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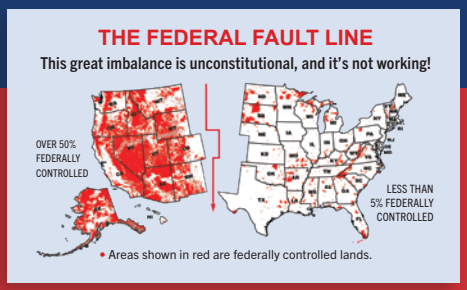

IN TRUST

Detailing the Progression from Federal Territory to Sovereign Statehood

by Bill Howell

A Project of
American Lands Council Foundation

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The American Lands Council Foundation (ALCF) is a 501(c)(3) nonpartisan, nonprofit organization focused on research and education related to the historical, legal, economic, environmental, and social aspects of public land management, ownership, disposition and policies. Our goal is to contribute research and education relating to public land governance and stewardship in conformance with the United States Constitution. ALCF's important work is made possible through support from the American Lands Council (ALC) and charitable giving.

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PART VI OF THE FEDERAL FAULT LINE SERIES

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IN TRUST

Detailing the Progression from Federal Territory to Sovereign Statehood

"The necessities which gave birth to the Constitution, the controversies which precede its formation and the conflicts of opinion which were settled by its adoption, may properly be taken into view for the purposes of tracing to its source, any particular provision of the constitution, in order thereby, to be enabled to correctly interpret its meaning."

Pollock v. Farmers' Loan and Trust Co. 157 U.S. 429 (1895)

Bill Howell

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SYNOPSIS

Federal territorial lands are those lands acquired by the United States either by cession of one of the original States or by conquest, cession, or purchase of some other sovereign. In 1894, the United States Supreme Court said that it made no difference from whom, or by what means, the United States obtained a new territory, such as the vast Mexican cession and purchase. The Court said that whatever the circumstances of acquisition may have been, "the same title and dominion passed to the United States." The Court also said that acquired territorial lands were "for the benefit of the whole people." When the meaning of this statement is researched in the historical record, one finds that this means the acquired territorial lands are to be liquidated by Congress with the proceeds being placed in the general fund of the nation "for the benefit of the whole people." The land itself, the Court said, was to be held "in trust for the several states to be ultimately created" out of it.[1] Thus, while the land was to be liquidated, it was also destined to become new States and subject to sovereign State municipal jurisdiction.

The question to be addressed with this paper is this: What are the terms of this trust that Congress is bound to honor on behalf of new States established out of federally owned territorial lands? The answer, in part, is found in the character of the original thirteen States.

The American Revolution began in 1775. In 1776, the thirteen former British colonies declared "That these United Colonies are, and of right ought to be, FREE AND INDEPENDENT STATES." (Emphasis in the original.) In 1777, these free and independent States agreed to unite themselves in a "league of friendship" under Articles of Confederation and perpetual union, Maryland alone abstaining. By Article I of the Articles, it was declared that, "The Stile of this confederacy shall be 'The United States of America.'"

At the outset of the Revolution, seven of these original States asserted sovereign claims to land lying west of the Appalachian Mountains to the Mississippi River. In several instances, these sovereign claims were contested between claimants. Smaller States, having no claim to these lands, were jealous of the wealth that the land-claiming States would have so long as they were allowed to hold their land claims. Discord among the States threatened the existence of their "league of friendship."

On September 6, 1780, in an attempt to quell internal discord, Congress adopted a resolution in which it asked that the land-claiming States cede their western land claims to it. On October 10, 1780, Congress passed a second resolution in which it made certain promises as to what it would do with any lands that the land claiming States might choose to cede to the United States.

The purpose of this paper is to demonstrate that the promises made by Congress in its resolution of October 10, 1780, are the origin of the federal trust with respect to territorial lands owned by the United States and, together, these promises constitute the totality of it.

It should be noted that this paper is not concerned with lands acquired by the United States from within an existing State. This paper is concerned only with lands acquired by the United States by cession of one of the original States or from a foreign sovereign, such as the Louisiana Purchase acquired from France and the Mexican cession and purchase acquired from Mexico. The word "territory," including its variants, is used in this paper in reference only to these lands and that portion of these lands that remains under United States ownership within the borders of the several States, primarily those States in the so-called "public land" west.

1 "Upon the acquisition of a territory by the United States, whether by cession from one of the states, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several states to be ultimately created out of the territory." Shively v. Bowlby, 152 U.S. 1 (1894).

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PART I: ESTABLISHING THE TERMS OF TRUST REGARDING TERRITORIAL LANDS

By the year 1780, the American States had been in revolution against British imperialism for five years. Contention between the States over the destiny of former British crown lands lying west of the Appalachian Mountains was threatening to fragment the delicate union that had been established under the Articles of Confederation. The State of Maryland was refusing to sign the Articles of Confederation until the dispute over the western lands was settled. In 1833, President Andrew Jackson observed, in retrospect, that settlement of the distress caused by State claims to the western former British crown lands was "necessary to the happy establishment of the Federal Union."[2]

On September 6, 1780, Congress adopted a resolution requesting that the land-claiming States cede to it as much of their western claims as they deemed appropriate. One month later, on October 10, 1780, Congress passed a second resolution wherein it detailed what it would do with any lands that the land-claiming States might choose to cede to it. With this second resolution, Congress promised that,

1. New States: All lands ceded to the United States would be subdivided into "suitable extent[s] of territory" which would be admitted into the union of States as new States possessing "the same rights of sovereignty, freedom and independence as the other States," later called equal footing or the Equal Footing Doctrine.
2. Disposal: All lands ceded to the United States would be "granted and settled at such times and under such regulations as shall hereafter be agreed on by the United States in Congress assembled, or any nine or more of them."
3. Territorial Guarantee: The United States shall "guaranty the remaining territory of the said states respectively."
4. Republican Governance: Ceded lands would "be settled and formed into distinct Republican states."

In the year 1780 it was clear to the States that refusal by Maryland to sign the Articles of Confederation and complete the American Union was encouraging the British enemy. It was believed that the revolution was being prolonged by the English in the hope that the fragile American Union would fall apart. It was to remove this obstacle to the settlement of hostilities that Maryland agreed to sign the Articles on March 1, 1781, and, thus, complete the Union. However, in signing the Articles, Maryland made it clear that it was not conceding any claim that it might have to the western lands. Maryland is due an expression of gratitude for having initially refused to sign the Articles. Maryland's refusal compelled Congress to craft the resolution of October 10, 1780, and, thereby, establish specific terms of trust as to what would be done with any territorial lands that might come into the possession of the United States.

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PART II: THE VIRGINIA LAND CESSION OF MARCH 1, 1784

On March 1, 1784, Congress accepted the land cession instrument issued by the State of Virginia. The ceded land was situated north and west of the Ohio River and was known as the Northwest Territory. Certain words in the text of this land cession instrument are of fundamental importance to the purpose of this paper. Most particularly, the Virginia land cession instrument reads, in part, as follows:

> The State of Virginia does, "… transfer, assign and make over unto the United States in Congress Assembled ... all **right, title** and **claim as well of soil as jurisdiction,** which this Commonwealth hath to the territory or tract of country within the limits of the Virginia Charter, situate, lying and being to the north-west of the river Ohio ...." *Virginia land cession instrument*, March 1, 1784. (Emphasis added.)

This excerpt from the Virginia land cession instrument demonstrates that common proprietorship

2 President Andrew Jackson, *Veto of the Land Bill*, December 5, 1833.

(right and title) is separate and severable from a claim "as well of soil as jurisdiction." This is to say that a change of title has no effect on jurisdiction while, conversely, a change of jurisdiction has no effect on proprietary right and title.

Before cession of the Northwest Territory, proprietary right and title in it belonged to the State of Virginia. The word "claim" is clarified in the instrument as referring to "soil" and "jurisdiction." The word "soil" was likely a reference to the sovereign right of eminent domain in the ceded lands while the word "jurisdiction" was likely a reference to sovereign State municipal jurisdiction.

Since both common proprietorship and sovereign State municipal jurisdiction, including sovereign eminent domain, are expressly included in this cession instrument, the State of Virginia retains no residual interest in these lands; but Virginia did reserve an interest in the proceeds of sale of these lands. The State's cession instrument provided that ceded lands,

> "shall be considered as a common fund for the use and benefit of such of the United States, as have become or shall become members of the confederation or federal alliance of the said states, Virginia inclusive, according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and bona fide disposed of for that purpose, and for no other use or purpose whatsoever." *Virginia land cession instrument*, March 1, 1784.

The Virginia land cession instrument of 1784, as well as those instruments of land cession issued by the remaining land-claiming States, was inspired by, and in response to, the promises made by Congress in its resolution of October 10, 1780. With acceptance of these State land cession instruments, the United States became "bound … to a particular course of policy in relation to them [the ceded lands] by ties as strong as can be invented to secure the faith of nations."[3] Central to this "particular course of policy" is the promise of territorial disposal. If territorial disposal is denied, the remaining three promises of Congress cannot be fulfilled and the federal trust obligation established under these cession instruments is betrayed.

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PART III: FURTHER ACTIONS OF THE SECOND CONTINENTAL CONGRESS

As of March 1, 1784, the United States became the trustee for the vast Northwest Territory.

On April 23, 1784, at the request of Congress, Thomas Jefferson drafted the Land Ordinance of 1784. This ordinance of Congress,

> "Provided that both the temporary and permanent governments be established [within the federal territories] on these principles ... Third. That they in no case shall interfere with the primary disposal of the soil by the United States in Congress assembled, nor with the ordinances and regulations which Congress may find necessary for securing the title in such soil to the bona fide purchasers." *Land Ordinance of 1784*.

On May 20, 1785, Congress adopted the Land Ordinance of that year which was titled, "*An Ordinance for Ascertaining the Mode of Disposing of Lands in the Western Territory*." Under this ordinance, territorial lands belonging to the United States were to be surveyed into townships consisting of thirty-six sections of one square mile each. Surveying the land facilitated its settlement and, ultimately, its establishment as new States in the American union of States.

On July 13, 1787, Congress adopted the Northwest Ordinance, "*An Ordinance for the government of the Territory of the United States northwest of the River Ohio*."[4] In the words of Richard Henry Lee, a member of Congress at the time, this ordinance was adopted for the purpose of establishing "a strong toned government" in the territory so that the "rights

[3] President Andrew Jackson, ibid.

[4] "[T]he Northwest Ordinance established the basic framework of the American territorial system." Hall, Kermit L., ed. in chief. *The Oxford Companion to the Supreme Court of the United States*. New York: Oxford University Press, 1992, p. 600; "This document [the Northwest Ordinance] is a continent-wide expression of the rights of Americans." Hall, Kermit L., ed. *The Oxford Companion to American Law*. New York: Oxford University Press, 2000, 64.

of property [would] be clearly defined ... as a measure preparatory to the sale of the lands."[5] Security of private property rights was seen by Congress as essential to the successful disposal of the territorial land to prospective purchasers. The Northwest Ordinance was another demonstration of good faith, on the part of Congress, that it fully intended to fulfill its trust obligation to dispose of the territorial lands coming into the possession of the United States.

The Northwest Ordinance was adopted by the Continental Congress before the Constitution. However, it was made "a part" of the Constitution of 1788 by the Debts and Engagements Clause of Article VI.[6] On August 7, 1789, with its eighth official act, the first Congress under the Constitution "adapted" the text of the ordinance to the structure of the new Federal government under the Constitution "in order that the ordinance of the United States in Congress assembled, for the government of the territory north-west of the river Ohio, may continue to have full effect."[7] This "adaptation" provided roles for the new office of the president and a role of advice and consent for the Senate in the new bi-cameral Congress when filling certain offices in local territorial governments.

