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**FEDERAL LAND RETENTION AND THE  
CONSTITUTION'S PROPERTY CLAUSE: THE  
ORIGINAL UNDERSTANDING**

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## I. CASEY EMERSON AND THE MODERN CONTROVERSY

*“Title to the land in Montana should have gone to the state as soon as Montana became a state in 1889. And the only real question is: Does the federal government owe us rent on that land since then?”*

– Former State Senator Casey Emerson<sup>1</sup>

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1. Telephone Interview with Clarence A. Emerson, former Montana State Senator, R-Bozeman (Apr. 29, 2004).

### A. Introduction<sup>2</sup>

Clarence A. (“Casey”) Emerson of Bozeman, Montana—a former state senator, retired high school teacher, and now a prominent local businessman—wants Montana to sue the federal government.<sup>3</sup> Montana, like most other western states, is composed largely of federal land,<sup>4</sup> and

2. The following is a list of repeatedly referenced works:

THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Merrill Jensen et al. eds., 1976–2004) [hereinafter DOCUMENTARY HISTORY] (multiple vols. projected; not all completed).

JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Burt Franklin ed., 1968) [hereinafter ELLIOT’S DEBATES].

THE FEDERALIST (Alexander Hamilton, John Jay, James Madison) (George W. Carey et al. eds., Gideon 2001).

SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE (Times Books 1979) [hereinafter JOHNSON’S DICTIONARY].

FORREST McDONALD, *NOVUS ORDO SECLORUM* (1985).

THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1937) (1911) [hereinafter Farrand].

1 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* (3d ed. 1999).

Peter A. Appel, *The Power of Congress “Without Limitation”: The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1 (2001).

Albert W. Brodie, *A Question of Enumerated Powers: Constitutional Issues Surrounding Federal Ownership of the Public Lands*, 12 PAC. L.J. 693 (1981).

David E. Engdahl, *State and Federal Power over Federal Property*, 18 ARIZ. L. REV. 283 (1976).

Eugene R. Gaetke, *Refuting the “Classic” Property Clause Theory*, 63 N.C. L. REV. 617 (1985).

Robert E. Hardwicke et al., *The Constitution and the Continental Shelf*, 26 TEX. L. REV. 398 (1948).

Carolyn M. Landever, *Whose Home on the Range? Equal Footing, the New Federalism and State Jurisdiction on Public Lands*, 47 FLA. L. REV. 557 (1995).

Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 CASE W. RES. L. REV. (forthcoming 2005) [hereinafter Natelson, *Necessary and Proper*].

Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077 (2004) [hereinafter Natelson, *Public Trust*].

Robert G. Natelson, *The Enumerated Powers of States*, 3 NEV. L.J. 469 (2003) [hereinafter Natelson, *Enumerated*].

Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1 (2003) [hereinafter Natelson, *General Welfare*].

Robert G. Natelson, *A Reminder: The Constitutional Values of Sympathy and Independence*, 91 KY. L.J. 353 (2003) [hereinafter Natelson, *Sympathy and Independence*].

C. Perry Patterson, *The Relation of the Federal Government to the Territories and the States in Landholding*, 28 TEX. L. REV. 43 (1949).

3. Telephone Interview with Clarence A. Emerson, *supra* note 1.

4. Federal land makes up the following percentages of the areas of the Rocky Mountain states:

Arizona.....	44.7%
Colorado.....	36.3%

Emerson, like many other Westerners, is fed up with federal land management. He wants that acreage given to the states. More specifically, he wants Montana's federal lands deeded to the state government. Montanans, he says, can do a lot better managing local lands than bureaucrats in Washington, D.C.—who, if they care about Montana at all, are under enormous pressure from people who do not.

Casey Emerson is not a lawyer, but he is pretty sure he has a clear case. The Constitution, he says, limits federal land ownership within existing states to post offices and post roads, the capital district, and items enumerated in the Enclave Clause: "Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."<sup>5</sup> He argues that the other relevant constitutional provision, the Property Clause,<sup>6</sup> contemplates only land disposal and land management pending disposal.

Even if the chances of success are not high, Emerson sees this as a case worth bringing. He believes Montanans cannot continue to suffer under federal land ownership policies. Those policies, he says, throw people out of work and bar them from their own backyards. In past years, he continues, federal policies have fostered over-cutting of timber; more recently, they have fostered undercutting—resulting in ravenous and polluting forest fires. He adds that the federal government harbors on its lands dangerous predators, such as wolves and grizzly bears that wander onto private property and threaten people and livestock.<sup>7</sup> Local people, he says, would administer Montana lands far more responsibly.

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Idaho .....	62.2%
Montana .....	27.8%
New Mexico.....	34.1%
Nevada .....	89.5%
Utah.....	64.2%
Wyoming .....	49.8%

STATISTICAL ABSTRACT OF THE UNITED STATES 228 tbl.369 (117th ed. 1997).

5. U.S. CONST. art. I, § 8, cl. 1, 17:

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

6. *Id.* art. IV, § 3, cl. 2:

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.

7. Telephone Interview with Clarence A. Emerson, *supra* note 1.

### *B. Prior Legal Commentaries*

Emerson's position—that the Constitution, as originally understood, requires the federal government to transfer nearly all of its remaining land to the states—may not reflect current case law,<sup>8</sup> but it is not unique. Indeed, after reviewing parts of the historical record, several legal commentators have reached conclusions more radical than Emerson's. Those commentators argue that *all* permanent federal landholding within states and outside the Enclave Clause violates the true meaning of the Constitution, and that such lands should be ceded to the respective state governments.<sup>9</sup> This conclusion—I shall call it the “conservative” position—is challenged by “liberal” commentators who argue that the Management Power in the Property Clause (to “make all needful Rules and Regulations respecting” federal land) authorizes virtually unlimited federal authority to own acreage.<sup>10</sup> At times, the exchange among commentators has been heated, with conservatives referring to federal land ownership as “national socialism”<sup>11</sup> and liberals characterizing their opponents as “extremists.”<sup>12</sup>

Unfortunately, commentators on neither side have done a particularly good job of uncovering the original meaning of the Property Clause. Prior studies have, for the most part, focused on historical material only weakly probative of the original meaning. For example, several conservative commentaries<sup>13</sup> and one major liberal commentary<sup>14</sup> emphasize the terms of state grants of territories to Congress during the Confederation period. However, the scope of congressional property powers under

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8. See, e.g., *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (granting broad management, and presumably retention, authority under the Property Clause); 1 ROTUNDA & NOWAK, *supra* note 2, at 390–93.

9. See e.g., Brodie, *supra* note 2; Hardwicke, *supra* note 2; Patterson, *supra* note 2. See also Landever, *supra* note 2 (showing some sympathy for this view).

10. U.S. CONST. art. IV, § 3, cl. 2. However, as pointed out by one of the more recent liberal commentators, heretofore the liberals have paid less attention to history than have the conservatives. See Appel, *supra* note 2, at 7–8.

11. Patterson, *supra* note 2, at 56 (calling views supporting extensive federal landowning “national socialism”).

12. E.g., Appel, *supra* note 2, at 11–12 (calling most advocates of a narrow Property Clause interpretation “extremists”). See also George Cameron Coggins et al., *The Law of Public Rangeland Management I: The Extent and Distribution of Federal Power*, 12 ENVTL. L. 535, 567 (1982) (labeling contentions that federal property ownership is constitutional only under the Enclave Clause as “extreme states-rights arguments”).

13. E.g., Brodie, *supra* note 2, at 695–96; Patterson, *supra* note 2, at 48–50.

14. Gaetke, *supra* note 2, uses the language of cessions in contending that Congress was granted broad discretionary power to keep the lands, but his argument is not very convincing. *Id.* at 626–67 (inferring a right to retain from a wording change from “granted and disposed of” to “disposed of” and from the Northwest Ordinance’s language preventing state interference with disposal).

the Confederation was very different from that under the Constitution,<sup>15</sup> because the Articles of Confederation conferred no express landowning authority and foreclosed reliance on implied authority.<sup>16</sup> These commentaries fail to explain convincingly why the negotiated terms of state grants of lands east of the Mississippi under the Articles should govern treaty cessions west of the Mississippi under the Constitution.<sup>17</sup> A favorite resort of conservative commentators has been the Equal Footing Doctrine.<sup>18</sup> Yet the Equal Footing Doctrine, while found in the Northwest Ordinance,<sup>19</sup> is unmentioned in the Constitution and thus is rarely a factor in constitutional adjudication.<sup>20</sup>

Commentators on both sides have analyzed the notes of the federal constitutional convention: a more germane source, to be sure, but a scanty one, for those notes have little to say about the relevant portions of the Property Clause.<sup>21</sup> Commentators' heaviest reliance has been on Supreme Court decisions issued many years—sometimes many decades—after the Constitution was ratified.<sup>22</sup> Such cases declare the doctrine for their times, but are not very good measures of original meaning. They are the products of special pleading, crafted largely from the briefs of parties and of *amici curiae* who had little motivation or expertise for dispassionate historical investigation. Moreover, nearly all these cases were decided before important records from the founding era became commonly available.<sup>23</sup>

15. See Gaetke, *supra* note 2, at 629.

16. ARTICLES OF CONFEDERATION art. II. "Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled." *Id.* (emphasis added).

17. The terms of these grants do, however, add some context to statements made in the ratification debates. See *infra* Part IV.C.4.

18. See e.g., Brodie, *supra* note 2, at 705–06. For a fairly recent treatment, see Landever, *supra* note 2.

19. NORTHWEST ORDINANCE art. 5, available at <http://www.yale.edu/lawweb/avalon/nworder.htm> (last visited June 2, 2004) ("And, whenever any of the said States shall have sixty thousand free inhabitants therein, such State shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original States in all respects whatever . . .").

20. Cf. *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845).

21. Discussion at the federal convention centered more on the Enclave Clause, 2 Farrand, *supra* note 2, at 117, 127–28, 261, 321–22, 325, 505, 509, and on the provisions of the Property Clause relating to the admission of new states and integrity of state boundaries, 2 *id.* at 133, 136, 147, 153, 173, 188, 324, 457, 458, 459, 461–65.

22. See, e.g., Engdahl, *supra* note 2, at 293–300 (discussing nineteenth century cases); Gaetke, *supra* note 2, *passim* (devoting most of its attention to nineteenth and twentieth century cases).

23. For example, Max Farrand's sprawling collection of convention materials, Farrand, *supra* note 2, was not published until the early twentieth century, well after some of the critical Property Clause cases discussed by the commentators. E.g., *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845); *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525 (1885). For an example

The upshot of all this is that there never has been a satisfactory analysis of whether the Property Clause, as originally understood, permitted widespread retention of federal land within state boundaries. The purpose of this Article is to provide such an analysis, and to do so by refocusing attention on the materials and factors most pertinent to reconstructing the provision's original meaning.

### *C. The Approach of This Study*

#### 1. The Nature of Original Meaning

Scholars across the political spectrum<sup>24</sup> agree that for purposes of constitutional interpretation, the legally relevant issue regarding a particular clause of the Constitution is not the "original intent" of the drafters, but the clause's objective meaning to the ratifying public.<sup>25</sup> The principle is closely analogous to that applied in contract law: if the subjective intent of an offeror is not reflected in the offer and is different from the probable understanding of the offeree, then generally that intent

of a commentator discussing these and other nineteenth century cases, see Gaetke, *supra* note 2, at 640–57.

James Hutson's valuable supplement did not see the light of day until 1987. SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (James H. Hutson ed., 1987) [hereinafter Hutson, SUPPLEMENT]. The first volume of DOCUMENTARY HISTORY, *supra* note 2, was issued in 1976. The first of four volumes dealing with New York was not issued until 2003, and the set is still far from complete. 19 DOCUMENTARY HISTORY, *supra* note 2. John Dickinson's notes of the constitutional convention were not published until 1983. See James H. Hutson, *John Dickinson at the Federal Constitutional Convention*, 40 WM. & MARY Q. 256 (1983). Those notes contain the prototype of the Necessary and Proper Clause, Hutson, SUPPLEMENT, *supra*, at 86, 89 (authorizing Congress "to pass Acts" to effectuate its enumerated powers), and have other constitutional implications. See, e.g., Natelson, *General Welfare*, *supra* note 2, at 26 (helping to explain the public trust purposes of the General Welfare Clause).

Also, as a practical matter many documents have become readily available to commentators in the hinterlands (such as this author) only with the advent of the Internet. See, e.g., Constitution Society, *Welcome to the Constitution Society*, at <http://www.constitution.org> (last visited Jan. 20, 2005).

For additional discussion of "original meaning," and distinctions between it and "original intent" and "original understanding," see Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113 (2003).

24. See, e.g., JACK N. RAKOVE, ORIGINAL MEANINGS 8–9, 17–18 (1996); Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 187 (2003); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999). Professor Rakove leans toward "progressive" views while Professor Barnett leans toward "libertarian" views.

25. I have entitled this article "Original Understanding" rather than "Original Meaning," however, because it explores the contemporaneous public understanding as valuable evidence of original meaning.

is not part of the ensuing contract.<sup>26</sup> This contractual approach reflects reality in that the Constitution (as amended by the Bill of Rights), was in fact a political bargain among contending factions.

## 2. Evidence of Original Meaning

Some kinds of evidence of original meaning are more reliable than others. Among the least reliable is the sort that prior Property Clause commentators have leaned on most heavily: post-ratification material; that is, material generated by events that, at the time of ratification, were still in the future. I resort to such material very sparingly, and only when it is uncontradicted, merely confirmatory of better evidence, or an admission against interest. I have, however, placed some leading post-ratification cases in the footnotes to show the extent to which subsequent adjudication reflects or contradicts the original meaning.

The most dependable evidence of original meaning, of course, is the structure and wording of the Constitution, read in the context of eighteenth century usage and definitions. Although in its fundamentals eighteenth century English was the same language we use today, there were many subtle differences, and those differences can deceive. One trying to deduce original meaning, therefore, should possess a good eighteenth century dictionary,<sup>27</sup> a working knowledge of Latin,<sup>28</sup> and (for interpretation of legal terms) access to contemporaneous legal materials.<sup>29</sup>

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26. Cf. E. ALLAN FARNSWORTH, *CONTRACTS* § 3.6 (1982) (objective theory of contracts generally prevails).

27. The most celebrated is, of course, *JOHNSON'S DICTIONARY*, *supra* note 2.

28. Latin was an essential part of the education of virtually every schooled person in the founding generation. For this reason, and also because that generation was closer to the time when Latin was commonly spoken, the founders' English usage was influenced heavily by the older tongue. See MCDONALD, *supra* note 2, *passim*; GARRY WILLS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE* 93 (Vintage Books 1979). To be blunt about it, I do not think one can be a competent constitutional interpreter without a fair knowledge of Latin.

To illustrate the point: I sometimes ask my students the meaning of the phrase in the Preamble, "a more perfect Union." Those with no Latin invariably answer, "a better union." The answer is "a more complete union." In the eighteenth century, outside the religious context, the word "perfect" nearly always meant "complete," following the Latin verb *perficere*, to finish or complete. *JOHNSON'S DICTIONARY*, *supra* note 2. Similarly, knowledge of Latin makes all the difference in understanding the original meaning of "provide" in U.S. CONST. art. I, § 8, cl. 1, the Taxation Clause. See Natelson, *General Welfare*, *supra* note 2, at 15-16.

29. Probably the single most useful legal source is WILLIAM BLACKSTONE, *COMMENTARIES*. Others include the works of Edward Coke, reported English cases, and the Emperor Justinian's codification of Roman law, from which English and American courts borrowed freely. Perhaps the most famous example of such borrowing is that classic chestnut of the law school curriculum, *Pierson v. Post*, 3 Cai. Cas. 175 (N.Y. 1805) (the venerable "fox hunting" case that traditionally begins courses in basic property law).



Next in evidentiary value are the records of the ratification debates, both within and outside of the state ratifying conventions. The words and actions of delegates at the federal constitutional convention also are valuable, because they shed light on the meaning of the document to the ratifiers.

Another essential interpretative tool is a basic knowledge of the founders' educational and cultural background, heavily imbued with (mostly) Protestant Christianity, the "Whig" version of English and colonial history, and the history and literature of ancient Greece and Rome.<sup>30</sup>

Finally, competent constitutional interpretation requires an understanding of the broadly held *constitutional values* Americans were trying to implement when they drafted, promoted, ratified, amended—or opposed—the Constitution.

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30. Perhaps the best book on the cultural influences on the framers is MCDONALD, *supra* note 2. An example of the cultural mix mentioned in the text is John Adams' *Novanglus*, which praised the "revolution principles" of "Aristotle and Plato, of Livy and Cicero, and Sidney, Harrington, and Locke." JOHN ADAMS, THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 152 (C. Bradley Thompson ed., 2000). Similarly, Hamilton's notes for his famous June 18, 1787 convention speech contain the following reference: "Aristotle—Cicero—Montesquieu—Neckar." 1 FARRAND, *supra* note 2, at 308. See also J. C. FURNAS, THE AMERICANS: A SOCIAL HISTORY OF THE UNITED STATES 1587–1914 267–74 (1969) (tracing classical influence primarily through the architectural styles of the founding generation).

