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A PROPERTY CLAUSE FOR THE TWENTY-FIRST CENTURY

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INTRODUCTION

The immodest title perhaps overstates the task I have set for myself, which is to try to draw some lessons from the way the Supreme Court has addressed implementation of the Property Clause by the Congress and the Executive, the more political branches of the national government. The Court has long said that the Property Clause contains no judicially enforceable limits on those other branches.[1] I neither propose to argue against, nor do I foresee any change in, that position.

But the Property Clause can be said to have framed an attitude the Supreme Court has brought to bear on legal issues involving federal lands. That attitude, which may fairly be viewed as an expression of constitutional common law, favors retention of federal land in national ownership (retention), national over state and local authority (nationalization), and environmental preservation (conservation). The Court's decisions embodying that attitude have left a decidedly positive imprint on American life and culture. For that reason, those constitutional common law principles deserve to be maintained into the future.

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1. *See, e.g.*, Gibson v. Choteau, 80 U.S. (13 Wall.) 92, 99 (1872); Kleppe v. New Mexico, 426 U.S. 529, 539-40 (1976).

I. A THUMBNAIL HISTORY

The Property Clause puts Congress squarely in charge of the nation's land, authorizing it to "make all needful rules and regulations respecting . . . property belonging to the United States."[2] As constitutional provisions go, it has had a relatively tame history in the courts. With but one significant exception (the tragic *Dred Scott* decision[3]), the Supreme Court has been content to interpret it to give political forces free rein to adjust national land policies to accommodate the vast social and economic changes that have occurred since the United States was established.

After the early emphasis on disposal to carry out national goals like raising revenue and encouraging westward expansion,[4] the thrust gradually shifted toward one of retention and management for various national purposes, coming finally, in the last four decades, to focus on environmental conservation as a dominant use of most of these lands.[5]

The trajectory traced by federal land policy mirrors broad economic and cultural trends in American life—a rising standard of living, increased urbanization, greater scientific understanding of the natural world, and a shift from viewing land as an exploitable commodity toward the Aldo Leopold ethic of stewardship.[6] As a leading public land historian put it more than a quarter of a century ago:

> The old debate [over how federal lands should be managed] is still going on but in a larger frame of reference. We now take a broader view of the value of our public domain and have a more acute reali-

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2. U.S. CONST. art. IV, § 3, cl. 2.

3. Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 432-52 (1857). There a majority, per Chief Justice Roger Brooke Taney, adopted the view that the "territory" referred to in the Property Clause included only land that some of the original thirteen colonies had ceded to the United States. This and the other holdings in the case made the Civil War inevitable. *See generally* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978); Peter Appel, *The Power of Congress "Without Limitation": The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1, 36-55 (2001).

4. *See generally* David P. Currie, *The Constitution in Congress: The Public Lands, 1829-1861*, 70 U. CHI. L. REV. 783 (2003).

5. *See* GEORGE CAMERON COGGINS, CHARLES F. WILKINSON, AND JOHN D. LESHY, FEDERAL PUBLIC LAND AND RESOURCES LAW 102-44 (5th ed. 2002).

6. *See, e.g.*, ALDO LEOPOLD, A SAND COUNTY ALMANAC (Ballentine Books 1990) (1949); *see also* ERIC T. FREYFOGLE, BOUNDED PEOPLE, BOUNDLESS LANDS: ENVISIONING A NEW LAND ETHIC (1998).

> zation of all the ecological and human interests that must be safeguarded.[7]

Since the retention policy took hold a little more than a century ago, popular support for large federal land-holdings has remained remarkably durable. Not long after it began to find favor, in fact, the United States undertook a major program to acquire more land, resulting in the establishment of national forests in the South, East and Midwest, and federal conservation lands throughout the country.[8] More recently, even as the era of big government has supposedly been winding down, the American people remain wholly comfortable with the idea of large national land-holdings. It has been decades since any mainstream politician has endorsed the idea of substantial divestiture of federal lands.[9]

And this is so even though right-wing think tanks and commentators have continued to attack the wisdom of the national government holding onto so much land.[10] The Reagan Administration made a brief foray in their direction—floating the idea of selling off a modest five percent of the national lands to raise revenue to fight ballooning deficits—but it quickly died for lack of political support.[11] The second Bush Administration—though it is more conservative than its two Republican predecessors on natural resource issues and has a more friendly Congress—has made no move to sell off federal land, even though its deficits are comparable to those run up in the Reagan era. Presumably Bush political advisors have confirmed through polling that there is little public support for the idea.

Similarly, even as the Supreme Court itself has turned rightward in the last couple of decades, it has shown no inclination to regard the Property Clause as limiting congressional power to acquire, hold, and manage land. This seems a studied choice, for the Court has been asked by some diehard fringe elements, sagebrush rebels, and libertarians to consider

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7. Paul W. Gates, *An Overview of American Land Policy*, 50 AGRIC. HIST. 213 (1976), *reprinted in* AMERICAN LAW AND THE CONSTITUTIONAL ORDER 121, 130 (Lawrence M. Friedman & Harry N. Schreiber eds., enlarged ed. 1988).

8. A signal event here was enactment of the Weeks Act in 1911. See 16 U.S.C. § 513 (2000); ROY ROBBINS, OUR LANDED HERITAGE 370 (2d ed. 1976); WILLIAM E. SHANDS & ROBERT G. HEALY, THE LANDS NOBODY WANTED (1977).

9. The last time was President Herbert Hoover's proposal to give to the states what became Bureau of Land Management-managed public lands. *See* COGGINS ET AL., *supra* note 5, at 132-33.

10. *See, e.g.*, ROBERT H. NELSON, PUBLIC LANDS AND PRIVATE RIGHTS: THE FAILURE OF SCIENTIFIC MANAGEMENT 303-05 (1995).

11. *See* Exec. Order No. 12,348, 47 Fed. Reg. 8547 (1982); NELSON, *supra* note 10, at 183-99.

remaking its approach to the Property Clause, but declined the invitation.[12] It is therefore unlikely the Court will discover, at this late date, that the Property Clause contains genuine internal doctrinal limitations on the management of federal lands by the more political branches of the government.

All indicators are, then, that large national land-holdings are destined to remain a fundamental, distinguishing feature of American life and that politics, not Court-imposed limits found in the Property Clause, will control what the national government does with these lands.

II. THE JUDICIARY AND FEDERAL LAND MANAGEMENT—CONSTITUTIONAL COMMON LAW

While the Property Clause has formally remained on the judicial periphery, the Supreme Court has long played a significant role in federal land management. It decides other kinds of constitutional questions—such as the separation of powers, takings of property rights, and First Amendment applications—in the federal lands context. It decides questions of federalism, of competing state and federal claims to land and regulatory authority over it. And it engages in ordinary judicial review of questions of federal law, usually statutory law, governing federal land management.