With its limited powers under the Articles of Confederation, Congress actually had no authority to establish local governments in the federal territories. However, when the Northwest Ordinance was made "a part" of the Constitution under the Debts and Engagements Clause, Congress could then do so with constitutional authority.

It is important to understand, however, that the Ordinance does not authorize Congress to *be* the municipal legislature for federal territories. The Ordinance authorizes Congress to participate with the President in *introducing* local governments into the territories and then to supervise these local territorial governments during their temporary period of "pupilage."[8]

[5] July 15, 1787 letter by Richard Henry Lee to George Washington, transmitting to Washington a copy of the Northwest Ordinance.

[6] "The sixth article of the Constitution declares, that 'all debts contracted, and all engagements entered into, before the adoption of this constitution, shall be as valid against the United States under this Constitution as under the confederation.' Thus this ordinance, the most solemn of all engagements, has become a part of the Constitution ..." *Pollard v. Kibbe*, 39 U.S. 353 (1840).

[7] U.S. Statutes at Large, chap. VIII: An Act to provide for the Government of the Territory Northwest of the river Ohio.

[8] "Congress, from time to time, created territorial governments, the existence of which was necessarily limited to the period of pupilage."... "The impermanent character of these governments has often been noted. Thus, it has been said, 'The territorial state is one of pupilage, at best,' *Nelson v. United States*, 30 F. 112, 115. … And, in Pollard's *Lessee v. Hagan*, 3 How. 212, 44 U. S. 224, the Court characterizes them as 'the temporary territorial governments.'" *O'Donoghue v. United States*, 289 U.S. 516 (1933).

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PART IV: THE CONSTITUTIONAL CONVENTION OF 1787

Article IV of the United States Constitution is sometimes referred to as "the State's article." This may be due, in part, to the fact that four clauses in this Article are *constitutional codification* of the four promises made by Congress just seven years earlier in its resolution of October 10, 1780.

The four clauses entered into Article IV for the purpose of empowering Congress to fulfill its promises and trust duties under the resolution of Congress of October 10, 1780, are the Admissions, Guarantee, Claims and Property clauses. A detailed analysis of these four clauses is essential to the purpose of this essay.

The Admissions Clause

The Admissions Clause is the first clause in section 3 of Article IV. In pertinent part, this clause reads as follows:

> "New states may be admitted by the Congress into this Union;" *Admissions Clause.*

The Court has recognized the Admissions Clause as a delegation of sharply limited power:

> "The power of Congress in respect to the admission of new states is found in the 3d section of the 4th article of the Constitution. That provision is that, 'new states may be admitted by the Congress into this Union.' The only expressed restriction upon this power is that no new state shall be formed within the jurisdiction of any other state, nor by the junction of two or more states, or parts of states, without the consent of such states, as well as of the Congress. But what is this power? It is not to admit political organizations which are less or

> greater, or different in dignity or power, from those political entities which constitute the Union. It is, as strongly put by counsel, a 'power to admit states.'" *Coyle v. Smith*, 221 U.S. 559 (1911).

Due to its limited authority under the Admissions Clause, Congress may "incorporate" federal territories, simply as property belonging to the United States, but it cannot "admit" federal territories, as such, into the American union of States:

> "It can nowhere be inferred that the territories were considered a part of the United States." *Shively v. Bowlby*, 152 U.S. 1 (1894).

Federal territorial lands admitted into the union of States, either as entire States or as component portions of admitted States, must lose their federal territorial character. This is done by shedding congressional supervision and territorial jurisdiction under the Northwest Ordinance, or under the Wisconsin Organic Act of 1836 which was successor to the Northwest Ordinance,[9] and assuming the cloak of sovereign State municipal jurisdiction. It is of no consequence if any portion of these former federal territorial lands should happen to remain under a proprietary federal ownership because, as discussed above (Part II), proprietary right and title are separate and severable from sovereign political jurisdiction. Admission of the new State of Alabama illustrates the point. The State of Alabama was established out of territorial lands ceded to the United States by the State of Georgia. With its admission into the union of States upon an equal footing with the original States, Alabama's territorial sovereignty extends to all land declared by congressional act to be that of the new State, regardless of proprietary titles that may exist:

> "Alabama is therefore entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine is to deny that Alabama has been admitted into the Union on an equal footing with the original states." *Coyle v. Smith*, 221 U.S. 559 (1911) citing *Pollard v. Hagan*, 44 U.S. 212 (1845).

If federal territorial jurisdiction should remain affixed to former federal territorial lands that remain under federal title within the new State, then these lands also remain jurisdictionally foreign to, and no part of any sovereign and jurisdictional State. And, as a consequence of the Admissions Clause limitation on congressional power, these "foreign" lands are inadmissible, as such, into the American union of States:

> "The Constitution was created by the people of the United States, as a union of states ...." *Downes v. Bidwell*, 182 U.S. 244 (1901).
>
> "All the property and all the institutions of the United States are, constructively, without the local, territorial jurisdiction of the individual states, in every respect, and for every purpose, including that of taxation." *McCulloch v. Maryland*, 17 U.S. 316 (1819).

Thus it is demonstrated that the Admissions Clause in the ratified Constitution of 1788 is a faithful codification of the promise Congress made just eight years earlier, whereby it would subdivide federal territorial lands into defined tracts of "suitable extent," and these tracts would be admitted into the union of States with the "same rights of sovereignty, freedom and independence as the other States."

The critical point to understand here is that it is States, and States alone, that may exercise sovereign municipal governance within those tracts of federal territory which Congress has defined and which have been admitted into the American union of States upon an equal footing with the original States.

The Guarantee Clause

The Guarantee Clause is located at the head of section 4 of Article IV. In pertinent part, the Guarantee Clause reads as follows:

> "The United States shall guarantee to every state in this union a Republican form of government …." *Guarantee Clause.*

[9] Hall, Kermit L., ed. in chief. *The Oxford Companion to the Supreme Court of the United States*. New York: Oxford University Press, 1992, 865.

The territorial extent of the original thirteen States was largely determined by boundaries established during the colonial time. Some of these boundaries were subsequently redrawn by the States themselves to settle the matter of unappropriated former British crown lands. By whatever means that the territorial extent of the original thirteen States was determined, one fact is beyond dispute. Each of these original States exercised undiminished municipal sovereignty and jurisdiction over that full extent.[10]

The fact that the original States retained undiminished municipal sovereignty and jurisdiction over the full extent of their territory, under both the Articles of Confederation and the Constitution of 1788, established one element of the Equal Footing Doctrine.[11] That element is simply this: Every new State established out of territorial land owned by the United States is entitled, under the Equal Footing Doctrine, to exercise the same undiminished municipal sovereignty and jurisdiction over the full extent of former federal territory that has been committed to the purposes of its statehood by act of Congress. This is to say that it is this congressionally delineated tract of former federal territory over which each new State is guaranteed the right, under the Guarantee Clause, and also under the Equal Footing Doctrine, to exercise its own undiminished Republican form of self-government.[12]

In order to know the extent of territory over which a State is entitled to exercise its own undiminished Republican form of self-government, as provided under the Guarantee Clause and the Equal Footing Doctrine, the extent of former federal territory that has been proclaimed by Congress to be the territory of the State must be known. This extent of land is detailed either in State enabling act compacts between the inhabitants of a particular federal territory and the United States or by congressional acts of new State admission, as the case may be.

The preamble to the 1894 enabling act compact for the future State of Utah illustrates the point.[13] By this preamble, it is declared that "all that part of the area of the United States now constituting the Territory of Utah, as at present described, may become the State of Utah, as hereinafter provided."

Within the body of the Utah enabling act, only "Indian lands" are set apart and reserved to the "absolute jurisdiction and control of the Congress of the United States."[14] The new State of Utah is entitled, under terms of its enabling act compact with the United States, to exercise its own undiminished and sovereign Republican form of municipal self-government over the complete remainder of the former Territory of Utah. This entitlement necessarily includes former federal territorial lands that have been encompassed within that tract and which remain under federal ownership under the head "public lands." Recall that common proprietorship is separate and severable from sovereign jurisdiction.

To adapt a line from the case of *Coyle v. Smith* above, wherein the case of *Pollard v. Hagan* is cited (Reference p. 5), "[Utah] is therefore entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it .... To maintain any other doctrine is to deny that [Utah] has been admitted into the Union on an equal footing with the original states ...." It hardly needs to be added that Utah, and every other State established out of former federal territorial lands, was admitted into the union of States upon the condition of sovereign equality, or

[10] "Each (the original States of South Carolina and Georgia) declared itself sovereign and independent, according to the limits of its territory."... "[T]he soil and sovereignty within their acknowledged limits were as much theirs at the declaration of independence as at this hour." *Harcourt v. Gaillard*, 25 U.S. 523 (1827).

[11] "The requirement of equal footing was designed not to wipe out those diversities (diversity incident to area, geology, latitude economy, etc.) but to create parity as respects political standing and sovereignty." ... "The 'equal footing' clause has long been held to refer to political rights and to sovereignty. See *Stearns v. Minnesota*, 179 U.S. 223, 245." *United States v. Texas*, 339 U.S. 707 (1950).

[12] Republican is a form of government "in which the supreme power rests in the body of citizens entitled to vote and is exercised by representatives chosen directly or indirectly by them." *Webster's Encyclopedic Unabridged Dictionary of the English Language*, ©1996.

[13] "A preamble, purpose clause, or recital is a permissible indicator of meaning." Antonin Scalia, Bryan A. Garner. *Reading Law*, 1st ed., Thompson/West, 2012, 217.

[14] Utah Enabling Act compact, Section 3, second.

equal footing, with the original States.[15] Under its limited Admissions Clause authority, Congress has no constitutional alternative.

Thus it is demonstrated that the Guarantee Clause in the ratified Constitution of 1788 is a faithful codification of the promise made by Congress just eight years earlier, in its resolution of October 10, 1780, whereby territorial lands owned by the United States would "be settled and formed into distinct Republican states" and also that these new States would be admitted as members of the American union of States, with "the same rights of sovereignty, freedom and independence as the other States," later referred to as "equal footing."

The Claims Clause

The Claims Clause is the third clause in section 3 of Article IV. In its entirety, the Claims Clause reads:

> "; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state." *Claims Clause.*

In the words of Justice Joseph Story,[16] the Claims Clause is attached as a "proviso"[17] to the Property Clause. A proviso "modifies the immediately preceding language."[18]

Since the Claims Clause proviso is attached to the Property Clause, it must have been the intent of the Framers that congressional power under the Property Clause would be "modified" in some manner. By its plain words, this modification of congressional Property Clause power is a limitation. In other words, congressional power under the Property Clause cannot be "without limitations," as the Supreme Court has opined in *Kleppe v. New Mexico*, 426 U.S. 529 (1976), because it is subject to the Claims Clause limitation; and this limitation shelters the "claims" of the States from any congressional prejudice in the exercise of such power as Congress might have under that clause. Moreover, by words of the Claims Clause, there is no power delegated *anywhere* under the Constitution by which Congress may "prejudice" the sovereign claims of the States.

The question, then, become this: What are the claims of the States that are expressly protected from congressional "prejudice" under its Property Clause power? The answer to this question may be found in the Court's definition of a constitutional State.

