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A Question of Enumerated Powers: Constitutional Issues Surrounding Federal Ownership of the Public Lands

ALBERT W. BRODIE*

[As President] I plan to emphasize the powers granted to the federal government, and those reserved to the states.

—President Ronald Reagan
Inauguration Day, 1981

President Reagan has previously identified himself as a “sage-brush” rebel. The question of federal control over public lands may soon be before the courts. In this article, the author advances the proposition that the federal government may not have a constitutional basis to control public lands for other than enumerated purposes.

The power of the federal government to own and control public lands within the states has been a source of legal and political conflict since our early days as a nation. Although questions regarding the exercise of this power never have lain dormant, controversy surrounding the propriety of such federal ownership recently has been raised anew, on a scale and with an intensity perhaps greater than at any time in our history.

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The catalyst for such controversy has been the passage of legislation in the Congress, chiefly the Land Management Act of 1976 and its progeny, which, for the first time in our history, set forth a unified, comprehensive plan for federal retention and control of the public lands. This legislation has greatly strengthened federal control over the lands and correspondingly has stripped the states chiefly affected by the legislation of jurisdictional power over these areas.

The western states have responded with the adoption of various bills that seek to offset the effects of these Congressional enactments and declare the right of each state to possession of the federally owned and managed public lands within its borders. Statutes challenging federal authority already have been approved by Nevada, California, Arizona, Colorado, Hawaii, Idaho, New Mexico, Utah, and Wyoming. Among the issues raised by this federal-state controversy is the question of whether the federal government has the power to exert dominion and control over the public lands. This article will suggest that, based upon records from the period of the Articles of Confederation, the Constitutional Debates, early case law, and from basic concepts of sovereignty within the federal system, no such power was conferred upon the central government under the Constitution, and the exercise of such control properly is opposed by the legislatures of the western states.

This article first will review the early history behind the federal property clauses, and then will recap the three major theories advanced concerning the nature of the federal right to own and control public lands. The article will conclude that none of the three theories is completely accurate, since each fails to properly recognize the distinction between the federal government's roles as both a sovereign and proprietor. After discussing this distinction, the article will postulate its own theory of the nature of federal ownership of public land, based on the enumerated powers of the federal government and the reserved powers of the state. As is the case in any question involving Constitutional interpretation, the answer to the present conflict is rooted in the past, in the early history of the United States with regard to the original territories.

2. The overwhelming majority of the public lands are located in the 13 western-most states (including Alaska and Hawaii).
3. The bills adopted to date include: Arizona SB 1012, effective July 14, 1980; California AB 2302, effective July 29, 1980; Colorado HJR 1006, effective April 8, 1980; Hawaii SR 266, effective April 15, 1980; Idaho SCR 129, effective March 14, 1980; Nevada AB 413, effective July 1, 1979 (the much publicized "Sagebrush Rebellion"); New Mexico HB 79, effective May 14, 1980; Utah SB 3, effective July 1, 1980; Wyoming HB 6, effective March 10, 1980.
A. The Controversy Over The Western Territories

Disposition of the western territory was a source of controversy long before our existence as a nation. The Proclamation of 1763, which confiscated the public lands for the benefit of the English Crown, was one of the chief causes of the American Revolution.4

After the thirteen colonies had declared their independence from Great Britain, one of the major stumbling blocks to ratification of the Articles of Confederation was the battle over ownership of the western lands. This problem arose because seven of the former colonies (Massachusetts, Connecticut, Virginia, North Carolina, South Carolina, Georgia, and New York) had received title to vast tracts of territory west of the Appalachian Mountains, either by grant from the King of England or by treaty with the Indian tribes. The remaining six colonies (Rhode Island, Maryland, Pennsylvania, New Hampshire, New Jersey, and Delaware) had acquired no such claims.5

This latter group, led by representatives from the state of Maryland, fought for a release of the areas in the west by the “landed” states throughout the Confederation period. The steadfast insistence of Maryland and her companions in the struggle to force a divesting of these territories was due to their fear of being overshadowed in the new union by massive states, which could exert undue domination and control over their smaller neighbors.6

On March 1, 1781, pursuant to a resolution of Congress, the state of New York surrendered its western claims to the Confederation, for purposes of providing a common fund to pay for expenses incurred by the revolution and with the express provision that the land was to be held in trust by the Congress until such time as the land could be formed into new and independent states in the federal alliance and “for no other use or purpose whatsoever.”7

Three years later, on March 1, 1784, the state of Virginia also entrusted its western lands to the Confederation. This grant contained language similar to that set forth in the cession of New York and included a condition “that the territory so ceded shall be laid out and formed into States . . . and that the States so formed shall be distinct

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4. The Declaration of Independence itself states, in listing the colonial grievances against the British monarch, that “He has endeavored to prevent the population of these states; for that purpose, obstructing the laws for naturalization of foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new appropriations of lands.” See also L. Gifson, The Coming of the Revolution 139-40 (2d ed. 1962).
6. See 3 Way & Gideon, Journals of the American Congress, 1774-1788, at 281-83 (1823) (see the instructions given to the delegates from Maryland on May 21, 1779) [hereinafter cited as Way & Gideon].
7. 3 Way & Gideon, supra note 6, at 582-86.
republican States, and admitted members of the Federal Union; having the same rights of sovereignty, freedom, and independence, as the other States.\footnote{8}

These cessions were followed by subsequent divestings, made for similar purposes, by Massachusetts on April 19, 1785,\footnote{9} Connecticut on September 13, 1786,\footnote{10} and by South Carolina, which ceded part of its territory on August 9, 1787.\footnote{11} Additional cessions of territory were offered to the Confederation by both North Carolina and Georgia, but the terms of their grants were found to be unsatisfactory to the Congress, and were subsequently rejected.\footnote{12} A complete surrendering of the western lands by North Carolina and Georgia was not effected until after the ratification of the Constitution.\footnote{13}

After the members of the Confederation had issued grants of these territories, a new dilemma arose. Under the Articles of Confederation, the central government was not empowered to own any land within the former colonies and had no constitutional authority to form them into states.\footnote{14} The Confederation Congress was "without the least color of constitutional authority" to receive these areas from the states.\footnote{15} The Articles of Confederation specifically stated that "no State shall be deprived of territory for the benefit of the United States."\footnote{16}

The inability of the Congress under the Confederation either to own or dispose of real property were two of the deficiencies that the Framers sought to cure at the time of the calling of the Constitutional Convention in 1787. Their solutions to these problems are integral components of any discussion involving the ability of the federal government to own or control public lands within the states.

\textbf{B. The Property Clauses}

As a result of the defects that were present in the Articles of Confederation, three clauses were debated and subsequently adopted in the body of the Constitution that deal directly with the power and ability of the federal government to own, control, and dispose of land.

\begin{footnotes}
\item 8. 4 WAY & GIDEON, supra note 6, at 342-44.
\item 9. 4 WAY & GIDEON, supra note 6, at 501-04.
\item 10. 4 WAY & GIDEON, supra note 6, at 645-48, 697-98.
\item 11. 4 WAY & GIDEON, supra note 6, at 769-72.
\item 12. 4 WAY & GIDEON, supra note 6, at 523-25, 834-35.
\item 13. T. DONALDSON, THE PUBLIC DOMAIN 65 (1884).
\item 14. See J. MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787, at 215 (Int'l ed. 1920) [hereinafter cited as MADISON]. See also THE FEDERALIST No. 43.
\item 15. See THE FEDERALIST No. 38.
\item 16. ARTICLES OF CONFEDERATION, art. IX.
\end{footnotes}
1. The Enclave Clause

The first of these clauses empowers the federal government to establish federal enclaves for its governmental seats, erection of forts, arsenals, and so forth. This provision, hereinafter referred to as the "Article I" clause or the "enclave" clause, has raised little controversy about the constitutionality of federal ownership. Although there have been a number of cases dealing with the authority of the state governments to impose taxes on such property, the propriety of federal jurisdiction and control over these areas has never seriously been challenged in the courts.