On the pervasive influence of Greco-Roman classics on the founding generation, see generally CARL J. RICHARD, THE FOUNDERS AND THE CLASSICS: GREECE, ROME, AND THE AMERICAN ENLIGHTENMENT (1994). Professor Richard tells us:

After the Stamp Act of 1765, many theses applied the political principles of Aristotle, Cicero, and Polybius to the debates concerning independence and the Constitution. Samuel Adams had anticipated these issues in his own master's thesis, delivered in flawless Latin in 1743. In answer to the title question "Whether It Be Lawful to Resist the Supreme Magistrate, if the Commonwealth Cannot Be Otherwise Preserved," Adams resoundingly asserted: absolutely!

*Id.* at 24.

A more subtle example of how Latin stylists such as Cicero influenced the debates appears in the essays of the anti-federalist "Impartial Examiner." For example, he introduced his subject from the standpoint of a foreigner looking in—the same device adopted by Cicero in his oration *Pro Caelio*. The Impartial Examiner's lengthy fourth sentence distinctly echoes the first in the *Pro Caelio*. 8 DOCUMENTARY HISTORY, *supra* note 2, at 387–88. Shortly thereafter, the writer imagines the foreigner disapprovingly thinking of Americans as "seeking after new things." 8 *id.* at 388. *Res novae* (new things) is the Latin term for revolution, and has a negative connotation. CHARLTON T. LEWIS, A LATIN DICTIONARY 1220 (photo. Reprint 1980) (1879).

### 3. The Interpretative Value of “Constitutional Values”<sup>31</sup>

Justice Stephen Breyer once pointed out that the “general purposes” behind the Constitution—that is, the values underlying it—should assist courts in construing the document.<sup>32</sup> He observed that when we interpret any other legal document, we employ its underlying goals as an aid to understanding it. We should do the same with the Constitution.<sup>33</sup>

The members of the founding generation, federalists and anti-federalists alike, were surprisingly unanimous in the political values they were trying to promote. They all wanted a charter that would realize those values, even if they disagreed on whether the federal convention’s draft would suffice.<sup>34</sup>

Some of the founders’ core values are still understood and appreciated today. One example is *republicanism*—the idea of popular government conducted under the rule of law.<sup>35</sup> Other values are understood, if not always appreciated. An example is *decentralization*—achieved in the Constitution by limiting the central government’s jurisdiction to a circumscribed cluster of enumerated powers.<sup>36</sup> Still other values tend to be overlooked today, even by constitutional scholars. Three of these are particularly relevant to interpreting the federal government’s property powers.<sup>37</sup>

The first of the neglected three was the ideal of *fiduciary government*. Virtually without dissent, participants in the American founding thought of public officials as guardians, agents, servants, or trustees of the people. The founders’ ideas on this subject had been borrowed from seventeenth and eighteenth century English Opposition theorists<sup>38</sup> such

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31. In discussing these values, I rely on some of my earlier work, collected *supra* note 2. I see no need to extend the current article by restating the underlying evidence here.

32. Stephen Breyer, *Madison Lecture: Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 247–48 (2002) (“[The Constitution’s] handful of general purposes will inform judicial interpretation of many individual provisions that do not refer directly to the general objective in question.”).

33. *Id.* at 249.

34. See generally Natelson, *Sympathy and Independence*, *supra* note 2.

35. Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution’s Guarantee Clause*, 80 TEX. L. REV. 807 (2002) (collecting citations on the founders’ republicanism).

36. Natelson, *Enumerated*, *supra* note 2, at 472.

37. There were other widely-held values in the founding, but I limit my discussion here to those of particular importance to the property powers. Some of the others were theism, private property, and personal liberty.

38. For authors other than those listed here, see generally Natelson, *Public Trust*, *supra* note 2.

as John Locke,<sup>39</sup> who in turn had appropriated them from classical authors such as Cicero.<sup>40</sup> This “strong” public trust doctrine was far more encompassing than the similarly named doctrine we encounter today in natural resource and water law.<sup>41</sup> Under the founders’ version, government officials had a *universal* responsibility to act pursuant to norms analogous to those imposed on private sector guardians, agents, servants, and trustees.<sup>42</sup> Officials were to act with care and loyalty, in good faith, within their instructions, for the general good, and impartially.<sup>43</sup> If, for example, a legislative body passed a law that benefited some citizens at disproportionate expense to others, that legislative body violated its duty of impartiality.<sup>44</sup> Governmental breaches of trust—at least serious

39. *E.g.*, JOHN LOCKE, OF CIVIL GOVERNMENT: SECOND TREATISE (1690), available at <http://www.constitution.org/jl/2ndtreat.htm> (last visited June 2, 2004). *See id.* at 18 (“nor under the dominion of any will, or restraint of any law, but what that legislative shall enact according to the trust put in it”); *id.* at 110 (“to the legislative, acting pursuant to their trust”); *id.* at 113–14 (“the community put the legislative power into such hands as they think fit, with this trust, that they shall be governed by declared laws, or else their peace, quiet, and property, will still be at the same uncertainty as it was in the state of nature”); *id.* at 116–17 (“But government, into whosoever hands it is put, being, as I have before shown, entrusted with this condition, and for this end, that men might have and secure their properties”); *id.* at 129 (“The power of assembling and dismissing the legislative, placed in the executive, gives not the executive a superiority over it, but is a fiduciary trust placed in him, for the safety of the people . . .”); *id. passim*.

40. *E.g.*, 1 MARCUS TULLIUS CICERO, DE OFFICIIS ¶ 85 (Walter Miller trans., Loeb 1956).

41. One branch of this modern “public trust doctrine” is that the state holds lands submerged beneath navigable waterways in public trust. The leading case is *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892). Another branch is the rule, applied in some states, that some or all natural resources are held in public trust. *See, e.g.*, CONN. GEN. STAT. § 22a-15 (2000):

Declaration of policy. It is hereby found and declared that there is a public trust in the air, water and other natural resources of the state of Connecticut and that each person is entitled to the protection, preservation and enhancement of the same. It is further found and declared that it is in the public interest to provide all persons with an adequate remedy to protect the air, water and other natural resources from unreasonable pollution, impairment or destruction.

For short surveys of the doctrine and citation to the literature, see Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) and James R. Rasband, Book Review, *The Public Trust Doctrine, A Tragedy of the Common Law*, 77 TEX. L. REV. 1335 (1999) (reviewing BONNIE J. MCCAY, OYSTER WARS AND THE PUBLIC TRUST: PROPERTY, LAW, AND ECOLOGY IN NEW JERSEY HISTORY (1998)).

Some commentators have argued that the delegates at the federal convention rejected the trust theory as to the public lands. *E.g.*, Gaetke, *supra* note 2, at 634–35, 638. In fact, however, they sought to implement a trust theory far more profound and sweeping. *See generally* Natelson, *Public Trust*, *supra* note 2, at 1136–68.

42. Natelson, *Public Trust*, *supra* note 2.

43. *Id.*

44. The duty of impartiality is manifested throughout the Constitution, notably in the General Welfare Clause. *See* Natelson, *General Welfare*, *supra* note 2, at 49–54; Natelson, *Public Trust*, *supra* note 2, *passim* and at 1150–58.

ones—were *ultra vires*.<sup>45</sup> In the language of the Constitution, they were not “proper.”<sup>46</sup> They were therefore void.<sup>47</sup>

A second core value relevant to understanding the federal government’s property functions was the ideal of “fellow-feeling”<sup>48</sup> or, as it usually was called, “sympathy.”<sup>49</sup> The social aspects of sympathy had been a prominent feature of Adam Smith’s influential philosophical work, *The Theory of Moral Sentiments*.<sup>50</sup> The founders applied sympathy to political systems. The ideal of sympathy was that there be identity of interest, rather than conflict of interest, between governors and gov-

45. For example, the liberal British minister and influential political commentator Richard Price had written, “[Parliaments] possess no power beyond the limits of the trust for the execution of which they were formed. If they contradict this trust, they betray their constituents and dissolve themselves.” RICHARD PRICE, OBSERVATIONS ON THE NATURE OF CIVIL LIBERTY, THE PRINCIPLES OF GOVERNMENT, AND THE JUSTICE AND POLICY OF THE WAR WITH AMERICA 11 (1776), available at <http://www.constitution.org/price/price.txt> (last visited Jan. 20, 2005). Cf. JOHN LOCKE, OF CIVIL GOVERNMENT: SECOND TREATISE 106 (1690), available at <http://www.constitution.org/jl/2ndtreat.htm> (last visited Jan. 20, 2005): “[T]he power of the society, or legislative constituted by them, can never be supposed to extend farther than the common good, but is obliged to secure every one’s property by providing against those three defects above mentioned that made the state of nature so unsafe and uneasy.”

John Dickinson expressed similar sentiments. See Robert G. Natelson, *The Constitutional Contributions of John Dickinson*, 108 PENN ST. L. REV. 415, 437 (2003). See also James Madison, *Memorial and Remonstrance against Religious Assessments* (1785), [http://press-pubs.uchicago.edu/founders/documents/amendI\\_religions43.html](http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html) (last visited Jan. 20, 2005):

Because if Religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body. The latter are but the creatures and vicegerents of the former. Their jurisdiction is both derivative and limited: it is limited with regard to the co-ordinate departments, more necessarily is it limited with regard to the constituents. The preservation of a free Government requires not merely, that the metes and bounds which separate each department of power be invariably maintained; but more especially that neither of them be suffered to overleap the great Barrier which defends the rights of the people. The Rulers who are guilty of such an encroachment, exceed the commission from which they derive their authority, and are Tyrants.

See also 3 ELLIOT’S DEBATES, *supra* note 2, at 501 (discussing James Madison, who, at the Virginia ratifying convention, stated that even the British king was not empowered to “dissolve the empire”).

46. U.S. CONST. art. I, §8, cl. 18 (the Necessary and Proper Clause).

47. Natelson, *Necessary and Proper*, *supra* note 2, at \_\_\_ (forthcoming 2005).

48. See, e.g., 3 ELLIOT’S DEBATES, *supra* note 2, at 395 (James Madison, using this term at the Virginia ratifying convention); 3 *id.* at 590 (Patrick Henry, doing the same, at the same convention).

49. The only detailed treatment of the concept in the constitutional context is Natelson, *Sympathy and Independence*, *supra* note 2, at 358–82, on which this discussion relies.

50. ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 9–16 (D. D. Raphael & A. L. Macfie eds., Oxford Univ. Press 1776). For the book’s international reception, see the editors’ introduction, *id.* at 25–32.

erned.<sup>51</sup> Preferably, each government official should feel this identity of interest not merely with some faction but with the public as a whole, or at least with all his own constituents. Accordingly, James Madison proposed a President who would “be considered as a national officer, acting for and equally sympathizing [sic] with every part of the U. States.”<sup>52</sup> Virtually every participant who addressed the issue agreed that constitutions should be written to promote sympathy.<sup>53</sup> Obviously, a government sympathetic to all the people was more likely to honor its public trust than one that was not.

A third founding value germane to interpreting the federal government’s property powers was the value of *independence*. Ideally, republican decision makers should be free from the sort of “undue influence” (note the fiduciary law<sup>54</sup> usage) that might deflect them from following fiduciary standards.<sup>55</sup> The discretion of dependent people was liable to be clouded by those on whom they were dependent. “In Religion the Creature is apt to forget its Creator,” observed Gouverneur Morris at the federal convention. “[I]t is otherwise in political affairs.”<sup>56</sup>

The drafters of the Constitution left to the states the task of limiting the electorate to the self-supporting, independent voters on whom governmental units and officials were to depend.<sup>57</sup> However, those drafters

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51. For the founders’ view that public officials had a fiduciary obligation to serve the general welfare and not specific interest groups or “factions,” see generally Natelson, *Public Trust*, *supra* note 2.

52. 2 Farrand, *supra* note 2, at 80. Cf. 3 ELLIOT, *supra* note 2, at 488 (James Monroe, stating at the Virginia ratifying convention: “He ought to depend on the people of America for his appointment and continuance in office; he ought also to be responsible, in an equal degree, to all the states . . .”).

53. See Natelson, *Sympathy and Independence*, *supra* note 2, at 358–82 (quoting both federalists and anti-federalists).

54. The phrase “undue influence” was a staple in political analysis. See, e.g., 8 DOCUMENTARY HISTORY, *supra* note 2, at 440 (Alexander White); 9 *id.* at 679 (“A Native of Virginia”); Letters from George Washington to the Marquis de Lafayette (Apr. 28 & May 1, 1788, in 9 *id.* at 767; 14 *id.* at 338 (Oliver Ellsworth, writing as “A Landholder”); THE FEDERALIST NO. 7 (John Jay), *supra* note 2, at 7; THE FEDERALIST NO. 77 (Alexander Hamilton), *supra* note 2, at 396, 399.

55. Natelson, *Sympathy and Independence*, *supra* note 2, at 382–415; see also 10 DOCUMENTARY HISTORY, *supra* note 2, at 1577 (“Impartial Examiner,” stating that undue influence leads to partiality).

56. 1 Farrand, *supra* note 2, at 512. Cf. THE FEDERALIST NO. 79 (Alexander Hamilton), *supra* note 2, at 408 (“In the general course of human nature, a power over a man’s subsistence amounts to a power over his will.”). John Adams wrote in 1776 that “children, servants and the propertyless were excluded [from civic life] because they were ‘too little acquainted with public affairs to form a right judgment, and too dependent upon other men to have a will of their own.’” MCDONALD, *supra* note 2, at 161. Cf. 1 Farrand, *supra* note 2, at 124 (Madison opining on the “biassed [sic] directions of a dependent Judge”).

57. On the perceived need for voters to be independent, see Natelson, *Sympathy and Independence*, *supra* note 2, at 386–90.

spent much effort crafting a structure in which governmental units and officials could act independently of other units and officials. The goal was a structure in which official judgments were unclouded by the undue influence of other governmental actors. Furthermore, assuring that governmental actors were independent of each other (and thus dependent only on the people) enabled them to compete freely against each other for popular favor.<sup>58</sup>

In pursuit of the ideal of independence, the drafters sought to render federal decision makers relatively free of the states and vice versa. They made the legislative, executive, and judicial branches of the federal government largely independent of each other.<sup>59</sup> The few times they violated the principle of independence (as when they authorized state legislators to elect federal senators), it was mostly to concede to units closer to the people the ability to influence those farther away.<sup>60</sup> But these were exceptions to the general rule.

Incidentally, the principal of independence should not be confused with the doctrine of separation of powers. The latter was merely a tool to be employed—or laid aside—as the needs of independence dictated.<sup>61</sup>

As I understand it, Justice Breyer's point about underlying values ("general purposes") is this: when confronted with more than one possible interpretation of a constitutional provision, we should select the one that more nearly comports with the values the Constitution was designed to implement. Of course, this interpretative principle is of less utility when no core values are in play or the relevant ones conflict. We shall see, however, that this is not so with the Property Clause: the underlying values of fiduciary government, sympathy, and independence are very helpful in divining its meaning.

## II. BETSY JOHNSON AND THE CONSTITUTIONAL RATIFICATION PROCESS

Just as the twenty-first century viewpoint of Casey Emerson helps us frame current controversies over federal land ownership, so can the eighteenth century perspective of Mrs. Elizabeth ("Betsy") Johnson assist us in understanding the meaning of the Property Clause at ratification. Unlike Mr. Emerson, Betsy Johnson and her husband, Edmund, are fictional characters. However, they are highly representative amalgamations of the politically-involved "moderates" who had to be won over be-

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58. *Id.* at 404–05.

59. *Id.* at 399–401.

60. *Id.* at 406–07.

61. *Id.* at 401.

fore the Constitution could be ratified.<sup>62</sup> By looking through Betsy Johnson's eyes, we can see how the proposed Constitution was understood by intelligent and active participants in the ratification debate.

We meet Mrs. Johnson in the early spring of 1788, when she was thirty-four years old. She and Edmund were living in a state that had not yet ratified the Constitution. They resided not far from the state capital with their four surviving children, the youngest of whom was ten years old.

Mrs. Johnson was respected locally as, in eighteenth century dialect, a "woman of parts": of intelligence and talent. Edmund was a reasonably successful businessman. The family enjoyed an upper middle class lifestyle.

Like Betsy, Edmund was well regarded by his neighbors. They showed this by electing him as a delegate to the pending state ratifying convention. Most of his neighbors were mildly anti-federalist, but they decided not to instruct him how to vote, and to trust in his discretion.<sup>63</sup>

Yet Edmund was not, as he sometimes said, "of a theoretick Turn of Mind." His wife was the political enthusiast in the family. Because her children were no longer small and because the family could now afford a few servants, she had time to read about and discuss political affairs with her friends, neighbors, and the local officeholders. In deciding how to cast his vote, Edmund would find Betsy's advice highly persuasive.

