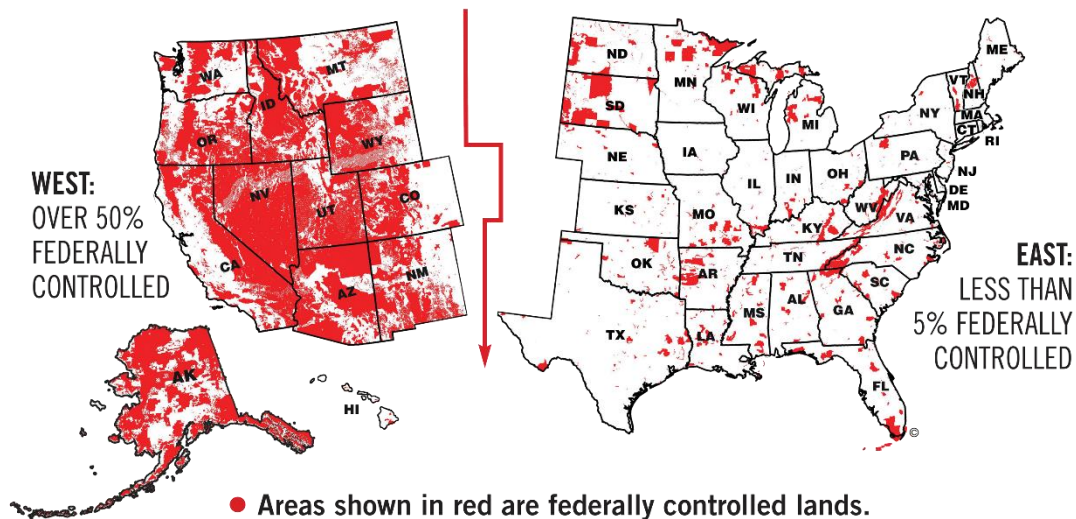


Federal Power Over Public Lands

A CRITICAL ANALYSIS OF CONGRESSIONAL RESEARCH SERVICE REPORT RL30126

Federal Land Ownership: Constitutional Authority; the History of Acquisition, Disposal, and Retention; and Current Acquisition and Disposal Authorities

THE FEDERAL FAULT LINE



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EXECUTIVE SUMMARY

There is no such thing as a federal legislative power “without limitation”.

The purpose of this paper is to highlight a dangerous divergence that exists between original text and meaning of the U.S. Constitution versus the modern-day interpretation concerning federal power over public lands as represented by CRS Report RL30126.

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, the Property Clause of Article IV, and, also, upon a current interpretation of the Equal Footing Doctrine. The Report carelessly neglects first constitutional principles as expressed in the literal text of the Constitution, in the record of the Constitutional Convention of 1787, and in other sources instrumental to America’s founding.

This paper exposes critical flaws in the CRS Report, including:

- The Report states that “*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 consented purchase.
- The Report states that “*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 not unlimited but limited to their disposal by all needful rules and regulations. Under first principles and constitutional limitations upon Federal power, there is no such thing as a federal legislative power “*without limitation.*”
- The Report says that Congress has “*power to legislate*” under the Property Clause. In actuality, under first principles, no sovereign legislative power is delegated to Congress under the Property Clause. All power delegated to Congress under the Property Clause is common and proprietary. Congressional authority to form and supervise local “*general assemblies*” within the territories derives not from the Property Clause but from the Northwest Ordinance.

- The Report states that “*The equal footing doctrine ... only transfers title of tidelands and submerged lands beneath navigable waterways to the states.*” The Equal Footing Doctrine is concerned with title in submerged and tide lands but it is also concerned with equality of political rights and sovereignty between the States, old and new.
- 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 title in “*federal [territorial] lands*” was never intended by the Framers to be a matter of discretionary “*initial policy.*” Under first principles, transfer of title in “*federal [territorial] lands*” to non-Federal holders is a matter of permanent congressional duty under the Property Clause. It is only the manner of disposal that is subject to discretionary Federal “*policy.*” And the duty to dispose of “*federal [territorial] lands*” applies to all such lands, not just “*many*” of them, because the disposal duty is a constitutional directive and the constitution is the law for all.