The reason for such acceptance is that it generally has been understood, from the birth of the Republic, that the central government of necessity must have certain lands for its exclusive use to carry out its enumerated powers. Furthermore, it has been understood that the federal entity must be able to control and protect such lands, separate and independent from the jurisdictions of the various states. This provision was inserted in the Constitution by the Framers as an enunciation of, and a solution to, that need.

During the Constitutional debates pertaining to this particular provision, Elbridge Gerry, a delegate from Massachusetts, objected that "this power might be made use of to enslave any particular State by buying up its territory, and that the strongholds proposed would be a means of awing the State into an undue obedience to the general government." Thereafter, Rufus King, also from Massachusetts, proposed that the insertion of the words, "by the consent of the Legislature of the State" would eliminate this danger and make the exercise of the power safe.19

17. U.S. CONST. art. I, §8, cl. 17 provides:
To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings.


19. The necessity of such a power was shown during the Revolutionary War, when a group of rebellious colonial troops forced the Congress to flee from Philadelphia to New Jersey. See Fort Leavenworth R.R. Co. v. Lowe, 114 U.S. 525, 529 (1885); 2 J. Story, Commentaries on the Constitution of the United States 123 (4th ed. 1873) [hereinafter cited as Story]. See also The Federalist No. 43.


2. The Article IV Property Clauses

Unlike the Article I property clause, the other two property clauses in the Constitution that pertain to the formation of new states and the regulation of territories have been the sources of most of the controversy involving federal control over real property within the states; it is to these clauses that much of this discussion will be directed.

The adoption of the Article IV property clauses certainly was because, under the Articles of Confederation, the Congress had no power to receive land or to admit new states into the union created by the former colonies. To cure this defect it became necessary at the Constitutional Convention to make provision for the admission of any territory that came into possession of the central government as a member of the new union of states.

C. The Admission of New States Under the Constitution

In 1791, pursuant to the authority vested in it by Article IV of the Constitution, the First Congress duly admitted into the Union the state of Vermont. This new state was created from territory ceded to the federal government by New Hampshire and New York. Thereafter followed the admission of the states of Kentucky in 1792 and Tennessee in 1796. Notably, no public lands were withheld from these three states formed during the first years of the Constitution.

Then, beginning with the admission of Ohio in 1803, Congress began imposing certain conditions and restraints concerning the admission of new states. The most pertinent of these conditions were agreements made by the territorial legislatures to acquiesce to the retention of certain tracts of federal lands that had not been ceded outright to these newly admitted sovereigns. The agreements additionally provided that the new states would never interfere with "the primary disposal" of these lands by the United States.

22. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the Legislature of the States concerned as well as the Congress.

U.S. CONST. art. IV, §3, cl. 1.

23. The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

U.S. CONST. art. IV, §3, cl. 2.

24. P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 286-88 (1968) [hereinafter cited as GATES].

25. GATES, supra note 24, at 288-316. The language pertaining to the disposal of the land originated from terms contained in the re-enactment of the Northwest Ordinance of 1787 by the First Congress. See 1 Stat. 50.
With the exceptions of Maine and Texas, these retentions were imposed upon every new state, up to and including Hawaii, and remain in effect to this date. Although there have been additional grants of property by the states to the federal government, the most notable of these being much of the land composing the national park system, the great majority of the public land remains from the cessions made at the time of admission of new states to the Union.

D. The Growth of Federal Power Over the Public Lands

As has been shown, the first public lands were ceded to the government of the United States by the former colonies as a result of the jealousies and concerns of the smaller states that they would be overcome by their larger neighbors. These lands were given to Congress to sell in order to pay for debts incurred in the Revolutionary War, with the understanding that they would be formed into new states. However, the more years that passed after the ratification of the Constitution, and the greater the territory of the United States became as the result of purchase, war, and annexation, the more the power of the federal government over these areas increased.

Initial judicial decisions limited the ability of the United States to exert control over the public lands. In an early Circuit Court case, the federal magistrate held that such ownership by the United States government did not prohibit a state from condemning certain of these properties for purposes of a railroad right of way. Other court decisions held that the United States had no power to exercise jurisdiction over public areas dedicated to the people of a state, nor could it grant a patent to land under navigable waters in a state.

The enumerated ability of the United States to dispose of the public lands was one of the first powers confirmed by the courts. The Supreme Court held that only a patent from the United States, and no grant by the individual states themselves, could vest title to the public lands. The exclusive power to dispose of the land later was held to include the ability to lease such land for a specified time and to pun-

26. GATES, supra note 24, at 288-316.
ish trespassers on the public lands.\textsuperscript{33}

In 1871, in another case involving title to land, the Supreme Court boldly proclaimed that "[w]ith respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. \textit{That power is subject to no limitation.}"\textsuperscript{34}

Thereafter followed rulings that the states could not impose a tax upon public lands owned by the United States unless such a power was reserved under the deed of cession.\textsuperscript{35} The question of the taxing power was limited further to the point that a state could not tax the land of the United States, whether or not a reservation had been made without the consent of the United States.\textsuperscript{36}

With respect to the acceptance of additional public lands not originally ceded by the states, in 1895 the Court held that the United States was empowered to receive such lands for purposes of a military cemetery.\textsuperscript{37} In so ruling, the Court tied this ability by the thinnest of threads to the Article I war powers.\textsuperscript{38}

One year later, in a case that empowered the United States to prohibit an individual from building fences on private property partially enclosing the public lands, the Court all but vested plenary authority over the public lands in the federal government.\textsuperscript{39}

Subsequent rulings completed the vesting of this plenary power. The Supreme Court declared the United States had the ability to prohibit unauthorized grazing on the public lands,\textsuperscript{40} to bar the acquisition of rights of way by eminent domain over the public lands unless granted in conformity with federal law,\textsuperscript{41} to punish individuals for building fires too close to the public lands,\textsuperscript{42} to enable a federal official to kill

\begin{thebibliography}{9}
\bibitem{33} Cotton v. United States, 52 U.S. (11 How.) 229 (1851).
\bibitem{34} Gibson v. Chouteau, 80 U.S. (13 Wall.) 92, 99 (1872) (emphasis added).
\bibitem{35} Fort Leavenworth R.R. Co. v. Lowe, 114 U.S. 525 (1885).
\bibitem{36} Van Brocklin v. Tennessee, 117 U.S. 151 (1886). These early decisions appear to unnecessarily expand the rule prohibiting state taxation of federal property. The rule no doubt has application with reference to those instrumentalities necessary to carry out the functions assigned to the federal government. However, taxation of the public lands arguably is not a tax upon such instrumentalities. The validity of such an argument is shown by the relatively recent passage of the Federal Land Policy and Management Act, Pub. L. No. 94-565, 90 Stat. 2670 (1976).
\bibitem{38} Ibid.
\bibitem{39} 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 at its own protection. A different rule would place the public domain of the United States completely at the mercy of state legislation.
\bibitem{40} Camfield v. United States, 167 U.S. 518, 525-26 (1897).
\bibitem{41} Utah Power & Light Co. v. United States, 243 U.S. 389 (1917).
\bibitem{42} United States v. Alford, 274 U.S. 264 (1927).
\end{thebibliography}
wild deer that threatened the public lands, even though such killings were in violation of state law,43 and to bar the applicability of state insurance laws over a hotel built on public lands.44 Additionally the Court held that title in a state to land under non-navigable waters automatically passed to the United States upon admission to statehood,45 that the United States could accept exclusive jurisdiction over land ceded by the state for non-Article I purposes after admission,46 that areas reserved by the federal government included the retention of water rights necessary to accomplish the purpose of the reservation,47 that Congress had the power to bar a state from destroying wild burros that roamed on the public lands,48 and, most recently, that the federal government has the power to dictate to the states what public lands will be returned to them, regardless of any state application made pursuant to their respective enabling acts or under federal statute.49 This rout of the states’ power to govern the public lands within their borders, in any fashion, appears to be complete.