From reading the newspapers, Betsy knew that two years earlier the Annapolis Convention had asked the Confederation Congress to call a convention to revise the Articles of Confederation.<sup>64</sup> On February 21, 1787, Congress complied. Convention delegates assembled in Philadelphia on May 14, achieved a quorum on May 25, and finished their work

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62. Constitutional interpretation has suffered, I think, from an overemphasis on the views of characters who took staunch nationalist positions: men like Alexander Hamilton, Gouverneur Morris, and James Madison. While the opinions of those personalities, especially Madison, are very important, just as much—often greater—insight comes from studying the views of more skeptical participants. It was, after all, the men in the middle who had to be won over, and without whom there would have been neither ratification nor a bill of rights. Edmund Randolph was one such person. Other influential contemporaries within the great moderate middle (on a spectrum from leaning nationalist to leaning confederate) were John Dickinson, Elbridge Gerry, Richard Henry Lee, and George Mason.

63. This scenario was not uncommon. It was precisely the situation of William Symmes, Jr., a delegate to the Massachusetts ratifying convention. Symmes, a lawyer, was elected as an uninstructed delegate from a moderately anti-federalist district, delivered a speech at the convention expressing doubts about the Constitution, and after being reassured by the adoption of amendments, supported ratification. See 4 DOCUMENTARY HISTORY, *supra* note 2, at 244–45. Symmes's elaborate speeches can be found at 2 ELLIOT'S DEBATES, *supra* note 2, at 70–75, 172–74. He was only twenty-eight years old.

64. The chronology used here is in 13 DOCUMENTARY HISTORY, *supra* note 2, at xl–xlii.

on September 17.<sup>65</sup> Their proceedings were secret. Thus, Betsy did not know that during the early weeks of the convention, the delegates seemed determined to adopt a very strong national government (modeled after the Virginia Plan), but then thought the better of it as time wore on.<sup>66</sup> Eventually they proposed a government with a very different structure from Congress under the Articles, and with modest accessions of power, defined and enumerated in the document.<sup>67</sup> Betsy did know that the federal convention had transmitted its final draft to Congress, which on September 28 had sent it to the states for ratification. Ratification was to be effectuated by individual state conventions,<sup>68</sup> such as the one to which Mr. Johnson had been chosen as a delegate.

Through the newspapers, Betsy learned that by early January, 1788, conventions in five states (Delaware, Pennsylvania, New Jersey, Georgia, and Connecticut) already had ratified by substantial margins. By that time, though, the anti-federalist opposition was stiffening, and it had become clear that the Constitution's advocates would have to make concessions to win the approval of most of the remaining states. In particular, the public needed reassurance that the jurisdiction of the new government would be sharply circumscribed.

Betsy Johnson was convinced that reform of the Articles of Confederation was necessary. Yet she was glad that the federalist momentum had slowed, for much about the new Constitution disquieted her. The document was so "high-toned,"<sup>69</sup> in the phrase of the day. It seemed so little regardful of the states and of people's local concerns. The drafters were, insofar as she knew of them, men she much respected, especially Dr. Franklin and General Washington. Yet she also knew that the consequences of ratification would survive any person then living.<sup>70</sup>

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65. 13 *id.*

66. Natelson, *Enumerated*, *supra* note 2, at 472–73.

67. *Id.* at 473.

68. U.S. CONST. art. VII.

69. For contemporary examples of variants of the phrase "high-toned" to describe government relatively distant from the people, see 1 Farrand, *supra* note 2, at 366 (Alexander Hamilton); 1 *id.* at 464 (James Madison); Letter from Nicholas Gilman to Joseph Gilman (July 31, 1787), in 3 *id.* at 66; Daniel Carroll, *Notes and Correspondence*, in 3 *id.* at 320 ("At that moment the Cant expression was high toned Government which superceeded [sic] the usual descriptions of Monarchy, Aristocracy, or Democracy.").

70. The importance of ratification or non-ratification to the future course of mankind was much discussed during the public debates. See, e.g., 13 DOCUMENTARY HISTORY, *supra* note 2, at 502 ("M.C." writing, "The present is universally acknowledged to be a most momentous aera [sic], as likely to decide the fate of a world for future ages."); 2 ELLIOT'S DEBATES, *supra* note 2, at 10 (Fisher Ames, speaking at the Massachusetts ratifying convention); 2 *id.* at 120–21 (General William Heath, speaking at the Massachusetts ratifying convention); 2 *id.* at 419 (James Wilson, speaking at the Pennsylvania ratifying convention); 3 *id.* at 271 (George Ma-



In early 1788, Mrs. Johnson began to read and hear things she found reassuring. Respected federalists such as James Madison<sup>71</sup> and James Wilson<sup>72</sup> publicly emphasized the new government's sharply limited scope. Other federalists published lists exemplifying the vast governmental functions outside the federal sphere that were to remain with the states and the people.<sup>73</sup> One of the list-makers was the prolific Tench Coxe, a businessman who wrote under several pseudonyms, but most of the others were celebrated lawyers.<sup>74</sup> Federalists also began to agree, sometimes reluctantly, to various amendments—the embryo of the Bill of Rights—further restricting national influence over individuals and states.

On the basis of these federalist concessions, states continued to ratify, but in every state except Maryland<sup>75</sup> prospective amendments were part of the basis of the bargain.<sup>76</sup> Conventions in Massachusetts, Virginia, New York, and New Hampshire approved the Constitution only by narrow margins, even after winning over some anti-federalists by offi-

son, speaking at the Virginia ratifying convention); THE FEDERALIST NO. 1 (Alexander Hamilton), *supra* note 2, at 1.

71. Madison wrote:

The powers delegated by the proposed constitution to the federal government, are few and defined. Those which are to remain in the state governments, are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several states will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the state.

THE FEDERALIST NO. 45 (James Madison), *supra* note 2, at 241.

72. Wilson said:

I leave it to every gentleman to say whether the [enumerated] powers are not as accurately and minutely defined, as can be well done on the same subject, in the same language. . . . nor does it, in any degree, go beyond the particular enumeration; for, when it is said that Congress shall have power to make all laws which shall be necessary and proper, those words are limited and defined by the following, "for carrying into execution the foregoing powers." It is saying no more than that the powers we have already particularly given, shall be effectually carried into execution.

2 ELLIOT'S DEBATES, *supra* note 2, at 468 (Wilson, speaking at Pennsylvania ratifying convention).

73. Natelson, *Enumerated*, *supra* note 2, at 479–88.

74. *Id.* at 479–80.

75. 13 DOCUMENTARY HISTORY, *supra* note 2, at xli. The vote for ratification in Maryland was lopsided: 63–11. 13 *id.*

76. An extant letter from Madison to Hamilton offers a glimpse into the bartering process. Letter from James Madison to Alexander Hamilton (June 22, 1788), *in* 10 *id.* at 1665 (discussing the plan of the federalists to concede recommendatory amendments so as to secure ratification in Virginia).

cially proposing amendments.<sup>77</sup> South Carolina approved by a wider margin, but also proposed amendments.<sup>78</sup> Two states—North Carolina and Rhode Island—flatly refused to consent until Congress had sent amendments to the states for approval.<sup>79</sup>

All around her, Betsy Johnson witnessed, and sometimes participated in, a public debate of great vigor. It surfaced in personal exchanges and raged in convention elections, in orations and pamphlets, in the newspapers, in state legislatures, and in the ratifying conventions.<sup>80</sup> Thus was shaped the great democratic political bargain that established the American form of government.

### III. KINDS OF FEDERAL PROPERTY: ENCLAVES, TERRITORIES, AND “OTHER PROPERTY”

#### *A. The General Scheme*

During the eighteenth century, reading was a more leisurely and thoughtful enterprise than it usually is today. Local newspapers had reprinted the proposed Constitution, and Betsy and Edmund Johnson perused it on several successive evenings before the hearth. They had an interest in the clauses pertaining to federal land ownership; several of their friends had title to land in the Northwest Territory, and other friends

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77. The Constitution was approved in Massachusetts by a vote of 187–168, in Virginia by 89–79, in New York by 30–27, and in New Hampshire by 57–47. 13 *id.* at xli–xlii.

78. The vote in South Carolina was 149–73. 13 *id.* at xlii.

79. 13 *id.* at xlii.

80. There is much historical testimony to the ubiquity of the debate. To cite just a handful of examples: A few weeks after the federal convention adjourned, Virginia’s St. George Tucker reported to his wife, “The Topic of the day is the new Constitution.” Letter from St. George Tucker to Frances Bland Tucker (Oct. 3, 1787), in 8 *id.* at 35. On October 21, 1787, James Madison, then in New York, wrote to Edmund Randolph that already, “The Newspapers in the middle & Northern States begin to teem with controversial publications.” Letter from James Madison to Edmund Randolph (Oct. 21, 1787), in 13 *id.* at 429. A week later, George Lee Turberville wrote to Arthur Lee, “The plan of a Government proposed to us by the Convention—affords matter for conversation to every rank of beings from the Governor to the door keeper—& the opinions appear to be as various as the persons possessing them . . .” Letter from George Lee Turberville to Arthur Lee (Oct. 28, 1787), in 8 *id.* at 127. *See also* Letter from James Breckinridge to John Breckinridge (Oct. 31, 1787), in 8 *id.* at 136; Letter from James Madison to Thomas Jefferson (Dec. 9, 1787), in 8 *id.* at 226 (“The Constitution proposed by the late Convention engrosses almost the whole political attention of America.”); Letter from James McClurg to James Madison (Oct. 31, 1787), in 8 *id.* at 137. After eleven states had ratified, Francis Hopkinson wrote that “Since the World began, I believe no Question has ever been more repeatedly & strictly scrutinized [sic] or more fairly & freely argued, than this proposed Constitution . . .” Letter from Francis Hopkinson to Thomas Jefferson (July 17, 1788), in 18 *id.* at 270.

held continental securities, which they expected to be redeemed, if at all, from congressional sale of western lands.<sup>81</sup> In addition, the Johnsons' eldest son was talking about joining the Continental Army. His parents realized how difficult his job might be if Congress did not obtain effective power to acquire, fund, and maintain western military installations.<sup>82</sup>

The Johnsons noticed that the Constitution distributed federal lands into three classes. The first was "territory," so labeled in the Property Clause.<sup>83</sup> Territory was the land lying outside the boundaries of all states, ceded to Congress by Britain and by individual states, and extending north from the Ohio River and west to the Mississippi River.<sup>84</sup> The Johnsons knew that later acquisitions of "territory" were possible, because Virginia, North Carolina, and Georgia might be persuaded to cede southwestern lands to Congress.<sup>85</sup> Many Americans hoped the United States eventually would annex Canada and all or parts of Florida and Louisiana.<sup>86</sup> The Johnsons recognized that if the Constitution were adopted and the federal government acquired more territory, the Management Power in the Property Clause would give Congress the capacity to "make all needful Rules and Regulations respecting" it.<sup>87</sup>

The Constitution's second class of federal land ownership was authorized by what is now called the Enclave Clause: in Article I, Section 8, Clause 17.<sup>88</sup> I will examine the Enclave Clause in the next subpart because its content, structure, and history shed light on our primary topic: the third class of federal land, called by the Constitution "other Property."<sup>89</sup>

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81. See *infra* Part IV.C.4.

82. See *infra* Part IV.C.4.

83. U.S. CONST. art. IV, § 3, cl. 2.

84. MCDONALD, *supra* note 2, at 95.

85. *Id.* at 95, 168.

86. The Articles of Confederation had contemplated the annexation of land to the United States. ARTICLES OF CONFEDERATION art. XI ("Canada acceding to this confederation, and joining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union: but no other colony shall be admitted into the same, unless such admission be agreed to by nine States."). See also 2 ELLIOT'S DEBATES, *supra* note 2, at 189 (quoting Oliver Ellsworth, who at the Connecticut ratifying convention, argued that failure to ratify would encourage Spain not "to relinquish the exclusive navigation of the Mississippi, or the territory which she claims on the east side of that river"); 2 Farrand, *supra* note 2, at 457–59, 461–66 (Gouverneur Morris writing that at the time of the federal convention he had hoped the United States would acquire Canada and Louisiana).

87. U.S. CONST. art. IV, § 3, cl. 2. It sometimes is asserted that "territory" in this clause referred only to then existing territories. *E.g.*, Hardwicke, *supra* note 2, at 423. I have seen no evidence of this. On the modern law, see 1 ROTUNDA & NOWAK, *supra* note 2, at 386.

88. U.S. CONST. art. I, § 8, cl. 17.

89. U.S. CONST. art. IV, § 3, cl. 2.

### *B. Enclave Property*

The Johnsons learned from the Constitution and from columns in newspapers<sup>90</sup> and pamphlets<sup>91</sup> that the new government was to be one of only enumerated powers.<sup>92</sup> It was to have no jurisdiction beyond that granted in the instrument. Most enumerated powers were listed in Article I, Section 8, although some others, such as authority to make treaties<sup>93</sup> and dispose of land,<sup>94</sup> lay elsewhere in the document. The Enclave Clause was the second-to-last power in Article I, Section 8. It authorized Congress

[t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . . .<sup>95</sup>

Thus, federal enclaves, unlike territories, were to be located within particular states. Enclaves were to be subject to the general legislative authority of Congress. The phrase “exclusive Legislation” implied that state laws had no force within federal enclaves,<sup>96</sup> although a very few

90. See, e.g., 1 Farrand, *supra* note 2, at 464 (James Madison).

91. E.g., Noah Webster, *To the Dissenting Members of the Late Convention of Pennsylvania*, in FRIENDS OF THE CONSTITUTION: WRITINGS OF THE “OTHER” FEDERALISTS: 1787–1788 176 (Colleen A. Sheehan & Gary L. McDowell eds., 1998) (writing as “America”).

92. *M’Cullough v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) (“This government is acknowledged by all to be one of enumerated powers.”) (Marshall, C.J.).

93. U.S. CONST. art. II, § 2, cl. 2 (“He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .”).

94. U.S. CONST. art. IV, § 3, cl. 2 (“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.”).

95. U.S. CONST. art. I, § 8, cl. 17.

96. See also 3 ELLIOT’S DEBATES, *supra* note 2, at 419 (John Marshall, stating at the Virginia ratifying convention, “The power of legislating given them within the ten miles square is exclusive of the states, because it is expressed to be exclusive.”); 3 *id.* at 434 (William Grayson, making a similar point at the same convention); THE FEDERALIST NO. 32 (Alexander Hamilton), *supra* note 2, at 155 (stating that the capital district will be governed only by federal law).

Early in its history the Supreme Court adopted this rule for the District of Columbia. *Reily v. Lamar*, 6 U.S. (2 Cranch) 344 (1805) (Marshall, C.J.). See also *United States v. Cornell*, 25 F. Cas. 650 (C.C.R.I. 1820) (Story, J.) (applying the same rule to a fort under U.S. ju-

thought that state legislation would survive to the extent it was not superseded by federal law.<sup>97</sup>

Betsy Johnson noticed that to be eligible for ownership under the Enclave Clause, “Buildings” had to be “needful.” The adjective “needful” was a much more familiar word for her than it is for us today. It was a common synonym for “necessary.”<sup>98</sup> Both words had several meanings, and they changed meanings together. In some circumstances, “necessary” or “needful” could mean “indispensable.”<sup>99</sup> At the opposite extreme, when they were used in phrases such as “as he shall judge needful,” and “whenever [they] shall deem it necessary,” they meant that the decision maker could do practically anything he or she wanted.<sup>100</sup> What did “needful” mean in this case?

The answer came from an unexpected direction. Mrs. Johnson had heard of the public dispute over the Necessary and Proper Clause,<sup>101</sup> one of the most controversial of the enumerated powers given to Congress. That clause had disturbed her, because at first glance it seemed to be a vague and limitless font of congressional power. The anti-federalists were representing it as such.<sup>102</sup>

risdiction). *But see* Engdahl, *supra* note 2, at 288–89 (arguing that “exclusive legislation” means only the power to legislate with preemptive effect).

97. *See* 3 ELLIOT’S DEBATES, *supra* note 2, at 435 (George Nicholas, speaking at the Virginia ratifying convention). Engdahl, *supra* note 2, at 289, cites THE FEDERALIST NO. 43 (James Madison) for this proposition, but this seems to be a misreading. Madison apparently was referring to a future municipal government—“a municipal legislature for local purposes”—for the capital district, not the government of the ceding state. THE FEDERALIST NO. 43 (James Madison), *supra* note 2, at 223.

The Supreme Court has adopted the “legal co-existence” principle for some enclaves. *Evans v. Comm’n*, 398 U.S. 419 (1970); *Howard v. Comm’rs. of Sinking Fund of the City of Louisville*, 344 U.S. 624 (1953).

98. *M’Cullough v. Maryland*, 17 U.S. (4 Wheat.) 316, 356 (1819) (“‘Necessary and proper’ are, then, equivalent to *needful and adapted*.”); Alexander Hamilton, *Opinion on the Constitutionality of the National Bank*, in M. ST. CLAIR CLARK & D.A. HALL, LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 97 (Augustus M. Kelley ed., 1967) (1832); JOHNSON’S DICTIONARY, *supra* note 2 (giving the definition of “needful” as “Necessary; indispensably requisite” and the first definition of “necessary” as “Needful, indispensably requisite”).

99. JOHNSON’S DICTIONARY, *supra* note 2 (defining both “needful” and “necessary” as, sometimes “indispensably requisite”). *Cf.* U.S. CONST. art. I, § 7, cl. 3; *id.* art. II, § 1, cl. 3 (both using “necessary” in a procedural context as “indispensable”). For other examples, see Natelson, *Necessary and Proper*, *supra* note 2.

