mississippi and Alabama, had been acquired by the United States from France as part of the Louisiana Purchase in 1803.[32] Under the laws of France and Spain, which had alternately governed that territory before its acquisition by the United States, certain lands were regarded as "common" lands, held by the King but dedicated to public use. This was found to be the character, for example, of certain lands along the shore in the city of New Orleans, and certain lands below the high water mark in Mobile, Alabama.[33] In 1836 the Supreme Court held in *Mayor of New Orleans v. United States*[34] that once Louisiana had been created as a state the United States could claim "neither the fee of the land . . . nor the right to regulate the use" of such lands,[35] even though the interest in them, which had been acquired by the United States from France, had not been transferred to Louisiana by any cession, agreement, or act.[36]

The rationale on which the *Mayor of New Orleans* holding was based was more fully developed in *Pollard v. Hagan*.[37] In *Pollard* the Court equated the United States' interest in these common lands in territories acquired from foreign powers, with its interest in such common lands in the territories which had been ceded by states of the Union. According to the *Pollard* Court's reasoning, the United States acquired title to and jurisdiction over these common lands only as a trust, to hold both title and jurisdiction for the new states that were to

32. The remainder of Alabama and Mississippi was ceded to the United States by Georgia.
33. *See* Mayor of New Orleans v. United States, 35 U.S. (10 Pet.) 662 (1836).
34. *Id.*
35. *Id.* at 732-37.
36. The Court relied upon the principle that new states are admitted to the Union on the same footing as the 13 original states. Thus, Louisiana's "rights of sovereignty are the same, and by consequence no jurisdiction of the federal government, either for purposes of police or otherwise, can be exercised over this public ground, which is not common to the United States." *Id.* at 737 (the ground at issue was a common in the City of New Orleans).
37. 44 U.S. (3 How.) 212 (1845).

be created from the territory.[38] As each new state was created, the Court reasoned, the state succeeded to title and jurisdiction over common lands within her borders by operation of law, without the necessity of any specific grant or cession by the United States. Indeed, the Court declared that even an express stipulation granting title or jurisdiction over such lands to the United States would have been voided when the new state was formed; title and jurisdiction could not be prevented from vesting automatically in the new state.[39]

Two reasons were given by the *Mayor of New Orleans* and *Pollard* Courts in support of this rule automatically divesting the United States of both title and jurisdiction in common lands. First, there was a strong commitment to the principle that new states must be admitted to the Union on an equal footing with the original states. With regard to lands within the boundaries of the original states which under English law had been held by the King for the people in common, the Court in another case held that

> 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.[40]

Consequently, if either title to or jurisdiction over common lands in the new states could be retained by the United States, those new states would be received into the Union on less than an equal footing with the original states.[41]

The second reason given in support of the rule that common lands necessarily vest in the new states upon their creation applies more clearly to jurisdiction than to title. The Court reasoned that the federal government lacked constitutional power to exercise general governmental jurisdiction over any territory within the boundaries of a state other than those places specified in the article I property clause.[42] This reasoning embodied that cardinal postulate of federal power, the doctrine of enumerated powers. Although the *Mayor of New Orleans* Court recognized that Congress could assert over these lands, just as it could assert anywhere in the country, the powers which were dele-

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38. *Id.* at 222-23.

39. *Id.* at 223. As the *Pollard* Court stated: "[N]o compact that might be made between [Alabama] and the United States could diminish or enlarge these rights." *Id.* at 229.

40. Martin v. Waddell, 41 U.S. (16 Pet.) 367, 410 (1842).

41. Pollard v. Hagan, 44 U.S. (3 How.) 212, 223, 228-29 (1845); Mayor of New Orleans v. United States, 35 U.S. (10 Pet.) 662, 737 (1836).

42. Pollard v. Hagan, 44 U.S. (3 How.) 212, 223 (1845); Mayor of New Orleans v. United States, 35 U.S. (10 Pet.) 662, 737 (1836).

gated to it by the commerce clause or other provisions of the Constitution, the Court also noted:

> [N]o jurisdiction of the federal government, either for purposes of police or otherwise, can be exercised over this public ground, which is not common to the United States. . . .
>
> All powers which properly appertain to sovereignty, which have not been delegated to the federal government, belong to the states and the people.[43]

The facts and thus the actual holdings of the *Mayor of New Orleans* and *Pollard* cases[44] only concerned those lands that were common, or invested with a public use, a type of lands constituting only a very small fraction of the lands to which the United States had obtained title by the acquisition of the territories. The Court's rationale in *Pollard*, however, carried definite implications for the entire public domain. The opinion in *Pollard* pointed out that while title to the lands denominated common lands vested by operation of law in the new states upon their creation, title to all of the other land owned by the United States constitutionally could, and in the absence of any explicit grant or cession would, remain in the United States.[45] As to this land, however, title had to be distinguished from governmental jurisdiction. To hold that the governmental jurisdiction which the United States had enjoyed over a territory could be retained over vast expanses of the public domain when that territory was organized into a state would be to place such a state on a different footing from the original, nonpublic domain states, much more clearly than would the retention of federal jurisdiction over common lands. Furthermore, if, as these early cases indicated, the Constitution allowed the federal government to exercise general governmental jurisdiction only with respect to article I property, the doctrine of enumerated powers must preclude such jurisdiction over the entire public domain just as it precluded it over the common lands. Hence, a significance far transcending the facts of the *Pollard* case must

43. Mayor of New Orleans v. United States, 35 U.S. (10 Pet.) 662, 737 (1836).

44. The reasoning and holding of *Pollard* was reaffirmed after full consideration in later cases. *See, e.g.*, Barney v. Keokuk, 94 U.S. 324, 337-38 (1876); Doe v. Beebe, 54 U.S. (13 How.) 25 (1852); Goodtitle v. Kibbe, 50 U.S. (9 How.) 471, 478 (1850). *See also* Withers v. Buckley, 61 U.S. (20 How.) 84, 92 (1858).

Although it seems inconsistent with the notion that the common lands were held in trust by the United States for public use and transfer to the states to be created, it was early noted in dictum that conveyances of title in such lands from the United States to private persons prior to the creation of the new state were valid, Goodtitle v. Kibbe, *supra*, and this became a ground of decision in Shively v. Bowlby, 152 U.S. 1, 47-48 (1894).

Once a state had been created out of part of the Louisiana Purchase, whether the state could convey part of these common lands to private persons or had to retain them for public use was regarded as a question of that state's own law. Barney v. Keokuk, *supra*.

45. Pollard v. Hagan, 44 U.S. (3 How.) 212, 223 (1845).

be attached to the Court's broad statement therein that "Alabama is, therefore, entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States."[46] This statement expresses a principle that was given general application.[47] Title to the public domain was in the United States, and the Union had all the power over it that was conferred by the article IV property clause, but as to property within a state, as distinguished from that in the territories, the article IV property power was not conceived to encompass a general federal governmental jurisdiction, or to exclude the general governmental jurisdiction of the state wherein the federal lands lay.[48]

In summary, then, the basic elements of the classic property clause doctrine were these two propositions: as to federal property covered by the article I property clause, the governmental jurisdiction of the United States was by constitutional prescription exclusive; as to federal property covered only by the article IV property clause, however, the states enjoyed general governmental jurisdiction and the United States had only a limited power akin to that of a proprietor. To be fully accurate, however, this statement must be immediately qualified by an important exception, recognized soon after *Mayor of New Orleans* was decided, and by some important constitutional principles which derive from sources other than the property clauses themselves.

The exception to any state's jurisdiction over article IV federal property within its boundaries concerned control over the acquisition of private rights in federal lands. So long as federal lands remained part of a territory, it was natural and necessary that federal law exclusively control any transfer of title to those lands. However, if general governmental jurisdiction passed to the new states upon their creation, one might have expected that federal conveyances of article IV property thereafter should be controlled by state law. As a practical matter, however, such a rule would have introduced far more intricacy and confusion into public land affairs than was already present under the federal laws alone. Perhaps as a response to this practical concern,

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46. *Id.* at 228-29.

47. *See* United States v. McBratney, 104 U.S. 621, 623-24 (1882).

48. Indeed, *Pollard* indicated that even an explicit cession of the state's jurisdiction over such property would be void. 44 U.S. (3 How.) at 223.

A different rule applied to Indian reservations within the territories from which new states were created. If a federal treaty with the Indians so provided, the Indian land was excluded from the state's governmental jurisdiction. Langford v. Monteith, 102 U.S. 145, 146 (1880); *see* Harkness v. Hyde, 98 U.S. 476, 478 (1878). Additionally, the federal government has general power over relations with the Indians under the treaty and commerce clauses. U.S. CONST. art. I, § 8, cl. 3; *id.* art. II, § 2, cl. 2. *See generally* Clinton, *Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951 (1975).

from an early date it was held quite consistently that the acquisition of title and other private rights in United States land remained exclusively under federal control.[49] This rule was clearly understood as an exception to the general principle that governmental jurisdiction over article IV property was vested in the state within which the lands lay.[50]

The other qualification that must be added to the above summary statement of 19th century property clause doctrine requires somewhat more explanation. From the beginning of the nation there had been some pieces of property, for example, some of the old forts, that were owned by the United States but failed to meet the narrow specifications of the article I property clause because they had not been purchased "by the Consent of the Legislature of the State."[51] As to these lands, it was early established that if there had been no cession by the state, governmental jurisdiction remained in the state, complete and perfect.[52] Such property was governed by the article IV property clause, but its utilization to effectuate constitutionally enumerated federal powers placed it in a somewhat different situation from vacant or unutilized article IV property with respect to state power. The precise difference, however, was not articulated until the last quarter of the 19th century.

The distinction was adumbrated in an 1876 Supreme Court decision, *Kohl v. United States*,[53] which concerned federal acquisition by condemnation of property[54] to be utilized as a post office site,

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49. State statutes of limitations, state laws creating or disregarding equitable or inchoate rights, and state laws ranking competing claimants to such federally owned land were given no effect. Broder v. Water Co., 101 U.S. 274 (1879); Gibson v. Chouteau, 80 U.S. (13 Wall.) 92, 99 (1872); Irwine v. Marshall, 61 U.S. (20 How.) 558, 563 (1858); Jourdan v. Barrett, 45 U.S. (4 How.)168, 184 (1846); United States v. Gratiot, 39 U.S. (14 Pet.) 526, 537 (1840); Wilcox v. Jackson, 38 U.S. (13 Pet.) 498, 516-17 (1839); Bagnall v. Broderick, 38 U.S. (13 Pet.) 436, 450 (1839).

Upon transfer from the United States, property which had once been federally owned became subject to state law for future transactions of title. Wilcox v. Jackson, 38 U.S. (13 Pet.) 498, 517 (1839). *But see* Emblen v. Lincoln Land Co., 184 U.S. 660, 664 (1902).

50. In fact, the general principle of state power over article IV property was so well understood and accepted that the exception allowing the United States complete control over the acquisition of rights in that property occasionally was not applied. For example, states sometimes sought to condemn and acquire by eminent domain land which was owned by the United States but was not at the time being utilized for some constitutionally recognized federal purpose, such as a fort or a lighthouse to protect commerce. The Supreme Court seemed willing to concede the validity of such condemnation of federal land in United States v. Chicago, 48 U.S. (7 How.) 185, 194-95 (1849), and it was upheld in United States v. Railroad Bridge Co., 27 F. Cas. 686 (No. 16,114) (C.C.N.D. Ill. 1855). This position eventually was reversed, however, and the exception to state governmental jurisdiction was applied consistently. *See* Minnesota v. United States, 305 U.S. 382, 386-87 (1939).

51. U.S. CONST. art. I, § 8, cl. 17. Fort Niagara in New York was one example.

52. People v. Godfrey, 17 Johns. 225 (N.Y. 1819); 2 J. STORY, COMMENTARIES ON THE CONSTITUTION § 1328 (3d ed. 1858).

53. 91 U.S. 367 (1875).

54. The United States apparently had never attempted to acquire real property by condemnation until after the Civil War. On the other hand, it had never been seriously

effectuating a clearly enumerated federal power.[55] A post office is certainly a "needful building," and to that extent within reach of the article I property clause. However, article I covers only property "purchased by the Consent of the Legislature of the State" and the Ohio legislature had not consented to the United States' acquisition of this post office site. Because a contrary holding would have allowed a state to frustrate the exercise of an enumerated federal power by refusing to consent to an acquisition of property necessary to effectuate that power,[56] the Supreme Court held that the United States may acquire land for its constitutional functions by condemnation, regardless of state consent.[57] In the Court's view, the consent of the state to acquisition of real property to be utilized in furtherance of constitutionally enumerated federal functions "is needed only, if at all, for the transfer of jurisdiction and of the right of exclusive legislation after the land shall have been acquired."[58]

A state could frustrate the performance of constitutionally enumerated federal functions as effectively through regulation of the federal use of land as it might have through refusal to consent to its acquisition, and thus there was implicit in the *Kohl* decision a more general principle. This broader principle limiting state jurisdiction as to article IV federal property which was being utilized in pursuance of a constitutionally enumerated federal function was confirmed explicitly 10 years later in *Fort Leavenworth Railroad Co. v. Lowe.*[59] That case involved the land of a fort in Kansas which did not come within the precise terms of the article I property clause. The Supreme Court declared:

> Where, therefore, lands are acquired in any other way by the United States within the limits of a State than by purchase with her consent, they will hold the lands subject to this qualification: that if upon them forts, arsenals, or other public buildings are erected for the uses of the general government, such buildings, with their appurtenances, as *instrumentalities for the execution of its*

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doubted that the federal government, when necessary to effectuate an enumerated power, could seize and employ or destroy private personalty, provided compensation was paid. Mitchell v. Harmony, 54 U.S. (13 How.) 115, 134 (1851). *See also* United States v. Russell, 80 U.S. (13 Wall.) 623, 627 (1871).

55. U.S. CONST. art. I, § 8, cl. 7.

56. *See* 91 U.S. at 371-72.

57. Although the Court called this a federal power of eminent domain, it noted that this term is somewhat inapt for referring to the federal condemnation power because the feudal concept represented by the term eminent domain is not transferable to the federal government as to the states. *Id.* at 371-73. The *Kohl* Court did not note the apparent inconsistency between the use of this term and the rationale in some of the earlier cases, including Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845); this apparent inconsistency, however, is merely verbal and not of substance.

58. 91 U.S. at 374.

59. 114 U.S. 525 (1885).

> *power, will be free from any such interference and jurisdiction of the State as would destroy or impair their effective use for the purposes designed.* Such is the law with reference to all instrumentalities created by the general government. Their exemption from state control is essential to the *independence and sovereign authority of the United States within the sphere of their delegated powers.* But, when not used as such instrumentalities the legislative power of the State over the places acquired will be as full and complete as over any other places within her limits.[60]
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> . . . .
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> . . . 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.[61]

This qualification upon state governmental jurisdiction over article IV property that is being utilized to effectuate an enumerated power derives not from any terms of the article IV property clause itself, but rather from two other doctrines closely related to one another. Those two, the doctrine of intergovernmental immunities and the doctrine of the necessary and proper clause,[62] both found their first expression in *McCulloch v. Maryland.*[63] What distinguishes these two *McCulloch* doctrines is that the necessary and proper clause supports measures affirmatively enacted by Congress, combining with the supremacy clause[64] to enable such measures to override conflicting state laws, while the intergovernmental immunities doctrine can limit state power with respect to federal instrumentalities regardless of congressional action on the matter. In their origin in *McCulloch,* however, both doctrines were entirely dependent upon employment of the federal act or instrumentality to effectuate some constitutionally enumerated federal power.[65] The facts of *Kohl,* of course, met this requirement, and the

60. *Id.* at 539 (emphasis added).

61. *Id.* at 531 (emphasis added). Thus, with regard to the Fort Leavenworth Military Reservation, the *Fort Leavenworth Railroad* Court stated:

> So far as the land constituting the Reservation was not used for military purposes, the possession of the United States was only that of an individual proprietor. The State could have exercised, with reference to it, the same authority and jurisdiction which it could have exercised over similar property held by private parties.

Id. at 527.

62. U.S. CONST. art. I, § 8, cl. 18.

63. 17 U.S. (4 Wheat.) 316 (1819).

64. U.S. CONST. art. VI, cl. 2. *See generally* Engdahl, *Preemptive Capability of Federal Power,* 45 U. COLO. L. REV. 51 (1973).

65. This fact was emphasized by the *McCulloch* Court's observation that if the object being effectuated had been one "not entrusted to the [federal] government," the federal action would have been void. 17 U.S. (4 Wheat.) at 423. This *McCulloch* dictum was unnecessary and ill-conceived, and it would come to create very substantial confusion in constitutional doctrine before being finally repudiated. See text accompanying notes 128-42, 230-38 *infra.* The point here, however, is that no matter how

Court's recognition in *Fort Leavenworth Railroad* that the immunities doctrine would apply to article IV property only insofar as that property was being utilized to carry out the constitutionally enumerated purposes of the federal government was a reflection of the same basic feature of both *McCulloch* doctrines.

B. *The Origin of Tax Immunity for Federal Property*

One of the early problems arising in relation to federal property located within state boundaries was whether such property was subject to taxation by the state. *McCulloch,* in invalidating a state tax on notes issued by the second Bank of the United States,[66] did not actually pronounce a categorical prohibition against state taxation of federal property. For more than 60 years thereafter general disagreement existed as to whether or not the taxation of United States property by the various states was ever permissible.[67] Not until 1886 in the case of *Van Brocklin v. Tennessee*[68] was it finally held by the Supreme Court that federally owned property is exempt from state taxation. The *Van Brocklin* Court based its decision on a construction of the *McCulloch* intergovernmental immunities doctrine, and the actual holding on the facts in *Van Brocklin,* as distinguished from some of the broad statements made by the Court, is a good illustration of the integral relationship between the immunities doctrine and the doctrine of enumerated powers. The narrow question raised by the facts was whether real estate purchased by the United States at a tax sale for nonpayment of federal taxes, and redeemed within a few months by the taxpayer or sold for cash toward the taxes due, could be taxed by a state during the interval of United States ownership. To this question the Court gave an equally narrow and sufficient answer, closely tied to the doctrine of enumerated powers.[69]

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erroneous this dictum may have been, its recitation underscores the fact that in *McCulloch* the Court contemplated application of the necessary and proper clause and intergovernmental immunities doctrines only where the federal object was within the scope of the enumerated powers.

66. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436 (1819).
67. *See* cases cited in Van Brocklin v. Tennessee, 117 U.S. 151, 159-77 (1886).
68. 117 U.S. 151 (1886).
69. The Court said:

> The United States acquired the title to all the land now in question under the express authority of acts of Congress . . . . The provisions authorizing the United States to sell the land for nonpayment of the taxes assessed thereon, and to purchase the land for the amount of the taxes if no one would bid a higher price, were necessary and proper means for carrying into effect the power to lay and collect the taxes; and so were the provisions authorizing the United States afterwards to sell the land, to apply the proceeds to the benefit of the former owner. . . . To allow land, lawfully held by the United States as security for the payment of taxes assessed by and due to them, to be assessed and sold for State taxes, would tend . . . to defeat the exercise of the constitu-

Beyond what was necessary to dispose of the case, however, the lengthy opinion of the Court in *Van Brocklin* addressed in broad terms the whole general question of whether the states in any circumstances could tax federal property. To this general question the Court answered categorically that "no State can tax the property of the United States without their consent."[70] This categorical principle of tax immunity, while not derived from the holding in *McCulloch v. Maryland*, was premised on philosophical considerations similar to those which had played a predominant role in the reasoning of the *McCulloch* Court.[71] The *Van Brocklin* Court stated:

> In short, under a republican form of government, the whole property of the State is owned and held by the State for public uses, and is not taxable, unless the State which owns and holds it for those uses clearly enacts that it shall share the burden of taxation with other property within its jurisdiction. Whether the property of one of the States of the Union is taxable under the laws of that State depends upon the intention of the State as manifested by those laws. But whether the property of the United States shall be taxed under the laws of a State depends upon the will of its owner, the United States . . . .[72]

Van Brocklin established categorical exemption of the United States from the taxing jurisdiction of the states with regard to federal property.[73] It is important to note, however, that *Van Brocklin* did not in any way impair the general principle of the classic property clause cases that, subject to the intergovernmental immunities doctrine and the necessary and proper clause, the states enjoyed general governmental jurisdiction over article IV land. The rule of *Van Brocklin* was conceived as an application of the doctrine of intergovernmental immunities. Moreover, that rule dealt only with taxation, and did not prejudice other exertions of state jurisdiction to regulate or otherwise govern such land.[74]

It was essential to the rationale of *Van Brocklin* that the United States was a "republican form of government." That characteristic was said to distinguish the United States from a monarchy in that "the whole property of the State is owned and held by the State for public uses

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> tional power to lay and collect taxes, to pay the debts and provide for the common defence and general welfare of the United States.

Id. at 179-80.

70. *Id.* at 175.

71. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 425-36 (1819); *cf.* Helvering v. Gerhardt, 304 U.S. 405, 412 (1938).

72. 117 U.S. at 174-75.

73. This rule, however, did not preclude the taxation by states of property or activities of private persons located or occurring on article IV land. See text accompanying note 389 *infra*.

74. See text accompanying note 389 *infra*.

. . . ."[75] As the *Van Brocklin* Court explained, "[T]he United States do not and cannot hold property as a monarch may, for private or personal purposes. All the property and revenues of the United States must be held and applied, as all taxes, duties, imports and exises must be laid and collected, 'to pay the debts and provide for the common defence and general welfare of the United States.'"[76] This passage has become the subject of serious and highly misleading interpretations. The Interdepartmental Committee stated that it established the proposition that "the Federal Government does not, and cannot, hold property in a proprietary capacity, [but rather] owns all of its property in a governmental capacity."[77] Reflecting much the same view the report of the Public Land Law Review Commission declared that "[a]s a matter of constitutional law, there is no legal significance in the different roles of the Federal Government as sovereign and as proprietor . . . ."[78]

The *Van Brocklin* Court, however, said no such thing. Some rather complicated developments which took place many years later did produce judicial statements which, because they have not been carefully examined, have been taken to support this erroneous view espoused in the federal studies. Those statements, also made in tax immunities cases, however, in no way contradicted the established distinction between article IV property clause powers and other federal powers;[79] moreover, *Van Brocklin* itself did not even contain such statements. A clear distinction between those powers over federal property which the United States enjoyed by virtue of its governmental sovereignty and those which it enjoyed under the article IV property clause by virtue of proprietorship was established by precedents antedating *Van Brocklin*. It was by virtue of proprietorship, for example, and not by virtue of governmental jurisdiction, that the United States had been held entitled to relief under state law in a trespass action for the taking of timber from the public lands,[80] and to relief in equity against the waste of its property by unauthorized mining.[81] The same distinction continued to operate as a decisive factor in subsequent property clause decisions, quite unaffected by anything said in *Van Brocklin*.[82] Thus, both the Interdepartmental Committee and the Public Land Law Review Commission entirely misread *Van Brocklin's* language and mis-

75. 117 U.S. at 174.
76. *Id.* at 158-59, *quoting* U.S. CONST. art. I, § 8, cl. 1.
77. INTERDEPARTMENTAL COMMITTEE REPORT, PART II, *supra* note 5, at 271.
78. PUBLIC LAND LAW REVIEW COMM'N, *supra* note 6, at 36.
79. For a close examination of these cases, see text & notes 185-203 *infra*.
80. Cotton v. United States, 52 U.S. (11 How.) 229, 231-32 (1851).
81. United States v. Gear, 44 U.S. (3 How.) 120, 132 (1845).
82. *See* United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915); United States v. Grimaud, 220 U.S. 506 (1911).

understood the Court's intent. What the Court was saying in *Van Brocklin* was that even as a proprietor the federal government holds its property for the public benefit and not, "as a monarch may, for private or personal purposes." Nothing in *Van Brocklin* supports the thesis of the Interdepartmental Committee and the Public Land Law Review Commission, that the federal government's power by virtue of the article IV clause, with regard to federal property within states, is something other than the power of a proprietor.

C. *The Prime of the Classic Principles*

Federal property cases decided around the turn of the 20th century exemplify the application of the classic principles. The basic proposition, articulated originally in *Pollard v. Hagan*,[83] that article IV property not being utilized for an enumerated federal governmental purpose was by constitutional reservation subject to the general governmental jurisdiction of the state wherein it lay, was reaffirmed in *Ward v. Race Horse*[84] in 1896. In *Ward*, the Supreme Court held that Wyoming laws regulating the hunting and killing of game governed both federally owned and privately owned property within the state,[85] even in the face of a treaty provision by which the United States had granted Indians the right to hunt on the federal land.[86]

That the classic principles were well understood was illustrated a few years later in *Kansas v. Colorado*.[87] There, speaking about reclamation of the arid lands within the borders of the Western states, the Court observed:

> [T]he 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,

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83. 44 U.S. (3 How.) 212 (1845).
84. 163 U.S. 504 (1896).
85. *Id.* at 507.
86. *Id.* at 508. In dicta the Court noted that the conclusion might possibly be different with respect to lands embraced within an Indian reservation, *id.* at 516, or if Congress were to authorize such hunting in the exercise of its enumerated power to regulate commerce with the Indian tribes. *Id.* at 514. Since on the facts neither of those considerations applied, however, the general governmental jurisdiction of the state controlled the right to hunt on the federal land. *Ward* cannot be dismissed as merely involving judicial construction of the terms of the treaty and the subsequent act admitting Wyoming into the Union. See discussion note 332 *infra*.
87. 206 U.S. 46 (1907).

> 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.[88]

Thus, the Court specifically denied that the article IV property clause in and of itself is a "definite grant of power" sufficient to supersede a state's governmental jurisdiction over property within its borders, even if federally owned.[89]

Under the classic property power doctrine, although the state enjoyed general governmental jurisdiction, if federal property were used to effectuate one of the enumerated federal governmental powers, that enumerated governmental power would invoke the supremacy clause so as to override state law. This principle was illustrated in *Ohio v. Thomas*,[90] where the Supreme Court held that a state law forbidding the serving of oleomargarine could not be applied to the supervisor of a soldiers' home located on article IV property[91] and operated by the War Department. The home was being operated pursuant to enumerated military powers, and this served as a basis for justifying disregard of state laws, but only to the extent "necessary . . . for the purpose for which it was incorporated, or authorized by an act of the United States."[92] The Court, applying *McCulloch*, found in the appropriation acts adequate "necessary and proper" congressional authorization of the serving of oleomargarine at the home.[93] The *Ohio v. Thomas* decision thus illustrates the rationale developed in *Fort Leavenworth Railroad* and *Kohl*.[94]

While the classic principles of property clause doctrine were adhered to, however, there were two important new developments late in the 19th century. One of these developments was the emergence of the idea that in certain circumstances and with important limitations governmental jurisdiction over article IV land could be ceded by a state

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88. *Id.* at 92. See discussion note 251 *infra.*

89. What is most significant about the *Kansas v. Colorado* dictum is its recognition that under the classic property power principles not only the actions of private persons on article IV property, but even those legislative acts of the federal government itself, which rested on its proprietorship power rather than on any of its governmental powers, were subordinate to state law. In 1976 the Supreme Court resorted to a notably disingenuous construction to explain away this *Kansas v. Colorado* dictum. Kleppe v. New Mexico, 426 U.S. 529, 537-38 (1976); *see* text accompanying notes 327-30 *infra.* Since the Court in 1976 did not cite Ward v. Race Horse, 163 U.S. 504 (1896), or any of the other cases discussed herein which had applied the classic principle subordinating federal proprietorship power to state law, and apparently did not even read them —the cases were not cited in the briefs—it is not surprising that the Court could make sense out of the old dictum only by giving it a disingenuous construction.

90. 173 U.S. 276 (1899).

91. The governmental jurisdiction over the land, which once had been ceded to the United States, had since been retroceded to the state. *Id.* at 280.

92. *Id.* at 283.

93. *Id.* at 283-84.

94. See text accompanying notes 53-65 *supra.*

to the federal government. The earliest cases, such as *Pollard v. Hagan*,[95] had reasoned that governmental jurisdiction over article IV property could not be conferred on the federal government even pursuant to the state's own agreement, because it was only with regard to article I property that the Constitution allowed such general governmental jurisdiction to the federal government. In *Kohl v. United States*[96] the Court had intimated that property which initially was under the article IV clause because acquired without the consent of the state could later be brought under the article I clause by securing the consent of the state.[97] In the *Fort Leavenworth Railroad* case,[98] the Court went a significant step further. The land constituting Fort Leavenworth had been reserved to the United States as article IV property when Kansas was admitted to the Union. Subsequently, a cession of jurisdiction over the reservation had been enacted by the state, and the Court presumed that the United States had accepted the cession. This cession, however, was found to be insufficient to place the property under the article I clause, because of certain reservations that the cession contained.[99] The Court could have simply declared the cession invalid on the basis of the *Pollard* rule that the federal government could not be given governmental jurisdiction except in accordance with the article I property clause, but it did not do so. Unlike the lands involved in *Pollard*, the land covered by the qualified Kansas cession was being utilized to effectuate an enumerated federal power; it was being used as a military installation. As to article IV lands being so used, as distinguished from the bulk of article IV lands, the Court reasoned,

> [a]s instrumentalities for the execution of the powers of the general government, they are . . . exempt from such control of the States as would defeat or impair their use for those purposes; and

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95. 44 U.S. (3 How.) 212 (1845). See discussion note 39 *supra*.
96. 91 U.S. 367 (1875).
97. See text accompanying note 58 *supra*.
98. Fort Leavenworth R.R. v. Lowe, 114 U.S. 525 (1885). Other aspects of this case are discussed at text accompanying notes 59-65 *supra*.
99. The Kansas cession reserved to the state "the right to tax railroad, bridge, and other corporations, their franchises and property, on said Reservation." 114 U.S. at 528, *quoting* Act of Feb. 25, 1875, ch. LXVI, § 1, [1875] Kan. Sess. Laws 95. This reservation of taxing jurisdiction disqualified the Kansas act as an article I cession, for as the Court noted, it was settled "that no other legislative power than that of Congress can be exercised over" article I property, because a valid consent or cession under that clause "operates to exclude all other legislative authority." *Id.* at 537-38. The Court even quoted from an opinion of Justice Story to the effect that

> it may well be doubted whether Congress is, by the terms of the Constitution, at liberty to purchase lands for forts, dock-yards, & c., with the consent of the State Legislature, where such consent is so qualified that it will not justify the exclusive legislation of Congress there. It may well be doubted if such consent be not utterly void.

Id. at 534, *quoting* United States v. Cornell, 25 F. Cas. 650 (No. 14,868) (C.C.D.R.I. 1820).