With so many powers now vested in the federal government in these areas, what remains to the states? Indeed, the scope of federal control over the public lands is now so extensive that there appears to be little authority remaining in the states themselves, other than perhaps service of their civil and criminal processes.50

It is this steadily increasing control, coupled with a stated policy of retention, that has inflamed the western states and has precipitated the current struggle over federal ownership of public lands. The controversy has generated numerous theories concerning the propriety of such federal power over public lands, and it is around these theories that the battlelines have been drawn in the current federal-state conflict.

THEORIES PERTAINING TO FEDERAL OWNERSHIP OF THE PUBLIC LANDS

Among the arguments that have been proposed either for defending or qualifying the right of the federal government to own and control the public lands, three predominant theories have emerged over the

50. For an illustration of such retained jurisdiction, see 1 JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES 28-29 (USGPO 1956).

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past several years. These theories will be set forth below and briefly analyzed for the purpose of examining the propriety of such control of property by the central government.

A. The Ownership Theory

The first of these arguments is that the United States has been vested with complete powers of ownership, control, and disposition of public lands. It postulates that the federal government never was obligated to grant to any of the states admitted subsequent to the adoption of the Constitution the right to ownership of any of the soil within their borders. This claim is predicated upon the fact that, in the original cessions made during the Confederation period, territory was granted to the central government with the understanding that the western lands were to be transferred to the United States and administered by it for the benefit of all the states then in existence. This claim is based in large part on the arguments made by Maryland, Delaware, and other states that had no claim to the western lands that land obtained by the blood of every state should in turn belong to all of the states. As to the lands acquired subsequent to the adoption of the Constitution, including those obtained by the Louisiana Purchase, the Mexican War, the cession of Alaska, and the Gadsden Purchase, the argument changes in emphasis slightly. These lands, having been procured by funds received from taxpayers of all the states, should be held by the federal government for the whole nation.

Proponents of this theory argue that “[i]t is quite logical, therefore, that the United States should retain or dispose of its public lands for the benefit of all the people rather than the transfer of ownership of those lands to a particular state.” There are, however, a number of questions about the correctness of such a theory. Initially, it should be remembered that although the states with no title claim to the western lands insisted upon a transfer of the western lands to the Confederation, a primary purpose behind such a transfer was to guarantee that these states would not be dominated by their larger landed neighbors.

It is unlikely that any of the former colonies would have agreed to place total control over these areas in the central government. It seems illogical that the states would have struggled to limit the size of the

51. Clark, National Sovereignty and Dominion Over Lands Underlying the Ocean, 27 Tex. L. Rev. 140 (1948) [hereinafter cited as Clark]. See also BLM News Release of 10/31/79, at 4 (Secretary Andrus raises the same contentions).
52. Clark, supra note 51, at 149.
53. Clark, supra note 51, at 149.
54. Clark, supra note 51, at 151.
55. Clark, supra note 51, at 151.
state governments, only to allow the national government to be unbounded.

It also should be noted that Congress withheld no lands from the first three states admitted under the Constitution and subsequently surrendered the overwhelming majority of the public lands in all the states east of the 100th meridian, reserving control over vast tracts only in the western states. This would not appear to have been a policy aimed at benefiting all the people of the nation, but rather one aimed at benefiting those individual states within whose boundaries the land was situated. Once the federal government had divested itself of these areas, either to individuals or to the respective states, these lands were removed from their central control and placed in the hands of local authorities. It is inconsistent to argue that western lands are to be held for the benefit of all the people, but that eastern, southern, northern, or midwestern lands were not intended to be so held.

If this theory is correct, then arguably all of the lands acquired by the federal government should have been held in perpetuity by Congress. Such an argument appears to be but a justification for the retention of the western lands, an afterthought based upon facts as they existed, rather than an enunciation of long-standing constitutional doctrine.

If, in fact, the federal government was supposed to hold all of the lands for all of the people, one wonders why the territory of the Atlantic states was exempted from such ownership. To justify such a theory, all of the land in the United States should have been thrown into a hotchpot, and the states as such should have been abolished, except insofar as they could serve as administrative components of the central government. Otherwise, the theory becomes one of eastern parochialism, with all of the lands being held for all the people, with the exception of the land in the original thirteen colonies, which are held only by those respective states.

It should be noted that such a plan to abolish the states was proposed at the Constitutional Convention and was rejected by the delegates. The above argument represents an enunciation of the same theory, but in a modified form, and warrants similar rejection.

B. The Trust Theory

A second theory, one that has been propounded by Nevada and other western states in their struggle to obtain the return of their public lands from the federal government, states that public lands were in-

56. See GATES, supra note 24, at 286-88.
57. MADISON, supra note 14, at 126.
tended to be held in trust by the federal government for only a limited period of time, after which they were to be vested in the respective states. The argument presented is that the central authority now has violated the terms of that trust, based on its recently stated policies of retention, and that such a violation mandates the immediate return of the lands to the states.\footnote{58}

This theory is based in large part on language in a number of Supreme Court cases that refers to these lands as being held in trust by the government of the United States.\footnote{59} The use of the word “trust” in labelling the interest of the United States in the public lands, however, was both imprecise and unfortunate. For in doing so the Court used familiar but inappropriate language, language that has created confusion up to the present day. There can be little doubt that a trust was in fact created at the time of the original cessions of western lands under the Confederation. However, the states placed the lands in trust only until the area could be formed into new and independent states.\footnote{60} No language of trust appears in the property clauses of the Constitution, nor was the creation of a trust in these lands ever discussed at the time of the Constitutional Convention.\footnote{61} If the Framers knew of the then-current trust status of the territories ceded to the Congress, which they most certainly did,\footnote{62} one wonders why they did not transfer language of trust into the body of the Constitution itself. The answer seems apparent. No trust was created under the Constitution because of the provisions of Article IV, which gave the new government the power, heretofore denied to the central authority, to create states out of the territory received by it and to rule those lands prior to their inclusion in the federal union. Such power obviated the need for a trust provision for, with the creation of the Constitution, the necessity of a trust fiction, created by the inability of the Confederation to hold land in its own right, disappeared; a system had now been formulated for the divesting and disposition of these lands by the Congress.\footnote{63}

A final problem with the trust theory is that it is subject to the doctrine of laches since it is an equitable argument. Such a defense would pose no problem if the violation of the trust had only occurred recently.

\footnote{58. See Legislative Commission of the Legislative Counsel Bureau, State of Nevada, Means of Deriving Additional State Benefits From Public Lands, Bulletin No. 77-6, at 1-39 (1976) [hereinafter cited as Nevada Bulletin].}
\footnote{59. Nevada Bulletin, supra note 58, at 3.}
\footnote{60. See 3 WAY & GIDEON, supra note 6, at 582-86.}
\footnote{61. MADISON, supra note 14, at 251-59, 487-96. Three major debates took place in the Constitutional Convention regarding the admission of new states, on July 14 and on August 29 and 30, 1787. No indication of the creation of a trust appears in the records of these debates.}
\footnote{63. See notes 7-8 and accompanying text supra.
However, other federal enactments, particularly those that closed the frontier and halted the divesting of the public lands in the 1930's, raise the spectre of just such an equitable defense.\textsuperscript{64}

\textbf{C. The Equal Footing Theory}

The last of these theories, also forwarded by the western states in their current struggle with the federal government, postulates that each new member of the union is entitled to be admitted on the basis of constitutional equality of right and power with the original states. Hence, the federal government cannot withhold land from any of the states admitted subsequent to the adoption of the Constitution, since it had not been allowed to withhold any such lands from what had been the original thirteen colonies.\textsuperscript{65}

Of the three theories mentioned above this is the one, perhaps, that most closely reflects the intent of the Framers of the Constitution. However, there are also problems in this argument with historical and constitutional interpretation and with the emphasis placed on the respective rights of the state and federal governments.