100. *E.g.*, U.S. CONST. art. II, § 3. *See also id.* art. V (“shall deem it necessary”).

101. *Id.* art. I, § 8, cl. 18 (“The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).

102. 5 DOCUMENTARY HISTORY, *supra* note 2, at 846 (“The Republican Federalist,” calling it the “omnipotent clause”); 3 ELLIOT’S DEBATES, *supra* note 2, at 150 (quoting Patrick Henry, who called it the “sweeping clause” at the Virginia ratifying convention). For one of

Then, one day, the Johnsons were conducting some business with their family lawyer. That worthy gentleman gave them several documents to sign, one of which was a power of attorney appointing an agent for Edmund's retailing business. Betsy noticed that the power of attorney included wording very reminiscent of the Necessary and Proper Clause.<sup>103</sup> She asked her lawyer if the similarity was intentional, and he assured her that it almost certainly was. He reminded her that many of the Constitution's drafters were distinguished lawyers, including some who had received their training in the finest institutions in Britain.<sup>104</sup> The Necessary and Proper Clause made it clear that the Constitution incorporated an established principle of agency law known as the doctrine of implied incidental powers.<sup>105</sup> The clause reflected the view that in the new government Congress would be the agent of the people.<sup>106</sup>

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many newspaper attacks on it, see 16 DOCUMENTARY HISTORY, *supra* note 2, at 120 (referring to it as "Brutus").

103. Readers who doubt that in the eighteenth century a woman might be called upon to sign such an instrument should examine *Howard v. Bailie*, 126 Eng. Rep. 737, 741 (K.B. 1796) (involving a woman as principal in a power of attorney granting "necessary or proper" power to her business agents).

104. The Necessary and Proper Clause was drafted by four of the country's leading attorneys: Edmund Randolph, Oliver Ellsworth, James Wilson, and John Rutledge. Natelson, *Necessary and Proper*, *supra* note 2. Wilson had studied at St. Andrews University in Scotland and trained in the law office of John Dickinson. CLINTON ROSSITER, 1787: THE GRAND CONVENTION 104-05 (1966). The "finest institutions in Britain" referred to in the text were the Inns of Court, where seven other delegates had been trained. See E. ALFRED JONES, AMERICAN MEMBERS OF THE INNS OF COURT 21-22, 61-63, 102, 104-05, 134-35, 170-72 (1924) (discussing John Blair, John Dickinson, William Houston, Jared Ingersoll, William Livingston, Charles Pinckney, and Charles Cotesworth Pinckney). Inns of Court alumni also served as leaders of the federalist faction during the ratification process. See *id.* at 124-25 (Henry Lee, a federalist speaker at the Virginia ratifying convention); *id.* at 216-17 (Alexander White, author of one of the published enumerations of state powers and a leading federalist spokesman in Virginia); 8 DOCUMENTARY HISTORY, *supra* note 2, at 525 (Francis Corbin, leading federalist spokesman at the Virginia ratifying convention).

105. See generally Natelson, *Necessary and Proper*, *supra* note 2.

106. See, e.g., 2 Farrand, *supra* note 2, at 260 (James Wilson, referring to federal officials as the agents of the people). Many others in the founding generation made explicit their view of free government as an agency arrangement. See, e.g., 3 ELLIOT'S DEBATES, *supra* note 2, at 306 (James Madison, at the Virginia ratifying convention, stating: "The members of the one government, as well as of the other, are the agents of, and subordinate to, the people."); 3 *id.* at 225 (John Marshall, speaking at the Virginia ratifying convention: "You cannot exercise the powers of government personally yourselves. You must trust to agents."); 3 *id.* at 227 ("We are answered, that the powers may be abused; that . . . Congress may . . . prostitute their powers to destroy our liberties. This goes to the destruction of all confidence in agents."); 3 *id.* at 233 ("Are they not both the servants of the people? Are not Congress and the state legislatures the agents of the people, and are they not to consult the good of the people?"); 2 Farrand, *supra* note 2, at 377 ("Mr. Elsworth argued that they were unnecessary. The U- S- heretofore entered into Engagements [i.e., debts] by Congs who were their Agents. They will hereafter be bound to fulfil [sic] them by their new agents."); THE FEDERALIST NO. 14 (James Madison), *supra* note 2, at 63 (Congress to be the people's "representatives and agents"); THE

The Johnsons' lawyer added that the implied incidental powers doctrine had been refined through two centuries of English case law. "You need to know, therefore," he said, "that when you sign this document giving your agent 'needful and necessary'<sup>107</sup> powers to carry on a general retailing business, he must stay within the scope of his mandate—he must limit himself to accomplishing your goals. But by these words you give him more than just the powers absolutely or reasonably necessary to accomplish those goals. You also give him considerable discretion to use means that are customary or even convenient to accomplish your purpose.<sup>108</sup> If you want to restrict your agent's discretion more narrowly, you will have to specify in the document that you are giving only *absolutely necessary* powers."<sup>109</sup>

He added that he was less certain about the meaning of the term "proper" in the Necessary and Proper Clause, but it was a common word in agency usage. To be proper, any law Congress adopted had to meet fiduciary standards inherent in the agency relationship.<sup>110</sup> In other words, to be "proper" a law had to comply with the rules in the Constitution, treat citizens relatively impartially, and represent a good faith effort to effectuate an enumerated power. It could not be a mere pretext to regulate something else.<sup>111</sup>

Mrs. Johnson later read a federalist tract explaining the Necessary and Proper Clause as, essentially, surplusage—a mere rule of interpreta-

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FEDERALIST NO. 46 (James Madison), *supra* note 2, at 243 ("The federal and State governments are in fact but different agents and trustees of the people . . ."); THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 2, at 404 ("If there should happen to be an irreconcilable variance between the two . . . the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.").

107. An example of elegant variation: *Cf.* SCOTT J. BURNAM, DRAFTING AND ANALYZING CONTRACTS 227 (3d ed. 2003) (referring to this poor drafting practice). However, this wording was common in eighteenth century powers of attorney. *See, e.g.*, ANONYMOUS, THE ATTORNEY'S COMPLEAT POCKET-BOOK 174 (3d ed. 1751) ("to do, execute and accomplish, all and whatsoever shall be needful and necessary to be done in or about the Premises [sic]"); *id.* at 174–75 ("to execute, seal and deliver such Conveyances and Assurances of the said Premises [sic] . . . as shall be needful and requisite for the doing thereof . . . granting unto my said Attorney full Power and absolute Authority to do, execute and perform any Act or Acts, Thing or Things whatsoever, that shall be needful and necessary to be done"). The "Pocket-Book" was what we would call a form book today, presenting common legal forms for common transactions.

108. *See* Natelson, *Necessary and Proper*, *supra* note 2. *Cf.* *M'Cullough v. Maryland*, 17 U.S. (4 Wheat) at 413 ("If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another.").

109. *Cf.* U.S. CONST. art. I, § 10, cl. 2 (requiring use of the phrase "absolutely necessary" in the policy context).

110. Natelson, *Necessary and Proper*, *supra* note 2.

111. *Id.*

tion, without which federal authority would remain unchanged.<sup>112</sup> The clause was surplusage, it seemed, because the grant of express powers implicitly authorized any “necessary” means, and because “improper” actions were *ultra vires* breaches of trust even without the clause.<sup>113</sup> Mrs. Johnson found this somewhat reassuring, but still thought it would be a good idea to add some clarifying amendments.<sup>114</sup>

So when Mrs. Johnson reread the Enclave Clause, she saw that “needful” meant the same thing as “necessary” in the Necessary and Proper Clause; indeed, it had replaced “necessary” in an earlier draft.<sup>115</sup> To qualify as a federal enclave, a building had to be necessary, customary, or convenient for executing an enumerated power—not merely needful in the abstract. This was confirmed by the examples of “needful Buildings” listed in the Constitution: “Forts, Magazines, Arsenals, dock-Yards.” It also was confirmed by the federalist essays she had read listing governmental powers outside the federal domain.<sup>116</sup> These essays had pointed out that buildings for purposes outside the enumerated powers, such as schools and poorhouses, would not be within the domain of Congress.<sup>117</sup>

The drafters had inserted the Enclave Clause to better effectuate the fiduciary ideal of impartiality.<sup>118</sup> They wanted federal installations to be

112. *E.g.*, THE FEDERALIST NO. 33 (Alexander Hamilton), NO. 44 (James Madison).

113. *See supra* notes 44–46 and accompanying text.

114. The Ninth and Tenth Amendments were added for that purpose. Natelson, *Necessary and Proper*, *supra* note 2. Governor Edmund Randolph of Virginia was central to adoption of these amendments as clarifying the Necessary and Proper Clause. *Id.*

115. 2 Farrand, *supra* note 2, at 321, 325. Madison apparently made the initial proposal. 2 *id.* at 324–25.

116. *See* Natelson, *Enumerated*, *supra* note 2.

117. 5 DOCUMENTARY HISTORY, *supra* note 2, at 652 (Massachusetts Gazette article, representing that charity schools and poorhouses were outside the federal sphere); 5 *id.* at 568 (Justice Nathaniel Peaslee Sargeant, representing that schools and institutions for the poor were outside the federal sphere).

118. On July 26, 1787, at the Constitutional Convention, George Mason proposed the idea of a federal capital district:

Col. Mason. observed that it would be proper, as he thought, that some provision should be made in the Constitution agst. choosing for the seat of the Genl. Govt. the City or place at which the seat of any State Govt. might be fixt. There were 2 objections agst. having them at the same place, which without mentioning others, required some precaution on the subject. The 1st. was that it tended to produce disputes concerning jurisdiction—The 2d. & principal one was that the intermixture of the two Legislatures tended to give a provincial tincture to ye Natl. deliberations. He moved that the Come. be instructed to receive a clause to prevent the seat of the Natl. Govt. being <in the same City or town with> the seat of <the Govt. of> any State <longer> than untill [sic] the necessary public buildings could be erected.

2 Farrand, *supra* note 2, at 127. The motion was seconded and the idea discussed for a time and then deferred. 2 *id.* at 127–28.

On August 11, James Madison set forth the following rational for a capital district:



independent of the states in which they were located. Various historical examples compelled this conclusion, but the most recent had befallen only four years before the convention, when in June, 1783, mutinous soldiers, angry because they had not been paid, besieged Congress in the State House in Philadelphia.<sup>119</sup> Without its own police force, Congress had to ask the Pennsylvania executive council to call out the state militia.<sup>120</sup> To Congress' mortification, the council refused. Although the soldiers refrained from molesting any of its members, Congress nevertheless felt compelled to leave the state and convened for several weeks at Princeton, New Jersey. This incident led Congressman Benjamin Hawkins to move "[t]hat a Committee be appointed to consider and define the jurisdiction proper to be established by Congress within the bounds of the district that may be allotted to them by the State in which they may chose [sic] to fix their permanent residence."<sup>121</sup> Congress authorized creation of the committee, which subsequently recommended a

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Mr. <Madison> supposed that a central place for the Seat of Govt. was so just and wd. be so much insisted on by the H. of Representatives, that though a law should <be made requisite for> the purpose, it could & would be attained. The necessity of a central residence of the Govt wd be much greater under the new than old Govt The members of the <new> Govt wd. be more numerous. They would be taken more from the interior parts of the States: they wd. not, like members of <ye present> Congs. come so often from the distant States by water. As the powers & objects of the new Govt. would be far greater <yn. heretofore>, more private individuals wd. have business calling them to the seat of it, and *it was more necessary that the Govt should be in that position from which it could contemplate with the most equal eye, and sympathize most equally with, every part of the nation.*

2 *id.* at 261 (emphasis added).

On August 18, the predecessor of the Enclave Clause was proposed. 2 *id.* at 321–22. See also 2 *id.* at 364 (referral to committee of detail on August 18). It was polished and presented by the Brearly Committee of Eleven on September 5, 2 *id.* at 505–06, then amended and adopted. 2 *id.* at 510.

119. The story is told concisely in WILLIAM GARROTT BROWN, *THE LIFE OF OLIVER ELLSWORTH* 102–03 (1905).

120. 24 J. CONTINENTAL CONG. 410 (1783), available at [http://lcweb2.loc.gov/cgi-bin/query/r?ammem/hlaw:@field\(DOCID+@lit\(jc024158\)\)](http://lcweb2.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(jc024158))). The petition read in part:

Resolved, That the president and supreme executive council of Pennsylvania, be informed that the authority of the United States having been this day grossly insulted by the disorderly and menacing appearance of a body of armed soldiers about the place within which Congress were assembled, and the peace of this city being endangered by the mutinous disposition of the said troops now in the barracks, it is, in the opinion of Congress, necessary that effectual measures be immediately taken for supporting the public authority.

24 *id.*

121. 24 *id.* at 428, available at [http://lcweb2.loc.gov/cgi-bin/query/r?ammem/hlaw:@field\(DOCID+@lit\(jc024164\)\)](http://lcweb2.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(jc024164))).

capital district between three and six miles square, subject to exclusive federal jurisdiction.<sup>122</sup>

Although the Confederation Congress did not get its capital district, the drafters of the Constitution were determined that the federal authority never again would find itself at the mercy of the policymakers of any state. Hence the insertion of the Enclave Clause.

During the subsequent ratification debates, a few anti-federalists denied that the Enclave Clause was necessary,<sup>123</sup> but most participants who spoke to the issue<sup>124</sup>—including some anti-federalists<sup>125</sup>—

122. 25 *id.* at 603–04, available at [http://lcweb2.loc.gov/cgi-bin/query/r?ammem/nhlaw:@field\(DOCID+@lit\(jc02517\)\)](http://lcweb2.loc.gov/cgi-bin/query/r?ammem/nhlaw:@field(DOCID+@lit(jc02517))).

123. See, e.g., Letter from Caleb Wallace to William Fleming (May 3, 1788), in 9 DOCUMENTARY HISTORY, *supra* note 2, at 782–83; 3 ELLIOT'S DEBATES, *supra* note 2, at 146 (Patrick Henry, at the Virginia ratifying convention, stating that Holland, “the fairest country in the world” got along well without a Ten Miles Square). Governor Edmund Randolph responded to Henry:

Holland [Randolph means the entire United Provinces of the Netherlands], it seems, has no ten miles square. But she has the Hague, where the deputies of the states assemble. It has been found necessary to have a fixed place of meeting. But the influence which it has given the province of Holland [one of the seven provinces] to have the seat of the government within its territory, subject in some respects to its control, has been injurious to the other provinces. The wisdom of the Convention is therefore manifest in granting the Congress exclusive jurisdiction over the place of their session.

3 *id.* at 190.

124. See, e.g., 4 *id.* at 219–20 (James Iredell, speaking at the North Carolina ratifying convention). See also THE FEDERALIST NO. 43 (James Madison), *supra* note 2, at 222–23:

The indispensable necessity of complete authority at the seat of government, carries its own evidence with it. It is a power exercised by every legislature of the union, I might say of the world, by virtue of its general supremacy. Without it, not only the public authority might be insulted, and its proceedings be interrupted with impunity, but a dependence of the members of the general government on the state comprehending the seat of the government, for protection in the exercise of their duty, might bring on the national councils an imputation of awe or influence, equally dishonorable to the government and dissatisfactory to the other members of the confederacy. This consideration has the more weight, as the gradual accumulation of public improvements at the stationary residence of the government, would be both too great a public pledge to be left in the hands of a single state, and would create so many obstacles to a removal of the government, as still further to abridge its necessary independence.

....

The necessity of a like authority over forts, magazines, &c. established by the general government, is not less evident. The public money expended on such places, and the public property deposited in them, require, that they should be exempt from the authority of the particular state. Nor would it be proper for the places on which the security of the entire union may depend, to be in any degree dependent on a particular member of it. All objections and scruples are here also obviated, by requiring the concurrence of the states concerned in every such establishment.

In further support came the following from the Massachusetts ratifying convention:

recognized the need to shield important federal installations from insult, intimidation, or undue influence from the states where those installations were located.

The anti-federalists' principal complaint about the Enclave Clause was that it might be abused. They agreed with the goal of official impartiality, but argued that the new government might employ the Enclave Clause to defeat that goal. At the Virginia ratifying convention, for example, William Grayson predicted that Congress might grant monopolies and other special privileges to companies in the capital district and other federal enclaves.<sup>126</sup> Anti-federalists such as New York's Gilbert

Hon. Mr. STRONG said, every gentleman must think that the erection of a federal town was necessary, wherein Congress might remain protected from insult. A few years ago, said the honorable gentleman, Congress had to remove, because they were not protected by the authority of the state in which they were then sitting. He asked whether this Convention, though convened for but a short period, did not think it was necessary that they should have power to protect themselves from insult; much more so must they think it necessary to provide for Congress, considering they are to be a permanent body.

Hon. Mr. DAVIS (of Boston) said it was necessary that Congress should have a permanent residence; and that it was the intention of Congress, under the Confederation, to erect a federal town. He asked, Would Massachusetts, or any other state, wish to give to New York, or the state in which Congress shall sit, the power to influence the proceedings of that body, which was to act for the benefit of the whole, by leaving them liable to the outrage of the citizens of such states?