In the case, *Texas v. White*, the Court explained that a constitutional State consists of three foundational elements. A constitutional State consists of: 1. a political community of free citizens that, 2. occupies a territory of defined boundaries and, 3. is organized under a government that is sanctioned by the consent of the governed and limited by a written constitution. In the actual words of the Court:

> "In the Constitution the term state most frequently expresses the combined idea just noticed, of people, territory, and government. A state, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed." ... "This is undoubtedly the fundamental idea upon which the republican institutions of our own country are established." *Texas v. White*, 74 U.S. 700 (1868).

The Court has also spoken to the geographic extent over which this "community of free citizens" shall exercise its sovereign municipal jurisdiction:

> "What then is the extent of jurisdiction which a state possesses? We answer, without hesitation, the jurisdiction of a state is co-extensive with its territory; co-extensive with its legislative power." *U.S. v. Bevans,* 16 U.S. 336 (1818).

[15] "AN ACT to enable the People of Utah to form a Constitution and State Government, and to be admitted into the Union on an equal footing with the original States." Preamble, Utah Enabling Act compact, July 16, 1894.

[16] Justice Joseph Story, 1779 – 1845. Associate Justice on the Supreme Court, 1812-1845.

[17] Story, *Commentaries on the Constitution*, Vol. III, Ch. XXXI, sec. 1316 (1833).

[18] Scalia, Antonin & Bryan A. Garner. *Reading Law*, 1st Ed., Thompson/West, 2012, 154.

In other words, constitutional States exist only to the territorial limit of their sovereign municipal jurisdiction. States do not exist within tracts that are subject to the municipal jurisdiction of a sovereign other than themselves, such as territories of the United States:

> "The word 'State' must be held to have been used in a constitutional sense, which does not include a territory of the United States." *United States ex rel. Champion v. Ames*. Circuit Court of North Dakota and Illinois. March 31, 1899.

The three elements of constitutional statehood, as recognized by the Court in *Texas v. White* above, are people, a defined extent of territory, and that people's sovereign jurisdiction over that extent of territory. If the Claims Clause forbids federal "prejudice" of the claims of the States, it cannot be speaking of the people in their individual or collective persons; nor can it be speaking of the tract of federal territory that Congress has outlined as the territorial extent of a new State. The claims of the States that the Claims Clause contemplates as being beyond any federal Property Clause power to "prejudice" must, therefore, be the States' claims to sovereignty and jurisdiction over the entirety of those tracts of former federal territory that have been declared to be "States" by virtue of their admission into the union of States.

It is concluded here that the Claims Clause is faithful codification of the promises made by Congress in its resolution of October 10, 1780, whereby new States would be "republican" in their form of self-governance and they would possess "the same rights of sovereignty and independence as the other states." This is to say that Congress cannot mount a challenge, under its Property Clause authority, or under any other federal constitutional authority, to the municipal sovereignty and jurisdiction of the States over those tracts of former federal territory which it has admitted into the union of States as component portions of new States.

The Property Clause

The Property Clause is the second clause in section 3 of Article IV. This clause reads as follows:

> "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;" *Property Clause.*

The Property Clause, the Admissions Clause, and the Claims Clause were adopted by the Framers on the same day of the Constitutional Convention, August 30, 1787. This fact, alone, suggests a harmony of purpose among the three clauses, and a harmony of purpose suggests a commonality of origin.

The commonality of origin must be the promises of Congress made in its resolution of October 10, 1780. The common purpose of these three clauses must be the establishment of new States with "the same rights of sovereignty, freedom and independence" as the original States.

In the span of time between adoption of the resolution of October 10, 1780, and adoption of the Admissions, Property, and Claims clauses of the Constitution on August 30, 1787, Congress repeatedly affirmed its duty to dispose of territorial lands owned by the United States, and to do so by congressional ordinance or regulation. In the resolution of 1780, it is stated that territorial lands, "shall be granted and settled at such times and **under** such regulations as shall hereafter be agreed on by the United States in Congress assembled." On April 23, 1784, Congress adopted an ordinance which provided that territorial lands would be disposed of **under** "ordinances and regulations which Congress may find necessary, **for** securing the title in such soil to the bona fide purchasers." On May 20, 1785, Congress adopted an ordinance providing a method for surveying territorial lands belonging to the United States in preparation for their disposal. On July 13, 1787, Congress adopted the Northwest Ordinance. In this ordinance, Congress spoke of congressional regulations, "**for** securing the title in such soil to the bona fide purchasers."

Thus, the intent of Congress was demonstrated on at least four occasions before the Constitution. Territorial land belonging to the United States was to be disposed of "**under**" ordinances or regulations adopted by Congress "**for**" that purpose. Within the context of federally owned territorial lands and the federal laws associated therewith, congressional ordinances and regulations were to be adopted for the purpose of territorial disposal and for no other purpose

whatsoever. Conversely, this is to say that the ordinances and regulations adopted by Congress, within the context of federal territorial lands under its Property Clause authority, were never intended for, or understood to be for, the purpose of territorial governance. It is within the context of promised and repeatedly affirmed territorial disposal that the Framers, in Convention, adopted the text of the Property Clause on August 30, 1787.

Context is critical to an accurate interpretation of the Property Clause. In the words of Mr. Justice Frankfurter, "Words [such as those of the Property Clause] must be read with the gloss of the experience of those who framed them."[19] And also, "The values of the Framers of the Constitution must be applied in any case construing the Constitution."[20]

The text of the Property Clause is *inconsistent* with the text of the related, prior existing enactments of Congress previously discussed. The text of the Property Clause places the conjunction "and" between the delegated "power to dispose" and the delegated power "to make all needful rules and regulations respecting the territory or other property belonging to the United States." The prepositions "**under**" and "**for**" which are found in the prior related enactments, are not found in the Property Clause text. And the phrase "or other property," found in the Property Clause, has no precedent in the earlier enactments of Congress that deal with federal territories.

These divergences from established form drew the attention of the Court. In the case *O'Donoghue v. United States*,[21] the Court referred to the text of the Property Clause as "the peculiar language of the territorial clause, Art. IV, § 3, cl. 2, of the Constitution."

The "peculiar language" of the Property Clause is undoubtedly responsible for having given rise to widely divergent or contrary interpretations of its meaning. In the case of *Downes v. Bidwell*, the Court recognized this "contrariety":

> "I am not unmindful that there has been some contrariety of decision on the subject of the meaning of the clause empowering Congress to dispose of the territories and other property of the United States, some adjudged cases treating that article as referring to property as such, and others deriving from it the general grant of power to govern territories*." Downes v. Bidwell,* 182 U.S. 244 (1901).

When the historical record is given due consideration, as above, the conclusion that congressional power under the Property Clause is no more than that of a common proprietor exercising common proprietary powers over "property as such" is favored:

> "[S]o far as it relates to the public lands within a new State, (federal power) amounts to nothing more nor less than rules and regulations respecting the sales and disposition of public lands." *Coyle v. Smith*, 221 U.S. 559 (1911).

> "[Federal land laws under the Property Clause] are not of a legislative character in the highest sense of the term, but savor somewhat of mere rules prescribed by an owner of property for its disposal." *Butte City Water Co. v. Baker*, 196 U.S. 119 (1905).

That Congress is no more than a common proprietor when acting under its Property Clause authority seems to be affirmed, as well, by that provision in State enabling act compacts which requires that new States "never interfere" with the rules or regulations of Congress which are adopted under its Property Clause authority for the purpose of territorial disposal. President Jackson explained that the purpose of this restraint on the otherwise unencumbered exercise of State municipal jurisdiction over all of the territory proclaimed by Congress to be a new member State in the American Union was to facilitate territorial disposal by providing Congress with an "unshackled power":

> "To secure to the Government of the United States, forever, the power to execute these [State land cession] compacts in good faith, the Congress of the confederation, as early as July 13th, 1787, in an ordinance for the government

[19] Mr. Justice Frankfurter with whom Mr. Justice Jackson joins, dissenting, *United States v. Rabinowitz*, 339 U.S. 56 (1950); "[M]any of the members of that legislative body [the Second Continental Congress] had been deputies from the States [to the Constitutional Convention] ... and assisted in forming the new Government ...." S*cott v. Sandford,* 60 U.S. 393 (1856).

[20] Report of Senate Subcommittee on the Constitution, 97th Cong. 2nd Session, p. 83, February 1982.

[21] O'Donoghue v. United States, 289 U.S. 516 (1933).

of the territory of the United States northwest of the river Ohio, prescribed to the people inhabiting the Western territory, certain conditions which were declared to be 'articles of compact between the original States and the people and States in the said territory' which should 'forever remain unalterable, unless by common consent.' In one of these articles it is declared that —

The Legislatures of those districts, or new States, 'shall never interfere with the primary disposal of the soil, by the United States in Congress assembled, nor with any regulation Congress may find necessary for securing the title in such soil to the *bona fide* purchasers.'

This condition has been exacted from the people of all the new territories; and, to put its obligation beyond dispute, each new State, carved out of the public domain, has been required explicitly to recognise [sic] it as one of the conditions of admission into the Union. …

With such care have the United States reserved to themselves, in all their acts down to this day– in legislating for the Territories and admitting states into the Union–the unshackled power to execute in good faith the compacts of cession made with the original States." President Andrew Jackson, in the Senate, *Veto of the Land Bill*, December 5, 1833.

This expressed, temporary restriction on the otherwise unencumbered sovereign municipal powers of the States would be unnecessary if the rules and regulations adopted by Congress under its Property Clause authority were, in fact, *laws* adopted in pursuance of an Article I enumerated power. In this case, these rules and regulations would be automatically sheltered from State interference under the Supremacy Clause:

"This constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land;" *Supremacy Clause*, Article VI, clause 2.

When it is understood that the power delegated to Congress under the Property Clause is a common proprietary power to dispose of the territorial lands belonging to the United States, and when it is understood, also, that powers delegated to the United States under the Constitution are mandates levied upon an agent of the people and not discretionary suggestions,[22] then the Property Clause can be viewed as the Framers undoubtedly intended. The clause can be viewed as being written in furtherance of that complete territorial disposal which Virginia insisted upon in its land cession instrument of 1784, and in furtherance also of the promise of territorial disposal set down by Congress in its resolution of October 10, 1780. With this understanding, the Property Clause becomes what the Framers intended it to be, a constitutional mandate to dispose of territorial lands owned by the United States. And insofar as disposal is constitutionally mandated, unwarranted delay is impliedly constitutionally prohibited.

It is concluded here that the Property Clause, when interpreted within the context of the times in which it was written, is faithful codification of the promise of territorial disposal made by Congress in its resolution of October 10, 1780. By this promise, territorial lands acquired by the United States are to be "granted and settled at such times and under such regulations as shall hereafter be agreed on by the United States in Congress assembled, or any nine or more of them."

President Jefferson certainly understood this to be the intent of the Framers and the meaning of the Property Clause. The United States completed its acquisition of the vast Louisiana Purchase on July 5, 1803. Thirty-nine days later, on August 12, 1803, Jefferson wrote a letter to Senator Breckinridge wherein he spoke of the nation's recent acquisition. In this letter, Jefferson made the following comment: "The Constitution has made no provision for holding foreign territory, still less for incorporating foreign nations into our Union."

[22] Ref. footnote No. 40, *McCulloch v. Maryland*, 17 U.S. 316 (1819) and related text; "It may be admitted that a power given for one purpose cannot be perverted to purposes wholly oppo site, or besides its legitimate scope." 2 Story, *Commentaries on the Constitution*. sec. 1077.

