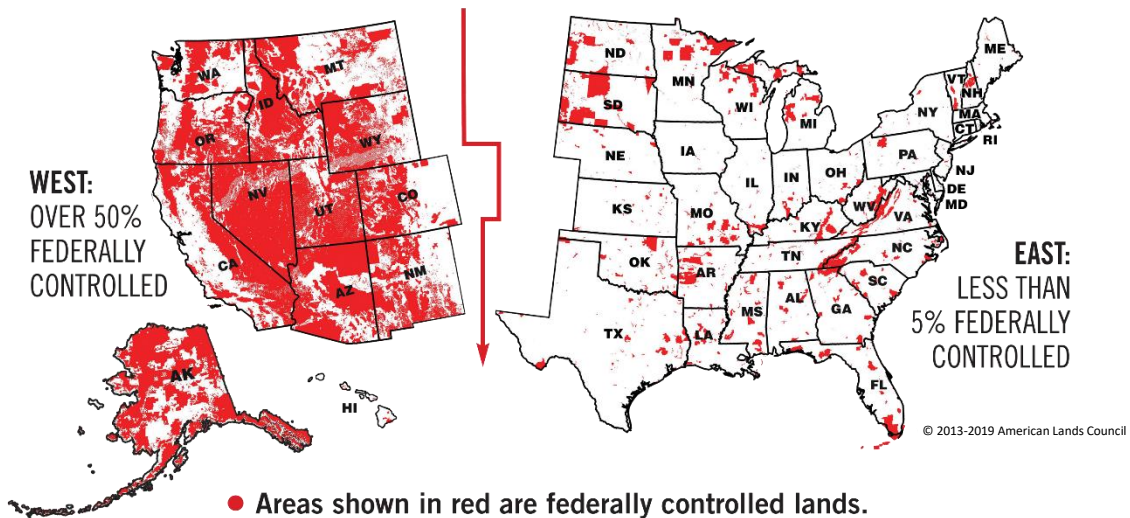


FEDERAL POWER over PUBLIC LANDS

A CRITICAL ANALYSIS OF CONGRESSIONAL RESEARCH SERVICE REPORT RL30126

THE FEDERAL FAULT LINE



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EXECUTIVE SUMMARY:

On April 7, 1999, the Congressional Research Service (CRS), a branch of the Library of Congress, issued Report RL30126 titled *Federal Land Ownership: Constitutional Authority; the History of Acquisition, Disposal, and Retention; and Current Acquisition and Disposal Authorities*.

In its depiction of the constitutional authority of Congress over Federal land, the CRS Report relies upon currently prevailing judicial interpretations under the Enclave Clause of Article I and the Property Clause of Article IV, and also upon a current interpretation of the Equal Footing Doctrine.

The purpose of this paper is to set these currently prevailing judicial interpretations of Federal constitutional power over “*Federal land*” along side “*first constitutional principles*” and to take measure of the contrast between them.

With this paper, the reader will find that:

- the Report states that the “*Article I [Enclave Clause] requires cession by the states and consent of their legislatures for the exercise of exclusive federal Jurisdiction over lands.*” In actuality, under first principles, State consent is required for the purchase by Congress of land within a state. The exercise of “*exclusive federal Jurisdiction*” follows purchase.
- the Report states that the “*Article IV [Property Clause] addresses the authority of Congress over federal property generally, and the Supreme Court has described Congress's power to legislate under this clause as 'without limitation'.*” In actuality, under first principles, the Property Clause deals solely with territorial and public lands, not “*federal property generally*, and the power of Congress over these lands under this clause is limited to their disposal by all needful rules and regulations. Under first principles and constitutional limitations, there is no such thing as a federal legislative power “*without limitation.*”
- the Report states that “*The equal footing doctrine ... only transfers title of tidelands and submerged lands beneath navigable waterways to the states.*” In actuality, under first principles, the Equal Footing Doctrine has nothing to do with land *per se* or with title in land. This doctrine is concerned solely with absolute equality between the States, new and original, as to political rights and sovereignty.
- the Report states that “*The initial policy of the federal government generally was to transfer ownership of many of the federal lands to private and state ownership, to pay Revolutionary War soldiers, to finance the new government, and later to encourage the development of infrastructure and the settlement of the territories.*” In actuality, transfer of Federal title in Federal lands was never intended by the Framers to be a matter of discretionary congressional “*policy.*” Under first principles, transfer of Federal title in Federal lands is a matter of congressional duty under its Property Clause authority.