2 ELLIOT'S DEBATES, *supra* note 2, at 99; *see also* 3 *id.* at 433 (James Madison, speaking at the Virginia ratifying convention):

How could the general government be guarded from the undue influence of particular states, or from insults, without such exclusive power? If it were at the pleasure of a particular state to control the session and deliberations of Congress, would they be secure from insults, or the influence of such state? If this commonwealth depended, for the freedom of deliberation, on the laws of any state where it might be necessary to sit, would it not be liable to attacks of that nature (and with more indignity) which have been already offered to Congress?

*See also* 3 *id.* at 439–40 (Edmund Pendleton, speaking at the same convention).

125. *See, e.g.*, 3 *id.* at 291 (William Grayson, speaking at the Virginia ratifying convention); 3 *id.* at 432 (George Mason, who had proposed enclaves at the federal convention, speaking at the Virginia ratifying convention). *But see* 3 *id.* at 434 (Grayson, at the same convention, suggesting that Congressional jurisdiction over the capital district should not be *exclusive*).

126. 3 *id.* at 291:

Perhaps I am mistaken, but it occurs to me that Congress may give exclusive privileges to merchants residing within the ten miles square, and that the same exclusive power of legislation will enable them to grant similar privileges to merchants in the strongholds within the states. . . . [I]n process of time, and from the simple operation of effects from causes, the whole commerce of the United States may be exclusively carried on by merchants residing within the seat of government, and those places of arms which may be purchased of the state legislatures. . . . Things of a similar nature have happened in other countries; or else from whence have issued the Hanse

Livingston and Virginia's Patrick Henry and George Mason feared that residents of the "Ten Miles Square" would consist largely of dependents of the government who would lose sympathy with the rest of the country and administer affairs to suit themselves.<sup>127</sup> Anti-federalists further argued that Congress might use military enclaves to intimidate the states<sup>128</sup>

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Towns, Cinque Ports, and other places in Europe, which have peculiar privileges in commerce as well as in other matters?

See also 3 *id.* at 430–31 (same). For the notion that granting monopolies was a breach of trust, see, for example, Letter from James Madison to George Washington (Oct. 18, 1787), in 13 DOCUMENTARY HISTORY, *supra* note 2, at 408 (suggesting that granting monopolies would be a breach of trust and outside Congress's enumerated powers).

127. See, e.g., 2 ELLIOT'S DEBATES, *supra* note 2, at 287–88 (Gilbert Livingston, speaking at the New York ratifying convention); 3 *id.* at 158 (Patrick Henry, speaking at the Virginia ratifying convention); 3 *id.* at 431 (George Mason, speaking at the same convention); see also Letter from Caleb Wallace to William Fleming (May 3, 1788), in 9 DOCUMENTARY HISTORY, *supra* note 2, at 782–83, writing that the capital district

will be the most successful nursery of slaves that ever was devised by man . . . . The sum of the whole is, that these numerous and wealthy slaves will infallibly be devoted to the views of their masters; and having surrendered their own, will always be ready to trample on the rights of free men. . . . By these officers, or rather creatures of state, the supreme government will be administered and Congressional purposes accomplished without regard to the State governments or feeling for individuals.

9 *id.*

128. There are numerous surviving examples of anti-federalist concern about the dangers in the "ten miles square" and the federal military enclaves. *E.g.*, 14 DOCUMENTARY HISTORY, *supra* note 2, at 182 ("Cato" declaiming against the "ten miles square"); 2 Farrand, *supra* note 2, at 510 (Elbridge Gerry, speaking at the federal convention); see also 17 DOCUMENTARY HISTORY, *supra* note 2, at 46 (Consider Arms, Malachi Maynard & Samuel Field):

When we take a forward view of the proposed Congress, seated in the federal city, ten miles square, fortified and replenished with all kinds of military stores, and every implement—with a navy at command on one side, and a land army on the other. We say, when we view them, thus possessed of the sword in one hand and the purse-strings of the people in the other, we can see no security left for them in the enjoyment of their liberties . . . .

See also 2 ELLIOT'S DEBATES, *supra* note 2, at 62 (Major Kingsley at the Massachusetts ratifying convention):

[O]ur federal rulers will be masters, and not servants. I will examine what powers we have given to our masters. They have power to lay and collect all taxes, duties, imposts, and excises; raise armies; fit out navies; to establish themselves in a federal town of ten miles square, equal to four middling townships; erect forts, magazines, arsenals, &c. . . .

It has been said that there was no such danger here. I will suppose they were to attempt the experiment, after we have given them all our money, established them in a federal town, given them the power of coining money and raising a standing army, and to establish their arbitrary government; what resources have the people left?

See also 4 *id.* at 203 (William Lenoir, at the North Carolina ratifying convention, stating: "They have also an exclusive legislation in their ten miles square, to which may be added their power over the militia, who may be carried thither and kept there for life. Should any one

and thereby undermine the independence of *state* governments from undue *federal* influence.

Feeding anti-federalist fears was the conviction that the enclaves might be too large. One of the best essayists to oppose the Constitution—the “Federal Farmer”—noted that ten miles square was four times the area of London.<sup>129</sup> When Patrick Henry led the opposition to the Constitution at the Virginia ratifying convention, part of his larger assault on Article I, Section 8 was his claim that

[t]he clause before you gives a power of direct taxation, unbounded and unlimited, exclusive power of legislation, in all cases whatsoever, for ten miles square, and over all places purchased for the erection of forts, magazines, arsenals, dockyards, &c. What resistance could be made? The attempt would be madness. You will find all the strength of this country in the hands of your enemies; their garrisons will naturally be the strongest places in the country.<sup>130</sup>

Betsy Johnson noticed that, in addition to justifying the Enclave Clause’s role as a guardian of federal independence, the friends of the Constitution offered a three-prong defense of that provision. First, they suggested that the residents of the Ten Miles Square might not be as wicked as anti-federalists feared.<sup>131</sup> Being a skeptical woman, Mrs. Johnson did not think much of that argument. She found the federalists’ second point more persuasive: an enclave could not be created without the consent of the local state legislature, which could impose conditions to guard state independence.<sup>132</sup> She also was reassured by the propo-

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grumble at their acts, he would be deemed a traitor, and perhaps taken up and carried to the exclusive legislation, and there tried without a jury.”).

129. 17 DOCUMENTARY HISTORY, *supra* note 2, at 366–68 (the “Federal Farmer,” expressing a concern about a federal district four times the area of London). *See also* 2 ELLIOT’S DEBATES, *supra* note 2, at 62 (Major Kingsley at the Massachusetts ratifying convention, complaining that the capital district will be as large as “four middling townships”); 2 *id.* at 99 (“Dr. TAYLOR asked, why it need be *ten miles square*, and whether one mile square would not be sufficient.”).

130. 3 ELLIOT’S DEBATES, *supra* note 2, at 51 (speaking at the Virginia ratifying convention). *See also* 3 *id.* at 56 (“I believe I should take up very little of your time in enumerating the little power that is left to the government of Virginia; for this power is reduced to little or nothing: their garrisons, magazines, arsenals, and forts, which will be situated in the strongest places within the states; their ten miles square, with all the fine ornaments of human life, added to their powers, and taken from the states, will reduce the power of the latter to nothing.”).

131. *See, e.g.*, 3 *id.* at 124 (Governor Edmund Randolph, speaking at the Virginia ratifying convention: “Will the ten miles square transform our representatives into brutes and tyrants? I see no grounds to distrust them.”); 3 *id.* at 435–36 (Henry Lee, making a similar point at the same convention); 3 *id.* at 558 (John Marshall, making a similar point at the same convention).

132. On September 5, 1787, the following colloquy took place at the Constitutional Convention, according to Madison’s notes:

nents' third contention: federal enclaves would be quite small. By the terms of the clause, all but one of the enclaves would consist only of "Buildings" and, presumably, appurtenant grounds. The largest enclave, the capital district—"this little spot"<sup>133</sup>—was to be limited to ten miles square and might well be even smaller.<sup>134</sup>

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On the residue, to wit, "to exercise like authority over all places purchased for forts &c. Mr Gerry contended 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 Genl. Government—Mr. King thought himself the provision unnecessary, the power being already involved: but would move to insert after the word 'purchased' the words 'by the consent of the Legislature of the State.' This would certainly make the power safe. Mr. Govr Morris 2ded. the motion, which was agreed to nem. con. as was then the residue of the clause as amended."

2 Farrand, *supra* note 2, at 510. The expression "nem. con.," which was used extensively in the notes of the convention, means "*nemine contradicente*"—that is, "no one contradicting" or unanimously. Of course, at the convention this referred to votes of state delegations, not individuals. *See also* 4 ELLIOT'S DEBATES, *supra* note 2, at 219–20 (James Iredell, at the North Carolina ratifying convention, arguing that a state could "stipulate the conditions of the cession"); THE FEDERALIST NO. 43 (James Madison), *supra* note 2, at 289 ("And as it [i.e., an enclave] is to be appropriated to this use with the consent of the State ceding it: as the State will no doubt provide in the compact for the rights and the consent of the citizens inhabiting it; as the inhabitants will find sufficient inducements of interest to become willing parties to the cession."). *Cf.* 3 ELLIOT'S DEBATES, *supra* note 2, at 89–90 (James Madison, speaking at the Virginia ratifying convention):

He next objects to the exclusive legislation over the district where the seat of government may be fixed. Would he submit that the representatives of this state should carry on their deliberations under the control of any other member of the Union? If any state had the power of legislation over the place where Congress should fix the general government, this would impair the dignity, and hazard the safety, of Congress. If the safety of the Union were under the control of any particular state, would not foreign corruption probably prevail, in such a state, to induce it to exert its controlling influence over the members of the general government? Gentlemen cannot have forgotten the disgraceful insult which Congress received some years ago. When we also reflect that the previous cession of particular states is necessary before Congress can legislate exclusively any where, we must, instead of being alarmed at this part, heartily approve of it.

*See also* 3 *id.* at 433 (James Madison, at the same convention, stating, "there must be a cession, by particular states, of the district to Congress, and that the states may settle the terms of the cession. The states may make what stipulation they please in it, and, if they apprehend any danger, they may refuse it altogether."); 3 *id.* at 434 (George Nicholas, at the same convention, making much the same point); 3 *id.* at 439 (James Madison, making the same point at the same convention). *But cf.* 1 ROTUNDA & NOWAK, *supra* note 2, at 387–88 (providing that at time of cession, state and federal government may agree on a plan of joint sovereignty).

133. 9 DOCUMENTARY HISTORY, *supra* note 2, at 674 ("A Native of Virginia").

134. *See, e.g.,* 3 ELLIOT'S DEBATES, *supra* note 2, at 432 (James Madison, at the Virginia ratifying convention, referring to the capital enclave as "a small district, which cannot exceed ten miles square, and may not be more than one mile"); *id.* (James Madison calling it "a very circumscribed district"); THE FEDERALIST NO. 43 (James Madison), *supra* note 2, at 223 ("The extent of this federal district is sufficiently circumscribed to satisfy every jealousy of an opposite nature.").

A modern Supreme Court opinion helps explain why the framers included size limitations as well as the state-consent requirement:

The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: “Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.”<sup>135</sup>

The framers had decided that no dependent or corrupt state legislature would be allowed to surrender huge tracts of state territory to Congress and threaten “the liberties that derive from the diffusion of sovereign power.”<sup>136</sup> Thus, the modern cases that rely solely on state consent and disregard limits on the size of enclaves<sup>137</sup> run contrary to the constitutional balance implicit in the Enclave Clause.

### C. “Other Property”

The Johnsons saw that there was a third class of federal land, which the Property Clause called “other Property.” Some conservative commentators have suggested that “other Property” referred to any future ter-

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135. *New York v. United States*, 505 U.S. 144, 181 (1992) (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991)). For a recognition of this basic principle by a commentator on the Property Clause, see Patterson, *supra* note 2, at 67 (reservation of powers to the states under the Constitution can’t be altered by state-federal compact).

136. *New York*, 505 U.S. at 181.

137. *See, e.g.*, *United States v. Armstrong*, 186 F.3d 1055 (8th Cir. 1999) (upholding Minnesota’s implied cession to federal government of jurisdiction over waters in national park); *United States v. Brown*, 552 F.2d 817 (8th Cir. 1971) (applying the Clause to the land and waters in a national park); *see also Peterson v. United States*, 191 F.2d 154 (9th Cir. 1951) (sustaining California’s cession to the federal government of regulatory power over private land within a national park). In *Peterson* the Court stated that:

no authority has been submitted nor does independent research reveal any basis for concluding that the sovereign state may not, as part of its power of sovereignty, cede part of its jurisdiction over privately owned property to its paramount sovereign cases like the instant case. To the contrary, it is clear that such cessions of jurisdiction, motivated by the comity between sovereigns, have been found to be lawful and proper for the reason that they are necessary in order to secure the great public benefits intended to be derived from the dedicated areas.

*Id.* at 156. As appears from the text above, the founders took *precisely* the opposite view of the matter. *See also infra* notes 217–19 (describing the assertions of federalists Harry Innes and Edmund that a free government has no just power to yield territorial sovereignty in a way that disadvantaged some of its citizens).

ritories,<sup>138</sup> but there is not much evidence for this position. On the contrary, the unmodified term “Territory” in the phrase, “The Congress shall have Power to dispose of . . . the Territory or other Property belonging to the United States”<sup>139</sup> was broad enough to include prospective acquisitions, such as Canada, Florida, or Louisiana. Conservative commentators also have argued that “other Property” referred only to federal enclaves and that the Constitution did not authorize other federal land ownership within state boundaries.<sup>140</sup> However, even one without legal training could see that because the Enclave Clause granted Congress authority to “exercise exclusive Legislation in all Cases whatsoever” over enclaves, if “other Property” had meant only enclaves then the power to “make all needful Rules and Regulations respecting . . . other Property”<sup>141</sup> would have been superfluous. So “other Property” had to mean something different from enclaves, and “Rules and Regulations” had to mean something less than “exclusive Legislation.”<sup>142</sup>

We can enlist the constitutional value of independence as a further aid to interpreting the meaning of “other Property.”<sup>143</sup> If Congress were

138. See, e.g., Brodie, *supra* note 2, at 720; Hardwicke, *supra* note 2, at 423; Patterson, *supra* note 2, at 54.

139. U.S. CONST. art. IV, § 3, cl. 2.

140. See, e.g., Brodie, *supra* note 2; Hardwicke *supra* note 2; Patterson, *supra* note 2. This view is based largely on the terms of land grants from states during the Confederation period and shortly thereafter, and on language—arguably dictum—in *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845). The *Pollard* language is arguably dictum because the constitutional issue was unnecessary to the decision of the case, which could have been resolved on the terms of the deeds of cession. The dictum is as follows:

And, if an express stipulation had been inserted in the agreement [i.e., the deed of cession and associated legislation], 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.

*Id.* at 223. The court then proceeded to reference the Enclave Clause.

Actually, the dictum is partially correct. The federal government may not enjoy a fully “sovereign” right over a territory within a state except through the Enclave Clause. However, applying this language to “other Property” is erroneous, because Congress may acquire and own such property by reason of the Necessary and Proper Clause—i.e., by implication from the enumerated powers. See *infra* Part IV.A–B.

141. U.S. CONST. art. IV, § 3, cl. 2.

142. As noted by one commentator, the Supreme Court has construed the Management Power of the Property Clause so broadly that it nearly duplicates the Enclave Clause. Brodie, *supra* note 2, at 711. *But cf.* Appel, *supra* note 2, at 10 (asserting the federal government’s “sovereign” power over Article IV property). See also *id.* at 30 (stating that the federal government’s power to arbitrate land claims suggested that it was not merely a proprietor but a sovereign, but missing the difference: arbitration was mostly outside of states; proprietorship was within).

143. See *supra* Part I.C.3.



prohibited from holding non-enclave land, states could interfere readily with the proper exercise of federal power. For years, Betsy Johnson and others of her generation had witnessed the Confederation Congress being held hostage to the whims of recalcitrant states. Like most of her contemporaries, she was absolutely sure she did not want that kind of obstruction to continue. "Posit a case, dear Husband," she told Mr. Johnson in her contemporaneous English,

in which a Post Office Building or a Post Road or a Customs House must needs qualify as an Enclave. The State where located could obstruct it merely by refusing to allow Congress to buy the needful Land. Think on how the States have obstructed the Requisitions of Congress under the Articles of Confederation. 'Tis just the Sort of Infelicity this Constitution is designed to correct.

At some level, therefore, Mrs. Johnson would have understood that interpreting "other Property" as enclaves alone would undercut a central value she and the rest of her generation were trying to promote: independence of governmental units from each other.<sup>144</sup> So for her, as it is for me, the conclusion was inescapable: "other Property" was land within the boundaries of a state, owned by the federal government, but not qualifying as an enclave.