These judicial decisions have helped shape the character of federal land holdings in significant ways. The Court's decision in *United States v. Midwest Oil*,[13] recognizing a broad executive power to withdraw federal lands from federal laws opening them to development, formed the initial legal foundation for the modern system of national wildlife refuges and allowed the Executive Branch to save countless other acres from various forms of despoliation. Its decision in *Cameron v. United States*,[14] upholding Teddy Roosevelt's audacious Antiquities Act proclamation protecting much of the Grand Canyon from mining and privatization, has so far allowed presidents to protect more than 70 million federal acres across the country. Its decision in *Sierra Club v. Morton*[15] not

12. *See, e.g.*, United States v. Gardner, 107 F.3d 1314 (9th Cir.), *cert. denied*, 522 U.S. 907 (1997) (rejecting a direct challenge to the very idea that the government could constitutionally own and manage national forest lands); Nevada v. Watkins, 914 F.2d 1545, 1552-53 (9th Cir. 1990), *cert. denied*, 499 U.S. 906 (1991) (rejecting a challenge to Congress's decision to site a nuclear waste repository on federal land within Nevada). *See also* United States v. Nye County, 920 F. Supp. 1108 (D. Nev. 1996), *aff'd mem.*, 133 F.2d 930 (9th Cir. 1997).

13. 236 U.S. 459 (1915).

14. 252 U.S. 450 (1920).

15. 405 U.S. 727 (1972).

only threw open the federal courthouse doors to conservationists challenging federal land management decisions, but also set in motion a chain of events that within five years had saved a beautiful wilderness valley in the Sierra Nevada range from a Disney development, as Congress incorporated it into Sequoia National Park.[16] Its decision in *California Coastal Commission v. Granite Rock Co.*,[17] giving states environmental regulatory authority over federally-authorized private activities on federal lands, stopped a mine that would have defaced a peak in a national forest on the scenic Big Sur coast of California and opened the way for similar results elsewhere.

If any of those decisions had gone the other way, our country's natural landscapes would look considerably different. They would look worse.

These decisions, and others like them, were not explicitly grounded in the Property Clause, but they reflect an attitude about federal lands that connects with that Clause and that might be considered, borrowing Professor Henry Monaghan's term, a kind of constitutional common law.[18] This kind of law is found in things like "clear statement" rules for construing ambiguities or silences in statutes and other legal instruments—interpretive principles that call for a certain kind of result unless the controlling legal institution (usually Congress) makes a clear statement otherwise. As Professor Tribe points out, these kinds of rules "occupy an interesting niche between law and politics. [They] do not arise out of the Constitution *per se*, but they are constitutionally inspired and do shape Congress's exercise of its powers [and provide] significant protections" for various interests.[19]

Professor Tribe was writing about the best-known of the Court's "clear statement" rules—those inspired by judicial respect for state sovereignty and notions of federalism, which presume to find an accommodation of state interests in federal legislation unless Congress clearly says otherwise. They arise from the structure of the federal Constitution, building on the independent sovereignty of the states. The common law around the Property Clause may also be said to draw from the constitutional structure and background; after all, the Property Clause was itself shaped in reaction to so-called "western" land claims of some of the thir-

16. 16 U.S.C. § 45g (2000).

17. 480 U.S. 572 (1987).

18. Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 3 (1975).

19. 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-9, at 851 (3d ed. 2000).

teen original states.[20] The Court has never fully articulated a rationale for these common law principles around the Property Clause, nor has it uniformly applied them. But, like large-scale federal ownership of land itself, they have endured.

Three principles emerge from the Supreme Court's federal lands decisions:

- The first is to favor government over the private sector. That is, when the choice is between public rights and private rights, between retention in government hands and disposal into the private sector, the Court tends to call the close questions in favor of continuing governmental ownership and control of lands.

- The second is nationalism—calling the close questions in favor of national versus state and local governmental control.

- The third is environmental conservation—calling the close questions in favor of protection rather than development of these lands and their resources.

Taken together, they suggest that the Court tends to perceive its role under the Property Clause as providing a nationalizing, unifying, conserving force regarding national lands.

A. Favoring Government Ownership and Control of Lands When the Choice is Between Retention and Disposal

The Court has long displayed a rather tight-fisted attitude, being generally unwilling to resolve ambiguities in favor of disposal. It has long applied the doctrine that grants of land from the United States government "are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it."[21]

This idea, applied in numerous cases,[22] has occasionally been taken to some remarkable lengths. In *Causey v. United States*, the Court held

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20. *See* Appel, *supra* note 3, at 16.

21. United States v. Union Pac. R.R. Co., 353 U.S. 112, 116 (1957) (citing Caldwell v. United States, 250 U.S. 14, 20-21 (1919)).

22. *See, e.g.*, United States v. Grand River Dam Auth., 363 U.S. 229, 235 (1960); Andrus v. Charlestone Stone Prods. Co., 436 U.S. 604, 617 (1978) (using the canon to invalidate a mining claim based on the discovery of groundwater); Watt v. W. Nuclear, Inc., 462 U.S. 36 (1983) (construing the Stock-Raising Homestead Act of 1916 in favor of the government to

that, when the United States sought to void a homesteader's sale of land acquired by patent from the federal government on the ground that the sale violated the terms of the patent, it need not offer to return the money the grantee had paid.[23] Justice Willis Van Devanter, a Wyoming native as well as a former Assistant Attorney General for Public Lands and long recognized as a leading explicator of the public land law, explained for the unanimous Court:

> [T]he government, in disposing of its public lands, does not assume the attitude of a mere seller of real estate at its market value. These lands are held in trust for all the people, and in providing for their disposal Congress has sought to advance the interests of the whole country by opening them to entry in comparatively small tracts under restrictions designed to accomplish their settlement, development, and utilization. And when a suit is brought to annul a patent obtained in violation of these restrictions, the purpose is not merely to regain the title, but also to enforce a public statute and maintain the policy underlying it. Such a suit is not within the reason of the ordinary rule that a vendor suing to annul a sale fraudulently induced must offer and be ready to return the consideration received. That rule, if applied, would tend to frustrate the policy of the public land laws; and so it is held that the wrongdoer must restore the title unlawfully obtained and abide the judgment of Congress as to whether the consideration paid shall be refunded.[24]

The Court's parsimony—leaving it to Congress rather than the courts to decide whether to reimburse the purchase price paid by the grantee—can also be illustrated in its attitude toward claims by various nonfederal interests that they have established some sort of right in federal lands that allows them to resist federal regulation, or to object to federal decisions about how those lands are to be managed. In *United States ex rel. McLennan v. Wilbur*,[25] the Court justified its construction of the Mineral Leasing Act to give the Secretary of the Interior authority to withhold federal land from oil and gas companies in part on the Secretary's "general powers over the public lands as guardian of the people" and the "right of the President to withdraw public lands from private ap-

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hold that gravel is a reserved mineral). *But see* Amoco Prod. Co. v. S. Ute Indian Tribe, 526 U.S. 865, 880-81 (1999) (Ginsburg, J., dissenting) (citing the canon in dissent from majority's construction of patents issued pursuant to the Coal Lands Act of 1909 and 1910 to have included reserves of coalbed methane gas); *see also* Bedroc Ltd. v. United States, *infra* note 35.