INTRODUCTION:

On April 7, 1999, the Congressional Research Service (CRS), a branch of the Library of Congress, issued Report RL30126 titled *Federal Land Ownership: Constitutional Authority; the History of Acquisition, Disposal, and Retention; and Current Acquisition and Disposal Authorities*.

In discussing the “*constitutional authority*” of Congress with respect to Federal lands, the Report relies upon **currently prevailing judicial interpretations** of two clauses of the U.S. Constitution, the Enclave Clause in Article I and the Property Clause in Article IV, and upon **a relatively recent interpretation** of the foundational constitutional principle of “*equal footing*” among the States.

The purpose of this paper is to do what the Report does not, and that is to compare the currently prevailing judicial interpretations of these clauses and this foundational constitutional principle to the original words and original intent of the Framers as they debated and composed the text of the Constitution while sitting in Convention in Philadelphia in the summer of 1787. And why is it important for “*We the People*” to subject judicial interpretation of our Constitution to examination within the context of original intent? It is important, even essential, because, as the Supreme Court (hereafter, S. Court) of the United States has said, “*The security of a people against the misconduct of their rulers, must lie in the frequent recurrence to first principles, and the imposition of adequate constitutional restrictions.*” Fletcher v. Peck, 10 U.S. 87, 1810. President Lincoln told us where the ultimate responsibility for recurrence to “*first principles*” and the imposition of “*adequate constitutional restrictions*” lies, and it is not with the S. Court: “*If there is anything which it is the duty of the whole people to never entrust to any hands but their own - that thing is the preservation of their own liberties and institutions.*”

Keystone American values of truth, freedom and justice are at risk whenever presumed “*authorities*,” such as the CRS, the Library of Congress, Congress itself, and even the S. Court make statements that are patently erroneous or at odds with original intent, and those statements are allowed to stand unchallenged over time. The longer such statements from presumably authoritative sources stand unchallenged, the more they take on a patina of legitimacy. It has been said that, left unchallenged, such statements made by presumed “*authorities*” tend to “*crystallize into constitutional tradition.*” This is a frightening concept. What this concept suggests is that over time, and in barely perceptible increments, judicial interpretation of words or clauses in the Constitution may shift until modern day interpretations lose all relation to original intent. In *Shively v. Bowlby*, 152 U.S. 1 (1894), the S. Court cited to *Genesee Chief*, 53 U.S. 443 (1851), when it referred to this freedom-destroying evolutionary process as “*the natural influence of precedents and established forms.*” Judicial precedent is a well understood concept. “*Established forms*” would be those ideas which are not in the Constitution but which have been introduced by the courts in dicta, by Congress stretching its limits, or by alleged “*authorities*” who have posited unique ideas that have been taken up by the courts and have crystallized, or are in the process of crystallizing, into constitutional tradition. Justice William O. Douglas acknowledged the danger inherent in reliance upon “*precedents and established forms*” when interpreting constitutional text when he said that a judge “*remembers above all that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may*

have put upon it.” Justice William O. Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735 (1949). Justice Douglas is not alone in this view. Justice Peter V. Daniel, among others, expressed the same idea in different words: “*Nor will I abide by the decisions of judges, believed by me to be invasions of the great lex legum. I, too have sworn to observe and maintain the Constitution.*” Justice Peter V. Daniel, *The License Cases*, 46 U.S. 504, 612 (1847).