> if, to their more effective use, a cession of legislative authority and political jurisdiction by the State would be desirable, we do not perceive any objection to its grant by the Legislature of the State.[100]

This allowance of a cession of governmental jurisdiction, too limited to place the property under the article I clause, was without precedent before the *Fort Leavenworth Railroad* case.[101] Such article IV cessions would differ from article I cessions, the Court reasoned, in that, "[i]t not being a case where exclusive legislative authority is vested by the Constitution of the United States, that cession could be accompanied with such conditions as the State might see fit to annex not inconsistent with the free and effective use of the fort as a military post."[102] Furthermore, since such an article IV cession was simply to facilitate the more effective use of the property for some constitutionally enumerated federal purpose, the Court reasoned that the jurisdiction ceded to the United States "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."[103] This principle of automatic reverter of jurisdiction ceded under article IV when the land ceased to be used for an enumerated purpose, regardless whether such reverter was called for by the terms of the cession,[104] underscores the point that the Court considered the cession of governmental jurisdiction as to property which remained under the article IV clause to be constitutionally permissible only as to property that was being utilized to effectuate some constitutionally enumerated federal power, and only insofar as the possession of such jurisdiction might be said to facilitate such use. It was essentially an application of the necessary and proper clause.

A second new development occurred in the case of *Camfield v. United States.*[105] The government had followed a policy of granting alternate sections of public land in the West to railroads to encourage their capital investment in transcontinental transportation, retaining the intermediate sections for subsequent sale at an appreciated price after

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100. 114 U.S. at 541-42.

101. The whole discussion of cessions of jurisdiction over article IV property could be regarded as dicta in *Fort Leavenworth Railroad,* and at most it was an alternate ground for the holding. The Court prefaced its discussion of the cession problem by saying that even if cessions were impossible under article IV, "it would not aid the railroad company; the jurisdiction of the State would then remain as it previously existed." *Id.* at 540. See discussion note 318 *infra.* But what originally was dicta or an alternative rationale soon became the ground of decision in other litigation concerning the same military reservation. Benson v. United States, 146 U.S. 325 (1892). *See also* Chicago, R.I. & P. Ry. v. McGlinn, 114 U.S. 542 (1885).

102. 114 U.S. at 539.

103. *Id.* at 542.

104. As it was, for example, in Palmer v. Barrett, 162 U.S. 399 (1896).

105. 167 U.S. 518 (1897).

the rail lines were built. Camfield, having acquired a number of such alternate sections from a railroad, contrived a clever fencing scheme whereby, without locating any fence outside the borders of the sections to which he held title, he could effectively cut off access to the sections still owned by the government but interspersed among his own. Although the lands were located in the State of Colorado, no state law objection to the scheme was raised.[106] Instead, Camfield was prosecuted under a federal statute which forbade the enclosure of public lands. The Supreme Court upheld the federal claim, employing a nuisance rationale:

> Considering the obvious purposes of this structure, and the necessities of preventing the enclosure of public lands, we think the fence is clearly a nuisance, and that it is within the constitutional power of Congress to order its abatement, notwithstanding such action may involve an entry upon the lands of a private individual. The general Government doubtless has a power over its own property analogous to the police power of several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case . . . . While we do not undertake to say that Congress has the unlimited power to legislate against nuisances within a State, which it would have within a Territory, we do not think the Admission of a Territory as a State deprives it of the power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power, so long as such power is directed solely to its own protection. A different rule would place the public domain of the United States completely at the mercy of state legislation.[107]

The decision in *Camfield* might be defended in either of two ways. First, it might be considered an application of the necessary and proper clause. It had been held as to article I property that Congress could regulate acts taking place outside of that property if such regulation was necessary and proper to effectuate Congress' comprehensive power over the article I property.[108] Under classic property clause doctrine, of course, congressional power over article IV property was far less comprehensive, but there is no reason why the necessary and proper clause could not apply to help effectuate that less comprehen-

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106. Since the land in question was, according to legal principles recognized at that time, subject to the general governmental jurisdiction of the state, it would seem that the fence could have been abated as a nuisance under state law. This, of course, would be the remedy open to a private proprietor similarly cut off from his land.

107. *Id.* at 525-26.

108. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 426-29 (1821) (Congress could punish the act, committed outside an enclave, of concealing a felony which had been committed within the enclave).

sive power. Any proprietor enjoys the power to determine within the limits of state law how and by whom his property should be used. The difference between this power and the federal power recognized by the *Camfield* Court is that the private proprietor must depend upon state remedies for vindication of such property rights, while the United States as a proprietor may rely on federal remedies enacted pursuant to the necessary and proper clause.[109] The other explanation for the *Camfield* decision is to recognize it as establishing an exception to the classic article IV property clause principles where protection of federal property rights is at issue.[110]

In any event, *Camfield* can hardly be viewed as authority for a rule of general federal governmental jurisdiction with respect to article IV property. To construe the language of the *Camfield* opinion as recognizing such a power would read into that opinion a proposition wholly contradictory to established doctrine, which had been forcefully reiterated in *Ward v. Race Horse*[111] only 1 year before. There is no indication in the unanimous *Camfield* opinion that any of the Justices perceived such a contradiction.

In sum, the classic principles governing article IV property at the turn of the century gave a major role to the doctrine of enumerated powers. The United States, by virtue of the sovereignty delegated to it, could exercise its enumerated powers over federally owned article IV land, just as it could exercise those powers anywhere in the nation. Proprietorship, however, gave to Congress additional powers.[112] As a proprietor the United States was recognized as having the same right that any proprietor has to use its property in any lawful manner. This was true notwithstanding the fact that the policies which might be formulated with respect to such property, or which might be promoted by the use of that property, might not fall within the scope of federal governmental jurisdiction according to the doctrine of enumerated powers. The United States had no private or personal powers; all of its powers

109. The applicability of the necessary and proper clause would not necessarily render the supremacy clause applicable as well. Where the end is the effectuation of an enumerated federal power, which itself is capable of preempting state law, then the necessary and proper regulation as a means to that end must of course be preemptive. But where the end is a power which itself is subject to state governmental jurisdiction and control—as was the article IV property power under the classic doctrine—then the necessary and proper means to that end would also be subject to state power. *But see* Hunt v. United States, 278 U.S. 96, 100 (1928).

110. *See* 167 U.S. at 526, 528. The policy considerations alluded to by the Court amply justify the creation of such an exception. Compare the exception, based upon policy grounds, concerning acquisition of private rights in federal lands. See text accompanying notes 49-50 *supra*.

111. 163 U.S. 504 (1896); *see* text accompanying note 84 *supra*.

112. United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915) ("Congress not only has a legislative power over the public domain, but it also exercises the powers of the proprietor therein.").

were public.[113] Among its public powers over its lands, however, an essential distinction was drawn between the "rights incident to proprietorship" and "the power of the United States as a sovereign over the property belonging to it."[114] The latter—the sovereign, governmental, or legislative power—could be exerted over article IV property no less, and no more, than over any property in the nation; but the former—the proprietary power—gave the United States additional rights and powers over article IV property.

Granting and denying permits for the use of article IV property, and similar matters of administration, were regarded as exercises of the proprietary power rather than of any legislative or governmental power. That is why those administrative functions could validly be delegated to employees or officials without compliance with the standards or rules which at the time impeded the delegation of legislative power.[115] It was as a proprietor, and not as a government, that the United States was held entitled to the same relief as any private landowner for waste committed against federal property, both at law[116] and in equity.[117]

Of course, the United States does differ from an ordinary proprietor in that it is a public entity whose estate is administered through a legislative body. Thus, instead of being formulated by an individual and carried out by that individual's self-help, aided only by recourse to state courts and law, policies for the utilization of federally owned land frequently are formulated in legislation and carried out by those legal processes customarily available for enforcement of a legislature's will—criminal sanctions.[118] Thus, the nonlegislative, proprietorship power can be executed legislatively. However, the fact that the policies of the United States as a proprietor might be articulated in legislative form by no means meant, under the classic doctrine, that those proprietorship policies were entitled to the precedence over state rules that was guaranteed to assertions of the legislative powers of the federal sovereignty by the Constitution's supremacy clause.[119] The United States might in some instances utilize its property in an exercise of

113. As already noted, because the United States was a republic and not a monarchy, all of its powers were "public," and consequently it was not possible for the federal government to use its property, "as a monarch may, for private or personal purposes." Van Brocklin v. Tennessee, 117 U.S. 151, 158-59 (1886). *See* text accompanying notes 67-74 *supra*.

114. *See* Light v. United States, 220 U.S. 523, 537 (1911).

115. United States v. Grimaud, 220 U.S. 506, 515-16 (1911).

116. Cotton v. United States, 52 U.S. (11 How.) 229, 232 (1851).

117. United States v. Gear, 44 U.S. (3 How.) 120, 132 (1845).

118. The power to enforce Congress' will as a proprietor through the device of criminal sanctions has been recognized since early days. United States v. Briggs, 50 U.S. (9 How.) 351 (1850) (enforcing Act of Mar. 2, 1831, ch. LXVI, 4 Stat. 472 (repealed in part 1933)).

119. U.S. CONST. art. VI, cl. 2.

sovereignty—that is, to effectuate its constitutionally enumerated powers—in which event every interfering state law must yield. By virtue merely of proprietorship, however, the United States might utilize its property in countless other ways, and such uses, the cases made quite clear, were subject to the governmental jurisdiction of the state wherein the particular land lay, without the possibility of federal preemption.

II. A GENERATION OF CONFUSION AND NEGLECT

A. *Utah Power & Light Co. v. United States*

Against this cohesive doctrinal background the case of *Utah Power & Light Co. v. United States*[120] was decided in 1917. In that case, involving a utility company's claim to rights-of-way upon federal forest reserve lands, the Court reached a result consistent with the applicable property clause doctrines, but the opinion of the Court was laced with dicta reflecting significant misconceptions. The rights-of-way claimed by the Utah Power & Light Company were based on acts and circumstances which under state law would have been sufficient to vest in the utility rights-of-way on private lands. However, no conveyance or license or other authorization had been sought from the United States. The company argued that its right-of-way claims

> must be tested by the laws of the State in which the lands are situate rather than by the legislation of Congress, and in support of this position they say that lands of the United States within a State, when not used or needed for a fort or other governmental purposes of the United States, are subject to the jurisdiction, powers and laws of the State in the same way and to the same extent as are similar lands of others.[121]

This was an accurate statement of the established general rule; however, the general rule was quite inapplicable to the *Utah Power & Light* case. At stake in that case was not an exercise of state governmental jurisdiction over the use of the federal land,[122] but rather a claim that private rights had been acquired in federal land. For more than a century it had been uniformly and repeatedly held that the acquisition of private rights in federal land was governed exclusively by federal law.[123] This principle was a well settled[124] exception to the general rule that the state enjoyed governmental jurisdiction over

120. 243 U.S. 389 (1917).
121. *Id.* at 403-04.
122. *See* Ward v. Race Horse, 163 U.S. 504 (1896); text accompanying notes 84-86 *supra*.
123. See text accompanying notes 49-50 *supra*.
124. *But cf.* discussion note 50 *supra*.

article IV land not being utilized to effectuate constitutionally enumerated federal powers. This exception was squarely on point in *Utah Power & Light* and ample to dispose of the power company's claim.

However, a new assortment of Justices was now on the bench,[125] and the dicta in *Utah Power & Light* suggest that some of them were seriously deficient in their understanding of the property clause precedents. Instead of confining itself to a discussion of the law governing acquisition of private rights in government land, the opinion in *Utah Power & Light* took the exceptional rule of exclusive federal power, properly applicable only to the acquisition of such private rights, and applied it much more broadly. Although the actual holding on the facts in *Utah Power & Light* was unquestionably correct under the precedents, there emerged in these dicta[126] an entirely novel view of relative state and federal power over article IV property, under which the exception pertaining to acquisition of private rights devoured the established rule. The general principle of state governmental jurisdiction over article IV land was only grudgingly conceded as "true, for many purposes," but subordinate to the power of the United States to control the use of its lands as it chose. State laws, the Court stated, did not apply as a matter of constitutional right, but only "as they may have been adopted or made applicable by Congress."[127] Insofar as it con-

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125. Of those who had been on the Court a decade before when it reaffirmed the old established principles in Kansas v. Colorado, 206 U.S. 46 (1907); see text accompanying notes 87-88 *supra*, only four now remained; and of these, only two had joined in seeming approval of the language of the Court's opinion in that case, the other two separately noting their concurrence in the result. The majority of the Justices in *Utah Power & Light*, including the author of the unanimous opinion, had risen to the bench in the years since *Kansas v. Colorado*.

126. [R]epeated decisions of this court have gone upon the theory that the power of Congress is exclusive and that only through its exercise in some form can rights in lands belonging to the United States be acquired. True, for many purposes a State has civil and criminal jurisdiction over lands within its limits belonging to the United States, but this jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use and to prescribe in what manner others may acquire rights in them. . . . From the earliest times Congress by its legislation applicable alike in the States and Territories, has regulated in many particulars the use by others of the lands of the United States, has prohibited and made punishable various acts calculated to be injurious to them or to prevent their use in the way intended, and has provided for and controlled the acquisition of rights of way over them for highways, railroads, canals, ditches, telegraph lines and the like. . . . And so we are of opinion that the inclusion within a State of lands of the United States does not take from Congress the power to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them, even though this may involve the exercise in some measure of what commonly is known as the police power. . . .

It results that state laws, including those relating to the exercise of the power of eminent domain, have no bearing upon a controversy such as is here presented, save as they may have been adopted or made applicable by Congress.

243 U.S. at 404-05.

127. *Id.* at 405.

templated facts other than the claimed acquisition of private rights in federal land, this language was merely dictum; nevertheless, it represented a radically new turn in property clause thinking.

Although changes in the perception and application of constitutional principles often are associated with changes in the composition of the Court, personnel changes alone cannot explain such a sudden departure from established principles as that represented by the dicta in *Utah Power & Light.* Contemporaneous developments that were taking place in related aspects of constitutional doctrine also must be examined. Because constitutional law is whole cloth, threads of doctrine from elsewhere in the fabric often control the pattern of thought of new and old Justices alike, even when those threads are undisclosed, or indeed, unperceived. A thought pattern characteristic of the contemporary phase of the struggle surrounding Congress' use of enumerated powers to achieve extraneous ends is reflected in the dicta of *Utah Power & Light.*

B. *The Dagenhart Error*

Since Chief Justice Marshall's dictum in *McCulloch v. Maryland* that Congress could not, "under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government,"[128] there had been a tendency among constitutional lawyers to look upon the enumeration of federal constitutional powers as a complete catalogue of objectives or ends that the federal government was competent to achieve. Before the last quarter of the 19th century, Congress had almost never employed one of its constitutional powers as a device to promote "objects not entrusted to the government."[129]

In the last decade of the 19th century, however, Congress prohibited first the interstate shipment of lottery tickets[130] and then the

128. 17 U.S. (4 Wheat.) 316, 423 (1819). The question whether enumerated powers could be used as means to extraneous ends is not to be confused with the power under the necessary and proper clause to deal with extraneous matters as a means of effectuating enumerated powers, the enumerated power being the end. The necessary and proper clause power was expressed by Chief Justice Marshall in his classic statement in *McCulloch*: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.* at 421. *Compare* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899), *with* United States v. E.C. Knight Co., 156 U.S. 1 (1895). At the same time, Marshall uttered the dictum quoted in the text, prohibiting the use of enumerated powers to promote extraneous ends. The principle that would eventually be found to demonstrate the error of this dictum was also articulated by Marshall himself in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), but the error was not dispelled until more than 20 years after the era in which *Utah Power & Light* was decided.

129. One of Congress' rare such exercises was found in the Customs Act of 1842, ch. 270, § 28, 5 Stat. 566 (amended 1857) (prohibiting the importation of obscene materials).

130. Act of Mar. 2, 1895, ch. 191, 28 Stat. 963 (codified in part at 39 U.S.C. §§ 3005-3007 (1970)).

interstate shipment of both obscene literature and contraceptives.[131] While both of these acts were upheld as constitutional,[132] the arguments that sustained them were a confused combination of inapplicable necessary-and-proper-clause language, moralistic predelictions, and a slowly dawning appreciation of the character of enumerated federal powers. Through a series of irreconcilable decisions early in the 20th century, the Supreme Court wrestled with additional instances of such "pretext" legislation and the century-old dictum of John Marshall forbidding it.[133] The Justices' inadequate efforts to reconcile the successive holdings illustrate how difficult the intellectual challenge was.[134] The clearest revelation of this doctrinal struggle came only 15 months after the *Utah Power & Light* decision when the same nine Justices who had been unanimous in that case split five to four in *Hammer v. Dagenhart*,[135] the majority firmly insisting, in accordance with the old Marshall dictum, that enumerated powers may not be employed as means for the accomplishment of extraneous, even though not explicitly forbidden, ends—in this case the prohibition of child labor.[136]

The erroneous notion of the Marshall dictum, which was adopted by the majority in *Dagenhart*, was not definitively dispelled from constitutional jurisprudence until 1941. In that year the Supreme Court at last proclaimed that Justice Holmes' dissent in the *Dagenhart* case had indeed represented the true constitutional rule, and that the majority's view had rested on misconception.[137] Today, it is clearly understood that Marshall's *McCulloch* dictum was inconsistent with principles fundamental to one of his own more famous holdings,[138] and there is no longer any doubt that the federal government may constitutionally employ its enumerated powers toward the accomplishment of any extraneous, but unprohibited, objective it might choose.

Nonetheless, for a period of time in the early 20th century the erroneous notion of the old Marshall dictum prevailed. This miscon-

131. Act of Feb. 8, 1897, ch. 172, 29 Stat. 512.

132. Champion v. Ames, 188 U.S. 321, 363-64 (1903) (the Lottery Case); United States v. Popper, 98 F. 423, 424-25 (N.D. Cal. 1899).

133. Several of the Justices appointed during the first decade and a half of the 20th century inclined distinctly toward the Marshall view. Included among this group were Justices Van Devanter, McReynolds, Pitney, and Day.

134. *See, e.g.*, United States v. Hill, 248 U.S. 420 (1919); Hammer v. Dagenhart, 247 U.S. 251 (1918); Weeks v. United States, 245 U.S. 618 (1918); Caminetti v. United States, 242 U.S. 470 (1917); Weber v. Freed, 239 U.S. 325 (1915); Hoke v. United States, 227 U.S. 308 (1913); Hipolite Egg Co. v. United States, 220 U.S. 45 (1911); Champion v. Ames, 188 U.S. 321 (1903).

135. 247 U.S. 251 (1918).

136. As in some earlier "pretext" legislation, the federal government's power over interstate commerce was the means by which the undesirable practice was reached. Shipment in interstate commerce of the products of an employer of child labor was forbidden. *Id.* at 268.

137. United States v. Darby, 312 U.S. 100, 116-17 (1941).

138. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

ception, which for convenience of reference may be denominated the *Dagenhart* error,[139] serves to explain the radical departure of the *Utah Power & Light* dicta from the property clause doctrines that the precedents had laid down. In terms of the analysis that had been followed in the earlier decisions, the federal property involved in *Utah Power & Light* was being utilized by the United States for purposes extraneous to the enumerated federal powers.[140] The precedents had reasoned that as a proprietor the United States could devote its lands to uses unrelated to any objective within the scope of an enumerated power;[141] to subscribe to that view, however, would require conceding that the enumerated power of control over article IV land could be employed as a means to extraneous ends. That was a concession which the Justices who subscribed to the Marshall dictum apparently were unwilling to make. Yet it was at least equally undesirable to rule that the federal government was powerless to put its lands to such uses as grazing and recreation. The only way out of this dilemma was to conceive of the article IV property clause as a grant of enumerated power to promote whatever ends might be promoted by the use of article IV property. On this view, the use of article IV land for any purpose whatsoever would appear to be, not the promotion of some "object not entrusted to the government" under the pretext of exercising an enumerated power, but rather the straightforward exercise of an enumerated power. Under this approach, however, the distinction which the precedents had drawn between article IV property which was being utilized in pursuit of enumerated federal functions and that which was not, lost not only its significance but its comprehensibility. On this view, all article IV property was held and utilized for enumerated functions, because that clause, as so conceived, made every purpose for which federal property might be used ipso facto an enumerated purpose insofar as it was attainable by means of the use of federal property. Hence no state police power regulation could possibly have any greater application to article IV property than state laws purporting to create private rights therein could have; no rules of state law could have any effect upon article IV property "save as they may have been adopted or made applicable by Congress."[142]

139. The error was even more strongly expressed in Linder v. United States, 268 U.S. 5 (1925) (unanimous).

140. Making provision for public recreation or for future timber needs is not an objective within the scope of any enumerated federal power.

141. Bacon v. Walker, 204 U.S. 311 (1907) (federal lands used to pasture grazing sheep); Ward v. Race Horse, 163 U.S. 504 (1896) (federal lands used as stalking grounds for hunters).

142. Utah Power & Light Co. v. United States, 243 U.S. 389, 405 (1917). Justice Van Devanter, the author of the Court's opinion in *Utah Power & Light*, was one of the Justices who subscribed to Marshall's *McCulloch* dictum and joined in the *Dagenhart*

C. *Property Clause Doctrine and Practice Prior to 1937*

Despite the dicta of cases such as *Utah Power & Light*, the holdings of Supreme Court property clause cases prior to 1937 continued to conform to the 19th century precedents. The United States still was held to enjoy exclusive jurisdiction "in virtue of the constitutional provision"[143] over property coming within the article I clause. The question whether a state could validly reserve any measure of jurisdiction over property to which the state ceded jurisdiction under that clause was held "not an open one. It long has been settled" that it could not.[144] This was recognized as the cardinal distinction between a cession comporting with the terms of the article I clause, on the one hand, and a cession under the article IV clause on the other.[145] In accordance with the *Fort Leavenworth Railroad* principle,[146] cessions under the latter clause to facilitate effectuation of some enumerated power could voluntarily be made as complete and unqualified as cessions under article I were made by constitutional rule, in which case they would exclude all state jurisdiction.[147] Unlike article I cessions, however, article IV cessions also could be as conditional or as qualified as the ceding state—or the accepting United States—might choose.[148] If the manner in which or the use for which property was acquired by the United States disqualified it from coverage by the article I clause, and if there had been no cession in accordance with *Fort Leavenworth Railroad*, then the state by constitutional reservation retained its general governmental jurisdiction over the federal land. That this classic principle still was accepted by the Court was demonstrated less than a year

error. At the age of 36 Van Devanter had successfully assembled the precedents supporting the traditional rule of state governmental jurisdiction to win the case for his client in Ward v. Race Horse, 163 U.S. 504 (1896). For discussion of *Ward*, see text accompanying notes 84-86 *supra*. It is both remarkable and puzzling, therefore, that at the age of 57 when he wrote the Court's opinion in the *Utah Power & Light* case, he totally ignored *Ward* and all of the precedents on which it had relied. The only explanation that presents itself as possibly accounting for this phenomenon is the fundamental constitutional confusion, shared by Justice Van Devanter with most of his colleagues, which exhibited itself in the *Dagenhart* error.

Because the facts of *Utah Power & Light* were so clearly within the precedents on federal control over the acquisition of private rights in United States land, it is not at all remarkable that none of the Justices troubled himself to denounce the misguided dicta of that opinion by writing a separate concurrence. One cannot charge every judge who acquiesces in a colleague's written opinion with endorsement of every word in the opinion, and least of all with its dicta. For the views of those Justices not fallen prey to the *Dagenhart* error, one needs to look to other decisions in which they participated, rather than to the opinion in *Utah Power & Light*.

143. Surplus Trading Co. v. Cook, 281 U.S. 647, 652 (1930).

144. *Id.* The only exception to this basic proposition was the state's reservation of the right of process service in article I territory. See text accompanying note 172 *infra*.

145. United States v. Unzeuta, 281 U.S. 138, 142 (1930).

146. *See* text accompanying notes 98-104 *supra*.

147. Standard Oil Co. v. California, 291 U.S. 242 (1934); United States v. Unzeuta, 281 U.S. 138, 142 (1930).

148. United States v. Unzeuta, 281 U.S. 138, 142 (1930).

after *Utah Power & Light* when the Court upheld the power of the State of Idaho to regulate the pasturing of sheep upon the federal public domain within that state.[149] Such state jurisdiction, of course, did not detract from the United States' power, derived not from its sovereignty but from its proprietorship, to make rules subject to state supervention pertaining to use and interference with use of its lands.[150]

While no holding of the Supreme Court had yet departed from the property clause principles supported by the 19th century precedents, some of the early exceptions were finding slightly broader application. In 1927 the Court upheld a federal law punishing one who built and failed to extinguish a fire on private land dangerously near the public domain;[151] and in 1928 it held Arizona game laws inapplicable to prevent the slaughter, under federal authority, of deer within a national forest and national game reserve when they reached such numbers that their forage was destroying the federal lands.[152] These holdings were new and somewhat broader applications of the rule, laid down in *Camfield v. United States*,[153] empowering the federal government to enact laws to protect the property of the United States. In *Camfield* the Court had announced a "constitutional right of protecting

149. Omaechevarria v. Idaho, 246 U.S. 343, 346 (1918) (police power of state extends over federal public domain, at least when there is no congressional legislation on the subject). It is significant that Justice Van Devanter, who had authored the opinion and dicta in *Utah Power & Light*, dissented in *Omaechevarria*, for *Omaechevarria* reaffirmed Bacon v. Walker, 204 U.S. 311 (1907), which had upheld a state statute regulating grazing on federal lands, without any showing that the state regulation was consistent with the federal policy for the use of those lands, much less that the regulation had been adopted or approved by Congress.

150. McKelvey v. United States, 260 U.S. 353, 359 (1922). In *McKelvey* Justice Van Devanter, who wrote for the unanimous Court, acknowledged in dicta that state police regulations are applicable to public land areas, but he expressed the view that such state regulations applied only "so long as the regulations are not arbitrary or inconsistent with applicable congressional enactments." *Id.* The emergence of this personal view of Justice Van Devanter probably explains why, in order to make the opinion in *Omaechevarria* acceptable to as many of the Justices as possible, the statement of the traditional rule was muted by adding a qualifying phrase: "The police power of the State extends over the federal public domain, at least when there is no legislation by Congress on the subject." 246 U.S. at 346.

The traditional rule, of course, actually was that the state police power extended over the federal public domain even where there was contrary federal legislation on the subject, *see* Kansas v. Colorado, 206 U.S. 46, 92 (1907); Ward v. Race Horse, 163 U.S. 504, 516 (1896), except insofar as the state interfered with the use of the federal property as a means to effectuate an enumerated federal governmental power. It is in the light of this latter exception that one may correctly understand the statement in another case from the same period, that "[t]he United States may perform its functions without conforming to the police regulations of a State." Arizona v. California, 283 U.S. 423, 451 (1931) (involving state laws governing water rights).

151. United States v. Alford, 274 U.S. 264, 267 (1927).

152. Hunt v. United States, 278 U.S. 96, 100 (1928). There is some unguarded language in the *Hunt* opinion, such as: "[T]he power of the United States to thus protect its lands and property does not admit of doubt, . . . the game laws or any other statute of the state to the contrary notwithstanding." *Id.* Such language, and the Court's citation to some of the novel dicta of *Utah Power & Light*, invite the conclusion that the Court had departed from the traditional rules. The holding in *Hunt*, however, is supportable in terms of the traditional rules.

153. 167 U.S. 518 (1897).

the public lands from nuisances erected upon adjoining property."[154] The 1927 fire case was squarely within this rule, and in the 1928 Arizona case the rule was simply applied a fortiori to deer which were nuisances upon the government's own land. These cases together established, either as an exception to the classic property clause doctrines or as an application of the necessary and proper clause, a broad power of federal self-help to protect article IV property from nuisances and damage, but they did not negate the general principle of the controlling force of state governmental power.[155] The right to protect its property which the United States enjoyed as a proprietor, although certainly a somewhat greater right of self-help than that which a private proprietor could claim,[156] was different both in origin and in

154. *Id.* at 528.

155. It is significant not only that no holding of the Supreme Court departed from the old precedents during these years, but also that on at least one occasion the efforts of attorneys for the United States to extrapolate the dicta of *Utah Power & Light* into a rule of decision adverse to the old principles failed. Colorado v. Toll, 268 U.S. 228 (1925). Rocky Mountain National Park had been created by the Act of Jan. 26, 1915, ch. 19, 38 Stat. 798 (now 16 U.S.C. §§ 191, 193-195 (1970)), on land owned by the United States within the state of Colorado. The act contained no language concerning the jurisdiction which the state might retain over the land in the park, although it did contain a provision confirming rights of way, such as the state's rights-of-way for roads, acquired before the creation of the park. In *Colorado v. Toll* the state sued in equity to prevent the park superintendent from regulating traffic on state roads within the park pursuant to federal authorization, Act of Jan. 26, 1915, ch. 19, § 4, 38 Stat. 800 (codified, as amended, 16 U.S.C. § 195 (1970)), but against the will of the state. The state relied not on the grant of rights of way, but on its general governmental jurisdiction. As summarized by the Court, "[a]part from those terms [of the act concerning rights of way] the State denies the power of Congress to curtail its jurisdiction or rights without an act of cession from it and an acceptance by the national government." 268 U.S. at 231, *citing* Fort Leavenworth R.R. v. Lowe, 114 U.S. 525 (1885). In reply to the state's citation of *Fort Leavenworth Railroad*, the Solicitor General relied on the dicta of *Utah Power & Light* and two other recent cases, McKelvey v. United States, 260 U.S. 353 (1922), and Omaechervarria v. Idaho, 246 U.S. 343 (1918). The Court, however, held in favor of the state, saying through Justice Holmes:

> As the [park superintendent] is undertaking to assert exclusive control and to establish a monopoly in a matter as to which, if the allegations of the bill are maintained, the State has not surrendered its legislative power, a cause of action is disclosed if we do not look beyond the bill, and it was wrongly dismissed. The cases cited for the defendant do not warrant any such extension of the power of the United States over land within a State.

268 U.S. at 231. Here it was the United States itself, through the duly authorized national park superintendent, that was allegedly acting in derogation of the state jurisdiction over article IV property. The Court held that if the allegations were true they constituted grounds for enjoining the federal government's agent. Thus, in the strongest way possible the *Toll* Court specifically held that the inference of new property clause principles from the dicta in *Utah Power & Light*, adverse to the principles of *Fort Leavenworth Railroad* and the other older cases, was unwarranted.

Before the allegations of the bill in *Toll* had been disposed of on remand, Colorado did cede its jurisdiction over the territory embraced within Rocky Mountain National Park, by an act approved Feb. 19, 1929. Ch. 135, [1929] Colo. Laws 475 (codified at COLO. REV. STAT. ANN. § 3-1-130 (1973)). The United States accepted the cession by Act of Mar. 2, 1929, ch. 583, § 1, 45 Stat. 1536 (codified at 16 U.S.C. § 198 (1970)).