Jefferson's comment is significant for two reasons:

First, Jefferson affirms that the essence of the promise made by Congress in its resolution of October 10, 1780, that federal territorial lands would be disposed of, is included in the constitutional text.

Second, Jefferson affirms that the promises made by Congress in its resolution of October 10, 1780, extend to all territories acquired by the United States, whether from one of the original land-ceding States or from some foreign sovereign, as was the case with the Louisiana Purchase acquired from France.

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PART V: INTERIM REVIEW

In the year 1780, the Second Continental Congress adopted an ordinance designed to encourage those States that were asserting claims to former British Crown lands to cede portions of those claims to it. By this resolution, Congress made four promises as to what it would do with any lands that the land-claiming States might choose to cede. These promises are summarized as follows: 1. Ceded lands would be subdivided into reasonably sized tracts and these tracts would be admitted into the union of States as new States with "the same rights of sovereignty, freedom and independence as the other States." 2. Ceded lands would be disposed of under regulations adopted by Congress for that purpose. 3. The United States would make no claim to jurisdiction over lands that the States might choose to retain to themselves. 4. New States established out of land ceded to the United States in response to the promises made would be guaranteed to have Republican governments.

Initially, the promises made by Congress in its resolution of October 10, 1780, were directed to lands that may be ceded to the United States by one of the original land-claiming States and to the States established therefrom. However, these promises were incorporated into the constitutional text under four clauses in the Fourth Article. These four clauses are the Admissions, Guarantee, Claims, and Property clauses. And as these promises were incorporated into and made part of the national Constitution, they necessarily apply to every federal territory and to every new State established therefrom because the government established under the Constitution ". . . is the government of all; its powers are delegated by all; it represents all, and acts for all."[23]

At another time, the Court expressly acknowledged the applicability of these promises of Congress to every territory acquired by the United States and to the benefit of every new State established therefrom, because every new State was admitted into the union of States upon an equal footing with the original States:

> "Whenever the United States shall have fully executed these trusts [established under the State land cession instruments], the municipal sovereignty of the new states will be complete, throughout their respective borders, and they, and the original states, will be upon an equal footing, in all respects whatever." *Pollard v. Hagan*, 44 U.S. 212 (1845).

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PART VI: JUDICIAL INTERPRETATION OF CONGRESSIONAL POWER UNDER THE PROPERTY CLAUSE

The Property Clause has been interpreted by the U.S. Supreme Court most recently in the case *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

Citing a handful of cases stretching back to *Sere v. Pitot,* 10 U.S. 322 (1810), the *Kleppe* court effectively rejected the idea that Congress is no more than a common proprietor over federal territorial lands that remain under federal ownership within the States.

With its *Kleppe* decision of June 17, 1976, the Court made the following statements in describing its view of federal Property Clause power over former federal territorial lands remaining under federal ownership within the borders of the States:

Municipal Police Power

> "Even over public land within the states, the general government has a power over its own property analogous to the police power of the several states, and the extent to which it may go in the exercise of such power is measured

[23] *McCulloch v. Maryland*, 17 U.S. 316 (1819).

by the exigencies of the particular case; Congress exercises the powers both of a proprietor and of a legislature over the public domain."

Complete Power

"Although the property clause in Article IV, sec. 3, clause 2, of the federal Constitution, conferring upon Congress the power to dispose of and make all needful rules and regulations respecting property belonging to the United States, does not authorize an exercise of a general control over public policy in a state, it does permit an exercise of the complete power which Congress has over particular public property entrusted to it."

Power Without Limitations

"The [Property] Clause must be given an expansive reading, for '[t]he power over the public lands thus entrusted to Congress is without limitations.'" *Kleppe v. New Mexico* citing *United States v. San Francisco*, 310 U.S. 16 (1940).

Supremacy Over State Law

"Although absent consent or cession a state retains jurisdiction over federal lands within its territory, Congress retains the power to enact legislation respecting those lands pursuant to the property clause of Article IV, sec. 3, clause 2, of the federal Constitution, which confers upon Congress power to dispose of and make all needful rules and regulations respecting property belonging to the United States; the federal legislation under the property clause necessarily overrides conflicting state laws under the supremacy clause in Article VI, clause 2, of the federal Constitution."

As a consequence of the power of Congress under the Property Clause, as that power is recognized by the *Kleppe* court, the national Congress is the defacto municipal legislature over former territorial lands that remain within the States and under federal ownership. While the States may exercise some part of their retained municipal sovereignty within the confines of these in-held federal territorial lands, they do so, according to the Court, subject to a complete and unlimited federal municipal supremacy. In other words, *independent* State sovereignty does not exist within these in-held lands. This is despite the fact that these lands were committed to the purposes of sovereign statehood by terms of each State's respective enabling act compact or congressional act of admission, as the case may be, and these States were, in theory, admitted into the union of States upon an "equal footing," as to political rights and sovereignty, with the original States.

It is, therefore, demonstrable that the currently applicable judicial interpretation of congressional Property Clause power is in destructive conflict with the rights of States, and the duties of Congress, under the Admissions, Claims and Guarantee clauses.

Under the Admissions Clause, Congress is authorized to "admit States" into the union of States. It was noted above that federal territories are not part of the United States.[24] Federal territories are "incorporated" as property belonging to the United States, but, as a result of the Admissions Clause limitation on federal power, they are not admissible into this union of States so long as they remain in their territorial condition. Nonetheless, Congress presumes to admit territorial lands into the United States, ostensibly as component parts of new and sovereign States, while, at the same time, maintaining them, with sanction by the *Kleppe v. New Mexico* court, in their pre-statehood territorial condition. Embarrassment of the Admissions Clause does not end here. There is more.

In theory, every new State has been admitted into the union of States upon the promise of "the same rights of sovereignty, freedom and independence as the other States" or, stated otherwise, upon an equal footing with the original States as to political rights and sovereignty. However, insofar as any new State is denied municipal sovereignty and jurisdiction over any portion of that tract of land which was committed to the purposes of its statehood by terms of its compact of admission, that State is also denied its claim to constitutional equality, or equal footing relative to the original States; and the admission of such jurisdictionally degraded States is contrary to the specific requirement of the Admissions Clause.

[24] Reference *Shively v. Bowlby*, 152 U.S. 1 (1894), p. 5.

Under the Claims Clause, the territorial sovereignty and municipal jurisdiction of new States was to be sheltered from "prejudice" by Congress. However, retention of a complete, unlimited and supreme federal municipal jurisdiction over former federal territorial lands that happen to remain under federal ownership within the States, as sanctioned by the *Kleppe v. New Mexico* ruling, is blatant prejudice against the constitutional "claims" of the States to undiminished territorial sovereignty, equal in extent to that of the original States.

New States possess constitutional claims to independent municipal sovereignty over the full extent of territory that has been committed to the purpose of their statehood by terms of their respective congressional acts of admission, including over former federal territorial lands which happen to remain within their borders under federal ownership. Recall that proprietorship and jurisdiction are separate and severable.

Under the Guarantee Clause, States are guaranteed a Republican form of self-government. It must be accepted that this guarantee extends over all of that tract of federal territory that has been committed to the purposes of sovereign statehood by terms of each State's congressional act of admission.[25] However, as a consequence of the Court's ruling in *Kleppe v. New Mexico*, independent State sovereignty and municipal jurisdiction do not extend to former federal territorial lands remaining under federal ownership within the States. Any jurisdiction that a State may exercise within these federally owned tracts is subject to a judicially established, complete and unlimited federal municipal supremacy and is, therefore, not sovereign self-governance but subordinate, permitted administration.

The Property Clause joins the Admissions, Claims and Guarantee clauses by not escaping distortion of its meaning under the *Kleppe* court's interpretation of congressional power. On October 21, 1976, Congress passed the *Federal Land Policy and Management Act*, (FLPMA), 90 Stat. 2743. By section 102 (a) (1) of this act, Congress "declared" the following policy: "the public lands be retained in Federal ownership, unless ... it is determined that disposal of a particular parcel will serve the national interest."

With passage of FLPMA, it is apparent that Congress fully embraces the *Kleppe* court's opinion that its power under the Property Clause is "without limitations." As a consequence of this judicially sanctioned legislative discretion without perceptible limitations, Congress has determined that it is not accountable to the Property Clause mandate for territorial disposal. Stated otherwise, under shelter of an "expansive" judicial interpretation, Congress has determined that the expressly delegated "power to dispose" under the Property Clause is no more than a discretionary suggestion such that it would be of no consequence if those words were erased from the constitutional text. However, the Court ignores the effect of the delegated "power to dispose" on the meaning and purpose of the Property Clause at peril to its own credibility.[26]

Ironically, this judicially sanctioned, complete and supreme federal municipal jurisdiction without limitations over former federal territorial lands remaining within the States and under federal ownership reverses the intent of Congress, as that intent is set down in acts of new State admission into the American union of States. These lands were committed to the purposes of sovereign statehood by these acts of Congress, but the Court's interpretation of congressional power under the Property Clause effectively *retrocedes* these lands back to the status of pre-statehood, federal jurisdictional territory.[27] And this effective retrocession is in direct contravention of the purpose and the promise of the Claims Clause which is attached as a "proviso" to the Property Clause.

The record of the Federal convention suggests that the Framers did not provide the Federal government with a power to displace sovereign State municipal jurisdiction from lands committed to the purposes of statehood, regardless of ownership. By way

[25] Reference *U.S. v. Bevans*, 16 U.S. 336 (1818), p. 8.

[26] "Whenever a reading arbitrarily ignores linguistic components or inadequately accounts for them, the reading may be presumed improbable." E.D. Hirsch, *Validity in Interpretation*, 236 (1967).

[27] "[A] general jurisdiction [such as the congressional jurisdiction without limitations that the Court currently recognizes over former federal territorial lands situated within the States] is essentially the same [as a] cession of territory [to he who exercises that general jurisdiction]." *United States v. Bevans*, 16 U.S. 336 (1818).

of example Mr. Luther Martin, a delegate to the Convention from the State of Maryland, said "The [federal] system [is] being designed to preserve to the States their whole territory unbroken ...."[28]

The damage done to this constitutional Republic, as a result of the Court's interpretation of congressional power under the Property Clause, is at least as expansive as the power that it has bestowed. The following examples make the point:

1. Three clauses related to the Property Clause and which bear upon the admission, the perpetuity, and the equality of member States in the American union, are rendered either inoperable or substantially irrelevant.

2. Congress is authorized to exercise municipal powers, such as the municipal police power, which the Framers and the people expressly denied to it, as evidenced by the Tenth of the Bill of Rights.[29]

3. Where the Framers crafted and the people ratified a Federal government of limited and enumerated powers,[30] the Court has vested Congress with a "complete" and "supreme" municipal power "without limitations."

4. While the Property Clause delegates the explicit "power to dispose" of the territorial lands belonging to the United States, Congress thumbs its collective nose and declares that it is burdened by no requirement to do so.

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PART VII: THE SOURCE OF CONTRARITY IN PROPERTY CLAUSE INTERPRETATION

In Part IV above, it was noted that the Court has referred to the language of the Property Clause as being "peculiar." It was also noted that the Court has recognized "some contrariety" in judicial interpretations of this clause. It is most likely that this judicial "contrariety" as to the meaning of the Property Clause is due to its "peculiar language." With this Part VII, the source of this language, and the object of its author, will be exposed.

From the resolution of Congress of October 10, 1780, through the ordinance of July 13, 1787, Congress made its intensions clear. The consistent intent of Congress was to honor its promises of 1780 and its duty under the State land cession instruments. That duty was and remains to dispose of the territorial lands coming into the possession of the United States. Nowhere in this seven year span of history is a provision made for indefinite retention of territorial lands under federal ownership. Nor is there any provision made for putting territorial land to some federal use other than the creation and admission of new States.