#### IV. FEDERAL POWERS OVER "OTHER PROPERTY"

##### *A. Acquisition of "Other Property"*

On rereading the Constitution, Mrs. Johnson noticed that, other than in the Enclave Clause, the instrument granted no express or independent capacity to acquire "other Property."<sup>145</sup> The Property Clause authorized only management and disposal. However, after her talk with the family lawyer,<sup>146</sup> she could see that several enumerated powers, particularly when coupled with the Necessary and Proper Clause, granted considerable *implied* authority to acquire land. A government authorized to "establish Post Offices and post Roads"<sup>147</sup> would have capacity to acquire real estate for the purpose. The authority to govern relations with do-

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144. See *Kohl v. United States*, 91 U.S. 367 (1875). This case effectively overruled the dictum of *Pollard* that implied that the federal government may not own land within existing states except pursuant to the Enclave Clause. *Pollard*, 44 U.S. at 212.

145. It does not explicitly deny the power either. Gaetke, *supra* note 2, at 633.

146. See *supra* notes 99–107 and accompanying text.

147. U.S. CONST. art. I, § 8, cl. 7.

mestic Indian tribes<sup>148</sup> might imply a power to acquire and set aside land for displaced tribes.<sup>149</sup> The government's powers to "constitute tribunals inferior to the supreme Court,"<sup>150</sup> "raise and support Armies,"<sup>151</sup> and "maintain a Navy"<sup>152</sup>—even its need to house local tax, customs, and commerce officers<sup>153</sup>—all suggested authority to acquire useful real estate. From her modest reading in Greek and Roman classics,<sup>154</sup> Mrs. Johnson knew that wars and treaties often lead to land acquisition and cession. It followed that the Treaty Clause and the War Power also were potential vehicles for federal land acquisition<sup>155</sup>—although land acquired by war or treaty, being outside state boundaries, would be "Territory" and not "other Property."<sup>156</sup>

Further, Mrs. Johnson could see that even though the Property Clause expressly authorized only land management and disposal, it might justify incidental acquisitions as well. Local farmers sometimes bought adjacent land to make management of their own farms easier. Before selling a parcel of land the previous year, her husband had acquired a neighboring strip so as to command a much better price for the whole. That Congress could do this was shown by the Necessary and Proper Clause—with the caveat that any land purchase based on the Property Clause would have to be truly incidental to management or disposal.

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148. *Id.* art. I, § 8, cl. 3 ("To regulate commerce . . . with the Indian tribes"—called the "Indian Commerce Clause"); *id.* art. II, § 2, cl. 2 (treaty power).

149. Although the precise formula differs with the reservation, essentially the federal government retains legal title to reservation lands while tribes or individuals have equitable title. Equitable title, therefore, is held by entities other than the United States, having been given to the tribes or individuals under the Disposal Power of the Property Clause. *Id.* art. IV, § 3, cl. 2. Because it is held by the United States, legal title (and ultimate Management Power) over reservation land is federal property under the Property Clause, while equitable title is not. Suggestions that legal title is not federal "property" may derive from a misunderstanding of the principles of trust and property title law. *See, e.g.,* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 210 (Rennard Strickland et al. eds., 1982). However, as in other trusts, the federal government's Management Powers pursuant to legal title are circumscribed by the fiduciary relationship. *Id.* at 221–28. In the text, I state "might imply," because most land ownership seems remote from regulating commerce. *See infra* Part IV.C.3 (discussing pre-ratification federalist representations that real estate would be within the ambit of state, not federal, power).

150. U.S. CONST. art. I, § 8, cl. 9.

151. *Id.* art. I, § 8, cl. 12.

152. *Id.* art. I, § 8, cl. 13.

153. *Id.* art. I, § 8, cl. 1, 3.

154. *See supra* note 29 on the founding generation's fascination with the classics.

155. *Cf. Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828) (upholding the Louisiana Purchase under the treaty and war powers).

156. *See supra* Part III.A.

Congress would not be permitted to purchase acreage for unenumerated reasons, by using the Property Clause as a “pretext.”<sup>157</sup>

So the natural understanding of the land acquisition power was broader than some conservative commentators claim it is.

*B. Retention of “Other Property” for Enumerated Purposes*

If Congress had incidental power to *acquire* land for enumerated purposes, it certainly had incidental power to *retain* land for such purposes. Land within new states necessary for military installations, for example, could be retained,<sup>158</sup> even if that land could not qualify as an enclave because the local legislature objected.

At the time of the ratification, the idea that the central government would retain some non-enclave land seems to have been more assumed than mentioned. Sometimes, however, it was explicitly mentioned. At the Virginia ratifying convention, the anti-federalist William Grayson suggested that federal holdings in the territories could survive creation of states there, and no one contradicted him. The report of Grayson’s speech seems garbled, but the import is still clear: even after states were created in the territories, Congress would retain soil for enumerated purposes, without the consent of those states. Grayson began with the Enclave Clause, and then passed to consideration of other federal lands:

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157. That Congress must limit itself to effectuating enumerated powers was affirmed in *M’Culloch v. Maryland*:

[S]hould Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.

17 U.S. (4 Wheat.) 316, 423 (1819) (Marshall, C.J.).

158. 14 DOCUMENTARY HISTORY, *supra* note 2, at 135 (statement of the “Inhabitants of Pittsburgh” on the need for federal protection in western territories, Nov. 11, 1787). *See also* Letter from James Madison to George Nicholas (May 17, 1788), *in* 9 *id.* at 809 (“The new Govt. and that alone will be able to take the requisite measures for getting into our hands the Western [military] posts [from the British.]”); 2 ELLIOT’S DEBATES, *supra* note 2, at 189 (Oliver Ellsworth, speaking at the Connecticut ratifying convention):

If we go on as we have done, what is to become of the foreign debt? Will sovereign nations forgive us this debt, because we neglect to pay? or will they levy it by reprisals, as the laws of nations authorize them? Will our weakness induce Spain to relinquish the exclusive navigation of the Mississippi, or the territory which she claims on the east side of that river? Will our weakness induce the British to give up the northern posts? If a war breaks out, and our situation invites our enemies to make war, how are we to defend ourselves? Has government the means to enlist a man or buy an ox?

2 *id.*

It is answered that the consent of the state must be required [for an enclave], or else they [i.e., Congress] cannot have such a district, or places for the erecting of forts, &c. But how much is already given them! Look at the great country to the north-west of the Ohio, extending to and commanding the lakes.

Look at the other end of the Ohio, towards South Carolina, extending to the Mississippi. See what these, in process of time, may amount to. They [i.e., Congress] may grant exclusive privileges to any particular part of which they have the possession. But it may be observed that those extensive countries will be formed into independent states, and that their [i.e., the new states'] consent will be necessary. To this I answer, that they [Congress] may still grant such privileges as, in that country, are already granted to Congress by the states [i.e., through the enumerated powers and Confederation-era land grants]. The grants of Virginia, South Carolina, and other states, will be subservient to Congress in this respect. Of course, it results from the whole, that requiring the consent of the states will be no guard against this abuse of power.<sup>159</sup>

### *C. Retention of "Other Property" for Non-Enumerated Purposes*

#### 1. Textual Analysis

Modern liberal cases and commentators interpret the Property Clause's Management Power (to "make all needful Rules and Regulations respecting" federal land) as authorizing indefinite retention of tracts for unenumerated purposes.<sup>160</sup> It is unlikely that Betsy Johnson would have understood it that way. The Property Clause said nothing about retention. It authorized management and disposal. The Management Power assumed as a background fact that the federal government would own some land—acquired by cession, for example, or pursuant to its enumerated powers—and permitted Congress to craft "all needful Rules and Regulations respecting" that land.

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159. 3 ELLIOT'S DEBATES, *supra* note 2, at 434.

160. See, e.g., *Vogler v. United States*, 859 F.2d 638 (9th Cir. 1988) (holding that Congress has the power to retain federal land for "important" public purposes); Appel, *supra* note 2, at 91–92 (arguing management actions under the Property Clause should be treated as the so-called Spending Clause now is: authorizing governmental action untethered to any enumerated power).

Indeed, as Mrs. Johnson may have noticed, the Management Power was only one of several provisions imposing procedural rules on the exercise of powers granted elsewhere.<sup>161</sup> For example, the Appropriation Clause did not actually authorize appropriations.<sup>162</sup> They were authorized by other parts of the document.<sup>163</sup> Rather, the Appropriations Clause (a) assumed as a background fact that there would be federal funds and appropriations arising from the exercise of *other* powers and (b) established rules for them. In like manner, the Property Clause's Management Power did not authorize ownership. It merely authorized management of land owned for other reasons.

Strengthening the conclusion that the Management Power, and therefore the lands managed, had to be tied to enumerated authority, was that tell-tale word "needful." This was the same word Mrs. Johnson had noticed in her power of attorney and in the Enclave Clause.<sup>164</sup> The Property Clause did not grant Congress power to make *all* rules and regulations, nor "all rules and regulations as Congress shall deem needful." It granted only the power to make "all *needful* rules and regulations." Needful for what? Needful for the exercise of jurisdiction Congress was given elsewhere.<sup>165</sup> In other words, as Chief Justice John Marshall was to suggest some years later,<sup>166</sup> congressional rules and regulations were to be of the sort "needful" to execute one or more express federal powers—not "needful" in the abstract.<sup>167</sup>

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161. In addition to the Appropriation Clause, discussed in the text, see, for example, U.S. CONST. art I, § 7, cl. 1 ("All bills for raising Revenue shall originate in the House of Representatives"). This clause did not authorize revenue-raising bills—for which the primary authority is art. I, § 8, cl. 1—but assumes that there will be such bills pursuant to other parts of the Constitution, and establishes a rule for them. See also *id.* art. I, § 5, cl.2 (empowering each house of Congress to "determine the Rules of its Proceedings"); *id.* art. I, § 5, cl. 3 (providing that "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those present, be entered on the Journal."). Neither of these two latter clauses authorizes proceedings, but they establish rules for proceedings authorized elsewhere in the instrument.

162. *Id.* art. I, § 9, cl.7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.").

163. See *id.* art. I, § 8.

164. See *supra* notes 99–113 and accompanying text.

165. See *supra* notes 111–113 and accompanying text.

166. *M'Cullough v. Maryland*, 17 U.S. (4 Wheat) 316, 422 (1819) (Marshall, C.J.) ("The power to 'make all needful rules and regulations respecting the territory or other property belonging to the United States,' is not more comprehensive than the power 'to make all laws which shall be necessary and proper for carrying into execution' the powers of the government.").

167. Thus, the analysis of the word in *Kleppe v. New Mexico*, 426 U.S. 529 (1988) would seem to be contrary to its function in the document. *Kleppe* reached its conclusion without historical investigation into the drafting or ratification of the Constitution. See also Appel,

In sharp contrast to the qualified nature of the Management Power was the unqualified nature of the Disposal Power.<sup>168</sup> The Property Clause stated unconditionally: "The Congress shall have Power to dispose of . . . other Property belonging to the United States."<sup>169</sup> In other words, the capacity to dispose, unlike that of management, was a power unqualified by any other.

At first glance, the Disposal Power might have seemed permissive only: Congress could, but was not required to, dispose. In some contexts, however, a power permissive in form can become mandatory in fact. At the North Carolina ratifying convention, the federalist floor leader (and later Supreme Court Justice) James Iredell compared the Constitution's grant of powers to Congress to a grant under a power of attorney.<sup>170</sup> His analogy suggests the following illustration:

The power of attorney Edmund and Betsy Johnson signed in their lawyer's office granted authority to an agent to carry on a retail business. As part of that authority, the document gave the agent power to manage two parcels of land, Blackacre and Whiteacre, which the Johnsons hoped would prove suitable for retail shops. The document also authorized the agent to sell property. Blackacre proved suitable for retailing, but Whiteacre did not. The agent had no authority to engage in land speculation or other ventures unrelated to retailing. In absence of a further grant of authority from the Johnsons, therefore, the agent's exercise of the power to sell Whiteacre became manda-

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*supra* note 2, at 10 (claiming that the Property Clause is "unconditional," without considering the limiting effect of the word "needful").

168. This power is subject to fiduciary limitations, however. *See infra* Part IV.C.4. *Cf.* *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288 (1936) (use of Property Clause to justify federally-owned electricity generation business).

169. U.S. CONST. art. IV, § 3, cl. 2. Initially, the Supreme Court upheld broad Congressional authority in disposition cases. *United States v. City & County of San Francisco*, 310 U.S. 16 (1940); *Gibson v. Choteau*, 80 U.S. 92 (1872); *United States v. Gratiot*, 39 U.S. 526 (1840) (involving land leasing, a form of disposition). The Court later conceded the same broad authority to the management portion of the Property Clause. *Kleppe*, 426 U.S. at 529. In doing so, the Court was encouraged by careless language in some of the disposition cases. *See, e.g., Gibson*, 80 U.S. at 99 ("With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations."). This development disregards the difference in the wording of the management and disposal powers.

170. 2 ELLIOT'S DEBATES, *supra* note 2, at 148 ("It is a declaration of particular powers by the people to their representatives, for particular purposes. It may be considered as a great power of attorney, under which no power can be exercised but what is expressly given."). *See also 2 id.* at 166 (repeating same argument).

tory. Of course, the agent was permitted to exercise reasonable discretion as to the timing and terms of the sale.<sup>171</sup>

To summarize: textual analysis suggests that because all powers not granted were reserved and because the Constitution conferred no *independent* power to acquire or retain “other Property,” the original meaning of the Constitution was that the federal government was required to dispose of any land not “necessary” or “needful” for enumerated purposes.

## 2. Corroborating Evidence from the Founding Generation’s Constitutional Values

The founding generation’s constitutional values<sup>172</sup> support the conclusion that Congress was required to dispose of all “other Property” unneeded for enumerated purposes. We have seen that allowing the federal government to own intra-state lands for enumerated purposes protected federal independence from the states, since the federal government did not need to obtain state permission to do its job.<sup>173</sup> Correspondingly, denying the federal government the power to retain other intra-state lands helped preserve the independence of states and citizens from the federal government.

In addition, limiting federal land ownership promoted the constitutional value of *decentralization*<sup>174</sup> because it prevented the central government from engaging in activities (such as business activities) outside the scope of its agency.

The values of *sympathy* and public trust rules of *impartiality* required the central government to treat different parts of the country equally,<sup>175</sup> insofar as practical.<sup>176</sup> Neither sympathy nor impartiality is

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171. Cf. Brodie, *supra* note 2, at 711. This original understanding would seem to be contrary to cases such as *Vogler v. United States*, 859 F.2d 638 (9th Cir. 1988) (holding that Congress has the power to retain federal land for “important” public purposes) and *Fay v. United States*, 204 F. 559 (1st Cir. 1913) (holding that the United States has the power to acquire land and use it for any public purpose). It may also contradict *Russia v. National City Bank of New York*, 69 F.2d 44 (2d Cir. 1934) (holding that because the United States is in the nature of a corporate entity, it has a “common law right” to acquire property). Of course, the United States has no “common law” rights; it has enumerated powers, and the implied powers incident to them.

172. See *supra* Part I.C.3.

173. See *supra* notes 139–40 and accompanying text.

174. See *supra* Part I.C.3.

175. See *supra* note 50 and accompanying text.

176. Of course, some disparities of treatment are unavoidable, given differences among states. To offer one example: some states are more appropriate for military installations than others. To offer another: some have more foreign commerce than others. *But cf.* United States

fostered when the federal government owns most of the territory of some states and very little in others. Indeed, James Madison strongly argued that adoption of the Constitution would, by encouraging privatization of western lands, lead to “greater . . . sympathy between the whole and each particular part.”<sup>177</sup> Although anti-federalists contended that widespread federal land ownership would empower the government to create protected commercial enclaves and other special privileges in violation of both of those values, federalists responded that the anti-federalist interpretation was incorrect because it was at odds with the spirit of public trust enshrined in the Constitution.<sup>178</sup> We should take them at their word.

### 3. Corroborating Evidence from the Ratification Records: In General

The ratification records do not shed as much light on the meaning of the Property Clause as they do for some other constitutional provisions, because the participants did not publish exhaustive analyses of the Property Clause as they did for some other provisions. For example, James Madison’s reference to the clause in Federalist No. 43 is quite brief,<sup>179</sup> presumably because the issues involved were “sufficiently known to the public.”<sup>180</sup> So, too, was the treatment in another thoughtful survey of the Constitution, written by the pseudonymous “A Native of Virginia.”<sup>181</sup>

v. Texas, 339 U.S. 707 (1950) (equal footing doctrine applies to political rights and sovereignty, not economic stature or property ownership).

177. Letter from James Madison to George Nicholas (May 17, 1788), in 9 DOCUMENTARY HISTORY, *supra* note 2, at 805.

178. Letter from James Madison to George Washington (Oct. 18, 1787), in 13 *id.* at 408 (suggesting that granting monopolies would be a breach of trust and outside Congress’ enumerated powers).

Sir Edward Coke, the great proto-Whig and legal mentor of the founding generation was the most famous exponent of anti-monopoly sentiments. *See, e.g.*, 11 Coke Rep. 84b, 77 Eng. Rep. 1260 (1602) (his report of The Case of Monopolies); 3 THE SELECTED WRITINGS OF SIR EDWARD COKE 1201 (Steve Sheppard ed. 2003).

179. The following is the entire text of Madison’s treatment:

To dispose of and make all needful rules and regulations respecting the territory or other property, belonging to the United States, with a proviso, that nothing in the constitution shall be so construed, as to prejudice any claims of the United States, or of any particular State.