156. It has been asserted, however, that the federal right of self-help was not so much broader than that of a private owner. The Solicitor General argued in United States v. Hunt, 278 U.S. 96, 99 (1928), citing cases from New Hampshire, Iowa, Washington, and New York, that state game laws should be construed to allow even private proprietors when necessary to protect their property to kill game in disregard of those laws, lest they be unconstitutional.

kind from governmental or police power with respect to such land. The latter, in accordance with the classic property clause doctrines remained in the state.[157]

Thus, although the proprietary protection rule was broadened somewhat, the Supreme Court decisions remained consistent with the classic doctrines. Nevertheless, both administrative practice and lower court decisions, as well as the dicta of some Supreme Court Justices, deviated markedly from the prior precedents.[158] Consequently, it is

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157. The fact that the classic principles still prevailed in the Supreme Court, however, by no means indicates that they were universally understood and consistently applied by all lawyers, government officers, and inferior courts. The fact is that public attitudes and government policies toward the public lands had begun to change in the 1890's and issues of property clause doctrine had been arising with such great rapidity and in so many contexts that judicial resolution of all such issues as they arose was impossible. Yet government policies for conservation and utilization called for pressing ahead with federal designs. Aggressive administration, the acceptance which the *Dagenhart* error received among the bar, dicta like that in *Utah Power & Light*, and a disinclination to doubt the legality of measures which facilitated the realization of such significant national ambitions as a system of national parks, as well as the characteristic impatience of lawyers toward careful research among hoary old cases, all were factors which combined to obscure the established principles of property clause doctrine during this period.

158. The degree to which government practice, and even lower court decisions, departed from the rules of the precedents, is best illustrated by actions and decisions relating to the new phenomenon of national parks. While the use of federal land as parks, like its use for wildlife and forest preserves, is highly desirable and is perfectly legitimate under the United States' power as a proprietor, such use clearly does not constitute the utilization of federal property as a means to effectuate any constitutionally enumerated power. Nevertheless, without judicial sanction, government practice with regard to national parks developed along lines appropriate only for property that is being utilized as a means to effectuate an enumerated power.

The first tract of land in federal ownership set apart explicitly for national park purposes was Yellowstone, Act of Mar. 1, 1872, ch. 24, 17 Stat. 32, which at the time was located in the territories of Wyoming and Montana, which were not yet organized into states. Consequently, from the outset Congress enjoyed over Yellowstone the full powers of sovereignty without interference from any state. This arrangement apparently proved so convenient that it seemed desirable to provide for continued exclusive federal jurisdiction after the states within whose boundaries the park lay had been created. Consequently, in the act admitting Wyoming into the Union in 1890, Congress inserted a provision saving "exclusive control and jurisdiction" over Yellowstone to the United States. Act of July 10, 1890, ch. 664, § 2, 26 Stat. 222. Although there was neither precedent nor authority for such an attempted reservation of federal governmental jurisdiction upon the admission of a state, Idaho and Montana each enacted cessions of exclusive jurisdiction over that portion of Yellowstone National Park that lay within their respective borders. Act of Feb. 7, 1891, § 1, [1890-91] Idaho Laws 40 (codified at IDAHO CODE § 58-701 (1948)); Act of Feb. 14, 1891, [1891] Montana Laws 262; *see* Yellowstone Park Transp. Co. v. Gallatin County, 31 F.2d 644, 645 (9th Cir. 1928), *cert. denied*, 280 U.S. 555 (1929). *See also* MONT. REV. CODES ANN. § 83-106 (1966). These acts were followed by a federal act in 1894 asserting that the park remained under "the sole and exclusive jurisdiction of the United States." Act of May 7, 1894, ch. 72, § 1, 28 Stat. 73 (now 16 U.S.C. § 24 (1970)). Of course, desirable as such exclusive federal jurisdiction might have been, it was wholly unsupportable under the established property clause doctrine, which was still being followed at least by the Supreme Court, *see* Ward v. Race Horse, 163 U.S. 504 (1896); Palmer v. Barrett, 162 U.S. 399 (1896), unless national parks were to be viewed either as includable within the article I property clause, as the Idaho cession apparently assumed, or else as a utilization of federal land to effectuate some enumerated power.

However, the constitutionality of this asserted exclusive federal jurisdiction was not litigated for more than 30 years. Meanwhile, perhaps in part because of doubts on the constitutional point, the United States did not assert exclusive jurisdiction over any of the half-dozen or more national parks created within the borders of states during

hardly surprising that symptoms of uncertainty about the power of states to assert jurisdiction upon federal land which had never been the subject of a cession occasionally appeared in Congress. This uncertainty is reflected, for example, in the provision inserted in the Mineral Leasing Act of 1920 declaring:

> That nothing in this Act shall be construed or held to affect the rights of the States or other local authority to exercise any rights

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the Roosevelt, Taft, and early Wilson years. The State of Washington offered a cession of exclusive jurisdiction over the territory embraced within Mount Rainier National Park in 1901, Act of Mar. 16, 1901, ch. 92, § 1, [1901] Wash. Laws 192 (now WASH. REV. CODE ANN. § 37.08.200 (1964)), but the cession was not accepted by the United States until 15 years later. It was during those 15 years that Marshall's *McCulloch* dictum, soon to flourish as the *Dagenhart* error, was rising to prominence. That erroneous notion—with its implication that national parks must be considered an objective encompassed within an enumerated power or else not permissible at all—together with the aggressive park and conservation policies of the Roosevelt and Taft administrations, *e.g.*, Act of Apr. 9, 1912, ch. 74, § 1, 37 Stat. 80 (now 16 U.S.C. § 51 (1970) (providing for acquisition of privately owned land within the borders of Yosemite National Park)), apparently tended to overcome doubts about the constitutionality of exclusive federal jurisdiction over such areas. Thus in 1916 Congress finally accepted Washington's 1901 cession with regard to Mount Rainier National Park, Act of June 30, 1916, ch. 197, § 1, 39 Stat. 243 (now 16 U.S.C. § 95 (1970)), and also accepted Oregon's cession of exclusive jurisdiction over Crater Lake National Park. Act of Aug. 21, 1916, ch. 368, § 1, 39 Stat. 521 (now 16 U.S.C. § 124 (1970)). This was still several months before Justice Van Devanter's dicta in the *Utah Power & Light* case gave credibility to the possibility that the Supreme Court's understanding of the precedents might be undergoing some change.

Exclusive federal jurisdiction over Yellowstone was finally brought to a judicial test in 1928. The United States District Court for the District of Montana, not having before it all of the relevant Montana legislation, held that the state had not surrendered jurisdiction to the United States; the court then observed, in dictum, that if such a surrender had been attempted, its constitutionality would be "at least doubtful." Yellowstone Park Transp. Co. v. Gallatin County, 27 F.2d 410, 412 (D. Mont. 1928). The court's citations were to the cases representing the established property clause doctrine. The Court of Appeals for the Ninth Circuit, however, reversed, Yellowstone Park Transp. Co. v. Gallatin County, 31 F.2d 644 (9th Cir. 1928), *cert. denied*, 280 U.S. 555 (1929), citing the act by which Montana had in fact purported to cede jurisdiction, and relying for the constitutional point upon a decision of the United States Supreme Court delivered only 4½ weeks earlier, and several months after the Montana district court's decision. (The courts in *Yellowstone Park Transportation* did not rule on the validity of the reservation of federal governmental jurisdiction in the act admitting Wyoming into the Union.)

The Supreme Court decision which the court of appeals viewed as controlling the case was Arlington Hotel Co. v. Fant, 278 U.S. 439 (1929). That case involved land within the State of Arkansas which had been designated Hot Springs National Park in 1921. Act of Mar. 4, 1921, ch. 161, § 1, 41 Stat. 1407 (now 16 U.S.C. § 2 (1970)). The property had been owned by the United States continuously ever since Arkansas had been a territory. Title, but not exclusive jurisdiction, was retained by the United States when Arkansas was admitted to statehood in 1836. After Arkansas' statehood but before any cession of jurisdiction by the state, the United States built a military hospital on a part of its land not far from the Arlington Hotel which had been built and operated under lease from the United States for approximately 16 years. Some 30 years later Arkansas ceded exclusive jurisdiction to the United States, with certain reservations, over a part of the federally owned land which included both the military hospital and the privately operated hotel. No. 30, [1903] Ark. Acts 30 (repealed 1923). The Supreme Court held that by this cession the property was placed under the article I property clause. 278 U.S. at 455.

It is worth passing notice that the Arkansas cession was regarded as valid as an article I cession notwithstanding its reservation of precisely the same measure of jurisdiction to the state as had been reserved in the Kansas cession considered in the *Fort Leavenworth Railroad* case 44 years before. In *Fort Leavenworth Railroad*, the reservation had been held to disqualify the Kansas act from being an article I cession. In

> which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States.[159]

The language of this provision, "any rights which they may have," mirrors Congress' uncertainty as to what those rights might be, an uncertainty no doubt aggravated by the dicta in *Utah Power & Light*, decided only 3 years before. Under the precedents, this statutory provision was superfluous, because the states enjoyed a constitutionally assured general governmental jurisdiction over federal property which had not been the subject of a cession of jurisdiction, subject only to the intergovernmental immunities and necessary and proper clause principles;[160] congressional permission was not necessary to state assertion of such power. Indeed, even the terms of this statutory provision pur-

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Arlington Hotel, on the other hand, this reservation was not perceived as any reason to disqualify the cession from consideration under the article I clause; the facts did not raise and the Court did not reach the question whether in view of the exclusiveness of jurisdiction contemplated by the article I clause the attempted reservation by Arkansas could be given any effect. A year later, however, the Court did display its continued recognition of the established principle that article I cessions could not be so qualified, by pointedly intimating that an attempted reservation of that measure of state jurisdiction in an article I cession would be void. Surplus Trading Co. v. Cook, 281 U.S. 647, 656-57 (1930); United States v. Unzeuta, 281 U.S. 138, 142 (1930).

What is most notable about *Arlington Hotel*, however, is that the facts with respect to the Hot Springs National Park were markedly different from those with respect to other national parks. It was these unique facts that the Supreme Court relied upon to support its decision that the cession of exclusive jurisdiction was valid. Specifically noting that it was reserving for future decision the issues affecting the validity and effect of cessions with respect to other national parks, 278 U.S. at 454, the Court in *Arlington Hotel* emphasized that the Arkansas cession concerned land principally used at the time as the site of a military hospital. It was this military use, the Court held, that

> justified acquisition of the springs and hospital for the exclusive jurisdiction of the United States under clause 17, Section 8, Article I of the Constitution. Nor is the constitutional basis for acquisition any less effective because the springs thus kept safely available for the Federal purpose do in the abundance of their flow also supply water sufficient to furnish aid to the indigent and to those of the public of the United States who are able to pay for hotel accommodation on the little park surrounding the hospital and the springs.

Id. at 455. The last sentence of this statement was merely the application to the article I property involved in *Arlington Hotel* of a principle which had been articulated and applied in an article IV context in 1892—the principle that whether some part of a larger tract had ceased to be used for the enumerated purpose which still dominated the whole was a matter in which the courts follow the action of the political department of the government and will not make a determination of their own. Benson v. United States, 146 U.S. 325, 331 (1892). The same principle is reflected in United States v. Unzeuta, 281 U.S. 138, 143 (1930).

Thus, as carefully pointed out by the Supreme Court itself in specific terms, *Arlington Hotel* did not hold either that national parks in general could be regarded as coming within the article I property clause, or that exclusive jurisdiction over them as article IV property could be ceded under the *Fort Leavenworth Railroad* rule. Either of those holdings would have represented a sharp break with the precedents, which the Supreme Court simply was not prepared to make. *Arlington Hotel* presented an unusual if not altogether unique case of interrelationship between a national park and the effectuation of the enumerated military powers. The court of appeals in the *Yellowstone Park Transportation* case took no account of this, and claimed *Arlington Hotel* as authority for the Yellowstone cession when in fact it was no precedent for it at all.

159. Act of Feb. 25, 1920, ch. 85, § 32, 41 Stat. 450 (now 30 U.S.C. § 189 (1970)).

160. The states' general governmental jurisdiction was subject also, in the case of Indian reservations, to the special federal powers concerning Indians. *See* Surplus Trading Co. v. Cook, 281 U.S. 647, 651 (1930).

ported not to grant any new state powers, but only to disavow interference with those which the states already possessed. Nonetheless, with this and other similar statutory provisions in effect,[161] it was natural whenever possible for the Supreme Court to premise its confirmation of state power upon the statutory statements without reaching the constitutional principle which, if precedents were followed, would have upheld the states' power regardless of Congress' assent.[162] Since most controversies involving article IV property were thus capable of resolution without resorting to the constitutional precedents, those precedents became even easier for lawyers in their everyday practice to neglect and forget.

Neither the dicta of Supreme Court Justices, nor the practice of government agencies, nor a generation of practitioner neglect, however, had prepared the country for the sudden new turns that property clause doctrine was to take in three decisions of the United States Supreme Court during its 1937 term.

III. The Fruits of Confusion

A. *The 1937 Term*

The thirties witnessed a substantial expansion of land acquisition programs by the federal government. Much of the land acquired came within the scope of the article I property clause under the Supreme Court precedents, and more of it was conceived as subject to exclusive federal jurisdiction under misconceptions of those precedents that had

161. The first act of Congress authorizing the setting apart of portions of the public domain as forest reserves or reservations was enacted in 1891. Act of Mar. 3, 1891, ch. 561, § 24, 26 Stat. 1103 (now 16 U.S.C. § 471 (1970)). The more extensive provisions on forest reservations, inserted in a general appropriations act in 1897, Act of June 4, 1897, ch. 2, 30 Stat. 11 (repealed in part, 1905, codified in part in scattered sections of 16, 44 U.S.C.), contained a paragraph providing that:

> The jurisdiction, both civil and criminal, over persons within such reservations shall not be affected or changed by reason of the existence of such reservations, except so far as the punishment of offenses against the United States therein is concerned; the intent and meaning of this provision being that the State wherein any such reservation is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State.

30 Stat. at 36. This provision merely stated the rule which would have applied as a matter of course under the precedents, inasmuch as the preservation or protection of forests is not the utilization of the public lands to effectuate a constitutionally enumerated federal power.

162. Mid-Northern Oil Co. v. Walker, 268 U.S. 45 (1925). It is a well accepted principle of Supreme Court decisionmaking that "[t]he Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of . . . . Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter." Ashwander v. TVA, 297 U.S. 288, 347 (Brandeis, J., concurring).

become common among practitioners and lower courts. Out of concern for the inroads on their power, and particularly the power to tax private persons living or working on federal property, many states began attaching substantial reservations to their consents or cessions with respect to federally acquired property. As to property actually coming within the article I clause, the precedents clearly indicated that such attempted reservations were void.[163] However, the question was to be faced anew in 1937 in *James v. Dravo Contracting Co.*[164]

James involved lands acquired for construction of locks and dams for improvement of navigation. The purpose, while clearly within the federal commerce power,[165] had nothing to do with forts, magazines, arsenals, or dock-yards, the uses specified in article I. Moreover, although the state had consented to the acquisition, this consent was cast in terms purporting to grant only concurrent, not exclusive, jurisdiction to the United States, and providing for the reverter of all jurisdiction to the state if the land should be used for other purposes. These qualifications would have presented no difficulty under the precedents if the Court had viewed the "consent" to acquisition of the property as being a cession of jurisdiction under the article IV clause; for some reason, however, the Court felt constrained to bring this property within the article I clause. It did this by construing the "other needful buildings" language of the article I property clause to embrace "whatever structures are found to be necessary in the performance of the functions of the Federal Government."[166] That construction of "other needful buildings" was a reasonable one; however, it created the problem that, having thus placed the property under the article I clause, the Court had to reconcile the constitutional grant of exclusive legislation, with the cession's reservation of concurrent and reversionary state jurisdiction. The view which had been taken in the earlier cases[167] and reiterated as recently as 1930[168] held that such a qualification to a state's cession or consent could not validly be made under the article I property clause, although it would be acceptable in a cession of property under the article IV clause. In *James*, however, the Court held that

163. See text & note 99 *supra*.
164. 302 U.S. 134 (1937).
165. United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940); Leovy v. United States, 177 U.S. 621, 632 (1900); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189 (1824).
166. 302 U.S. at 143. "Functions of the federal government," in this context, must be understood in terms of the doctrine of enumerated powers. *See* Collins v. Yosemite Park & Curry Co., 304 U.S. 518 (1938), discussed in text accompanying notes 181-84 *infra*.
167. *See* text accompanying note 98 *supra*.
168. *See* Surplus Trading Co. v. Cook, 281 U.S. 647 (1930); United States v. Unzeuta, 281 U.S. 138 (1930).

a consent or cession under the article I clause could be just as qualified as a cession under the article IV clause. In either case, the terms agreed to by the two governments as to their respective spheres of jurisdiction would control.[169]

On the same day the Court made another substantial departure from precedent in *Silas Mason Co. v. Tax Commission*.[170] This case involved a United States acquisition of property under a state consent or cession which by its terms purportedly reserved to the state "concurrent jurisdiction." This reserved jurisdiction, however, was to extend only "so far as that all civil and criminal process that may issue under the authority of this state against any person or persons charged with crimes committed, or for any cause of action or suit accruing without the bounds of any such tract, may be executed therein . . . ."[171] To call this a reservation of concurrent jurisdiction, as the terms of the cession did, was misleading, for it reserved nothing so grand. Identical reservations of the mere right to serve on federal property state process concerning actions accruing elsewhere had been viewed even by the earliest commentators as consistent with exclusive federal jurisdiction.[172] By its terms, this was a far narrower reservation than that involved in *James*, which reserved not only the right to execute process, but also "such other jurisdiction and authority over the [land] as is not inconsistent with the jurisdiction ceded to the United States by virtue of such acquisition," and a right of reverter.[173] The cession in *Silas Mason* was said to be "in accordance with the seventeenth clause of the eighth section of the first article of the Constitution,"[174] and the Court thus treated the property as being under article I. Then the Court went on to construe the cession, in spite of its generous and virtually unqualified language, as intended to cede no more jurisdiction than was necessary for the unimpeded fulfillment of the federal objective in using the property.[175] This conclusion was in direct contrast to the Court's position only 7 years earlier. In a 1930 case, *Surplus Trading Co. v. Cook*,[176] the Court had not only refused

169. 302 U.S. at 147-49.
170. 302 U.S. 186 (1937).
171. *Id.* at 205 n.6.
172. *See* Surplus Trading Co. v. Cook, 281 U.S. 647 (1930); United States v. Knapp, 26 F. Cas. 792 (No. 15,538) (S.D.N.Y. 1849); United States v. Davis, 25 F. Cas. 781 (No. 14,930) (C.C.D. Mass. 1829); United States v. Cornell, 25 F. Cas. 650 (No. 14,868) (C.C.D.R.I. 1820); United States v. Travers, 28 F. Cas. 204 (No. 16,537) (C.C.D. Mass. 1814); 2 J. STORY, *supra* note 52, at § 1225.
173. 302 U.S. at 145 n.5.
174. 302 U.S. at 205 n.6.
175. *Id.* at 207-09. The Court buttressed its construction by inferring that even if a greater cession was intended by the state, no greater cession was accepted by the United States. *Id.*
176. 281 U.S. 647 (1930).

to draw suggested inferences of reservations in an article I consent, but had declared that to find any implicit reservation "would lead to a serious question respecting the validity of" the consent.[177] In *Silas Mason*, however, the Court eagerly inferred such a reservation, and one which on its face appeared extremely broad. The Court found that the state had reserved all jurisdiction the cession of which was not necessary to the fulfillment of the federal objective in the use of the property.[178]

At the same time that it was obliterating the traditional distinction between article I and article IV property with regard to reservations in a cession of jurisdiction by a state, the Court was also obliterating other traditional distinctions between the clauses. No Supreme Court decision had ever held that exclusive jurisdiction could be ceded by a state over article IV property to the federal government for any purpose other than the effectuation of an enumerated federal power.[179] Precedent was in fact precisely to the contrary.[180] Yet by 1938 numerous such cessions, particularly with respect to national parks, had been in effect for years, even decades, without Supreme Court test. In the same term as *Silas Mason* and *James*, the Court finally upheld such cessions in *Collins v. Yosemite Park & Curry Co.*[181] The Court found it impossible to fit Yosemite National Park even within the newly broadened definition of article I property,[182] such use not being pursuant to any constitutionally enumerated federal governmental func-

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177. *Id.* at 657, 652-58.

178. It was presumed without controversy in *Silas Mason* that the use to which the property was being put by the United States was an effectuation of the enumerated federal commerce power. 302 U.S. at 197.

Even without any cession of jurisdiction, Congress would have had power under the necessary and proper clause to use its property to achieve an enumerated end, superseding interfering state laws. Moreover, the doctrine of intergovernmental immunities would have prevented the state from interfering with the use of the property to such end. Consequently, if the cession in *Silas Mason* did no more than cede what was necessary to the unimpeded fulfillment of the enumerated federal objective in the use of the property, it was a meaningless cession indeed. It was not even as generous, in fact, as the cession which Kansas had made with respect to Fort Leavenworth; and that Kansas cession, it will be recalled, had been considered much too qualified to be valid under the article I clause, although permissible under article IV. See text & notes 98-99 *supra.*

179. In Benson v. United States, 146 U.S. 325 (1892), Battle v. United States, 209 U.S. 36 (1908), and Standard Oil Co. v. California, 291 U.S. 242 (1934), the property over which jurisdiction had been ceded under the *Fort Leavenworth Railroad* rule was being used to effectuate enumerated powers.

180. *See* text & notes 39, 100-04 *supra.* Arlington Hotel Co. v. Fant, 278 U.S. 439 (1929), involving Hot Springs National Park, had been decided without reaching this point. See discussion note 158 *supra.*

181. 304 U.S. 518, 528-30 (1938).

182. In *James v. Dravo Contracting Co.*, just 6 months earlier, the Court had construed "other needful Buildings" in the article I clause to include "whatever structures are found to be necessary in the performance of the functions of the Federal Government." Even with the article I clause construed this broadly, however, the Court recognized that large bodies of public lands "are used for forests, parks, ranges, wild life sanctuaries, flood control, and other purposes which are not covered by Clause 17." 304 U.S. at 529-30.

tion.[183] Nonetheless, noting explicitly that it was a case of first impression, the Court held that as to such property not being utilized in pursuit of an enumerated function, cession by the state and acceptance by the United States could provide for any division of state and federal jurisdiction thought desirable, and even for exclusive federal jurisdiction.[184] Thus, in only three cases decided during its 1937 term, the Supreme Court had unsettled the entire field of constitutional property clause law, and had begun a merging of the traditional concepts under the article I and article IV property clauses.

B. *The Proprietary-Governmental Distinction*

A year later, in a decision concerning tax immunity of federal entrepreneurial activities unrelated to federal property, the Supreme Court uttered a proposition which, because of confusion on the part of the lawyers who read it, came to have a profound effect upon the practice of federal property law. Understanding this development requires a bit of background. It will be recalled that in *Van Brocklin v. Tennessee*[185] the Court had pointed out that in a republican government, unlike a monarchy, all of the actions, powers, and interests of the sovereign are public and none are private.[186] At the same time, the classic property clause cases both before and consistently after *Van Brocklin* had held that the power which the United States enjoyed in article IV property was, with certain qualifications, the power of a proprietor, to be carefully distinguished from the sovereign legislative power which the United States enjoyed over matters within the scope of its enumerated governmental powers. In terms of the distinction drawn in *Van Brocklin,* this federal proprietorship power was a public, not a private power.

The observation which the Court had made in *Van Brocklin,* that republican governments have only public and no private powers, had not applied to municipal corporations created by the states. Municipal corporations had long been recognized by American law to have not only certain powers and duties in their public character, but also the

183. See discussion note 166 *supra.*

184. 304 U.S. at 529-30. One factor in the Court's reasoning seems to have been the unsupported assumption that property for national parks could have been acquired even by condemnation. *See id.* at 530 (dictum). A similar dictum, equally without any attempt to square it with the precedents, appears in Bowen v. Johnston, 306 U.S. 19, 23 (1939).

The Court still had never specifically reached the question of whether the United States could reserve governmental jurisdiction at the time of admission of a state into the Union, as it had purported to do in the case of Wyoming and Yellowstone National Park.

185. 117 U.S. 151 (1886).

186. *See* text accompanying notes 76-82 *supra.*

power to engage in private business like other corporations. This distinction between the public and private aspects of municipal corporations had been given major significance, for example, with regard to the tort liability of municipal corporations.[187] Late in the 19th century, and increasingly as the 20th century commenced, there appeared a new movement among the states themselves—as distinguished from their municipal corporations—to engage in activities which amounted to business ventures, such as the operation of railroads; gas, water, and electric utilities; and liquor dispensaries.[188]

When it was confronted with this new development, the Supreme Court was reminded of the observation it had made in *Van Brocklin.* The Court proved unwilling, however, to conclude that a state's undertaking of such private activities ran afoul of the guaranty clause.[189] Thus, insofar as it referred to the states, the Court effectively rejected the *Van Brocklin* view that a republican government has no private powers. The Court, however, did think it necessary to meet the new development with a change in the doctrine of reciprocal intergovernmental immunities, a doctrine which since 1871[190] had exempted state activities from taxation by the United States. The Court therefore held in *South Carolina v. United States*[191] that "the exemption of state agencies and instrumentalities from National taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the State in the carrying on of an ordinary private business."[192]

At a much later date than the states, the federal government, too, began to engage in activities which traditionally had been confined to the private sector. These new federal ventures came into litigation at a time when the Supreme Court was grappling with another confusingly similar, but fundamentally different, concept of federal power. The new federal ventures into traditionally private activities were challenged during the same late New Deal era when the Supreme Court

187. *See* Oliver v. Worcester, 102 Mass. 489 (1869); Lloyd v. City of New York, 5 N.Y. 369 (1851).

188. By the turn of the century there were even a few people "insisting that the State shall become the owner of all property and the manager of all business." South Carolina v. United States, 199 U.S. 437, 454 (1905). This extreme view underscored the trend toward entirely new sorts of state involvement in what traditionally had been private concerns.

189. The Court asked rhetorically, apparently intending a negative reply: "Would the State by taking into possession these public utilities lose its republican form of government?" *Id.* at 454.

190. Collector v. Day, 78 U.S. (11 Wall.) 113 (1871).

191. 199 U.S. 437 (1905).

192. *Id.* at 461; *accord,* Ohio v. Helvering, 292 U.S. 360, 368-69 (1934). The Court specifically noted the analogy between this new immunities rule and the rule which had long utilized the governmental-proprietary dichotomy to determine the tort liability of municipal corporations. 199 U.S. at 461-63.

was struggling toward the final repudiation of the *Dagenhart* error and the legitimation of using enumerated powers to promote extraneous ends.[193] Unfortunately, the Court sometimes failed to distinguish the fundamentally different concepts involved in these separate issues.

In 1939 the Supreme Court held that even when engaging in activities similar to those of a private business, instrumentalities of the United States could be immunized against taxation by a state.[194] In *South Carolina v. United States*[195] the Court had in effect rejected the *Van Brocklin* notion that a republican government has no private powers, and had, for purposes of immunity from federal taxes, distinguished state activities of a strictly governmental character from those comparable to a private business. Thus, if the Court were now to be consistent, it could not appeal to the federal government's republican character as the reason for refusing to make a similar distinction for the purposes of federal immunity from state taxation. The Court seized instead upon the doctrine of enumerated powers, and turned it to the use that had been served by the republican government concept in *Van Brocklin*. Although the passage from *Van Brocklin* was cited as authority for the Court's decision that the United States, unlike the states,[196] is immune from taxation even for its activities which are comparable to private business, the foundation for the rule was stated quite differently than in *Van Brocklin*: "As [the federal] government derives its authority wholly from powers delegated to it by the Constitution, its every action within its constitutional power is governmental action . . . ."[197]

This rationale enabled the Court to maintain categorical federal immunity on the authority of *Van Brocklin* despite its displacement of the *Van Brocklin* rationale. However, it also effected an erroneous equation between the public-private dichotomy and the dichotomy of enumerated and reserved powers. The term "governmental," which had been commonly used as the equivalent of "public" in the former dichotomy, was now used as the equivalent of "enumerated," and it was taken for granted that the concept which the word "governmental"

193. See text accompanying notes 128-42 *supra*, 233-38 *infra*.
194. Pittman v. Home Owners' Loan Corp., 308 U.S. 21, 32-33 (1939). *See also* Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 477 (1939). On the facts of the case, the activities also were aimed at objectives extraneous to the enumerated powers, but that was not perceived as a separate issue.
195. 199 U.S. 437 (1905).
196. While the verbal labels sometimes used to represent the distinction have fallen into disfavor even among the Justices themselves, the rule of *South Carolina v. United States* denying the protection of tax immunity to certain activities of the states has been reaffirmed and continues in effect. See New York v. United States, 326 U.S. 572 (1946).
197. Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 477 (1939).

represented in each instance must be the same. This erroneous equation of two entirely different dichotomies was reinforced 2 years later with the statement that "any constitutional exercise of [the federal government's] delegated powers is governmental," and the Court's observation that "[t]he argument that the lending functions of the federal land banks [for example] are proprietary rather than governmental misconceives the nature of the federal government with respect to every function which it performs."[198]

That, however, was only the beginning of the confusion. Since the antipode of "governmental" in habitual legal vocabulary is "proprietary," lawyers soon came to regard this line of cases dealing with federal entrepreneurial activities as having implications for property clause doctrine. In classic property clause doctrine the federal government's basic power under the article IV clause was well understood to be the power of a proprietor rather than a power of governmental jurisdiction, although it was both an enumerated power and a public rather than a private power.[199] Proprietary, however, had now taken on additional meanings, referring in some instances to activities comparable to those of a private business, and in other instances to matters outside the scope of enumerated federal powers. The Supreme Court had said that "every action [of the federal government] within its constitutional power is governmental action . . . ."[200] Failing to realize that a single word can denote several entirely different concepts, many lawyers were seduced into total misunderstanding of property power concepts. The logic seemed compelling: if something is governmental, it cannot be proprietary; the property power is conferred by the Constitution and therefore, according to the tax immunities decisions, is governmental; *ergo*, the property power is not a proprietary power. The syllogism, however, is faulted by a linguistic short circuit, which few were astute enough to perceive.[201]

198. Federal Land Bank v. Bismarck Lumber Co., 314 U.S. 95, 102 (1941). *See also* Federal Land Bank v. Kiowa County, 368 U.S. 146, 150 (1961).

199. Van Brocklin v. Tennessee, 117 U.S. 151 (1886); *see* text accompanying note 76 *supra*.

200. *See* text accompanying note 197 *supra*.