Members of the founding generation understood the essential link between personal liberty and first constitutional principles. It was Patrick Henry who stated that, “*No free government, or the blessing of liberty, can be preserved to any people without a frequent recurrence of fundamental principles.*” Benjamin Franklin stated that, “*A frequent recurrence to fundamental principles...is absolutely necessary to preserve the blessings of liberty and keep a government free.*” The constitution of the State of Utah echoes this wisdom:

“*Frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government.*”

Article I, section 27, Constitution of the State of Utah

Errors in constitutional interpretation, whether made by the courts or by those considered to be “*authorities*” on the subject, when left without correction, pose the risk of being incorporated, over time, into what has been termed “*precedents and established forms.*” In the case of *American Legion et al. v. American Humanist Assn. et al.* argued: February 27, 2019 Decided: June 20, 2019, Justice Alito observed that “*The passage of time thus gives rise to a strong presumption of constitutionality.*” This paper, by implication, asks whether *We the People* are willing to abide the erosion of first constitutional principles, as that erosion is evidenced in the text of the Congressional Research Service Report, such that these and like misinterpretations promulgated by presumed constitutional authorities take upon themselves, over time, an irreversible “*presumption of constitutionality*”?

INTRODUCTION

In discussing the “*constitutional authority*” of Congress with respect to Federal lands, the Congressional Research Service Report RL30126, hereafter CRS Report, relies upon currently prevailing judicial interpretations of two clauses in the U.S. Constitution, including the Article I Enclave Clause and the Article IV Property Clause, and also upon a relatively recent interpretation of the constitutional doctrine of “*equal footing*” among the States. This paper will compare currently prevailing judicial interpretations of these clauses and this doctrine, **as represented by selected text from the CRS Report**, to original source documents from the Continental Congress and to the words and expressed meaning of the Framers as they debated and composed the text of the Constitution while sitting in Convention in Philadelphia in the summer of 1787.

Why is it important for “We the People” to subject judicial interpretation of our Constitution and the words of constitutional “authorities” to examination within the context of original meaning? Popular examination is vital because, as the U.S. Supreme Court 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 seemed to concur when he said that, “*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.*” Abraham Lincoln.

It is demonstrable that, upon occasion and as a function of human error, prejudice, or hubris, constitutional “*authorities*” may misinterpret either constitutional text or original meaning or both. It has been said that if such misinterpretations are left unchallenged over time they tend to “*crystalize into constitutional tradition.*” Justice Alito wrote, in a different context but in a similar vein, that “*The passage of time thus gives rise to a strong presumption of constitutionality.*” American Legion et al. v. American Humanist Assn. et al., Argued: February 27, 2019. Decided: June 20, 2019. That interpretational error or personal prejudice may become “*constitutional*” if left unchallenged over time is a disquieting concept. This concept suggests that, over time and perhaps in barely perceptible increments, the plain purpose of words or clauses in the Constitution may be redirected until modern day interpretations lose all relation to original meaning. In Shively v. Bowlby, 152 U.S. 1 (1894), the U. S. Supreme Court cited to Genesee Chief, 53 U.S. 443 (1851), when it referred to this degenerative evolutionary process as “*the natural influence of precedents and established forms.*”

Adherence to judicial precedent, a policy called *stare decisis*, is a useful concept with value under certain circumstances under Common Law, but not necessarily so when interpreting the Constitution. Justice William O. Douglas acknowledged the danger inherent in reliance upon “*precedents and established forms*” when interpreting the constitution. A judge, he said, “*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).

BACKGROUND

In the balance between the exercise of Federal power and State territorial sovereignty, the Framers deferred to the primacy of State territorial sovereignty.

The CRS Report grounds its remarks as to the constitutional authority of Congress over land upon judicial interpretations of Article I, section 8, clause 17, the Enclave Clause, of Article IV, section 3, clause 2, the Property Clause, and of the Equal Footing Doctrine. Before a fair analysis of the remarks made in the CRS Report can be made, the historical origins of these two clauses are reviewed. The Equal Footing Doctrine is considered in PART 3 of this analysis.

