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CONSTITUTIONAL AUTHORITY, COMMON RESOURCES, AND THE CLIMATE

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Abstract

History, text, and precedent reveal an understudied and underutilized source of constitutional authority for environmental protection—the Property Clause of Article IV, Section 3. The Clause vests Congress with the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." This work re-examines these words, the context in which they were written, and the limited judicial decisions interpreting them with an eye towards increased congressional reliance on the Property Clause in the face of daunting threats to our natural environment. Much prior scholarly explanation of the Property Clause focused on the Framers' concerns about the land claims of various states, failing to consider any secondary motivations that deepen our understanding of arguably the Constitution's most explicitly environmental provision. Eugene Gaetke and Peter Appel began the push back against the originalist argument for a narrow interpretation of Congress's power under the Clause. This piece completes the picture, making an affirmative case for a fuller, conservationist original understanding, one that acknowledges the historic role of the federal government in preserving the nation's environment and natural resources.

 Associate Professor of Law, University of Maine School of Law. The author would like to thank Sarah Schindler, John Echeverria, Hope Babcock, Thomas McHenry, Justin Pidot, Katrina Fischer Kuh, Michael Pappas, Joshua Sarnoff, Todd Aagaard, Sarah Fox, and Robert Fischman for their thoughtful comments on earlier drafts. This paper also benefited from: the Colloquium on Environmental Scholarship at Vermont Law School, the Climate Change: Emerging Issues seminar held jointly by the University of Maryland Francis King Carey School of Law and Elisabeth Haub School of Law at Pace University, and AALS session on New Scholarship in Environmental, Energy, Natural Resources, Agricultural, Food, and Animal Law, sponsored by the Section on Environmental Law. Many thanks to Maggie O'Neil for her helpful research assistance and to Ryan Williams, who, along with his team at the Utah Law Review, provided editorial wisdom. All errors are the author's alone.

Of all the questions which can come before this nation, short of the actual preservation of its existence in a great war, there is none which compares in importance with the great central task of leaving this land even a better land for our descendants than it is for us . . . .

—President Theodore Roosevelt[1]

INTRODUCTION

Article IV, Section 3, Clause 2 of the United States Constitution simply and unequivocally declares that "[t]he 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."[2] Interpreting this constitutional authority, the Supreme Court famously said, "the power over the public land thus entrusted to Congress is without limitations."[3] Environmentalists and scholars have thus for years pointed to the Property Clause as a theoretical basis for legislating environmental protection.[4] And the so-called constitutional common law that developed around the Property Clause provides support for their interpretation.[5] Nonetheless, the majority of the statutes that comprise the field we have come to call "environmental law," including recent efforts to legislate solutions to the climate crisis, do not claim the Property Clause as their primary source of authority.[6]

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[1] President Theodore Roosevelt, Address in Osawatomie, Kansas, New Nationalism (Aug. 31, 1910), *in* Megan Slack, *From the Archives: President Teddy Roosevelt's New Nationalism Speech*, WHITE HOUSE ARCHIVES (Dec. 6, 2011), https://obamawhitehouse.archives.gov/blog/2011/12/06/archives-president-teddy-roosevelts-new-nationalism-speech [https://perma.cc/AJX7-6WXS].

[2] U.S. CONST. art. IV, § 3, cl. 2.

[3] Kleppe v. New Mexico, 426 U.S 529, 539 (1976) (citing United States v. San Francisco, 310 U.S. 16, 29 (1940)).

[4] *See, e.g.*, Joseph L. Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239 (1976).

[5] *See* John D. Leshy, *A Property Clause for the Twenty-First Century*, 75 U. COLO. L. REV. 1101, 1101 (2004) [hereinafter Leshy, *A Property Clause*] (describing a constitutional common law of the Property Clause that "favors retention of federal land in national ownership (retention), national over state and local authority (nationalization), and environmental preservation (conservation).").

[6] The understudy and underutilization of the Property Clause is by no means limited to environmental law. As Jeffrey Schmitt noted recently, "No leading [Constitutional Law] textbook devotes a single case to the study of the Property Clause." *See* Jeffrey M. Schmitt, *Limiting the Property Clause*, 20 NEV. L.J. 145, 146, n.4 (2019) (citing as examples ERWIN CHEMERINSKY, CONSTITUTIONAL LAW (5th ed. 2017); GEOFFREY R. STONE, LOUIS MICHAEL SEIDMAN, CASS R. SUNSTEIN, MARK TUSHNET & PAMELA S. KARLA, CONSTITUTIONAL LAW 742, 967–68, 1039 (7th ed. 2013)); *see also* Ronald F. Frank & John H. Eckhard, *Power of Congress Under the Property Clause to Give Extraterritorial Effect to Federal Lands Law: Will "Respecting Property" Go the Way of "Affecting Commerce"?* 15 NAT. RES. LAW. 663, 664 (1983).

The Property Clause, as its name suggests, has been consistently interpreted to vest Congress with legislative authority to govern the property of the federal government, as well as private property that affects it.[7] Courts, particularly in the twentieth century, have been steadfast in this understanding of the powers granted by the somewhat unusual and arcane constitutional provision, upholding congressional action that governs activity on private and state-owned land.[8] Much of the legislative activity, even the laws extending to private and state property, could best be characterized as federal land management. Even as policy in that arena shifted towards conservation, or at least mixed use, in the twentieth century, the prevailing view accepted that the Property Clause encompassed those values.

The origins of the Property Clause at the founding, however, have (prior to this work) consistently been wielded to cast doubt upon readings that ascribe to it the modern-day values of environmentalism. Sharing an article with its immediately preceding clause governing the admission of new states, the first mention of anything resembling the Property Clause at the Constitutional Convention came in that very context.[9] The language of the Clause itself ("dispose of") and contemporary federal lands policy of the later eighteenth and early nineteenth centuries suggested further that the power vested in Congress would expand the treasury while *decreasing* federal landholdings. Hence, the originalist understanding has been that the Framers had two motivations in adopting the Property Clause (boundaries of states and economics), neither of which resembled a conservationist ethos (even as such a philosophy would have manifested at the time). Indeed, scholars, as recently as Jeffrey Schmitt in 2019,[10] have leaned on this understanding of constitutional history to argue against the current status of Property Clause jurisprudence.

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[7] *See* Peter A. Appel, *The Power of Congress "Without Limitation": The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1, 4 (2001).

[8] *See id.* (citing United States v. Armstrong, 186 F.3d 1055, 1061–62 (8th Cir. 1999), *cert. denied*, 529 U.S. 1018, and *cert. denied*, 529 U.S. 1033 (2000); Minnesota *ex rel.* Alexander v. Block, 660 F.2d 1240, 1249–51 (8th Cir. 1981); United States v. Lindsey, 595 F.2d 5, 6 (9th Cir. 1979) (per curiam)). *But see* Schmitt, *supra* note 6, at 174–86 (arguing that a series of mid-nineteenth and early twentieth century Supreme Court cases adopted a narrower, and in Schmitt's proper, interpretation of Property Clause authority).

[9] *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 321–22 (Max Farrand ed., 1911), https://oll.libertyfund.org/title/farrand-the-records-of-the-federal-convention-of-1787-vol-2#Farrand_0544-02_2213 [https://perma.cc/5R6J-DD3B] ("The following additional powers proposed to be vested in the Legislature of the United States having been submitted to the consideration of the Convention . . . To dispose of the unappropriated lands of the United States . . . To authorise [sic] the Executive to procure and hold for the use of the United States landed property for the erection of forts, magazines, and other necessary buildings . . . To establish public institutions, rewards and immunities for the promotion of agriculture, commerce, trades, and manufactures.").

[10] *See* Schmitt, *supra* note 6, at 147 ("[T]he Court's expansive interpretation of the Property Clause is inconsistent with constitutional history, antithetical to structure principles of federalism, and undesirable as a matter of policy. [The Article] therefore will present a new approach to the Property Clause that both accommodates the reality of widespread federal land ownership and imposes limits on federal regulatory power.").

This work sets out to re-examine and challenge that history of the Property Clause with an eye towards increased Congressional reliance on it in the face of daunting threats to our natural environment. For instrumental purposes,[11] it will draw on the theories of constitutional interpretation favored by the current Supreme Court majority—most notably textualism[12] and originalism.[13] No one could seriously question the primary motivations of the Framers, but that does not foreclose the importance of searching for secondary motivations that deepen our understanding of arguably the Constitution's most explicitly environmental provision. Eugene Gaetke's work in the 1980s[14] and Peter Appel's work twenty years later[15] laid the groundwork for this Article's argument by pushing back on the originalist argument for a narrow interpretation of Congress's power under the Clause.[16] The argument put forward in the pages that follow completes the picture, using the full constitutional interpretation toolbox to lay out an affirmative case for a fuller, conservationist original understanding, one that acknowledges the historical role of the federal government in preserving the nation's environment and natural resources.

Part I describes in detail the professed constitutional basis for significant federal environmental law, cataloging a consistent pattern of reliance on the Commerce Clause. Parts II, III, and IV explain how the Property Clause's origins, its history, and the precedent interpreting it all support the case for greater reliance on it as the constitutional basis for environmental legislation. To assuage concerns of those who fear a broad interpretation of the Property Clause amounts to federal police power, Part V offers a potential limit on its otherwise theoretically limitless authority. Part

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[11] This is to say this piece does not stake out a normative position on the relative merits of the various theories of Constitutional interpretation. It is enough to acknowledge that textualism and originalism have grown in influence and representation on the Supreme Court in recent years, thus making arguments in those modes almost essential to practical success on judicial review.

[12] *See* Harvard Law School, *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg [https://perma.cc/H8Z2-PZQM] ("[W]e are all textualists now . . . .").

[13] *See, e.g.*, Yasmin Dawood, *Election Law Originalism: The Supreme Court's Elitist Conception of Democracy*, 64 ST. LOUIS U. L.J. 609, 611 (2020) (explaining that "at least for some issues, the founding era is serving as an implicit baseline for the conservative wing of the Court" and analyzing the effect of the "majority's originalist orientation" on election law).

[14] Eugene Gaetke, *Refuting the Classic Property Clause Theory*, 63 N.C. L. REV. 617–20 (1985).

[15] *See generally* Appel, *supra* note 7 (proclaiming support for a broad interpretation of the Property Clause).

[16] This article does not engage with the argument, which recently reemerged in Utah, that the entirety of federal land ownership and management is somehow unconstitutional. John Leshy sufficiently disposes of that rather outlandish contention in a 2018 article. *See* John D. Leshy, *Are U.S. Public Lands Unconstitutional?,* 69 HAST. L. J. 499 (2018) [hereinafter Leshy, *U.S. Public Lands Unconstitutional?*].

VI argues that, even constrained by a limiting principle like the one suggested in the previous part, the power vested in Congress through the Property Clause includes the ability to address the climate crisis with comprehensive legislation. The final part lays out the practical reasons why climate legislation should explicitly embrace the Property Clause as its constitutional foundation.

II. CONSTITUTIONAL AUTHORITY FOR ENVIRONMENTAL LAW

The 1970s has a special place in the history of environmental law. In that decade, Congress drafted and passed the sweeping legislation that would come to occupy the field. Congress, of course, derived the power to pass those foundational statutes from the Constitution. The question of which part of the Constitution did not invite much controversy or debate.[17] When some in the regulated industry challenged the constitutionality of environmental laws, the Commerce Clause of Article I, Section 8 emerged as the primary source of cited authority.[18]

The United States Supreme Court has declared unequivocally that "the power conferred by the Commerce Clause [is] broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State."[19] At issue in that case, *Hodel v. Virginia Surface Mining Reclamation Association*, were the central provisions of the Surface Mining Control and Reclamation Act,[20] but the Supreme Court's pronouncement swept much more broadly, embracing the whole environmental law regime as a constitutional exercise of Commerce Clause authority. Nowhere in that case, or any other case considering the constitutionality of environmental legislation focused on the control of pollution,[21] did the Court find that Congress's regulatory authority derived from the Property Clause of Article IV. That is true despite the fact

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[17] U.S. HOUSE OF REPRESENTATIVES, Rule XII, clause 7(c) of the Rules of United States House of Representatives, 112th Congress (2011) (requiring that so-called "Constitutional Authority Statements" accompany proposed legislation, did not yet exist; it was added in 2011).

[18] *See* Christine A. Klein, *The Environmental Commerce Clause*, 21 HARV. ENV'T. L. REV. 1, 66 (2003).

[19] Hodel v. Va. Surface Mining Recl. Ass'n., Inc., 452 U.S. 264, 282 (1981).

[20] 30 U.S.C. § 1201 et seq.

[21] I use the phrase "environmental law" here rather narrowly, confining this discussion to the statutes aimed at regulating polluters of air, water, and land. Legislation focused on natural resource and public lands issues—extraction, allocation, management, and similar subjects—certainly came with a more explicit grounding in the Property Clause. *See, e.g.*, *Kleppe*, 426 U.S. at 529 (upholding the Wild Free-Roaming Horses and Burros Act as a valid exercise of Congress's Property Clause authority). *See also* TODD AAGAARD, DAVE OWEN, & JUSTIN PIDOT, PRACTICING ENVIRONMENTAL LAW 117 (2017) ("To the extent environmental resources are 'Property belonging to the United States,' the Property Clause gives Congress broad authority to enact legislation to protect such resources. For natural resources statutes that govern the management of federal lands and waters, this is a powerful justification. . . . The Property Clause has less effect on pollution statutes, where environmental resources are not generally owned by the federal government.").

that the *Hodel* plaintiffs explicitly argued that the Surface Mining Control and Reclamation Act exceeded Congress's Property Clause authority[22] and that statute could just as easily be characterized as a natural resource management vehicle as a pollution control mechanism. The divergence of purposes—pollution control and resource management—took on a constitutional dimension, suggesting a core difference among a broad suite of laws that share the goal of environmental protection. This split the statutes into two root systems, one with a much more developed jurisprudence based on economic and political theories, the other relatively underexplored.

The judicial recognition of the Commerce Clause as justification for legislation that dictated the practices and behavior of wide swaths of the economy is unsurprising on multiple fronts. For one, as constitutional law scholars have meticulously chronicled and analyzed,[23] the post-*Lochner* approach to Commerce Clause jurisprudence dispatched with narrow conceptions of commercial and economic activity, granting Congress a wide berth and deferring to its conclusions. The practical result of that doctrinal development was an increased reliance on the Commerce Clause as the proffered authority for legislation targeting new frontiers—like the environment.