201. The confusion arose from the fact that the same two words, long contraposed in the minds of lawyers, were now being used simultaneously to express several distinct concepts. "Governmental" and "proprietary" were still being used as convenient labels to distinguish between the public and private activities of governments, or in the better words of Justice Frankfurter, to distinguish "between the State as government and the State as trader . . . ." New York v. United States, 326 U.S. 572, 579 (1946). At the same time, however, "governmental" was used in the 1939 and 1941 cases as an adjectival reference to the doctrine of enumerated powers. The classic property cases had used the word "proprietary" in an entirely different sense to indicate that the basic article IV property power, with certain qualifications, was as much subordinate to state power as the rights of any other property owner, and was not governmental in the sense of being a sovereign and supervening legislative power.

It is this muddied stream of reasoning that has led many lawyers and some judges into hopeless confusion about the property power. The Interdepartmental Committee and the Public Land Law Review Commission both fell victim to this error, concluding that the power of the United States over article IV property is in every sense governmental and not analogous to the power of an ordinary proprietor at all. Thus, both concluded that all the property clause precedents propounding the contrary view somehow, at some unknown time, must have been tacitly overruled.[202] The error of this view should have been apparent from the fact that, even after it had declared all federal powers to be governmental in the context of tax immunities, the Supreme Court still applied the classic property clause principles to hold that the states, and not the United States, possess general governmental jurisdiction over article IV land.[203]

Neither in *Van Brocklin* nor in the tax immunities decisions had the Supreme Court made any change in article IV property clause doctrine. The article IV property power is an enumerated power, and it is a public power in the *Van Brocklin* sense. Under the Supreme Court's decisions since early in the 19th century, however, the article IV property power was unique among the enumerated federal powers in that it was not a supervening sovereign power nor a governmental power like the other enumerated powers, but a power analogous to the power of a private proprietor. As such, apart from the exceptions concerning creation of private rights in federal lands and the protection of those lands, and except in those instances when the principles of the necessary and proper clause or the intergovernmental immunities doctrine applied, the federal power under the article IV property clause was subordinate to state legislation. In its 1937 term the Supreme Court had made great changes with respect to cessions of state jurisdiction, but otherwise the classic doctrine had not been derogated except in occasional dicta. However, because of profound intellectual confusion resulting from overreliance upon ambiguous words as the vehicles for expressing difficult legal concepts, the law as perceived by many lawyers and judges and by the federal officials who managed the public lands appeared to have changed.

IV. Property Clause Doctrine and Practice Since 1938

A. *Confusion and Merger of Property Clause Concepts*

The characteristic which all the 1937 term property clause de-

202. Interdepartmental Committee Report, Part II, *supra* note 5, at 251 n.6; Public Land Law Review Comm'n, *supra* note 6, at 278.
203. Wilson v. Cook, 327 U.S. 474 (1946).

cisions had in common was the confused misapplication of concepts to property under one of the Constitution's property clauses that had theretofore been applied by the Supreme Court only to property under the other. Such a tendency toward the merger of property clause principles was bound to have profound effects. While the gradual piecemeal progression of the confused merger of concepts in Supreme Court doctrine has contributed greatly to the puzzling complications of property clause practice, however, it nonetheless would be erroneous to assume that in the years since 1938 the significance of distinctions between the two clauses has entirely disappeared. The points on which the doctrines under the two clauses have been effectively merged by Supreme Court decision, and the respects in which the doctrines remain distinct require examination.

Some of the consequences of the merger of article I and article IV property clause concepts in *James*, *Silas Mason*, and *Collins* very quickly became apparent—although those consequences were not recognized as resulting from conceptual confusion. The first such effect was with regard to military bases. Virginia had passed an act consenting to federal purchase of lands "for any military or naval purpose or other purpose embraced within the provisions of the seventeenth clause of the eighth section of Article one . . . ."[204] However, the act went on to reserve substantial aspects of jurisdiction to the state. Under the novel rules of *James*, such reservations, if agreed to by the United States, would not have been inconsistent with the exclusive federal jurisdiction contemplated by the article I property clause. Since 1841, however, a federal statute, which had not been considered in *James*, had been in effect, requiring a written opinion of the Attorney General in support of the validity of the title before land could be purchased for "armories, arsenals, forts, fortifications, navy yards, customhouses, light-houses, or other public buildings of any kind whatever . . . ."[205] This list substantially conforms to the list of purposes in the article I property clause. In light of the traditional principle that the federal government's jurisdiction over article I property constitutionally must be exclusive, it had long been understood as the duty of the Attorney General to disapprove under the 1841 statute any proposed purchase for one of the listed purposes where the state offered to cede less than exclusive jurisdiction, allowing reservation only of the right to serve process.[206] Therefore, even though the Court had now ruled

204. Ch. 382, § 19, [1936] Va. Acts 610 (now VA. CODE ANN. § 7.1-15 (1973)).
205. J. Res. 6, §§ 1, 3, 5 Stat. 468 (now 40 U.S.C. § 255 (1970)).
206. *See* 38 OP. ATT'Y GEN. 341 (1935); 31 OP. ATT'Y GEN. 294 (1918); 31 OP. ATT'Y GEN. 282 (1918); 31 OP. ATT'Y GEN. 265 (1918); 31 OP. ATT'Y GEN. 263 (1918); 26 OP. ATT'Y GEN. 289 (1907); 24 OP. ATT'Y GEN. 617 (1903); 20 OP. ATT'Y

that the Constitution allowed substantial reservations or qualifications in favor of retained state jurisdiction, the Attorney General held that he was bound by the stricter requirement of the statute, fixed by nearly a century of practice in his office, to disapprove the purchase on Virginia's qualified terms.[207]

The resulting confusion caused much inconvenience at a time when many tracts of property were being acquired for bases and other facilities necessary for conducting a war. Thus, the next year, 1940, Congress amended the federal statute, taking advantage of the new constitutional rules. The 1940 amendment provided that exclusive federal jurisdiction over property acquired for the listed purposes need not be obtained, and established a procedure whereby federal administrative officers could accept or decline any or all jurisdiction over such property at and for whatever times the appropriate administrative officer deemed desirable. The new act also specified that as to any such property thereafter acquired, unless and until jurisdiction in whole or in part had been accepted by the prescribed administrative process, "it shall be conclusively presumed that no such jurisdiction has been accepted."[208] Prior cases had reasoned that exclusive jurisdiction over article I property would vest in the United States by operation of law, without the need for any express terms of cession in the state's consent to the purchase of the lands, and without the possibility of reservations. That rule had been abdicated by the 1937 cases, and now the 1940 statute erected a presumption operating precisely to the contrary. The statutory presumption for article I lands, in fact, was equivalent to the rule which the earlier precedents had established with respect to article IV lands. Although the 1940 legislation may have restored some degree of equilibrium to property clause practice, it also reinforced the

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GEN. 611 (1891-93); 31 OP. ATT'Y GEN. 298 (1891-93); 20 OP. ATT'Y GEN. 242; 10 OP. ATT'Y GEN. 34 (1861); 8 OP. ATT'Y GEN. 418 (1857); 7 OP. ATT'Y GEN. 628 (1856).

207. 39 OP. ATT'Y GEN. 285 (1939).

208. Act of Oct. 9, 1940, ch. 793, § 355, ¶ 8, 54 Stat. 1083 (now 40 U.S.C. § 255 (1970)); *see* Adams v. United States, 319 U.S. 312 (1943). The 1940 act provides:

> Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; but the head or other authorized officer of any department or independent establishment or agency of the Government may, in such cases and at such times as he may deem desirable, accept or secure from the State in which any lands or interests therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor of such State or in such other manner as may be prescribed by the laws of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted.

tendency of practitioners and officials to disregard the distinctions upon which classic property clause doctrine had been built.

Another Supreme Court decision reflecting the confusion of property clause concepts was handed down in 1940. Fifty-five years earlier in *Chicago, Rock Island & Pacific Railway v. McGlinn*[209] the Supreme Court had held that a state statute enacted before a cession of jurisdiction over article IV land continued to apply to actions occurring on the federal land even after the cession of state jurisdiction, so long as the federal government had not acted to change or abrogate the state law.[210] In the 1940 case, mistaking *McGlinn* for authority, the Court applied exactly the same principle to article I property.[211]

An even more significant development from this confusion and merger appeared in 1953 when the Supreme Court decided *Howard v. Commissioners*,[212] allowing municipal annexation of an article I

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209. 114 U.S. 542 (1885). The state law created a cause of action where cattle were killed by a train.

210. Forty years before *McGlinn* in Permoli v. First Municipality, 44 U.S. (3 How.) 589 (1845), the Court had held that laws of Congress conferring political rights—as distinguished from private rights—were superseded by the state constitution when Louisiana was created out of federal territory, unless the federal laws were adopted by the new state as state law.

211. James Stewart & Co. v. Sadrakula, 309 U.S. 94 (1940). Specifically noting that it considered the property to be covered by the article I clause, *id.* at 97 n.1, 99, the *Sadrakula* Court held that a state statute in force at the time jurisdiction was ceded, requiring construction contractors to take certain precautions for the safety of workers, remained in force on the article I federal property. *See also* Pacific Coast Dairy, Inc. v. Department of Agriculture, 318 U.S. 285, 294 (1943).

Another doctrinal development resulting from the merger of article I and article IV property concepts appeared in S.R.A., Inc. v. Minnesota, 327 U.S. 558 (1946). Realty which the Court held to be within the article I clause was sold by the United States to a private corporation, its utility to the government having ceased. Since there was no federal act retroceding jurisdiction to the state, and no provision in the earlier state cession act for reversion of jurisdiction should the United States cease to own the property, the case presented for the first time the question whether the exclusive federal jurisdiction provided for under the article I clause automatically ceased upon transfer of ownership from the United States. Citing dictum from Fort Leavenworth R.R. v. Lowe, 114 U.S. 525, 542 (1885), *quoted in* text accompanying note 103 *supra*, the majority opined that federal jurisdiction under the article I property clause must cease when the federal ownership of the property ceased. 327 U.S. at 564. The *Fort Leavenworth Railroad* dictum, however, had contemplated article IV property. It was the view in *Fort Leavenworth Railroad* that jurisdiction could be ceded with respect to article IV property only if that property was not only owned by the United States but being utilized to effectuate some enumerated power. From this the reverter of jurisdiction upon termination of federal ownership followed a fortiori. Under the article I clause, however, Congress' power of exclusive legislation is not necessarily dependent upon the federal retention of title; to this the situation of the seat of the government attests. See discussion note 17 *supra*. It does make sense, in order to avoid "numerous islands of federal jurisdiction," to hold that "the unrestricted transfer of the property to private hands . . . without more" revests entire jurisdiction in the state, 327 U.S. at 563-64, but the *Fort Leavenworth Railroad* article IV dictum provided no precedent for this new article I rule. Two of the Justices insisted that this question was not in the *S.R.A.* case, and branded as dictum their colleagues' statements in regard to it. *Id.* at 570-71. Be it dictum or not, it has been followed as precedent. *See* United States v. Goings, 504 F.2d 809 (8th Cir. 1974).

In Humble Pipe Line Co. v. Waggonner, 376 U.S. 369 (1964), the Court refused to extend the rationale of *S.R.A., Inc. v. Minnesota* so as to terminate exclusive federal jurisdiction over federal property when it was leased to a private concern.

212. 344 U.S. 624 (1953).

enclave. That case involved property acquired for an article I purpose after the 1940 act was passed, as to which the state had ceded jurisdiction without reservation, and as to which the United States had duly accepted exclusive jurisdiction. At issue was the applicability of a Louisville, Kentucky, occupational tax to employees of a naval ordnance plant. A federal statute specifically authorized such taxes,[213] but the Louisville tax by its terms applied only to persons working within the City of Louisville. It was therefore crucial to the application of the tax that certain city ordinances annexing the article I property on which these employees worked be found valid as not inconsistent with exclusive federal jurisdiction over the property. Although it explicitly declared that the property was under the article I clause,[214] the Court upheld the annexation, stating:

> When the United States, with the consent of Kentucky, acquired the property upon which the Ordnance Plant is located, the property did not cease to be a part of Kentucky. The geographical structure of Kentucky remained the same. In rearranging the structural divisions of the Commonwealth, in accordance with state law, the area became a part of the City of Louisville, just as it remained a part of the County of Jefferson and the Commonwealth of Kentucky. A state may conform its municipal structures to its own plan, so long as the state does not interfere with the exercise of jurisdiction within the federal area by the United States. Kentucky's consent to this acquisition gave the United States power to exercise exclusive jurisdiction within the area. A change of municipal boundaries did not interfere in the least with the jurisdiction of the United States within the area or with its use or disposition of the property. The fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries, so long as there is no interference with the jurisdiction asserted by the Federal Government. The sovereign rights in this dual relationship are not antagonistic. Accommodation and cooperation are their aim. It is friction, not fiction, to which we must give heed.[215]

Howard could have been reconciled with the precedents if there had been a federal statute authorizing the state to exercise the challenged measure of jurisdiction over article I property. While the explicit property clause precedents indicated that state power over article I property—where there were no reservations in the cession—was constitutionally precluded, principles had developed late in the 19th century in fields other than the property power permitting Congress to

213. *Id.* at 627-29.
214. *Id.* at 627.
215. *Id.* at 626-27.

authorize states to regulate in areas which otherwise would have been held to be realms of constitutionally exclusive federal power.[216] However, although a federal statute authorized the application of state taxes to persons working on article I property,[217] there was no federal authorization for the annexation. Consequently, *Howard* can only be viewed as a clear break with the precedents. It was, in fact, a repudiation of what had been the fundament of article I property clause doctrine since the beginning of the 18th century.[218] There can be no doubt that this change, unlike many of the other changes in property clause doctrine, was consciously and deliberately made.[219]

That the change was deliberate does not mean, of course, that all the implications of the decision were immediately perceived or fully understood, either by the Justices or by others who would deal with property clause questions after the *Howard* decision. The Interdepartmental Committee perceived that "[t]he decision in the *Howard* case would seem to make untenable the premise of extraterritoriality"[220] of federal enclaves, which was integral to all of the precedents holding that state power and the privileges of state citizenship could not reach inside the enclaves. The Committee, however, did not trace further the implications of the Court's doctrinal change. In fact, the *Howard* decision struck down the entire logical and precedential support for the traditional view that equates the constitutional term "exclusive Legislation" with "exclusive governmental jurisdiction"[221] and thus views the article I power as "in essence complete sovereignty."[222] As is often the case with doctrinal breakthroughs in the law, however, the full significance of the *Howard* decision is emerging slowly.[223]

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216. *In re* Rahrer, 140 U.S. 545 (1891).

217. The Buck Act, 4 U.S.C. §§ 105-110 (1970); *see* Howard v. Commissioners, 344 U.S. 624, 627-28 (1953).

218. That theory had been summarized by Justice Story, speaking of an article I fort in Rhode Island, in these words: "Strictly speaking, it was not within the body of any county of Rhode Island, for the state had no jurisdiction there. It was as to the state as much a foreign territory, as if it had been occupied by a foreign sovereign." United States v. Cornell, 25 F. Cas. 650, 653 (No. 14,868) (C.C.D.R.I. 1820). In stark contrast is the language of the *Howard* Court: "The fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries." 344 U.S. at 627.

219. The issue in *Howard* was well briefed, and both the appellant and the appellee pointed out to the Court the clear contradiction between the rule which it was urged to, and ultimately did, adopt and the rule of the older cases like United States v. Cornell, 25 F. Cas. 650, 653 (No. 14,868) (C.C.D.R.I. 1820), and Reily v. Lamar, 6 U.S. (2 Cranch) 344, 356-57 (1805) (District of Columbia ceased to be part of Maryland). *See* Brief for Appellants at 7-17, Brief for Appellees at 22-25, Howard v. Commissioners, 344 U.S. 624 (1953).

220. INTERDEPARTMENTAL COMMITTEE REPORT, PART II, *supra* note 5, at 242.

221. *See* cases cited note 15 *supra*.

222. S.R.A., Inc. v. Minnesota, 327 U.S. 558, 562 (1946).

223. Among those lower courts which considered the effect of *Howard* prior to 1970, several failed to perceive its implications. *See, e.g.*, Mississippi River Fuel Corp.

In 1970 the Supreme Court reaffirmed *Howard* and applied it without dissent in *Evans v. Cornman.*[224] *Cornman* held that the property constituting the National Institutes of Health, which the Court explicitly declared to be within the article I property clause,[225] did not cease to be a part of Maryland when that state ceded exclusive jurisdiction over the property to the United States. Consequently, the Court held—contrary to overwhelming precedent[226]—that persons who resided upon that property could not be denied the right to vote in Maryland on the ground that they were not residents of that state. The emergence of the revolutionary new article I property clause principle[227] enumerated in *Howard* and again in *Cornman* was unquestion-

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v. Cocreham, 382 F.2d 929, 938 n.17 (5th Cir. 1967) (the implications of *Howard* had been perceived by the district court in that case; *see* 247 F. Supp. 819 (E.D. La. 1965)); Murphy v. Love, 249 F.2d 783 (10th Cir. 1957); Langdon v. Jaramillo, 80 N.M. 255, 454 P.2d 269 (1969); Burns v. State, 79 N.M. 53, 439 P.2d 702 (1968); Schwartz v. O'Hara Township School Dist., 375 Pa. 440, 100 A.2d 621 (1953). Even the Supreme Court, when the parties failed to point out in briefs or argument the significance of *Howard,* reiterated in 1963 the old principle repudiated by the decision in *Howard,* that the article I clause "by its own weight, bars state regulation without specific congressional action." Paul v. United States, 371 U.S. 245, 263 (1963) (dictum). Nonetheless, more and more lower courts during the last several years have been recognizing and implementing the implications of *Howard* in the face of the older article I rules. *E.g.,* First Hardin Nat'l Bank v. Fort Knox Nat'l Bank, 361 F.2d 276, 279 (6th Cir. 1966); Bartsch v. Washington Metropolitan Area Transit Comm'n, 357 F.2d 923, 924 (4th Cir. 1966); Alabama-Tennessee Natural Gas Co. v. City of Huntsville, 275 Ala. 184, 153 So. 2d 619 (1963); Beagle v. Motor Vehicle Accident Indemnification Corp., 26 App. Div. 2d 313, 274 N.Y.S.2d 60 (1966); Brennan v. Shipe, 414 Pa. 258, 199 A.2d 467 (1964); Western Union Tel. Co. v. Commonwealth, 204 Va. 421, 132 S.E.2d 407 (1963); DuPont-Fort Lewis School Dist. v. Clover Park School Dist., 65 Wash. 2d 342, 396 P.2d 979 (1964). *See also* United States v. City of Bellevue, 334 F. Supp. 881 (D. Neb. 1971).

224. 398 U.S. 419 (1970). The implications of *Howard's* repudiation of the extraterritoriality notion had been openly explored in the briefs and arguments.

225. *Id.* at 420.

226. *See* Albaugh v. Tawes, 233 F. Supp. 576 (D. Md. 1964); State *ex rel.* Parker v. Corcoran, 155 Kan. 714, 128 P.2d 999 (1942); Herken v. Glynn, 151 Kan. 855, 101 P.2d 946 (1940); Royer v. Board of Election Supervisors, 231 Md. 561, 191 A.2d 446 (1963); Lowe v. Lowe, 150 Md. 592, 133 A. 729 (1926); Opinion of the Justices, 42 Mass. 580 (1840); Sinks v. Reese, 19 Ohio St. 306 (1869); Custis v. Lane, 17 Va. 579 (1813); cases collected in Annot., 34 A.L.R.2d 1193 (1954).

227. It is unclear at the present time whether the *Howard* and *Cornman* repudiation of the extraterritoriality principle can be relied upon; for while the repudiation was explicit and deliberate, and in *Cornman* unanimous, even the Supreme Court itself has been inconsistent in regard to it. As already noted, 10 years after *Howard,* when neither the parties nor the Court made reference to that decision, the Court in dictum recited approvingly the extraterritoriality rule. Paul v. United States, 371 U.S. 245, 263 (1963) (dictum); *see* discussion note 223 *supra.* That recitation did not interfere with the 1970 reaffirmation of *Howard* and repudiation of the extraterritoriality rule in *Cornman.* However, in 1973 the Court, albeit in default of guidance by counsel, relied upon the extraterritoriality principle again. United States v. State Tax Comm'n, 412 U.S. 363 (1973), involved a claim by Mississippi that the twenty-first amendment empowered the state to regulate liquor shipped into article I enclaves located within the geographical boundaries of Mississippi. Section 2 of the twenty-first amendment provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The United States argued, relying on the extraterritoriality principle, that the enclaves were federal islands which did not constitute any part of Mississippi and were no more a part of her territory than the territory of a sister state or a foreign land, so that importation into the enclaves was not importation into the state.

ably facilitated by the modern tendency toward confusion and merger of article I and article IV concepts. Nevertheless, even if inadvertently, the Court in these cases made the first judicial proclamations of what seems clearly to have been the original intent and meaning of the article I property clause.[228] Even if the logic underlying *Cornman* and *Howard* is destined to be extended no further than to voting rights for residents of article I enclaves, their significance is profound.[229]

Neither the parties nor the trial court had discovered *Howard* or *Cornman*, nor had they perceived that those cases had repudiated the extraterritoriality notion and thus undone the Government's case. In fact, when this writer suggested to one of the attorneys who was representing Mississippi in the litigation that he should resort to *Howard* and *Cornman* to buttress his case, he put off the suggestion with the comment that he had no hope that the Supreme Court would be consistent anyway! Consequently the Supreme Court was without the resources of briefs and arguments to remind them of the repudiation, and instead the briefs of both parties labored over such precedents as Collins v. Yosemite Park & Curry Co., 304 U.S. 518 (1938), which antedated the *Howard* and *Cornman* repudiation and which, with the extraterritoriality premise unchallenged, were persuasive authority against the position maintained by Mississippi.

Felix Frankfurter in a concurrence once wrote that "[d]ecisions of this Court do not have equal intrinsic authority." Adamson v. California, 332 U.S. 46, 59 (1947). Compared with the well-briefed and deliberate repudiation of the extraterritoriality rule in *Howard* and the unanimous renewal of that repudiation in *Cornman*, the totally unbriefed and casual, not to say accidental, revival of the notion of extraterritoriality in *United States v. State Tax Commission* would seem to be utterly lacking in "intrinsic authority." Nevertheless, the decision does create new uncertainty as to what role, if any, the traditional but mischievous extraterritoriality rule will continue to play in article I property clause doctrine.

The federal District Court for the Northern District of Texas, relying upon the extraterritoriality rule by virtue of the authority of *United States v. State Tax Commission*, recently held a union security agreement, which would be void under Texas law, to be enforcible within an article I enclave. Cooper v. General Dynamics, 378 F. Supp. 1258 (N.D. Tex. 1974).

228. See text accompanying notes 9-12 *supra*. Quite aside from the exegetical merits of the new principle, there are sound reasons of policy to support it. The federal government was not created for the purpose of direct general governance of geographical units of territory. It does operate directly upon citizens, but it does so on the assumption that those same citizens are governed in the bulk of their affairs by another power—a state. No extensive patchwork of nationalized acreages created here and there out of the territory of the states, even with state consent, could have been intended. Perhaps it was not anticipated that the federal government would become the owner of such a vast assortment of federal enclaves as it now has; but surely it was not conceived that such federal enclaves should compose a patchwork nation independent of the states. Certainly it makes good sense now, as it did to the drafters in 1787, to provide for greater federal power in such enclaves than is enjoyed by the federal government in other parts of the country. Instead of being limited to its enumerated powers and the necessary and proper clause, the government should have in those enclaves as much of the police and other governmental powers, otherwise reserved to the states, as the government deems it expedient to exercise there. Only in this way can the federal government be relieved of the embarrassment that dependence upon the good will and potency of a state for protection in the operation of federal institutions had produced under the Articles of Confederation. That need is amply supplied by giving to Congress the power to supersede state power in those enclaves insofar as Congress sees fit, without constitutionally precluding state power even when Congress is silent, and without treating the enclaves as no longer a part of any state.

229. The power which the federal government enjoys over enclaves like those involved in the *Howard* and *Cornman* cases is "like authority" to that which it enjoys over Washington, D.C. *See* Paul v. United States, 371 U.S. 245, 263 (1963); Surplus Trading Co. v. Cook, 281 U.S. 647, 652 (1930). If the denial of voting rights to residents of an enclave like that involved in *Cornman* raises an equal protection question, it might be argued that the denial of voting rights in Maryland to the residents of the District of Columbia similarly raises an equal protection question.

The broad possibilities opened up by *Howard*, and its unanimous 1970 reaffirmation

B. *Vestiges of the Dagenhart Error*

While a number of significant changes in property clause doctrine have been produced since 1938 as a result of the merger of article I and article IV clause concepts, an equally important source of complication and change has been the continuing tendency of lower courts, and even some Supreme Court Justices, to fall prey to the fallacious reasoning associated with the *Dagenhart* error. Shortly before the property power decisions of the 1937 term, the confusion which still surrounded the question whether enumerated powers could be utilized to effectuate extraneous ends was evidenced at the Supreme Court level. In *Ashwander v. Tennessee Valley Authority*[230] a plurality of the Court verbally affirmed the *McCulloch* dictum of Chief Justice Marshall forbidding Congress to pass laws for extraneous objectives under the pretext of exercising its enumerated powers, and declared it to be an "essential limitation."[231] However, in the face of that affirmation, the plurality upheld the power of the government to utilize property, which it had acquired for enumerated purposes, to produce electricity for sale to a private utility company for resale to consumers, clearly an extraneous end. Apparently only Justice McReynolds perceived the glaring inconsistency of the plurality's position. Insisting upon a genuine application of the Marshall dictum,[232] Justice McReynolds dissented. Within 4 or 5 years, a majority of the Court would come to realize the inconsistency and would reject the Marshall notion as represented by the *Dagenhart* error while clearly affirming the contrary principle on which the decision in *Ashwander* must be based; the confounding of these concepts in the Court's *Ashwander* opinion, however, serves to illustrate how susceptible to misunderstanding and confusion the principles involved really are.

It was in 1940 that the Supreme Court reestablished, after many years of obscurity, the principle that Congress' power over federal property included the utilization of that property for extraneous ends. In that year, the Court held in *United States v. San Francisco*,[233] that Congress could grant certain lands and rights-of-way to a city for development and maintenance of a water supply and electricity generating system, making the grant conditional upon the state's acceptance of certain terms, namely the distribution of electricity through a public agency rather than through a privately owned public utility. The promotion

in *Cornman*, and further new developments in property clause doctrine are explored later in this Article. See text accompanying notes 447-56 *infra*.

230. 297 U.S. 288 (1936).

231. *Id.* at 326.

232. *Id.* at 372.

233. 310 U.S. 16 (1940).

of public in preference to private enterprise in the electric utility industry is, of course, not within the scope of any enumerated power, but a private proprietor could certainly make a grant of his land on virtually any conditions he might please. There is no reason, aside from the *Dagenhart* error, why the United States, as a proprietor, should be any more narrowly restrained.[234] Thus, by making the acquisition of rights in federal land conditional upon acceptance of terms that the United States would have no power to impose in the form of regulations, Congress could accomplish objectives extraneous to its enumerated powers by virtue of its property power.

Early in the next term, the same principle was applied in the context of federal licensing.[235] Finally, a few months later, the Court explicitly repudiated the *Dagenhart* error in *United States v. Darby*.[236] Today the promotion of extraneous objectives under the pretext of exercising the enumerated powers is clearly understood to be legitimate, and is in fact the most notable feature of modern federal legislation. Yet, despite the repudiation of the *Dagenhart* error, the logical fallacy associated with that error since the early 20th century[237] has persisted. Lawyers and courts still tend to assume, quite incorrectly, that if an objective is being promoted by means of the utilization of federal property, that objective is ipso facto an end within the scope of the constitutionally enumerated federal governmental powers.[238]

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234. The Court thus stated:

> Congress may constitutionally limit the disposition of the public domain to a manner consistent with its views of public policy. . . . The statutory requirement that . . . power be publicly distributed does not represent an exercise of a general control over public policy in a State but instead only an exercise of the complete power which Congress has over particular public property entrusted to it.

Id. at 30. To the same effect, see Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 295 (1958). The qualifying terminology in the latter case—conditions "relevant to federal interests"—should not be viewed as indicating that in order to be valid the conditions must bear a telic relation to the effectuation of some enumerated power; that would be a limitation which the cases do not really support.

235. United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940), held that if Congress has power by virtue of some enumerated power to require that a license be secured for some activity, then Congress may condition that license upon the applicant's agreement to terms even if those terms bear no telic relation to any end within the enumerated powers.

236. 312 U.S. 100, 114-17 (1941).

237. See text accompanying notes 139-42 *supra*.

238. Nowhere is this patently mistaken idea more graphically illustrated than in the area of federal acquisition of property by condemnation and eminent domain. It will be recalled that the first case upholding the power of the United States to acquire property by condemnation, in exercise of the power of eminent domain, derived that power from the necessary and proper clause. Kohl v. United States, 91 U.S. 367, 371-73 (1875). See text & notes 53-57 *supra*. The Court articulated the power in terms of property needed for the effectuation of a constitutionally enumerated federal power. Even in Ashwander v. TVA, 297 U.S. 288 (1936), *discussed in* text accompanying notes 230-32 *supra*, the Court noted that the government had "rightly conceded at the bar, in substance," that it could not acquire property except in connection with "the exercise of some power delegated to the United States." 297 U.S. at 340. During the period when property clause doctrine had been distorted by the influence of the *Dagenhart*

C. *Federal Aggrandizement by Default: The Desuetude of State Jurisdiction Over Article IV Property*

The merger of article I and article IV property clause concepts, the confusion that still lingers from the *Dagenhart* error, and the seduc-

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error, however, the United States had begun to assert a power to acquire property by condemnation for uses which, although certainly public and beneficial, were not in pursuit of any enumerated power. These were uses such as national parks, to which the United States as a proprietor could certainly devote its land, but which were not federal functions in the constitutional sense as contemplated by the precedents supporting the eminent domain power. Early objections to the assertion of such a power had been raised, *see* argument of counsel in United States v. Gettysburg Elec. Ry., 160 U.S. 668, 677 (1896), and had been overcome by finding the condemnation to be an aid in effectuation of an enumerated power. *See id.* at 681-83.

During the great depression the United States asserted a power to acquire land by condemnation for the purpose of slum clearance and urban renewal, claiming authority under Title II, § 203 of the National Industrial Recovery Act of 1933, 48 Stat. 195, 202 (terminated, 1943). This assertion of an eminent domain power for extraneous, although permissible, purposes was held unconstitutional by the Court of Appeals for the Sixth Circuit. United States v. Certain Lands in Louisville, 78 F.2d 684 (6th Cir. 1935). Rather than force the issue before the Supreme Court, the government abandoned those projects where the constitutional issue had been raised in response to attempted condemnation, securing a dismissal of its certiorari petition on the ground that the issue had become moot. *See* United States v. Certain Lands in Louisville, 297 U.S. 726 (1936) (dismissing petition for certiorari); Annot., 130 A.L.R. 1073 n.1 (1941). The United States Housing Act passed the next year, in 1937, 50 Stat. 888 (codified at 42 U.S.C. § 1401 (1970)), contained no specific authorization for condemnation, so the issue was not again raised in that context. As to projects where property had already been acquired without the constitutional issue being raised at the time, courts refused to entertain subsequent challenges to the validity of the condemnation. *See* United States v. Boyle, 52 F. Supp. 906 (N.D. Ohio 1943), *aff'd sub nom.* Cleveland v. United States, 323 U.S. 329 (1945).