A. THE CONSTITUTIONAL ENCLAVE CLAUSE

Origin of the Enclave Clause:

In Philadelphia, on September 5, 1787, the Constitutional Convention was debating the question of land acquisition within the States by Congress in furtherance of the powers that were to be delegated to it under the national constitution that was then being crafted. It had already been generally conceded that the Federal government would need land for such things as military bases and federal buildings and that, once these parcels were acquired, the United States should possess “*exclusive legislation in all cases whatsoever*” over them. However, from the convention notes of James Madison, “*Mr. Gerry contended that this power [to exercise exclusive legislation in all cases whatsoever over purchased lands] 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.*” Rufus King then rose to state that he felt no additional protection for State territorial sovereignty was necessary but, nonetheless, would move to “*insert after the word ‘purchased’ the words ‘by the consent of the Legislature of the State.’ This [he said] would certainly make the power [of Congress to purchase lands within a State] safe.*” With the requirement for State consent attached to the act of purchase by Congress of land within the States, the proposed text, which became the Enclave Clause, was approved by the Convention “*nem. con.*” or without objection. The relevant text from the Enclave Clause follows:

*The Congress shall have Power; To ... [exercise exclusive Legislation in all Cases whatsoever] 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.*

It is important to understand why the Framers were concerned about the security of State territorial sovereignty. States are defined, in part, by a prescribed extent of territory over which State legislatures exercise sovereign jurisdiction. If State territory should be declared susceptible to appropriation by a different sovereign and to that sovereign’s jurisdiction, regardless of State consent, then States exist only for so long as that different sovereign does not acquire or otherwise

assume command over their territory. The Constitutional Convention understood the importance of territorial sovereignty to the perpetuity of the States. Accordingly, in the balance between the exercise of Federal power and State territorial sovereignty, the Framers deferred to the primacy of State territorial sovereignty. But this balance has not survived the hubris of later constitutional “*authorities*,” or the deference given to Federal power by the Federal courts.

Judicial Interpretation of the Enclave Clause:

In 1845, the U.S. Supreme Court recognized the meaning of the Framers under the Article I Enclave Clause to protect State territorial sovereignty when it said that, “...*the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a State (emphasis added) or elsewhere, except in the cases in which it is expressly granted.*” “*The [Enclave Clause] shows that no such [unauthorized Federal municipal sovereignty] can be exercised by the United States within a State. Such a power is ... repugnant to the Constitution*” Pollard v. Hagan, 44 U.S. 212 (1845).

Despite the Pollard court’s defense of original meaning under the Enclave Clause, Thomas Cooley (1824 – 1898) took the opposite view. In 1868 Cooley wrote the volume “Constitutional Limitations.” In the chapter on eminent domain, Cooley wrote that,

*“So far, however, as the general government may deem it important to appropriate lands or other property for its own purposes and to enable it to perform its functions, ... **the general government may still exercise the authority** [eminent domain], **as well within the state as within the territory under its exclusive jurisdiction** (emphasis added), and its right to do so may be supported by the same reasons which support the right in any case; that is to say, the absolute necessity that the means in the government for performing its functions and perpetuating its existence should not be liable to be controlled or defeated by the want of consent of private parties, or of any other authority.”*

Cooley, “Constitutional Limitations,” 1868.

With these words, Cooley argued for reversal of the balance struck by the Framers under the Enclave Clause. In his view, Federal power and existence of the Federal government must take primacy over the territorial sovereignty and existence of the States.

While the opinion of Cooley with respect to the exercise of a Federal power of eminent domain within the States was the opinion of just one man, and despite the fact that this opinion was diametrically opposed to the recorded meaning of the Framers and the plain text of the Enclave Clause, the Supreme Court, in 1875, chose to adopt his opinion as supreme law. In Kohl v. United States, 91 U.S. 367 (1875), the Court stated that “*The consent of a State can never be a condition precedent to [the exercise of Federal powers]. Such consent is needed only, if at all, for the transfer of jurisdiction and of the right of exclusive legislation after the land shall have been acquired.*” With these words, the Kohl court severed the requirement for State consent from the act of Federal acquisition of lands within a State, where the Framers had purposely placed it and where it was purposely ratified by the States, and tenuously attached it, with the words “*if at all,*” to the exercise of exclusive Federal legislation over the places acquired.