The doctrine of equal footing traditionally has been interpreted as referring to the \textit{political} equality of the states and not equality as it pertains to proprietary control over real property.\textsuperscript{66} The equal status of the western lands was a source of bitter controversy during the drafting of the Constitution. Delegates from some of the states feared that the growth of the new states eventually would subjugate the Atlantic states to political subservience by the after-included members of the Union.\textsuperscript{67} Other founders foresaw that it would be unwise to preclude the new states from having an equal political voice in the new nation, thereby ignoring one of the ideals for which the revolution had been waged.\textsuperscript{68} A provision guaranteeing the equality of the states was introduced at the Constitutional Convention, but was omitted in the final draft.\textsuperscript{69} However, a doctrine of the political equality of the states subsequently was formulated by the Supreme Court and has been applied consistently since the early days of the Constitution.\textsuperscript{70}

\textsuperscript{65} Nevada Bulletin, supra note 58, at 39-43.
\textsuperscript{67} 1 Farrand, supra note 20, at 583.
\textsuperscript{68} 1 Farrand, supra note 20, at 578-79.
\textsuperscript{69} 2 Farrand, supra note 20, at 454.
\textsuperscript{70} McCabe v. Atchison, T. & S.F. Ry., 235 U.S. 151 (1914); Illinois Cent. R.R. v. Ill., 146 U.S. 387, 434 (1892); Knight & United States Land Ass'n, 142 U.S. 161, 183 (1891); Weber v. Harbor Com'mrs, 85 U.S. (18 Wall.) 37, 65 (1873); Permoli v. First Municipality, 44 U.S. (3 How.) 589, 609 (1845).
The equal footing doctrine adopted by the Supreme Court has encompassed in part the right of a state to control the lands within its boundaries. However, that doctrine has been inexplicably limited to include only the shores of navigable waters in a state.\textsuperscript{71} Therefore, the concept of equal footing has taken on a character, definition, and meaning which are traditionally different than that proposed by the western states. However, the principle behind this theory is viable in so far as it pertains to the inherent right of a state to control the land within its borders.\textsuperscript{72}

This right does not stem from any discretionary power deemed to have been given to the federal government to grant these lands to the states. Rather it arises by way of the right and necessity of a state to assume jurisdiction over these areas when the power of the federal government in this regard ceases, namely upon the admission of that state into the Union under operation of the Constitution.

With this in mind, it is necessary to view the respective sovereign functions of the state and central governments within the federalist system. Such functions have been outlined by the relative powers granted to these entities under the Constitution.

\textbf{THE UNITED STATES AS SOVEREIGN AND PROPRIETOR}

In viewing the questions surrounding federal control over real property, a distinction first must be drawn between those areas in which the United States is deemed to be a “sovereign” and that property in which it has been held to be but a “proprietor”. No question is raised by this article over federal control of the former; however, it is the exercise of federal jurisdiction over the latter that is viewed as being inconsistent with our system of government as conceived.

Sovereignty generally is accepted as being “the supreme, absolute and uncontrollable power by which any independent state is governed,” including the paramount political authority that encompasses the full scope of both the internal and external affairs of a particular state or nation.\textsuperscript{73}

The federal system, as created, was to be one of “dual sovereignty”; neither the national nor state governments were to hold absolute authority in all areas, because neither was conceived as sovereign in the pure sense of the word. Instead, each was to be paramount in the fields

\textsuperscript{72} See notes 65-71 and accompanying text supra.
\textsuperscript{73} BLACK'S LAW DICTIONARY 1588 (4th rev. ed. 1968).
delegated to it by the Constitution. Therefore, when addressing issues of central control in a given area, including jurisdiction of the United States over the public lands, it is important to be mindful of those powers given to the federal entity under the provisions of the Constitution.

A. The Doctrine of Enumerated Powers

It is a fundamental principle of our federal system that the government of the United States was founded and is to be maintained as one of limited and enumerated powers as they have been propounded in the Constitution. The doctrine of the enumerated powers of the federal government has a far more limiting effect with regard to the internal affairs of the nation than with its external affairs.

With respect to the latter field, particularly the ability to declare and wage war, to make peace, to enter into treaties, and to maintain diplomatic relations with other nations, the powers of the United States are indeed sovereign and supreme. These sovereign powers are not granted only by the words of the Constitution itself, but are deemed to have passed to the United States as a political body when the external sovereignty of Great Britain over the colonies ceased. Even if the powers in external affairs had not been granted by the Constitution, they would nevertheless have been vested in the federal government as concomitants of nationality. The only major impediments to the exercise of this power are specific prohibitions contained in the Constitution itself.

When the focus changes from one of external to internal affairs, however, it is clear that the federal government is not empowered to exert

75. In the words of Chief Justice John Marshall, setting forth perhaps the definitive enunciation of this concept: This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted is perpetually arising, and will probably continue to arise, as long as our system shall exist. . . If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action.
78. Id. at 318.
untramelled sway in these areas; its powers in the national, as opposed to the international, sphere are not unbounded. The Framers of the Constitution carved from the mass of legislative powers only those which they thought wise to confer upon the general government. To insure that there would be no confusion with regard to what was delegated and what was retained, the national powers were duly enumerated, "with the result that what was not embraced by the enumerated powers remained vested in the state without change or impairment."  

This concept of enumerated powers has particular importance with respect to public lands. For if the central government has the power to control these lands, it is clear that such power must stem from the constitutional source that created the federal entity itself, and no other.

B. The Sovereign-Proprietor Dichotomy

It is beyond the scope of this article to catalogue completely the present extent of federal control over all of the lands within its jurisdiction in the 50 states. 81 The extent and nature of this control varies from state to state, and often from parcel to parcel. Differences in the type of jurisdiction arise depending upon the terms of the various cessions or reservations, whether the matter involved is in the criminal or civil area of the law, the constitutional authority under which the land is deemed to be held, the extent of jurisdiction accepted by the federal government, and which particular federal agency exercises control over the area. 82

For purposes of this discussion, the lands owned and controlled by the federal government will be divided into three major categories: the federal enclaves, the territories, and the non-enclave public lands. Paramount in any discussion involving federal control over real property is an evaluation of the powers of the federal government in these three particular areas. A key point in this regard is the distinction that has evolved between the central government acting in the capacity of a "sovereign", as opposed to its acting as a "proprietor" over the land. With this in mind, a brief discussion of federal power over Article I property, as compared to Article IV property, is necessary.

Traditionally, the right to exercise jurisdiction over Article I property, or the federal enclaves, has been viewed as being within the sole province of the federal government. This view stems from the specific enumerated power "to exercise exclusive legislation" over these areas,

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81. See generally Public Land Statistics 10 (1977) (shows the United States government as owning over 741 million acres of land, in all categories, comprising 32.6% of the real property in the nation).
82. 1 Jurisdiction Over Federal Areas Within the States 3 (USGPO 1959).
as set forth in the Article I property clause itself. The courts, from an early date, defined this phrase as being the equivalent of "exclusive jurisdiction" over such lands. As a result, federal power in these areas was viewed as being "in essence complete sovereignty." Such judicial interpretations, in effect, created mythical or imaginary federal islands, or states within the states, inside the boundaries of the respective members of the Union themselves.

This view may be undergoing a process of revision, as evidenced by recent cases in this area. In these cases, the Court specifically rejected the "fiction of a state within a state," holding instead that the creation of a federal enclave did not totally remove that area from the operation of the laws of the local government.

This new view appears to recognize the Article I property as being a part of the state and subject to its laws, except where those laws might conflict with or impair the orderly functioning of the federal enclaves themselves. In other words, the federal government has the ability to exercise "exclusive" governmental jurisdiction over these areas, pursuant to the powers which are deemed to be vested by the provisions of Article I itself, but it is not absolutely necessary that it do so. Therefore, as in other instances of concurrent jurisdiction between the federal and state governments, if no such enactments are passed by the Congress, state legislation pertaining to the given area will be allowed to prevail.