When the Chickamauga and Chattanooga National Military Park was in litigation before the Supreme Court in 1939, the Court noted that some of the property within the park had been acquired by condemnation. Bowen v. Johnston, 306 U.S. 19, 28 (1939). However, no challenge to the condemnation was made. Perhaps the lawyers considered such a challenge futile in that case because of the direct precedent on which that particular acquisition, unlike others, could have been found to be a means of effectuating the enumerated military powers. For example, in United States v. Gettysburg Elec. Ry., *supra*, with respect to a similar military park, the Court had found a necessary and proper clause relationship to the war powers:

> Any act of Congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country and to quicken and strengthen his motives to defend them, and which is germane to and intimately connected with and appropriate to the exercise of some one or all of the powers granted by [*sic*] Congress must be valid. . . .
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> . . . Valuable lessons in the art of war can now be learned from an examination of this great battlefield in connection with the history of the events which there took place. . . . Such a use seems necessarily not only a public use, but one so closely connected with the welfare of the republic itself as to be within the powers granted Congress by the Constitution for the purpose of protecting and preserving the whole country . . . . The right to take land for cemeteries for the burial of the deceased soldiers of the country rests on the same footing and is connected with and springs from the same powers of the Constitution.

Id. at 681-83.

In the case concerning the Chickamauga and Chattanooga National Military Park, the Court observed, "There is no question that the United States had the constitutional power to acquire the territory for the purpose of a national park and that it did acquire it." 306 U.S. at 23. That language could be interpreted merely as an observation that the particular issue had not been raised in the case. Or, it could be understood as an implicit reference to the *Gettysburg Electric Railway* case quoted above, which was closely analogous on the facts. With those two interpretations of the language available, it seems unwarranted to wrench this language out of the context of the case and treat

tive linguistic deception of the proprietary-governmental dichotomy are all factors which have contributed to uncertainty as to the respective powers of states and the federal government over federal property today. The most significant factor, however, has been the utter failure of lawyers and judges to critically examine the precedents, assess the validity of both new and old rules, and assert for the states the responsible role which the precedents secure. To the extent that elements of the classic doctrine under the article IV property clause have survived, they have survived in spite of the failure of lawyers to under-

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it as if it spoke to the general question of condemnation for park purposes. On the latter interpretation, the language would be an unsupported *ipse dixit* on an extremely important issue of first impression—the validity of federal condemnation for a purpose extraneous to any enumerated power.

Although no case presented the critical issue to the Supreme Court for actual decision, there is no reason to doubt that the Court retained the traditional view that condemnation was authorized only where the land to be acquired was to be utilized in pursuit of some enumerated power, rather than for an extraneous purpose. When the Court in 1946 upheld the condemnation of a site for a post office, it articulated the rule, as it had always been articulated before, in terms of the enumerated powers: "If the United States has determined its need for certain land for a public use that is within its federal sovereign powers, it must have the right to appropriate that land." United States v. Carmack, 329 U.S. 230, 236 (1946). (The powers which the United States enjoys as sovereign are to be distinguished, according to classic property clause doctrine, from the powers which it enjoys under the article IV property clause as proprietor.)

The Supreme Court did declare in dictum in 1958 that the promotion of agriculture, which of course is an objective extraneous to the enumerated powers, United States v. Butler, 297 U.S. 1 (1936), was "a valid public and national purpose" for which property could be acquired by the United States. Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 294 (1958). That 1958 case involved no challenge to the condemnation. The Court did rely heavily upon an earlier decision, United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950), in which it had held that the taking of private property for the same reclamation project obligated the United States to make compensation. Neither party in *Gerlach* had contested the power of condemnation, however, nor had the Court itself raised the question whether a condemnation for the purposes of reclamation would be constitutionally valid. The government had claimed that the taking was valid and noncompensable as an exercise of the United States' navigation servitude under the commerce clause; the private owners had maintained that it was a compensable taking by eminent domain. Since the project was in part for the improvement of navigation, *see id.* at 731-32, had the issue been raised the condemnation would have been supportable, in accordance with the precedents, as necessary and proper to that commerce clause end.

Since the facts of *Ivanhoe* did not present for decision the validity of an acquisition by condemnation for the promotion of agriculture or any other extraneous objective, the Court's dictum should not be taken as deciding the point. More important, however, is how clearly that 1958 dictum displays the fallacy in reasoning upon which is based the notion that condemnation for extraneous objectives is valid. In the same paragraph, by way of additional support, the Court referred to the spending power, 357 U.S. at 294, but the settled rule that the general welfare clause authorizes spending for purposes outside the scope of the enumerated powers precludes any conclusion that every purpose promoted by federal spending is ipso facto a national purpose in the sense of being within the scope of the enumerated powers. In the same way, the fact that federal property may be used for extraneous purposes precludes the conclusion that every purpose promoted by the use of federal property is ipso facto a valid national purpose in the constitutional sense, as distinguished from a purpose toward which the United States may validly devote its property as a proprietor. Only by overlooking this obvious point, in the same way that it had been overlooked earlier by lawyers under the influence of the *Dagenhart* error, could the Court lay down its 1958 dictum as casually as it did.

Even though no Supreme Court holding has yet departed from the traditional rule, a few lower courts during the past generation have regarded it as entirely beyond argument that the United States can condemn property and acquire it by eminent domain

stand and appreciate their soundness. Moreover, because of inadequate analysis by federal government lawyers and the utter lack of analysis by others, the classic doctrine has been increasingly abandoned —not by conscious, deliberate decision, but in ignorance and by default.

The only limits to state power over article IV federal property under the classic doctrine were the principle of intergovernmental immunities, the principle of the necessary and proper clause,[239] and, of course, the rule giving the United States complete control over the creation of private rights in its property.[240] Additional limitations to state power over article IV property could be created if the state were to cede all or part of its jurisdiction to the United States. Such cessions had first become possible in certain circumstances by virtue of the *Fort Leavenworth Railroad* rule;[241] since 1938 it had been possible for a state to cede jurisdiction over article IV property regardless of whether the land was to be utilized to effectuate an enumerated power.[242] However, in the absence of any jurisdictional cession by the state, under classic property clause doctrine the state retained general governmental jurisdiction subject only to the limitations above indicated.

It was significant, therefore, that in the 1946 case of *Wilson v. Cook*,[243] where none of those limitations was applicable, the Supreme

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for purposes such as national parks and game preserves, which, although public and highly desirable, are extraneous to the enumerated federal powers. *E.g.*, Scott Lumber Co. v. United States, 390 F.2d 388 (9th Cir. 1968); United States *ex rel.* TVA v. Three Tracts of Land, 377 F. Supp. 631 (N.D. Ala. 1974); United States v. 1,972.27 Acres of Land, 297 F. Supp. 1137 (W.D. Okla. 1969); Halpert v. Udall, 231 F. Supp. 574, 577 (S.D. Fla. 1964); *In re* United States, 28 F. Supp. 758 (W.D.N.Y. 1939); United States v. Sixty Acres, 28 F. Supp. 368 (E.D. Ill. 1939). Typically in such cases judges and attorneys alike focus on the issue of public use without perceiving that a use can be public even though it is outside the scope of any enumerated power of the federal government.

If today no challenge to the power of the United States to acquire land by condemnation for extraneous objectives such as national parks, game preserves, national monuments, historical sites, urban renewal projects, and the like can be expected to be seriously entertained, it is only because many years of practice have established the power as if by prescription, without Supreme Court deliberation or decision, and contrary to both the rule and the reason of the precedents on which the federal power of eminent domain is supposedly based. It is an enduring vestige of the conceptual confusion introduced by the now long-discarded *Dagenhart* error.

239. Since the intergovernmental immunities and the necessary and proper clause principles are each derived independently of the property clauses, they apply equally in cases where property is rented, not owned, by the federal government, Penn Dairies, Inc. v. Milk Control Comm'n, 318 U.S. 261 (1943), as well as in cases having nothing to do with land. *See* Public Utilities Comm'n v. United States, 355 U.S. 534 (1958).

240. The rule originating in Camfield v. United States, 167 U.S. 518 (1897), authorizing the federal government to act in protection of its property, see text accompanying notes 105-10 *supra*, may be viewed as an application of the necessary and proper clause, or in the alternative, as an exception to the rule of state power over such property.

241. *See* text accompanying notes 95-104 *supra*.

242. *See* text accompanying notes 181-84 *supra*.

243. 327 U.S. 474 (1946).

Court upheld the assertion of state governmental jurisdiction over article IV land. The land in question had been owned by the United States since territorial days and had never been the subject of a cession of jurisdiction. The Court held that the state "retained its legislative jurisdiction, which it acquired by statehood, over public lands within the state," even though these lands had been included within a federal forest preserve.[244] What is most significant about this 1946 holding is that the opinion of Chief Justice Stone for the Court clearly endorsed the classic doctrine that the state's jurisdiction was the same over federal land as over that of private proprietors, and that the state's power could be overridden only pursuant to the federal government's enumerated powers, the article IV property power itself not being a power of governmental jurisdiction. The Court said:

> Upon admission of Arkansas to statehood in 1836 upon an equal footing with the original states . . ., the legislative authority of the state extended over the federally owned lands within the state, to the same extent as over similar property held by private owners, save that the state could enact no law which would conflict with the powers reserved to the United States by the Constitution.[245]

In support of this proposition, Chief Justice Stone cited *Fort Leavenworth Railroad*, one of the landmark precedents for the classic doctrine of state governmental jurisdiction over article IV property.[246]

While the decision in *Wilson* and its reaffirmation of the doctrine of *Fort Leavenworth Railroad* are indications that the Supreme Court continued to recognize the classic article IV principles where there had been no cession of a state's jurisdiction, the subtlety of property clause concepts and the tenacity of the logical fallacies associated with the *Dagenhart* error continued to foster confusion. Even one famous Supreme Court Justice was misled.[247] The modern practice of federal

244. *Id.* at 488. As to lands purchased by the United States after Arkansas became a state, with the state's consent, and added to the federal forest, the Court upheld state jurisdiction on the basis of its construction of a federal statute on point. *Id.* at 486-87. As to land owned by the United States since before statehood, however, the Court's finding of state governmental jurisdiction was explicitly based not on any statute, but on the traditional constitutional rule. *Id.* at 487-88.

245. *Id.* at 487-88.

246. The next year, the Court reaffirmed yet another landmark article IV property clause case, *Pollard v. Hagan, see* text accompanying notes 37-42 *supra.* United States v. California, 332 U.S. 19, 36 (1947). In this case, however, the Court refused to expand the *Pollard* rule to reach submerged lands off the coasts of states. *Id.* at 38.

247. Justice Frankfurter's misconception is reflected in his dissenting opinion in Johnson v. Yellow Cab Co., 321 U.S. 383, 393 (1944). That case involved the application of an Oklahoma prohibition statute to the Fort Sill military reservation located in that state. Oklahoma had ceded its jurisdiction over Fort Sill, but it was argued that the state could regulate liquor transactions there nonetheless. The majority avoided ruling on any constitutional issue by construing the Oklahoma statute as not intended to apply to Fort Sill.

Justice Frankfurter, however, rejected the majority's statutory construction and thus

property law unfortunately has not been characterized by any critical examination of the precedents nor by any review of the policies they represent, but rather by an aggressive determination of federal officials to enlarge the scope of centralized discretion and control on the one hand, and by timid and poorly researched responses by the states on the other. As a consequence, and notwithstanding the precedents, not only has the confused merger of article I and article IV property clause concepts continued[248] but also the notion that the United States can do

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reached the constitutional question. Frankfurter concluded that the state prohibition law could and did apply on the grounds of Fort Sill. What is remarkable, however, is Frankfurter's suggestion that "[i]f it chooses, Congress may provide a rule of law which runs counter to the expressed dry policy of Oklahoma. . . ." *Id.* at 398. If Frankfurter had premised this assertion upon the fact that Oklahoma had ceded governmental jurisdiction over Fort Sill to the United States, the suggestion would have been sound, for the power to supervene prior state law is the very least that exclusive jurisdiction either under the traditional view of the article I clause or as ceded with respect to article IV property could be taken to mean. But Frankfurter made no reference to the state's cession of jurisdiction, and instead premised his assertion squarely upon the article IV property clause. He said:

> Of course, all transactions on the Reservation are subject to regulation by Congress. Constitution, Art. IV, § 3, par. 2; see Collins v. Yosemite Park Co., . . . Penn Dairies v. Milk Control Comm'n, . . . Pacific Coast Dairy v. Department of Agriculture . . . . If it chooses, Congress may provide a rule of law which runs counter to the expressed dry policy of Oklahoma . . . .

Id. at 397-98.

Frankfurter's undiscriminating reliance upon the three cases he cited as support for his article IV proposition is one indication of his confusion, for while *Collins* did involve article IV property, *Pacific Coast Dairies* involved article I property and *Penn Dairies* did not involve federally owned property at all. But the really noteworthy feature of Frankfurter's suggestion that by virtue of the article IV property clause Congress could contravene the dry policy of Oklahoma is its complete disregard or ignorant oversight of the established distinction between rights derived from proprietorship and rights of governmental jurisdiction or sovereignty, with regard to article IV property. As a proprietor, of course, the United States could have forbidden liquor in its land although the state of Oklahoma permitted it. But merely as a proprietor, the United States could not have permitted liquor when the state in the exercise of its police power had forbidden it. Under the precedents, had it not been for the cession of jurisdiction by the state the United States could have contravened the dry policy of Oklahoma only if that were necessary and proper as a means for the effectuation of some enumerated power, or if the Oklahoma policy interfered with the effectuation of some such power. It seems unlikely that Justice Frankfurter really contemplated that contravention of a state's dry policy might be supportable on such necessary and proper clause or intergovernmental immunities grounds; but if that is not what he contemplated, and since he did not rely on the cession by the state, he must have conceived of the article IV property power in a wholly unprecedented way. He must have conceived of it, not merely as a grant of proprietorship powers, supplemented by the necessary and proper clause and intergovernmental immunities doctrines, but rather as a grant of governmental jurisdiction over article IV property which would control over state legislation by virtue of the supremacy clause.

If property clause doctrine had been a subject to which lawyers were in the habit of devoting that kind of research and critical analysis which characterizes the practice of constitutional law at its best, the error of Justice Frankfurter's suggestion in his *Yellow Cab* dissent might have been quickly perceived. It is significant that this Frankfurter misconception, expressed only in dictum in a dissent, was apparently not shared by his colleagues on the Court. Within 3 years after Frankfurter's novel suggestion was made, the classic doctrine had been articulated anew in Wilson v. Cook, 327 U.S. 474 (1946); *see* text accompanying note 245 *supra*, and the basic classic cases with whose reasoning Frankfurter's suggestion was flatly inconsistent had been reaffirmed.

248. One more recent case in which the confused merger of property clause concepts is evident is United States v. Sharpnack, 355 U.S. 286 (1958). There the Court sustained the 1948 Assimilative Crimes Act, 18 U.S.C. § 13 (1970), which makes even

as it likes with its article IV property despite the state's wishes, and without reliance upon its enumerated powers, has become widely accepted.[249] In fact, during the past 30 years, it has never been competently challenged. It has attained its widespread acceptance simply by default.

The clearest illustration is to be found in the case of the Pelton Dam, *Federal Power Commission v. Oregon*,[250] decided in 1955, a case which has been the focus of much controversy among water law lawyers.[251] The court of appeals had upheld Oregon's claim that in

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subsequently enacted state criminal laws effective within federal enclaves. The point of interest here is not the holding, but some statements which illustrate the Court's conceptual confusion. The Court said nothing to indicate whether the property involved in the case had been acquired by the United States before or after the 1940 statute, 40 U.S.C. § 255 (1970), *quoted* note 208 *supra*, which created for acquisitions after that date a presumption in favor of retained state jurisdiction. The case contains no reference to that statute. Instead, the majority worked from the premise that "[i]n the absence of restriction in the cessions of the respective enclaves to the United States, the power of Congress to exercise legislative jurisdiction over them is clearly stated in Article I, § 8, cl. 17, and Article IV, § 3, cl. 2, of the Constitution." 355 U.S. at 288. For this proposition the Court cited Collins v. Yosemite Park & Curry Co., 304 U.S. 518 (1938). 355 U.S. at 288. *Collins*, of course, was an article IV property case, and even as to article IV property, the case did not preclude the finding of implied reservations or a limited acceptance of cession despite the absence of explicit restrictions in the cession. *See* Wilson v. Cook, 327 U.S. 474, 486-88 (1946). Moreover under the 1940 statute, at least as to property acquired after that date, the Court's statement was clearly wrong since under that statute the United States had only such jurisdiction as was explicitly ceded by the state and accepted by the federal government. See text & note 208 *supra*.

On the facts in *Sharpnack* nothing turned on this point, but it serves to illustrate how casually and carelessly the Court was ready to espouse clearly erroneous property clause notions, at least in dictum. Even Justices Douglas and Black in dissent seemed ready to treat the question of the exclusiveness of the federal power as if the question turned on the same considerations under either clause. 355 U.S. at 299.

249. The notion did not originate with Frankfurter's *Yellow Cab* dissent, of course. It had been asserted numerous times previously by counsel for various federal agencies. *See* INTERDEPARTMENTAL COMMITTEE REPORT, Part II, *supra* note 5, at 284-91.

250. 349 U.S. 435 (1955).

251. The aspect of the Pelton Dam case that is to be discussed in the text is not the aspect that has excited lawyers practicing water law. The latter aspect, however, merits some discussion because it does involve property power concepts.

Many water lawyers view the Pelton Dam case as the ominous assertion of a novel federal power to reserve water rights on the public domain from private acquisition under rules of state law. The so-called "reservation doctrine," however, is hardly a novel principle. The territories which now constitute 16 of the Western states were acquired by the United States by a series of treaties with France, Great Britain, and Mexico. By those treaties the United States acquired not only sole political sovereignty, but also title to most of the land. Since there was no other lawmaker to provide otherwise, and no other claimant in whom they could vest, the United States also acquired title to all possible water rights in those territories. When states were created out of those territories, the states succeeded to the powers of general governmental jurisdiction, or sovereignty, necessary to place them on an "equal footing" with other states, but they did not succeed to federal property rights except as may have been in certain instances specifically provided by Congress. Unlike certain tidelands and shores, *see* Shively v. Bowlby, 152 U.S. 1 (1894); Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845), and the land underlying navigable waters, Barney v. Keokuk, 94 U.S. 324 (1876), the water rights owned by the United States in those territories were not conceived as common property held in trust for the public benefit, *see* Arizona v. California, 373 U.S. 546, 597-98 (1963), in such a sense that title would pass by operation of law to a state upon its creation, as discussed in text accompanying notes 35-41 *supra*.

As property of the United States, these water rights came within the well-established exception to state governmental jurisdiction according to which the United States

the exercise of its governmental jurisdiction it could fix certain conditions under which a dam could be erected on article IV federal land.[252] The government insisted that the discretion of the United States in the project could not be interfered with by the state. While the majority

has exclusive power over the acquisition by others of rights in its property. There is a statement by the Court in Kansas v. Colorado, 206 U.S. 46, 94 (1907), that "Congress cannot enforce either [the riparian rights or the appropriation] rule upon any State," but this only means that Congress cannot decree which rule a state must follow as to water over private rights in which the state has the power of control. *Kansas v. Colorado* explicitly recognized the power that the United States retains under the article IV property clause over the property which it owns. *Id.* at 92. Correctly applying the classic doctrine, the Court appropriately suggested in dictum in *Kansas v. Colorado* that federal policy could not "override state laws in respect to the general subject of reclamation," even on the public domain, *id.*, but transfer of title to federal property, according to the classic doctrine itself, was a matter of exclusive federal power. Hence, the water rights acquired by the United States in the Western territories remained in the United States as much as the title to the public domain, except as Congress itself provided for their transfer. Whether the riparian rights doctrine or the appropriation doctrine, or neither, is to control the acquisition of rights in federal waters is exclusively for determination by federal law.

By the Act of July 26, 1866, ch. 262, § 9, 14 Stat. 253 (now 43 U.S.C. § 661 (1970)), and by the Act of July 9, 1870, ch. 235, § 17, 16 Stat. 218 (now 43 U.S.C. § 661 (1970)), Congress validated the claims of past appropriators to rights in federal water. Then, by the Desert Land Act of 1877, Act of Mar. 3, 1877, ch. 107, § 1, 19 Stat. 377 (codified, as amended, 43 U.S.C. § 321 (1970)), Congress provided that private rights could be acquired in certain federal water by appropriation in accordance with state law. As the Court explained in California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935):

> As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately. . . . The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land should be patented separately . . . .

Id. at 162. The water was to be disposed of separately, and the directive of the statute that "all non-navigable waters thereon should be reserved for the use of the public under the laws of the state and territories . . . ," *id.* at 162, was not a mere acknowledgement of a state power that would have existed even in the absence of such recognition, but rather represented a deliberate choice by Congress that state law should be applied. This was quite consistent with the rule of exclusive federal power over the creation of rights in federal water, for it was federal law that permitted the state rules to apply, and the federal law circumscribed and could at any time alter for the future the policy of reliance on state rules. In the *Beaver Portland Cement* case the Court had said that "all non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states . . . ." *Id.* at 163-64. That holding, however, was conditioned upon a finding by the Court of "the authority of Congress to vest such power in the state, and that it has done so by" the Desert Land Act. *Id.* at 162. It has never been the law that state rules of water rights, by their own force and independent of the will of Congress, can control the acquisition of rights in federal water.

By noting in the Pelton Dam case, to the seeming surprise of many water lawyers, that the Desert Land Act was inapplicable to certain lands, the Court merely noted one circumscription of the congressional policy of voluntary subjection to state rules for the acquisition of water rights. The widespread dismay over the subsequent decision in Arizona v. California, 373 U.S. 546 (1963), simply made it more evident that many water lawyers had been overlooking the significance of federal title and the traditional rule of exclusive federal power over the acquisition of rights in federal property. The alarm that has been raised over reservation of federal water rights is only a reflection of poor understanding of basic property clause principles that have been operative all along.

An argument along these same lines would have provided additional and more cogent support for the decision in Cappaert v. United States, 426 U.S. 128 (1976), applying the reserved rights doctrine to ground water.

252. Oregon v. Federal Power Comm'n, 211 F.2d 347 (9th Cir. 1954), *rev'd*, 349 U.S. 435 (1955).

opinion in the court of appeals contained some intimations of the classic constitutional view, its articulation and defense of that view was so imperfect that the dissenting circuit judge concluded that even the majority appeared to recognize what the dissenter conceived as the "virtually unlimited" federal power over article IV property.[253] The court of appeals' opinion was based on the conclusion that regardless of the constitutional question, certain federal statutes secured the claimed power of the state.[254]

In its brief to the Supreme Court, the government dealt with the constitutional point only briefly, citing several cases in support of the proposition that "[i]t is beyond dispute that, unless Congress has consented or granted its interest, the State cannot interfere with the regulation or use by the Federal Government of its lands, their waters, and resources."[255] But not one of the cases which the government cited was any authority for this bold and confident assertion, or for the companion claim that "Oregon has no jurisdiction over the United States or its property . . . ."[256] Only one of the cases relied upon by the government for its constitutional assertion was even mentioned, however, in the brief for the State of Oregon, and it was dealt with in a way which cast no doubt whatsoever upon its support of the government's proposition.[257] Neither Oregon nor any of the amici curiae who joined the state's cause made any effort whatsoever to challenge the government's fallacious constitutional premise.[258] No party and no

253. *Id.* at 355 (Healy, J., dissenting).
254. *Id.* at 351-52.
255. Brief for Federal Power Comm'n at 14, 23, Federal Power Comm'n v. Oregon, 349 U.S. 435 (1955).
256. Reply Brief for Federal Power Comm'n at 2, Federal Power Comm'n v. Oregon, 349 U.S. 435 (1955). A critical look at the government's cases would have confirmed this. Arizona v. California, 283 U.S. 423 (1931), had turned on the plenary character of federal power over navigable waters under the commerce clause, not on any property power. The passage cited from United States v. Rio Grande Irrigation Co., 174 U.S. 690, 703 (1899), likewise relied on the enumerated commerce power over navigation, as well as the established principle of federal control over the divestment of federal title and the acquisition of rights in federal lands. It was this rule of federal control over the creation of private rights in federal land—the oldest and best recognized exception to the general rule of state governmental jurisdiction—that was illustrated by United States v. Oregon, 295 U.S. 1, 27-29 (1935), Utah Power & Light Co. v. United States, 243 U.S. 389 (1917), and Gibson v. Chouteau, 80 U.S. (13 Wall.) 92 (1872). The equally exceptional rule permitting the United States something slightly greater than the rights of a private proprietor for the protection of federal lands from enclosure or destruction was all that was supported by Camfield v. United States, 167 U.S. 518 (1897), and Hunt v. United States, 278 U.S. 96 (1928). In Light v. United States, 220 U.S. 523 (1911), the Court had avoided deciding any constitutional question at all. These were the cases on whose purported authority the government now contravened the doctrine that had been followed for more than a century and a half, and reconfirmed by the Supreme Court less than a decade before.
257. United States v. Rio Grande Irrigation Co., 174 U.S. 690 (1899), *discussed in* Brief for Respondents at 11, 20, 26, Federal Power Comm'n v. Oregon, 349 U.S. 435 (1955).
258. Oregon and the Izaak Walton League as amicus curiae simply argued the statutory issue. The five other states which entered the case as amici—Indiana, Texas, Montana, Pennsylvania, and Minnesota—merely adopted Oregon's brief.

amicus cited *Wilson v. Cook*,[259] *Colorado v. Toll*,[260] *Omaechevarria v. Idaho*,[261] *Bacon v. Walker*,[262] *Ward v. Race Horse*,[263] *Fort Leavenworth Railroad Co. v. Lowe*,[264] or *Pollard v. Hagan*.[265] These were the cases that the states could have used to demonstrate the error of the government's constitutional contention; but instead, the whole matter went by default. When the Supreme Court concluded that the court of appeals had wrongly decided the statutory issue, it found the government's constitutional claim entirely uncontested. Thus, given the subtlety of the misconceptions upon which that erroneous assertion was based, there is little cause for wonder that the Court simply glided over the constitutional point.[266]

The Court found that federal ownership of the land where Pelton Dam was to be built authorized the United States to license construction of the dam.[267] Although that conclusion was unexceptionable, another decision just 5 years before had illustrated that the federal grant of a license, even where that was an exercise of an enumerated power, might be powerless to excuse the licensee from compliance with state laws affecting the licensed activity.[268] That case too, however, was overlooked by all of the briefs in the Pelton Dam case. With no guidance from counsel, the Court thus assumed that the license for dam construction issued by virtue of the property power was as capable of preempting state regulations as the license issued by virtue of the commerce power which had been considered in an earlier Federal Power Commission case, on which the Court heavily relied.[269] This

259. 327 U.S. 474 (1946).
260. 268 U.S. 228 (1925).
261. 246 U.S. 343 (1918).
262. 204 U.S. 311 (1907).
263. 163 U.S. 504 (1896).
264. 114 U.S. 525 (1885).
265. 44 U.S. (3 How.) 212 (1845).
266. Unaided by any efforts of counsel, even Justice Douglas, whose dissent otherwise displayed a good comprehension of the distinctions needing to be made, *see* 349 U.S. at 453 n.1, cited none of the cases dispositive of the constitutional issue.
267. *Id.* at 443-45.
268. Regents of the Univ. System v. Carroll, 338 U.S. 586 (1950). *Regents* involved both questions of statutory construction and questions of constitutional law. The crucial constitutional question concerned the effect upon contract rights under state law which the applicant's unilateral repudiation of a contract—repudiated in fulfillment of a licensing condition—would have. The Court made no reference at all to the statute to settle this point. The rule that "the imposition of the conditions cannot directly affect the applicant's responsibilities [under state law] to a third party dealing with the applicant," *id.* at 600, is a rule of constitutional law. Complete licensing power, including the power to attach conditions, had been statutorily conferred, but that power was constitutionally incapable of freeing the licensee of his subjection to state law.
269. First Iowa Cooperative v. Federal Power Comm'n, 328 U.S. 152 (1946). The difference, of course, is that the commerce power is a power of governmental sovereignty which overrides state law by virtue of the supremacy clause. The article IV property power, on the other hand, under the precedents is not a power of governmental sovereignty but rather is analogous to the power of a private proprietor, and with certain circumscribed qualifications, is subject to the general governmental jurisdiction of the states.

assumption, for which the Court articulated no support at all, is actually supportable on the facts of that particular case on grounds entirely independent of the property power proposition asserted by the government in its brief;[270] but with those grounds not articulated, the decision appears to lend credibility to the government's bald assertion of federal power to supersede state governmental jurisdiction over article IV federal property without reference to any cession of state jurisdiction, the doctrine of intergovernmental immunities, or the necessary and proper clause.

For 21 years after the Pelton Dam case, federal government lawyers and the federal agencies they advised proceeded as though the unprecedented proposition of unlimited federal power over article IV property[271] were the constitutional rule. Occasionally an inferior court, equally ignorant of the holdings of the precedents, would take it for granted that Congress could freely supersede state policy on article IV land without showing any objective within an enumerated power,[272] but the issue was not brought again before the Supreme Court until 1976.

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270. As Justice Douglas pointed out, the case could have been viewed as raising commerce and necessary and proper clause issues, and thus as properly invoking the supremacy clause. 349 U.S. at 453 n.1 (dissenting opinion).

271. Superficially, this new purported article IV rule resembles the rule which—at least until Howard v. Commissioners, 344 U.S. 624 (1953), and Evans v. Cornman, 398 U.S. 419 (1970); *see* text accompanying notes 212-29 *supra*—had traditionally been applied to article I property. There are, however, significant differences. On the one hand, the traditional article I rule was a rule of exclusive jurisdiction, while under this new purported article IV rule the states retained concurrent jurisdiction subject, however, to preemption by federal action on any matter regardless how unrelated to any enumerated power. This purported article IV rule was thus equivalent to what was probably the framers' original intent for the article I clause, *see* text accompanying notes 9-12 *supra*, rather than to what has been the traditional view of that clause since early in the 19th century. On the other hand, the purported new article IV rule operates regardless of a state's refusal to voluntarily cede any jurisdiction, while article I property is by definition property with respect to which there has been at least some degree of cession in the state's consent.