The Kohl v. United States decision was not the end of mischief done by the Court to the Framers' Enclave Clause as a consequence of the demonstrably aberrant opinion of Thomas Cooley.

Ten years later, in Ft. Leavenworth v. Lowe, 114 U.S. 525 (1885), the Court proclaimed the opinion of the Kohl court to be "*a doctrine authoritatively declared.*" Interestingly, Ft. Leavenworth does not proclaim the opinion of the Kohl court to be "*a constitutional principle authoritatively affirmed.*" Ft Leavenworth then proceeded to add to the Kohl court's Cooley-inspired unilateral rewriting of the Enclave Clause. In this case, the Court stated that property acquired by Congress within a State without State consent "*unless used as a means to carry out the purposes of the government, is subject to the legislative authority and control of the states equally with the property of private individuals.*" The trick here, of course, is that every parcel acquired by Congress is, by definition, "*used as a means to carry out the purposes of government.*" Consequently, every parcel acquired by Congress within the States, regardless of consent, is subject to Federal legislative power; and this legislative power is exercised under authority of the constitutional Supremacy Clause. The Ft. Leavenworth court excuses itself for further expanding Federal power over the States by adding the following casual rhetorical sweep of the judicial hand: "*This clause has not been strictly construed.*"

The Court, in Downes v. Bidwell, observed that, "*It is ever true that, where a malign principle is adopted, as long as the error is adhered to it must continue to produce its baleful results.*" Downes v. Bidwell, 182 U.S. 244 (1901). Accordingly, the Ft. Leavenworth view of Federal Enclave Clause power is still not the end of mischief rooted in the Cooley opinion. In Collins v. Yosemite Park & Curry Co., 304 U.S. 518 (1938), the Court gave sanction to Federal acquisition of land within a State for purposes beyond those enumerated within the Enclave Clause. In Collins, the Court stated that "*The United States has large bodies of public lands. These properties are used for forests, parks, ranges, wildlife sanctuaries, flood control, and other purposes which are not covered by Clause 17.*"

Through the influence of "*precedents and established forms,*" the net result of the Cooley idea being incorporated into constitutional law is that Congress may now purchase land within a State without State consent, exercise such legislative jurisdiction over the place purchased as it deems necessary without State consent, and purchase land for any purpose whatever, regardless of those particular purposes expressly enumerated under the Enclave Clause. In actuality, and as a consequence of the Cooley inspired Kohl, Ft. Leavenworth and Collins continuum of judicial opinions, the constitutional Enclave Clause, as written, no longer has practical value other than as a quaint but useless rhetorical artifact.

A Fraud Upon the People:

In his 1833 "Commentaries on the Constitution," vol. 2, sec. 1080, Justice Joseph Story noted that the Constitution was ratified by the States after certain protections were "*sedulously propagated*" to them during the time of the State ratification debates. The Federalist Papers would be central to the propagation of these protections. Story then states that "*to give a different construction*" to these protections would be "*a fraud*" upon the people. Most certainly, by the standard set down by Story, the Kohl, Ft. Leavenworth and Collins continuum of judicial opinions has perpetrated a

fraud upon the people. At its root, this fraud is the result of the aberrant opinion of just one man, Thomas Cooley, who, like the courts that followed him, placed himself above the learned Framers, above the people who ratified the Constitution as it was written, and above the people who have the sole authority to amend their Supreme Law.

B. THE CONSTITUTIONAL PROPERTY CLAUSE

Origin of the Property Clause:

To understand the Founder's purpose for writing 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 unappropriated land previously claimed by the British king. These State land claims overlapped in many instances. By the year 1780 quarreling between the States 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 (hereafter Resolution of 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. These promises will be discussed in some detail in PART 2 of this analysis.

With respect to lands which might be ceded to Congress by the States, Congress promised that they would not be retained as a new Federal empire but, rather, these lands,

“shall 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....”

Resolution of Congress, October 10, 1780

Between 1780 and 1802, each of the seven land-claiming States did make generous cessions of their claimed lands to Congress. These ceded lands became the first Federal territories. The State land cession instruments reiterated the promises made by Congress in its 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.