The importance of the post-*Lochner* Commerce Clause jurisprudence to environmental jurisprudence cannot be understated and persists to this day. This is despite more recent Commerce Clause cases curbing Congress's authority.[24] Courts throughout the federal system—when confronted with constitutional challenges to federal environmental statutes—cite the most prominent Supreme Court precedent on the Commerce Clause. A recent challenge to the Clean Air Act by several states is emblematic. In rejecting the states' claim and upholding the constitutionality of the Clean Air Act, the D.C. Circuit relied on the Commerce Clause itself and Supreme Court precedent, including *Darby, Wickard*, and *Lopez*, among others.[25]

It was not only in court proceedings that environmental law offered the Commerce Clause as its constitutional basis for existence. Within the halls of

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[22] *See Hodel*, 452 U.S. at 275–76 (1981) ("Consequently, appellees contend that the ultimate issue presented is 'whether land *as such* is subject to regulation under the Commerce Clause, *i.e.* whether land can be regarded as "in commerce."' In urging us to answer 'no' to this question, appellees emphasize that the Court has recognized that land-use regulation is within the inherent police powers of the States and their political subdivisions, and argue that Congress may regulate land use only insofar as the Property Clause grants it control over federal lands.") (citations omitted).

[23] *See, e.g.,* Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 458 (1989).

[24] *See* United States v. Lopez, 514 U.S. 549 (1995) and United States v. Morrison, 529 U.S. 598 (2000) (both citing *Hodel v. Va. Surface Mining Recl. Ass'n., Inc.* favorably).

[25] Miss. Comm'n on Env't Quality v. EPA, 790 F.3d 138, 180 (2015) (relying on Congress's power to regulate interstate commerce granted in U.S. CONST. art. I, § 8, cl. 3, as interpreted in C.J. Roberts's opinion in Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 549 (2012), and in other Commerce Clause jurisprudence including *Darby, Wickard,* and *Lopez*).

Congress itself, the subject of environmental regulation found its first home in committees responsible for the regulation of commerce. In the early 1970s, the Senate committee on the environment was actually a subcommittee of the Committee on Commerce.[26] That link between the economy and the environment thus from the very beginning dominated the perspective of legislators, policymakers, and jurists across all regulated natural media.

Indicative of this perspective, the text and legislative history of the Clean Air Act includes multiple references to "interstate commerce."[27] Those references have the sole purpose of establishing Congress's jurisdiction to regulate air pollution via its Commerce Clause authority; there would be no other reason to mention the connection between emissions control and interstate commerce. The courts made the same connection, describing "the activities that the EPA seeks to regulate [as] the commercial, industrial, and extraction processes that produce . . . emissions."[28] Courts reviewing the constitutionality of the Clean Air Act relied on the Supreme Court's decision on the Surface Mining Control and Reclamation Act described above.[29] Scholars that have since questioned the constitutional authority for the Clean Air Act have likewise focused on the limits of Congress's Commerce Clause authority in the context of delegation to administrative agencies;[30] no similarly forceful or prominent arguments have focused on any potential Property Clause justification for the protection of the air we collectively breathe.

The control of water pollution, like air pollution, has been repeatedly classified as an exercise of Congress's Commerce Clause authority. Indeed, one of the Clean Water Act's most litigated and debated phrases—"waters of the United States"[31]—has been defined, in the statute itself, in regulation, and in judicial precedent, by reference to navigability for the purpose of making clear the connection to interstate commerce. The debate in the House of Representatives on the passage of the 1972 Clean Water Act amendments included an explicit claim that "[t]he authority of Congress over navigable waters is based on the Constitution's grant to Congress of

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[26] *See Safe Drinking Water Act of 1973: Hearing on S. 433 and S. 1735 Before the Subcomm. on Env't of the S. Comm. on Commerce*, 93d Cong., I–II (1973).

[27] *See* 115 CONG. REC. 30, 41269 (1969) ("The bill would provide authority . . . for the Secretary to promulgate national emission standards for new and used aircraft, vessels, and other vehicles capable of moving *interstate commerce* . . . to set national emission standards for certain organic solvents, paints, and other oxidants which, because they are manufactured and shipped in *interstate commerce*, cannot be effectively controlled at their point of use . . . ." (emphasis added)).

[28] *Miss. Comm'n on Env't Quality*, 790 F.3d at 181 (2015).

[29] *See, e.g.,* Allied Local & Reg'l Mfrs. Caucus v. EPA, 215 F.3d 61, 83 (2000) ("[T]he power conferred by the Commerce Clause [is] broad enough to permit congressional regulation of *activities causing* air or water pollution, or other environmental hazards that may have effects in more than one State." (quoting Va. Surface Mining & Reclamation Ass'n, 452 U.S. at 282)) (emphasis added) (citations omitted).

[30] *See, e.g.*, Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 332–33 (1999) (focusing on nondelegation in the context of regulating interstate commerce).

[31] 33 U.S.C. § 1362(7).

'Power . . . [t]o regulate commerce with Foreign Nations and among the several States.'"[32] The Senate Conference report likewise proclaimed that the phrase "navigable waters" should "be given the broadest possible constitutional interpretation"[33]—a clear reference to the connection between navigability and interstate commerce. As the Supreme Court accurately described it, "neither this, nor anything else in the legislative history . . . signifies that Congress intended to exert anything more than its commerce power over navigation."[34]

Even broadening the focus from navigable waters to all subjects of Clean Water Act regulation, courts have consistently tied the limits of the federal government's power to the Commerce Clause. A District Court in Minnesota put it this way: "[i]t is well-settled that Congress has broad authority under the Commerce Clause to regulate activities that cause water pollution and that may have interstate effects."[35] Thus, while federal jurisdiction over direct discharges is limited by the statutory definition of 'navigable waters,' the appropriate framework for evaluating the federal government's power under the Clean Water Act to regulate indirect pretreatment discharges into sewer systems and publicly owned treatment works is provided by the Commerce Clause. The choice to interpret the Clean Water Act as confined by the connection between water quality and interstate commerce was one the Supreme Court made rather explicitly, rejecting a broader statutory reach. Justice Stevens, dissenting in *Solid Waste Agency v. United States Army Corps of Engineers*, questioned that approach, asking, "Why should Congress intend that its assertion of federal jurisdiction be given the 'broadest possible constitutional interpretation' if it did not intend to reach beyond the very heartland of its commerce power?"[36] Justice Stevens argued that the water polluting activities governed by the Act "have nothing to do with Congress's 'commerce power over navigation.'"[37] The

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[32] 118 CONG. REC. 33757 (1972) (citing Gibbons v. Ogden, 22 U.S. 1 (1824) (quoting Const. art. I, § 8, cl. 3)).

[33] ENV'T POL'Y DIV. OF THE CONG. RSCH. SERV. OF THE LIBR. OF CONG., 93RD CONG., 1ST SESS., A LEGIS. HIST. OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 (Comm. Print 1972).

[34] Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 197 n.3 (2001). *See also* 118 CONG. REC. 33757 (1972) ("Although most interstate commerce 150 years ago was accomplished on waterways, there is no requirement in the Constitution that the waterway must cross a State boundary in order to be within the interstate commerce power of the Federal Government. Rather, it is enough that the waterway serves as a link in the chain of commerce among the States as it flows in the various channels of transportation—highways, railroads, air traffic, radio and postal communication, waterways, et cetera.").

[35] United States v. Rosenblum, 2008 U.S. Dist. LEXIS 15957, at *22, *25 (D. Minn. Mar. 3, 2008).

[36] *Solid Waste Agency of N. Cook Cnty.*, 531 U.S. at 181 (Stevens, J., dissenting).

[37] *Id.*

majority rejected that broader framing then and has maintained the Commerce Clause justification for the Act since.[38]

Perhaps more explicitly than the other foundational environmental laws, the Endangered Species Act described its effect within the statutory text itself as the regulation of interstate commerce. Sections six, nine, and ten of the Act all use the phrase "interstate commerce."[39] Like the Clean Air Act's text and legislative history, the references to interstate and foreign commerce limit the act's reach so as to coincide with the Commerce Clause. The emphasis on commerce in the Endangered Species Act is interesting because, unlike controlling air and water pollution, which generally involves instrumentalities of commerce, preservation of species involves a host of strategies, many of which do not implicate commercial activity at all. And even where the animals and plants themselves might be bought and sold in commerce, the motivation for their preservation has nothing to do with the market for them.

Courts considering the constitutionality of the Endangered Species Act, and regulations enacted under it, have had to grapple with the at-times tenuous connection between individual endangered or threatened species and interstate commerce. Many such species have habitats that do not cross state borders and have no commercial value. Confronted with those situations, rather than rely on

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[38] *See id.* at 181–82 (citations omitted) (internal quotation omitted) ("The majority's reading drains all meaning from the conference amendment. By 1972, Congress' Commerce Clause power over 'navigation' had long since been established. As we recognized in *Riverside Bayview*, the interests served by the statute embrace the protection of 'significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites' for various species of aquatic wildlife. For wetlands and 'isolated' inland lakes, that interest is equally powerful, regardless of the proximity of the swamp or the water to a navigable stream. Nothing in the text, the stated purposes, or the legislative history of the CWA supports the conclusion that in 1972 Congress contemplated—much less commanded—the odd jurisdictional line that the Court has drawn today.").

[39] Endangered Species Act, Pub. L. No. 93–205, 87 Stat. 884, Sec. 6, Part (f) ("Any State law or regulation which applies with respect to the importation or exportation of, or *interstate or foreign commerce* in, endangered species or threatened species is void to the extent that it may effectively (1) permit what is prohibited by this Act or by any regulation which implements this Act, or (2) prohibit what is authorized pursuant to an exemption or permit provided for in this Act or in any regulation which implements this Act." (emphasis added)); *id.* at Sec. 9, Part (a) ("[I]t is unlawful for any person subject to the jurisdiction of the United States to . . . (E) deliver, receive, carry, transport, or ship in *interstate or foreign commerce*, by any means whatsoever and in the course of a commercial activity, any such species; (F) sell or offer for sale in *interstate or foreign commerce* any such species" (emphasis added)); *id.* at Sec. 10, Part (c) ("Non-edible byproducts of species taken pursuant to this section may be sold in interstate commerce when made into authentic native articles of handicrafts and clothing; except that the provisions of this subsection shall not apply to any non-native resident of an Alaskan native village found by the Secretary to be not primarily dependent upon the taking of fish and wildlife for consumption or for the creation and sale of authentic native articles of handicrafts and clothing.").

constitutional authority other than the Commerce Clause, like the Property Clause, courts have leaned heavily on the aggregation jurisprudence stemming from the famous *Wickard* case.[40] The jurisprudence continues to describe the Endangered Species Act as "an economic regulatory scheme."[41] Scholars have likewise defended the Endangered Species Act as an appropriate exercise of Commerce Clause authority,[42] rather than turning to the Property Clause, which fits the structure and purpose of the Act more neatly.

With respect to toxic waste, the constitutional dimension of the debate over whether and how the federal government should step in to mandate cleanup of contaminated sites and prevent future contamination focused exclusively on the Commerce Clause. The hearings on both the Resource Conservation and Recovery Act (RCRA) and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in the House of Representatives included lengthy discussions of Congress's authority and (according to some) duty[43] to regulate the interstate transport of waste and preempt state law on the subject. Before RCRA was passed, one congressman proclaimed:

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[40] *See, e.g.*, GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622, 640–41 (5th Cir. 2003) ("Cave Species takes may be aggregated with all other ESA takes. As noted, plaintiffs concede such aggregation substantially affects interstate commerce. In sum, application of ESA's take provision to the Cave Species is a constitutional exercise of the Commerce Clause power."); *See also* Gibbs v. Babbitt, 214 F.3d 483, 507–08 (4th Cir. 2000); Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1057 (D.C. Cir. 1997) (upholding the ESA on Commerce Clause grounds).

[41] *GDF Realty Invs.*, 326 F.3d at 640–41.

[42] *See* John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174, 214 (1998); Eric Brignac, Recent Development, *The Commerce Clause Justification of Federal Endangered Species Protection:* Gibbs v. Babbitt, 79 N.C. L. REV. 873, 873 (2001).

[43] *See Symp. on Res. Conservation and Recovery: Printed for Use of Subcomm. on Transp. and Com. of H. Comm. on Interstate and Foreign Com.,* 94th Cong. 57 (1976) (statement of David T. Bardin, N.J. State Env't Prot. Agency), *reprinted in* 26 RCRA, LEGISLATIVE HISTORY OF THE RESOURCE CONSERVATION & RECOVERY ACT OF 1976 (1976) ("[W]e strenuously oppose the notion that the Commerce Clause of the Constitution obliges a State to open its land to be used as a dumping ground to be filled with other States [sic] solid wastes."); *see also Superfund: Hearings on H.R. 4571, H.R. 4566, and H.R. 5290 Before the Subcomm. on Transp. and Com. of the H. Comm. on Interstate and Foreign Com.*, 96th Cong. 248–49 (1979), *reprinted in* 54 CERCLA, LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (1979) (statement of Thomas C. Jorling, Assistant Adm'r for Water and Waste Materials).

> [I]t is high time that this Congress corrected to use the commerce clause, to discourage the proliferation of unnecessary solid wastes, to encourage the recycling of materials, to encourage the recovery of energy value of the wastes that we must produce, to encourage the recovery of resources and to meet the real problems, not only of our metropolitan areas but of our economy as a whole.[44]

Much of the discussion concerning RCRA and CERCLA centered on the preemption of state law—with expressions of reticence from representatives and agency personnel testifying before them.[45] Despite these federalism concerns, no one expressed doubt in the authority of Congress to regulate the field under the Commerce Clause. Instead, the argument concerned how best to facilitate, rather than inhibit, interstate commerce.[46] Courts have routinely upheld both statutes as proper exercises of Commerce Clause authority, even as they apply to contamination that never crosses state lines.[47] The doctrinal rationale offered by the federal courts was that "unregulated management of hazardous substances, even strictly within individual states, significantly impacts interstate commerce . . . ."[48] This line of reasoning exemplifies the post-*Lochner* era's expansive reading of the Commerce Clause.

On the subject of useful, rather than wasteful, toxic chemicals, congressional action was also predicated on the Commerce Clause. Of all the foundational environmental statutes, the Toxic Substances Control Act (TSCA) and Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) perhaps fit most naturally in the category of commercial regulation. Both acts govern the use, sale, and distribution of products for which substantial national markets exist. The legislative history of both statutes evidences widespread recognition of this fact and, as a consequence, reflects careful discussions about how much, if anything, to leave to

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[44] *Id.* at 55.

[45] *See, e.g.*, *Superfund: Hearings on H.R. 4571, H.R. 4566, and H.R. 5290 Before the Subcomm. on Transp. and Com. of the H. Comm. on Interstate and Foreign Com.*, 96th Cong. 256 (1979), *reprinted in* 54 CERCLA, LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (1979) (statement of Barbara Blum, Deputy Adm'r, Env't Prot. Agency, Accompanied by Thomas C. Jorling, Assistant Adm'r for Water and Waste Mgmt) ("I think it is clear that our agency's position has historically been one of not seeking preemption of any State authority in the environmental field. We hope that we can come up with a mechanism on the spill side which would preserve as much of the activities of the State of New Jersey and those of other States as is possible without generating the types of concerns expressed most specifically by industry that they are being double-charged, that they are paying twice for the same relief and the same service from the Government and that the complexities of the impact on interstate commerce are so high as to dictate preemption.").