Such an interpretation is perhaps a more reasonable approach to the implementation of federal and state powers in this field than is the "federal islands" concept and is arguably more in keeping with the intent of the Framers of the Constitution.

The right of exclusive jurisdiction includes not only the ability to legislate over these areas, but the power to protect that property as well. At the time the Constitution was formed it was seen as vital to the integrity of the central government that it not be dependent upon any state for its existence or survival; it was for this reason that the enclave clause ultimately was adopted.

87. 344 U.S. at 627.
This ability to exclude state laws from any application in the federal enclaves, as has been stated above, stems from the grant of "exclusive legislation" given to the United States over these areas. To a similar degree, this supreme power of legislation and protection also exists in the federal government with regard to the territories or those non-enclave properties which are owned by the United States prior to their admission to statehood.

The ability of the federal government to exercise exclusive control over the territories stems not from the Article I property clause, but from the specific grant of authority "to make all needful rules and regulations" respecting these areas set forth in Article IV, section 3, clause 2. Since there is no other government that can exercise jurisdiction over the lands belonging to the United States while they are in a territorial status, these lands are in fact tantamount to federal enclaves prior to their admission into the union of states. The exclusive nature of federal jurisdiction in this area clearly has been established, both by the words of the Constitution and by case law.91

With regard to the Article IV public lands, it is important to note that the same grant of exclusive legislation which extends over the federal enclaves and, in effect, over the territories, does not pertain to non-enclave property within the states themselves. Instead, federal legislative and jurisdictional powers over the public lands have been deemed to originate from the Constitutional language to "make all needful rules and regulations respecting the . . . other property of the United States."92

Such an interpretation of the language of Article IV has raised a perplexing dichotomy with regard to federal-state control over the public lands. Upon its admission as a state, federal jurisdiction over real property in a former territory is deemed to devolve to that new member of the Union.93 This is not to say that the state also accedes to all title to the lands formerly held by the federal government for, as we have seen, it became a policy of the United States to reserve in itself title to certain parcels of these lands after admission. The distinction that has developed is that the federal government, immediately upon admission of the area to statehood, becomes a "proprietor" of any lands not ceded or

93. 101 U.S. at 133.
given to the states. In this capacity it is claimed to be similar to other proprietors, but its powers as a "sovereign" cease to exist.94

As the cases cited above have shown, the interpretation of these areas as being "property" over which the federal government can "regulate" has been drastically expanded with the passing of the years. The United States is currently vested with the power to resist, by the exercise of its legislative or executive authority or through proceedings in the courts, any attempted interference with these lands by a state or individual. The Congress also has been deemed to have the power to protect, and, pursuant to recent legislation, to retain and manage the public lands.

It is clear that federal control over the public lands is unlike that of any proprietor in history. The difference between the United States as "sovereign" and "proprietor" has been whittled away to the point where it is now a distinction without substance. It is clear that Congress, with the aid of the courts, has extended its purported proprietary role to a point where it in fact exerts sovereign control over the public lands, rather than merely exercising its claimed Constitutional authority to make "needful rules and regulations" respecting these properties. The exceptions have consumed the rule; regulation has become supreme legislative jurisdiction in all but name only.

It is pure sophistry to contend that the states currently have any real ability to govern, implement legislation, or exercise jurisdiction over the public lands within their geographical limits. Furthermore, it is difficult to discern at the present time, especially in view of the recent changes in Article I property doctrine, how federal control over its enclaves and the territories differs from federal control over Article IV property.

It is this "property regulation," this ability to own and control the public lands, which appears foreign to the federal system of government as originally conceived. Not only does such control impinge upon the sovereign reserved powers of the states in this area, but it additionally raises serious questions with regard to the constitutional validity of such landholdings by the federal government. Before discussing the constitutional invalidity of such control, however, it is necessary to consider the reserved powers of the state.

THE RESERVED POWERS OF THE STATE

Just as the doctrine of enumerated powers occupies one side of the

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federalist coin, the concept of the reserved powers of the state, as articulated in the tenth amendment and implied from the enumeration of the federal powers, occupies the other.

The individual states of the Union themselves were never sovereign in the pure sense of that word. This is because, with respect to the international sphere, states' powers in this field were first held by the British Crown, then by the Union formed pursuant to the Articles of Confederation, and finally by the Congress under the Constitution.

With respect to their internal affairs, however, the states have retained as much power and jurisdiction over individuals and objects within their geographical bounds as has any foreign nation, except when that jurisdiction either was surrendered or restrained under the Constitution itself. One of the powers so reserved by the states was the right to legislate and exercise jurisdiction over their own land. Records of the debates in both the Congress under the Articles of Confederation and the Constitutional Convention show that these were rights which were jealously guarded by those delegates representing the component parts of the fledgling nation.

It is important initially to understand the proposition that the right to control the property within its own geographical boundaries is implicit in the concept of a "state" itself. Such power is an essential component in the concept of sovereignty. "Sovereignty and legislature are, indeed, convertible terms; one cannot subsist without the other." No purpose is served by the creation of a state that does not have the ability to legislate within its own sphere, including the power to control the property within that state. Arguably, such an entity is but a paper sovereign. It is land that gives it substance: it is control over that land that gives it power.

The jurisdiction of a state over its own soil was recognized at an early date by our courts. The rationale of the initial cases which dealt with this concept, however, was distorted by subsequent opinions.

95. 1 FARRAND, supra note 20, at 323-24; 1 STORY, supra note 19, at 147-50.
98. See notes 7-12 and accompanying text supra. In the deeds of cession during the Confederation period, the landed states specified that the jurisdiction of the United States was to vest only in that western territory ceded; presumably, it was understood that the states were to maintain control over all soil not ceded to the federal government. Also, initial debates in the Constitutional Convention proposed an abolition of the states entirely, and the creation of a national, and not a federal government. See 2 FARRAND, supra note 20, at 323-25. Needless to say, these proposals never came to fruition. This view also is supported by the fact that there are no public lands in the original 13 states. See note 62 supra.
100. 1 STORY, supra note 19, at 145.
In the watershed case of *Pollard v. Hagan*, the Supreme Court was faced with the question of whether or not the United States could give a patent to land encompassing in part the navigable waters of the state of Alabama. In holding for the right of Alabama to maintain jurisdiction and control over such areas, the Court in part declared that the shores of navigable waters and the soils beneath them were reserved to the states and were not ceded to the United States under the Constitution. It further held that any right the central government might have had to the public lands gave it no power to grant these lands to the parties in question. It is important to note that the territory that comprises the state of Alabama was part of the area ceded by post-colonial Georgia to the new government of the United States, and some of the real property within the state had been retained by the federal government after its admission to statehood.

The language of *Pollard* points to the ability to exert dominion and control over the landed areas in the states not necessary for federal enclaves that was among the powers retained by the states under the tenth amendment and could not be transgressed upon by the federal sovereign. To quote from Story's *Commentaries on the Constitution*: “the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they had before, and which were not by that act, exclusively delegated to the United States.”

The full extent of the holdings in *Pollard v. Hagan* remained relatively dormant for a number of years. Then, in the early twentieth century they reemerged, but with a decided twist in their interpretation. In these later decisions, the Supreme Court held that what *Pollard* in fact had said was that the right of the states to sovereignty and jurisdiction over unceded lands in effect extended only to those areas consisting of the shores of navigable waters and the soil beneath them, as a matter of

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101. 44 U.S. (3 How.) 212 (1845).
102. Id. at 230.
103. We, therefore, think the United States hold the public lands within the new states by force of the deeds of cession, and the statutes connected with them, and not by any municipal sovereignty which it may be supposed they possess, or have reserved by compact with the new states, for that particular purpose. Id. at 224 (emphasis added). Later in the opinion, the Court noted: Alabama is, therefore, entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, subject to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine, is to deny that Alabama has been admitted to the Union on an equal footing with the original states, the constitution, laws, and compact, to the contrary notwithstanding. Id. at 228, 229 (emphasis added).
104. 1 Story, supra note 19, at 322 (emphasis in original).
right. No rationale is given in these cases as to why the Court so narrowly construed its holdings in these decisions; however, the state of the law today reflects these misconceptions.