The congressional promise of territorial disposal had been repeatedly affirmed with simple and unambiguous language in the ordinances of 1784 and 1787. It is a matter of curiosity, then, that the Property Clause, which was written by the Framers just forty-three days after Congress adopted the Northwest Ordinance of 1787, should be drafted in language which the Court has called "peculiar."

Fortunately, the historical record provides us with the answer as to who wrote the clause, what his "peculiar" motive was, and what he hoped would be the consequence of his rhetorical handiwork. Perhaps the most important information that can be gleaned from this history is an admission by the author of the clause that the Convention, as a whole, did not detect his surreptitious scheme, and if it had, "a strong opposition would have been made."

Gouverneur Morris — The Person

The Property Clause was adopted by the Constitutional Convention on August 30, 1787, on a motion

[28] Mr. Luther Martin, Secret Proceedings and Debates of the Federal Convention (of 1787), 26.

[29] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Tenth of the *Bill of Rights*; "The States supposed that by their tenth amendment, they had secured themselves against constructive powers." Thomas Jefferson to William Johnson, 1823. ME 15:450; "The Constitution requires a distinction between what is truly national and what is truly local, … the police power, which the Founders undeniably left reposed in the States and denied the central government ...." *United States v. Morrison et al.*, decided May 15, 2000;

[30] "This original and supreme will [of the people] organizes the government ... establish certain limits not to be transcended .... The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written." *Marbury v. Madison*, 5 U.S. 137 (1803).

by Gouverneur Morris (1752 – 1816). Catherine Drinker Bowen,[31] wrote the following of Morris in her book *Miracle at Philadelphia*:[32]

> "Himself fastidious, mannered, he disliked Westerners, their politics, their ways, their speech; he feared their terrifying potential. 'I dread the cold and sour temper of the back counties,' he was to write [General George] Washington during ratification in Pennsylvania. ... He worked in committee to alter Article IV, Section 3, so that new states might not come in unconditionally." Catherine Drinker Bowen, *Miracle in Philadelphia*.
>
> As a cultural elitist, Morris held westerners in contempt. He considered them to be unworthy of participation in the affairs of government and detrimental to the "Atlantic interests":
>
> "The Busy haunts of men not the remote wilderness, was the proper School of political Talents. If the Western people get the power into their hands they will ruin the Atlantic interests." Gouverneur Morris quoted in Amar, Akhil Reed, *America's Constitution: SA Biography*, New York: Random House, 2005, p. 87.

Gouverneur Morris — The Politician

On April 8, 1831, James Madison wrote a letter to Mr. Jared Sparks.[33] In this letter, Madison characterized Morris's political inclinations:

> "Dear Sir: I have duly received your letter of March 30th. In answer to your inquiries 'respecting the part acted by Gouverneur Morris in the Federal Convention of 1787, and the political doctrines maintained by him,' it may be justly said that he was an able, an eloquent, and an active member, and shared largely in the discussions succeeding the 1st of July, previous to which, with the exception of a few of the early days, he was absent."
>
> "Whether he accorded precisely with the 'political doctrines of Hamilton,' I cannot say. He certainly did not 'incline to the democratic side,' and was very frank in avowing his opinions, when most at variance with those prevailing in the Convention. He did not propose any outline of a constitution, as was done by Hamilton; but contended for certain articles (a Senate for life particularly) which he held essential to the stability and energy of a government capable of protecting the rights of property against the spirit of democracy. He wished to make the weight of wealth balance that of numbers, which he pronounced to be the only effectual security to each, against the encroachments of the other."[34] James Madison to Mr. Jared Sparks, Montpellier, April 8, 1831. *Farrand's Record*, Vol. 3, 498.

In 1834, Nicholas P. Trist[35] interviewed James Madison. In the course of this interview, Madison made the following observation regarding Gouverneur Morris:

> "[Gouverneur Morris had an] usual fondness for saying things and advancing doctrines that no one else would." James Madison. Nicholas P. Trist: Memoranda. Montpellier, Sept. 27th, 1834. *Farrand's Records*, Vol. III, 534.

Gouverneur Morris — The Author of "Peculiar Language" in the Property Clause and His Motive

In a letter dated December 4, 1803, to Henry W. Livingston,[36] Gouverneur Morris explained his motive in crafting the text of the Property Clause as he did:

> "A circumstance, which turned up in conversation yesterday, has led me again to read over your letter of the third of November, and my answer of the twenty-eighth. I perceive now, that I mistook the drift of your inquiry, which

[31] Catherine Drinker Bowen (1897 – 1973), an American historical biographer.

[32] Catherine Drinker Bowen. *Miracle at Philadelphia*, Little, Brown and Co., 1966.

[33] Jared Sparks (1789 – 1866). An American historian, educator, and Unitarian minister. President of Harvard College, 1849 to 1853.

[34] The Debates in the Several State Conventions on the Adoption of the Federal Constitution, Elliot's Debates, volume 1, 507.

[35] Nicholas P. Trist, (1800 – 1874). American lawyer, diplomat, planter, and businessman.

[36] Henry W. Livingston (1768 – 1810), Yale graduate (1786), former clerk for Alexander Hamilton (1787 – 1789), former secretary for Gouverneur Morris (1792 – 1794), member of the 8th and 9th Congress (1803 – 1807).

is substantially whether the Congress can admit, as a new State, territory, which did not belong to the United States when the Constitution was made. In my opinion they cannot."

"I always thought that when we would 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 [the Property Clause] 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." Gouverneur Morris to Henry W. Livingston, Morrisania, Dec. 4, 1803. *Farrand's Records*, Vol. 3, 404.

It is fortunate that Gouverneur Morris, by his own hand, chose to confess his motive for crafting the "peculiar language" of the Property Clause as he did. Speculation is unnecessary. By his own admission, he wanted new territories that may be added to the United States to be maintained "as provinces"[37] with "no voice in our councils." By the phrase "no voice in our councils," Morris meant that these places would have no elected representation of their own sitting in the legislative offices of the Federal government in Washington, D.C.

It's fortunate, also, that Morris admits that if the Convention had been aware of his scheme and its potential consequences, "a strong opposition would have been made." In other words, he knew that the Convention would not support the retention of territorial land owned by the United States as a federal provincial or territorial empire.

Nonetheless, it is obvious that Morris's scheme has come substantially to fruition. The United States now owns some six-hundred and forty million acres of land or nearly one-third of the nation's land mass. Nearly half of the land west of the 100th Meridian is owned by the United States. The Court has opined that the power of Congress over this vast expanse is "complete," "without limitations," and "analogous" to the retained municipal powers of the States, including municipal "police power." And, finally, no member of Congress and no senator resides within this vast expanse so that, just as Morris intended, it has "no voice" of its own in the federal "councils."

If there is to be a distinction made between the dependent provinces envisioned by Gouverneur Morris and the territorial empire now held and governed at the municipal level by Congress, it would be this. Federal land policy, generally speaking, does not allow permanent human habitation inside this federal territorial empire.

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PART VIII: ANALYZING THE ELEMENTS OF GOUVERNEUR MORRIS'S SUBTERFUGE

"Contrariety" in judicial interpretation of the Property Clause has been noted. The purpose of this section is to draw the text of the Property Clause into the sharpest contrast possible with the related text from the resolution of Congress of October 10, 1780, and then to analyze the implications of the textual differences between the two. For convenient reference, the text of the Property Clause and the related text from the resolution of October 10, 1780, are presented in the box below.

PROPERTY CLAUSE

"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;"

RELATED TEXT — RESOLUTION OF OCTOBER 10, 1780

"Resolved, That the unappropriated lands that may be ceded or relinquished to the United States, by any particular states, pursuant to the recommendation of Congress of the 6 day of September last, shall be granted and disposed of for the common benefit of all the United States .... That the said lands shall be granted and settled at such times and under such regulations as shall hereafter be agreed on by the United States in Congress assembled, or any nine or more of them."

[37] Province — an administrative division or unit of a country. *Webster's Encyclopedic Unabridged Dictionary of the English Language,* Gramercy Books, 1996.

Morris's Property Clause text includes certain words which give the impression, upon casual listening, that the obligations of Congress, under the resolution of 1780 and the State land cession compacts, are accounted for and the powers that Congress will need to fulfill these obligations are faithfully provided. For example, the words "power to dispose," and "rules and regulations" must have sounded familiar and appropriate to the Convention, as a whole, when Morris made his motion. But Morris eliminated certain words that had been used by Congress in the context of the federal trust duty respecting territorial lands and he added other words that were unprecedented in this context. It is of little wonder that the Court has referred to Morris's Property Clause language as "peculiar." A particularized examination of Morris's rhetorical handiwork follows.

Linking Prepositions Are Eliminated

A preposition is a word, such as "by" or "under," that is used before a noun, such as "rules" or "regulations," and which connects the noun to another word, such as "dispose." In the related acts of Congress that precede adoption of the Property Clause, congressional "rules" or "ordinances" are linked to the act of disposal of territorial lands by the prepositions "under" and "for." In Morris's Property Clause text, there is no linking preposition between the phrase "power to dispose" and the nouns "rules" and "regulations."

The Verb "Make" Is Substituted For Linking Prepositions

The familiar sounds of "power to dispose," and "rules and regulations" in the collective ear of the Convention possibly obscured the fact that the linking prepositions "under" and "for," which Congress previously employed to link its "ordinances" and "regulations" to the act of territorial disposal, have been eliminated. The "non-linking" verb "make" is put in their place. Rhetorical "distance" is, therefore, created between the delegated "power to dispose" and the delegated power to "make all needful rules and regulations." The word "make" does not exist in this context in any of the related, preceding acts of Congress.

The Unnecessary Word "Needful" Is Added

The word "needful" is wholly unnecessary. As long as Congress is empowered to make rules or regulations for the disposal of federal territorial lands, the idea of "needfulness" is clearly implied. The word "needful" being added is a sham.[38] This unnecessary word, in this context, establishes a false aura of sincerity, or of virtuous commitment, or of fidelity to the generally understood purpose of the Property Clause. For good reason, the word "needful" does not exist, in this context, in any of the relevant preceding acts of Congress.

The Unnecessary Word "All" Is Added

The word "all" is also wholly unnecessary. If a constitutional provision delegates a particular power to Congress, then it is necessarily implied that Congress may employ all means necessary to accomplish the objective of that power. However, for Morris's purposes, the word "all" serves a special purpose as will be demonstrated below. The word "all" does not exist, in this context, in any of the relevant, preceding acts of Congress.

The Words "Or Other Property" Are Added

The Convention notes of James Madison from August 18, 1787, are clear. The matter of territorial disposal was to be taken up by the Convention in the context of "unappropriated lands of the United States." Specifically, Madison's notes, with him speaking in the third person, read as follows: "Mr. MADISON submitted in order to be referred to the Committee of detail the following powers as proper to be added to those of the General Legislature — 'To dispose of the unappropriated lands of the United States.'"[39] Within the context of congressional promises and congressional duties with respect to "unappropriated lands of the United States," beginning with the resolution of October 10, 1780, and extending through congressional adoption of the Northwest Ordinance on July 13, 1787, there is no reference whatever made to "other property." Why would Morris insert these words for which there is no historical precedent

[38] Sham — a cover or the like for giving a thing a different outward appearance; to make a false show of something; to pretend.

Webster's Encyclopedic Unabridged Dictionary of the English Language, Gramercy Books, 1996.