[46] *See id.* at 256 ("That is a delicate area. We hope we can come up with one which achieves the purposes of the Government as well as those of interstate commerce.").

[47] *See, e.g.*, United States v. Olin Corp., 107 F.3d 1506 (11th Cir. 1997) (holding that CERCLA was constitutional as applied to intrastate disposal of hazardous waste).

[48] *See id.* at 1510.

the states.[49] In the end, both TSCA and FIFRA left some room for states to regulate more stringently, but set floors deemed necessary for human health and safety.[50]

The text and legislative history of our foundational environmental laws, as well as the judicial precedent interpreting them, clearly indicates a belief that they are grounded in the power of Congress to regulate interstate commerce. That interpretation has indeed contributed to the statutes' resilience in the face of numerous allegations of unconstitutionality over the decades. However, grounding environmental protection in economic regulation, rather than, say, conservation of nature, also comes at a cost—both in the reach of the law and its expressive function. The following parts explain why paying that cost is needless and argue that the Property Clause provides an alternative conservation-minded source of constitutional authority.

II. THE PROPERTY CLAUSE AT THE FOUNDING

Article IX of the Articles of Confederation proclaimed that "no [S]tate shall be deprived of territory for the benefit of the [U]nited [S]tates."[51] In the abstract, this principle sounds rather innocuous. However, it was included at the behest of seven so-called "landed" states—colonies whose royal charters extended west to the Mississippi River or the Pacific Ocean—to preserve their claims to that territory.[52]

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[49] *See, e.g.*, H.R. REP. NO. 94-1341, at 137 (1976) ("Traditionally States have been most sensitive to the health concerns of their citizens. As a consequence, States have been granted wide latitude under the Commerce clause of the Constitution to act on behalf of their citizens even when those regulated are marketing their products through the channels of interstate commerce. Congress has also enacted legislation which liberally defines the role of the States in important health and safety laws.").

[50] *See, e.g.*, H.R. REP. NO. 92-511, at 14 (1971) ("The Congress hereby finds that pesticides are valuable to our Nation's agricultural production and to the protection of man and the environment from insects, rodents, weeds, and other forms of life which may be pests; but it is essential to the public health and welfare that they be regulated closely to prevent adverse effects on human life and the environment, including pollution of interstate and navigable waters; . . . and that regulation by the Administrator and cooperation by the States and other jurisdictions as contemplated by this Act are appropriate to prevent and eliminate the burdens upon interstate or foreign commerce, to effectively regulate such commerce, and to protect the public health and welfare and the environment.").

[51] ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 2.

[52] *See Motion Regarding the Western Lands, [6 September] 1780*, NAT'L ARCHIVES: FOUNDERS ONLINE, https://Founders.archives.gov/documents/Madison/01-02-02-0051 [https://perma.cc/EX4A-CQVC] (last visited July 24, 2021) (describing the position and listing the landed states as "Massachusetts, Connecticut, New York, Virginia, North Carolina, South Carolina, and Georgia"). The sheer brazenness of the colonies to claim ownership and control over lands that had for centuries been the home of indigenous peoples of this continent deserves some mention here. The significance of the colonialist and racist roots of the United States system of law and government is not the subject of this work but has received increased attention elsewhere. *See, e.g.,* NATSU TAYLOR SAITO, SETTLER COLONIALISM, RACE, AND THE LAW: WHY STRUCTURAL RACISM PERSISTS (2020).

The remaining six states opposed those claims, arguing that states should cede to the central government any territory west of the Appalachian Mountains.[53] One strong argument in favor of cession was relative equality of geographic jurisdiction, and therefore political influence, among the states.[54] Another was the dire need for federal funds to pay the debts incurred fighting the Revolutionary War. Even James Madison, champion of "landed" Virginia, acknowledged the potential importance of ceded territory as a common resource.[55] Rather than resolve these competing land claims in the Articles of Confederation themselves, the Congress encouraged the cession of territory by the states and resolved that "the unappropriated lands that may be ceded or relinquished to the United States . . . shall be disposed of for the common benefit of the United States and be settled and formed into distinct republican states, which shall become members of the federal union."[56] The following year, in 1781, the Articles were ratified without the issue being fully resolved. And Virginia's attempt to make a qualified cession of territory, despite passage by the state assembly in 1781,[57] was not immediately accepted by Congress.[58]

The ensuing failure of our first constitution can, in part, be attributed to the uncertainty surrounding these land claims and the resultant lack of central government resources, including land. The aforementioned Virginia cession is instructive—the Virginia Compact codifying the cession makes explicit reference to a series of triggering events beginning in 1781 and concluding after the ratification

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[53] *See Motion Regarding the Western Lands, supra* note 52.

[54] *See id.*

[55] *See id.* (Moving, among other things, "[t]hat all the Lands to be ceded to the United States and not appropriated or disposed of in bounties to the American Army shall be considered as a common Fund for the use and benefit of such of the United States as have become or shall become Members of the Confederation").

[56] LIBR. OF CONG., 18 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 915 (Gaillard Hunt ed., Wash. Gov't Printing Office 1910) (1780).

[57] *See* VA. CODE ANN. § 1-303 (1950); Thomas Jefferson, *From Thomas Jefferson to Samuel Huntington, 17 January 1781, enclosing Resolution of Assembly concerning the Cession of Lands, 2 January 1781*, NAT'L ARCHIVES: FOUNDERS ONLINE (Jan. 17, 1781), https://Founders.archives.gov/documents/Jefferson/01-04-02-0481 [https://perma.cc/N8P5-JT6M] (last visited July 24, 2021).

[58] *See Editorial Note: The Virginia Cession of Territory Northwest of the Ohio*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/01-06-02-0419-0001 [https://perma.cc/7S4V-7H2M] ("A few leaders, such as George Mason, James Madison, Thomas Jefferson, George Washington, Joseph Jones, Benjamin Harrison—some of whom were far from being disinterested themselves—led the three-year fight to yield in the national interest a vast tract of territory for which the state had a more defensible title than most other western claims.").

of the United States Constitution.[59] The Property Clause of the United States Constitution has its origins in this story of a resource-deprived federal government.[60]

In 1787, the debate over the legislative powers of the federal government raged fiercely. Parts of that debate concerned the ability to regulate the lands held and acquired—what would become the Property Clause. Nonetheless, contemporary accounts of the Constitutional Convention, most notably the notes of James Madison, suggest that the conversations on this particular subject were not nearly as heated or extensive as the discussions of what were perceived as more controversial powers.[61] The cession of lands by the original states to the federal government, now understood as necessary for the preservation of the union, importantly distinguished the reach of the constitutional central government from the previous one under the Articles of Confederation;[62] however, there was limited discussion concerning how the power over them might be used.[63]

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[59] *See* Va. Code Ann. § 1-303 ("The territory northwest of the Ohio River ceded by the Commonwealth shall be and remain the same as provided by: 1. An act of the General Assembly passed on January 2, 1781 . . . . 2. An act of the General Assembly passed on December 20, 1783 . . . . 3. An act of the General Assembly passed on December 30, 1788, whereby, after referring to an ordinance for the government of the territory, passed by the United States Congress on July 13, 1787 . . . .").

[60] *See* Leshy, *U.S. Public Lands Unconstitutional?*, *supra* note 16, at 504–06 (describing the early history of federal public lands acquisition (by cession) and management embodied in four documents: "the October 10, 1780 Resolution of Second Continental Congress that urged the states with western land claims to cede them to the United States . . . Virginia's 1784 cession to the United States of the western lands it claimed . . . the famous Northwest Ordinance adopted by the Congress of the Confederation in 1787. . . [and] the United States Constitution, which replaced the Articles of Confederation in 1788.").

[61] *See, e.g.,* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911), https://oll.libertyfund.org/title/farrand-the-records-of-the-federal-convention-of-1787-vol-1#preview [https://perma.cc/U567-JMXS] (containing 18 instances of the word "lands" compared to 265 instances of the word "representation"—a much debated issue with respect to the composition of the legislature); *see also* Schmitt, *supra* note 6, at 154 ("Original intent . . . does little to clarify the meaning of the Property Clause. There is simply no record of the Founders discussing the power of Congress to regulate federal land within an existing state. In fact, the records of the Constitutional Convention contain little debate over any aspect of the Property Clause.").

[62] *See* CONG. RSCH. SERV., FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA (2020) ("The original states reluctantly ceded the lands to the developing new government. This cession, together with granting constitutional powers to the new federal government, including the authority to regulate federal property and to create new states, played a crucial role in transforming the weak central government under the Articles of Confederation into a stronger, centralized federal government under the U.S. Constitution."); *see also* Appel, *supra* note 7, at 23 (2001) ("[T]he history reveals that the western lands, the question of who should control them, and the eventual decision to vest that authority in the United States rather than the individual states received significant attention from the Continental Congress.").

[63] *See* Leshy, *A Property Clause*, *supra* note 5, at 506 ("The Property Clause did not provoke significant discussion at the Constitutional Convention.").

One of the few explicit references to the idea of granting Congress the power over federal lands simply listed "additional powers proposed to be vested in the Legislature of the United States," many of which concerned the governance of real and intellectual property.[64] The proposed authority over real property included the power "[t]o dispose of the unappropriated lands of the United States" and "[t]o authorise [sic] the Executive to procure and hold for the use of the United States landed property for the erection of forts, magazines, and other necessary buildings" and "[t]o establish public institutions, rewards and immunities for the promotion of agriculture, commerce, trades, and manufactures."[65]

At first blush, these powers sound rather mundane and even ministerial. Indeed, at least one constitutional scholar who has looked at the contemporary records contends that the delegates to the Convention conceived of public land management as an administrative, rather than legislative, function.[66] This argument finds additional support in the Convention's decision to locate the Property Clause in Article IV, rather than with the other legislative powers in Article I. As the role of administrative law has grown in prominence since the founding, this may be a distinction without a practical difference. Regardless of the nominal conception of federal lands policymaking as legislative or administrative, one could read the proposed powers as reflecting a deeper appreciation of the federal government's responsibility as steward of common resources. For instance, the establishment of public institutions for the promotion of agriculture and the acquisition of land for necessary buildings are two prominent functions of modern public land governance as delegated by Congress to the Bureau of Land Management,[67] the National Park Service,[68] and United States Department of Agriculture.[69]

Further supporting the notion that the Founders understood the Property Clause to convey significant authority to Congress is their conscious decision *not* to place

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[64] *See* 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 9, at 322 (listing, among other things, the power "[t]o grant charters of incorporation in cases where the public good may require them, and the authority of a single State may be incompetent; [t]o secure to literary authors their copy rights for a limited time; [t]o establish an University; [t]o encourage, by proper premiums and provisions, the advancement of useful knowledge and discoveries; . . . [t]o grant patents for useful inventions; [t]o secure to authors exclusive rights for a certain time").

[65] *Id*.

[66] *See* Lance F. Sorenson, *The Hybrid Nature of the Property Clause: Implications for Judicial Review of National Monument Reductions*, 21 U. PA. J. CONST. L. 761, 781–82 (2019) ("[T]he Convention did not conceive of the management of property as a legislative power. Rather, it remained administrative. As such, it was separated from more traditional legislative functions. Public lands management was, and remains to this day, an administrative power housed in Congress.").

[67] *See* Federal Land Policy and Management Act, 43 U.S.C. §§ 1701–1785 (1976).

[68] *See* National Park Service Organic Act, ch. 408, 39 Stat. 535 (1916) (codified as amended at Pub. L. No. 108–352).

[69] An Act to establish a Department of Agriculture, ch. 71, 12 Stat. 387 (1862).

the Clause within the Article II purview of the executive branch.[70] The ratified language of Article IV's Property Clause explicitly acknowledges that public lands policy involves more than just acquisition and disposal, implicitly endorsing a stewardship role for Congress. In addition to transactional authority, the Clause tasks Congress with "mak[ing] all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[71] This language clearly contemplates more active management than even the proposed powers listed by the draft committee and reproduced above. Even scholars who argue for a narrow interpretation of the Clause concede that its text, according to original and contemporary understanding, grants Congress some version of police power with respect to federal land.[72]

What remains unclear from the text is just what the Founders envisioned as "needful" when it came to managing and protecting government property. The word could be read as alternatively permissive and restrictive. Those who read it as limiting suppose that the Framers simply intended to continue the status quo vision of federal land policy, with the federal government acting largely as a transitional police authority over territory before new states were established in it.[73] That view attributes too little foresight to the Founders—men who had just watched an under-resourced, un-landed constitutional government fail rather unceremoniously.

In the Federalist Papers, famously authored to convince states to ratify the Constitution, both Hamilton and Madison offer some limited insight on the point of federal land policy. In the Federalist No. 43, Madison recounts a version of the text of the Property Clause itself and describes the power conveyed by it as "a power of very great importance."[74] He goes on to argue the vesting of this power in the federal government as necessary for the management of the yet unexplored western territories, preempting debate among various states that may lay claim to the governing of said territories.[75] The focus on quashing the competing jurisdictional

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[70] Lance F. Sorenson, *The Hybrid Nature of the Property Clause: Implications for Judicial Review of National Monument Reductions*, 21 U. PA. J. CONST. L. 761, 781 (2019) ("[T]he Convention did *not* want the public domain managed by the President out of concern that it was too much power in one person's hands.").

[71] U.S. CONST. art. III, § 3, cl. 2.

[72] *See* Schmitt, *supra* note 6, at 154 ("In sum, the Property Clause, when read in context, could be read to grant Congress either: (1) an unlimited regulatory power over federal land, or (2) a more limited regulatory power that does not include the power to preempt contrary state legislation with respect to land within a state.").

[73] *See id.* at 155 ("The framers therefore sought to facilitate the continuation of the federal land policy that had existed under the Articles of Confederation. Three relevant principles governed this policy: (1) the federal government would have an unlimited regulatory power over the federal territories (outside the borders of any state), (2) the new states would be equal in sovereignty to the old, and (3) the United States would retain land within the new western states.").

[74] THE FEDERALIST NO. 43, at 211 (James Madison) (Floating Press ed., 1783).

[75] *See id.* (arguing the Property Clause "was probably rendered absolutely necessary, by jealousies and questions concerning the Western territory, sufficiently known to the public").

claims of the states to new territories, particularly in the West, is a theme that pervades the discussion of the Property Clause throughout the essays of both Hamilton and Madison.

In Federalist No. 7, Hamilton recounts "serious and animated discussion concerning the right to the lands which were ungranted at the time of the Revolution."[76] He correctly asserts that states compromised under the Articles of Confederation, settling on the view that those ungranted lands transferred from the Crown to the federal government of the United States at the signing of the Treaty of Paris.[77] Hamilton goes on to emphasize the importance of maintaining the "Western territory" as "the common property of the union," arguing the importance of federal control to avoid inconsistent principles of management and apportionment, as well as interstate hostility.[78] That extended argument could rightly be classified as the first documented argument for the conservation of federal landholdings, albeit protecting them from state, rather than private, acquisition.