The CRS Report presents the meaning or effect of the Enclave and Property Clauses and the Equal Footing Doctrine within the context of “*precedents and established forms.*” This paper presents these elements of our Constitution within the context of “*first principles.*” The object of this paper is to highlight the divergence of constitutional interpretation that has occurred as a consequence of these two contrasting methods of interpretation. It is left to the reader to decide where the truth lies and to respond as he will:

“The man who first espies any defect, or decay in the fabric, should, therefore, be the first to point it out; that it may be amended, before the injury which it may have occasioned is too great to be repaired. Those who, perceiving the defect, deny that it exists; or willfully obstruct the amendment, are the real enemies of the constitution: it's real friends ought to pursue a different conduct.” Tucker's Blackstone, Volume 1, Appendix, Note D.

ANALYSIS OF SELECTED REMARKS FROM THE CRS REPORT IN THREE PARTS.

1. Distinguishing Between the Enclave Clause and the Property Clause: The CRS Report reads: “*Article I [Enclave Clause] requires cession by the states and consent of their legislatures for the exercise of exclusive federal Jurisdiction over lands. Article IV [Property Clause] addresses the authority of Congress over federal property generally, and the Supreme Court has described Congress's power to legislate under this clause as 'without limitation'.*”

Critique:

Such a tangled web! What is the distinction, if any exists in a practical sense, between “*exclusive legislation*” under the Enclave Clause and legislative power “*without limitation*” under the Property Clause? How does a government formed under a constitution which delegates to it only certain and limited powers come to possess a legislative power “*without limitation?*” There was a time when the S. Court defined the powers of Congress differently: *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). The CRS Report accepts this tangled web with no effort made to sort it out or even acknowledge it. To sort out this tangled web, one must “*recur to first principles.*” We begin with the Framers’ intent with respect to the Article I Enclave Clause which reads,

“To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings.” Article I, sec. 8, cl. 17, the Enclave Clause.

The Framers of the Constitution, sitting assembled in convention in Philadelphia in the summer of 1787, understood that the Federal government they were devising would occasionally need parcels of land within the States in order to carry out its functions (e.g., land for post offices). What was to become the Enclave Clause of Article I was debated by the Constitutional Convention on September 5, 1787. Mr. Gerry feared that an unbridled Federal power to purchase land within the States "*might be made use of to enslave any particular State by buying up its territory, and that the strongholds proposed would be a means of awing the State into an undue obedience to the Genl. Government.*" To ease Mr. Gerry's concern, Mr. King moved "*to insert after the word 'purchased' the words 'by the consent of the Legislature of the State.'* This would certainly make the power [of Congress to purchase and govern lands within the States] *safe.*" Mr. King's motion was passed by the Convention without a dissenting vote. Two critical observations are to be made here. First, placement of the consent requirement within the text of the Enclave Clause was deliberate. It is clear that State consent was intended by the Framers to be a precondition to purchase and NOT a precondition to the exercise of "*exclusive [federal] legislation.*" Second, the purpose of the Enclave Clause is to provide a constitutional means for the government to acquire land needed for the conduct of its delegated powers, NOT land for any purpose whatever.

The Enclave Clause has NOTHING to do with pre-statehood federal territorial lands, and it has NOTHING to do with federal territorial lands held within the confines of States as public lands. Federal territorial and public lands are the single and sole object of the Article IV Property Clause; and the Property Clause is the only clause in the Constitution dealing with these lands: "*The question of Territories was dismissed with a single clause applicable to territory then existing giving congress the power to govern and dispose of them.*" *Downes v. Bidwell*, 182 U.S. 244 (1901).

Before proceeding with a discussion of the Property Clause, it is essential to establish the historical context in which it was written. Following the outbreak of the American Revolution, seven of the original States asserted claims to large tracts of land previously claimed by the British king. These State land claims overlapped in many instances. By the year 1780 quarreling over the boundaries of these land claims threatened to fragment the new American union at the very time that unity was necessary to successfully prosecute the Revolution. Congress sought to quell the divisive arguments between the States by adopting the Resolution of October 10, 1780. With this resolution, Congress requested that the land-claiming States cede to it as much of the claimed land as each of them thought proper. In return for any land cessions that the States might make, Congress made several promises which became precursors to the future Property Clause. First, Congress promised that any lands ceded "*[S]hall be granted and disposed of for the common benefit of all the United States that shall be members of the federal union [and] 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*" Second, Congress promised that new States established out of federally held lands "*shall become members of the federal union, and have the same rights of sovereignty, freedom and independence, as the other states.*" Between 1780 and 1802, each of the seven land-claiming States did make generous cessions of their claimed lands to Congress. These became the first Federal territorial lands. These State land cessions were executed with documents which reiterated the promises made by Congress in the Resolution of 1780. Congress accepted each of these land cession instruments and by this acceptance, "*solemn compacts*" of trust were created whereby Congress was duty bound to the promises it had made in the Resolution. With this