From Madison's notes on the Constitutional Convention of 1787, we know that debate on the future of Federal territorial lands under the new Constitution was initiated on August 18, just seven years after Congress adopted the Resolution of 1780. Debate began under the subject heading “*To dispose of the unappropriated lands of the United States.*” Final debate on the disposition of these “*unappropriated lands*” occurred twelve days later on August 30. 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*” with respect to Federal

territorial or “*unappropriated*” lands could only be those promises made by Congress in its Resolution of 1780, which promises were incorporated into the terms of the “*solemn compacts*” issued by the land ceding States and accepted by Congress. The Property Clause was then adopted by the Convention as moved by Gouverneur Morris of Pennsylvania, Maryland alone in dissent. The Property Clause remains unchanged to this date as moved by Morris:

“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.”

Article IV, sec. 3, clause 2 (Property Clause)

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 Supreme 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 promise of complete disposal of Federal territorial lands that was made under the Resolution of 1780, and which promise was rendered binding and obligatory under the “*solemn compacts*” of trust between the land ceding States and Congress, was incorporated as *Supreme Law of the Land* under the IV Property Clause. And as a component part of the *Supreme Law of the Land*, this obligatory disposal 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).

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 also the means to carry out this disposal by adopting “*all needful rules and regulations.*” There is nothing in either the text or the formative history of the Property Clause to suggest that this clause was intended by the Framers to be a delegation of sovereign governmental power. Disposal of property and the making of common rules and regulations are the powers possessed by common proprietors.

Having been expressly delegated the singular and unambiguous “*power to dispose*” of Federal territorial 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).

C. BACKGROUND SUMMARY:

There is nothing in either the text or the formative history of the Property Clause to suggest that this clause was intended by the Framers to be a delegation of sovereign governmental power.

In sum and under first constitutional principles, the Article I Enclave Clause and the Article IV Property Clause were designed by the Framers for separate and distinct purposes. The Enclave Clause was designed and adopted by the Framers to provide Congress with a constitutional means for meeting a specific Federal need. The Property Clause was crafted and adopted by the Framers to provide Congress with the constitutional authority it would need to fulfill the promise it made to the States in its Resolution of 1780 to dispose of all Federal territorial lands. There is nothing in either the text or the formative history of the Property Clause to suggest that this clause was intended by the Framers to be a delegation of sovereign governmental power.

ANALYSIS OF SELECTED REMARKS FROM THE CRS REPORT IN FOUR PARTS

The following analysis of selected remarks from the CRS report, divided into in four parts, demonstrates that there are just two instances in which Congress may be involved with municipal governance, characteristic of the States, as contrasted with its enumerated and constitutionally delegated governance. Federal municipal governance is authorized within the States under the terms and limitations of the Enclave Clause and, secondly, Congress supervises local General Assemblies within the Federal territories under terms of the Northwest Ordinance.

PART 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'.*"

Analysis:

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*?" Would the learned framers have written an instrument with such ambiguity and internal conflict? and would the cautious and suspicious States have ratified such an instrument? There was a time when the Supreme 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 of conflicting interpretation without apparent question. To sort out this tangled web, one needs only to "*recur to first principles*" beginning with the actual words of the Article I Enclave Clause:

"The Congress shall have Power ... 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

At least three significant observations can be made here with respect to the selected statement above from the CRS Report.

1. Placement of the State consent requirement within the text of the Enclave Clause in association with the act of purchase and NOT in association with the exercise of "*exclusive*

[Federal] *legislation*” was deliberate and purposeful.

2. The purpose of the Enclave Clause is to provide a constitutional means for the Federal government to acquire land needed for the conduct of its delegated powers, NOT land for any purpose whatever.