James Madison, in the Federalists Nos. 14 and 41, argues forcefully in favor of a strong union and in support of the particular distribution of powers and responsibilities among levels and branches of government. Madison urges that the union is necessary as the "conservator of peace" and "guardian of our . . . common interests."[79] This passage is notable for two reasons. First, we see in it a very early usage of the idea of government as an agent of conservation, albeit conservation of a peaceful and tranquil state of affairs, rather than nature. Second, Madison acknowledges the existence of, and, more importantly, the value of protecting, commonly held resources, many of which, especially at this time, were natural. The recognition of the importance of central government to the preservation of commonly held property ties Madison's line of reasoning back to Roman and natural law,[80] which is where, not coincidentally, we find the roots of the public trust doctrine.[81]

One can understand the Property Clause as an acknowledgment of the natural law obligation of states to preserve and protect common resources. Both Madison and Hamilton, along with a good number of the Founders, were noted subscribers to

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[76] THE FEDERALIST NO. 7, at 44 (Alexander Hamilton) (Floating Press ed., 1783).

[77] *See* Treaty of Paris, Gr. Brit.-U.S., Sept. 3, 1783, 12 Bevans 8.

[78] *See* THE FEDERALIST NO. 7, *supra* note 76, at 44–45 (Alexander Hamilton).

[79] THE FEDERALIST NO. 14, at 94 (James Madison) (Floating Press ed., 1783).

[80] *See* THE INSTITUTES OF JUSTINIAN, Book II, Title I (J.B. Moyle trans., 5th ed. 1913) ("[N]ow let us proceed to the law of Things. Of these, some admit of private ownership, while others, it is held, cannot belong to individuals: for some things are by natural law common to all, some are public, some belong to a society or corporation, and some belong to no one.").

[81] *See* PPL Mont., LLC v. Montana, 565 U.S. 576, 603 (2012) ("The public trust doctrine is of ancient origin. Its roots trace to Roman civil law and its principles can be found in the English common law on public navigation and fishing rights over tidal lands and in the state laws of [the United States of America]."); *see generally* Bruce W. Frier, *The Roman Origins of the Public Trust Doctrine*, 32 J. ROMAN ARCHAEOLOGY 641 (2019).

the theory of natural law.[82] Madison wrote of a legal duty "precedent, both in order of time and in degree of obligation, to the claims of Civil Society."[83] Hamilton specifically espoused belief in "the law of nature," defined as "an eternal and immutable law, which is indispensably obligatory upon all mankind, prior to any human institution whatever."[84] Whether or not one ascribes to a natural law theory of the Constitution, it is difficult to ignore the theory's influence on the document's drafters, particularly when interpreting their words. In the context of the Property Clause, that influence suggests that "needful rules and regulations" would be those that ensure the preservation of the common property resources of the United States for use and enjoyment by citizens in perpetuity. And further, the writings of Justinian place air and water among those common resources.[85] Thus, the Property Clause could quite reasonably be read to constitutionally empower Congress to enact legislation for the purpose of maintaining a healthy, sustainable environment. At the very least, the protection of these resources as they exist on federal lands would constitute a permissible exercise of congressional authority.

III. FOUNDING ERA USE OF PROPERTY CLAUSE AUTHORITY

As others have recently and belatedly noted,[86] the lack of debate concerning the Property Clause in the late eighteenth century did not translate to a dearth of congressional *action* pursuant to the Clause in the early nineteenth century. Alas, much of the earlier congressional action under the Property Clause dispatched into private hands, rather than preserved, federal lands. Owing no doubt to the attitude of the times, federal landholdings in the West were put forward as opportunities for new, enterprising citizens. The federal government also saw in this policy the prospect of revenue generation at a time when precious few sources of funds were available.[87]

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[82] *See* Robert S. Barker, *Natural Law and the United States Constitution,* 66 REV. OF METAPHYSICS 105, 109 (2012) ("The most influential Founders of the United States Constitution saw God as the source of the supreme rules of law and government, and applied the Natural Law in their work in the 1787 Constitutional Convention.").

[83] James Madison, *Memorial and Remonstrance Against Religious Assessments*, *in* 5 THE FOUNDERS' CONSTITUTION 82 (Philip B. Kurland & Ralph Lerner, eds., 1987).

[84] ALEXANDER HAMILTON, THE FARMER REFUTED (1775), *reprinted in* 1 THE WORKS OF ALEXANDER HAMILTON 55, 62 (Henry Cabot Lodge, ed., 1904).

[85] *See* THE INSTITUTES OF JUSTINIAN, *supra* note 80 ("Thus, the following things are by natural law common to all—the air, running water, the sea, and consequently the sea-shore.").

[86] *See* Schmitt, *supra* note 6, at 158 (noting that "the issue of Congress's regulatory authority over federal land within the states . . . emerged repeatedly in Congress during the early nineteenth century" and arguing that scholars have largely ignored this historical evidence, instead focusing on the meager accounts of debates at the founding and later Supreme Court precedent).

[87] *See* U.S. CONST. amend. XVI; *see also* Revenue Act of 1861, Act of August 5, 1861, Chap. XLV, 12 Stat. 292 (imposing the first federal income tax).

Congress established the General Land Office (GLO) as an agency housed within the Department of the Treasury in 1812, vesting it with the authority to "superintend, execute and perform, all such acts and things, touching or respecting the public lands of the United States."[88] The GLO continued the work of disposing of western lands that predated the Constitution.[89] Congress implicitly signaled its approach to land policy, and thereby the Property Clause, when it chose to place the GLO within the Treasury Department. That move signaled two important things. First, Congress saw the chief public benefit of federal landholdings as revenue generation.[90] Second, Congress did not embrace stewardship of common resources as an important function of the then-constituted federal government, instead prioritizing the "settlement" of as much territory as possible.[91]

These perspectives on common resources were widely shared among early citizens and thinkers.[92] A lone dissenting voice resonated from jurist and scholar St. George Tucker, who argued that "[t]he western territory ought to be regarded as a national stock of wealth."[93] Tucker advocated for limited disposal of federal lands, sufficient only to raise revenue necessary to pay current debt, and favored retaining the rest of the property as a common resource.[94] This view sounds much more consistent with a stewardship ethos. And, practically speaking, it is. Upon closer examination, however, Tucker's rationale for limiting disposal emerges as having little to do with conservation and much more to do with a concern that a bloated federal treasury would lead to an increasingly intrusive and potentially tyrannical centralized government.[95]

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[88] An Act for the Establishment of a General Land-Office in the Department of the Treasury, ch. 68, 2 Stat. 716 § 1 (1812); *see also* MILTON CONOVER, THE GENERAL LAND OFFICE: ITS HISTORY, ACTIVITIES AND ORGANIZATION 3 (1923) (describing the creation of the General Land Office).

[89] *See generally* Land Ordinance of 1785, reprinted in 2 THE TERRITORIAL PAPERS OF THE U.S., THE TERRITORY NORTHWEST OF THE RIVER OHIO 12 (Clarence Edwin Carter, ed., 1934) (allowing settlers to purchase land in undeveloped parts of the country).

[90] *See* Lance F. Sorenson, *The Hybrid Nature of the Property Clause: Implications for Judicial Review of National Monument Reductions,* 21 U. PA. J. CONST. L. 761, 775 n.48 (2019) ("By placing responsibility for land policy within the Department of the Treasury, Congress underscored the revenue-raising nature of federal lands.").

[91] *See generally* GORDON WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (1993) (arguing that American individualistic drive for westward expansion was a significant cultural attitude at the time of the American Revolution and continued into the 1800s).

[92] *See, e.g.,* President Thomas Jefferson, U.S., First Inaugural Address, (Mar. 4, 1801) *in* 1 AM. STATE PAPERS: FOREIGN RELS. 56 (describing the country as encompassing "a wide and fruitful land" with "room enough for our descendants to the thousandth and thousandth generation").

[93] ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES, AND OF THE COMMONWEALTH OF VIRGINIA 285 (Philadelphia, Birch & Small, 1803).

[94] *See id.* at 283–84.

[95] *See id.* at 283–86 ("To amass immense riches to defray the expenses of ambition

Historical accounts of the GLO's activity describe an agency struggling to manage the rapid, speculative westward expansion of the United States.[96] The GLO's policies facilitated easy, private acquisition of federal lands. A system of credit offered to enterprising citizens looking to acquire undeveloped property became increasingly burdensome for GLO to administer and encouraged wild speculation, as the United States government lost out on both land and, alarmingly, the continuing payments meant to compensate it for that land.[97] The records, including statements of President Jackson, indicate that the priorities of the agency centered on surveying more and more land for sale and ensuring proper accounting of such transactions;[98] nowhere is the preservation of valuable government assets, let alone conservation, mentioned as part of the GLO's mission.

In 1845, the Supreme Court had occasion to opine on the federal government's responsibility, and authority, to regulate activity on public lands in newly forming states. In dicta in the case of *Pollard v. Hagan*, the Justices wrote that they

> . . . *think* the United States hold the public lands within the new states by force of the deeds of cession, and the statutes connected with them, and not by any municipal sovereignty which it may be supposed they possess, or have reserved by compact with the new states, for that particular purpose [and that] the [Property Clause] shows that no such power can be exercised by the United States within a state.[99]

Jeffrey Schmitt calls this language "highly persuasive" in making the case for a narrow interpretation of Property Clause authority.[100] It is more appropriately cast, however, as merely reflective of the general attitude towards federal landholdings at

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when occasion may prompt, without seeming to oppress the people, has uniformly been the policy of tyrants. Should such a policy creep into our government, and the sales of land, instead of being appropriated to the discharge of former debts, be converted to a treasure in a bank, those who can at any time command it, may be tempted to apply it to the most nefarious purposes."); *see also* Lance F. Sorenson*, The Hybrid Nature of the Property Clause: Implications for Judicial Review of National Monument Reductions,* 21 U. PA. J. CONST. L. 761, 774–75 (2019) (discussing Tucker's argument).

[96] *See* CONOVER, *supra* note 88, at 18.

[97] *See id.* at 19–20.

[98] *See* President Andrew Jackson, U.S., Annual Address to Congress (Dec. 7, 1835) ("At the time this institution was organized, near a quarter century ago, it would probably have been thought extravagant to anticipate for this period such an addition to its business as has been produced by the vast increase of those sales during the past and present years. It may also be observed that since the year 1812 the land offices and surveying districts have been greatly multiplied, and that numerous legislative enactments from year to year since that time have imposed a great amount of new and additional duties upon that office, while the want of a timely application of force commensurate with the care and labor required has caused the increasing embarrassment of accumulated arrears in the different branches of the establishment.").

[99] Pollard v. Hagan, 44 U.S. 212, 224 (1845) (emphasis added).

[100] *See* Schmitt, *supra* note 6, at 175.

the time; the Court simply reiterated the policies of the legislative and executive branches in favor of expedient sale to speculators rather than actual management.

It was not until 1849 that any change in Congress's approach came about, and even then, at the height of Manifest Destiny, the focus was largely not on stewardship. In that year, Congress established the Department of the Interior.[101] Congress moved the GLO, along with all of its responsibilities, under the supervision of this department. The Department of the Interior's mission at its inception, though broader in perspective than national debts and revenues, did not yet include notions of sustainable resource management or environmental protection. Those goals would not outwardly manifest until the twentieth century.[102]

As the nineteenth century came to a close, the Supreme Court once again weighed in on the meaning of the Property Clause. During this time, the Supreme Court's holdings began to support a broad interpretation of the Property Clause. In 1871, in *Gibson v. Chouteau*, the Court for the first time described the Property Clause power as "subject to no limitations."[103] A little more than a decade later, in *United States v. Beebee*,[104] the Court endorsed the notion of using the Property Clause's authority to protect the public domain.[105] And then, at the turn of the twentieth century, the Court issued an opinion interpreting the Property Clause that would come to shape the doctrine for the modern era. In *Camfield v. United States*, the Supreme Court held that Congress's authority extended to the regulation of fencing on *privately-held* land neighboring federal property.[106] The defendants in

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[101] *See* An Act to Establish the Home Department, and to Provide for the Treasury Department an Assistant Secretary of the Treasury, and a Commissioner of the Customs, Pub. L. 30-108, 9 Stat. 395 (1849).

[102] *See, e.g.*, Exec. Order No. 1014 (Jan. 26, 1909) ("It is ordered that the Pelican Island Reservation, Florida, created by Executive Order of March 13, 1903, for the protection of native birds, be and the same is hereby enlarged so as to include all unreserved mangrove and other islands [near] the Tallahassee meridian, Florida . . . . It is unlawful for any person to hunt, trap, capture, willfully disturb, or kill any bird of any kind whatever, or take the eggs of such birds within the limits of this reservation, except under such rules and regulations as may be prescribed by the Secretary of Agriculture."); Multiple-Use Sustained-Yield Act of 1960, Pub. L. No. 86-517 (1960).

[103] 80 U.S. 92, 99 (1872).

[104] 127 U.S. 338 (1888).

[105] *Id.* at 342 ("[T]he Government is charged with the duty and clothed with the power to protect the [public domain] from trespass and unlawful appropriation . . . .").

[106] 167 U.S. 518, 525 (1897) ("Considering . . . the necessities of preventing the enclosure of public lands, we think the fence is clearly a nuisance, and that it is within the constitutional power of Congress to order its abatement, notwithstanding such action may involve an entry upon the lands of a private individual."); *see also* McKelvey v. United States, 260 U.S. 353, 359 (1922) ("[Congress] may sanction some uses and prohibit others, and may forbid interference with such as are sanctioned."); United States v. Alford, 274 U.S. 264, 267 (1927) ("Congress may prohibit the doing of acts upon privately owned lands that imperil the publicly owned forests.").

Camfield argued that a federal statute prohibiting enclosure of public lands[107] could not be applied to their creative scheme whereby they constructed fences on the edge of neighboring privately held parcels to effectively encapsulate a larger parcel of public land. The Court rejected their argument, holding that Congress had "the power of legislating for the protection of the public lands, [which] may thereby involve the exercise of what is ordinarily known as the 'police power,'[108] so long as such power is directed solely to its own protection."[109] This permissive interpretation of the Property Clause, recognizing its underlying stewardship purpose, established it as an important source of legislative power for the budding conservation movement.