272. The United States Court of Appeals for the Tenth Circuit, in United States v. Hatahley, 220 F.2d 666 (10th Cir. 1955), expressed in dictum the view that the federal power to supersede state policy on federal property is unlimited. *Id.* at 670-71. The court's holding, however, was that Congress had not chosen to do so, and that the state law there in question therefore applied. On appeal, the Supreme Court viewed the federal legislation differently, construing it as intended to preclude application of the particular state law being challenged; thus, the judgment was reversed. Hatahley v. United States, 351 U.S. 173 (1956). However, the Supreme Court's decision did not have the effect of endorsing the court of appeals' dictum. The state statute in *Hatahley* provided for the destruction of abandoned horses, defining "abandoned horses" as horses running at large on the open range. "Open range" was defined to include the federal public domain, and the facts of *Hatahley* involved such public domain. As to the United States, therefore, which could have authorized the horses in question to be loosed on its land, the state in effect had undertaken to provide for the destruction of horses running on a proprietor's own land without the proprietor's permission. This was an interference with the prerogatives of a proprietor that could not be sustained except on a showing of adequate relation to legitimate state objectives, and no such relationship was sufficiently shown in *Hatahley*. The state law was inapplicable, therefore, not because any federal legislation unsupported by the necessary and proper clause had displaced or could displace the general governmental jurisdiction of the state over the federal land, but rather because the particular state legislation failed to pass muster under the familiar fourteenth amendment tests applicable to any state legislation that

In the year of the Bicentennial, the Supreme Court unwittingly revolutionized its article IV property clause doctrine in *Kleppe v. New Mexico*.[273] The New Mexico Livestock Board, acting pursuant to the state's Estray Law,[274] had entered upon the public domain and removed a number of unbranded and unclaimed burros, selling them later at auction. Thereafter the Bureau of Land Management, which administers the article IV land in question, asserted jurisdiction under the Wild and Free-Roaming Horses and Burros Act[275] and demanded that the Board recover the animals and return them to the public lands. The Board and the State of New Mexico then filed suit for a declaratory judgment that the federal statute, designed to protect unbranded and unclaimed horses and burros on the public lands of the United States from capture, branding, harrassment, or death, was unconstitutional, and for an injunction against its enforcement. There is no doubt, on long settled principles, that the state's position on the issue was wrong. However, the Supreme Court's rationale for its decision against the state was not an application of long settled principles. Instead, the Supreme Court for the first time in its history adopted as its ground of decision a proposition contradictory to the cardinal thesis of the classic article IV property clause doctrine.

There were at least four ways in which the federal law could have been held valid and supreme over New Mexico's Estray Law without departing from property power precedents and without even raising the question which the Supreme Court reached out to decide. The federal act declared that the horses and burros were to be managed "as com-

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impinges upon property or other rights. *See* Morey v. Doud, 354 U.S. 457 (1957); Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

In 1966 the Supreme Court in dicta indicated a willingness to assume, for the purposes of a particular case in which nothing turned on the point, that "Congress could under the Constitution readily enact a complete code of law governing transactions in federal mineral leases among private parties." Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966). This is language that could easily be seized upon by one confused by the precedents, as it seems to provide authority for the notion of complete federal governmental jurisdiction over federally owned property. To do so would be error, however, as such legislation fits within a recognized exception to the rule of state jurisdiction. Unlike, for example, successive transfers of title to land previously owned by the United States, transactions in federal mineral leases involve property to which the United States still holds title; and it has always been and still is the rule that the United States has absolute control over the terms and conditions under which any person shall acquire any right in federal property, by grant, transfer, operation of law, or otherwise, whether title, leasehold, or other interest. *See* Alabama v. Texas, 347 U.S. 272 (1954). If the Court had suggested that the lessee in *Wallis* could conduct his drilling activities in violation of laws of the state, or that Congress, without satisfying the requisites of the necessary and proper clause, could authorize him to do so, that would have been inconsistent with historic property clause doctrine; but the dictum actually uttered in *Wallis* was perfectly consistent with the historic rules.

273. 426 U.S. 529 (1976).

274. Ch. 80, § 1, [1907] N.M. Laws 153, *as amended*, N.M. STAT. ANN. §§ 1-10 (1953 & Supp. 1975).

275. 16 U.S.C. §§ 1331-1340 (Supp. IV, 1974).

ponents of the public lands . . . in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands;"[276] and thus the act could be defended within the principle of cases like *Camfield*[277] and *Hunt*[278] concerning the federal power to protect the public lands.[279] Second, the burros and horses on the public lands could be considered to be themselves federal property, and thus the act could be defended in terms of the long established rule that federal law exclusively governs the creation of private rights in federal property.[280] Third, the federal act constituted the authorization of the proprietor for those animals to run free on the land, even to the detriment of livestock ranchers who themselves enjoyed the privilege of pasturage there only by virtue of grazing permits issued by the proprietor pursuant to the Taylor Grazing Act;[281] consequently, the state law providing for their capture and sale or destruction could be upheld in the face of the proprietor's right to control his own land only if it could pass the test of adequate relationship to a legitimate state interest, the test traditionally applied under the fourteenth amendment to state interference with property rights.[282] Fourth, the federal act could have been upheld as an exercise of federal power under the commerce clause.[283] On any of these four grounds, the federal act would have been valid and the state Estray Law rendered inapplicable with respect to horses and burros on federal lands.

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276. *Id.* § 1333(a).
277. See text accompanying notes 105-10 *supra.*
278. See text accompanying notes 152-53 *supra.*
279. The *Kleppe* Court specifically noted that this was a possible ground of decision. 426 U.S. at 537-38.
280. The Court specifically noted that this also was a possible ground of decision. *Id.*
281. 43 U.S.C. § 315b (1970).
282. See the discussion of Hatahley v. United States, 351 U.S. 173 (1956), note 272 *supra.*
283. The Court specifically noted that this was a possible ground of decision. 426 U.S. at 535 n.6. The argument as set forth in the Secretary of the Interior's brief was:

> Wild horses and burros in general do range across state lines, and Congress was well aware of this [*see* Senate Hearing, *supra,* note 16, at 45, 52, 61, 63]. Regardless whether this interstate movement alone is sufficient to sustain Congress' power to regulate them under the Commerce Clause . . . the legislative history discloses other connections with interstate commerce as well.
>
> For example, wild free-roaming horses and burros are objects of interest to amateur students of nature and professional scientists, who travel in interstate commerce to observe and study them. Moreover, the legislative history shows that Congress was concerned with the commercial exploitation of wild horses and burros and that the Act was designed in part to prevent such exploitation. . . .
>
> Thus, the effect upon interstate commerce of the commercial exploitation of wild horses and burros, as well as the interstate movement of the live animals themselves and the persons interested in observing them, empowered Congress to enact appropriate legislation. That legislation is no less valid because it serves other purposes as well.

Brief for the Secretary of Interior at 21-22, Kleppe v. New Mexico, 426 U.S. 529 (1976).

The Court, however, declined to decide the case on any of these theories choosing instead to reject what it called "appellees' narrow reading of the Property Clause."[284] The Court held that the article IV property clause gives to the United States "complete power" over the public lands,[285] and that upon congressional exercise of this power "the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause."[286] The Court's opinion in *Kleppe* on its face is cogent and persuasive. Only when the cases on which the Court relied, as well as the cases that are conspicuously absent from the Court's discussion, are thoroughly understood does it become evident that every single precedent was misunderstood, and that the Court departed from the consistent doctrine of its precedents to apply a rule that had never before been a part of Supreme Court jurisprudence.

In terms of legal advocacy, *Kleppe* was an unequal contest. The federal government's case was briefed and argued by skillful career counsel from the Department of Justice thoroughly familiar with the view of the precedents which, however erroneously, had been used by federal lawyers for decades without benefit of Supreme Court decision to support the claim of complete and supreme federal power over article IV lands.[287] The state, on the other hand, was represented by lawyers from a private law firm, designated special assistant attorneys general for the particular case, who, however competent as a general matter, had no particular background in the constitutional law of federal property and exhibited an unfortunate misconception of its most conspicuous distinctions.[288] The state's brief neglected to utilize the most powerful precedents on the point which the Court took to control its decision, and argued the other precedents on the point ineptly. Once again, the states' loss of a major issue of constitutional federalism must be characterized as a loss by default.

Each of the precedents claimed as authority for the Court's unprecedented rule in *Kleppe* was misconstrued and misapplied. The Court cited several cases for the proposition that the article IV property power is "without limitations,"[289] and that the federal government has

284. 426 U.S. at 536.
285. *Id.* at 539-40.
286. *Id.* at 541-43.
287. See INTERDEPARTMENTAL COMMITTEE REPORT, *supra* note 5, and the briefs for the government in the Pelton Dam case, discussed in text accompanying notes 255-65 *supra*, and in *Colorado v. Toll*, discussed in note 155 *supra*.
288. The state's brief expressed repeatedly the notion that to uphold the federal statute would be to give Congress exclusive power over federal lands. The Court properly pointed out the confusion which this notion reflected. 426 U.S. at 541-44.
289. The precedents cited were Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 294-95 (1958); Alabama v. Texas, 347 U.S. 272, 273 (1954); Federal Power Comm'n

"complete power" over such property.[290] Every one of the cases thus cited, however, involved the creation of rights in federal land by transfer of title, lease, or license, or the validity of terms imposed by Congress as conditions of such grants. It has been settled since early in the 19th century that Congress has not only complete and supreme, but exclusive, power to determine when, how, and under what conditions rights in federal lands are to be created.[291] It has been recognized from the outset, however, that this exclusive federal power over disposal of federal lands was an exception to the otherwise general rule that subjected federal proprietorship under the article IV property clause to the governmental jurisdiction of the states.[292] The Supreme Court in *Kleppe* mistook the exception for a general rule, taking the language which had earlier been used to express holdings with regard to disposal, and erroneously applying that language as if it were accurate for all aspects of the article IV property power.[293]

The *Kleppe* Court also misconceived the *Camfield* case, quoting out of context its statement that "[t]he general Government doubtless has a power over its own property analogous to the police power of the several States . . . ."[294] *Camfield* did not recognize any such general power as the Court asserted in *Kleppe*; the quoted statement speaks only of a power "analogous to" the states' police power, and the *Camfield* Court went on to explain later in the same paragraph that Congress has "the power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power, so long as such power is directed solely to its own protection."[295] *Camfield* stands only for the classic doctrine that the federal government has a power to protect its property[296] which somewhat exceeds the self-help powers of private proprietors;[297] the last clause quoted above emphasizes that the case is no authority for the broad rule of complete and general federal governmental jurisdiction asserted in *Kleppe*.

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v. Idaho Power Co., 344 U.S. 17, 21 (1952); United States v. California, 332 U.S. 19, 27 (1947); United States v. San Francisco, 310 U.S. 16, 29 (1940); Gibson v. Chouteau, 80 U.S. (13 Wall.) 92, 99 (1871); United States v. Gratiot, 39 U.S. (14 Pet.) 526, 537 (1841).

290. Cited for this point was United States v. San Francisco, 310 U.S. 16, 30 (1940).

291. See text & notes 49-50 *supra.*

292. See discussion note 50 *supra.*

293. The *Kleppe* Court also cited a number of cases dealing with Congress' power over territories outside the boundaries of any state, 426 U.S. at 539-40, failing to recognize the distinction which must be drawn when there is another political entity present whose constitutional powers must be considered. See text & note 29 *supra.*

294. 426 U.S. at 540, *quoting* Camfield v. United States, 167 U.S. 518, 525 (1897).

295. 167 U.S. at 526.

296. *Camfield* would have given support to the *Kleppe* decision if the Court had employed the alternative ecological protection rationale. See text accompanying notes 276-79 *supra.*

297. See text accompanying notes 108-10 *supra.*

The *Kleppe* Court also asserted that "Congress exercises the powers both of a proprietor and of a legislature over the public domain," again citing cases.[298] The proposition as stated in *Kleppe* connotes that the federal power as legislature gives it powers beyond those it would have as a mere proprietor; but precisely the converse connotation was given by the cited precedents.[299] Those cases had recognized that Congress' power as a legislature is restricted by the doctrine of enumerated powers, and that the power conferred by the article IV property clause is not a legislative power with regard to federal land.[300] Their holding was that, beyond its enumerated legislative powers exercisable on article IV property as elsewhere, the federal government has power by virtue of its proprietorship to do things with respect to federal property which it could not do by virtue of any legislative power.[301] Thus federal officials could withhold federal land from sale even without statutory authorization to do so,[302] and Congress' investigatory function with regard to federal lands extended "to matters affecting the interest of the United States as owner as well as those having relation to the legislative function."[303] The *Kleppe* Court ignored the facts and thus misconceived the holdings of the precedents which it cited, and mistakenly took them as authority for a proposition as to article IV property within the borders of states which is valid under the precedents only as to property in the territories outside the borders of any state.[304]

The *Kleppe* Court stated further that the article IV property clause "in broad terms, gives Congress the power to determine what are 'needful' rules 'respecting' the public lands."[305] In *Kleppe* this statement

298. The court cited Sinclair v. United States, 279 U.S. 263, 297 (1929), and United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915). Alabama v. Texas, 347 U.S. 272, 273 (1954), also cited, only quotes *Midwest Oil.*

299. "Congress not only has a legislative power over the public domain, but it also exercises the powers of the proprietor therein." United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915). The connotation that the legislative powers made it possible to do what the proprietary powers alone would not have made possible, rather than the converse, would be appropriate with regard to federal property outside the borders of any state. See text accompanying note 29 *supra.*

300. See text accompanying notes 42-43, 112-19 *supra.*

301. *See* text accompanying notes 112-14 *supra.* For instance, Congress could delegate functions with regard to administration of public land without regard to such rules as would restrict its delegation of legislative power. United States v. Grimaud, 220 U.S. 506 (1911).

302. United States v. Midwest Oil Co., 236 U.S. 459, 474-75 (1915).

303. Sinclair v. United States, 279 U.S. 263, 297 (1929). As the Court said in Watkins v. United States, 354 U.S. 178, 187 (1957), legislative investigations "must be related to and in furtherance of a legitimate task of the Congress." Legitimacy is a function of constitutional powers. Congress' legislative powers alone would not have been sufficient to sustain the breadth of the investigation at issue in *Sinclair,* and reliance upon the additional nonlegislative, proprietorship power conferred by the article IV property clause was therefore necessary.

304. See text accompanying note 29 *supra.*

305. 426 U.S. at 539, *citing* United States v. San Francisco, 310 U.S. 16, 29-30

was directed toward federal power vis-à-vis states'; however, the only precedents cited which addressed the federalism question of federal versus state power, rather than the entirely different separation of powers question of congressional versus judicial power,[306] were cases applying the exceptional rule of exclusive federal power over the acquisition of rights in federal property.[307] No case cited by the Court, and no case which it could have cited, provided precedent for the proposition that Congress has power to determine what are "needful" rules "respecting" the public lands in the face of contrary state law, except concerning its disposal, for the land's protection, or where the rules are sustainable under the necessary and proper clause as a means to effectuate some enumerated federal power independent of the article IV property clause.[308]

Finally, and most significantly, the Court in *Kleppe* asserted that whenever Congress exerts the power conferred by the article IV property clause, "the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause."[309] It had never before been held by the Supreme Court that enactments under the article IV property clause which were not viewable as necessary and proper means to effectuate some other enumerated power would or could invoke the supremacy clause. The contrary had been consistently recognized, since the supremacy clause was viewed as pertaining only to the federal legislative powers, and the article IV property power was not a legislative power.[310] In fact, it had even been indicated that treaty provisions concerning activities on federal land were subordinate to contrary state laws.[311] The Supreme Court in *Kleppe* offered only two citations as authority for this radical departure from the precedents. The first citation was to a passage in *Hunt v. United States*,[312] a case dealing not with the general principle of classic article IV property clause doctrine but with an exception to that general principle giving Congress power

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(1940); Light v. United States, 220 U.S. 523, 537 (1911); United States v. Gratiot, 39 U.S. (14 Pet.) 526, 537 (1841).

306. The separation of powers issue was involved in Light v. United States, 220 U.S. 523 (1911), and also was the point of dictum in United States v. San Francisco, 310 U.S. 16, 29-30 (1940).

307. United States v. San Francisco, 310 U.S. 16 (1940); United States v. Gratiot, 39 U.S. (14 Pet.) 526 (1841).

308. The Court in *Kleppe* did cite and rely upon the dictum of Utah Power & Light Co. v. United States, 243 U.S. 389, 405 (1917). 426 U.S. at 540. The error of that dictum is discussed in the text accompanying notes 120-27 *supra*. An earlier attempt by government counsel to derive from the *Utah Power & Light* dicta the same principle now adopted in *Kleppe* had been unsuccessful in *Colorado v. Toll*. See discussion note 155 *supra*.

309. 426 U.S. at 542-43.

310. See text accompanying notes 42-43, 112-19 *supra*.

311. Ward v. Race Horse, 163 U.S. 504 (1896).

312. 278 U.S. 96, 100 (1928).

to protect its own property notwithstanding state law. The other citation was to a dictum of Justice Van Devanter in *McKelvey v. United States*,[313] the erroneousness of which has already been discussed.[314]

The *Kleppe* Court was no more successful in attempting to distinguish the authorities relied on by the state on this point than it was in understanding those it mistook as authority for its own rationale.[315] The state had relied on the language of some of the precedents declaring explicitly that in the absence of a cession the government's possession of article IV property was "only that of an individual proprietor,"[316] or "simply that of an ordinary proprietor."[317] The *Kleppe* Court dismissed these statements as mere dicta.[318] More powerful expressions of the classic principles, however, the *Kleppe* Court could not dispose of so easily. With regard to *Colorado v. Toll*[319] the *Kleppe* opinion reasons that "the Court found that Congress had not purported to assume jurisdiction over highways within the Rocky Mountain National Park, not that it lacked the power to do so under the Property Clause."[320] It is not true, however, that Congress had "not purported

313. 260 U.S. 353, 359 (1922).

314. See discussion note 150 *supra*.

315. Both *Hunt* and *Camfield* were cited by the State of New Mexico, but counsel for the state attempted to extract an unjustified negative inference from them. Both of the cases represent an exception to the general rule that the article IV clause confers only proprietorship powers, holding that Congress has power legislatively to protect article IV property from harm, but neither opinion discusses whether or not there might be other exceptions as well. New Mexico argued in *Kleppe* that these cases maintained that the exception for such protection is the only instance in which Congress' power is greater than a proprietor's power, an argument that was inaccurate. In reply the *Kleppe* Court pointed out that "*Camfield* contains no suggestion of any limitation on Congress' power over conduct on its own property," 426 U.S. at 538, and that "*Hunt* . . . only holds that damage to the land is a sufficient basis for regulation; it contains no suggestion that it is a necessary one." *Id.* at 537. That was true; however, it was equally true that *Camfield* contained no suggestion that Congress' power was not limited, and that *Hunt* contained no suggestion that damage to the land was not a necessary basis. Thus the Court was equally guilty of abusing *Camfield* and *Hunt* as precedents when it claimed them as purported authority for the proposition of preemptive general legislative power under the article IV property clause.

316. Fort Leavenworth R.R. v. Lowe, 114 U.S. 525, 527 (1885) ("The State could have exercised, with reference to it, the same authority and jurisdiction which she could have exercised over similar property held by private parties.").

317. Paul v. United States, 371 U.S. 245, 264 (1963).

318. The statement in *Paul* was indeed dictum; the statement in *Fort Leavenworth Railroad*, however, was technically not dictum, but rather an alternative ground of decision. Plaintiff in error challenged a state tax, which the state claimed power to impose on private property located on article IV land by virtue of a clause in its cession of jurisdiction reserving the power to so tax. Plaintiff in error challenged the validity of the cession containing this reservation. Although it did go on to uphold the cession and reservation as valid, the Court noted that were it to hold otherwise, "it would not aid the railroad company; the jurisdiction of the State would then remain as it previously existed." 114 U.S. at 540. The way it "previously existed," according to the proposition which the *Kleppe* Court misbranded as dictum, was that the state had general governmental jurisdiction including jurisdiction to tax private property on the land because "the possession of the United States was only that of an individual proprietor." See discussion note 316 *supra*.

319. 268 U.S. 228 (1925), *discussed in* note 155 *supra*.

320. 426 U.S. at 544.

to assume jurisdiction" in that matter. The park superintendent was exercising the power delegated to him by Congress.[321] The Court held in *Toll,* not that the superintendent was acting without congressional authorization, but that his actions within the scope of congressional authorization, but contrary to state law, could be enjoined.[322]

With regard to *Wilson v. Cook,*[323] the *Kleppe* Court pointed out that in that case "[n]o question was raised regarding Congress' power to regulate the forest reserves under the Property Clause."[324] The fact remains, however, that in *Wilson* the Court had endorsed the classic article IV rule that states have legislative authority over federally owned lands "to the same extent as over similar property held by private owners," subject of course to the limitations provided by the necessary and proper clause and the doctrine of intergovernmental immunities[325] as recognized by the classic principles.[326]

The *Kleppe* Court sought to escape the dictum of *Kansas v. Colorado*[327] by asserting that "this does no more than articulate the obvious: that the Property Clause is a grant of power only over federal property.[328] It gives no indication of the kind of 'authority' the Clause gives Congress over its property."[329] To the contrary, however, the *Kansas v. Colorado* dictum addressed squarely the kind of authority the property clause confers upon the federal government, declaring:

> 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.[330]

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321. Act of Jan. 26, 1915, ch. 19, § 4, 38 Stat. 800 (codified, as amended, 16 U.S.C. § 195 (1970)). Because the power conferred by the article IV property clause was conceived as a power of proprietorship and not as a legislative or governmental power, this broad delegation of authority to administrative officials was permissible notwithstanding the strictures which at that time were held to apply to the delegation of legislative power. *See* United States v. Grimaud, 220 U.S. 506 (1911). *See also* United States v. Midwest Oil Co., 236 U.S. 459, 474-75 (1915).

322. See discussion note 155 *supra.*

323. 327 U.S. 474 (1946), *discussed in* text accompanying notes 243-46 *supra.*

324. 426 U.S. at 544.

325. 327 U.S. at 487. The phrase, "to the same extent as over similar property held by private owners," was no inadvertent dictum, but a repetition of the rule stated with equal clarity and considerably more elaboration in Fort Leavenworth R.R. v. Lowe, 114 U.S. 525, 527 (1885), *quoted in* note 316 *supra.*

326. See text accompanying notes 51-65 *supra.*

327. 206 U.S. 46, 89 (1907). See text accompanying note 88 *supra.*

328. Curiously, this rationalization of the *Kansas v. Colorado* dictum contradicts the Court's own explanation, in the very next paragraph of its *Kleppe* opinion, of the decision in *Camfield.* The Court said *Camfield's* "sole message" is that the property power can reach beyond the borders of the federal property; yet in dealing with the later *Kansas v. Colorado* dictum it called the contrary proposition "obvious."

329. 426 U.S. at 537-38.

330. 206 U.S. at 92.

Several of the most compelling precedents contradicting the thesis of the Court in *Kleppe* are conspicuously omitted from discussion in the opinion. There is no attempt to deal with *Ward v. Race Horse*,[331] for example, which held that state law controlled actions on federal property over the contrary terms of a federal treaty with an Indian tribe.[332] Neither does the *Kleppe* opinion mention *Omaechevarria v. Idaho*,[333] *Bacon v. Walker*,[334] or *Pollard v. Hagan*,[335] all holdings based squarely on the classic principles.

Thus, while to the uninformed the opinion in *Kleppe* appears cogent and unsurprising, to one who is familiar with the precedents and the doctrines to which they had adhered, the opinion is very distressing. The rule of preemptive general legislative power announced in *Kleppe* would be less grievous had it resulted from a knowledgeable analysis of the precedents and a deliberate policy decision to abandon established principles as ill-suited to modern needs. But there is no discussion of policy in the *Kleppe* opinion at all. The opinion proceeds in ignorant confidence that the new rule announced had always been the law. The resulting unsettlement of property clause doctrine is made more appalling by the fact that the decision could have been based on any of at least four alternative rationales[336] without reaching out to establish a new constitutional rule. The *Kleppe* opinion gives reason to wonder whether the concepts which constitute the constitutional law of federalism are too subtle and intricate to survive even in a system which purports to rely upon precedent and reasoned analysis. At least the opinion demonstrates that, where federalism issues are concerned,

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331. 163 U.S. 504 (1896).

332. See text & notes 84-86 *supra*. *Ward* cannot be dismissed as merely involving judicial construction of the terms of the Indian treaty and the subsequent act admitting the state into the Union: the reason given by the Court as necessitating the construction adopted was that construing the treaty and act differently would result in violation of the constitutional rule that a state cannot be precluded from exercising and enforcing its general governmental jurisdiction over federal lands within its borders. This point was discussed at great length in the opinion. 163 U.S. at 508-16. The *Ward* Court quoted from Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845), *discussed in* text accompanying notes 37-48 *supra*, and several other cases applying the same constitutional rule that states upon their creation unavoidably acquire the same governmental jurisdiction over federal as over private land within their borders. To construe the Indian treaty with its specific authorization of Indian hunting on federal lands as allowing such hunting notwithstanding state law, would be to unconstitutionally deprive the state of "a power resulting from the fact of statehood and incident to its plenary existence." 163 U.S. at 514. According to the *Ward* Court, a part of the power of sovereignty which unavoidably passed to the state, and which could not constitutionally be retained by the United States, was "the complete power to regulate the killing of game within its borders." *Id.* at 510.

333. 246 U.S. 343 (1918). See text & note 149 *supra*.

334. 204 U.S. 311 (1907). See discussion note 149 *supra*.

335. 44 U.S. (3 How.) 212 (1845), *discussed in* text accompanying notes 37-48 *supra*.

336. See text accompanying notes 276-83 *supra*.

much more sophisticated scholarship is sorely needed on the Supreme Court.

V. Present and Future Federal Property Power Doctrine

The tedious history of federal property power doctrine traced in the foregoing text must necessarily be understood in order to assess the current vitality of various propositions that appear in the cases or in secondary works. It is even more essential in order not only to predict the future course of property power doctrine during the next decade but also to aid the preparation of better arguments to facilitate a more rational development of property clause doctrine. From the foregoing judicial melange, the author has derived the following picture of the certainties and uncertainties of property power doctrine as the nation enters its third century, and of some of the potential routes of future development.

A. *Article IV Property Clause Principles*

The article IV property clause, by virtue of the generality of its terms, applies to all United States property,[337] even that which comes also under the narrower article I property clause. Property covered by the article I clause is distinguished from other federal property by its use and by state consent to its acquisition. It is to be utilized for "Forts, Magazines, Arsenals, dock-Yards [or] other needful Buildings,"[338] or for the seat of the government. The phrase "other needful Buildings," of course, is a very broad one, and has been construed to embrace "whatever structures are found to be necessary in the performance of the functions of the Federal Government."[339] The second distinguishing characteristic of article I property is the constitutional requirement of either state consent—amounting to a cession of jurisdiction—prior to the federal purchase, or a cession subsequent to federal acquisition.[340]

337. The article IV clause covers personalty, including intangible property, as well as realty. *See* discussion note 19 *supra.*
338. U.S. Const. art. I, § 8, cl. 17.
339. James v. Dravo Contracting Co., 302 U.S. 134, 143 (1937). The "functions of the Federal Government," however, must be understood in terms of the doctrine of enumerated powers. Thus, for example, the Supreme Court has pointed out that many tracts of federal land, as well as many structures and buildings, "are used for forests, parks, ranges, wild life sanctuaries, flood control, and other purposes which are not covered by Clause 17," Collins v. Yosemite Park & Curry Co., 304 U.S. 518, 529-30 (1938), because they are purposes which, while permissible by virtue of proprietorship, are not within the scope of any enumerated power.
340. A cession is appropriate where federal acquisition preceded formation of the state, or where such acquisition via condemnation, purchase, or otherwise was accomplished without prior state consent.

Many of the confusing intricacies of property clause doctrine over the years are attributable to the fact that both of these factors must be present before a piece of federal property can properly be considered as coming under the article I property clause. Some old forts, arsenals, or other places satisfying the first criterion did not come under the article I clause, either because there had been no state consent or else because there had been a cession which was, under the precedents which were followed until 1937, too limited to qualify as an article I consent.[341] These remained under the article IV clause alone. In addition, states have sometimes made partial or total cessions of jurisdiction over property not being utilized for any purpose within the terms of the article I property clause. Such property, consistent with the Supreme Court decisions,[342] must be regarded as remaining under the article IV clause alone, and not as coming under the article I clause at all, even where the cession act by its terms refers to the article I clause. The most obvious examples are the national parks. The presence of a cession of jurisdiction, therefore, whether in the form of a consent to acquisition or in any other form, is not by itself determinative of whether the article I clause or only the article IV clause is applicable. Of course, where no consent or cession at all has been given by the state, it is clear that the article I clause cannot apply.

1. *Acquisition of Property.* There is no doubt that the United States may obtain property by gift, bequest, or devise,[343] or by negotiated purchase. Nor is there reason to doubt that, having the virtually unrestricted power to spend money in pursuit of its conception of the general welfare,[344] Congress may buy land from a willing seller to promote any end that Congress might choose, even if it is an end extraneous to the enumerated federal powers. In addition, since 1876 it has been settled that Congress can acquire title to property by condemnation in the exercise of a right of eminent domain where the property is needed for the effectuation of one of the constitutionally enumerated federal powers.[345] Even property belonging to a state can be acquired by the exercise of this power.[346]

The federal eminent domain power has its origin in the necessary and proper clause, and for that reason it is dependent upon the enumerated powers. Some lower court cases have been decided as if this

341. *See* text accompanying notes 95-101 *supra.*
342. *See* text accompanying notes 181-84 *supra.*
343. United States v. Burnison, 339 U.S. 87, 90 (1950).
344. Helvering v. Davis, 301 U.S. 619 (1937).
345. Kohl v. United States, 91 U.S. 367 (1875), *discussed in* text accompanying notes 53-57 *supra.*
346. United States v. Carmack, 329 U.S. 230 (1946); Wayne County v. United States, 53 Ct. Cl. 417 (1918), *aff'd,* 252 U.S. 574 (1920).

federal power of eminent domain were independent of the necessary and proper clause and the doctrine of enumerated powers; however, the holdings of the Supreme Court do not support that view.[347] Although the lower court opinions are based on a misreading of the Supreme Court cases, the prevalence of the misconception has had such widespread effect on real estate titles that its correction at this point would create havoc unless vested titles were given special protection.[348] Another possibility, of course, is that courts will throw reason to the wind and, without attempting its reconciliation with constitutional principles, adhere to the now widely held view that federal eminent domain is limited only by the requirement that the land be used for a public purpose, whether or not constitutionally enumerated. Whatever the ultimate judicial direction, it is at least clear that there exists a cogent potential challenge to condemnations for extraneous purposes such as parks, recreation areas, and urban renewal projects.[349]

There is an important respect in which state law can, to some extent, control the acquisition of property by the United States. In *United States v. Burnison*,[350] the Supreme Court held that state law could validly prohibit the devise of lands to the United States. The principle of the case is broader than the bare holding, encompassing other types of transfers as well. The rationale for the decision was that while the state may not control the United States as transferee by forbidding it to accept the transfer, the state may control any transferor over whom it has jurisdiction by prohibiting or invalidating the transfer.[351] No reason appears for applying this principle only to testamen-

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347. *See* discussion note 238 *supra*.
348. *See* Linkletter v. Walker, 381 U.S. 618, 622-29 (1965) (a judicial ruling may be denied retroactive effect).
349. The practical effect of such a challenge, however, might be minimal. If the state were interested in seeing the federal project carried out, it could condemn the property merely on a showing of public purpose and subsequently convey to the federal government or to some other grantee. *See* Kohl v. United States, 91 U.S. 367, 373 (1875).
350. 339 U.S. 87 (1950) (following United States v. Fox, 94 U.S. 315 (1877)).
351. As the Court held:

> [T]he state acts upon the power of its domiciliary to give and not on the United States' power to receive. As a legal concept a transfer of property may be looked upon as a single transaction or it may be separated into a series of steps. The approach chosen may determine legal consequences. Where powers flow so distinctly from different sources as do the power to will and the power to receive, we think the validity of each step is to be treated separately.