This is a power of very great importance, and required by considerations, similar to those which show the propriety of the former. The proviso annexed is proper in itself, and was probably rendered absolutely necessary by jealousies and questions concerning the western territory sufficiently known to the public.

THE FEDERALIST NO. 43 (James Madison), *supra* note 2, at 224.

180. *Id.*

181. 9 DOCUMENTARY HISTORY, *supra* note 2, at 688.



Yet parts of the ratification record do confirm that the federal government was not to retain “other Property” for unenumerated purposes.

There were, first of all, the federalist representations that jurisdiction over real property would be a state, not a federal, matter. As noted earlier, advocates of the Constitution responded to their opponents’ fears of an all-powerful central government by publicly listing the government functions that would be outside the national sphere. Preeminent among these functions was control of land.<sup>182</sup> Federalist writers and orators aggressively represented that real property within state boundaries would be almost exclusively an area of state concern.<sup>183</sup> The states were to enjoy exclusive power over land titles,<sup>184</sup> land transfers,<sup>185</sup> and inheritance<sup>186</sup>—virtually all aspects of real estate law and usage.<sup>187</sup> The

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182. See *supra* notes 69–70 and accompanying text.

183. Natelson, *Enumerated*, *supra* note 2, at 481–82.

184. See 5 DOCUMENTARY HISTORY, *supra* note 2, at 599 (“A.B.,” Hampshire Gazette, Jan. 2, 1788,) (citing title to lands); 8 *id.* at 404 (Alexander White, a leading Virginia lawyer and legislator, citing “titles of lands” as out of the reach of Congress); 15 *id.* at 508 (Tench Coxe as “A Freeman,” asserting that forbidding entails will be “exclusively in the power of the state legislatures”).

185. See 3 ELLIOT’S DEBATES, *supra* note 2, at 40 (Chancellor Edmund Pendleton at the Virginia ratifying convention, stating, “[The Constitution] only extends to the general purposes of the Union. It does not intermeddle with the local, particular affairs of the states. Can Congress legislate for the state of Virginia? Can they make a law altering the form of transferring property, or the rule of descents, in Virginia?”); 3 *id.* at 553 (John Marshall, speaking at the same convention); THE FEDERALIST NO. 29 (Alexander Hamilton), *supra* note 2, at 141 (strongly implying that federal power does not include “varying the rules of descent, and of the alienation of landed property”). *But see* Maryland Resolutions, in 2 ELLIOT’S DEBATES, *supra* note 2, at 551.

186. See 5 DOCUMENTARY HISTORY, *supra* note 2, at 568 (Nathaniel Peaslee Sargeant, a justice—soon thereafter Chief Justice—of the Massachusetts Supreme Judicial Court); 8 *id.* at 404 (Alexander White, stating that “the right of altering the laws of descents and distribution of the effects of deceased persons and titles of land” were all “clearly out of the power of Congress”); 15 *id.* at 508 (Tench Coxe as “A Freeman,” asserting that “Regulating the law of descents” will be “exclusively in the power of the state legislatures”); 3 ELLIOT’S DEBATES, *supra* note 2, at 620 (James Madison at the Virginia ratifying convention, assuming the federal government could not alter the law of descents); 3 *id.* at 40 (Chancellor Edmund Pendleton at the Virginia ratifying convention arguing that the federal government will not able to alter law of descent in Virginia); THE FEDERALIST NO. 29 (Alexander Hamilton), *supra* note 2, at 141 (implying the federal government could not alter the law of descents); THE FEDERALIST NO. 33 (Alexander Hamilton), *supra* note 2, at 160 (stating the same).

187. 4 DOCUMENTARY HISTORY, *supra* note 2, at 79 (Harrington implying that the federal government would not control “real estates”); 5 *id.* at 568 (Justice Nathaniel Peaslee Sargeant arguing for a law of partition in state sphere); 5 *id.* at 652 (*Massachusetts Gazette* opining that land officers and surveyors would be within the state sphere); 8 *id.* at 404 (Alexander White stating that real estate titles and certain land uses—“fowling, hunting, and fishing”—were outside federal jurisdiction); 16 *id.* at 51 (Tench Coxe, claiming that the states retain “[t]he lordship of the soil,” which “remains in full perfection in every state”); THE FEDERALIST NO. 17 (Alexander Hamilton), *supra* note 2, at 80–81 (claiming agriculture out of the federal sphere). See also 1 THE POLITICAL WRITINGS OF JOHN DICKINSON 1764–1774 xvi (Paul Leicester Ford ed., Da Capo Press 1970) (1895). Dickinson, another leading lawyer, is noted therein to

much-published federalist writer Tench Coxe, in his second "Freeman" essay, was quite specific: "[t]he states," he wrote, "are to hold *separate territorial rights*, and the domestic jurisdiction thereof, exclusively of any interference of the federal government."<sup>188</sup>

Given the copious promulgation and ultimate public acceptance of such representations, it seems unlikely that Mrs. Johnson would have understood the Constitution as authorizing permanent federal land ownership within organized states on a large scale.

There is another piece of evidence that disposal of property not held for enumerated purposes was to be mandatory: the universal expectation that the lands would, in fact, be disposed of.<sup>189</sup> This expectation will be explored in greater detail below,<sup>190</sup> but consider first an admission from a framer who wanted the federal government to retain large tracts of dependent territory. In 1803, Gouverneur Morris, the principal polisher of the finished Constitution, confessed that he would have liked to have written the Property Clause so that Canada and Louisiana, once acquired, could be governed perpetually as federal provinces.<sup>191</sup> He acknowledged, however, that there was little he could do to further that vision, because his fellow delegates did not agree with him.<sup>192</sup> Those delegates

have approvingly quoted Lord Chatham (William Pitt the Elder), who in 1774 spoke on behalf of the colonies. He divided British and colonial responsibility in a way that foreshadowed the division of federal and state responsibility:

As an Englishman, I recognize to the Americans, their supreme unalterable right of property. As an American, I would equally recognize to England, her supreme right of regulating commerce and navigation. The distinction is involved in the abstract nature of things; property is private, individual, absolute; the touch of another annihilates it. Trade is an extended and complicated consideration; it reaches as far as ships can sail, or winds can blow; it is a vast and various machine. To regulate the numberless movements of its several parts, and combine them into one harmonious effect, for the good of the whole, requires the superintending wisdom and energy of the supreme power of the empire.

1 *id.* at xvi.

188. 15 DOCUMENTARY HISTORY, *supra* note 2, at 509. This essay was printed in the *Pennsylvania Gazette* on January 30, 1788, and reprinted in two or three other newspapers. 15 *id.* at 511 n.1.

189. This is virtually conceded by advocates of federal retention. *See, e.g.,* Gaetke, *supra* note 2, at 638.

190. *See infra* Part IV.C.4.

191. This is post-ratification evidence, and therefore less reliable than pre-ratification evidence. *See supra* Part I.C.2. On the other hand, it also is an admission against interest.

192. Morris admitted:

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

adopted the Property Clause amid an almost universal assumption that its most important function was to promote land disposition and the creation of new states.<sup>193</sup>

#### 4. Corroborating Evidence from the Ratification Records: Guidelines for Disposition

Textual analysis showed that the Property Clause's Disposal Power, while permissive in form, was, as to land not "needful" for enumerated purposes, mandatory in fact.<sup>194</sup> That this was the original meaning is corroborated by contemporary records showing a universal expectation of disposal, by a congressional ordinance contemplating disposal,<sup>195</sup> and a high level of agreement on how the lands were to be alienated and how the proceeds were to be used. For example, in a lengthy letter written on May 17, 1788, to another influential Virginia federalist, Madison discussed what he saw as the many benefits adoption of the Constitution would bring to the West.<sup>196</sup> Madison made no mention of the federal government retaining ownership of land, except perhaps for military purposes.<sup>197</sup> His focus was exclusively on how "the establishment of the new Govt. will thus promote the sale of the public lands"<sup>198</sup> and "[t]he protection and security which the new Government promises to purchasers of the federal lands,"<sup>199</sup> and the many other benefits that would flow from privatization. The universal desire was that land should be disposed of in accordance with the standards of public trust. Luther Martin, the Attorney General of Maryland, a federal convention delegate, and an anti-federalist, expressed the majority view when he wrote of "[l]ands which were *acquired by the common blood and treasure, and which ought to have been the common stock, and for the common benefit* of the

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Letter from Gouverneur Morris to Henry W. Livingston (Dec. 4, 1803), in 3 FARRAND, *supra* note 2, at 404.

193. See 2 *id.* at 457–59, 461–66.

194. See *supra* Part IV.C.1.

195. For example, this expectation was reflected in Congress's Land Ordinance of 1785, which stated: "Be it ordained by the United States in Congress assembled, that the territory ceded by individual States to the United States, which has been purchased of the Indian inhabitants, shall be disposed of in the following manner," and then proceeded to outline the manner. 28 J. CONTINENTAL CONG. 375 (1785), available at [http://memory.loc.gov/cgi-bin/ampage?collId=lljc&fileName=028/lljc028.db&recNum=386&itemLink=r?ammem/hlaw:@field\(DOCID+@lit\(jc02899\)\):%230280387&linkText=1](http://memory.loc.gov/cgi-bin/ampage?collId=lljc&fileName=028/lljc028.db&recNum=386&itemLink=r?ammem/hlaw:@field(DOCID+@lit(jc02899)):%230280387&linkText=1) (last visited Jan. 20, 2005).

196. Letter from James Madison to George Nicholas (May 17, 1788), in 9 DOCUMENTARY HISTORY, *supra* note 2, at 804–10.

197. 9 *id.* at 809 (acquisition of western posts from the British).

198. 9 *id.* at 806.

199. 9 *id.* at 805.

Union.”<sup>200</sup> Martin’s prescription was consistent with the formula under which Virginia<sup>201</sup> and other states<sup>202</sup> ceded their vast claims in the Old Northwest “as a common fund” for the “use and benefit” (a classic trust phrase) of the United States.

Both the friends of the Constitution<sup>203</sup> and their opponents<sup>204</sup> agreed that the best method of carrying out this trust responsibility was to

200. 16 *id.* at 42 (writing as “Genuine Information”).

201. 25 J. CONTINENTAL CONG. 561 (1783), available at [http://memory.loc.gov/cgi-bin/ampage?collId=lljc&fileName=025/lljc025.db&recNum=34&itemLink=r?ammem/hlaw:@field\(DOCID+@lit\(jc02510\)\):%230250035&linkText=1](http://memory.loc.gov/cgi-bin/ampage?collId=lljc&fileName=025/lljc025.db&recNum=34&itemLink=r?ammem/hlaw:@field(DOCID+@lit(jc02510)):%230250035&linkText=1) (last visited Jan. 20, 2005).

202. For example, New York. See 19 J. CONTINENTAL CONG. 208–09 (1781), available at [http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field\(DOCID+@lit\(jc01957\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(jc01957))) (last visited Jan. 20, 2005). Georgia’s act of cession on February 1, 1788 ceded “for the use and benefit of the said United States” but did not use the common fund language. 3 DOCUMENTARY HISTORY, *supra* note 2, at 292.

203. For examples of federalist sentiment, see 15 DOCUMENTARY HISTORY, *supra* note 2, at 549–55 (“Aristides,” William Contee Hanson, writing of the importance of western territory being in the common stock); Letter from George Washington to the Marquis de Lafayette (Feb. 7, 1788), in 16 *id.* at 71 (“A spirit of emigration to the western Country is very predominant. Congress have sold, in the year past, a pretty large quantity of lands on the Ohio, for public Securities, and thereby diminished the domestic debt considerably. Many of your Military acquaintances . . . propose settling there. From such beginnings much may be expected.”); Letter from George Thatcher to Pierce Long (Apr. 23, 1788), in 16 *id.* at 199–200 (doubting whether sale of western land will be sufficient to pay off debts); Letter from James Madison to George Nicholas (May 17, 1788), in 18 *id.* at 24–25 (contending that adoption of Constitution will increase sympathy between East and West and encourage sale of lands to pay off debts); 18 *id.* at 372–73 (the *Pennsylvania Packet* opining on the value of land cession by Georgia in paying off public debt, and calling the cession a tribute to the new Constitution).

At the Massachusetts ratifying convention, Nathaniel Gorham complained about the slow rate at which the Confederation Congress was selling land to pay off the debt:

The Hon. Mr. GORHAM . . . added, that, during the session of the federal Convention, when seven states only were represented in Congress, application was made by two companies for the purchase of lands, the sale of which would have sunk seven or eight millions of dollars of the Continental debt, and the most pressing letters were sent on to Rhode Island to send on its delegates; but that state refused: the consequence was, the contract could not then be made.

2 ELLIOT’S DEBATES, *supra* note 2, at 23. For other comments, see 4 DOCUMENTARY HISTORY, *supra* note 2, at 359 (American Herald, December 3, 1787, opining, “by the sale of our lands the principal of our debt every day dec[r]eases”) (alteration in original); 17 *id.* at 131 (Congressional request that Georgia cede so lands could be sold to pay debts); Letter from Charles Thomson to James McHenry (Apr. 19, 1788), in 17 *id.* at 178–79.

204. Anti-federalists generally argued that land sales were going well enough that ratification of the Constitution was not necessary. See, e.g., 4 DOCUMENTARY HISTORY, *supra* note 2, at 342–43 (“Agrippa,” an anti-federalist):

The embar[r]assments consequent upon a war, and the usual reduction of prices immediately after a war, necessarily occasioned a want of punctuality in publick payments. Still however the publick debt has been very considerably reduced, not by the dirty and delusive scheme of depreciation, but the nominal sum. Applications are continually making for purchases in our eastern and western lands. Great exertions are making for clearing off the arrears of outstanding taxes, so that the certificates for interest on the state debt have considerably increased in value. This is a

sell the land to private parties. The sale proceeds would be employed for the common benefit in two principal respects.<sup>205</sup> Initially, those proceeds would pay off the public debt.<sup>206</sup> After that, they would be applied to reduce taxes.<sup>207</sup> Sales of western land, coupled with the federal gov-

certain indication of returning credit. Congress this year disposed of a large tract of their lands towards paying the principal of their debt. Pennsylvania has discharged the whole of their part of the continental debt. New-York has nearly cleared its state debt, and has located a large part of their new lands towards paying the continental demands. Other states have made considerable payments. Every day from these considerations the publick ability and inclination to satisfy their creditors increases.

See also 4 *id.* at 381 (“Agrippa” writing, “The Congress lands are fully adequate to the redemption of the principal of their debt, and are selling and populating very fast. The lands of this state, at the west, are, at the moderate price of eighteen pence an acre, worth near half a million pounds in our money. They ought, therefore, to be sold as quick as possible.”); 5 *id.* at 484, 577–78 (“Agrippa,” expressing similar sentiments). For other examples of similar anti-federalist statements, see 14 *id.* at 20 (“Federal Farmer”—possibly Richard Henry Lee); 14 *id.* at 319–20 (“Centinel”); 14 *id.* at 361 (“Cincinnatus”); 17 *id.* at 151 (“A Plebeian”—Melancton Smith); 3 ELLIOT’S DEBATES, *supra* note 2, at 276 (William Grayson, at the Virginia ratifying convention); 3 *id.* at 278 (same). See also 2 *id.* at 211 (Robert R. Livingston, commenting at the New York ratifying convention):

He observed, that a considerable proportion of our domestic debt was already in the treasury, and though we were indebted for a part of this to our citizens, yet that debt was comparatively small, and could easily be extinguished by an honest exertion on the part of the government. He observed, that our back lands were competent to the discharge of our foreign debt, if a vigorous government should be adopted, which would enable us to avail ourselves of this resource; so that we might look forward to a day when no other taxes would be required from us than such as would be necessary to support our internal government, the amount of the impost being more than adequate to the other expenses of the Union.

2 *id.*

205. See Appel, *supra* note 2, at 29–30. The Virginia “common fund” formula was followed in other cessions, both before and after ratification. For example, in late 1789, the North Carolina legislature ceded the territory that later became Tennessee to the United States under condition that the land be used “for a common fund for the use and benefit of the United States of America.” The terms of the cession and the subsequent deed are located at 1 DOCUMENTS LEGISLATIVE AND EXECUTIVE OF THE CONGRESS OF THE UNITED STATES IN RELATION TO THE PUBLIC LANDS 97–98 (1834), available at <http://memory.loc.gov/cgi-bin/ampage?collId=llsp&fileName=028/llsp028.db&recNum=106> and <http://memory.loc.gov/cgi-bin/ampage?collId=llsp&fileName=028/llsp028.db&recNum=107> (last visited Nov. 7, 2004).

206. See, e.g., Letter from James Madison to George Nicholas (May 17, 1788), in 9 DOCUMENTARY HISTORY, *supra* note 2, at 806; Noah Webster, *Connecticut Courant*, Nov. 20, 1786, in 3 *id.* at 10. See also *supra* note 200.