The twentieth century saw the Court relying on *Camfield* as support for a broad notion of Property Clause authority, drawing on the case in analogous constitutional contexts. In keeping with the holding of *Camfield*, rather than the dicta of *Pollard*, the prevailing interpretation likened the Property Clause power to a general police power—an interpretation oft-cited when considering the reach of police powers in other areas.[110] Specifically with respect to common resources, it was now well-settled that the Property Clause conferred the police power necessary for "[t]he United States [to] prohibit absolutely or fix the terms on which its property may be used."[111]

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[107] *See Camfield*, 167 U.S. at 521–522; 23 Stat. 321, 43 U.S.C. § 1062 ("That all [e]nclosures of any public lands in any State or Territory of the United States, heretofore or to be hereafter made, erected, or constructed by any person, party, association, or corporation, to any of which land included within the [e]nclosure the person, party, association, or corporation making or controlling the [e]nclosure had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith with a view to entry thereof at the proper land-office under the general laws of the United States at the time any such [e]nclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construction, or control of any such [e]nclosure is hereby forbidden and prohibited; and the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States in any State or any of the Territories of the United States, without claim, color of title, or asserted right, as above specified as to [e]nclosure, is likewise declared unlawful, and hereby prohibited.").

[108] *Camfield*, 167 U.S. at 526.

[109] *Id.*

[110] *See, e.g.*, Interstate Consol. St. Ry. Co. v. Mass., 207 U.S. 79, 86–87 (1907) ("I hesitatingly agree with the state court that the requirement may be justified under what commonly is called the police power. The obverse way of stating this power in the sense in which I am using the phrase would be that constitutional rights like others are matters of degree and that the great constitutional provisions for the protection of property are not to be pushed to a logical extreme, but must be taken to permit the infliction of some fractional and relatively small losses without compensation, for some at least of the purposes of wholesome legislation." (citing *Camfield*, 167 U.S. at 524)); Noble State Bank v. Haskell, 219 U.S. 104, 111 (1911) ("It may be said in a general way that the police power extends to all the great public needs." (citing *Camfield*, 167 U.S. 518)).

[111] Light v. United States, 220 U.S. 523, 536 (1911).

Coincident with the emerging American conservation ethos and emboldened by the Property Clause jurisprudence, Congress enacted legislation more attuned to protecting federal lands and resources. One emblematic statutory provision criminalized "build[ing] a fire in *or near* any forest, timber, or other inflammable material upon the public domain."[112] That particular provision became the subject of constitutional challenge before the Supreme Court. If there was any question as to the uniqueness of *Camfield* to the rather devious plot to skirt the law in that case, the decision to uphold the aforementioned fire-prevention provision in *United States v. Alford*[113] made clear that the Property Clause permits regulation of private property in a multitude of contexts. The Court explicitly held that, pursuant to the Property Clause, "Congress may prohibit the doing of acts upon privately owned lands that imperil the publicly owned forests."[114]

The more active, conservation-oriented management of public lands and resources by executive agencies empowered by statutory delegations suggests that the executive and legislative branches held consonant views of the federal government's stewardship responsibility as conferred by the Property Clause. This activity represented the first kernels of real manifestation of the natural law obligations undergirding the Founders' thinking. This shift in approach did not go unchallenged; the Court continually gave its blessing to this type of "needful" regulation that implicated private interests, as well as public resources. One such Department of Agriculture policy resulted in the removal to private land large numbers of deer carcasses—the animals having been hunted within a national forest and game preserve for the purpose of ecosystem management.[115] The Supreme Court in *Hunt v. United States*[116] held that the policy was squarely within the power of the United States to protect its lands and property.[117] A prevailing principle emerged at this time as to the scope of property management authority (i.e., what constitutes proper "disposal" or a "needful" regulation). That principle required consonance

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[112] Act of June 25, 1910, ch. 431, § 6, 36 Stat. 855, 857, (amending § 53 of the Penal Code of Mar. 4, 1909) (emphasis added).

[113] 274 U.S. 264 (1927).

[114] *Id*. at 267 (citing *Camfield*, 167 U.S. at 518 and *McKelvey*, 260 U.S. at 353).

[115] *See* United States v. Hunt, 19 F.2d 634, 637 (1927) (reproducing the "Regulation Permitting the Removal of Deer by Killing or Otherwise from the Grand Canyon National Game Preserve or Parts Thereof Whenever Such Removal is Advisable in Order to Prevent an Overstocking Detrimental to the Welfare of the Deer or to Provide Animals for Transfer to Other Areas").

[116] Hunt v. United States, 278 U.S. 96 (1928).

[117] *Id.* at 100 ("The district forester, acting under the direction of the Secretary of Agriculture, proceeded to kill large numbers of the deer and ship the carcasses outside the limits of the reserves. That this was necessary to protect the lands of the United States within the reserves from serious injury is made clear by the evidence. The direction given by the Secretary of Agriculture was within the authority conferred upon him by act of Congress. And the power of the United States to thus protect its lands and property does not admit of doubt.").

with the nature and purpose of the property in question and advancement of a true public interest, as opposed to private interest.[118]

These early twentieth-century developments in Property Clause jurisprudence reflected the nation's explicit embrace, for the first time, of the value of wilderness and its vast natural resources and the importance of conserving it. More than a shifting attitude towards the natural world, this period in our history was an awakening to values already inherent in the principles and actions undergirding our founding. The Property Clause is but one prominent, underexplored example.[119] The presidency of Theodore Roosevelt is often credited with bringing conservation ethics into the American political conscientiousness. The philosophy motivating Roosevelt was at least equally important as his actions while governing. Even the name given to the Progressive Party during Roosevelt's failed campaign for a third term—"Bull Moose"—reflects a reverence and appreciation for the natural world. Bull Moose's conservationist ideals outperformed and outlasted its candidates, making the conservation of natural resources a vital consideration, and aspiration, for policy decisions for years to come.[120]

IV. THE CONTEMPORARY PROPERTY CLAUSE

Interpreting the scope of the Property Clause in *Kleppe v. New Mexico*, and relying on *Camfield* to do so,[121] the Supreme Court famously held that "the power over the public land thus entrusted to Congress is without limitations."[122] In upholding a narrow federal legislative protection for wild horses and burros,[123] the Court, perhaps unwittingly or perhaps intentionally,[124] opened the door for federal lawmakers to use their Property Clause authority to protect the natural environment. Surprisingly, however, Congress has yet to walk through that open door, let alone drive an electric truck filled with climate change policy through it.

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[118] *See* Ashwander v. TVA, 297 U.S. 288, syl. ¶ 10 (1936) ("The method of disposing of government property under the constitutional provision (§ 3, Art. IV) must be appropriate to the nature of the property, and be adopted in the public interest as distinguished from private or personal ends.").

[119] The sustainability ethic enshrined in Anglo-American property law doctrine of waste is another that has enjoyed more scholarly attention. *See, e.g.,* Anthony L. I. Moffa, *Wasting the Planet: What a Storied Doctrine of Property Brings to Bear on Environmental Law and Climate Change*, 27 J. ENVTL. L. & LITIG. 459 (2012); JEDEDIAH PURDY, THE MEANING OF PROPERTY: FREEDOM, COMMUNITY, AND THE LEGAL IMAGINATION 52– 53 (2010).

[120] *See* JEDEDIAH PURDY, AFTER NATURE: A POLITICS FOR THE ANTHROPOCENE 153–87 (2015).

[121] *See Kleppe*, 426 U.S at 540–41.

[122] *Id.* at 539; *see also* United States v. City & Cty. of S.F., 310 U.S. 16, 29 (1940) ("The power over the public land thus entrusted to Congress is without limitations.").

[123] Wild Free-Roaming Horse and Burro Act of 1971, 16 U.S.C. §§ 1331–1340.

[124] *See* Leshy, *A Property Clause, supra* note 5, at 1101 (arguing that the Supreme Court's federal lands jurisprudence is an expression of "constitutional common law" that favors "retention of federal land in national ownership (retention), national over state and local authority (nationalization), and environmental preservation (conservation).").

The decision in *Kleppe* made clear that Property Clause authority sweeps broadly, reaching beyond the borders of federal property. However, the Court explicitly left open the question of just how far beyond government property borders the power reaches[125]—to the extent that those borders can and should be defined by the traditional metes and bounds of property law. That question went unanswered at the highest court, but circuit courts expounded on it in the wake of *Kleppe*. Just one year after the Supreme Court's decision, the Eighth Circuit bluntly and aptly described the state of the doctrine, writing that "whether federal regulations can be deemed 'needful' prescriptions 'respecting' the public lands . . . is primarily entrusted to the judgment of Congress, and courts exercising judicial review have supported an expansive reading of the Property Clause."[126] The court relied on this deferential reading to uphold congressional regulation of non-federal waters.[127] The Ninth Circuit similarly unequivocally declared as "well-established" the understanding that the Property Clause "grants to the United States power to regulate conduct on non-federal land when reasonably necessary to protect adjacent federal property."[128] This interpretation of the Property Clause was understood as a necessary incident of Congress's undisputed power to dedicate federal land for specific purposes (e.g., the protection of wildlife); Congress must have the ability to make unlawful conduct that threatens those chosen purposes.[129] The Supreme Court has suggested, relying on *Kleppe* and *Camfield*, that a purpose-driven understanding of the authority of the Property Clause's reach comports with the Constitution.[130] The Eighth Circuit has most clearly laid out, and repeatedly reaffirmed, this contemporary understanding of the Property Clause:

> Under this [Property Clause-based] authority to protect public land, Congress' power must extend to regulation of conduct on or off the public land that would threaten the designated purpose of federal lands. Congress

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[125] *See Kleppe*, 426 U.S at 546 ("While it is clear that regulations under the Property Clause may have some effect on private lands not otherwise under federal control, *Camfield v. United States*, 167 U.S. 518 (1897), we do not think it appropriate in this declaratory judgment proceeding to determine the extent, if any, to which the Property Clause empowers Congress to protect animals on private lands or the extent to which such regulation is attempted by the Act.").

[126] United States v. Brown, 552 F.2d 817, 822 (8th Cir. 1977) (citing City & Cty. of S.F., 310 U.S. 16, 28– 30 (1940)).

[127] *Brown*, 552 F.2d at 821– 22 (8th Cir. 1977) (holding that the Property Clause authorizes Congress "to regulate activities on non-federal public waters in order to protect wildlife and visitors on [federal] lands").

[128] United States v. Lindsey, 595 F.2d 5, 6 (9th Cir. 1979) (per curiam).

[129] *See* Minn. *ex rel.* Alexander v. Block, 660 F.2d 1240, 1249 (8th Cir. 1981).

[130] *See* North Dakota v. United States, 460 U.S. 300, 319 (1983) ("The United States is authorized to incorporate into easement agreements such rules and regulations as the Secretary of the Interior deems necessary for the protection of wildlife, 16 U. S. C. § 715e, and these rules and regulations may include restrictions on land outside the legal description of the easement." (citing *Kleppe v. New Mexico*, 426 U.S. 529, 546 (1976) and *Camfield v. United States*, 167 U.S. 518, 525-526 (1897)).

> clearly has the power to dedicate federal land for particular purposes. As a necessary incident of that power, Congress must have the ability to insure that these lands be protected against interference with their intended purposes.[131]

That reading of the Clause attributes appropriate precedential weight to both *Camfield* and *Kleppe*, while adding a layer of reasoning with respect to the Property Clause's reach that comports with common sense and the Founders' natural law perspectives on stewardship of common resources. It would be nonsensical if Congress were powerless to protect federal resources from depletion at the hands of any source not emanating from federal property itself.

Congress's seeming reluctance to rely on the Property Clause cannot be attributed to inconsistent signals from the Court[132] or to lack of opportunity. The latter half of the twentieth century and the early twenty-first century have forced society to confront some of the greatest environmental threats in human history—threats that unquestionably touched federal lands. Since before that time, and continuing through it, the Supreme Court's federal lands jurisprudence could be read to endorse three approaches: retention, nationalization, and conservation.[133] That trifecta translates to a green light for legislation that maintains or expands federal landholdings, while protecting them from environmental degradation.

This modern, more expansive interpretation of the Property Clause, while questioned by some scholars,[134] has held fast in the courts in recent decades as well. Indeed, in recent years even reticent federal courts have avoided finding any limitation within the constitutional doctrine itself, assuming sweeping Property Clause authority and instead relying on principles of statutory interpretation to read the particular statutes at issue to confine federal agency action.[135] Affirmative

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[131] United States v. Armstrong, 186 F.3d 1055, 1062 (8th Cir. 1999) (quoting Minn. *ex rel.* Alexander v. Block, 660 F.2d 1240, 1249 (8th Cir. 1981)).

[132] There does exist some limited authority that scholars and commentators could draw on to suggest that *Camfield* was a unique, non-precedential situation and that *Kleppe* was perhaps wrongly decided, or at least wrongly interpreted in subsequent years. In particular, the Court considered the application of the very same statute from *Camfield* to an agricultural corporation's refusal to permit a public road through its property. In *Leo Sheep Co. v. United States*, the Supreme Court characterized *Camfield* as "analyz[ing] the fence [on private land that practically enclosed federal land] from the perspective of nuisance law, and conclude[ing] that the Unlawful Inclosures Act was an appropriate exercise of the police power." 440 U.S. 668, 685 (1979). The *Leo Sheep* Court went on to explain in dicta that *Camfield* "affirmed the grantee's right to fence completely his own land." *Id.*

[133] Leshy, *A Property Clause, supra* note 5, at 1101.

[134] *See, e.g.*, Schmitt, *supra* note 6; Allison H. Eid, *The Property Clause and New Federalism*, 75 U. COLO. L. REV. 1241 (2004).

[135] *See, e.g.,* Utah Native Plant Soc'y v. U.S. Forest Serv., 923 F.3d 860, 867 (10th Cir. 2019) ("Assuming the Property Clause reaches thus far, Congress, with the aim of preserving federal lands, might rely on it to enact legislation altering the State of Utah's authority to manage wildlife on its own lands. . . . While Congress might enact legislation respecting

statements of the Property Clause's broad reach have also been a hallmark of some recent decisions. The Ninth Circuit described as regulable activity "that has implications for [federal] land even if commenced on property adjacent to [it]."[136] In a case upholding the priority given to rural Alaskans for subsistence hunting permits, the court specifically identified the goals of congressional policy as conservation of limited natural resources and protection of wildlife-dependent rural inhabitants.[137] Taken together, these cases suggest that Congress can act under the Property Clause to protect natural resources, as well as human and environmental health more broadly, and can target harmful activities on private land with that action.