To carry these interpretations to their logical, and perhaps absurd, conclusion is to maintain that when each territory was admitted into the Union, the duty of Congress, in terms of necessarily ceded real property, was to vest in the new state title to only those lands under or around rivers or lakes within these former territories. This conjures up the historical possibility of the Congress instituting and creating riverine or canal states, with the overwhelming majority of the states’ land being reserved in the federal government. The holdings become even more ludicrous since the United States has the ability to regulate traffic on these waterways pursuant to its powers under the Commerce Clause. Therefore, little or no power would be left to the state over any of its lands. To interpret the holding in *Pollard v. Hagan* as contemplating the institution of such political entities is contrary to all reason, history, and logic.

The inherent right of a state to govern the property within its own borders pursuant to its sovereign powers also was raised and affirmed in a non-water rights case, *Coyle v. Oklahoma*. In *Coyle*, the question presented was whether the state of Oklahoma had the power to relocate its state capitol from Guthrie to Oklahoma City, contrary to certain provisions of the enabling act which admitted it to statehood. The Supreme Court held that the ability to make such a change did exist and was within the power of the state.

Relying on *Pollard*, the Court declared that when a new State is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original States, and *that such powers may not be constitutionally dimin-

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107. 221 U.S. 559 (1911).
108. "This Union" was and is a union of States, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of the Congress to admit new States, might become a union of States unequal in power, as including States whose powers were restricted . . . by an act of Congress accepted as a condition of admission. Thus it would result, first, that the powers of Congress would not be defined by the Constitution alone, but in respect to new States, enlarged or restricted by the conditions imposed upon new States by its own legislation admitting them into the Union; and, second, that such new States might not exercise all of the powers which had not been delegated by the Constitution, but only as had not been further bargained away as conditions of admission.

Id. at 567.
ished, impaired or shorn away by any conditions, compacts or stipula-
tions embraced in the act under which the new State came into the
Union, which would not be valid and effective if the subject of congres-
sional legislation after admission.\textsuperscript{109}

The language of the above cases points to the fact that the Framers
of the Constitution intended that the states were to control and govern
the land within their borders, independent of interference from sister
states or the central government. It is doubtful that a constitution
which proposed any other scheme of real property control would have
been drafted at the Constitutional Convention and later adopted by the
people of the former colonies.\textsuperscript{110}

No one would dream of postulating, for example, that California
should be able to dictate to Nevada how the latter should legislate over
its lands or, worse yet, send California state employees into Nevada to
manage these areas pursuant to California law. The control currently
exerted by the federal government does not differ conceptually from
this illustration. Such an infringement upon the sovereign powers of a
state is destructive to our system of government and stands on dubious
constitutional grounds. Based on the preceding discussions of the
proprietorial role of the federal government and the reserved powers of
the state, this article will suggest that there is no Constitutional author-
ity for the agreements that were imposed upon the states wherein they
agreed at the time of admission to retention of Article IV public land
by the federal government.

\textbf{CONSTITUTIONAL QUESTIONS SURROUNDING THE CESSION OF
PUBLIC LANDS}

Crucial to any discussion involving the power of the federal govern-
ment to implement and pass legislation, to enter into compacts, or to
accept grants of land, is whether that power is contained expressly in
the Constitution, or whether it can be deemed to exist as part of the
"necessary and proper" powers given to enable it to perform its enu-
merated functions.

There is no basis for the cession of land from the states to the federal
government for anything but enumerated purposes. The ability of the
federal government to accept real property, other than that which is to
be used for Article I purposes, does not exist by virtue of its right to
contract, nor from its right to acquire territory. Furthermore, the
power is not contained in the words of the Constitution and is in fact

\textsuperscript{109} \textit{Id.} at 573 (emphasis added).
\textsuperscript{110} MADISON, supra note 14, at 487-93.
refuted by records of the Congress under the Articles of Confederation and the Constitutional Convention, and by basic concepts of federalism itself.

A. The Power to Contract

It has been stated that the various enabling acts which admitted the territories into the Union and which contained provisions for reservation of the public lands by the United States constituted agreements that were in themselves sufficient to vest the Congress with regulatory powers over these areas. There are, however, a number of arguments that refute such a position.

Nowhere in the Constitution is Congress given the ability to contract with an individual state regarding any matter. Although the courts have held that this ability does exist in certain circumstances, such decisions have been based upon concepts of the right of the United States to act in its own sovereign capacity. One such area has been in the field of federal funding, upheld under the necessary and proper clause, as applied to the taxing and spending power. Therefore, the right of the United States to contract is not denied if it is in the exercise of an enumerated power.

The Constitution is silent about the ability of the federal government to expand its enumerated powers in derogation of the reserved powers of the state by contract or agreement. It is also silent about the power of both the state and federal governments acting in concert to effect such a transformation. Such an ability would circumvent, and is therefore repugnant to, the existence of a written constitution.

The concept of federal-state compacts, as it pertains to this discussion, very plainly means that the Constitution does not empower the federal government to contract with, or obtain the consent of, the legislatures of the territories for purposes of denying those political entities the power to exert sovereign and jurisdictional control over their soil once they have become states.

Such an argument is supported by the words of the Article IV property clause itself. It should be noted that there is no language which allows the federal government to retain any lands on the basis of the consent of the states in Article IV, section 3, clause 2. Although con-

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111. Gates, supra note 24, at 317. See also Stearns v. Minnesota, 179 U.S. 223, 244, 245 (1900).
112. 2 Story, supra note 19, at 143.
sent was made a component to the acquisition of exclusive jurisdiction by the federal government over Article I property and to the creation of a new state within the boundaries of existing states in the first clause of Article IV, such a consent provision is glaringly absent in the Article IV property clause with regard to "territory or other property." Therefore, the obtaining of the consent of the states to retention of their land by the federal government is irrelevant with respect to the Article IV public lands.\textsuperscript{115}

That these inherent powers of sovereignty and jurisdiction were recognized by the Congress of the United States itself is implied from the contents of the various organic acts mentioned. The agreements carry within themselves the seeds of their own contradiction. If the federal government did not realize that the individual states' power of sovereignty, which included the right of jurisdiction over the land within their geographical boundaries, existed, then why in each instance did it move by cessions or reservation of certain parcels of land to the United States to exclude it? If the power of the central government to exercise continuing control over those areas which were not given to the states was complete, it would have been unnecessary to compel each individual state to enter into an agreement confirming those rights. If the constitutional ability to retain the lands existed, it was complete in itself. No compact between the state and federal governments would have been necessary since any such agreement was superfluous in terms of conferring or confirming a power already vested. Conversely, if such a power was not granted to the Congress under the Constitution, no agreement, even between the respective sovereigns, could validly or effectively create it.\textsuperscript{116}

Although the Congress may exact from the territories whatever conditions it deems appropriate to their admission as states pursuant to its discretion to admit new members into the Union, once they have been included, the federal government cannot deny to them any of the privileges and immunities which the other states enjoy.\textsuperscript{117} There are, in fact, a number of cases that have held that once the states have gained admission, they can abrogate or ignore any such conditions.\textsuperscript{118} Although

\begin{enumerate}
\item If an express stipulation had been inserted in the agreement, granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative; because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere, except in the cases in which it is expressly granted. 44 U.S. (3 How.) at 223.
\item License Cases, 46 U.S. (5 How.) 504, 580 (1847); New Orleans v. United States, 35 U.S. (10 Pet.) 662, 735 (1836).
\item See, e.g., Bolln v. Nebraska, 176 U.S. 83, 89 (1900); Escanaba Co. v. Chicago, 107 U.S. 678, 688 (1882); Permoli v. First Municipality, 44 U.S. (3 How.) 589, 610 (1845).
\end{enumerate}
the cases have dealt primarily with concepts pertaining to the "political" rights of the states, there appears to be no good cause, particularly in view of the above arguments pertaining to the power to form federal-state compacts, why this rule should not include the right of a state to exert sovereign control over the real property within its borders.