3. With regard to interpretation of the Constitution, the Supreme Court, in *Wright v. United States* said that,

*“To disregard such a deliberate choice of words and their natural meaning would be a departure from the first principle of constitutional interpretation. 'In expounding the Constitution of the United States,' said Chief Justice Taney in Holmes v. Jennison, ..., '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.**”*

Wright v. United States, 302 U.S. 583 (1938)

If the *Wright* court is correct with this observation, as it must be if first principles are to be preserved, then the CRS Report defies “*the first principle of constitutional interpretation*” when it describes Federal power under the Enclave Clause in the following abbreviated fashion: “*Article I [Enclave Clause] requires cession by the states and consent of their legislatures for the exercise of exclusive federal Jurisdiction over lands.*” Abruptly ending this sentence with the word “*lands*” suggests that the words “*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*” are constitutional text that is “*unnecessary*” and “*needlessly*” added.

The Enclave and Property clauses do not operate at cross purposes with each other as the CRS Report suggests. Under first constitutional principles, the Enclave Clause has nothing to do with Federal territorial lands; and the Property Clause has nothing to do with Article I Federal enclaves. Federal enclaves for express Federal purposes are the singular and sole object of the Enclave Clause; and Federal territorial lands are the singular and sole object of the Property Clause.

PART 2. 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.*”

Analysis:

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*” wrongly suggests a discretionary and malleable course of procedure. By its Resolution of 1780, Congress invited land cessions from certain of the original States and, in return, it offered five specific promises to them. In time, these promises would be solemnized and made permanently binding upon Congress, not only as elements of solemn compact but also as express constitutional dictates. The promises made by Congress to the States are abbreviated as follows:

1. All ceded lands would be divided into new States consisting of “*a suitable extent of territory*”;
2. All new States would be admitted into the Union of States with the same “*sovereignty, freedom and independence, as the other states*” or equal footing;
3. All ceded lands “*shall be granted and disposed of for the common benefit,*” and “*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*”
4. The United States will make no claim upon any lands that the States choose not to cede to Congress: “*... the United States shall guaranty the remaining territory of the said States respectively.*”
5. The Federal territories shall, “*... be settled and formed into distinct republican states.....*”

In the words of President Jackson, the solemn compacts between the States and Congress “*bound the United States to a particular course of policy in relation to [ceded lands] by ties as strong as can be invented to secure the faith of nations.*”

Also in Jackson’s words, these compacts “*forme[ed] the basis upon which [the Constitution] was made.*” President Jackson, Veto of the Land Bill, Dec. 5, 1833. President Jackson’s observation that the terms of the Resolution of 1780 “*form[ed] the basis*” for our national Constitution is illustrated by the table on the following page.

Excerpt from Resolution of October 10, 1780

Resulting Constitutional Clause, 1787

<p>1. <i>“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 ...”</i></p>	<p>Article IV, sec. 3, cl. 2, the Property Clause: <i>“The Congress shall have the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States;”</i></p>
<p>2. <i>“... and be settled and formed into distinct republican states ”</i></p>	<p>Article IV, sec. 4, the Guarantee Clause: <i>“The United States shall guarantee to every state in this union a Republican form of government,..... ”</i></p>
<p>3. <i>“ ... which shall become members of the federal union.....”</i></p>	<p>Article IV, sec. 3, cl. 1, the Admissions Clause: <i>“New states may be admitted by the Congress into this union;”</i></p>
<p>4. <i>“ ... the United States shall guaranty the remaining territory of the said states respectively.”</i></p>	<p>Article I, sec. 8 cl. 17, Enclave Clause: <i>“The Congress shall have power to ... exercise (exclusive legislation in all cases whatsoever) over 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.”</i></p> <p>Article IV, sec. 3, cl. 1, Admissions Clause: <i>“no new State shall be formed or erected within the Jurisdiction of any other State ... without the consent of the Legislatures of the States concerned as well as of the Congress.”</i></p> <p>Article IV, sec. 3, cl. 2, Claims Clause: <i>“and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.”</i></p>
<p>5. <i>“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.”</i></p>	<p>Article IV, sec. 3, cl. 2, Property Clause, Row 1 above <i>“... make all needful rules and regulations..... ”</i></p>

In addition to being the progenitor of as many as five clauses in the U.S. Constitution, the agreements struck between Congress and the land claiming States in response to the Resolution of 1780 defused a source of severe conflict between the States over land claims that threatened to dismember the nascent American union. In the words of President Jackson, *“The wastelands within the United States constituted one of the early obstacles to the organization of any Government for the protection of their common interests.”*

When the significance of the Resolution of 1780 is understood, one can also understand that to refer to it as nothing more than *“The initial policy of the federal government generally”* is a misrepresentation of historical fact of extraordinary proportions. This characterization disregards the deep and enduring influence that this resolution had on the founding of the American union.