V. LIMITING THE LIMITLESS

Given the interconnected nature of the planetary ecosystem, the increasing industrialization and globalization of human society, and the ability of modern science to detect even the slightest of environmental impacts, the scope of the Property Clause power under current doctrine could truly be unlimited.[138] Some, no doubt, do not fear such a state of affairs; indeed, many environmentalists would celebrate constitutional law's harmonization with the true practical reach of human development on the natural world. Surprisingly, you could also count the 1940 Supreme Court among the unconcerned. That year, the Court presciently spoke of the possibility of an unconstrained authority related to federal lands and did not express concern about its self-professed inability to constrain Congress's legislative authority in this area. The 1940 Court in *United States v. City and County of San Francisco* wrote that Congress, not the courts, had the responsibility of determining the limits of its own authority, presumably by exercising a similar restraint to that of the Court when tasked with defining judicial review.[139]

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national forests, the 'clear and manifest purpose' of which is to preempt Utah's traditional trustee and police powers as a sovereign to manage wildlife within its borders, it has not done so."); Herr v. U.S. Forest Serv., 865 F.3d 351, 358 (6th Cir. 2017) ("The Forest Service tells us that it can regulate littoral and riparian rights under the Property Clause to the same extent that state regulators can regulate them. Maybe; maybe not. But we need not decide."); Virginia v. Reno, 955 F. Supp. 571, 580 (E.D. Va. 1997) (finding that the Enclave Clause of Article I does not limit Congress's authority under the Property Clause of Article IV).

[136] United States v. Parker, 761 F.3d 986, 990 (9th Cir. 2014).

[137] Alaska Const. Legal Def. Conservation Fund, Inc. v. Kempthorne, 198 F. App'x 601, 603 (9th Cir. 2006).

[138] *See* Schmitt, *supra* note 6, at 190 ("Because natural ecosystems are highly interconnected, virtually any land use or activity that causes pollution could substantially affect federal land."). This is not to suggest that no extrinsic limits to the clause would exist regardless of how its text is interpreted. *See* Appel, *supra* note 7, at 103 ("The exercise of the Property Clause power would not excuse Congress from otherwise applicable requirements, such as the provisions of the Bill of Rights.").

[139] *See* United States v. City & Cty. of S.F., 310 U.S. 16, 29–30 (1940) ("The power over the public land thus entrusted to Congress is without limitations. And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.").

A great many others (including the majority of legal scholars and policymakers), however, would resist a Property Clause doctrine that in effect vested Congress with unconstrained federal police power.[140] The Framers famously and quite clearly opposed such a system of government.[141] Thus, a thin thread of scholarship has developed in an attempt to decipher some limitation on the Property Clause power from history, text, and jurisprudence. To date, these efforts have failed to produce an acceptable theory that simultaneously respects: the stewardship ethos ingrained within the Clause,[142] the existing doctrine from *Camfield* to *Kleppe*, the harsh reality of human impacts on the environment, and the practical workings of Congress and the courts. After an explanation of why some prominent proposed limitations fail to adhere to these goals, this piece will offer a simple, elegant solution for those concerned about leaving the Property Clause power open-ended.

The text of the Property Clause itself provides four potential hooks on which to hang a limiting principle. Again, the relevant part of the Clause reads: "[t]he Congress shall have Power to . . . make all *needful Rules and Regulations respecting* the Territory or other *Property belonging to the United States*."[143] The italicized words are the aforementioned hooks. As Peter Appel explained, these words describe the necessary attributes of an exercise of Property Clause authority: "First, the enactment must be a rule or regulation. Second, the rule or regulation must involve property belonging to the United States. Third, the rule or regulation must be needful. Fourth, and finally . . . the rule or regulation must be one 'respecting' federal property."[144]

Assuming that Congress understands how to write a legislative rule or regulation and knows the extent of the relevant federal property, the best textual candidates for limiting principles are the words "needful" and "respecting." "Needful" could be interpreted to impose some substantive limitation, while "respecting" could be interpreted as the source of some geographic limitation. Together, they are best understood as indicating that there must be a nexus between the rule or regulation, the federal property, and the purpose of that property.[145] The

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[140] *See* Schmitt, *supra* note 6, at 190 ("A sufficiently broad interpretation of the Property Clause, however, would essentially create an unlimited federal police power.").

[141] *See, e.g.*, THE FEDERALIST NO. 45 (James Madison) ("The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will for the most part be connected. The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.").

[142] *See supra* Part II.

[143] U.S. CONST. art. IV, § 3, cl. 2 (emphasis added).

[144] Appel, *supra* note 7, at 79–80 (citing U.S. CONST. art. IV, § 3, cl. 2).

[145] *See id.* at 83 ("The most serious limitation intrinsic to the Property Clause questions whether the act qualifies as a rule or regulation 'respecting' the property of the United States.

difficult question—the one the proposed limiting principles purport to answer—asks what precise type and degree of nexus is constitutionally sufficient.

At the furthest end of the spectrum towards a very limited scope of Property Clause authority lies the infamous *Dred Scott* opinion.[146] Along the way to the universally denounced majority holding in the case, Justice Taney asserted a likewise wrongheaded and extraordinarily narrow interpretation of the Property Clause. In his view, the Clause "applied only to the property which the States held in common at [the Founding], and ha[d] no reference whatever to any territory or other property which the new sovereignty might afterwards itself acquire."[147] Modern scholars have largely rejected this interpretation,[148] and not just due to the unsavory opinion from which it derives. Those who urge a narrow interpretation see no rationale for excluding federal property acquired after the Founding from Congress's reach, choosing to focus on the substantive, rather than geographic, scope of authority. The most popular limitation in this vein argues that Congress has no more power over federal property than an ordinary private landowner.[149] Thus, at least when acting solely pursuant to the Property Clause, Congress would be limited by state law in what it could permit or prohibit.[150] This theory, while simple to apply, fails on the other relevant dimensions. It contradicts years of Supreme Court precedent concerning not only the Property Clause but the application of other state and local law to the federal government as landowner more generally.[151] Much of the Property Clause jurisprudence discussed herein involved the Court giving

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This requirement means that the federal government must demonstrate a nexus between the rule or regulation and the federal property being protected.").

[146] *See generally* Dred Scott v. Stanford, 60 U.S. 393 (1857).

[147] *Id*. at 436.

[148] *See* Schmitt, *supra* note 6, at 179 ("Like most modern scholars, this Article does not endorse *Dred Scott*'s narrow interpretation of the scope of the land governed by the Property Clause.").

[149] *See*, *e.g., id.* at 148 ("In sum, this Article will argue that, while Congress should have a police power over the federal territories, it should have no more regulatory authority over federal land within a state by virtue of the Property Clause than a private landowner. Under this approach, Congress could continue to limit activities on federal lands, just as any landowner can exclude trespassers. When acting solely under the Property Clause, however, Congress would not have the ability to preempt otherwise valid state regulations."); *see also* Louis Touton, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 COLUM. L. REV. 817, 821 (1980) ("It has long been established that, at a *minimum*, the property clause gives the federal government the same powers over federally owned land as a private landowner has over his private land." (emphasis added) (citing *Alabama v. Texas*, 347 U.S. 272, 273 (1954); *United States v. Midwest Oil Co.*, 236 U.S. 459, 474–75 (1915))).

[150] *See* Schmitt, *supra* note 6, at 148 (advocating this limit and nevertheless acknowledging that Congress could, of course, pass legislation pursuant to other enumerated powers that superseded otherwise applicable state law).

[151] *See, e.g.*, Van Brocklin v. Tennessee, 117 U.S. 151 (1886) (holding that property of the United States government is exempt from taxation under the authority of a state); *Wisconsin Cent. R.R. Co. v. Price Cnty.*, 133 U.S. 496 (1890) (reaffirming holding in *Van Brocklin*).

constitutional sanction to legislative restrictions that a private landowner could never impose.[152] Furthermore, limiting the Property Clause to essentially a truism—the government as lawful property owner can exercise its property rights—strips the conferred power of any underlying philosophical connection to the concept of stewardship of common resources. As environmental science makes clear, the ability to preserve and protect natural resources requires more than ordinary property rights over them. Myriad actions and forces beyond the borders of federal lands have the capacity to degrade and destroy them. *Camfield* and *Kleppe* properly recognized that reality. To narrow the Property Clause authority, especially as the Commerce Clause potentially grows out of fashion,[153] would perilously defang the legislature in its ability to protect our natural resources from the catastrophic effects of climate change. When proposing to reinterpret the Constitution to limit Congress's authority, such practical consequences are relevant to the analysis,[154] and in this case, counsel strongly against an overly restrictive limiting principle based on notions of private property rights.

Another prominent line of limiting theory similarly draws on traditional notions of property law, while also acknowledging that the federal government's reach extends beyond the borders of its landholdings. A nuisance-based limiting principle, alternatively articulated by Joseph Sax[155] and Eugene Gaetke,[156] would allow Congress to engage in extraterritorial regulation pursuant to the Property Clause if that regulation met a balancing test. Drawing on the common law of nuisance is attractive because it speaks to the ability to control, or at least seek compensation for, activities that interfere with the use and enjoyment of property but do not occur within the metes and bounds of the property itself. Nuisance is in many ways the

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[152] *See supra* Parts IV and V; *see also* Touton, *supra* note 149, at 821 ("[T]he property clause itself accords the federal government certain rights unavailable to private landowners. Thus, Congress has power to dispose of its property irrespective of state-created restrictions, and it may extract revenue by leasing or selling its land, or by selling products of the land. . . . [T]he courts have upheld federal laws designed to protect federal lands by prohibiting fires on neighboring property, securing access to federal lands, or exterminating state-protected deer to prevent overbrowsing." (citing *Gibson v. Chouteau*, 80 U.S. 92, 99 (1872); *United States v. Gratiot*, 39 U.S. 526, 537–38 (1840); *Pollard v. Hagan,* 44 U.S. 212, 224 (1845); *Ashwander v. Tennessee Valley Auth*., 297 U.S. 288, 330–40 (1936); *United States v. Alford*, 274 U.S. 264, 267 (1927); *Camfield v. United States*, 167 U.S. 518, 524–26 (1897); *Hunt v. United States*, 278 U.S. 96, 100 (1928)).

[153] *See* Schmitt, *supra* note 6, at 150 ("[T]he importance of the Property Clause will grow if, and when, the Court narrows the reach of the federal commerce power.").

[154] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 601 (2012) (Ginsburg, J., concurring) ("Consistent with the Framers' intent, we have repeatedly emphasized that Congress's authority under the Commerce Clause is dependent upon 'practical' considerations, including 'actual experience.'" (citing *NLRB v. Jones & Laughlin SteelCorp.,* 301 U. S. 1, 41–42)); *see Wickard v. Filburn*, 317 U. S. 111, 122 (1942); *United States v. Lopez*, 514 U. S. 549, 573 (1995) (Kennedy, J., concurring).

[155] *See* Sax, *supra* note 4, at 250–55.

[156] *See* Eugene R. Gaetke, *Congressional Discretion Under the Property Clause*, 33 HASTINGS L.J. 381, 395–402 (1981).

common law predecessor of modern environmental law, providing a framework for determining when specific noxious uses so harmed specific environments that they warranted injunctive relief. If one conceives of federal property as a conglomeration of specifically endangered parcels, this analogy works quite well and allows courts to draw on a wealth of common law precedent.[157] Eugene Gaetke proposed a Property Clause formulation of the nuisance analysis thusly:

> [T]he value of the challenged regulation to the public lands should be compared to the degree of imposition on the owners of nonfederal property. Should the balance indicate that the regulation interferes with the ownership of nonfederal property more than is warranted by Congress's stated policy, a court justifiably could conclude that it is not a 'needful' regulation 'respecting the federal lands.'[158]

The limiting principle derived from nuisance law would thus amount to a cost-benefit analysis, rendering unconstitutional any Property Clause-based restriction that imposed a cost on a private landowner greater than the benefit provided to federal property.

At first blush, the nuisance approach seems elegantly conceived and arguably consistent with the text of the Property Clause. However, when one considers the different nature of federal property from personal property, the flaws in relying on nuisance law to interpret the Constitution are exposed. Federal property is a diffuse, diverse, and collectively massive common resource; many different activities threaten it in many different ways. Indeed, individual private landowners impose cumulative negative environmental effects on federal property almost continuously across time and space. It would thus be very difficult in practice to apply Gaetke's proposed balancing test to individual acts of Congress in isolation, let alone the working of those acts to individual private tracts. Courts would be forced to make decisions about when and what could be considered together (i.e., aggregated); in a best-case scenario, a doctrine would develop around such determinations. At worst, they would be made on an ad-hoc basis. Either way, nuisance law, necessarily concerned with individual property owners and specific parcels, would provide little

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[157] *See* Sax, *supra* note 4, at 254 n.77 (1976) ("Another self-limiting rationale for the use of the property clause to regulate peripheral private uses could be drawn from an analogy to the Court's evolution of a federal common law of nuisance in cases involving interstate pollution." (citing *Illinois v. Milwaukee*, 406 U.S. 91 (1972); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907))).

[158] Gaetke, *supra* note 156, at 398.

guidance. Furthermore, stewardship of common resources and prevention of environmental harm operate on multi-generational timescales,[159] implicating questions about discounting in the context of the type of cost-benefit analysis commonly employed in nuisance situations.[160]

A more jurisprudentially practical approach to deciphering a Property Clause limiting principle looks not to other sources of property law but to the interpretation of other clauses of the Constitution. Peter Appel championed this approach as derived from Akhil Amar's intratextual theory[161] of constitutional interpretation.[162] Appel's interpretive insight was to not just draw on similar words and phrases in other constitutional clauses, but similar purposes and functions.[163] Using this technique, the Commerce Clause emerges as the most salient analogous constitutional provision—it confers upon Congress authority to "regulate" in a broadly conceived topical area. Not only that, but abuse, or even merely expansion, of Commerce and Property Clause authority implicate similar concerns.[164] Modern Commerce Clause doctrine limits the reach of Congress's authority to regulating only "those activities that substantially affect interstate commerce."[165] Appel has proposed a nearly identical Property Clause limit, based on the word "respecting"—Congress can regulate only those activities substantially affecting federal lands.[166] That interpretation fits the text well and has the advantage of a wealth of analogous constitutional precedent to draw on. Perhaps the most contentious strain of that Commerce Clause precedent concerns what types of activities can be aggregated to determine whether their effect is substantial. In *Lopez* and *Morrison*, the Court made clear that only the effects of "economic" activities can be aggregated to justify congressional regulation under the Commerce Clause. Where Appel's theory of the

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[159] *See* PURDY, *supra* note 120, at 139 (2010) (describing how the longer time horizon of climate change makes cost-benefit analysis politically useless, noting that "within any political cycle, it is highly likely that the costs of a serious mitigation effort will outweigh its benefits").

[160] *See* DOUGLAS A. KYSAR, REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY (2010).

[161] *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999) (describing "intratextualism" as the interpretive technique wherein "the interpreter tries to read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase").

[162] *See* Appel, *supra* note 7, at 91 n.412 ("The approach I suggest is similar but not identical to Amar's theory of intratextualism. Amar argued that in interpreting one word or phrase in the Constitution, courts should look at similar terms and words in the text and how they have been interpreted.").

[163] *See id.* ("My approach to the Property Clause, by contrast, looks at possibly analogous clauses that may provide guidance in finding the reach of the Property Clause.").