23. Causey v. United States, 240 U.S. 399 (1916).

24. *Id.* at 402 (citations omitted).

25. 283 U.S. 414 (1931).

propriation."[26] In *United States v. Locke*,[27] Justice Marshall's majority opinion emphasized that Congress's power to "qualify existing property rights is particularly broad" in the context of federal lands, because the United States,

> as owner of the underlying fee title to the public domain, maintains broad powers over the terms and conditions upon which the public lands can be used, leased, and acquired. . . . [Mining c]laimants thus take their mineral interests with the knowledge that the Government retains substantial regulatory power over those interests.[28]

The same attitude was on display when the Court decided that land granted to a railroad must be returned to federal ownership because of a breach of a condition of conveyance.[29] And it shows up in other kinds of cases involving federal land management. In *Lyng v. Northwest Indian Cemetery Protective Ass'n*,[30] the Court balked at the implications of construing the First Amendment as creating "de facto beneficial ownership [by practitioners of Native American religion] of some rather spacious tracts of public property," which would diminish "the Government's property rights."[31] In *Public Lands Council v. Babbitt*,[32] the Court refused an invitation to place a broad construction on a congressional directive that the Secretary of the Interior "adequately safeguard[]" private grazing privileges on federal land. In upholding comprehensive governmental authority over public land livestock grazing, the Court firmly rejected the ranchers' argument that the statutory phrase should be interpreted in their favor because "history has created expectations in respect to the security of 'grazing privileges' [upon which ranchers] have relied."[33]

The Court has, to be sure, sometimes refused to apply the canon. In *Leo Sheep*, it rejected the government's claim that it had impliedly reserved a right of way across land it granted to a railroad, finding that the circumstances there did not support the canon's application.[34] Just this

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26. *Id.* at 419. The Court cited *United States v. Grimaud*, 220 U.S. 506 (1911) and *Midwest Oil*, *supra* note 13, for the latter two propositions.

27. 471 U.S. 84 (1985).

28. *Id.* at 104-05.

29. United States v. Or. & Cal. R.R. Co., 164 U.S. 526, 539 (1896).

30. 485 U.S. 439 (1988).

31. *Id.* at 453.

32. 529 U.S. 728 (2000).

33. *Id.* at 729.

34. Leo Sheep Co. v. United States, 440 U.S. 668 (1979). The Court chose instead to apply a somewhat competing canon of construction that railroad land grants, along with other grants that are designed to induce individuals or corporations to "undertake and accomplish

term, the Court rejected a federal claim that it had reserved sand and gravel when it reserved "valuable minerals" in conveying land into private ownership.[35] But in neither of these cases did the Court question the validity of the canon of construction; it merely said it did not apply in the circumstances at hand.[36]

The Court has complemented its tight-fistedness toward disposal of interests in federal land with a generous attitude toward acquisition of land into national ownership. More than a century ago, the Court indicated it would not seriously question claims by the political branches that certain lands needed to be acquired into national ownership in order to serve some "public use."[37] The Court's attitude has paved the way for

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great and expensive enterprises or works of a *quasi* public character in or through an immense and undeveloped public domain," should receive "a more liberal construction in favor of" this purpose, because it is designed to "secure public advantages" and therefore "stands upon a somewhat different footing from merely a private grant[.]" *Id.* at 683 (quoting United States v. Denver and Rio Grande Ry. Co., 150 U.S. 1, 14 (1893)). Justice Rehnquist's opinion for the unanimous Court curiously did not cite the Court's prior decision in *Union Pacific*, which had become the case usually cited for the general canon in favor of government retention (*see supra* note 21), even though *Leo Sheep* and *Union Pacific* both involved the same grant. Prior decisions by the Court involving other railroad land grants took the *Union Pacific* view; *see, e.g.*, Barden v. N. Pac. R.R. Co., 154 U.S. 288, 319 (1894) (it is a "settled rule . . . that nothing will pass to the grantee by implication or inference, unless essential to the use and enjoyment of the thing granted, and that exceptions intended for the benefit of the public are to be . . . liberally construed").

35. Bedroc Ltd. v. United States, 124 S.Ct. 1587 (2004). A plurality of four justices held that sand and gravel were not "valuable minerals" reserved to the United States in land grants issued under a 1919 statute that applied only in Nevada and was repealed in 1964, subject to valid existing rights. The plurality followed the path of *Amoco Production Co.*, *supra* note 22, and rejected the government's claim of ownership because it was not based on the most natural reading of the statutory language and thus there was no need to "consider the applicability of the canon that ambiguities in land grants are construed in favor of the sovereign." *Bedroc*, 124 S.Ct. at 1594 (quoting *Amoco Prod. Co.*, 526 U.S. at 880). Two other Justices would have reached the same result by a somewhat different path, again without mentioning the canon. Three Justices would have held for the government, based on deference to the executive interpretation and Congress's failure to disturb the Court's prior ruling in *Western Nuclear*, *supra* note 22, which construed a similar but not identical statute to hold that the government had reserved sand and gravel.

36. The Court has occasionally used contract law principles to protect private parties who have contracted with the government to extract federally owned natural resources. *See* Mobil Oil Exploration & Producing Southeast, Inc. v. United States, 530 U.S. 604 (2000). While the Court there held against the government, the private parties were not seeking a judicial remedy as to how national lands were to be used or managed; instead, they sought only restitution of money they paid the government to secure these contracts (there, offshore oil and gas leases). *See id.* at 607.

37. *See* United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668 (1896). In tersely rejecting a railroad company's preposterous (at least in hindsight) argument that the national government could not acquire the private lands where the seminal Battle of Gettysburg was fought by eminent domain because the acquisition was not for a 'public purpose,' the Court asked rhetorically: "Can it be that the government is without power to preserve the land . . . ? Can it

bringing millions of acres into federal ownership, including national parks, wildlife refuges, forests, and other conservation lands throughout the country, and practically all the national forests in the eastern United States.[38] Of course, this constitutional common law principle also leaves ample room for the Congress to dispose of federal land wholesale so long as it makes its intentions clear.[39]

What might explain this judicial attitude? At first blush, favoring the government in interpreting federal land grants and statutes may seem odd because typically the government prepares these documents. Therefore the idea is contrary to the maxim that ambiguities in such documents are ordinarily construed against the drafter, especially when the drafter is the more powerful party.[40] Interestingly, some of the early cases that construed ambiguities in federal grants in favor of the government noted that companies receiving these grants often drafted them.[41] This rationale disappeared in subsequent cases, but the attitude persisted.

One might say that the Court is being appropriately deferential to Congress, which is, after all, the organ of government to which the Property Clause speaks. But this does not explain why the Court demands that Congress express itself more clearly when it wants to dispose of federal lands than when it retains them.