Therefore, any retentions of Article IV property in the states by the federal government must have their bases in the powers given to the Congress itself and cannot be predicated upon the above-mentioned compacts with the states. Its origin must be found in the body of the Constitution and cannot stem from the adoption of the various organic acts between the state and central governments.

If the acts imparting statehood were insufficient to vest legal title to these areas in the federal government, we must turn to the language and history of the Constitution itself to examine possible sources of this power.

B. The Power to Acquire Territory

The ability of the United States to acquire territory by gift, conquest, purchase, annexation, or bequest is vested in it by the Constitution, as well as being within its powers as a sovereign nation in its own right.119 The Congress has the legal duty and obligation to ensure that it divest itself of these areas and admit the territory as a member of the Union of States once Congress finds the territory is capable of assuming the responsibilities of statehood.120 The power to admit new states into the federal union is one expressly given to the Congress under Article IV, section 3, clause 1. A provision for the retention of property in a former territory after its admission as a state, other than for the existence of federal enclaves, appears nowhere in the constitutional structure.121

It is therefore clear that the United States, although empowered to

121. These propositions were set forth by Chief Justice Roger Taney:

There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasures; nor to enlarge its territorial limits in any way, except by the admission of new States. That power is plainly given; and if a new State is admitted, it needs no further legislation by Congress, because the Constitution itself defines the relative rights and powers, and the duties of the States, and the citizens of the States, and the Federal Government. But no power is given to acquire a Territory to be held and governed permanently in that character. . . . It is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority; and the propriety of admitting a new State is committed to the sound discretion of Congress, the power to acquire territory for that purpose, to be held by the United States until it is in a suitable condition to become a State upon an equal footing with the other States, must rest upon the same discretion.

acquire territory, also is mandated to organize such acquisitions into new states for purposes of inclusion into the federal union: "The United States do [sic] not and cannot hold property, as a monarch may, for private or personal purposes." The issue that therefore arises is: where has the United States been granted the power to maintain control over property in the former territories after their admission to statehood? Or, which specific Constitutional provision entitles the central government to act in the capacity of a proprietor over such areas? The ability of the United States to retain these landholdings after admission of a state to the Union either must appear in the Constitution among its enumerated powers or must be "necessary and proper" to carry out one or more of those powers. If such an ability does not appear in the Constitution, it does not exist.

C. The "Territory or Other Property" Clause

The clause under which this power generally is deemed to be vested is Article IV, section 3, clause 2. The power to maintain continuing jurisdiction over the public lands arguably could originate from this clause which gives Congress power to make all needful rules and regulations "respecting the territory or other property" of the United States. The power, however, cannot be deemed to have been vested by the right to acquire or regulate the territory of the United States due to the command to form these areas into new states. "Territory," taken in its logical and grammatical context, only refers to the real property owned by the United States while in a territorial status.

Taking this argument a step further, the word "territory" must be interpreted as meaning only that property for which title is vested in the government of the United States for purposes of its formation into new states, and not as meaning territory in its general sense or any real property belonging to the federal entity. The power therefore logically stems from the ability of Congress to regulate the "other property" of the United States. As late as 1906, some 115 years after the ratification of the Constitution, the Supreme Court itself stated that "[t]he full scope of this paragraph has never been definitely settled." If the term "other property of the United States" can be seen as referring to the public lands, then arguably there is a legitimate claim to the federal power to control these areas. There are two arguments, however, which serve to invalidate such a claim.

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123. See note 92 supra.
The first of these is the historical fact that, at the time of the framing of the Constitution, two states, North Carolina and Georgia, had not ceded their western territory to the government of the United States, although it was anticipated that they would do so. Therefore, these unceded areas properly could not be classified as "territory" of the United States, but rather were in a state of jurisdictional limbo, as far as control by the United States was concerned, until ceded. A strong argument can therefore be made that the words "other property" were inserted in the phrase to specify the status of these unceded lands.\textsuperscript{126}

This argument is further supported by the fact that at the Constitutional Convention the original resolution pertaining to these areas, as submitted to the Committee of Detail, contained language empowering the new government "[t]o dispose of the unappropriated lands of the United States."\textsuperscript{127} The Article IV property clause was the end result of this resolution.

Moreover, there is evidence to show that at least some of the Framers of the Constitution anticipated that the jurisdiction of the United States eventually would span the Mississippi and extend to the western ocean.\textsuperscript{128} Although the fire of Manifest Destiny did not burn in the nation as a whole in 1787, its tinder was set in the minds of the more far-sighted of its founders. The term "other property" was thus also conceivably penned to provide for those areas across the Mississippi that could come eventually under this country's control.

The second argument deals with the relative juxtaposition of the three different property clauses in the Constitution. An analysis of the order in which these three clauses appear provides an aid in comprehending the powers of state and nation within the federal structure as they pertain to the governing of real property within the limits of the United States. Article I, section 8, clause 17 is contained in that area of the Constitution dealing with specific powers granted exclusively to Congress, deemed necessary to the implementation of an effective system of central government. Article IV, section 3, clause 1 and clause 2, on the other hand, are contained in that area of the founding document that deals with the relative positions of the state and central governments within the federalist system. These two clauses, when read together, clearly show that the ultimate purpose of these provisions of the Constitution was to establish a format for the inclusion of new states


\textsuperscript{127} 2 Farrand, supra note 20, at 321.

\textsuperscript{128} 3 Farrand, supra note 20, at 401, containing the letter of Governeur Morris to Henry W. Livingston, dated November 25, 1803.
into the Union and to empower Congress to regulate these areas prior to statehood.

In this context, an interpretation of "other property" as meaning that the United States has the power to withhold public lands at the time of admission and to regulate the public lands after admission to statehood is glaringly misplaced. If this power were to have been vested in the central government, it could have been inserted logically and easily among the specific powers given to Congress in Article I. It was not so inserted because it was felt that the federal government should own no property for any purpose other than for the implementation of its enumerated functions. To argue that the power to own other types of property exists in the Article IV property clauses is to stretch constitutional interpretation to the breaking point.

Finally, with respect to Article IV, the phrase "territory or other property," when read in reference to the remainder of the clause, clearly shows that they are to be treated coequally. In other words, it matters not whether you classify the land as "territory" or "other property"; they are both to be dealt with in the same manner, namely to be formed into states for purposes of admission into the Union. Therefore, if the United States cannot hold "territory" in a permanent nature, neither can it hold "other property" in such a fashion. Hence, the right to regulate land "in the territories" does not equal the right to regulate land "in the states." 129

D. The Mandate to Dispose

Reservation by the federal government of public lands in the states raises additional questions about the constitutionality of such holdings under the provisions of the Article IV property clause. This clause does not empower the federal government to "own and dispose" of the other property belonging to the United States, but merely gives it authority to "dispose" of these lands. Both history and recent legislation have shown that it has been a policy of the United States that certain public lands be retained in federal ownership and pass out of that ownership only at the complete discretion of the central authority. It is submitted that no rule of constitutional construction can alter, interpret, or construe the mandate to "dispose" to include the power to "retain" permanently, as is the enunciated policy of the federal government.

The theory of retention is further refuted by the one universal proposition that was argued and accepted from the period of cession during the Confederation period, through the Constitutional Convention, and

129. See notes 7-11 supra.
ultimately to the debates over ratification. This proposition was that the public lands ceded to the United States were to be sold to offset the national debt incurred as a result of the Revolutionary War and ultimately were to be formed into independent republican states. James Madison, one of the chief architects of the Constitution, wrote that the western lands were to be used to discharge the domestic debts of the country and provide revenue to the federal treasury for only "a certain period." Such evidence indicates that any policy of retention by the federal government contravenes the intent of the Framers with regard to the public lands.