207. See, e.g., Publicola (Archibald Maclaine), An Address to the Freemen of North Carolina (Mar. 20, 1789), in 16 *id.* at 441:

Taxes are necessary for the support of every government, and though we shall always have a state establishment to support, the taxes for the union will be applied for our protection and defence from foreign enemies . . . But it is not probable, in our present situation, that the federal government will want any direct taxes from the states, for a considerable time to come . . . But the sale of the western territory, and

ernment's services as an impartial arbiter of conflicting land claims,<sup>208</sup> would benefit the commonality in nonfinancial ways as well. They would bring about the settlement of the west—a great increase in the American population, largely from European immigration.<sup>209</sup> This population increase would render the new nation more militarily defensi-

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the duties arising from imposts, will, in all probability, be more than equal to our wants while we continue in peace.

*See also* Letter from Charles Thomson to James McHenry (Apr. 19, 1788), *in* 17 *id.* at 178–79; 2 ELLIOT'S DEBATES, *supra* note 2, at 211 (Robert R. Livingston, speaking at the New York ratifying convention); 4 *id.* at 189–190 (Archibald Maclaine, stating at the North Carolina ratifying convention, "Congress will not lay a single tax when it is not to the advantage of the people at large. The western lands will also be a considerable fund. The sale of them will aid the revenue greatly . . . I am not unacquainted with the territory or resources of this country. The resources, under proper regulations, are very great. In the course of a few years, we can raise money without borrowing a single shilling."). *But see* 3 *id.* at 214–15 (James Monroe, an anti-federalist, discussing sources of confederation revenue at the Virginia ratifying convention):

May we not suppose, when the general government will lay what duties it may think proper, that the amount will be very considerable? There are other resources. The back lands have already been looked upon as a very important resource. When we view the western extensive territory, and contemplate the fertility of the soil, the noble rivers which penetrate it, and the excellent navigation which may be had there, may we not depend on this as a very substantial resource?

3 *id.*

208. Governor Edmund Randolph, at the Virginia ratifying convention, contrasted the value of a federal arbitrator with the former situation:

Before the revolution, there was a contest about those back lands, in which even government was a party; it was put an end to by the war. Pennsylvania was ready to enter into a war with us, for the disputed lands near the boundaries, and nothing but the superior prudence of the man who was at the head of affairs in Virginia could have prevented it.

3 ELLIOT'S DEBATES, *supra* note 2, at 76. Anti-federalists argued that the Confederation had been successful in resolving land disputes. *See, e.g.,* 3 *id.* at 212 (James Monroe—then an anti-federalist and later President of the United States—speaking at the Virginia ratifying convention); 3 *id.* at 277 (William Grayson, speaking at the same convention). Anti-federalists also argued that a government organized under the Constitution would deprive honest settlers of their land titles. *See, e.g.,* 3 *id.* at 270 (George Mason, speaking at the Virginia ratifying convention).

209. *See* "The Republican VII," CONN. COURANT, Mar. 26, 1787, *in* 3 DOCUMENTARY HISTORY, at 35–37; Letter from James Madison to George Nicholas (May 17, 1788), *in* 9 *id.* at 805 (speaking of the benefit of population increase arising from land sales); 2 ELLIOT'S DEBATES, *supra* note 2, at 419 (James Wilson, speaking at the Pennsylvania ratifying convention, stating "Numerous states yet unformed, myriads of the human race, who will inhabit regions hitherto uncultivated, were to be affected by the result of their proceedings."); 3 *id.* at 312 (James Madison, at the Virginia ratifying convention, stating, "If we afford protection to the western country, we shall see it rapidly peopled."). *See also* CHARLES PAGE SMITH, JAMES WILSON: FOUNDING FATHER 163–66 (1956), for a description of the process by which James Wilson and his partner, Dorsey Pentecost projected that land was to be staked out, privatized, sold to immigrants, and formed into new states.

ble.<sup>210</sup> The United States then could protect her interests on the Mississippi River and in the northwest<sup>211</sup> and play a larger role on the world stage. Greater population and military strength would open new markets for all Americans and would tie Americans together into one nation.<sup>212</sup> As James Wilson argued at the Pennsylvania ratifying convention:

[i]t is a maxim of every government, and it ought to be a maxim with us, that the increase of numbers increases the dignity and security, and the respectability, of all governments. It is the first command given by the Deity to man, Increase and multiply. This applies with peculiar force to this country, the smaller part of whose territory is yet inhabited. We are representatives, sir, not merely of the present age, but of future times; not merely of the territory along the sea-coast, but of regions immensely extended westward. We should fill, as fast as possible, this extensive country, with men who shall live happy, free, and secure. To accomplish this great end ought to be the leading view of all our patriots and statesmen.<sup>213</sup>

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210. 3 ELLIOT'S DEBATES, *supra* note 2, at 72–73 (Governor Edmund Randolph, at the Virginia ratifying convention, lamenting that the lack of population in the western territories rendered defense against the Indians more difficult). On the other hand, Patrick Henry denied that the Constitution was necessary for development of the backcountry and resultant military protection. 3 *id.* at 155.

211. Letter from James Madison to George Nicholas (May 17, 1788), in 9 DOCUMENTARY HISTORY, *supra* note 2, at 806; 2 ELLIOT'S DEBATES, *supra* note 2, at 189 (Oliver Ellsworth, speaking at the Connecticut ratifying convention); 3 *id.* at 231 (John Marshall, speaking of the Mississippi at the Virginia ratifying convention: "To the debility of the Confederation alone may justly be imputed every cause of complaint on this subject."); 3 *id.* at 239 (George Nicholas, speaking at the same convention).

212. James Madison to George Nicholas, May 17, 1788, in 9 DOCUMENTARY HISTORY, *supra* note 2, at 805. See also David Ramsey, *Oration of June 5, 1788*, in 18 *id.* at 158, 161 (arguing that Constitution will protect commerce and navigation, and thereby unite East and West). *But cf.* 5 *id.* at 515–16 ("Agrippa," arguing against the Constitution):

The common conclusion from this [pro-Constitution] reasoning is an exceedingly unfair one, that [in the event of rejection] we must then separate, and form distinct confederacies. This would be true if there was no principle to substitute in the room of power. Fortunately there is one. This is commerce. All the states have local advantages, and in a considerable degree separate interests. They are, therefore, in a situation to supply each other's wants. . . . The same principles apply to the connection with the new settlers in the west. Many supplies they want, for which they must look to the older settlements, and the greatness of their crops enables them to make payments. Here then we have a bond of union which applies to all parts of the empire, and would continue to operate if the empire comprehended all America.

5 *id.*

213. 2 ELLIOT'S DEBATES, *supra* note 2, at 462. Oliver Ellsworth of Connecticut, a federal convention delegate (where he served on the Committee of Detail) and later Chief Justice of the Supreme Court, expressed a similar view of the beneficent effects of population increase. See 16 DOCUMENTARY HISTORY, *supra* note 2, at 368 (stating, under the pen name of

The founders hoped the increase of population would make feasible the creation and admission of new states.<sup>214</sup> They would not have agreed, however, with conservative commentators who argue that federal lands should have been ceded to the governments of those new states. The founding generation sought to build the nation by land privatization, not through state land holdings.<sup>215</sup>

Indeed, the ratification record suggests that gratuitous transfer of lands to state governments would have been seen as a “partial” act, and therefore a breach of public trust. Value was to be derived from land for the benefit of *all* Americans, not merely for those who lived in the vicinity. During the ratification debates no one suggested deeding western lands to new state governments. The talk was all of privatization, with proceeds to be used to benefit the commonality. More importantly, participants in the ratification debates took firm stands against any land disposition that would benefit one part of the nation at the expense of other parts.

For example, at the North Carolina ratifying convention, delegates such as William Porter sought reassurance that the new government would not make a treaty “which will be of great advantage to the Northern States, and equal injury to the Southern States” by “giv[ing] up the

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“A Landholder,” that “Long experience hath taught that the number of industrious inhabitants in any climate is not only the strength, but the wealth of a state.”)

214. See, e.g., Letter from James Madison to George Nicholas (May 17, 1788), in 9 DOCUMENTARY HISTORY, *supra* note 2, at 805; David Ramsey, *Oration of June 5, 1788*, in 18 *id.* at 158, 164. See also 2 ELLIOT’S DEBATES, *supra* note 2, at 238–39 (Alexander Hamilton, speaking at the New York ratifying convention):

The Congress is to consist, at first, of ninety-one members. This, to a reasonable man, may appear as near the proper medium as any number whatever, at least for the present. There is one source of increase, also, which does not depend upon any constructions of the Constitution; it is the creation of new states. Vermont, Kentucky, and Franklin [Tennessee] will probably become independent [of New York, Virginia, and North Carolina]. New members of the Union will also be formed from the unsettled tracts of western territory.

See also 9 DOCUMENTARY HISTORY, *supra* note 2, at 688 (“A Native of Virginia,” pointing out, for those inclined to be suspicious of the North, that most new states would be created from territories in the Southwest); 3 ELLIOT’S DEBATES, *supra* note 2, at 585 (James Madison, at the Virginia ratifying convention, arguing that the Constitution will increase the likelihood of new states being admitted to the union).

215. See *United States v. Gardner*, 107 F.3d 1314 (9th Cir. 1997) (holding that the federal government is not required to turn over federal lands to a state on its admission to the union). See also *United States v. Texas*, 339 U.S. 707 (1950) (equal footing doctrine applies to political rights and sovereignty, not economic stature or property ownership); Gaetke, *supra* note 2, at 643. This is conceded by one of the commentators favoring disposition of federal property. Patterson, *supra* note 2, at 61–62.



rivers and territory of the Southern States.”<sup>216</sup> At the all-important Virginia ratifying convention, fear that the federal government might dispose of lands “partially” (*i.e.*, in violation of the trust duty of impartiality) became a prominent issue. Patrick Henry and other anti-federalists charged that the new government’s land Disposal Power might be employed to prevent Americans from the navigating the Mississippi. This would greatly disadvantage Kentucky, then a “District” still administered by Virginia. Mindful of the Jay-Gardoqui treaty negotiations with Spain that had threatened to cede navigation of the Mississippi, the Constitution’s opponents contended that federal officials might use the Treaty Power to make land cessions that would disadvantage the South.<sup>217</sup> They pointed out that under the Articles of Confederation, major decisions required the agreement of at least nine, and sometimes all thirteen, states—while under the Constitution, the seven states north of the Mason-Dixon line would control Congress.<sup>218</sup>

Part of the federalists’ reassurance was based on the widely-accepted view that governmental violations of public trust were *ultra vires*.<sup>219</sup> Before the Virginia convention met, Harry Innes, the attorney general for the District of Kentucky, maintained that Congress had no more right to disadvantage some citizens for the benefit of others by ceding navigation of the Mississippi than it had to close the Chesapeake.<sup>220</sup> At the Virginia convention, Governor Edmund Randolph followed the same line of reasoning in defending the Constitution:

[t]o make a treaty to alienate any part of the United States, will amount to a declaration of war against the inhabitants of the alienated part, and a general absolution from allegiance. They will never abandon this great right. . . . The gentleman wishes us to show him a clause which shall preclude Congress from giving away this right. It

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216. 4 ELLIOT’S DEBATES, *supra* note 2, at 115. See also 4 *id.* at 118. Governor Samuel Johnston, a federalist, responded that this was unlikely given that both the President and two-thirds of the senators would need to concur in the making of treaties. 4 *id.* at 115–16.

217. MCDONALD, *supra* note 2, at 169.

218. 3 ELLIOT’S DEBATES, *supra* note 2, at 141 (Patrick Henry, stating at the Virginia ratifying convention, “While the consent of nine states is necessary to the cession of territory, you are safe. If it be put in the power of a less number, you will most infallibly lose the Mississippi.”). See also 3 *id.* at 151–52 (same); 3 *id.* at 325–26 (same); 3 *id.* at 292–93 (William Grayson, speaking at the same convention); 3 *id.* at 340 (James Monroe, speaking at the same convention). James Madison strongly disputed this conclusion. See Letter from James Madison to George Nicholas (May 17, 1787), in 9 DOCUMENTARY HISTORY, *supra* note 2, at 804–10.

219. See *supra* notes 44–46 and accompanying text.

220. Letter from Harry Innes to John Brown (Dec. 7, 1787), in 8 DOCUMENTARY HISTORY, *supra* note 2, at 221–22 (see Innes’ third and tenth items). Brown was a Virginia state senator and delegate to Congress. 8 *id.* at 525.

is first incumbent upon him to show where the right is given up. *There is a prohibition naturally resulting from the nature of things, it being contradictory and repugnant to reason, and the law of nature and nations, to yield the most valuable right of a community, for the exclusive benefit of one particular part of it.*<sup>221</sup>

It appears, therefore, that by the founding generation's understanding of the Property Clause (and the rest of the Constitution), Congress was required to dispose of lands not necessary for enumerated purposes. It also appears that disposition was to occur in an impartial manner for the common benefit. Lands could not simply be given away to states or to any other favored parties. Betsy Johnson and the rest of her generation would have thought such a disposition neither "necessary" nor "proper."<sup>222</sup>

## CONCLUSION

Considered from the vantage point of original meaning, both the conservative and liberal interpretations of the "other Property" portion of the Property Clause are partly correct. The liberals are correct in that the Constitution—not just arguably, but *clearly*—authorizes permanent property ownership outside the Enclave Clause. The clarity of this result flows both from the text of the document and from comments made during ratification. Moreover, the liberals are correct in suggesting that those lands are subject to a public trust and cannot be ceded to the respective states without compensation. Federal land disposal, like federal land management, must serve the interest of the entire country.

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221. 3 ELLIOT'S DEBATES, *supra* note 2, at 362 (emphasis added). Randolph added:

But there is an expression which clearly precludes the general government from ceding the navigation of this river. In the 2d clause of the 3d section of the 4th article, Congress is empowered "to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States." But it goes on, and provides that "nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or any particular state." Is this a claim of the particular state of Virginia? If it be, there is no authority in the Constitution to prejudice it. If it be not, then we need not be told of it. This is a sufficient limitation and restraint.

3 *id.* at 362–63. See also 3 *id.* at 505 (Edmund Randolph); 3 *id.* at 509 (Francis Corbin).

Randolph and his allies knew their Coke. See, e.g., *The Case of Monopolies*, 11 Coke Rep. 84b, 86b, 77 Eng. Rep. 1260, 1263 (1602) ("[E]very gift or grant from the King has this condition, either expressly or tacitly annexed to it, *Illa quod patria per donationem illiam magis solito non oneretur seu gravetur*, and every grant made in grievance or prejudice of the subject is void . . .").

222. Natelson, *Necessary and Proper*, *supra* note 2 (forthcoming 2005).

On the other hand, the conservatives are correct about another aspect of original meaning. As understood at the time of ratification, the Constitution did not permit the federal government to retain and manage land indefinitely for unenumerated purposes. Massive, permanent federal land ownership would have been seen as subversive of the constitutional scheme. The federal government's authority to dispose was unlimited (except for trust standards), but its authority to acquire, retain, and manage was not: all the latter functions could be exercised only to serve enumerated powers. To be sure, Congress would have considerable discretion as to how to effectuate enumerated powers, and reasonable exercises of discretion were not to be questioned. At the end of the day, however, all federal land not "necessary and proper" to execute an enumerated power was to be disposed of impartially and for the public good.

I should not be understood as saying that the framers and ratifiers meant to require sale on the open market or to the highest bidder as the only way of disposing land for the public good. That was the method appropriate in 1788, perhaps; but they would have understood that in later times the "proper" methods of disposition would vary according to needs of the country and the nature of the land.<sup>223</sup> In future years, the public interest might justify disposing of (on suitable terms) agricultural lands to homesteaders, mining lands to miners, and environmentally sensitive lands to other public entities or to nonprofit environmental trusts. Generally, though, the Constitution's original meaning was that lands not dedicated to enumerated functions were to be privatized or otherwise devolved on terms that best served the general interest.

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#### POSTSCRIPT ON THE CAST OF CHARACTERS

*Edmund Johnson*, Betsy's husband, subsequently attended his state's ratifying convention, where he took the floor twice to express misgivings about the Constitution. After the convention voted to propose amendments, he followed Betsy's advice and voted for ratification. He was thus one of those who supplied the federalists with a narrow margin of victory in his state. Thereafter, he returned home and success-

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223. Thus, Edmund Randolph, who as a member of the federal convention's "committee of detail" produced the first sketch of the Constitution, laid it down as one of his axioms that the constitution should include "essential principles only, lest the operations of government should be clogged by rendering those provisions permanent and unalterable, which ought to be accommodated [sic] to times and events." 2 Farrand, *supra* note 2, at 137.

fully urged his skeptical constituents to give the new government a fair chance. He died in 1790, after a fall from a horse. He was thirty-nine years old.

*Betsy Johnson* did not remarry. She continued to play an honored role in her community. In later years, she served as an informal advisor to several local political figures. Only two of her children survived her: a daughter who wrote books and married a prosperous merchant, and her eldest son, who joined the army and served with distinction in the American West. Mrs. Johnson lived to see the new century, finally succumbing to pneumonia in 1810, after a life of the then-respectable length of fifty-six years.

*Casey Emerson* is very much alive—a vigorous seventy-nine year old who works hard and remains determined to find a way to force the “feds” to transfer Montana public lands to the state government; and, if possible, to induce the federal government to pay Montana 116 years’ back rent.