background, we can proceed with a discussion of the constitutional Property Clause within the context of “*first principles*.”

Contrary to the words of the CRS Report, the Property Clause was NEVER intended by the Framers to be a grant of “*authority [to] Congress over federal property generally*.” From Madison’s Notes on the Federal Convention, we know that debate on the future of Federal territorial lands was initiated on August 18, 1787, just seven years after Congress adopted the Resolution of October 10, 1780. Debate on the future of Federal territorial lands under a new national constitution began under the subject heading “*To dispose of the unappropriated lands of the United States*.” Final debate on the disposition of “*unappropriated lands*” (Federal territorial lands) occurred twelve days later on August 30, 1787. On this date and on this subject, Mr. Williamson of North Carolina stated that “*He was for doing nothing in the constitution in the present case, and for leaving the whole matter in Statu quo*.” Immediately thereafter, Mr. Wilson of Pennsylvania stated that “*He should have no objection to leaving the case of new States as heretofore*.” The “*Statu quo*” that had been established “*heretofore*” by Congress with respect to Federal territorial lands and new States established therein could only be those promises made by Congress in its Resolution of 1780, and which promises were incorporated into the terms of the “*solemn compacts*” issued by the land ceding States and accepted by Congress. The Article IV Property Clause was then adopted by the Convention as moved by Gouverneur Morris of Pennsylvania, Maryland alone in dissent. It should be noted that nine members of the Constitutional Convention were members of the Second Continental Congress which produced the Resolution of 1780. It is not surprising that these men would vote in favor of constitutional text that faithfully reflected the terms set down in the Resolution of 1780 and the “*solemn compacts*” inspired by it because, as the S. Court has said, “*Men do not use words to defeat their purposes*.” *United States v. Classic*, 313 U.S. 299 (1941). The unavoidable “*takeaway*” from this review of proceedings in the Constitutional Convention is this. The obligatory and complete disposal of Federal territorial lands that was promised under the Resolution of Congress of October 10, 1780, and which promise was rendered binding under the “*solemn compacts*” of trust between the land ceding States and Congress, was expressly and knowingly incorporated into the *Supreme Law of the Land* under the Article IV Property Clause. And as a component part of the *Supreme Law of the Land*, this disposal dictate under the Property Clause must apply to all Federal territorial lands because the Federal government “*is the government of all; its powers are delegated by all; it represents all, and acts for all*.” *McCulloch v. Maryland*, 17 U.S. 316 (1819). In its entirety, the Property Clause reads,

“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.”

The Property Clause delegates to Congress the singular and unambiguous “*power to dispose*” of the territory and other property (public lands) belonging to the United States and the means to carry out this disposal by adopting “*all needful rules and regulations*.” Having been expressly delegated the singular and unambiguous “*power to dispose*” of territorial and public lands, Congress is, with equal force and by necessary implication, denied the opposite “*power to retain*” these lands indefinitely under federal title. The Latin phrase *expressio unius est exclusio alterius* is an applicable legal canon. This phrase means “*the expression of one thing is the exclusion of another*.” *Burgen v. Forbes*, 293 KY. 456, 169 S.W. 2d. 321, 325, from *Black’s Law Dictionary*, 4th ed., 692 (1951). Other sources have acknowledged this canon in different terms but to the same effect:

“It may be admitted that a power given for one purpose cannot be perverted to purposes wholly opposite, or besides its legitimate scope.” 2 Story, Commentaries on the Constitution. sec. 1077.

“The power can only be exercised as prescribed.” Downes v. Bidwell, 182 U.S. 244 (1901).