[39] Madison, James, Notes on the Debates in the Federal Convention. August 18, 1787.

within the context of "unappropriated [territorial] lands of the United States?"

The answer to this question may have something to do with the fact that constitutional powers delegated to the United States are, in fact, mandates issued to an agent by its principles with the expectation that they will be faithfully executed as its principles, the people, intend. In a different context but with application here, the Court has said as much: "The power being given, it is the interest of the nation to facilitate its execution."[40] It would therefore be both fair and consistent with the historical record to conclude that disposal of territorial lands belonging to the United States is a constitutional mandate. However, no one would suggest that Congress is also mandated to dispose of "other property" belonging to the United States. Who, for example, would say that Congress is obligated to dispose of weapons of war, or post offices, or desks and pencils "belonging to the United States?"

By inserting the words "other property" into the Property Clause text, Morris associated property which Congress was bound "by ties as strong as can be invented to secure the faith of nations" to dispose of with other property which no one would suggest that Congress has a duty to dispose of. This clever juxtaposition substantially confounds the idea of mandatory disposal. And as the meaning of the delegated "power to dispose" is rendered seemingly ambiguous, so too is the delegated power to "make all needful rules and regulations" also rendered ambiguous. The conclusion that can be drawn and, in fact, has been drawn by the Court, is that the delegated power to "make all needful rules and regulations" must have a *broader purpose* than simply a means for territorial disposal.

It's clear that Gouverneur Morris intended to plant a textual "seed of destruction" into the federal trust with respect to territorial lands owned by the United States. The federal trust with respect to all federal territorial lands is embodied in the Admissions, Claims, and Guarantee clauses, and in the Property Clause were it to be interpreted in a manner consistent with the legislative acts that make up its formative history. But when the Property Clause is interpreted in a manner consistent with Morris's quest for federal "provinces with no voice in our councils," the objectives of these three related clauses are rendered discretionary at the will of Congress.

In order for Morris's scheme to bear the fruit he intended, a specific judicial determination was needed. By this determination, it must be found that Congress itself is empowered with municipal authorities with which it can function in the capacity of a local municipal legislature in the federal territories and, secondly, this authority must emanate not from the Northwest Ordinance, where such local territorial governments are temporary, pending the advent of statehood, but from the Constitution itself in order to carry the permanence of that instrument of supreme law. Twenty-three years later, after the strenuous State ratification debates over first principles and balanced constitutional federalism were a generation in the past, the Court was in a position to provide, as discussed in Part X.

The Conjunction "And" Is Added

Morris inserted the coordinating conjunction "and" between the delegated "power to dispose" and the delegated power "to make all needful rules and regulations." This word also does nFot exist, in this context, in any of the relevant preceding acts of Congress. Nonetheless, this word, in this location, is crucial to Morris's scheme. This conjunction in this location, along with having eliminated the previously used linking prepositions "under" and "for," yields the impression that two independent powers are delegated in the same clause, the "power to dispose" and the power to "make all needful rules and regulations." The Conference of Western Attorneys General (CWAG) is among those who have accepted this interpretation of the Property Clause.[41]

[40] *McCulloch v. Maryland*, 17 U.S. 316 (1819).

[41] In August 2014, the Public Lands Subcommittee of the Western Attorneys General Litigation Action Committee, Conference of Western Attorneys General (CWAG), submitted a report in which it examined "the legal issues regarding federal land ownership in the western states." In reference to the Property Clause, the committee concluded that this clause "vests Congress with two related but distinct powers — the power to manage property owned by the federal government and the power to dispose of such property."

With the delegated power to "make all needful rules and regulations" presumptively disassociated from the delegated "power to dispose," this power now appears to be no longer linked with, and, thereby, limited to the execution of any particular purpose, such as territorial disposal. This seemingly independent power to "make all needful rules and regulations" can now be plausibly interpreted as being "complete," in and of itself and "without limitations." This is exactly what the Court, in *Kleppe v. New Mexico*, has done. The unnecessary word "all" comes into play here. Insertion of this unnecessary word tends to justify the *Kleppe* court's "expansive reading" of congressional Property Clause power.

The *Kleppe v. New Mexico* court's interpretation of congressional power under the Property Clause was discussed in some detail in Part VI above. According to this court, congressional power under this clause is "complete" and "without limitation." This power of allegedly unlimited scope cannot be derived from the singular, delegated "power to dispose" which sits to the left of the coordinating conjunction "and." Consequently, this allegedly unlimited power must be considered by the Court to be the product of the delegated power to "make all needful rules and regulations respecting the territory or other property belonging to the United States" which sits to the right of the conjunction "and." Since the coordinating conjunction "and" plays a significant role in the Court's interpretation of the meaning of the Property Clause, an examination of the grammatical rule for coordinating conjunctions is warranted.

Judicial Interpretation v. The Grammatical Rule for the Coordinating Conjunction "And"

The question to be considered here is this: Is the currently applicable judicial interpretation of congressional power under the Property Clause consistent with the grammatical rule governing the use of coordinating conjunctions such as the word "and" which lies between the delegated "power to dispose" and the delegated power "to make all needful rules and regulations respecting the territory or other property belonging to the United States?"

By grammatical rule, coordinating conjunctions such as "and," "but," and "for" are used when connecting words, phrases, or independent clauses of *equal grammatical importance.* The term "equal grammatical importance" means that no single idea on one side of the conjunction overshadows the idea on the other side of the conjunction. Thus, we have the term "coordinating conjunction."

The Court's currently applicable interpretation of congressional Property Clause power fails to comply with the grammatical rule for coordinating conjunctions. On the left side of the conjunction, the single and unambiguous "power to dispose" is delegated. On the right side of the conjunction, according to the Court, a "complete" power "without limitations" "analogous" to yet "supreme" over the municipal powers of the States is delegated. It is obvious that this judicially recognized "complete" and "supreme" power "without limitations" on the right duplicates and effectively nullifies the singular power on the left. By grammatical rule the delegated power to "make all needful rules and regulations, which lies to the right of the coordinating conjunction, must be limited in scope and not, as the Court has determined, "complete" and "without limitations."

When the historical context in which the Property Clause was written is taken into consideration, it is clear that congressional "rules and regulations," within the context of federal territorial lands, are authorized for the limited purpose of territorial disposal and by no means for the purposes of general and supreme local municipal governance.[42]

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PART IX: JUDICIAL INTERPRETATION v. CANONS OF STATUTORY INTERPRETATION

Canons of statutory interpretation may be defined as "intelligible, generally accepted and consistently applied"[43] rules for interpreting statutes. As rules for statutory interpretation, canons of law tend to erect barriers against "a dangerous discretion [that may otherwise be exploited by judges] to roam at

[42] Ref. footnote No. 19, Mr. Justice Frankfurter with whom Mr. Justice Jackson joins, dissenting, and related text.

[43] Henry M. Hart & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1201 (tent. Ed. 1958) from *Reading Law*, Scalia — Garner, p. 8, n. 20.

large in the trackless field of their own imaginations."[44] As barriers to judicial discretion, interpretive canons tend to preserve the legislated word and, therefore, democracy itself.

The "peculiar language" of the Property Clause and the "contrariety" that characterizes its interpretation have been noted. With this Part, the currently prevailing judicial interpretation of this clause, as set down by the *Kleppe v. New Mexico* court in 1976, will be examined under three canons of statutory interpretation.[45]

1. Whole-Text Canon: "The text must be considered as a whole."

The Preamble to the U.S. Constitution affirms that this instrument of supreme law was ordained by the people "for the United States of America." This is to say that this instrument of supreme law was not written for political structures that are not member States of the American union. Under the Admissions Clause limitation on congressional power, political units that are not constitutional States are inadmissible into this union of States. (Ref. *Coyle v. Smith*, p. 5) The inadmissibility of political units that are not constitutional States was affirmed by President Jefferson in a letter written to Senator Breckinridge, dated August 12, 1803.

In his letter to Senator Breckinridge, President Jefferson wrote that "The Constitution has made no provision for holding foreign territory, still less for incorporating foreign nations into our Union." This letter was written on the heels of the Louisiana Purchase which was executed less than a month earlier on July 5, 1803.

In the opinion of the *Kleppe v. New Mexico* court, Congress holds the same power over public lands within the States as it holds over pre-statehood federal territories. Both lands are subject to the full force of congressional Property Clause power, as this power is currently interpreted by the Court. Under this interpretation of congressional Property Clause power, public lands within the States possess none of the attributes of sovereign statehood, and yet these lands have been admitted into the union of American States by specific acts of Congress and, on occasion, by congressionally authorized presidential proclamation.

Under the *Kleppe v. New Mexico* court's opinion of congressional Property Clause power, we now have a conflict of constitutional proportions. Either Congress has admitted into the union of American States lands which, according to the Court, remain as federal jurisdictional territory, in violation of its Admissions Clause authority or, in the alternative, the Court has reversed the constitutional acts of Congress by declaring that component portions of newly admitted States actually remain as federal jurisdictional territory simply because they remain under federal title. The question becomes this: Has Congress exceeded its authority under the Admissions Clause or has the Court misinterpreted the meaning of the Property Clause?

Under presidential proclamations of new State admission or, in the alternative, under Congressional acts of new State admission, Congress expressly defines the external boundaries of new States. Within these congressional acts, Congress may temporarily reserve certain public lands from the sovereign municipal jurisdiction of new States. For example, in the instance of the State of Utah, "Indian lands" are so exempted. Former federal territorial lands remaining under federal title within a new State under the head "public lands" are not reserved. These lands are to be lands of the States in which they are situated. As lands of the States in which they are situated, former federal territorial lands, now called "public lands," must be subject to sovereign State municipal jurisdiction. This extension of sovereign State municipal jurisdiction to former federal territorial lands remaining within new States as "public lands" is entirely consistent with the role of Congress under the Admissions Clause, with the Equal Footing Doctrine, and also with the purpose of the Constitution as stated in its Preamble. But then the Court steps into the picture.

The Court opines that public lands within the States are actually jurisdictionally indistinguishable from pre-statehood federal territories. With this ruling, the Court actually reverses the object of congressional acts of new State admission and the purpose of the national Constitution as that purpose is stated in its Preamble. It is therefore plain to see that the opinion of the Court in *Kleppe v. New Mexico* fails examination under the Whole-Text canon of statutory interpretation.

[44] Kent, *Commentaries on the Law*. 9th ed., 337 (1858).

[45] The canons considered here are taken from Scalia, Antonin and Bryan A. Garner, *Reading Law*, 1st ed., Thompson/West, 2012.

2. Harmonious-Reading Canon: "The provisions of a text should be interpreted in a way that renders them compatible, not contradictory."

It was demonstrated above (Ref. Part IV) that the Property Clause is associated, in the Constitution, with the Admissions, Claims, and Guarantee clauses. It was demonstrated also that all four of these clauses are rooted in the promises set down by Congress in its resolution of October 10, 1780.

The Admission, Claims, and Guarantee clauses are clearly associated with the admission of new States into the American union of States. These clauses provide for equality of statehood between new and original States, for the security of every State's territorial sovereignty, and for Republican State self-governance. The Property Clause mandate for territorial disposal was to be the constitutional means by which residual federal interference with local municipal affairs (e.g., tax exemption, immunity from State eminent domain) would end and the promises of the Admissions, Claims, and Guarantee clauses would, thereby, be fully realized by the inhabitants of every new State.