[164] *See id.* ("The clause that best suggests itself for this purpose is the Commerce Clause, because it implicates many of the same concerns as extra-territorial uses of the Property Clause.").

[165] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 536 (2012) (quoting *United States v. Morrison*, 529 U.S. 598, 609 (2000)).

[166] *See* Appel, *supra* note 7, at 83, 101.

Property Clause falls short—just before the finish line—is in deriving an appropriate analogous limitation on activities that affect federal property.[167]

Picking up the intratextualist spade in pursuit of a limiting principle, one simply need look afresh at the Commerce Clause aggregation parameters in *Lopez* and *Morrison*. The Court there focused on "economic" activities, a characterization that closely tracked the constitutional text's reference to "commerce."[168] Importantly, when determining whether to aggregate effects, the word "interstate" drops away—each individual activity need not be interstate, but need be economic. Similarly, the text of the Property Clause includes language describing the type of activity that is theoretically relevant for aggregation—the words "territory" and "other property." A relatively conservative intertextual approach suggests that these words at least encompass all activity concerning "land." In other words, economic is to commerce, as land is to territory or property. An intertextual approach that attributes distinct meaning to both territory and property would counsel for an aggregation principle that accounts for all activity concerning land *and* tangible personal property. This limit would be used to determine the reach of Congress's authority to regulate activity on private property under the Property Clause.[169] Thus understood, aggregation of activities on private property would be permissible to demonstrate a substantial effect on federal property if those activities were land-concerning activities, i.e., activities controlled by land use regulation, including zoning; or activities involving the use of tangible personal property, i.e., operation of machinery. So, for example, operation of an industrial facility could be aggregated, but purchasing a stock or banking online could not. It is certainly true that a great many activities fall into this category, and thus the Property Clause provides the equivalent of police powers over wide swaths of our lives. That reading is entirely consistent with the stewardship purpose of the Property Clause and the reality of environmental harms in the modern age.

How the law defines "the Territory or other Property belonging to the United States" will also play a role in determining the scope of the Property Clause authority—it determines where one looks for a significant effect. Under a broad conception, rooted in natural law principles, all common resources could

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[167] *Compare* Appel, *supra* note 7, at 96 ("Simply asserting that the aggregation principle should apply to extraterritorial regulations enacted under the Property Clause does not clearly identify which activities Congress can aggregate to show a substantial effect on federal lands."), *with id.* at 101 ("Under the Commerce Clause, courts limit intrastate federal regulation to those activities of an economic nature. Analogously, under the Property Clause, courts should permit federal regulation of extraterritorial activities only when substantially related to federal property.").

[168] *See Morrison*, 529 U.S at 610 (2000) (describing the law invalidated in *Lopez* as "ha[ving] nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms.") (quoting United States v. Lopez*,* 514 U.S. 549, 561 (1995)).

[169] The Property Clause authority need not rely on aggregation and is unquestionably a police power when Congress is regulating entirely within the boundaries of federal land. *See* Frank & Eckhard, *supra* note 6, at 673–74.

theoretically be included. Thus, individual activities conducted with personal or real property would be subject to regulation if, when considered together, they had a significant effect on air, water, or other natural resources. That view would undoubtedly leave room for myriad environmental laws rooted in the Property Clause. A narrower conception, including only what the federal government had legal title to within the category of concern, would still permit a great deal of environmental Property Clause legislation. Most importantly, as outlined below, a requirement of significant effect on even just federal landholdings would provide the authority for important climate change legislation.

A Property Clause limiting principle that mirrors Commerce Clause doctrine makes sense from a judicial administration and resource preservation standpoint. With respect to judicial administration, despite some misgivings of the *Lopez* and *Morrison* dissenters,[170] the Commerce Clause distinction between economic and noneconomic activities has been applied faithfully and consistently by the federal courts. The distinction between those activities that touch and concern the land (or personal property), and those that do not, is a much less amorphous and much more well-established distinction.[171] One would expect the Courts, and Congress, to understand and apply it quite well. From an environmental and conservation standpoint, there would be few polluting activities that would fall outside the reach of the properly understood Property Clause authority. As outlined in the following section, Congress can, and should, cite the Clause as constitutional authority for regulating emissions of greenhouse gases.

VI. CONSTITUTIONAL AUTHORITY FOR CLIMATE CHANGE LEGISLATION

Putting together the fundamental acknowledgment of some stewardship obligation running with the Property Clause at its inception with the modern conception of a power dubbed unlimited by the twentieth-century Supreme Court, there exists the requisite authority to legislatively address the climate crisis. Even constrained by the limitation proposed in the previous part, the power vested in Congress by the Clause includes wide latitude to address both the causes (e.g., emissions from stationary sources) and the harms (e.g., sea-level rise) of climate change. Despite the existing permissive doctrine and previous discussion of the Property Clause as an alternate basis for environmental legislation, there has, prior to this work, been no serious Property Clause climate policy proposal and analysis thereof.

The most prominent Property Clause scholarship to date, however, did quite thoroughly analyze the authority to regulate conventional air pollution pursuant to the Clause. Peter Appel convincingly laid out the sound constitutional basis for a hypothetical "National Parks Clean Air Act," which would directly regulate sources

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[170] *See, e.g., Morrison*, 529 U.S. at 656 (Breyer, J., dissenting) ("Consider the problems. The 'economic/noneconomic' distinction is not easy to apply.").

[171] U.S. v. Alford, 274 U.S. 264, 267 (rejecting the argument that the word "near" was too indefinite a limitation on the reach of a statute regulating activity on private property).

of sulfur and nitrous oxides.[172] His imagined act would regulate activities far from federal land, relying on the conclusion that they, "in the aggregate, harm federal lands in a demonstrable way."[173] He correctly characterized such legislation as posing two difficult questions for Property Clause doctrine; first, "whether Congress could regulate stationary sources of air pollution located several states away if it could reasonably conclude that these sources damaged federal property"; and second, "whether Congress could directly regulate all sources of sulfur dioxide or nitric oxides across the country because they collectively contribute to a problem that affects federal property."[174] Applying the Commerce Clause analogy discussed in the prior section, Appel argued that the doctrine answered both questions in the affirmative.[175] Adding the aggregation analysis proposed herein would not materially change that outcome. Assuming the vast majority of sources of air pollution involve activities that inherently concern land, their effects could be aggregated to demonstrate a substantial negative effect on air quality in National Parks, thereby constitutionally justifying air pollution regulation pursuant to the Property Clause. This logic quite comfortably extends to controlling greenhouse gas emissions.

Even if we constrain the permissible purpose of Property Clause-based legislation to the protection of legally recognized property interests held by the federal government, the authority for comprehensive climate legislation exists. In *Massachusetts v. EPA*, the Supreme Court accepted that the impacts of climate change affect the value of government landholdings (in that case state government) negatively.[176] And in *Kleppe*, the Court reaffirmed the principle that the Property Clause authority sweeps broadly enough to permit regulation on private land for the purpose of protecting public land.[177] Thus, combining those holdings, permissible Property Clause regulation would include the curtailment of greenhouse gas emissions from private land for the purpose of protecting federal landholdings by way of climate mitigation.

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[172] *See* Appel, *supra* note 7, at 84, 97 (describing the National Park Clean Air Act's reach as "exceed[ing] the level of regulation that the common law of nuisance would produce" and "extend[ing] to all sources of these air pollutants from large factories to automobiles and trucks").

[173] *Id.* at 84.

[174] *See* Appel, *supra* note 7, at 97.

[175] *Id.*

[176] Massachusetts v. EPA, 549 U.S. 497, 522 (2007) ("Because the Commonwealth 'owns a substantial portion of the state's coastal property,' it has alleged a particularized injury in its capacity as a landowner." (citations omitted)); *see also* Rhode Island v. Shell Oil Prods. Co., 979 F.3d 50, 53 (1st Cir. 2020) ("Rhode Island is salty about losing its already limited square footage to rising sea levels caused by climate change."), *vacated*, 210 L. Ed. 2d 830 (2021).

[177] *Kleppe*, 426 U.S. at 538 ("[T]he Property Clause is broad enough to permit federal regulation of fences built on private land adjoining public land when the regulation is for the protection of the federal property . . . the power granted by the Property Clause is broad enough to reach beyond territorial limits.") (citing *Camfield*, 167 U. S. at 518).

The federal government currently owns approximately 640 million acres, comprising 28% of the 2.27 billion acres of the United States' total land area.[178] Of those total landholdings, almost 80 million acres fall under the purview of the National Park Service.[179] A federal research group found in 2008 that "[c]limate change is redefining [national] parks and will continue to do so."[180] The report went on to identify habitat loss as an effect of climate change that demanded attention.[181] If the Property Clause permits Congress to protect living resources themselves for their own sake (in addition to the terrestrial ecosystem they inhabit),[182] ample scientific research demonstrates the negative effects of climate change on myriad species.[183]

The Park Service has also since put forward strategies to deal specifically with the impacts of sea-level rise on management areas, which include, among other things, "accelerated coastal erosion [and] landward migration of shorelines."[184] A study of country vulnerability to sea-level rise ranked the United States among the ten nations most exposed, based on land area within the floodplain of predicted scenarios.[185] According to that model's accounting, more than 20,000 square kilometers will be newly susceptible to flooding by 2100.[186] A complete accounting of precisely how much of that coastal property belongs to the federal government is beyond the scope of this work. Nonetheless, maps constructed with GIS data from the National Atlas reveal significant coastal property in Florida, California, Oregon, Washington, and Alaska under BLM and NPS management.[187] A finer toothed comb of GIS data would surely reveal many smaller parcels as well. The fact that climate

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[178] CONG. RSCH. SERV., *supra* note 62, at 2; *see also* Appel, *supra* note 7, at 1 ("The United States owns land in every state, approximately thirty percent of all of the land in the United States, and approximately eighty percent of the land in the state of Nevada.").

[179] *See id*.

[180] JILL S. BARON, CRAIG D. ALLEN, JESSICA FLESIHMAN, LANCE GUNDERSON, DON MCKENZIE, LAURA MEYERSON, JILL OROPEZA & NATE STEPHESON, U.S. CLIMATE CHANGE SCI. PROGRAM, PRELIMINARY REVIEW OF ADAPTATION OPTIONS FOR CLIMATE-SENSITIVE ECOSYSTEMS AND RESOURCES 4-3 (Susan Herrod Julius & Jordan M. West eds., 2008) (emphasis omitted).

[181] *Id.* at 5–19.

[182] *See Kleppe*, 426 U.S. at 537 ("[I]t is far from clear that . . . Congress cannot assert a property interest in the regulated [animals] superior to that of the State.").

[183] *See, e.g.,* WILDLIFE RESPONSES TO CLIMATE CHANGE: NORTH AMERICAN CASE STUDIES (Stephen H. Schneider & Terry L. Root eds., 2002); Catherine E. Burns, Kevin M. Johnston & Oswald T. Schmitz, *Global Climate Change and Mammalian Species Diversity in U.S. National Parks*, 100 PROC. NAT'L ACAD. SCIS. 20 (2003).

[184] NATIONAL PARK SERVICE, COASTAL ADAPTATION STRATEGIES HANDBOOK 3 (Rebecca Beavers, Amanda Babson & Courtney Schupp, eds., 2016).

[185] *See* S. Brown, R.J. Nicholls, P. Goodwin, I.D. Haigh, D. Lincke, A.T. Vafeidis & J. Hinkel, *Quantifying Land and People Exposed to Sea-Level Rise with No Mitigation and 1.5°C and 2.0°C Rise in Global Temperatures to Year 2300,* EARTH'S FUTURE 583, 593 (2018).

[186] *See id.* at 594.

[187] *See* CONG. RSCH. SERV., *supra* note 62, at 12–14.

change will escalate the loss of some measurable portion of this property is undeniable. Accordingly, Congress can, and should, use its Property Clause authority to protect these federal lands.

But could such a climate bill have the reach necessary to be effective? In other words, could it target the sources of greenhouse gas emissions, as well as buffer the effects of climate change on common resources? President Biden seems to think such an effort would at least have symbolic value; his recent flurry of executive orders on the climate crisis made specific reference to the federal government using property management authority to "combat the climate crisis by example. . . ."[188] Symbolism and leadership aside, certainly, if one interprets the reach of Property Clause authority as limited only by the question of what property-related activity causes substantial effects on federal property,[189] *all sources of emissions* would be the fair subject of such legislation. A bill targeting greenhouse gases would not materially differ from Peter Appel's hypothetical National Parks Clean Air Act, which he convincingly greenlighted using that framework.[190] The more difficult question is: could a bill limited by the aggregation principle offered above control a significant amount of greenhouse gas emissions? The most recent data suggests that it could. According to the EPA's inventory of greenhouse gas emissions over the past two decades, activities related to energy account for more than 80% of total greenhouse gas emissions in the United States.[191] The vast majority of energy-related emissions come from the combustion of fossil fuels. Indeed, "the direct combustion of fuels by stationary sources in the electric power, industrial, commercial, and residential sectors represent the greatest share of U.S. greenhouse gas emissions."[192] Those activities are by definition related to the use of land, and their effects on the climate would thus be subject to aggregation under any reading of the limiting principle suggested in the prior part. In other words, needful regulation pursuant to the Property Clause could lawfully control these sources for the purposes of protecting federal resources. Unsurprisingly, transportation emissions make up the next largest share. Most of those sources would be controllable as well, albeit through more creative means, such as regulations pertaining to manufacturing and the use of the federal highway system.

None of the climate change bills put forward in Congress or regulations proposed by EPA have proffered the Property Clause as their primary source of constitutional authority. The earliest proposed serious climate change laws—the Climate Stewardship Acts (also called the "McCain-Lieberman Bills") of the early 2000s and the American Clean Energy and Security Act of 2009 (also called the "Waxman-Markey Bill")—were quite explicitly designed as economic regulation.

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[188] Exec. Order No. 14008, 86 Fed. Reg. 7619, 7623 (Jan. 27, 2021).

[189] *See, e.g.*, Appel, *supra* note 7, at 97–98.

[190] *See id.* at 80–81.

[191] *See* EPA, INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS: 1990–2018, at 3-1 (2020).

[192] *Id.* at 3–14.

Because these bills came about prior to 2011,[193] no statement of constitutional authority accompanied their debate on the floor of the House or the Senate. However, all indications point to no serious consideration of the Property Clause, or the conservation of common resources, as the constitutional foundation of the proposed climate law. The popular and scholarly analysis of these bills, and the cap-and-trade policy they embodied, focused on their economic impacts.[194]

Following years of failure in the legislative branch to pass comprehensive climate legislation, the executive branch now appears to be the main driver behind climate policy.[195] The EPA set out to use existing delegated authority under the Clean Air Act to regulate carbon pollution through a series of prominent rules. Perhaps the most ambitious of these rules—the so-called "Clean Power Plan"—sought to limit carbon emissions from existing stationary sources in the electric utility sector.[196] In promulgating the rule, the EPA addressed its constitutionality and any challenges thereto. That discussion included no mention of the affirmative constitutional authority for a Clean Air Act rule addressing climate change; it instead focused on swatting away negative Tenth Amendment commandeering arguments.[197] Scott Pruitt, serving then as the Attorney General of Oklahoma, voiced the constitutional objections to a committee of the House of Representatives, claiming that the rule did not "provide States with the meaningful opportunity to

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[193] *See* U.S. HOUSE OF REPRESENTATIVES, *supra* note 17 (In 2011, the House of Representatives passed Rule XII, clause 7(c), requiring so-called "Constitutional Authority Statements" accompany proposed legislation.).