“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).

“[A]ll power, not conferred by it [the Constitution] upon the government of the United States, was expressly reserved [to the states and to the people].” Murphy v. Ramsey, 114 U.S. 15 (1885).

In sum and under “*first principles*,” the Article I Enclave Clause and the Article IV Property Clause were designed by the Framers to address separate and distinct needs and duties of the Federal government (land purchased by the consent of a State for the conduct of enumerated purposes and Federal territorial land disposal, respectively), and to address separate and distinct types of land (land purchased by consent of a State for enumerated purposes and “*unappropriated*” territorial land acquired by treaty, purchase or cession of a State or foreign power, respectively).

Over time, however, and through the “*the natural influence of precedents and established forms*” left unchallenged by way of intellectually honest recurrence and adherence to “*first principles*,” the S. Court has converted a constitutionally delegated power to purchase State lands “*by consent*” for certain enumerated purposes into a power to purchase State lands regardless of State consent (Kohl v. U.S., 91 US 367 [1875]), to exercise such legislative jurisdiction over purchased lands as Congress may deem necessary regardless of State consent (Fort Leavenworth R. Co. v. Lowe, 114 U.S. 525 [1885]), and to purchase State lands for any purpose whatever, including purposes beyond those enumerated. (Collins v. Yosemite Park & Curry Co. 304 U.S. 518 [1938]).

In like manner as with the Enclave Clause above, the S. Court has converted the plain and singular Property Clause “*power to dispose*,” and to “*make all needful rules and regulations*” for that purpose, into a Federal power of **municipal** government “*without limitation*” to be exercised not only over pre-statehood territorial lands but also over public lands within the States. Two observations are to be made here. First, under both the Enclave Clause and the Property Clause, the Federal government is delegated **no independent authority** whatsoever to exercise municipal government in any place. Under “*first principles*,” municipal governance may be exercised by the Federal government under the Enclave Clause only following the consent of a State to the purchase of lands within its borders for certain and enumerated purposes. Under the Property Clause, Congress is delegated no governmental power at all. Second, no clause in the Constitution delegates to the Federal government a legislative power “*without limitation*.” “[T]he powers of the legislature [Congress] 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). Unlimited Federal legislative power was seen by friends of the Constitution as a fearful apparition: “*The greatest [calamity] which could befall [us would be] submission to a government of unlimited powers.*” Jefferson, for the

General Assembly of Virginia, Declaration and Protest of Virginia, 1825. Limitation on the power of government is the core purpose of constitutions: “*In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution.*” Jefferson, Kentucky Resolution, Nov. 1798.

2. The Object of the Equal Footing Doctrine: The CRS Report reads: “[T]he [equal footing] doctrine only transfers title of tidelands and submerged lands beneath navigable waterways to the states.”

Critique:

The Equal Footing Doctrine is rooted in the Resolution of Congress of October 10, 1780. By this resolution, Congress committed itself to the principle that new States established out of Federal territories “*shall have the same rights of sovereignty, freedom and independence, as the other states.*” In the Land Ordinance of 1784, Thomas Jefferson referred to this equality among the States as “*equal footing.*” In 1787, within the text of the Northwest Ordinance, Congress affirmed its commitment that each new State “*shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original States IN ALL RESPECTS WHATEVER.*” (emphasis added)

If the Equal Footing Doctrine “*only*” transfers title to tidelands and lands submerged beneath navigable waterways to the States, why did Congress speak of the doctrine’s benefits in the plural sense, i.e., “*in all respects whatever?*” Why did the S. Court speak in the same plural terms?

“*Whenever the United States shall have fully executed these trusts, the municipal sovereignty of the new states will be complete, throughout their respective borders, and they, and the original states, will be upon an equal footing, IN ALL RESPECTS WHATEVER.*” Pollard v. Hagan, 44 U.S. 212 (1845). (emphasis added)

The “*trusts*” referred to in Pollard v. Hagan above are those solemn compacts executed between the land ceding States and the United States. These compacts expressly require that Federal territorial lands be disposed of by Congress just as Congress promised to do under its resolution of 1780. Pollard expressly links “*full execution*” of these compacts of trust to the constitutional “*equal footing*” of “*new states*” relative to “*the original states.*” If Congress should refuse to fully dispose of the public lands within “*new states,*” as it has done since 1976 under the Federal Land Policy and Management Act, then Congress is also denying to those States that equality “*in all respects whatever*” to which they are constitutionally entitled.