The CRS Report then refers to the Resolution of 1780, as “*a general policy for administering any lands transferred to the Federal government.*” Again, the word “*policy*” is inappropriate and misleading in the context of this resolution but the word “*administering*” is also inappropriate and misleading. The Resolution was and remains far more consequential than a common administrative instrument. The Resolution established **foundational constitutional duties and limitations** resting upon Congress with respect to both territorial and public lands.

The CRS 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. In actuality, the Resolution, and the constitutional clauses which were spawned by it, make no distinction with respect to disposition of territorial lands. ALL Federal territorial lands are subject to disposal in response to the directive set down in the Property Clause, not just “*many*” of them.

Repeating from above (page 8), the federal government under the Constitution “... *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)

“*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)

PART 3. 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.”

Analysis:

The Equal Footing Doctrine is also rooted in the Resolution of 1780. By this resolution, Congress promised 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 of sovereignty, freedom and independence among the States as “*equal footing.*” In 1787, within the text of the Northwest Ordinance, Congress affirmed its commitment to equality among the several States, both old and new, when it stated that new States, “*shall be admitted, by [their] delegates, into the Congress of the United States, on an equal footing with the original States in all respects whatever....*” The Supreme Court also referred to the States’ entitlement under the Equal Footing Doctrine in 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)

If the Equal Footing Doctrine “*only transfers title to tidelands and lands submerged beneath navigable waterways to the states,*” then why did Congress, in the Northwest Ordinance and the Court in *Pollard v. Hagan* speak of the doctrine's benefits in the plural sense, i.e., “*in all respects whatever?*”

In 1950, the Supreme Court informed us that “[*t*]he requirement of equal footing was designed ... to create **parity as respects political standing and sovereignty**” among all the States. *United States v. Texas*, 339 U.S. 707 (1950).

The equality of sovereignty of which the *Pollard* and *Texas* courts speak necessarily includes territorial sovereignty because the original States jealously retained complete sovereignty over the entirety of their territory under both the Articles of Confederation and the Constitution:

“Each (former colony) 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)

On its face, the statement made by the CRS Report that the Equal Footing Doctrine pertains “*only ... to tidelands and lands submerged beneath navigable waterways*” cannot be true. To suggest that this doctrine pertains “*only*” to title in certain lands is to suggest also that there is no constitutional guarantee of sovereign and political equality among the States. But such an idea as this is entirely antithetical to the most basic principles underpinning the American union.

To suggest that this doctrine pertains “only” to title in certain lands is to suggest also that there is no constitutional guarantee of sovereign and political equality among the States.

PART 4. Federal “Governance” of Territorial and Public Lands:

Under the Part 1 analysis above, it was noted that the CRS Report asserts that the Property Clause pertains to “*federal property generally*” and that it authorizes a Federal municipal legislative power over these lands “*without limitation.*” There are three interpretational errors in this single statement. First, the historical record is clear that the Property Clause pertains exclusively to “*unappropriated*” lands, not “*federal property generally.*” Second, the Property Clause provides Congress with proprietary powers only over these lands and not the sovereign powers of a government. Third, as to a Federal municipal legislative power “*without limitation,*” no such power exists within the limited and enumerated powers delegated to Congress under the Constitution:

“This original and supreme will (of the people) organizes the government, and assigns to different departments their respective powers. It may either stop here; or establish certain

limits not to be transcended by those departments. The government of the United States is of the latter description. 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)

If Congress has no authority under the Property Clause to govern federal territories, then from whence does territorial governance come? This is a question important to the purpose of this paper. For this reason, it is not to be left unanswered.

Within Federal territories, **local General Assemblies** are organized according to prescriptions set down **not** in the spare twenty-six words of the Property Clause but in thirteen sections set down by Congress within the Northwest Ordinance of July 13, 1787. It is these *General Assemblies* that govern in the Federal territories, although they do so under congressional supervision during the limited term of their existence, pending the advent of their statehood.