339 U.S. at 91. The Court made this statement in response to the contention of the United States

> that since the United States has the power to accept testamentary gifts, the Supremacy Clause bars a state from stopping this stream of federal revenue at its source. The argument is that every authorized activity of the United States represents an exercise of its governmental power, and that therefore the power to receive property through a will is a governmental power. Since a state cannot interpose "an obstacle to the effective operation of a federal

tary transfers of realty, as were specifically dealt with in *Burnison*. Thus, it would seem that a state is generally free to forbid, and a fortiori to regulate or condition, the ability of persons subject to its jurisdiction to transfer property by gift, devise, sale, or any other means to the United States. The *Burnison* rule must of course be qualified by the principles of the intergovernmental immunities doctrine and the necessary and proper clause. In other words, a state's regulations applied to the transferor will be superseded insofar as they prevent the realization of federal policy on a matter within the scope of an enumerated federal power.[352]

2. *Protection of United States Property*. As a proprietor the United States is entitled to the benefit of those laws and judicial remedies that are available to aid any property owner in the protection and enjoyment of its property.[353] In addition, the cases secure to the United States a somewhat greater prerogative of self-help for the protection of its property than that enjoyed by private individuals.[354] Because the United States is a public body whose will is most often expressed in legislative acts, federal measures of self-help frequently take the form of prohibitions enforced by criminal sanctions. Although in that respect they resemble police regulations or statutes enacted by virtue of some sovereign power, it would be a mistake to view such measures as assertions of a general governmental jurisdiction with

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> constitutional power," the Government argues a state cannot interfere with this power to receive.

Id.

352. An example is afforded by United States v. Allegheny County, 322 U.S. 174 (1944). In that case it was argued that whether the United States had obtained title to certain machinery depended upon state law, which required that the transfer of title be accompanied by a transfer of possession in order to be good against subsequent purchasers and lienors. The Supreme Court rejected the argument, holding that state law would not be decisive of the question of title. The reason given by the Court, however, was that the machinery was acquired in accordance with procurement policies enacted under the power to raise and support armies, with the aid of the necessary and proper clause, so that the supremacy clause applied. *Id.* at 182-83. The Court stated:

> The validity and construction of contracts through which the United States is *exercising its constitutional functions*, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state.

Id. at 183 (emphasis added). This reasoning, of course, would not hold in a case where the transfer of property was for some purpose not within the scope of the enumerated federal powers, even though it was a purpose permissible for the federal government to promote by the use of enumerated powers as a means. See text accompanying note 137-38 *supra*. In such a case, it seems clear, the *Burnison* rationale must prevail.

At one point in the *Allegheny County* opinion the Court stated that "[e]very acquisition, holding, or disposition of property by the Federal Government depends upon proper exercise of a constitutional grant of power." 322 U.S. at 182. This dictum, however, must not be given too much significance, for it obviously overlooks the fact that the United States can accept gifts or bequests despite the absence of any explicit grant of power to do so; can acquire territories without any explicit grant of power to do so; and can purchase property for the purpose of employing it toward extraneous ends, without anything but the spending power as support for its doing so.

353. *See* text accompanying notes 80-81 *supra*.

354. *See* text accompanying notes 105-10, 151-57 *supra*.

respect to federal property. Although in some instances analogous to exercises of a police power, they are enacted and sustained by virtue of the United States' role as a proprietor, albeit a proprietor having certain unique powers. As such, they do not derogate from the general rule of the classic property clause cases reserving general governmental jurisdiction over article IV property to the states.[355]

3. *Creation of Rights in United States Property.* No principle in the whole of property clause doctrine, past or present, is more firmly or more thoroughly supported by Supreme Court precedents than the principle that the United States has complete and exclusive control over the creation and recognition of private rights in property owned by the United States.[356] Even the very early assumption that states could exercise their power of eminent domain over federal land not being utilized to effectuate some enumerated power[357] was long ago recognized to be inconsistent with this principle.[358] Under this principle, state rules creating rights by prescription[359] or otherwise are not merely subject to federal supersession, but are entirely powerless to affect federal property.[360] If it chooses to do so, however, Congress can subject its interest to certain rules of state law.[361]

There has been no indication in any case of an inclination to diminish the complete federal control that this principle confers over the acquisition of rights in federal property. On the contrary, there has been a pronounced tendency to overlook the fact that this principle is a frank exception to the general rule concerning state power over article IV land and not an illustration of any general rule.

4. *General Governmental Jurisdiction Over Article IV Property.* Lawyers for the federal government have long maintained that the United States has "plenary constitutional authority over the retention, management, and disposition of public land."[362] The word "plenary"

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355. *Id. See also* McVay v. United States, 481 F.2d 615 (5th Cir. 1973).

356. *See* text & note 49 *supra. See also* United States v. Oregon, 295 U.S. 1, 27-28 (1935); Humble Oil & Refining Co. v. Calvert, 478 S.W.2d 926 (Tex.), *cert. denied,* 409 U.S. 967 (1972).

357. *See* discussion note 50 *supra.*

358. *Id.* In addition to the rule of exclusive control over the acquisition of adverse rights in its property, the immunity of the United States from unconsented suit bars any exercise of an eminent domain power over federal property by a state. *See* Minnesota v. United States, 305 U.S. 382, 386-87 (1939).

359. Texas v. Louisiana, 410 U.S. 702, 714 (1973).

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

361. For example, the Desert Land Act of Mar. 3, 1877, ch. 107, § 1, 19 Stat. 377 (codified, as amended, 43 U.S.C. § 321 (1970)), had this effect. *See* California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935).

Sometimes it may be permissible to utilize a rule of construction derived from state law as a guide to the intended meaning of a federal grant. *See* Oklahoma v. Texas, 258 U.S. 574, 595 (1922); *cf.* Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63 (1966). *See also* United States v. Oregon, 295 U.S. 1, 28 (1935).

362. Public Land Law Review Comm'n, *supra* note 6, at 2, 278. This proposi-

is not used anywhere in the Constitution, but it has been frequently utilized both by courts and by lawyers with reference to various federal powers.[363] It is a word productive of much misunderstanding, because it conceals several issues which, for purposes of constitutional analysis, must be kept clear and distinct. No federal power is plenary in the full sense of the term, because as to all of them at least the prohibitions of the Bill of Rights apply. More importantly, the use of the term "plenary" is misleading because it tends to merge several analytically distinct questions: whether a given federal power is exclusive; whether there are limits upon the manner in which, or the objectives toward which, it may be employed; and whether, or to what extent, it enjoys the capability of preempting state law.

As to the first question, the spending power of Congress, for example, is exclusive. No one but Congress can spend or authorize the spending of federal money. On the other hand, under modern constitutional doctrine the power of Congress over interstate commerce is not exclusive; so long as the states do not violate the concept of free trade, which the Supreme Court has developed as a constitutional principle, by unduly burdening interstate commerce,[364] they can regulate interstate commerce.[365] Although state regulations of interstate commerce can be either precluded or superseded by congressional action, that is due to analytically distinct principles, not to be confused with the question of the exclusiveness of the federal power. Similarly, the power of the United States to tax is not exclusive. The same incomes and the same articles of property that are subjected to taxes and excises by the United States can also be taxed by a state.

The second question, whether there are limits upon the manner in which or the objectives toward which a given federal power may be employed, presents a separate issue. The Bill of Rights and certain other constitutional provisions proclaim general principles that to some significant degree limit the manner in which federal powers can be employed, and also preclude certain objectives or effects, such as

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tion, assertedly based on the article IV property clause, is said to be supplemented by the supremacy clause. Thus the proposition advanced by the federal lawyers is that "Congress, therefore, is authorized to pass laws with respect to the administration of the property of the United States, and no state may interfere with the exercise of that power by the United States. The only limitations on this authority are those contained in the Bill of Rights." *Id.* at 278. This view was taken in the government's briefs in the Pelton Dam case, see text accompanying notes 250-55 *supra*, and in the report of the Interdepartmental Committee. *See* INTERDEPARTMENTAL COMMITTEE REPORT, PART II, *supra* note 5, at 169-88. The view of the federal lawyers was adopted by Judge Travia in United States v. Matherson, 367 F. Supp. 779, 781 (E.D.N.Y. 1973).

363. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824).

364. *See* Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945).

365. *See* Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R.I. & Pac. R.R., 393 U.S. 129 (1968).

abridgement of free speech or the establishment of religion. In addition, as to certain of Congress' powers there are special limitations on the manner of their exercise. The spending power, for example, although an exclusive power, is limited by the provision that expenditures be made only "in Consequence of Appropriations made by Law."[366] The taxing power, a nonexclusive power, is similarly limited by the requirement that "[a]ll Bills for raising Revenue shall originate in the House of Representatives,"[367] and by various other provisions.[368] Even the power over interstate commerce, although frequently described as plenary, is subject to a few special limitations on the manner of its exercise.[369] Subject to the few such limitations that there may be with respect to any given power, Congress enjoys complete discretion as to the manner in which it will exercise its power. With regard to interstate commerce, for example, Congress may simply establish rules for the conduct of commercial intercourse; it may exclude articles from interstate commerce entirely; or it may restrict the privilege of doing a certain kind of interstate commerce to those who qualify for a license by adjusting their business practices or otherwise restyling their activities and commitments to suit the congressional pleasure.

As to the objectives toward which a particular power may be employed, there is no longer the constitutional difficulty there once was. The *Dagenhart* error concerned this point, the view being taken that the enumerated powers were conferred only for restricted purposes and could not be used to accomplish objectives extraneous to the purposes for which they were conferred.[370] On that view the commerce power, for example, could not be employed to exclude certain commodities from interstate commerce if the objective were not the improvement, protection, or regulation of commerce but rather the modification of factory practices.[371] The *Dagenhart* error has long since been repudiated,[372] although vestiges of the error still confuse many discussions of constitutional law.[373] With that error discarded, Congress today may use its enumerated powers to promote whatever extraneous objectives it desires.[374] If the term "plenary" is to be used

366. U.S. CONST. art. I, § 9, cl. 7.
367. *Id.* art. I, § 7, cl. 1.
368. *E.g., id.* art. I, § 9, cls. 4-6.
369. *E.g.,* "No preference shall be given by any Regulation of Commerce . . . to the Ports of one State over those of another . . . ." *Id.* art. I, § 9, cl. 6.
370. *See* text accompanying notes 128-29 *supra.*
371. As the Court said in Hammer v. Dagenhart, 247 U.S. 251, 273-74 (1918), "[t]he grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture."
372. *See* text accompanying notes 230-36 *supra.*
373. *See* text & notes 237-38 *supra.*
374. *See* United States v. Darby, 312 U.S. 100 (1941).

with some precision in constitutional discussions, it is best to use it to express this proposition: that the enumerated powers can be used to promote extraneous ends. Congress can, for example, regulate interstate commerce in ways designed to promote consumer protection, spend money to improve public education, impose taxes to deter transactions in narcotics, and prohibit mailing of certain classes of material to combat influences thought hostile to morals. One common technique by which Congress thus utilizes its enumerated powers to promote extraneous objectives is the imposition of conditions which must be met to entitle an applicant to a federal grant, contract, or license. If Congress has the power to make the grant or contract or to require the license, and if there are not applicable limitations upon the manner of its exercising that power, then Congress may attach whatever conditions it chooses; it is no constitutional objection that the objective at which the conditions may be aimed is extraneous to the enumerated powers. The only limitations upon the objectives which the federal government may promote are the limitations imposed by express constitutional provisions, particularly those in the Bill of Rights.

Finally, there is the separate and entirely distinct question of preemptive capability. It has been said that "conflict is the touchstone of preemption . . . ."[375] But conflict between state and federal policy does not necessarily produce preemption. Conflict between state and federal policy can produce preemption only insofar as the federal rule or policy constitutionally enjoys preemptive capability. The intricacies of preemptive capability are beyond the scope of this Article,[376] but a conclusory discussion is necessary here. In general, every exercise of a nonexclusive enumerated federal power enjoys preemptive capability as to matters within the scope of that power itself. For example, federal policy as to what, if any, conditions must be satisfied by an applicant to qualify for permission to engage in some aspect of interstate commerce cannot be interfered with against Congress' will by a state's insistence that the applicant meet different or additional conditions; Congress has the power to preempt that state policy. Thus the will of Congress can have the same effect with regard to nonexclusive federal powers that the rule of the Constitution has with regard to exclusive federal powers. However, when Congress employs any of its enumerated powers as a device for promoting some extraneous objective, as it may constitutionally do, Congress' choice of policy with respect to that extraneous objective wholly lacks preemptive capabil-

375. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 250 (1959).
376. For a thorough analysis of the concept, see Engdahl, *supra* note 64.

ity.[377] For example, if Congress were to offer grants to farmers on the condition that they provide farm laborers with on-farm living facilities meeting certain federally prescribed standards, the federal policy represented by those standards would be incapable of preempting the more stringent standards which might be prescribed for such facilities by a state. Or, if a broadcasting license were offered only on the condition that the applicant disaffirm a certain contract which imperiled its fiscal position, that licensing condition and its fulfillment would be powerless to preempt the rules of state law that bound the applicant to his contract.[378] It is permissible for Congress to promote, through the exercise of its enumerated powers, policies extraneous to its enumerated powers, but those extraneous policies can freely be ignored, frustrated, or contravened by the states without violence to the supremacy clause, because federal policies on matters extraneous to the federal powers simply lack preemptive capability.

The issue of governmental jurisdiction over article IV property must be considered in the context of the foregoing general and well established constitutional principles. The exclusive power of Congress to control the creation and recognition of rights in federal property may be considered first. That power is without any special constitutional limitations upon the manner of its exercise. Thus, it is entirely in the discretion of Congress whether the United States will retain its property, or dispose of it by lease, sell it, or give it away. It is not even required that the United States treat all interested parties, even if they be states, equally in this respect.[379] Congress may sell, grant, or lease federal land on any terms it may choose, limited only by constitutional restraints of general application, such as the Bill of Rights. Furthermore, like every other enumerated power, this power can be utilized to promote extraneous ends. Consequently, the terms and conditions of patents or other conveyances or leases of federal property can be tailored to promote any policy that Congress might choose, however extraneous to the enumerated powers. Congress might design a land policy to promote settlement in new territories or in new states containing stretches of public domain, even though the encouragement of migration and homesteading is not within the scope of any enumerated power. It might adjust the criteria for qualifying mineral discoveries, vary the size or number of claims that a single claimant may hold, or encourage or prohibit the assignability of claims, according to congres-

377. *Id.* at 68-76.
378. Regents v. Carroll, 338 U.S. 586, 600 (1950).
379. *See* Alabama v. Texas, 347 U.S. 272 (1954). Conceivably, as to persons, the "equal protection" content of due process required by the fifth amendment might be argued as a modest restraint.

sional estimates of what is sound policy, to optimize development of natural resources on federal lands, even though the production of resources for industry is not within the scope of any enumerated power. It may, if it wishes, provide in a lease detailed conditions concerning the methods to be used by the lessee in pursuing the enterprise for which the lease is made, or for that matter, for pursuing any other enterprise in which the lessee is engaged.

While the power to dispose of federal property can thus be used to promote policies extraneous to the enumerated powers, however, it does not follow that Congress' will with respect to such extraneous matters can supersede state law. There is no reason to conclude that the extraneous policies that Congress may advance by the use of this power are any more capable of preempting state law than extraneous policies promoted by the use of any other federal power, whether that power is nonexclusive like the commerce power, or exclusive like the spending power. The case would be different if the federal policy could be viewed as necessary and proper to the effectuation of some enumerated federal power, as for example, if the particular specifications were conceived as means necessary to promote national defense; but that difference would result from constitutional principles which do not derive from the property clause.[380] If Congress, or its delegate, were to lease a tract of the public domain to a corporation to strip mine for minerals for commercial use or sale, an extraneous end, the exclusiveness of federal power over the disposal of federal property could not prevent state law being applied to prohibit, or to impose various conditions upon, the strip-mining activities of the lessee.[381]

With respect to aspects of governmental jurisdiction other than the creation of private rights in federal land, at least until the 1976 decision in *Kleppe v. New Mexico*[382] the states had an even larger role. In the first place, while the power of Congress over the creation of rights in federal land is exclusive, its power in other respects over such land is not. There are no special constitutional limitations upon the manner of Congress' exercise of these other aspects of its control over federal property; however, the cases made it clear that the power Congress had over article IV property in respects other than the creation of rights therein was not a sovereign power of governmental jurisdiction, but rather the power of a proprietor. This public power, no less than the power of a private proprietor, was subject to limitation by state law.

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380. *See* text accompanying notes 52-65 *supra*.
381. *See generally* Barry, *Reclamation of Strip-Mined Federal Land: Preemptive Capability of Federal Standards Over State Controls*, 18 ARIZ. L. REV. 385 (1976).
382. 426 U.S. 529 (1976), *discussed in* text accompanying notes 273-336 *supra*, 392-400 *infra*.

Thus, by definition this federal power was not only nonexclusive, but was unique among the federal powers in being inherently subordinate to state law.

The power Congress enjoyed by virtue of proprietorship in federal property could of course, be exercised, like all of Congress' power, as a means either to effectuate other enumerated powers or to promote objectives extraneous to the enumerated powers. When federal property was used to effectuate one of the federal governmental powers enumerated in the Constitution, the principles of the necessary and proper clause and the doctrine of intergovernmental immunities were invoked, giving rise to preemptive capability despite the rule that would have prevailed for the property power alone. But when article IV property was merely laying idle or was being utilized to promote extraneous ends, general state governmental jurisdiction over that property and its use—whether by the United States itself or by others—was complete. The policies with regard to extraneous matters that Congress might choose to promote through this power could be altered or frustrated by the policy of a state, since those extraneous federal policies have no preemptive capability. In addition, however, since the government's power as a proprietor was inherently subordinate to the rules of state law, a state could regulate in spite of federal policy even as to matters within the scope of this particular federal power itself. Notwithstanding the fact that the federal policy might be articulated in legislative form, it was not viewed as an exercise of any legislative or sovereign power; and it was only the legislative or sovereign powers of the federal government that were given overriding effect by the supremacy clause. The property power was wholly different in nature and conception, and that is the reason why, for example, it could be delegated by Congress to administrative functionaries without regard to whatever restrictions on delegation might be found applicable to Congress' legislative powers.[383]

It was in accordance with these historic principles that a state had constitutional power to regulate the manner in which private persons with federal permission could utilize federal land,[384] and to exert its will even in the face of the contrary wishes of the administrators federally authorized to manage the property.[385] Similarly, these principles explain why congressional schemes for irrigation and reclamation[386] of

383. United States v. Grimaud, 220 U.S. 506 (1911).
384. Omaechevarria v. Idaho, 246 U.S. 343 (1918); Bacon v. Walker, 204 U.S. 311 (1907).
385. Colorado v. Toll, 268 U.S. 228 (1925).
386. As distinguished from the plans for distribution of water to other users, which are normally a major part of reclamation projects.

the public domain, if not buttressed by reliance upon the commerce power or some other enumerated power independent of the property clause, could not override state laws.[387] This is why state hunting regulations were as effective on article IV property as they were on private and state-owned property within a state.[388] This is also the reason that states could tax private activities on article IV lands,[389] although by virtue of the doctrine of intergovernmental immunities[390] they could not tax the United States itself. Some elements of state power over article IV property are ratified by provisions in certain federal statutes;[391] but under the precedents it could not be maintained that in the absence of those statutes the states' governmental jurisdiction would have been any less, or that the existence of the statutes in any way circumscribed the power which the states in accordance with the constitutional principles would have enjoyed in any event.

Everything that was settled with regard to aspects of governmental jurisdiction other than the creation of private rights in federal land, however, has now been suddenly unsettled by the 1976 decision in *Kleppe v. New Mexico*.[392] The degree to which the principles discussed in the three paragraphs immediately preceeding, which were based on the classic doctrine, can survive *Kleppe's* ignorant disregard of that doctrine, is yet to be determined. Of course, ill-informed or erroneous decisions have been made and subsequently overruled by the Supreme Court before, and if ever a state's advocates do a creditable job of presenting the precedents, there is some chance that *Kleppe* may be overruled. If it is not, however, there are grounds on which at least some remnants of the law that prevailed before *Kleppe* might nevertheless survive.

Kleppe might be confined to its facts and to the narrow statement of its holding expressed near the end of the opinion: "We hold today that the Property Clause also gives Congress the power to protect wildlife on the public lands, state law notwithstanding."[393] So confined, it would be but a slight variation of the rule of *Hunt v. United States*,[394] and easily supportable on several grounds.[395] Even if it is not so con-

387. Kansas v. Colorado, 206 U.S. 46, 92 (1907).
388. Ward v. Race Horse, 163 U.S. 504 (1896). Hunt v. United States, 278 U.S. 96 (1928), which has sometimes been taken as supporting a contrary principle, only represents a well-circumscribed exception which does not impeach the general rule. *See* text accompanying notes 151-57 *supra*.
389. Wilson v. Cook, 327 U.S. 474 (1946).
390. *See* text accompanying notes 405-31 *infra*.
391. *See* statutes cited notes 159, 161 *supra*.
392. 426 U.S. 529 (1976); *see* text accompanying notes 273-86 *supra*.
393. 426 U.S. at 546-47.
394. 278 U.S. 96 (1928), *discussed in* text & note 152 *supra*.
395. *See, e.g.*, 426 U.S. at 537 n.7, 541 n.10; text accompanying notes 276-83 *supra*.

fined, however, it is to be noted that *Kleppe* specifically asserts that states enjoy concurrent governmental jurisdiction over article IV land. The Court pointed out the confusion of the state's lawyers which led them to assume that federal power over the property must necessarily be exclusive of similar power in the states, and the Court assured that "the State is free to enforce its criminal and civil laws on those lands," albeit subject to preemption.[396] This means that a number of the state laws in force prior to *Kleppe* should remain intact, although now they may be under greater risk of preemption.

If *Kleppe* cannot be confined to its facts and the narrow expression of its holding, it will stand for the proposition that Congress has a general, unrestricted legislative power over public lands within a state, just like the power it has over unincorporated territories where no federalism considerations apply,[397] and that this federal power of general governmental jurisdiction has the capability of preempting state laws. Even on these terms, however, application of the general and well established constitutional principles discussed earlier in this subsection, which were not put in question by *Kleppe,* would reserve significant power to the states. Federal lands may still be used as a means to ends which are extraneous to any enumerated power. To assume that every use to which federal property may be put is ipso facto an end within the scope of the property power, and not extraneous, would be to revive the misconceptions of that bygone day when judicial minds were seduced by the now long-discarded *Dagenhart* error.[398] Once it is recognized that a particular use to which federal property is being put is extraneous to the enumerated powers, it must follow in accordance with the principle unchallenged in *Kleppe* that the federal policy with regard to that use lacks any preemptive capability. The state may lack power to regulate the federal government itself in such use, because of the doctrine of intergovernmental immunities, but depending upon the future developments taking place in that doctrine[399] the state could find ways to effectively regulate private persons engaged in extraneous uses of federal land.[400]

5. *Article IV Property and the Necessary and Proper Clause.* Under the necessary and proper clause Congress can deal with subjects outside the scope of its enumerated powers if it does so as a means of

396. 426 U.S. at 543.
397. *Cf.* Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845). See text accompanying notes 9-27 *supra.*
398. See text accompanying notes 128-42 *supra.*
399. See text accompanying notes 406-31 *infra.*
400. For example, through tax imposition, deductions, and credits, or through conditions on the doing of business within the state.

effectuating an enumerated federal power. Thus it can regulate manufacturing practices, for example, provided it does so as a means to effectuate its control over interstate commerce. Congress' discretion with respect to such necessary and proper regulations, as well as its discretion with respect to the objective within the scope of the enumerated powers, clearly has the capability of preempting state laws.[401]

Congress' power over the use of article IV property is itself an enumerated power, but according to classic property clause doctrine it was unique among the enumerated powers in that it was inherently subordinate to state law.[402] Measures taken as necessary and proper to the effectuation of this particular power could therefore have no greater preemptive capability than the article IV property power itself. However, article IV property can be utilized under the necessary and proper clause as a means to effectuate various other enumerated powers. Only when article IV property was so utilized did the necessary and proper clause impart the capability of preempting state laws, and this was not because of the property clause but because the property was being used as a means to effectuate one of the enumerated governmental powers.[403]

If the new rule of *Kleppe v. New Mexico* is not overruled or confined, this feature of the classic property clause doctrine can hardly survive. It would not follow, however, that every measure enacted as a means to implement an extraneous end to which federal property might be put would be supported by the necessary and proper clause. To so hold would be to follow an erroneous principle which is aptly referred to as the "bootstrap theory,"[404] the notion that once having acted to promote an extraneous objective to some extent by utilization of an enumerated power, Congress can treat that extraneous objective as if it were within its power so as to support extraneous means to that objective under the necessary and proper clause.

6. *Intergovernmental Immunities.* The doctrine of intergovernmental immunities has a complicated conceptual history.[405] Like the

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401. Nash v. Florida Indus. Comm'n, 389 U.S. 235 (1967); Campbell v. Hussey, 368 U.S. 297 (1961).

402. This proposition was subject, of course, to the exceptions respecting the acquisition of rights in federal property, and to the federal government's protection of its own property under the doctrine of Camfield v. United States, 167 U.S. 518 (1897). See text accompanying notes 49, 105-10 *supra*.

403. *See* text accompanying notes 54-65 *supra*. For a comprehensive discussion of the issues involved in determining whether the necessary and proper clause gives support to any particular measure, see Engdahl, *supra* note 64, at 78-87.

404. *See* D. ENGDAHL, *supra* note 2, § 3.06.

405. The doctrine originated in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 136 (1819), as a limitation on the exercise of state taxing power which interfered with the federal government's fulfillment of its constitutionally ordained role, and was later extended to regulations as well as taxes. The doctrine came to have a reciprocal dimen-

principle of the necessary and proper clause, the doctrine of intergovernmental immunities was in its origin explicitly and inextricably tied to the doctrine of enumerated powers.[406] In applying the doctrine the Supreme Court frequently took pains to point out how the objectionable state tax interfered with effectuation of some enumerated power.[407] Also at its origin, however, the doctrine of intergovernmental immunities was affected by the notion that the enumeration of powers in the Constitution amounted to an enumeration of the ends or objectives which the federal government was competent to achieve, and precluded the use of those enumerated powers as means to accomplish extraneous ends.[408] That notion, expressed in Chief Justice Marshall's dictum in *McCulloch v. Maryland* which originated the intergovernmental immunities doctrine, is the notion that flourished in the early 20th century as the *Dagenhart* error. As explained earlier,[409] one logical corollary of the *Dagenhart* error is the idea that whatever it is constitutional for the United States to do must ipso facto be within the scope of an enumerated power. When the immunities rule as articulated in *McCulloch* is applied in the light of this corollary of the *Dagenhart* error, it follows that the protection of the intergovernmental immunities doctrine extends to everything that the United States is legally able to do.

This categorical application of the immunities doctrine to all federal instrumentalities, including those which today would be recognized as designed to accomplish extraneous ends, was endorsed only shortly before the Supreme Court definitively repudiated the *Dagenhart* error.[410] Attempts made at that time to challenge the categorical application of the doctrine were couched in terms other than the distinction between enumerated and extraneous ends,[411] no doubt because the

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sion when the Supreme Court held that federal taxes could not be applied so as to interfere with state functions. New York v. United States, 326 U.S. 572 (1946); Collector v. Day, 78 U.S. (11 Wall.) 113 (1871); *cf.* National League of Cities v. Usery, 426 U.S. 833 (1976); United States v. California, 297 U.S. 175 (1936).

406. *See* text accompanying note 65 *supra.*

407. *See, e.g.,* Wisconsin R.R. v. Price County, 133 U.S. 496, 504 (1890); Van Brocklin v. Tennessee, 117 U.S. 151, 179-80 (1886); Weston v. City Council, 27 U.S. (2 Pet.) 449, 467 (1829).

408. *See* discussion note 65 *supra.*

409. See text accompanying notes 139-42 *supra.*

410. *See* Pittman v. Home Owners' Loan Corp., 308 U.S. 21 (1939); Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466 (1939). In *Graves* the Court said:

> As [the federal] government derives its authority wholly from powers delegated to it by the Constitution, its every action within its constitutional power is governmental action, and since Congress is made the sole judge of what powers within the constitutional grant are to be exercised, all activities of government constitutionally authorized by Congress must stand on a parity with respect to their constitutional immunity from taxation.

Id. at 477.

411. *See* Federal Land Bank v. Bismarck Lumber Co., 314 U.S. 95 (1941) (challengers unsuccessfully relied upon a proprietary-governmental dichotomy).

repudiation of *Dagenhart* was still too recent and its implications still too unclear for lawyers to perceive its relevance to the issue. Now, 36 years later, it seems obvious that the original immunities rationale of *McCulloch*, applied in light of the fact that some federal instrumentalities can be and are used to accomplish ends extraneous to any enumerated power, should entail a less categorical intergovernmental immunities rule. However, there has not yet been any judicial movement toward lessening the immunity of the United States and its instrumentalities. Therefore, the traditional categorical immunity of federal property from state taxation regardless of whether that property is being utilized for enumerated or extraneous objectives is still the rule.[412] In all or nearly all of the instrumentality cases a federal statute specifically conferring tax immunity has been present;[413] nonetheless the Court's reasoning appears to be that the immunity would be constitutionally afforded even if not statutorily conferred.[414] Thus the only revenue currently available to states from the federal government itself for federal property within the states' borders is such voluntary payment in lieu of taxes as the Congress might choose to make.[415] There nonetheless remains the possibility that the analysis suggested above might lead a court to change the rule.