Another explanation is that the Court is embracing the notion that the national government has a fiduciary responsibility to the people in

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not . . . take possession of the field of battle in the name and for the benefit of all the citizens of the country for the present and for the future?" *Id.* at 682. It took considerably longer for the Court to adopt a similar attitude with respect to state and local land acquisition. *See, e.g.*, Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984). Taken together, these decisions facilitate acquisition of land by governments at all levels. *See also* Buffalo River Conservation & Recreation Council v. Nat'l Park Serv., 558 F.2d 1342, 1344 (8th Cir. 1977), where the Court of Appeals, quoting the District Court, tersely rejected a challenge to federal condemnation: "For at least eighty years the power of the United States to create parklands has been a recognized and popular function of the national government."

38. Illustrations of the Court's attitude toward acquisition of conservation easements are provided further below; *see infra* Part II.C.

39. *See, e.g.*, the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1315 (2000), ceding to the coastal states a three-mile belt of submerged lands seaward of the coast, a few years after the Supreme Court, relying in part on the principle favoring retention, held that the offshore lands were and always had been owned by the United States. United States v. California, 332 U.S. 19 (1947).

40. *See, e.g.*, United States v. Seckinger, 397 U.S. 203, 216 (1970) (the "principle [construing ambiguities against the drafter] is appropriately accorded considerable emphasis in this case because of the Government's vast economic resources and stronger bargaining position in contract negotiations"); RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981).

41. *See, e.g.*, Dubuque & Pac. R.R. Co. v. Litchfield, 64 U.S. (23 How.) 66, 88-89 (1859) (quoting Gildart v. Gladstone, 103 Eng. Rep. 1167 (1809)); Slidell v. Grandjean, 111 U.S. 412, 437-38 (1883).

holding these lands. The Court did take a step in that direction in *Illinois Central Railroad Co. v. Illinois*,[42] where it held that government holds certain lands in trust for the people and thus lacks plenary power to dispose of them. But the lands in *Illinois Central* were held by the state, not the national government. Moreover, the Court took pains to distinguish title to lands held under the public trust from "the title which the United States holds in the public lands which are open to [disposal]."[43]

The best explanation is that the Court is acting on the basis of a largely unarticulated but realistic assessment of the pressures brought to bear on the Congress (and, to some extent, the executive) in making federal land policy decisions.

A little history is instructive. The antecedents of this canon of tightfistedness toward disposal may be traced to an English rule construing sovereign grants strictly in favor of the Crown.[44] It came into American law through cases testing whether government-issued corporate charters limited the government's power over corporations. The Supreme Court adopted the canon in that context over a strong dissent by Justice Story in a celebrated early case.[45]

As the Court came to explain:

> The doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of property, franchises or privileges in which the government or the public has an interest. Statutory grants, of that character, are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld; nothing passes by mere implication. This principle, it has been said, "is a wise one, as it serves to defeat any purpose concealed by the skillful use of terms to accomplish something not apparent on the

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42. 146 U.S. 387 (1892).

43. *Id.* at 452. The Court has continued to cite the public trust idea in certain contexts; *see, e.g.*, Summa Corp. v. California ex rel. State Lands Commission, 466 U.S. 198, 206 n.4 (1984) ("alienation of the beds of navigable waters will not be lightly inferred").

44. Stourbridge Canal Co. v. Wheeley, 109 Eng. Rep. 1336 (1831).

45. Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 36 U.S. (11 Pet.) 420, 548 (1837) (the "continued existence of a government would be of no great value, if by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation; and the functions it was designed to perform, transferred to the hands of privileged corporations."); and *see id.* at 583 (Story, J. dissenting). Story argued that a government grant in the form of a contract for a valuable consideration should be regarded differently. *See id.* at 598-600. Seven years before, the Court had adopted the canon in the context of a bank charter, determining that the grant could not impliedly include a relinquishment of the taxing power. Providence Bank v. Billings & Pittmann, 29 U.S. (4 Pet.) 514 (1830). The *Charles River Bridge* Court saw no difficulty in extending the canon beyond the "vital" taxing power to other government powers which "the whole community [has] an interest in preserving . . . undiminished." 36 U.S. at 547-48.

face of the act, and thus sanctions only open dealing with legislative bodies."[46]

The Court felt, in other words, a need to provide a counterbalance to the political power possessed by privatization advocates in and out of government. The same concern led the Court to use the "public trust" idea to void the Illinois Legislature's shady transfer of the bed of the Chicago harbor to the Illinois Central Railroad.[47] The idea dates back at least to Adam Smith, who noted that the interest of commercial entities "is always in some respects different from, and even opposite to, that of the public, . . . [being] generally an interest to deceive and even to oppress the public . . . ."[48]

For the Court to take the larger political context into account is not unheard of, because in several constitutional areas the Court pays some attention to the organization of interests and their access to the political system. The idea is reflected in, among other things, the famous footnote four of *Carolene Products*.[49] It is also found in how the Court approaches some federalism issues, such as the power of Congress to regulate state governmental activities.[50] And it is found in some of the Court's dormant Commerce Clause cases involving state discrimination against outsiders.[51]

Private sector commodity and development interests in federal lands are well represented in deliberations of the Congress. One does not have to be a close student of western history and federal lands to appreciate the power of the railroad lobby in the nineteenth century, or the timbering, ranching, mining, and electrical utility interests in the twentieth cen-

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46. Coosaw Mining Co. v. South Carolina, 144 U.S. 550, 562 (1892) (citations omitted) (quoting Slidell v. Grandjean, 111 U.S. 412, 438 (1883) (in a land dispute in Louisiana, refusing to construe Congressional adoption of three land commissioners' reports to include adoption of two others' reports, where the result of such a construction would be to grant massive amounts of public lands to the plaintiffs)); *see also* Rice v. R.R. Co., 66 U.S. (1 Black) 358, 380 (1862) (discussing earlier cases standing for the proposition that "public grants are to be construed strictly").

47. *See supra* note 42 and accompanying text.

48. ADAM SMITH, THE WEALTH OF NATIONS 219-20 (C.J. Bullock ed., P.F. Collier & Son 1909). *See also* CHARLES LINDBLOM, POLITICS AND MARKETS 170-88 (1977) (discussing the "privileged position" of business entities in the political process).

49. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

50. *See, e.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). *See generally* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); Larry D. Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000).

51. *See, e.g.*, West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 204-07 (1994).

tury. And one does not have to be a close observer of state capitols to understand that these commercial interests are also well represented in western state legislatures where federal lands are concentrated. Western states' members of Congress usually end up on the key congressional committees with jurisdiction over federal lands. And of course the relatively sparse population of most states that have large amounts of federal land gives them far more relative influence in the United States Senate.[52] Finally, the Bush Administration's staffing of key Executive Branch positions with energy, timber and ranching lobbyists fits a long pattern of such appointments.