However, in its *Kleppe v. New Mexico* decision, the Court determined that, under its Property Clause authority, Congress and not the States is the "complete" and "supreme" municipal legislature "without limitations" over public lands within the States. This interpretation of congressional Property Clause power denies these lands and, by extension, these States and their inhabitants, their entitlements under the Admissions, Claims, and Guarantee clauses. For this reason, the *Kleppe* court's interpretation of congressional Property Clause power fails examination under the Harmonious-Reading Canon of statutory interpretation.

3. Surplusage Canon: "If possible, every word and every provision is to be given effect. None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence."

The *Kleppe* court's interpretation of congressional Property Clause power, taken literally, necessarily includes the power to either dispose or not dispose of territorial and public lands belonging to the United States. These necessarily implied powers render the expressly delegated "power to dispose" both a duplication and null and of no consequence at the discretion of Congress. For these reasons, the *Kleppe* court's interpretation of Congressional Property Clause power fails examination under the Surplusage Canon of statutory interpretation.

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PART X: JUDICIAL COMPLICITY — CHIEF JUSTICE JOHN MARSHALL AND THE CASE OF *SERE v. PITOT*, 10 U.S. 332 (1810)

The Case of *Sere v. Pitot*, 10 U.S. 332 (1810)

It took twenty-three years for the Court to provide the "legal sanction" that would bring Morris's subterfuge to fruition.[46] In the case of *Sere v. Pitot*, 10 U.S. 332 (1810), Chief Justice John Marshall[47] rendered an opinion which held that, under either the treaty power or the Property Clause, Congress itself possesses the power to directly govern the federal territories:

> "The power of governing and of legislating for a territory is the inevitable consequence of the right to acquire and to hold territory. Could this position be contested, the constitution of the United States declares that '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.' Accordingly, we find congress possessing and exercising the absolute and undisputed power of governing and legislating for the territory of Orleans." *Sere v. Pitot*, 10 U.S. 332 (1810).

It was fortunate for Gouverneur Morris's purposes, though perhaps not coincidental, that Marshall, in rendering the Court's opinion in *Sere v. Pitot*, chose to ignore the existence of the Northwest Ordinance. By ignoring the existence of this Ordinance, while crediting the Property Clause as the source of congressional authority to establish a territorial gov-

[46] Coincidentally, Alexander Hamilton understood that subversive schemes do not mature overnight: "Schemes to subvert the liberties of a great community require time to mature them for execution." Hamilton, *Federalist* No. 26.

[47] Chief Justice John Marshall (1755 – 1835) served as Chief Justice of the U.S. Supreme Court 1801 – 1835.

ernment in the territory of Orleans, Marshall effectively credited the delegated power to "make all needful rules and regulations" under the Property Clause with the *broader purpose* that was needed to bring Morris's scheme to fruition. But Marshall was not finished with gifting Morris his vision.

When Marshall said, in his *Sere v. Pitot* opinion, that "we find congress possessing and exercising the absolute and undisputed power of governing and legislating for the territory of Orleans," he effectively established Congress as being in possession of municipal power "analogous" to that of the States and, beyond that, being constitutionally authorized to directly exercise this power in the manner of a supreme national municipal legislature over the federal territories. Later, as has been discussed, this power was extended to apply over former federal territorial lands remaining under federal ownership within the States as "public lands."[48]

Congress was prompt to capitalize on the confusion spawned by Morris's handiwork and the opportunity presented by the *Kleppe* court's interpretation of it. With its Federal Land Policy and Management Act of 1976, Congress declared that it is not bound by any constitutional mandate for territorial disposal. This is despite Congress's early reliance on the "faith of nations" that federal territorial lands would be disposed of. In the present opinion of Congress, the constitutionally delegated "power to dispose" is no more than a discretionary alternative.

In order to correct the record as to the actual power employed by Congress to establish a local territorial government in the territory of Orleans, all one must do is refer to 2 Statutes at large 322, dated April 2, 1805. Here, the neutral researcher will find that local territorial government in the territory of Orleans was established five years before the *Sere v. Pitot* case and it was done under authority, and in accord with the terms of the Northwest Ordinance. The Property Clause had nothing whatever to do with it:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States be, and he is hereby authorized to establish within the territory of Orleans, a government in all respects similar, (except as is herein otherwise provided,) to that now exercised in the Mississippi territory; and shall, in the recess of the Senate, but to be nominated at their next meeting, for their advice and consent, appoint all the officers necessary therein, in conformity with the ordinance of Congress, made on the thirteenth day of July, one thousand seven hundred and eighty-seven, and that from and after the establishment of the said government, the inhabitants of the territory of Orleans shall be entitled to and enjoy all the rights, privileges, and advantages secured by the said ordinance, and now enjoyed by the people of the Mississippi territory."[49] Enabling act for the territory of Orleans, 2 Stat. 322, April 2, 1805.

Over time and with a series of subsequent opinions,[50] guided by the legal practice of *stare decisis*, the Court refined its flawed opinion in *Sere v. Pitot*. In *Kleppe v. New Mexico*, the Court stated, without equivocation, that "It is the Property Clause, for instance, that provides the basis for governing the Territories of the United States." Reference to the treaty power is omitted without comment. Despite the absence of doubt in the *Kleppe* court's unequivocal attribution of governmental power under the Property

[48] In *United States v. Gratiot*, 39 U.S. 526 (1840) the Court announced that the word "territory" in the Property Clause referred "merely" to a form of property belonging to the United States and that this word is "equivalent to the word 'lands.'" With this interpretation, the extraconstitutional federal municipal governance which the Court had discovered under the Property Clause was ushered into the confines of the States upon former federal territorial lands situated there simply because they remain under federal title.

[49] Local territorial governance within the Mississippi territory was also established in accord with terms of the Northwest Ordinance: "[T]he President of the United States is hereby authorized to establish therein a government in all respects similar to that now exercised in the territory northwest of the river Ohio, excepting and excluding the last article of the ordinance [forbidding slavery] made for the government thereof by the late Congress on the thirteenth day of July one thousand seven hundred and eighty-seven [the NW Ordinance] ...." 1 Stat. 549, April 7, 1798.

[50] Cases cited in *Kleppe v. New Mexico*, as being supportive of its opinion: *United States v. Gratiot*, 39 U. S. 526 (1840); *Dorr v. United States*, 195 U. S. 138 (1904); *Balzac v. Porto Rico,* 258 U. S. 298 (1922); *Hooven & Allison Co. v. Evatt*, 324 U. S. 652 (1945).

Clause, it is noted, as previously mentioned, that there are contrary opinions as to the meaning of the Property Clause, and it has been said that "*stare decisis* has little applicability when the earlier case law has spawned uncertainty."[51]

In *Kleppe v. New Mexico*, the State attempted to make the argument that, under its Property Clause authority, Congress has power only to dispose of federal territorial lands and to make the rules and regulation necessary to accomplish that end. This would be the "property as such" argument.[52] The Court brushed the State's argument aside. The Court held that the powers of Congress under this clause are so broad that the singular delegated "power to dispose" cannot be construed as holding Congress to a "particular course of policy" with respect to territorial lands. (Ref. President Andrew Jackson, footnote No. 3 and related text.):

> "In brief, …, appellees have presented no support for their position that the Clause grants Congress only the power to dispose of, to make incidental rules regarding the use of, and to protect federal property. This failure is hardly surprising, for the Clause, in broad terms, gives Congress the power to determine what are 'needful' rules 'respecting' the public lands." *Kleppe v. New Mexico*, 1976.

It is no wonder that, after this ruling of the Court in June, 1976, Congress, in October, 1976, declared a national "policy" of retaining the remaining territorial lands under federal ownership unless disposal of a particular parcel is found to be "in the national interest." Gone is the recognition that powers being given, "it is the interest of the nation to facilitate their execution."[53] Gone is the understanding that a power given for one purpose cannot be perverted to purposes wholly opposite, or besides its legitimate scope.[54] Gone is the understanding that "whenever a reading arbitrarily ignores linguistic components or inadequately accounts for them, the reading may be presumed improbable."[55] Gone is the promise of statehood for the former federal territorial lands that happen to remain under federal title within the confines of new States.

Philosophically Kindred — Gouverneur Morris and Chief Justice John Marshall

Both historical and judicial inquiry should question why Chief Justice Marshall failed to acknowledge the existence and the purpose of the Northwest Ordinance in his ruminations as to the source of federal authority to establish local government within the territory of Orleans. He could not plead ignorance of it. He had participated in many of the events formative of the American confederacy. He wintered with Washington at Valley Forge and participated in the Virginia constitutional ratification convention of 1788. It can only be concluded that the Chief Justice purposely ignored the Ordinance and also the Debts and Engagements Clause which expressly affirmed that the Ordinance was retained in full force and effect as part of the Constitution.[56] Most telling is the fact that Marshall also ignored 2 Stat. 322 which established local government in the territory of Orleans under terms of the Northwest Ordinance five years before his opinion in *Sere v. Pitot*. But to what purpose would he ignore the ordinance?

In answer to this question, it is noted that Marshall and Gouverneur Morris were contemporary members of the founding generation and only three years apart in age. Where the elitist Morris had disdain for democratic institutions and dreaded the "cold and sour temper of the back counties," Marshall held similarly dismissive feelings toward the States. He had served two years in Virginia's Council of State and approximately six years in its House of Delegates. This exposure to State politics "convinced him that

[51] Antonin Scalia, Garner. *Reading Law*, note 4, p. 412, in reference to Scalia's concurring opinion in *Walton v. Arizona*, 497 U.S. 639 (1990).

[52] The State's argument is also consistent with the opinion of the Court in *Pollard v. Hagan*, 44 U.S. 212 (1845). In *Pollard*, the Court stated that "Upon the admission of Alabama into the union, the right of eminent domain, which had been temporarily held by the United States, passed to the State. Nothing remained in the United States but the public lands."

[53] Ref. footnote No. 40, *McCulloch v. Maryland*, related text.

[54] Ref. footnote No. 22, Justice Joseph Story, *Commentaries on the Constitution*.

[55] Ref. footnote No. 26. E.D. Hirsch, *Validity in Interpretation.*

[56] Ref. footnote No. 6, *Pollard v. Kibbe,* and related text.

state legislators were parochial and incompetent."[57] Conversely, it has been said of Marshall that he held a "magisterial view of the [Federal] government."[58] It has been further said of Marshal that "all his leading constitutional opinions, except *Marbury* [*v. Madison*], address the issue [of federalism], either directly or indirectly, and all of them curb state power."[59]

Thus, while Morris hoped that new federal territories would be maintained as "provinces … with no voice in our councils," Marshall used his position as Chief Justice to shift as much power to the Federal government as possible, at the expense of the States. The commonality between their respective political persuasions is self-evident. Both held animus toward States, Morris toward new States, Marshall toward existing States. So now the question becomes this: How did ignoring the existence and purpose of the Northwest Ordinance in the *Sere v. Pitot* case further the objectives of both men? The following scenario is plausible based on what is known from the historical record.

Gouverneur Morris wanted new territories to be held as provinces. He did not want them to be established as new and self-governing States. In his conception, Congress would be the "complete" governmental authority over them. And since federal territories are not members of the union of States, the Constitution, and constitutional limitations on federal power, do not extend to them of their own force. Congress must proactively bring constitutional principles to them. This being the case, it may be fairly said that in Gouverneur Morris's provinces Congress would not only have "complete" power but it would also have power "without [constitutional] limitations."