It is significant that the Supreme Court has distinguished between direct and exclusive Federal governance over Article I enclaves, established under authority of the Enclave Clause, and local governance within pre-statehood Federal territories under the Northwest Ordinance:

*“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)

CONCLUSION:

There is no more graphic example of contradiction between first constitutional principles and currently prevailing judicial interpretation of the Property Clause than the opinion that under this clause, Congress exercises a sovereign legislative power that is “without limitation.”

The CRS Report should not be taken as above 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*,” with respect to congressional authority over Federal territorial and public lands. Reference to first principles is entirely avoided. Justices Douglas and Daniel advised the opposite course.

It is not inappropriate for an authority like the Congressional Research Service to present judicial opinions on constitutional matters; but it is also not inappropriate for the Service to bring forward first principles and original text from which those opinions are considered to derive. Such a juxtaposition would be a true service to the people allowing them to be more fully informed. If contradiction between first constitutional principles and judicial construction is thereby exposed, an informed people might intervene to mend the error and, thereby, perpetuate first principles for the benefit of future generations.

There is no more graphic example of contradiction between first constitutional principles and currently prevailing judicial interpretation of the Property Clause than the opinion that under this clause, Congress exercises a sovereign legislative power that is “*without limitation*”. The purpose of a constitution is to define and limit the power of government for the protection of the people. Elsewhere, the Supreme Court has expressly acknowledged this fact: “*Congress’ Article I powers to legislate are limited not only by the scope of the Framers’ affirmative delegation, but also by the principle that the powers may not be exercised in a way that violates other specific provisions of the Constitution.*” *Saenz et Al. v. Roe, et al.*, 526 U.S. 489 (1999)

If the Court is correct in its opinion that under the Property Clause there exists a Federal legislative power “*without limitation*,” then either of two alternatives must be the case. Either federal territorial and public lands -- and the people upon them -- do not reside under the protection of constitutional limitation, or the common and proprietary Property Clause power to “*make all needful rules and regulations*” respecting them has been grossly and erroneously construed.

ENDNOTE

THE POWER OF A SINGLE WORD

The Library of Congress and an Error Timely Corrected:

A core principle of American federalism is this: Free, sovereign and independent States united under a national constitution only for certain and enumerated purposes. Beyond these purposes for which the States united, they retained their sovereignty and independence. The intended sovereignty and independence of the several States is evidenced by State constitutions under which State legislatures exercise municipal governance over the entirety of the State's territory.

This discussion illustrates how a single wrong word in a particular context could turn American federalism, as described above, upside down if it were to become the generally accepted "*established form*," or be incorporated into the jurisprudence of the U.S. Supreme Court as precedent.

The Library of Congress holds enumerable collections, one of which is titled "Documents from the Continental Congress and the Constitutional Convention." In this collection, the Library reported that on May 10, 1776, the "*Second Continental Congress adopted a resolution **authorizing** the colonies to adopt new constitutions.*"

In fact, the Continental Congress had no authority whatever to "*authorize*" the colonies to do anything. On May 10, 1776, the colonies were just two months away from declaring their complete independence not only from the British crown but also from one another. The actual resolution adopted by the Continental Congress on that date reads, "*Resolved, That it be **recommended** to the respective assemblies and conventions of the United Colonies,..., to adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general.*"

When it was pointed out to the Library that, with its use of the word "*authorizing*" to describe the relationship between the Continental Congress and the thirteen incipient States, it was vesting a superior power in Congress that did not exist. At the same time, the Library was, perhaps inadvertently, characterizing the colonies, and the States that they would become, as being entities subordinate to the superior will of Congress. Left unchallenged, this interpretation of congressional power, under the imprimatur of the Library of Congress, might, in time, have been incorporated into political thought generally and perhaps even into Federal court jurisprudence in the same manner as that of Thomas Cooley. To its credit, upon being notified of its error, the Library rewrote its entry for the date of May 10, 1776. That entry now reads, "*In May [1776], the Second Continental Congress **recommended** that the colonies establish new governments based on the authority of the people of the respective colonies rather than on the British Crown.*"

"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 wilfully 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