Thus the Court's demand for clear statements of disposal and relinquishment of national control reflects an appreciation for, and a felt need to provide a subtle counterbalance to, this kind of bias. The idea that the government needs a bit of protection is also illustrated by a counter-example—the canon applied to ambiguities in legal documents involving Indians, that "[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith."[53]

Professor Eskridge has aptly summarized the matter this way:

> The public values inherent in this rule of interpretation rest upon our desire that collective rights and property not be lost through official inadvertence or mistake and on our perception that as our bargaining agent the government is apt to be marshmallow soft. Although rooted in the common law, the rule construing public grants narrowly in some cases also possesses constitutional dimensions.[54]

B. Favoring Control of Federal Lands by the National Government Rather than State and Local Governments

This second constitutional common law idea springs from some of the same small "p" political imperatives. In one sense, favoring national

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52. At one extreme, Alaska has almost 386 acres of federal land per capita (Wyoming has 62, Nevada 26, and Idaho 24). At the other, New York has 180 people for every acre of federal land in the state. Land data from BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS 2000 at 7, *reprinted in* COGGINS ET AL., *supra* note 5, at 10. Population figures from U. S. Census Bureau, *Annual Estimates of the Population for the United States and States, and for Puerto Rico: April 1, 2000 to July 1, 2003, available at* http://www.eire.census.gov/popest/data/states/tables/NST-EST2003-01.php.

53. Rosebud Sioux Tribe v. Kneipp, 430 U.S. 584, 586 (1977) (quoting McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 174 (1973) and Carpenter v. Shaw, 280 U.S. 363, 367 (1930)).

54. William N. Eskridge, Jr., *Public Values in Statutory Interpretation,* 137 U. PA. L. REV. 1007, 1057 (1989).

control of land owned by the United States stands in remarkable contrast to the long and strong tradition of local authority over land use that generally prevails in this country. But in landholdings, the Court has favored the national government even when the stakes were high and the political tide was running the other way. In its landmark tidelands decision in 1947, for example, it held that the national government, and not the coastal states, retained ownership over the submerged lands off the coast.[55]

But here the picture is concededly somewhat more mixed. Federalism concerns and some burdens of history have led the Court to make some exceptions in favor of states. One exception concerns conflicting state and national claims to ownership of beds of inland navigable waters and the equal footing doctrine. In 1845, in *Pollard's Lessee v. Hagan*,[56] the Court ruled that newly admitted states automatically gain title to beds of navigable waters within their borders as a consequence of being admitted to the union on an equal footing with the thirteen original colonies. The reasoning was straightforward: Because those colonies had gained title to those submerged lands in their grants from the British Crown, which predated the establishment of the national government, new states that followed them should be treated the same.[57] As the Court has most recently put it, "the default rule is that title to land under navigable waters passes from the United States to a newly admitted State."[58]

While *Pollard* long ago resolved doubts to title against national ownership in the narrow context of beds of navigable waters, the Court has, over the years since, applied the nationalizing principle to limit *Pollard*'s reach substantially. For one thing, the Court has held that the *Pollard* rule does not apply to fast lands, including islands or fast lands located within navigable waters.[59] It also does not apply to coastal and tidal submerged lands.[60] And, as the Court has held in a modern decision, it does not apply to lands that accrete to submerged lands.[61]

As Justice Black wrote in *Arizona v. California, Pollard* "cannot be accepted as limiting the broad powers of the United States to regulate . . . government lands under [the Property Clause] of the Constitution."[62]

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55. United States v. California, 332 U.S. 19 (1947).
56. 44 U.S. (3 How.) 212 (1845).
57. *Id.*
58. Idaho v. United States, 533 U.S. 262, 272 (2001).
59. Scott v. Lattig, 227 U.S. 229, 242-43 (1913); Texas v. Louisiana, 410 U.S. 702, 713 (1973); United States v. Mission Rock Co., 189 U.S. 391, 403 (1903).
60. *See* United States v. California, *supra* note 55.
61. California *ex rel.* State Lands Comm'n v. United States, 457 U.S. 273, 285-86 (1982).
62. Arizona v. California, 373 U.S. 546, 597-98 (1963).

This means that, even with respect to those submerged lands under navigable waters to which *Pollard* would otherwise be applicable, the national government can unilaterally displace the principle before statehood by conveying the submerged land to a private party for a public purpose,[63] or by withdrawing the land from disposition to serve some national purpose.[64] Moreover, such conveyances or withdrawals can be made not only by Congress, but also by the Executive Branch with scant authority from Congress. Whether made by Congress itself or by Executive Branch officials, these reservations are sufficient to defeat the state's claim of title.

It is true that, in construing ambiguous circumstances to determine whether a federal withdrawal sufficient to defeat the state's equal footing claim of ownership had been made, the Court has at times demanded some "clear statement" of a national intent to defeat the state's claim.[65] That is, it has held that the states succeed to ownership of submerged lands under waters navigable at statehood unless the national government has withdrawn the land for national purposes with an intent "to defeat the future State's claim to the land."[66] Nevertheless, in its most recent decisions on the matter, the Court has applied that idea with some flexibility, especially where environmental conservation is a central concern (thus linking up with the third Property Clause common law principle, to be discussed further below).[67]

Another area where the picture is somewhat mixed—although on balance decidedly nationalizing in outlook—concerns neither fast land nor submerged land, but water associated with federal land. The so-called *Winters* doctrine holds that when the national government reserves federal land for national purposes, it also implicitly reserves water sufficient to carry out those purposes.[68] This doctrine, a creation of the Su-

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63. United States v. Holt State Bank, 270 U.S. 49, 54-55 (1926); Shively v. Bowlby, 152 U.S. 1, 30, 48 (1894).

64. A bare majority of the Court said this question was undecided as of 1987. *See* Utah Div. of State Lands v. United States, 482 U.S. 193, 200. Four Justices strongly disagreed. *See id.* at 209-10 (White, J. dissenting). The Court finally held in *United States v. Alaska*, 521 U.S. 1, 34-36, 41-46, 55-61 (1997) that the United States could (and did) withdraw submerged tidelands for a national purpose (the Arctic National Wildlife Refuge and the National Petroleum Reserve) prior to Alaska becoming a state.

65. *Utah Div. of State Lands*, 482 U.S. at 197-98.

66. *Id.* at 202.

67. Idaho v. United States, 533 U.S. 262 (2001); United States v. Alaska, 521 U.S. 1 (1997). Indeed, in *Idaho*, Chief Justice Rehnquist, joined by three other Justices, accuses the majority of "significantly dilut[ing] the [equal footing] doctrine" by holding against the State's claim of ownership of the bed of Coeur d'Alene Lake and the St. Joe River within the boundaries of the Coeur d'Alene Indian reservation. 533 U.S. at 282.