The Northwest Ordinance presented an obstacle to the accomplishment of Morris's scheme for these reasons: territorial governments are authorized only under provisions of the Ordinance; the role of Congress under the Ordinance is to establish and supervise local territorial governments, not to *be* those governments; and the Ordinance is explicit that these local governments are temporary, pending the advent of statehood for the territory. In sum, the Ordinance provides federal territories with a pathway to statehood which Morris objected to. It is plain to see why Marshall chose to ignore its existence in *Sere v. Pitot.*

The Tenth of the Bill of Rights presented another obstacle to the accomplishment of Morris's scheme. By the Tenth of the Bill of Rights, as previously mentioned, Congress does not possess the municipal powers of the States and it cannot exercise powers that it has not been given.[60] For Morris's scheme to come to fruition, three things needed to occur. First, the Northwest Ordinance must be ignored. Second, the authority of Congress to establish local governments in the federal territories must be said to arise not from the temporary authority of the Ordinance but out of some constitutionally permanent source. Third, the power that is found to arise out of some constitutionally permanent source must circumvent the limitation on federal power that has been set down by the Tenth of the Bill of Rights.

Having political sympathies aligned with those of Gouverneur Morris, Marshall was able to provide all that was needed to satisfy each of the three requirements for fulfilling Morris's vision. Marshall began by ignoring the existence of the Northwest Ordinance and its role in forming a local government in the territory of Orleans. Then, Morris provided Marshall with the opportunity to opine that territorial government in the territory of Orleans arose out of either the treaty power or the Property Clause. This Morris did when he effectively set the power to "make all needful rules and regulations" apart from any particular purpose, such as territorial disposal, which would limit its scope. Being apparently disassociated from any particular purpose, the Property Clause power to "make all needful rules and regulations" can be plausibly construed as not only constitutionally permanent but also "complete," "without [constitutional] limitations," and, therefore, inclusive of municipal powers. Within the scope of a "complete" power "without limitations," a "supreme" federal municipal "police power" effortlessly follows under color of the

[57] Hall, Kermit, ed. in chief, *The Oxford Companion to the Supreme Court of the United States*, Oxford Univ. Press, Inc., 1992, 524.

[58] Ibid, 281.

[59] Ibid, 525.

[60] "The United States is entirely a creature of the Constitution." *Reid v. Covert*, 354 U.S. 1 (1957) citing *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816).

Supremacy Clause; and all of the elements of federal power over lands owned by the United States that were identified by the *Kleppe v. New Mexico* court fall neatly into place.

Thus it is shown that, with his ruling in *Sere v. Pitot*, both Marshall and Morris get what they were seeking. Congress is released from any duty to dispose of territorial lands owned by the United States, it is vested with municipal powers necessary to directly govern federal territories as "provinces with no voice in our councils" and, potentially, no more "parochial and incompetent" new States need to be established out of federal territorial lands.

Despite Marshall's aid, Morris's vision has come to fruition only in part. States were ultimately established out of the territorial lands acquired by the United States after constitutional ratification. Nonetheless, a vast expanse of federal territorial land, totaling some one-third of the nation's land mass, remains under federal ownership and governed by Congress acting in the manner of a complete and supreme national municipal legislature without limitations. This expanse of federal jurisdictional territory is denied the attributes of sovereign statehood, just as Morris envisioned. While this vast expanse remains as property of the United States and federal jurisdictional territory, it can be no part of the union of independently sovereign States. Proper wording here would be that this vast expanse is "incorporated" as property belonging to the United States but it cannot be "admitted" into the union of States in this jurisdictional and territorial condition due to the Admissions Clause limitation on congressional power. And since only States reside under the Constitution, this vast expanse is held "extra-constitutionally" and jurisdictionally foreign to the member States of the American union.

The extra-constitutional status of this vast expanse explains how it is that a government which was established under a written Constitution with only limited and enumerated powers can exercise within it a "complete" power "without [constitutional] limitations," including the municipal and police powers of the States which it was not given under the Constitution. Simply put, these lands do not reside under the protection of constitutional limitations on federal authority. There is irony in the fact that this extra-constitutional political construct is alleged by the Court to derive from the Property Clause of the national Constitution.

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PART XI: WHERE WE NOW STAND

While the jurisdictional status of the residual federal territorial lands that remain situated within the confines of a number of the States may appear to be settled with the *Kleppe v. New Mexico* opinion, this may not be the case.

If ever an affected State should rise to challenge the currently applicable judicial interpretation of congressional Property Clause power on the basis of first principles, the Court would be faced with two options. It can continue to interpret the clause as has been done under the *Kleppe v. New Mexico* opinion or it can interpret the clause in a manner that does not create conflict with the meaning of the three clauses with which it is intimately and historically associated, the Admissions, Claims and Guarantee clauses. By either interpretation, certain words in the Property Clause are unavoidably rendered unnecessary and needlessly added. This is said in full view of the fact that the Court has said that no such words exist in the constitutional text.[61] This being the case, the Court must decide which alternative is the least damaging to constitutional federalism or, stated otherwise, which alternative is the most consistent with the Framers design.

In interpreting the Property Clause in the manner of the *Kleppe v. New Mexico* Court, the words "power to dispose" are considered "unnecessary and needlessly added." Proof is found in the 1976 policy of permanent retention announced by Congress under the Federal Land Policy and Management Act, FLPMA. Conversely if the Property Clause were to be interpreted by the Court in a manner consistent

[61] "In expounding the Constitution of the United States, every word must have its due force and appropriate meaning, for it is evident from the whole instrument that no word was unnecessarily used or needlessly added." ... "Every word appears to have been weighed with the utmost deliberation and its force and effect to have been fully understood." *Holmes v. Jennison*, 39 U.S. 540 (1840).

with its formative history and in a manner that eliminates the needless and unprecedented wording interjected by Gouverneur Morris to create his "peculiar language," the Clause would read as shown in the following demonstration:

> "The Congress shall have Power to dispose [by] ~~of and make all needful~~ Rules and Regulations ~~respecting~~ the Territory ~~or other Property~~ belonging to the United States;"

Striking Morris's rhetorical "smokescreen" from the Property Clause text and restoring a single linking preposition (by) exposes a clause, otherwise concealed, that is entirely consistent with the meaning and the objective of the three clauses with which it is intimately and historically associated, and entirely consistent, as well, with the related legislative instruments that precede adoption of the clause and constitutional ratification.

The dilemma that the Court is faced with, then, is not *whether* there are words in the Property Clause that are "unnecessary and needlessly added" because, under either method of interpretation, certain words are thus rendered. The dilemma for the Court is *which words* are going to be considered "unnecessary and needlessly added."

Currently, the Court has effectively determined that the words "power to dispose" will be sacrificed to the greater "complete" power "without limitations" to "make all needful rules and regulations." What are the consequences of this determination? The consequences of this approach to reading the Property Clause would include the following:

- Congress is vested with municipal and police powers which the people did not delegate to it under their Constitution.[62]
- The Tenth of the Bill of Rights is rendered a deceptive fraud.
- The Framer's constitutional government of limited and enumerated powers is vested with an extra constitutional power "without limitations."
- The Property Clause is placed into destructive conflict with the meaning and purpose of the Admissions, Claims, and Guarantee clauses with which it is intimately and historically associated.
- New States established out of federal territorial lands are denied the full benefit of their constitutional entitlements under the Admissions, Claims, and Guarantee clauses.
- Political organizations "which are less or greater, or different in dignity or power, from those political entities which constitute the Union" (organizations whose territories remain, in some measure, governed by Congress with an extraconstitutional municipal power) have been admitted into the union of States in violation of the Admissions Clause limitation on congressional power.

What would the consequences be if the Court were to preserve the delegated "power to dispose" as a constitutional mandate and, in the alternative, sacrifice the unnecessary and "peculiar language" introduced by Gouverneur Morris as demonstrated above? The consequences of this approach to a reading of the Property Clause would include the following:

- Congress would be denied a judicially sanctioned municipal and police power which the States retained to themselves and did not delegate to the United States under their Constitution.
- Congress would be denied an extraconstitutional municipal power "without limitations."
- The limitation on the scope of congressional power originally established under the Tenth of the Bill of Rights would be restored.
- New States established out of federal territories would be admitted into the union of States upon an equal footing with the original States, as to political rights and sovereignty, consistent with requirements of the Admissions Clause.
- New States established out of federal territories would be secured in the full benefits of the Claims and Guarantee clauses.
- The Property Clause would be interpreted in a manner that is consistent with and not in

[62] Ref. footnote No. 29, *United States v. Morrison et al.*

destructive conflict with the purposes of the Admissions, Claims, and Guarantee clauses.

- The constitutional mandate for territorial disposal, which originated out of the promises made by Congress in its resolution of October 10, 1780, would be restored.

In sum, the Court should be challenged, or challenge itself, to consider which method of Property Clause interpretation it should sustain. In doing so, the Court must consider which set of consequences, as listed above, is most conducive to the long-term survival of this constitutional republic. To pose the question in more stark terms, the question could be this: Does this republic reside under a Constitution of the Framer's design and as ratified by the people, or does this republic reside under a constitution devised, in part, by a clever political schemer and interpreted by an unaccountable Court, tainted with an historic and, by some accounts, an inherent animus toward the States?[63]

Among the options available to the Court, one choice creates a set of destructive consequences for the Framers original design. The other choice preserves the Framers design as well as constitutional equality of statehood among all of the members of the American union. The moral, the ethical and the constitutionally legitimate choice should be self-evident. One political obstacle of some significance warrants limited mention.

If and when the Court should reconsider its interpretation of congressional power under the Property Clause, strong opposition can be anticipated by a portion of the body politic that favors perpetuation of the currently existing federal territorial empire, regardless of its constitutionality. This opposition would speak, for example, of the "existence value" of an "enduring legacy of wildness" in the form of public lands. There is an answer in response to this opposition.

The remaining federal territorial empire could be divested by Congress, *en masse*, to the respective States in which it is currently situated for continued public benefit and public use as "State public lands." The States and the United States could enter into negotiations as to the fate of lands mutually understood to be of national interest such as current park, monument, and wilderness lands.

In closing, it should be understood that it is not the Constitution that will protect us from the weaknesses of some and the usurpations of others who would rule. Rather, it is the collective people, within their respective States, who must accept responsibility to protect the principles of the Constitution and, thereby, confine the actions of those who would rule to their proper and intended limits. If it is our intent to defend and preserve our uniquely American form of liberty in a nation of constitutionally equivalent self-governing States, then we must have knowledge of it — knowledge of its roots and its tenets. Without knowledge and conceptual clarity, threats pass unnoticed and liberty yields to organized and determined forces.

END

[63] As the Convention of 1787 debated the matter of territorial lands that had been ceded to the United States by certain of the original States, a suggestion was made to leave the matter to be resolved by the new Supreme Court that would be established under the new Constitution. James Madison objected. He observed that the federal court would have a federal bias that would only worsen jealousies associated with these lands: "Mr. Madison considered the claim of the U.S. as in fact favored by the jurisdiction of the judicial power of the U.S. over controversies to which they should be parties." Madison, *Records of the Federal Convention,* 2:464, Aug. 30, 1787.

“The United States is entirely a creature of the Constitution.”

— Reid v. Covert, 354 U.S. 1 (1957) citing Martin v. Hunter’s Lessee 14 U.S. 304 (1816).

“The federal union is a government of delegated powers. It has only such as are expressly conferred upon it and such as are reasonably to be implied from those granted.”

— U.S. v. Butler, 297 U.S. 1 (1936).

“[So] far as it relates to the public lands within a new State, (federal power) amounts to nothing more nor less than rules and regulations respecting the sales and disposition of the public lands.”

— Coyle v. Smith, 221 U.S. 559 (1911).

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