The intergovernmental immunities principle has a much more limited application to state taxation of private property or activities on federal land. The general rule is that state jurisdiction extends over article IV property as a matter of course.[416] If a private person or corporation is utilized as a federal instrumentality, the immunities doctrine

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412. The immunity ceases when the federal interest is transferred. It is possible that equitable title may pass, and immunity thus cease, even though legal title remains in the United States. *See* S.R.A., Inc. v. Minnesota, 327 U.S. 558 (1946).

413. *E.g.*, Laurens Fed. Sav. & Loan Ass'n v. South Carolina Tax Comm'n, 365 U.S. 517 (1961); Reconstruction Fin. Corp. v. Beaver County, 328 U.S. 204 (1946); City of Cleveland v. United States, 323 U.S. 329 (1945); Pittman v. Home Owners' Loan Corp., 308 U.S. 21 (1939).

414. *See* quotation note 410 *supra*.

415. Occasionally, Congress has waived the federal immunity with respect to certain kinds of property. *E.g.*, Reconstruction Finance Corporation Act, ch. 8, § 8, 47 Stat. 8 (now 15 U.S.C. § 607 (1970)); *see* Rohr Aircraft Corp. v. County of San Diego, 362 U.S. 628 (1960).

416. Kleppe v. New Mexico, 426 U.S. 529, 543 (1976); Wilson v. Cook, 327 U.S. 474 (1946). The rule was different as to private property located on article I federal property—at least until recent developments in article I property clause doctrine. See text accompanying notes 445-56 *infra*. Under the article I clause cases, the state generally could not tax the private property because, the enclave being excluded from the territory of the state, the state lacked jurisdiction. Humble Pipe Line Co. v. Waggonner, 376 U.S. 369 (1964); Surplus Trading Co. v. Cook, 281 U.S. 647 (1930). This rule applied unless the state had reserved taxing jurisdiction in its cession of the enclave, Superior Bath House Co. v. McCarroll, 312 U.S. 176 (1941), or unless the United States had given its consent to state taxation of private property. Offutt Housing Co. v. Sarpy County, 351 U.S. 253 (1956). New developments in article I property clause doctrine have impeached the logic of these cases, and consequently they may be overruled in the near future.

prevents the state from taxing it unless the United States consents.[417] Otherwise, however, the property and activities of private persons and corporations on article IV federal property are subject to taxation by the state.[418] The Supreme Court has suggested that Congress might have power to confer tax immunity upon private persons or corporations contracting with the United States or using federal property, even where the intergovernmental immunities principle itself affords no immunity.[419] Undoubtedly Congress could do so where the support of the necessary and proper clause could be invoked,[420] but if the requirements of that clause were not met, statutory immunity would be doubtful. In any event, Congress has not seen fit to do so, and thus the point has never been raised for decision.

The intergovernmental immunities doctrine applies not only to taxes but also to other regulations. Almost all of the cases holding that state regulations cannot bind the United States or its agents or instrumentalities are cases in which the state regulation would have interfered with the accomplishment of some objective within the scope of the enumerated federal powers.[421] Although that fact cannot by itself support an inference that without that relationship to the effectuation of an enumerated power the immunities question would have been differently decided, it does underscore the point that protecting the United States in its delegated governmental functions is the principal concern

417. *Cf.* Carson v. Roane-Anderson Co., 342 U.S. 232 (1952). *Carson* involved a federal statute conferring the tax exemption, but application of the intergovernmental immunities doctrine would have supported the immunity even without the statute if the private property and its owners were viewed as instrumentalities to effectuate enumerated federal powers.

418. This is true even if the person or corporation is providing goods or services to the United States, and even if the economic effect of the tax is passed on to the United States in the form of higher costs or lower rents. United States v. Boyd, 378 U.S. 39 (1964); City of Detroit v. Murray Corp., 355 U.S. 489 (1958); United States v. Township of Muskegon, 355 U.S. 484 (1958); United States v. City of Detroit, 355 U.S. 466 (1958).

419. City of Detroit v. Murray Corp., 355 U.S. 489, 495 (1958); United States v. City of Detroit, 355 U.S. 466, 474 (1958). The Court had recognized the issue, but refrained from uttering any dictum upon it in Alabama v. King & Boozer, 314 U.S. 1, 9 (1941), and Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 478-79 (1939).

420. The intergovernmental immunities principle bars state taxes which the judiciary, lacking any congressional statement on the point, finds to interfere with effectuation of enumerated federal powers. Circumstances might easily exist, in which a court would find no such interference if it were to judge for itself, and yet a contrary finding by Congress invoking the necessary and proper clause would have to be given controlling effect so long as that congressional finding had a rational basis.

In Carson v. Roane-Anderson Co., 342 U.S. 232 (1952), the Court premised the power to extend immunity to federal contractors explicitly upon the necessary and proper clause. *Id.* at 234. Explicit reliance upon the necessary and proper clause was evident also in Dameron v. Brodhead, 345 U.S. 322, 325 (1953) (upholding a federal statute extending a state tax immunity to military servicemen).

421. *E.g.*, United States v. Georgia Pub. Serv. Comm'n, 371 U.S. 285 (1963); Public Util. Comm'n v. United States, 355 U.S. 534 (1958); Johnson v. Maryland, 254 U.S. 51 (1920); Ohio v. Thomas, 173 U.S. 276 (1899); *In re* Neagle, 135 U.S. 1 (1890).

of the intergovernmental immunities doctrine. Moreover, as to article IV property not being used to effectuate an enumerated power, it has been specifically held that a state can interfere by a suit in equity with the federally authorized administration of such land.[422] If a state can do so by a suit to protect the power of legislation which it has not yet exercised, it would seem that a state must be equally capable of interfering legislatively with the federal administration of article IV property for extraneous purposes. Indeed, the latter would seem to be confirmed by the Court's dictum in another case suggesting that federal plans for irrigation and reclamation of the public domain, if not supported by some other enumerated power, would be subordinate to state law.[423]

A 1943 Supreme Court decision, however, has given rise to some uncertainty on this point. The facts in *Mayo v. United States*[424] involved a state inspection tax applied to fertilizer owned by the United States and held for distribution as part of a federal scheme to improve farm productivity and income. The objective of this scheme was extraneous to the enumerated powers, although the means utilized to achieve that extraneous end were the spending power and the power to convey federal property—in this case personal rather than real property. The Court spoke in terms which applied equally to taxes and to other regulations and which failed to indicate whether the exceptional power of Congress over the acquisition of rights in federal property[425] entered into the decision in any way. The Court held the state inspection scheme inapplicable because of the intergovernmental immunities doctrine. Its only apparent attempt to deal with the enumerated powers question completely missed the point. The Court merely commented that in carrying out its scheme the federal government was acting "in a governmental capacity."[426] In the sense in which that term was contemporaneously being used,[427] the statement was certainly true. However, as in several other cases decided during that early post-New Deal period when the Court was first groping with the implications of its repudiation of the *Dagenhart* error,[428] the Court mistook the fact that the government was acting in a governmental capacity for an answer to the very different question posed by the doctrine of enumer-

422. Colorado v. Toll, 268 U.S. 228 (1925). See discussion note 155 *supra.*
423. Kansas v. Colorado, 206 U.S. 46, 93-94 (1907). See discussion note 251 *supra.*
424. 319 U.S. 441 (1943).
425. The state statute provided for seizure and sale of noncomplying fertilizer by the state. Any attempted seizure and sale of federally owned property, of course, would be utterly void. *See* text & note 49 *supra.*
426. 319 U.S. at 444.
427. *See* text accompanying note 198 *supra.*
428. *See* Federal Land Bank v. Bismarck Lumber Co., 314 U.S. 95, 102 (1941). *See also* Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466 (1939).

ated powers; in reality, it did not speak to the latter question at all. Today, *Mayo* is commonly regarded as standing for a categorical immunity against state regulation of the United States itself in the use of federal property. The error of this view, however, might be judicially perceived if a litigant points out three facts: that *Mayo* did not involve state regulation of the use, but only federal discretion in the disposal, of federal property; that the Court in *Mayo* did not deal with the implications for the immunities doctrine of the rule, rejecting the *Dagenhart* error, that enumerated powers can be used to accomplish extraneous ends; and that the clear implication of the earlier cases[429] is adverse to the *Mayo* view.

Whether or not this categorical immunity of the United States itself is considered beyond question, however, it is clear, for the same reasons outlined in regard to state taxing jurisdiction, that the doctrine of intergovernmental immunities does not extend so far as to protect private persons who use article IV property from state regulation of that use.[430] The above discussion indicates that there is still a possible argument as to state taxes, and a much stronger argument as to state regulations, to the effect that the doctrine of intergovernmental immunities should not bar the assertion of state governmental jurisdiction over article IV property, even against the United States itself.[431] In any event, private persons and corporations are not so immunized unless the relationship to the government is sufficient to render the private party a federal instrumentality.

B. *Article I Property Clause Principles*

It is not possible to state with any assurance what the constitutional rules concerning article I property, or federal enclaves, are today or what they will be tomorrow: those precedents which have not already been overruled stand in jeopardy of falling as the implications of more recent Supreme Court rulings begin to be recognized by lawyers and implemented by courts.

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429. Colorado v. Toll, 268 U.S. 228 (1925); Kansas v. Colorado, 206 U.S. 46 (1907).

430. *See* Penn Dairies, Inc. v. Milk Control Comm'n, 318 U.S. 261 (1943). As in the case of taxes, the question of whether Congress could legislatively confer an immunity from regulation broader than that which is provided by the constitutional principle is a question which has not yet been the subject of anything more than mere dicta. *E.g., id.* at 269 (dictum relying on the necessary and proper clause concept).

431. No such argument was made in Hancock v. Train, 426 U.S. 167 (1976), or in Environmental Protection Agency v. California, 426 U.S. 200 (1976), where without distinguishing between those federal installations which are used to effectuate enumerated powers and those which arguably are used only for extraneous ends the Court held that certain provisions of state air and water pollution laws could apply to federal installations only with the clear and unambiguous approval of Congress, which as a matter of statutory construction was found to be lacking.

Under the classic principles, federal governmental jurisdiction over article I property was complete and constitutionally exclusive. The power that the United States enjoyed over those enclaves was "in essence complete sovereignty."[432] Thus, the enclaves actually ceased to be part of the territory of the states by whose consent or cession the federal government's jurisdiction had been acquired. The basic rule, therefore, was that neither prior nor subsequent state laws could have any effect on the article I property.[433] This rule was modified explicitly by the *James Stewart & Co. v. Sadrakula* holding that until superseded by federal regulations, prior state laws would govern on article I property no less than on property covered only by article IV.[434] We may regard the basic rule as having been subtly modified also by the late 19th century acceptance of the notion that exclusive authority in the United States meant only that "the ability of the several States to act upon the matter solely in accordance with their own will was extinguished, and the legislative will of the general government substituted."[435] In accordance with this view, exclusive federal jurisdiction would be no bar to the exercise of state jurisdiction pursuant to express federal permission, although in the absence of such permission the state could assert no power.[436]

Supreme Court decisions during the 1937 term further departed from the classic principles by holding that negotiation and agreement could fix any division of jurisdiction thought desirable by both the federal and state governments, affording opportunities for accommodation and flexibility in the governance of enclaves not possible under the earlier rules. The 1940 statute[437] took advantage of that change in doctrine by providing that henceforth the acquisition of completely exclusive federal jurisdiction on the traditional pattern should be the exception rather than the rule. These developments made possible as to enclaves acquired after those dates a variety of seemingly more desirable jurisdictional divisions.[438] Where truly exclusive governmental

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432. S.R.A., Inc. v. Minnesota, 327 U.S. 558, 562 (1946).

433. Such a cession had an effect exactly the converse of what happened upon a state's creation from a territory. When a state was created, prior and subsequent federal laws which rested only on Congress' power over the territories ceased to have effect. Permoli v. Municipality, 44 U.S. (3 How.) 589, 610 (1845).

434. James Stewart & Co. v. Sadrakula, 309 U.S. 94 (1940); *see* text accompanying notes 209-11 *supra*.

435. *In re* Rahrer, 140 U.S. 545, 561 (1891).

436. *Cf.* Paul v. United States, 371 U.S. 245, 263 (1963). *See also* California v. EPA, 511 F.2d 963 (9th Cir. 1975), *rev'd on other grounds*, EPA v. California, 426 U.S. 200 (1976).

437. Act of Oct. 9, 1940, ch. 793, § 355, ¶ 8, 54 Stat. 1083 (now 40 U.S.C. § 255 (1970)). See text of statute note 208 *supra*.

438. The cumulative effect of this variety, however, is woefully complex. The complexity has been multiplied by congressional enactments retroceding all or, since the constitutional possibility of divided jurisdiction under the article I clause was established

jurisdiction was acquired, however, the classic principles still prevailed.[439] Under those principles, in sum,[440] except for those civil laws existing at the time of the acquisition of federal jurisdiction[441] and those criminal and civil laws of subsequent state vintage which were adopted and made applicable in the enclave by congressional action, neither the criminal nor the civil laws of a state could have any application on article I property. Residents of federal enclaves enjoyed none of the privileges attendant upon state citizenship, such as voting rights and the right of access to state courts, public schools, and other state services. State taxes could not reach into the federal enclaves,[442] and the process of state courts could be served there only by virtue of the constitutionally immaterial reservation of the right of process service that had customarily been included in article I consents and cessions since the 18th century.

Despite efforts to adjust the traditional constitutional rules to conform with official judgments of sound and practical policy for the governance of article I enclaves, many anomalies and pointless inequities remain in this area of law. The classic theory that enclaves are not part of a state carries implications not only for the right of enclave residents to vote, but also for their right to hold office or otherwise participate in the political process. There is still grave doubt as to the availability or validity of state court actions involving enclave residents in matters depending upon domicile, such as divorce. Except where Congress has made some special provision, there are problems concerning testate and intestate succession and the administration of estates. The classic doctrine entails many other inconveniences as well.[443] These implications of the classic article I clause doctrine are so

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in 1937, a part of the jurisdiction over particular enclaves to the states. A list of the few such retrocessions effected prior to 1957 is contained in INTERDEPARTMENTAL COMMITTEE REPORT, PART II, *supra* note 5, at 89-96. Furthermore, by a few statutes of general application, *e.g.*, 4 U.S.C. § 104 (1970) (Lea Act); *id.* § 105 (Buck Act); 10 U.S.C. § 2667(e) (1970) (Military Leasing Act of 1947); 16 U.S.C. § 457 (1970) (wrongful death); 26 U.S.C. § 3305(d) (1970) (unemployment compensation); 40 U.S.C. § 290 (1970) (workmen's compensation), and by a few dealing with particular enclaves, Congress without retroceding jurisdiction has authorized states to exercise jurisdiction in certain specified matters on article I property. The general vacuum of criminal law in the enclaves has been filled by assimilation of state criminal laws. 18 U.S.C. § 13 (1970).

439. Pacific Coast Dairy, Inc. v. Department of Agriculture, 318 U.S. 285, 294 (1943).

440. Documenting by the citation of scores of state and lower federal cases the implications of the classic article I property clause doctrine is a task that was accomplished quite commendably by the Interdepartmental Committee in its "Text of the Law of Legislative Jurisdiction." INTERDEPARTMENTAL COMMITTEE REPORT, PART II, *supra* note 5, at 105-248.

441. Such preexisting civil laws continued in force in their original form, unaffected by subsequent state amendments, until changed or superseded by congressional action.

442. *See* cases cited note 416 *supra*.

443. Some of these are described in the INTERDEPARTMENTAL COMMITTEE REPORT, PART II, *supra* note 5, at 7, 215-48.

unnecessary and unfair that in practice they are generally ignored.[444] This in turn exacerbates the inequities in those cases where the classic principles are dutifully applied.

In view of these problems, as well as the impracticality of the current jurisdictional jumble, it is encouraging that the Supreme Court appears to be abandoning the classic principles in favor of recognizing a federal enclave as part of the state within which it is located.[445] The

444. The Interdepartmental Committee concluded:

> Probably the one fact that impressed the Committee most in the reports of the agencies favoring exclusive legislative jurisdiction, or partial legislative jurisdiction approaching exclusive, was that the installations in these jurisdictional statutes controlled by these agencies were very generally operated as though the United States had only concurrent legislative jurisdiction or only a proprietorial interest. Furthermore, the manner of their operation was incompatible with the exercise by the United States of exclusive or partial legislative jurisdiction. Almost uniformly, notarizations were performed by notaries public under the commission of the State in which the installation was located; state coroners frequently investigated deaths occurring under unknown circumstances within such areas; and vital statistics (marriages, births, deaths) were recorded in State or county recording offices. In numerous instances local police and fire protection was furnished to and on the Federal installation. In very many instances residents of the enclave were to all intents and purposes regarded as citizens of the State so far as their civil and political rights were concerned. Thus, their children were accepted on an equal basis in local schools, they were given the right of suffrage, they were accorded access to State courts in such matters as probate, divorce and adoption of children, and they were treated as citizens of the State in obtaining hunting licenses and reduced tuition to State colleges and universities.
>
> The extra-legal nature of many of the mentioned services and functions rendered by or under the authority of a State in an area under Federal jurisdiction is obvious. . . .
>
> The Committee considers it important that various necessary services and functions rendered in Federal areas by or under the authority of States be put on a firm legal footing.

Id., Part I, *supra* note 5, at 49-50.

> It would appear doubtful to the Committee, however, whether a State could, despite its best intentions, bestow certain types of benefits upon the residents of areas of exclusive Federal jurisdiction. The Committee refers particularly to those benefits which depend upon domicile within a State. An example is the right to maintain an action for divorce. Since Congress has provided no law of divorce for areas of exclusive Federal jurisdiction the residents of such areas must resort to a State court for relief. Several States have enacted statutes conferring jurisdiction on their courts to entertain actions for divorce brought by persons who have resided in Federal enclaves within such States for designated fixed periods. The courts of a few other States have assumed jurisdiction in such cases without benefit of a similar statute. In neither case have such decrees been put to the test of collateral attack on the basis that they were rendered without jurisdiction. It therefore remains to be seen whether a resident of an area of exclusive Federal jurisdiction, by virtue of residence in such area alone, can become legally domiciled in the State in which the Federal installation is located. The problems involved in these cases are, of course, of equal significance in other situations in which domicile is the basis of a right or obligation.

Id. at 57.

445. In Paul v. United States, 371 U.S. 245 (1963), the Court applied the classic principle of enclave extraterritoriality as if there were no reason to consider doing otherwise. (The *Paul* Court also expanded the rule of James Stewart & Co. v. Sadrakula, 309 U.S. 94 (1940), *discussed in* text & note 211 *supra*. *Id.* at 269.) The parties in *Paul*, however, had neglected to perceive and point out to the Court the significance of the decision a decade earlier in Howard v. Commissioners, 344 U.S. 624 (1953), *discussed in* text accompanying notes 212-23 *supra*, repudiating the extraterritoriality

most notable example, of course, is the unanimous Supreme Court decision in *Evans v. Cornman.*[446] More precedent-breaking decisions are likely during the next several years. There are two separate avenues, however, along which the reasoning might proceed. On the one hand, it could be emphasized that the old theory of enclave extraterritoriality was based, not on construction of the terms of state cessions, but on a constitutional rule.[447] By the same token, *Howard v. Commissioners*[448] and *Evans v. Cornman*[449] were decided on constitutional grounds, holding in effect that regardless how unqualified its terms, no cession is constitutionally capable of excluding the ceded area from the territory of the ceding state. If that which traditionally foreclosed state power in the enclaves was a constitutional rule, and that constitutional rule has now changed, all the precedents constructed upon the old constitutional principle should now be expected to fall. On this view, there is no longer any support for the familiar proposition that states can exercise no jurisdiction over enclaves except pursuant to prior congressional authorization or consent.[450] State governmental jurisdiction would extend over article I enclaves in its full scope, by right and as a matter of course, except that it would be subject not merely to the limitations imposed by the doctrine of intergovernmental immunities and the principle of the necessary and proper clause, but also to the much broader power of Congress to supersede or displace state law in the enclaves "in all Cases whatsoever."[451]

On this view, the several acts of Congress which have been passed to mitigate the untoward consequences of the classic article I doctrine[452]

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principle. In other cases, in both inferior courts and the Supreme Court itself, when counsel for parties have relied upon *Howard* the courts have increasingly tended to discard the classic article I clause precedents. *See* discussion note 223 *supra.*

446. 398 U.S. 419 (1970); *see* text & note 224 *supra.*

447. While sometimes the way in which a cession was qualified has caused the Court to conclude that it was not an article I cession at all, Fort Leavenworth R.R. v. Lowe, 114 U.S. 525 (1885), in other cases the Court has reasoned from the premise that the property was under article I to the conclusion that attempted reservations or conditions in the cessions were void. Surplus Trading Co. v. Cook, 281 U.S. 647 (1930); Arlington Hotel Co. v. Fant, 278 U.S. 439 (1929). While that conclusion was no longer to be drawn after James v. Dravo Contracting Co., 302 U.S. 134 (1937); see text accompanying notes 164-69 *supra,* the earlier reasoning illustrates that the powerlessness of states in the enclaves was due to a constitutional principle and not to construction of particular cessions or consents.

448. 344 U.S. 624 (1953). See text & notes 212-23 *supra.*

449. 398 U.S. 419 (1970). See text & notes 224-26 *supra.*

450. It is significant that no federal authorization or consent had been obtained for the annexation in Howard v. Commissioners, 344 U.S. 624 (1953), and no congressional grant or request of the franchise for enclave residents had been made on the facts in Evans v. Cornman, 398 U.S. 419 (1976).

451. U.S. Const. art. I, § 8, cl. 17.

452. *See, e.g.,* 4 U.S.C. § 104 (1970) (Lea Act); *id.* § 105 (Buck Act); 10 U.S.C. § 2667(e) (1970) (Military Leasing Act of 1947); 16 U.S.C. § 457 (1970) (wrongful death); 26 U.S.C. § 3305(d) (1970) (unemployment compensation); 40 U.S.C. § 290 (1970) (workmen's compensation).

are significant not for the scope of state taxation or regulation which they authorize, but rather for the limitations which might be inferred from their terms upon the power which the states would otherwise enjoy. Also, all the inequities and legal anomalies heretofore thought inherent in enclave status disappear, and the policy objectives endorsed as to federal enclaves both by the Interdepartmental Committee and by the Public Land Law Review Commission[453] are readily attained. Yet the United States enjoys all the power necessary to insure its integrity and to protect and utilize the enclaves as it sees fit, by virtue of its power of "exclusive Legislation in all Cases whatsoever."[454]

On the other hand, it could be reasoned that while *Howard* and *Cornman* repudiate the doctrine of extraterritoriality, they do not necessarily preclude the voluntary cession of a degree of jurisdiction somewhat greater than that which the new constitutional rule provides. Thus, beyond the constitutional question there would arise in each case a question of the construction of the cession to determine whether a particular aspect of jurisdiction had been voluntarily ceded even though the Constitution did not require that it be. On this view, the enclaves would remain parts of their states, so that those anomalies and inequities attributable to problems of residence and domicile under the old theory would for the most part disappear; however, depending upon the construction given to a particular cession, as to certain matters or certain enclaves the state might unnecessarily but voluntarily have surrendered its rights to govern except pursuant to prior congressional authorization or consent. State civil laws in force at the time of the cession then would remain in effect until Congress superseded them, in accordance with the *Sadrakula* rule,[455] but otherwise state power would be entirely excluded except as preserved by some reservation of jurisdiction, if any, contained in the cession.

This view would not so readily secure all of the policy objectives endorsed by the Interdepartmental Committee and the Public Land Law Review Commission, but it has certain attributes which might make it the more attractive rationale to courts which are hesitant to carry the logic of the recent decisions to the furthest sustainable limits.

453. *See* discussion note 7 *supra.*

454. On this view, if it should be thought necessary in any case to give some effect to the qualifications or reservations which have been permissible in article I cessions since 1937, their effect must be to diminish federal power over the reserved subject matters, reducing it from a categorical power to supersede state regulations of every nature with respect to those subjects, and confining the federal power and freedom as to those subjects on the enclave to that afforded by the necessary and proper clause and the intergovernmental immunities doctrine.

455. *See* James Stewart & Co. v. Sadrakula, 309 U.S. 94 (1940); text accompanying notes 209-11 *supra.*

It comports with the principle that states may voluntarily make cessions not required by the Constitution; it gives the various federal statutes passed to mitigate the consequences of exclusive federal jurisdiction an effect more in line with their intent and their terms; and, of course, it represents much less of a break with the results, as distinguished from the reasoning, of the older enclave cases.[456]

C. *Article IV Property Subject to Jurisdictional Cessions*

It is settled that states may cede jurisdiction over article IV federal property without placing that property under the article I property clause.[457] To be sure, it is possible to convert article IV property into article I property by a cession subsequent to its acquisition, regarded as equivalent to the consent at the time of acquisition which the article I clause on its face contemplates;[458] but such conversion is not an unavoidable result of cession.[459] However, even a cession which does not convert property into article I property must clearly have some effect upon the principles which would normally apply to article IV property if there had been no cession at all.

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456. This interpretation also makes possible a consistent explanation of some dicta in Howard v. Commissioners, 344 U.S. 624, 627 (1953), and the decision in Paul v. United States, 371 U.S. 245 (1963). *Paul* could be explained as turning upon a voluntary cession of jurisdiction not required to be ceded according to the article I property clause.

457. When the possibility of state jurisdictional cessions not in accordance with the article I clause was first confirmed by the Supreme Court, it was confined to instances in which the cession was designed to facilitate the utilization of article IV property to effectuate an enumerated governmental power. *See* text accompanying notes 95-104 *supra.* If antiquity alone were a reasonable measure of the worth of constitutional doctrine, it might make sense to urge a reversal of the 1937 term's development eliminating that constraint. However, the decision that term in Collins v. Yosemite Park & Curry Co., 304 U.S. 518 (1938); see text accompanying note 181 *supra,* was conceived as faciliating the desirable goal of intergovernmental accommodation and maximizing the possibilities for sharing the duties of government in more satisfactory ways. The fact that this opportunity has been utilized in a piecemeal and haphazard fashion, with results now thought too complicated to bear, is reason to undertake a more systematic effort at accommodation, but it is not necessarily a criticism of the constitutional doctrine that makes both satisfactory and unsatisfactory arrangements for accommodation possible. Furthermore, the unsettling effect on a variety of public and private legal relations which have been created in reliance upon the *Collins* rule would make a return now to the rule which prevailed until 1937 undesirable. It undoubtedly will remain the rule that states can cede governmental jurisdiction over article IV property, regardless of whether or not the property is being utilized to effectuate some enumerated federal power.

458. Kohl v. United States, 91 U.S. 367, 374 (1875).

459. Fort Leavenworth R.R. v. Lowe, 114 U.S. 525 (1885). Before the doctrinal changes of the 1937 term, property would remain only under the article IV clause despite a cession if the cession were qualified in any material way, see text accompanying notes 164-69 supra, and both before and since 1937 it remains only under the article IV clause despite the cession if the purpose for which the property is being used does not come within the terms of the article I clause. The most prominent example of the latter phenomenon is the national parks, which, in spite of the contrary language of some state cessions for this purpose, have been recognized by the Supreme Court as not coming under the article I clause. Collins v. Yosemite Park & Curry Co., 304 U.S. 518 (1938).

Now that the classic article I principle that enclaves are excised from the geographic territory of a state has been repudiated by recent cases, principally *Howard v. Commissioners*[460] and *Evans v. Cornman*,[461] the question arises whether a cession under article IV can have the effect of excising the property from the state even though a cession under the article I clause might not. Historic practice indicates that cession under the article IV property clause can have this effect,[462] but there are also indications that the classic cases did not contemplate such a result.[463] The rule that seems most compatible with the precedents is that a cession by a state for purposes not within the article I property clause is capable of excising that property from the territory of the state, but will not be regarded as having that effect unless a deliberate intent to accomplish that effect is found.

Short of excising the property from the territory of the state, however, a cession of jurisdiction over article IV property might be given the same effect as a cession or consent under the article I clause according to the rule of the *Howard* and *Cornman* decisions. This could produce either of two results. On the one hand, if a cession of exclusive jurisdiction, whether or not qualified with reservations or limitations, were to be construed as intended to give Congress only the same power over the particular article IV property that it is constitutionally entitled to exercise over article I property, then the cession would not foreclose the state from regulating even those matters as to which jurisdiction had been ceded, until Congress superseded the state's policy with a policy of Congress' own. Congress would have the power to legislate so as to exclude state law on those matters covered by the cession, but there would be no vacuum of governmental power as to such matters during the interval before Congress acted. Not only prior, but also all subsequent state regulations of those matters would control, by their own force, until Congress superseded them.

On the other hand, a cession of exclusive jurisdiction over article IV property could be construed as giving to Congress a greater power,

460. 344 U.S. 624 (1953).

461. 389 U.S. 419 (1970); *see* text accompanying notes 212-24 *supra*.

462. Several of the original states divested themselves of claims to Western territory in the 18th century, placing that territory outside their respective boundaries and giving the United States sole sovereignty over it. Moreover, on several occasions a state has carved off a piece of its territory and secured its creation and admission to the Union as a separate state.

463. The principle that jurisdiction would automatically revert to the state when the United States ceased to use the property in a manner facilitating the purpose for which jurisdiction had been ceded was applied first to article IV property, Fort Leavenworth R.R. v. Lowe, 114 U.S. 525 (1885), and was only applied to article I property some 60 years later in S.R.A., Inc. v. Minnesota, 327 U.S. 558 (1946). This suggests that at least in the classic cases it was not considered that article IV property would cease to be part of the state even when jurisdiction was ceded.

foreclosing the state from regulation of any matters as to which such a cession was made. This latter view is more in accord with the earlier precedents concerning article IV property with respect to which jurisdictional cessions have been made. The former view, however, is compatible with developments in article I doctrine that have taken place in the last few years and might ride in the crest of that new current of thinking, becoming accepted notwithstanding the earlier cases. It is certainly less of a departure from the rules which apply to article IV property in the absence of any cession, and it should be adequate to prevent interference with federal designs for the use of article IV land as to which there has been a jurisdictional cession.

VI. CONCLUSION

The constitutional law of state and federal power over federal property has always been conceptually difficult, and the frequent failures of lawyers and judges over the course of two centuries to expend the intellectual effort necessary to comprehend its intricacies has resulted in developments that have rendered this body of law inordinately complex. Confusion over the intricacies of doctrines comprising American constitutional federalism almost always contributes to centralization of governmental power in the federal government, because the easiest route out of the confusion is escape to a general, even though constitutionally ill-founded, concept of universal federal supremacy. The confusion that has so long characterized discussion of the property clauses has now been meticulously disclosed. It is hoped that this disclosure will help make it possible for future federal property practice and litigation to proceed along lines conducive to sound policy without the restraints attributable to the confusion of the past.