68. Winters v. United States, 207 U.S. 564, 577 (1908).

preme Court, is a good illustration of the Court's general tight-fistedness toward disposal of federal lands. By contrast, in three nineteenth century statutes, Congress had spoken deferentially toward allowing state law to control allocation of water where federal lands were concerned.[69]

The Court's decision in *Winters* reflected the parsimonious principle of *Causey v. United States*[70] and *United States v. Union Pacific Railroad Co.*,[71] holding that silence on water—even in the face of those nineteenth century statutes that severed water from federal land—ought to be construed in favor of federal reservation of water for national purposes.[72] *Winters* built on a prior decision, *United States v. Rio Grande Dam and Irrigation Co.*,[73] where the Court had said that the state cannot "destroy the right of the U.S., as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property, *in the absence of specific authority from Congress*."[74]

As part of its rightward tilt, the modern Supreme Court has put some limits on the scope of the *Winters* doctrine, refusing to read national forest statutes broadly to imply a federal reservation of water for wildlife (over a strong dissent by Justice Powell, joined by three other justices), recreation, and ranching purposes on national forests.[75] But these limits should not be exaggerated. The Court's decision in *New Mexico*, for example, reaffirmed the heart of the *Winters* doctrine, that the courts should imply national reservations of water along with federal land for many purposes and many categories of federal land, such as for forestry purposes and to secure "favorable conditions of water flows" on national forests, and for preservation and recreation in the national parks.[76] Indeed, no Supreme Court Justice has expressed disagreement with the core concept of *Winters* since Justice Brewer, who dissented without opinion in *Winters* itself.

Context and history go a long way toward explaining these limited exceptions to the nationalizing, unifying role the Court usually plays

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69. The statutes were somewhat less than clear, but the Court in 1935 eventually held that they generally severed water from federal land, giving state law primacy over water. *See* Cal. Or. Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935). The Court's decision in that case is a relatively rare example, doubtless influenced by the fact that water was the context, of the Court interpreting ambiguous statutes against federal control.

70. 240 U.S. 399 (1916).

71. 353 U.S. 112 (1957).

72. *See Winters*, 207 U.S. at 564.

73. 174 U.S. 690 (1899).

74. *Id.* at 703 (emphasis added).

75. United States v. New Mexico, 438 U.S. 696, 715 (1978).

76. *See id.* at 699-700.

with respect to federal lands. The independent sovereignty of the states brings into play somewhat different considerations when weighing conflicting state and national claims to property, as compared to conflicting private and national claims to property. Given this countervailing force, the fact that the Court has recognized only very limited exceptions actually underscores the strength of the general principle of nationalization.

The general principle finds significant expression in modern Supreme Court decisions involving federal land acquisition, especially for environmental conservation purposes. A 1973 decision, *United States v. Little Lake Misere Land Co.*,[77] explicitly developed a federal common law rationale for holding that state law may not interfere with federal land acquisition when the effect thwarts a federal objective. Chief Justice Burger's opinion for the Court conceded that the "great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state."[78] It also noted that, even when the federal courts were busily developing federal common law in diversity cases in the era before *Erie Railroad Co. v. Tompkins*,[79] they were careful not to override "local laws of real property."[80]

Nevertheless, even though Congress had not specifically provided for preemption of state law in authorizing federal land acquisition to protect migratory birds, the Court rejected the application of Louisiana law to the federal land acquisition in question. Expressing the nationalizing idea, the Court found that application of the state law

> would deal a serious blow to the congressional scheme contemplated by the Migratory Bird Conservation Act and indeed all other federal land acquisition programs. These programs are national in scope. They anticipate acute and active bargaining by officials of the United States charged with making the best possible use of limited federal conservation appropriations. Certainty and finality are indispensable in any land transaction, but they are especially critical when, as here,

77. 412 U.S. 580 (1973).

78. *Id.* at 591 (quoting Davies Warehouse Co. v. Bowles, 321 U.S. 144, 155 (1944)).

79. 304 U.S. 64 (1938).

80. *Little Lake Misere Land Co.*, 412 U.S. at 591 (citing Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842) and Kuhn v. Fairmont Coal Co., 215 US. 349, 360 (1910)). Thus it may be said that the federal common law of the Property Clause, with its constitutional underpinnings, is one of the survivors of *Erie*. *See generally* Henry J. Friendly, *In Praise of* Erie . . . *and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

> the federal officials carrying out the mandate of Congress irrevocably commit scarce funds.[81]

The Court went on to conclude that, "even assuming in general terms the appropriateness of 'borrowing' state law [to fill gaps in federal law], specific aberrant or hostile state rules do not provide appropriate standards for federal law," and the Louisiana law was "plainly hostile to the interests of the United States" and must fail.[82]

One scholar has described the Court's vigor in preempting state laws that undermine the effectiveness of federal land conservation acquisition programs as creating a dormant Property Clause, akin to the dormant Commerce Clause.[83] The description is an apt one, for it suggests a parallel between the Court's role as a surrogate for the more political branches in protecting national commercial interests (the dormant Commerce Clause) and its role as a surrogate in protecting national land conservation interests (the dormant Property Clause). There is no denying the results: the Court's willingness to preempt state law has facilitated the national government's acquisition and management of millions of acres of land in the past century, most of it for conservation purposes.

C. Favoring Protection Over Development of Federal Lands and Resources

Little Lake Misere thus provides a segue to the final constitutional common law principle—promoting conservation of natural values on federal property. Here it must be said that judicial rhetoric about the natural qualities of national lands has changed dramatically over the past two centuries. Upon its creation, the United States was largely a wilderness nation. While Native American population estimates of the era vary widely, their populations and densities were certainly much smaller than today.[84] European disease took its toll on Native American populations even before the colonies were established; three years before the Pilgrims

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81. *Little Lake Misere Land Co.*, 412 U.S. at 597.

82. *Id.* at 595-96, 597. Only Justices Stewart and Rehnquist did not join in this analysis. They would have found state law did apply, but they concurred in the judgment, because they thought the retroactive application of state law to already-completed federal acquisitions raised constitutional questions.

83. *See* Appel, *supra* note 3, at 125-27.

84. For example, New England's pre-Columbian Indian population has been estimated at about 100,000, whereas the current population of the region is over 14 million. WILLIAM CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS AND THE ECOLOGY OF NEW ENGLAND 42 (1983). For a description of the historical debate on Indian populations, *see id.* at 226.

established Plymouth Colony, an estimated ninety percent of the Indian population in New England died in an epidemic.[85] Perhaps five percent of the total land surface of the lower forty-eight states had been settled by Europeans by 1800.[86] For most of the next century, federal policy was aimed at reducing the amount of wilderness because, in Roderick Nash's words, that "defined man's achievement as he advanced toward civilization."[87]

Language in early Supreme Court opinions reflected this attitude. In 1814, Justice Story colorfully characterized the Kentucky lands to which title was an issue as "waste and vacant," in a "mere uncultivated country, in wild and unpenetrable woods, in the sullen and solitary haunts of beasts of prey."[88] In 1836, the Court saw as cause for celebration that "property, which within a few years was but of little value, in a wilderness, is now the site of large and flourishing cities."[89] As late as 1889, the Court spoke approvingly of the "universal custom" that "[e]verybody used the open unenclosed [federal lands] . . . as a public common on which their horses, cattle, hogs and sheep could run and graze."[90]

But by then public opinion and governmental policy were already shifting toward retaining federal land to serve longer-term goals includ-

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85. Karl Butzer, *The Indian Legacy in the American Landscape*, *in* THE MAKING OF THE AMERICAN LANDSCAPE 45 (Michael Conzen, ed., 1990). *See also* CRONON, *supra* note 84, at 86-89.