The “*equal footing*” doctrine, at its core, is an entitlement of new States to unimpaired territorial sovereignty and jurisdiction throughout their respective borders, identical to that of the original States. The judicial definition of State “*equal footing*” makes no allusion whatever to “*tide lands,*” or to “*submerged lands beneath navigable waters,*” or to the “*transfer of title*” in land, whether submerged or otherwise. The Equal Footing Doctrine is strictly a matter of State sovereignty and political rights:

“*The ‘equal footing’ clause has long been held to refer to POLITICAL RIGHTS AND*

SOVEREIGNTY. See Stearns v. Minnesota, 179 U.S. 223, 245.” United States v. Texas, 339 U.S. 707 (1950). (emphasis added)

The passing of title in tide lands and lands submerged beneath navigable waters from the Federal to State governments is a practice which originated in ancient Anglo-Saxon law. Under these ancient laws, the king held title to these lands for the purpose of commerce benefitting the whole people and not for the benefit of a private owner. When the English barons won substantial freedoms from the king under Magna Carta, they took possession of these lands as the new “*sovereigns of the soil.*” It is this model that is followed when a new sovereign State comes into being. The new State assumes ownership of, and jurisdiction over, tide lands (lands subject to the ebb and flow of the tides) and lands submerged beneath navigable waters as a matter of long-standing Anglo-Saxon custom. It might be said that assumption by a State of title in, and jurisdiction over, tide lands and lands submerged beneath navigable waters is a *component* of the Equal Footing Doctrine but these acquisitions are NOT the sum total of that doctrine.

It must be noted for clarification and in passing that it has been said, albeit awkwardly, that the Equal Footing Doctrine does not apply to “*land:*”

“The equal footing doctrine does not apply even to lands underlying non-navigable waters, see Koch v. Dep’t of Interior, 47 F.3d 1015, 1019 (10th Cir. 1995), let alone to dry lands within a national forest, see United States v. Gardner, 107 F.3d 1314, 1318-19 (9th Cir. 1997).” United States of America v. Diana Rose Luppi, U.S. Tenth Circuit Court of Appeals, No. 98-1475, Sept. 1998.

This statement made in the Diana Rose Luppi case, that the Equal Footing Doctrine does not apply to “*land*” or “*dry lands,*” may be said to be deceptively “*half-true.*” It is true that the Equal Footing Doctrine does not apply to land *PER SE*, and it also does not apply to title in land. But the Equal Footing Doctrine DOES apply to sovereignty and jurisdiction OVER land. Under the Equal Footing Doctrine, States are entitled to sovereignty and jurisdiction over ALL of the land within their borders. Pollard v. Hagan, from above, said as much. But Pollard, in 1845, was not the first to recognize the intended geographic extent of State territorial sovereignty. For example, in U.S. v. Bevens the S. Court said, “*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. Bevens, 16 U.S. 336 (1818). The unimpeachable George Washington said the same in different terms but to the same effect: “*It rests with the state to determine the extent of territory over which the federal will exercise sovereign jurisdiction.*” The Writings of George Washington from the Original Manuscript Sources, 1745-1799. John C. Fitzpatrick, Editor.--vol. 32, United States, November 9, 1792.

3. Federal Land Disposal: The CRS Report reads: “*The initial policy of the federal government generally was to transfer ownership of many of the federal lands to private and state ownership, to pay Revolutionary War soldiers, to finance the new government, and later to encourage the development of infrastructure and the settlement of the territories. In October, 1780, even before the Articles of Confederation ... the Continental Congress adopted a general policy for*

administering any lands transferred to the Federal government.”