F. The New States Clause

Another argument against the legality of continued federal retention and control of the public lands revolves around the New States clause, contained in Article IV, section 3, clause 1. This provision of the Constitution prohibits the creation of any state within the boundaries of an already existing state or states without the consent of the legislature of the states concerned and of the Congress.

An integral component in the creation of a "state" involves the right to legislate over the governing of the lands within that state. Arguably, the federal policy has elevated the public lands into the equivalent of vast federal enclaves not merely owned, but also managed by the central government, with comprehensive legislation that dictates the land's permissible uses. In doing so, the federal government has effectively created a vast federal protectorate that is independent of the jurisdiction of the states in which these lands exist and is exempt from state regulation and control.

Such jurisdiction by Congress is tantamount to the creation of federal states within the boundaries of already existing states, accomplished without the consent of the states concerned. The creation of such federal entities therefore would appear contrary to the provisions of the Article IV property clause.

An issue conceivably could be raised that the consent of the states to the creation of such federal bodies was, in fact, obtained by the adoption of the enabling acts which admitted each territory into the Union. There are, however, a number of arguments which serve to refute such a position.

In each of these acts, the territorial governments agreed to vest title to the unceded lands in the United States and not to interfere "with the

130. The Federalist No. 38.
primary disposal” of these lands by the central authority.\textsuperscript{131} The territories entered into no agreement consenting to permanent retention of those lands by the federal government. Moreover, it is questionable in simple contract terms whether the obtaining of consent to retain the lands was effective upon ratification of the various organic acts, based upon concepts of coercion and lack of consideration on the part of the United States. According to this analysis, the agreements by the territorial legislatures to surrender the lands as a condition precedent to obtaining statehood were void ab initio because they arguably were entered into under duress. The only alternatives presented were to agree to the retention of the land by the federal government or remain a territory.

Furthermore, in admitting the new states, Congress was performing a duty that it clearly had an obligation to perform under the Constitution. In exacting the requirement that certain lands be given to the federal government prior to the admission of new states, there was no bargained-for exchange between the two sovereigns; in return for their lands the states acquired only that which was already theirs under the provisions of the Constitution.

Finally, and perhaps most persuasively, even if the consent to such cessions is deemed to be effective, it has previously been shown that no agreement, although entered into between the state and federal governments themselves, can operate to create a power in the Congress not vested by the Constitution. Therefore, the deeds of cession which granted the public lands to the United States were void if the Congress had no constitutional power to receive these lands from the states.

Thus, no power appears in the Constitution to allow the Congress to transform these areas into huge quasi-colonies to be governed at the whim of the federal government. Such a scheme of property jurisdiction never was contemplated by the founders and cannot be deemed to have been created by the consent of the states.\textsuperscript{132}

\textbf{G. The Articles of Confederation}

Yet another point refuting the “proprietor” argument is centered around the powers formerly given to the United States in the Articles of Confederation. Under the Articles, the central government was not entitled to hold any property in the states even for its governmental seat. The reason for this limitation was the fear in the minds of the recent colonials that such an ability could lead to the creation of a mas-

\textsuperscript{131} See note 25 supra.

\textsuperscript{132} MADISON, \textit{supra} note 14, at 487-93.
sive and uncontrollable sovereign, similar to the one that had been
overthrown in the Revolutionary War.\textsuperscript{133}

The Constitutional Convention originally had been called for the
purposes of curing the defects that existed in the Articles of Confederation.
On this basis, it surely can be said that if the founders intended
for the central government to own any property, other than for federal
enclaves, such a power would have been expressly stated and inserted
into the body of the founding document.

\textbf{H. The Constitutional Debates}

The Congressional ability to retain these lands also is refuted by the
records we have of the debates in the Constitutional Convention. It is
clear from these records that the delegates feared that the acquisition
power under Article I could subject the individual members of the
Union to the will of a powerful sovereign. Hence, they inserted the
 provision requiring such acquisitions to be made "with the consent of
the State"\textsuperscript{134} in order to limit the power. The Article IV property
clause contains \textit{no} such consent provision with regard to the phrase
"territory or other property." It does not seem logical to assume that
these same delegates would have sanctioned federal control over state
land in regard to Article IV property without requiring the consent of
the states when they made consent an express condition with regard to
Article I property.

\textbf{I. Concepts of Federalism}

Finally, to argue that the federal government has the constitutional
ability to vest in itself the title to huge tracts of land within the former
colonies, in derogation of the inherent rights of the respective states to
control these areas, is opposed to all logical concepts of federalism. No
purpose would be served by allowing the federal government to own
land independent of its enumerated functions. Nor would any purpose
be served by creating a state if its landed area is dominated by the
federal government. If the federal government has the right to retain
control over territories in perpetuity, it has more power over these
lands \textit{after} their admission to statehood than it had \textit{prior} to their inclusion
in the Union of States. This result directly conflicts with the
constitutional mandate to create new states. Obeying this constitutional

\footnotesize{\begin{itemize}
\item \textsuperscript{133} See notes 20-21 \textit{supra}. \textit{See also} 2 \textsc{Farrand}, \textit{supra} note 20, at 509 (regarding appropriations for a national army).
\item \textsuperscript{134} See notes 20-21 \textit{supra}.
\end{itemize}}
command in name only, while in fact maintaining control over these areas as quasi-colonies, is a blatant exaltation of form over substance.

The constitutional interpretations that have given the federal government the right to exercise continuing jurisdiction over state land have conferred upon the United States the status of a sovereign in this regard, in derogation of the sovereignty of the respective states. Such an interpretation distorts the concept of federalism from that of a union of states which comprise a central government to one of a confederation of states which are united with a central government.

In other words, we are presently a united entity composed of 50 states, each independent of the other, with its own legislative, judicial, and executive branches, and which elects officials who are sent to represent our interests in a national forum. We are not a nation of 63 states with the additional sovereigns being the Federal States of Alaska, Nevada, California, and so on, which consist of non-enclave federal lands ruled by Congress and administered by various federal agencies. Such a union was never conceived by the Framers. The propriety of the evolution of such a system should be seriously questioned by both the federal and state governments.

The above arguments suggest that nowhere in the Constitution is there either an express or an implied power of the Congress to regulate or exercise jurisdictional control over the real property contained within the geographical boundaries of a state after its admission into the Union other than for uses as Article I property. Therefore, the ability of a state to exert self-rule over land within its boundaries must devolve to the state immediately upon its admission to the Union as part of that residuum of power maintained by the states under the tenth amendment.

**Conclusion**

This article has suggested that the federal government was conceived and is to be maintained as one of enumerated powers. Although sovereign in the international sphere, it is limited with regard to internal matters to those powers given to it under the Constitution. The powers of the states are equally sovereign and supreme within the sphere reserved to them under the Constitution. History, constitutional interpretation, and early case law show that the ability of the states to exert jurisdiction and control over the lands within their geographical boundaries was among those powers reserved to the states under the tenth amendment. With the exception of those areas reserved as federal enclaves, the individual states, not the federal government, accede
to all rights of sovereignty and general governmental jurisdiction over lands within their borders immediately upon admission to statehood. It is clear from the Constitution, as it has been consistently interpreted by case law, that exclusive federal governmental jurisdiction and legislation pass to the United States only in relation to Article I property that has been given to the federal government with the consent of the state in which the property is situated. No such power is given by the Constitution with respect to Article IV property. The original intention of the founding fathers has been eroded over the past 150 years to the point where the United States now exerts sovereign control over public lands in the states. Nonetheless, there is no express provision in the Constitution authorizing the exercise of proprietorial powers by the federal government over Article IV property in the states. Recent legislation that allows the Congress to retain, manage, and control the public lands represents a culmination of errors in this field of the law and is an impermissible extension of federal power over an area reserved to the states under the Constitution. The Founders originally sought to create an indestructible Union composed of indestructible states. When that purpose is ignored, although we may still remain one nation, our Union will not be the Union of the Constitution. \(^\text{135}\)

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\(^{135}\) See Coyle v. Oklahoma, 221 U.S. 559, 579-80 (1911).