86. *See generally* John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519, 526-529 (1996).

87. RODERICK NASH, WILDERNESS AND THE AMERICAN MIND 9 (3d ed. 1982).

88. Green v. Liter, 12 U.S. (8 Cranch) 229, 249 (1814); *see also* Davis v. Mason, 26 U.S. (1 Pet.) 503, 507 (1828) ("pathless deserts"); Smith v. Turner, 48 U.S. (7 How.) 437, 461 (1849) (Grier, J., concurring) (speaking of the "many millions of acres of vacant lands" in the country, of which the goal of the "cherished policy" of the national government was to "convert these waste lands into productive farms"). Nevertheless, James Madison, a principal crafter of the Constitution, observed in 1818:

> [W]e can scarcely be warranted in supposing that all the productive powers of [the earth's] surface can be made subservient to the use of man, in exclusion of all the plants and animals not entering into his stock of subsistence . . . . The supposition cannot well be reconciled with symmetry in the face of nature, which derives new beauty from every insight that can be gained into it. It is forbidden also by the principles and laws which operate in various departments of her economy . . . . [I]t is difficult to believe that it lies with him so to remodel the work of nature as it would be remodeled, by a destruction not only of individuals, but of entire species.

James Madison, Address to the Agricultural Society of Albemarle, Virginia (1818), *in* 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 67-68 (Philadelphia, J. B. Lippincott & Co., 1865), *quoted in* John F. Hart, *Fish, Dams, and James Madison: Eighteenth-Century Species Protection and the Original Understanding of the Takings Clause*, 63 MD. L. REV. 287, 316, 318-19 (2004).

89. Voorhees v. Jackson, 35 U.S. (10 Pet.) 449, 473 (1836).

90. Buford v. Houtz, 133 U.S. 320, 327-28 (1890).

ing, increasingly, protection of natural values. Soon the Court was forcefully brushing away potential legal obstacles in the path of this movement. In two decisions issued the same day in 1911, the Court rejected challenges to the upstart U.S. Forest Service's new program to regulate livestock grazing on federal lands that had recently been designated as national forests. In *Light v. United States*, the attack called into constitutional question the very idea that Congress could create the national forests and put them off-limits to settlement, especially without the consent of the state where the lands were found.[91] The Court's rebuff was terse and unequivocal: "The United States can prohibit absolutely or fix the terms on which its property may be used. As it can withhold or reserve the land it can do so indefinitely."[92]

The conservation thrust of the other decision was somewhat subtle. Superficially, the decision in *United States v. Grimaud*[93] merely upheld the power of Congress to make a broad delegation of management authority over federal lands to the Executive Branch. On closer examination, however, the conservation theme emerges. Congress had given the Executive Branch only the barest statutory authority to manage the national forests, making no mention at all of livestock grazing, which had for decades been a customary use of much of this land. The Secretary of Agriculture had nevertheless fashioned and enforced, with criminal penalties, regulations that required a federal permit to graze livestock on federal lands. The Court upheld this power, emphasizing how "impracticable" it was for Congress to provide "general regulations" in such a complicated field as managing large tracts of federal land set aside for forest reserves.[94]

The Court soon followed up with one of its most famous public lands decisions. In *Midwest Oil*, it held that a broad power to retain federal lands in United States' ownership could pass from Congress to the Executive not only by the ordinary method—through enactment of a positive law—but also simply through a congressional acquiescence in the Executive's grab for and exercise of such authority.[95] The facts did not involve environmental conservation, but the principle the Court upheld had already proved a powerful tool toward that end, and the Court knew it, because the majority opinion noted that forty-four "bird re-

91. Light v. United States, 220 U.S. 523 (1911).

92. *Id.* at 536.

93. 220 U.S. 506 (1911).

94. *Id.* at 516. This decision presaged the Court's recent decision in *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457 (2001), which rejected a challenge to the Clean Air Act as an unlawful delegation to the Executive, albeit without citing *Grimaud*.

95. United States v. Midwest Oil Co., 236 U.S. 459 (1915).

serves" had already been created by the Executive using its implied withdrawal power.[96] Moreover, the Court made clear that this power operated only in a protective direction, toward husbanding the resources of the national lands rather than exploiting them.[97]

A few years later, the Court issued another landmark opinion on behalf of conservation, firmly—and unanimously—rejecting a challenge to Teddy Roosevelt's bold exercise of authority under the ostensibly narrow confines of the Antiquities Act.[98] Although the Act seemed to convey limited power to the President, only to protect "objects of historic or scientific interest" by setting aside the "smallest area [of federal land] compatible with the proper care and management" of those objects, the Court upheld Roosevelt's reservation of 800,000 acres in and around the Grand Canyon.[99]

Certainly as measured by acreage, and probably as measured by value as well, most of the land the national government has acquired over the last century has been to serve conservation and related purposes like recreation. As noted earlier, the Court has facilitated this trend in a number of decisions, including, in modern times, striking down state law obstacles to such acquisitions. For example, environmental conservation was front and center in *North Dakota v. United States*,[100] where the Court applied *Little Lake Misere*[101] to strike down an effort by North Dakota to impose conditions and restrictions on the national government's efforts to acquire easements to protect wetlands for waterfowl. The Court's analysis began by noting that federal law, "[b]y providing

96. *Id.* at 470.

97. The majority opinion cautioned that the power it was vesting in the Executive to withdraw federal lands seemingly contrary to federal statute did not authorize an Executive Branch officer to create private rights in a railroad company by withdrawing more federal land for the railroad than the applicable statute provided. *See id.* at 473 (citing S. Pac. v. Bell, 183 U.S. 685 (1902)).

98. 16 U.S.C. § 431 (1906).

99. Cameron v. United States, 252 U.S. 450 (1920).

100. 460 U.S. 300 (1983).

101. 412 U.S. 580 (1973); *see supra* notes 77-82 and accompanying text. Even though the United States was acquiring the lands for a national wildlife refuge in *Little Lake Misere*, land conservation was not directly involved. When the United States acquired the lands, the former owners reserved mineral rights for ten years, after which, with certain exceptions not applicable here, the mineral interests vested in the United States. Within that ten-year period, Louisiana enacted a statute extending the reservation of mineral interests indefinitely, but only in situations where the United States held the remainder of the title. After the ten years had elapsed, the United States leased the oil and gas under its lands, and sued to quiet its title to the mineral interests. The question was therefore not whether the mineral interests would be developed, but whether the United States or the former owners would develop them. In this respect *Little Lake Misere* resembled *Midwest Oil*; although environmental conservation was not directly involved in either, the principles they established contributed greatly to that end.