Critique:

Imprecise words are the bane of truth, and, when employed deliberately, the province of deceivers. Transfer of ownership in federal lands was NOT an “*initial policy*” of the federal government. The term “*initial policy*” is suggestive of a discretionary and malleable course of procedure. However, by its Resolution of October 10, 1780, Congress invited land cessions from certain of the original States with the express promise that ceded lands “*shall be granted and disposed of for the common benefit,*” and that “*the 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,*” Then, by congressional acceptance of the subsequent land cessions made by the States under the same terms set down by the Resolution of 1780, disposal of the land, NOT its “*administration,*” became a fixed matter of solemn bi-lateral compact. And these solemn compacts, requiring that the Federal territorial lands be disposed of, applied to ALL Federal territorial lands, not merely “*many*” of them. There can be no discriminatory distinction made between Federal territories: “*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). (emphasis added)

The “*transfer [of] ownership*” in Federal territorial lands was NEVER, nor was it ever intended to be, a matter of discretionary congressional “*policy.*” A short seven years after the Resolution of 1780, and under the constitutional Property Clause, Congress was given the singular and unambiguous power and, therefore, the solemn duty, “*to dispose*” of the Federal territorial and public lands; and it was also given the means to do so by “*all needful rules and regulations.*” The equivalency of purpose between the language of the Resolution of 1780 and that of the Property Clause of 1787 is unmistakable and undeniable. Under both instruments, Congress has policy discretion only as to the “*needful rules and regulations*” it might choose to adopt for the purpose of executing its duty to dispose of territorial lands belonging to the United States. Chief Justice Taney, in *Scott v. Sandford*, 60 U.S. 393 (1856), citing to James Madison’s Federalist Paper No. 38, expressly recognized these purposes of the constitutional Property Clause:

“*[T]he importance of conferring on the new government regular [Property Clause] powers [of making all needful rules and regulations] commensurate with the objects to be attained [disposal of federal territorial and public lands], and thus AVOIDING THE ALTERNATIVES OF A FAILURE TO EXECUTE THE TRUST assumed by the acceptance of the [land] cessions made [by the States] and expected [from additional States], or its execution by usurpation [disposal without express constitutional authority], could scarcely be perceived. That it was in fact perceived, is clearly shown by the Federalist (No. 38) where this very argument is made use of in commendation of the Constitution.*” *Scott v. Sandford*, 60 U.S. 393, 15 L. Ed. 608 (1856). (emphasis added)

President Andrew Jackson acknowledged the binding nature of the compacts created by congressional acceptance of the State land cession instruments which were issued by them in response to the

promises made by Congress in its Resolution of 1780:

"These solemn compacts, invited by Congress in a resolution declaring the purposes to which the proceeds of these lands should be applied [the Resolution of October 10, 1780], originating before the constitution, and forming the basis on which it [the Constitution] was made, bound the United States to a particular course of policy in relation to them by ties as strong as can be invented to secure the faith of nations." President Jackson, Veto of the Land Bill, Dec. 5, 1833.

Note that Jackson uses the word "*policy*" in reference to the duty of Congress under the solemn State land cession compacts. It is possible that this is where the idea came into being that disposal of territorial lands was a matter of discretionary or fluid congressional "*policy*." However, Jackson also recognized that these compacts "*BOUND the United States TO A PARTICULAR COURSE OF POLICY in relation to them [territorial lands] by ties as strong as can be invented to secure the faith of nations.*" Such a "*PARTICULAR course of policy*" to which a party is "*BOUND*" must be singular and it cannot be discretionary. It cannot be subject to alteration, and it cannot be denied at the whim of he who is bound. This interpretation of Jackson's words is entirely consistent with the view discussed above that the Property Clause binds Congress to the singular policy "*to dispose*" of the Federal territorial lands. In sum, President Jackson's use of the word "*policy*" in conjunction with the act of disposal of Federal territorial lands cannot be justly construed as recognition of discretion in that act. Discretion lies only in the body of rules or regulations Congress might adopt to accomplish disposal.