for the acquisition of sanctuaries and waterfowl production areas, . . . play[s] a central role in assuring that our Nation's migratory birds will continue to flourish."[102] It observed that the United States "unquestionably has the power to acquire wetlands for waterfowl production areas, by purchase or condemnation, without state consent."[103] In this particular situation, Congress had conditioned acquisition on state consent, without saying whether a state could revoke its consent and apply state law to easements already acquired by the United States.[104] The Court held that the state could not revoke its consent and went on to nullify conditions in state law that purported to restrict the scope and duration of wetlands easements the federal government had already acquired. One of these state law restrictions limited the duration of some easements to 99 years. The Court held that it could not be applied to defeat the permanent easements the United States had acquired:

> The United States' commitment to the protection of migratory birds will not cease after 99 years have passed. This commitment has been incorporated into law for over 80 years and has been expressed in treaties since 1916, and the need to preserve migratory bird habitats is now no less than before.[105]

By such decisions the Court has married the second constitutional common law principle with the third. For example, the Court's skepticism about permitting states to determine whether and how federal lands are acquired is also found in its decisions regarding state efforts to determine how these lands are used. Significantly, if the state's concern involves environmental protection, the Court gives it more deference. This idea dates back to the Court's 1947 decision in *United States v. California*,[106] where it suggested that a State's power to influence decision-making on federal lands may depend on its objective; specifically, a state's claim of power to "regulate and conserve" natural resources ought to be judged differently from the state's claim of a right to "use and deplete resources which might be of national and international importance."[107] The suggestion ripened into an important holding in *Califor-*

102. *North Dakota*, 460 U.S. at 310.

103. *Id.* (citing Paul v. United States, 371 U.S. 245 (1963) and Kohl v. United States, 91 U.S. 367 (1875)).

104. *Id.* at 303 n.3, 313; 16 U.S.C. § 715k-5 (2000).

105. *North Dakota*, 460 U.S. at 320.

106. 332 U.S. 19 (1947).

107. United States v. California, 332 U.S. at 37-38 (explaining its prior decision in The Abbey Dodge, 223 U.S. 166 (1912)).

nia Coastal Commission v. Granite Rock Co.[108] There the question was whether a California state conservation agency could apply its permitting authority to a proposed private use of federal land when that use had already been approved by the federal land managing agency. The Court construed ambiguous federal law to allow state environmental conservation regulation to apply.[109]

The Court's strong support for environmental conservation on federal lands is not uniform. It has issued unsympathetic opinions construing the National Environmental Policy Act's application on federal lands,[110] and it has sometimes thwarted the efforts of conservation interests to obtain judicial review of agency decisions that have sought to develop federal lands. One such decision found no final agency action as well as an insufficient showing of standing on the part of the plaintiffs;[111] another found provisions in federal land use plans not ripe for review where more federal action had to be taken first;[112] and a very recent decision found that federal land management agency inaction cannot

108. 480 U.S. 572 (1987).

109. *Id.* Along the way, the Court squarely rejected the idea that the Property Clause "exempts federal lands from state regulation whether or not those regulations conflict with federal law," finding instead that the clause itself "does not automatically conflict with all state regulation of federal land." *Id.* at 580. The Court also assumed, without deciding, that the federal statutes there involved did not allow the states to dictate affirmative uses of federal land. This bias against preemption of state authority that does not seek to dictate how federal land is used is related to a principle, long embraced by the Court, that the states and localities have broad power to levy taxes on users of federal land, unless Congress explicitly provides otherwise. *See, e.g.*, Forbes v. Gracey, 94 U.S. 762 (1876); Commonwealth Edison v. Montana, 453 U.S. 609 (1981).

110. *See* Kleppe v. Sierra Club, 427 U.S. 390 (1976) (explaining the application of the National Environmental Policy Act to development of federally-owned coal in the Northern Great Plains); Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989) (explaining the application of the National Environmental Policy Act to a ski area proposal on national forest land).

111. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990).

112. Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726 (1998). Although it did not bear directly on land conservation, another decision saw a slim majority anomalously determine that exercises of Property Clause authority are not reviewable by courts upon suits by taxpayers for consistency with the First Amendment's Establishment Clause. Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, 454 U.S. 464 (1982). The Property Clause seemed key to the outcome, because the Court distinguished an earlier decision to the contrary, *Flast v. Cohen*, 392 U.S. 83 (1968), on the ground that it involved an exercise of Congress's constitutional power over taxing and spending. The majority unfortunately provided no explanation for how the Property Clause provided this insulation from judicial review. Justice Brennan's sharp dissent described the majority's decision as "tortuous," "specious," and "pernicious to our constitutional heritage." *Valley Forge Christian Coll.*, 454 U.S. at 510 (Brennan, J., dissenting).

be challenged in federal court unless Congress has given the agency a specific, mandatory duty to act.[113]

Although the Court's conservative tilt has led it to question much received dogma about constitutional law, there is no suggestion that the Court is fundamentally rethinking its strong support for conservation on federal lands, or for the other two constitutional common law principles discussed here. While some recent decisions seem tone-deaf to land conservation, the modern Court has also, in an inversion of nineteenth century rhetoric, spoken of the "public interest in preserving . . . wilderness areas."[114]

CONCLUSION

United States culture has always strongly identified with land and natural resources. Our unofficial national anthem, "America the Beautiful," speaks of "purple mountain majesties." Our artistic tradition from the Hudson River School through Albert Bierstadt, Thomas Moran, and beyond has celebrated the American wild landscape. The American West has been, in the words of cultural historian Henry Nash Smith, a "virgin land" that permeates our culture.[115] Wilderness is, in Wallace Stegner's famous words, "the challenge against which our character as a people was formed" and so it must be "preserved—as much of it as is still left, and as many kinds."[116] The United States has been a beacon of leadership for the world on these issues. It has exported the idea of national parks—in Stegner's words, the "best idea [we] ever had"—through the World Heritage Convention. It is now doing the same thing with the National Wilderness Preservation System.[117]

National government ownership and management of land—much of it wild and scenic—has always been a central part of that cultural celebration of our natural endowment. The U.S. Supreme Court, as I have attempted to explain here, has made an important contribution to the evolution of federal land management policy. The Property Clause for the

113. Norton v. SUWA, 124 S.Ct. 2373 (2004).

114. Udall v. Fed. Power Comm'n, 387 U.S. 428, 450 (1967).

115. HENRY NASH SMITH, VIRGIN LAND: THE AMERICAN WEST AS SYMBOL AND MYTH (1950).

116. Letter from Wallace Stegner to David E. Pesonen, Outdoor Recreation Resources Review Commission (Dec. 3, 1960), *reprinted in* WALLACE STEGNER, THE SOUND OF MOUNTAIN WATER 145-53, 147 (1969), *available at* http://www.wilderness.org/OurIssues/Wilderness/wildernessletter.cfm.

117. Robert L. Glicksman & George C. Coggins, *Wilderness in Context*, 76 DENV. U. L. REV. 383, 389 (1999).

twenty-first century is one where the Court continues not only its deeply ingrained habit of deferring to the more political branches to make basic decisions about federal land policy, but also its practice of resolving ambiguities in accordance with the three common law principles favoring retention, nationalization, and conservation.