President Jackson also noted that these solemn State land cession compacts "*form[ed] the basis on which it [the Constitution] was made.*" We know this to be true from Madison's notes on the Constitutional Convention. His notes on August 30, 1787, prove that the Property Clause was written and accepted with the intent of preserving the "*status quo*" then existing with respect to agreements previously made between the States and the United States in regard to "*unappropriated lands.*" There can be no doubt that the Property Clause was intended by the Framers as the means by which the solemn and singular duty of Congress to dispose of all Federal territorial lands would be carried into, and became an integral part of, the *Supreme Law of the Land*.

The Resolution of October 10, 1780, is the root or original source of both the Equal Footing Doctrine and the constitutional Property Clause. The Equal Footing Doctrine is rooted in the Resolution's promise that new States "*shall have the same rights of sovereignty, freedom and independence, as the other states.*" The Property Clause is rooted in the Resolution's promise that territorial lands acquired by the United States, as distinguished from Enclave Clause lands, "*shall be granted and disposed of for the common benefit,*" and that "*the 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,*" Note that in these foundational words from the Resolution 1780, there is **no provision** for "*administration*" of territorial lands, **no provision** for permanent federal ownership of territorial lands, **no provision** for setting territorial lands apart from disposal for national purposes such as parks or monuments and **no provision** for Federal governance of territorial lands.

The subject of territorial and public land governance is controversial. For this reason, the subject

warrants further analysis. The CRS Report states that, pursuant to S. Court interpretation of the Property Clause, Congress exercises a legislative power “*over federal property generally*” that is “*without limitation.*” Not so in either case. The Property Clause is NOT concerned with “*federal property generally*” but only with “*unappropriated*” Federal lands meaning Federal territories and public lands where public lands are merely Federal territorial lands within the States. And a legislative power “*without limitation*” is AREPUGNANCY TO CONSTITUTIONAL GOVERNMENT which was expressly avoided by the Framers. As noted above, there is no form of Federal governance of any kind authorized under the Property Clause, nor is there any form of Federal governance authorized under its progenitor, the Resolution of October 10, 1780. Federal territorial governance of a particular sort is authorized but ONLY under the Northwest Ordinance of July 13, 1787. And by this ordinance, the role of Congress in Federal territorial governance is both temporary and indirect.

Within Federal territories, local GENERAL ASSEMBLIES are organized according to the prescriptions set down in the Northwest Ordinance. Local general assemblies are comprised of a house of representatives consisting of members popularly elected from counties or townships within the district, a legislative council consisting of five members confirmed by Congress from a list of ten nominees submitted by the house of representatives and a governor appointed by Congress. It is significant that the S. Court has distinguished direct Federal governance over Article I Federal enclaves from local governance within pre-statehood Federal territories: “*Within the District of Columbia, and the other places purchased and used for the purposes above mentioned [Enclave Clause purposes], the national and municipal powers of government, of every description, are united in the government of the union. And these are the only cases, within the united states, in which all the powers of government are united in a single government, except in the cases already mentioned of the TEMPORARY TERRITORIAL GOVERNMENTS, AND THERE A LOCAL GOVERNMENT EXISTS.*” Pollard v. Hagan, 44 U.S. 212 (1845). (emphasis added) In sum, and under “*first principles,*” there are just two instances in which Congress may be involved with municipal legislative power, as opposed to enumerated and constitutionally delegated power. Federal municipal legislative power is authorized within the States under the terms and limitations of the Enclave Clause and, under the Northwest Ordinance, Congress may supervise local general assemblies through the congressionally appointed, territorial governor.

CONCLUSION:

The CRS Report should not be taken as authoritative or beyond reproach simply because it was produced by a “*branch*” of the Library of Congress. The Report merely parrots conventional thinking, or “*precedents and established forms,*” and this thinking, as this paper demonstrates, is demonstrably destructive of constitutional federalism as that unique model was conceived by the Framers in 1788 and ratified by the States in 1788. The CRS Report is devoid of independent recurrence to “*first principles*” which, as Justices Douglas and Daniel have unavoidably implied, is a practice essential to the preservation of constitutional liberties. The question that remains is this. With the defects having been pointed out, who will step forward to amend them before the injury is too great to be repaired? END