[194] *See, e.g.,* Ann E. Carlson, *Federalism, Preemption, and Greenhouse Gas Emissions*, 37 U.C. DAVIS L. REV. 281, 311 (2003). ("The global warming problem is fraught with uncertainty concerning the degree of its severity and the amount of economic sacrifice needed today to stave off future disaster."); Myron Ebell, *Trojan Hearse*, N. Y. POST (June 25, 2009, 6:29 AM) https://nypost.com/2009/06/25/trojan-hearse/ [https://perma.cc/3AWR-898Q] ("[T]he Waxman-Markey bill (as it's commonly called, after its two chief sponsors) would be the largest tax increase in world history, as well as transfer vast wealth from consumers to big-business special interests.").

[195] Robert Brinkmann & Sandra Jo Garren, *Synthesis of Climate Change Policy in Judicial, Executive, and Legislative Branches of U.S. Government*, SCH. OF GEOSCI. FAC. AND STAFF PUBL'NS 971 (2011) (noting that suits against GHG emitters in courts, executive orders by U.S. presidents, and agency actions on climate change have increased as little legislation targeting climate change has passed Congress).

[196] *See* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

[197] *See id.* at 64881–82 ("Some commenters have raised concerns that the emission guidelines and requirements for 111(d) state plans violate principles of federalism embodied in the U.S. Constitution, particularly the Tenth Amendment. These commenters claim that states will be unconstitutionally 'coerced' or 'commandeered' into taking certain actions in order to avoid the prospect of either a federal 111(d) plan applying to sources in the state, or of losing federal funds. We disagree on both fronts.").

decline implementation."[198] One of President Trump's early executive orders similarly suggested that the Clean Power Plan violated constitutionally enshrined principles of federalism.[199] Notably absent from these constitutional arguments against greenhouse gas emissions regulation is any question as to Congress's affirmative source of authority to address air pollution. This absence suggests an implicit acceptance of earlier proffered[200] Commerce Clause justifications for the Clean Air Act.

The recently revived legislative efforts to address climate change represent the most ambitious attempt yet in terms of its reach and scope. These newly proposed bills are accompanied by statements of constitutional authority. Unsurprisingly, none cite Article IV, Section 3, instead preferring to make explicit the reliance on the Commerce Clause of Article I. The constitutional authority statements for both the Climate Stewardship Act of 2019 and the Green New Deal state simply, "Congress has the power to enact this legislation pursuant to the following: Article I, Section 8."[201] The analysis herein suggests that these statements at best reflect an incomplete acknowledgment of the source of Congress's authority, and at worst, reflect an intentional and dangerous decision to legally bind climate policy to economic policy. The final part below describes why additional reliance on the Property Clause would carve a better, cleaner, stronger path forward for the federal government's efforts to combat the climate crisis.

VII. WHY THE SOURCE OF CONSTITUTIONAL AUTHORITY MATTERS

Any sound interpretation of current doctrine reveals that the Commerce Clause provides ample authority for Congress to legislatively address the climate crisis through a number of avenues—capping emissions, subsidizing clean energy, funding infrastructure and energy grid improvements. So, why concern ourselves with the question of whether the Property Clause would also justify such legislative action? Let me offer three reasons.

Firstly, and most importantly, the proffered constitutional basis for legislation says something about the underlying fundamental purpose of the law and affects consequential choices about statutory language. As Cass Sunstein powerfully argued almost three decades ago, law serves an expressive, in addition to behavior-policing,

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[198] *Impact of EPA's Clean Power Plan on States: Hearing Before the H. Subcomm. on Env't, H. Comm. on Sci., Space, and Tech.*, 114th Cong. 14–22 (2016) (Testimony of Hon. Scott Pruitt, AG of Oklahoma).

[199] *See* Exec. Order 13,783, *Promoting Energy Independence and Economic Growth*, 82 Fed. Reg. 16093, 16095 (Mar. 28, 2017) (directing federal agencies to review the existing Clean Power Plan, and "if appropriate . . . suspend, revise, or rescind . . . those rules.").

[200] *See supra* Part I.

[201] Climate Stewardship Act of 2019, H.R. 4269, 116th Cong. (2019); 165 Cong. Rec. H8720–21 (October 31, 2019); Green New Deal for Public Housing Act H.R. 5185, 116th Cong. (2019); 165 Cong. Rec. H9058 (November 19, 2019).

function.[202] Sunstein spotlights environmental law as a discipline where the social meaning of regulation is an important part of the policy debate.[203] One might understand important air and water pollution controls as both efforts to physically protect those natural resources and statements about society's collective attitude towards them. The preamble sections of some statutes testify to Congress's explicit recognition of this important expression.[204]

As detailed above,[205] for years, environmental statutes have been justified as regulation of commerce—in other words, economic policy. That link has been more than just a legal argument used to defend environmental law from constitutional attacks. The policy debate has been dominated by conversations about tradeoffs, quantification of costs and benefits, and, more recently, jobs in regulated industries. The dominance of the economic framing has in turn subordinated other perspectives at the core of environmentalism—ecology, ethics, and equity, to name a few. The language of environmental law largely reflects that subordination. Statutes explicitly mention "costs" and "economics,"[206] while forgoing philosophical or moral imperatives. At least one prominent reason for that drafting style is the stated

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[202] *See* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022, 2024 (1996) ("Many people support law because of the statements made by law, and disagreements about law are frequently debates over the expressive content of law.").

[203] *Id.* at 2024 ("In environmental protection, public debate is often focused on the perceived social meaning of law."); *see also id.* (offering the Endangered Species Act, emissions trading, and mandatory recycling as examples of environmental policies that serve important expressive functions); *see generally* Michael P. Vandenbergh, *The Social Meaning of Environmental Command and Control*, 20 VA. ENV'T. L. J. 191, 193 (2001) (identifying "two principle social meanings that appear to have been conveyed by the command and control system and explor[ing] the implications of the second social meaning for the future of environmental law.").

[204] *See, e.g.*, National Environmental Policy Act, 42 U.S.C. § 4331(a) ("The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.").

[205] *See supra* Part I.

[206] *See, e.g.*, Air Pollution Prevention and Control Act, 42 U.S.C. § 7479(3) ("The term 'best available control technology' means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this Act emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and *economic* impacts and *other costs*, determines is achievable for such facility through application of production processes and available methods, systems, and techniques . . . ." (emphasis added)).

constitutional basis in the Commerce Clause. The intractable environmental policy problem of climate change calls for a wider spectrum of perspectives from which to draw solutions.[207] At least in the United States, how a policy problem is framed within our Constitutional system of government constrains the range of options government will consider. Full consideration and debate of economic and noneconomic theories of environmental protection thus require acknowledging both the Commerce and Property Clauses as legitimate bases for regulation.

Furthermore, although the constitutional basis for a law is not necessarily the same as, or included within, a law's text, the recent requirement in the Rules of United States House of Representatives that a "Constitutional Authority Statement"[208] accompany every bill effectively ensures the choice serve an expressive function relevant to statutory interpretation. Reliance on the Property Clause, instead of, or, more likely, in addition to, the Commerce Clause, changes that expression. A body of climate change law that explicitly concerns itself with regulating not just economic activity but land use activity would root twenty-first-century environmental policy in foundational, pre-founding-era natural law principles of common resource allocation. So-rooted, new climate laws would appropriately focus on intergenerational equity and ecosystem resilience, in addition to, not necessarily in lieu of, carbon markets, jobs, and international trade.

Second, additional constitutional authority may be necessary to insulate future climate legislation from judicial review. Addressing climate change—both through mitigation and adaptation—will be a monumental lift that will touch nearly every facet of modern life and every part of society. Just look at the sweeping nature of the proposed "Green New Deal"; completing that policy agenda would require multiple statutes that reach beyond traditional environmental law. Any climate-related legislation that actually passes will inevitably face challenge in the federal courts. Reliance on more than just the permissive Commerce Clause jurisprudence would be a wise strategy in the face of such challenge. Indeed, a growing number of scholars have revisited the Commerce Clause justifications for comprehensive regulation of the environment, suggesting that even existing laws might not survive a modern Commerce Clause analysis.[209] That is particularly true given the

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[207] *See* PURDY, *supra* note 120, at 137–38 (2010) (Asserting that "[c]limate change might have been designed to confound the modern political economy" and describing how conventional approaches to environmental and economic policy will likely fail to mitigate it).

[208] *See* U.S. HOUSE OF REPRESENTATIVES, *supra* note 17, at 621 ("A bill or joint resolution may not be introduced unless the sponsor submits for printing in the Congressional Record a statement citing as specifically as practicable the power or powers granted to Congress in the Constitution to enact the bill or joint resolution. The statement shall appear in a portion of the Record designated for that purpose and be made publicly available in electronic form by the Clerk.").

[209] *See, e.g.*, James R. May, *Healthcare, Environmental Law, and the Supreme Court: An Analysis Under the Commerce, Necessary and Proper, and Tax and Spending Clauses*, 43 ENV'T. L. 233, 247 (2013); Christine A. Klein, *The Environmental Commerce Clause*, 27

documented unease of some Supreme Court justices with what they perceive as impermissible intrusion on free markets and personal liberty.[210] The current composition of the Court makes the work of these environmental scholars prescient and foreboding.

Offering the Property Clause as a constitutional basis for climate legislation, at least as an alternative justification,[211] would force the Court to consider the issue in the context of an entirely different jurisprudence. That doctrine has in modern times recognized the nearly unlimited power of Congress to protect federal lands and is rooted in a historical acknowledgment of the importance of preserving common resources for the collective good. Despite the originalist and textual arguments put forward in this work in favor of a broad interpretation of the Property Clause, it seems unlikely the current Court would use the Clause to sanction legislation it perceived as overly intrusive on economic liberty. Notwithstanding a happy surprise upholding a climate statute on a constitutional provision outside of the Commerce Clause,[212] adding a Property Clause justification to climate change legislation has value. It nonetheless would bolster the overall argument in favor of constitutionality and force the Court to confront the catastrophic realities of climate change for federal resources.

HARV. ENV'T. L. REV. 1, 66 (2003); John C. Eastman, *A Fistful of Denial: The Supreme Court Takes a Pass on Commerce Clause Challenges to Environmental Laws*, 2003 CATO SUP. CT. REV. 469, 469; *see also* Schmitt, *supra* note 6, at 194 ("Clean air, clean water, and even biodiversity all have a substantial effect on interstate commerce, at least in the aggregate. Since the Court limited the reach of the Commerce Clause to economic activity in *Lopez*, however, there has been considerable academic debate over whether these laws remain fully justified. Environmental legislation is often not commercial in nature and sometimes regulates activities that appear to be no more economic than the conduct at issue in *Lopez* or *Morrison*.").

[210] *See* Mark Joseph Stern, *A New Lochner Era*, SLATE, (June 29, 2018), https://slate.com/news-and-politics/2018/06/the-lochner-era-is-set-for-a-comeback-at-the-supreme-court.html [https://perma.cc/6JD8-S9NU] (discussing how *Lochner*-era thinking might return to the Supreme Court); *see* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012); Appel, *supra* note 7, at 2 ("Until recently, most scholars believed that Congress possessed almost unlimited power under the Commerce Clause, 10 making it unnecessary to explore other constitutional foundations for federal legislation.").

[211] The two clauses are not entirely at odds. On the contrary, property rights historically constituted some of the earliest value items of commerce. The theoretical connection between property rights and free markets is beyond the scope of this work. For one informed perspective on this foundational chicken-and-egg conundrum see PURDY, *supra* note 120, at 115–16 (2010) ("The difficulty is that conceptually and practically, markets do not come first: property comes first . . . .").

[212] *Cf.* National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012) (rejecting a Commerce Clause justification for the so-called "individual mandate" in the Affordable Care Act, but then upholding the provision as a proper exercise of Congress's taxing authority).

Third, an important thread of climate scholarship and litigation has argued that the public trust doctrine compels the government to address climate change.[213] Legislative reliance on the Property Clause, the constitutional expression of the public trust obligation, would tie the theories of climate action together. Notably, there has been some dispute in the aforementioned litigation over the existence of a federal public trust doctrine at all and, if one exists, where in the Constitution it derives from. The Supreme Court in *PPL Montana* suggested that the obligations imposed by the public trust doctrine are a matter of state law,[214] and some federal courts, most notably the D.C. Circuit, have interpreted that dicta as foreclosing any recognition of a federal public trust that encompasses the atmosphere.[215] Neither the Supreme Court nor the D.C. Circuit, however, considered the historical argument put forward above that the substantive content of the Property Clause constitutionally embedded the natural law principle of a public trust over common natural resources. Indeed, even the most successful public trust litigation to date has instead tied the public trust obligation to the Fifth and Ninth Amendments[216]—more attenuated connections. Congressional action explicitly drawing on Property Clause authority to protect public trust resources would serve as recognition by one co-equal branch that the Constitution entrusted the federal government to protect common resources. Thus, even a relatively mild piece of climate legislation, so rooted in the Property Clause, could provide support to those urging federal courts to compel the federal government to comprehensively address climate change as a matter of a constitutional public trust obligation.

CONCLUSION

History, text, and precedent reveal an as-yet underutilized source of constitutional authority for environmental protection. Set apart from the other legislative powers, Article IV, Section 3, Clause 2—the Property Clause—entrusts

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[213] *See, e.g.*, Juliana v. United States, 947 F.3d 1159, 1164–65 (9th Cir. 2020); *see also* OUR CHILDREN'S TRUST, https://www.ourchildrenstrust.org/ [https://perma.cc/E4MJ-DPT3] (last visited July 24, 2021); *see also* Gerald Torres, *Who Owns the Sky?*, 18 PACE ENV'T. L. REV. 227, 244–46 (2001) (explaining how the public trust doctrine applies to the atmosphere).

[214] PPL Mont., LLC v. Montana, 565 U.S. 576, 603 (2012) ("While equal-footing cases have noted that the States takes title to the navigable waters and their beds in trust for the public, the contours of that public trust do not depend upon the [United States] Constitution. Under accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine.").

[215] *See* Alec L. *ex rel.* Loorz v. McCarthy, 561 F. App'x 7, 8 (D.C. Cir. 2014) ("The Supreme Court in *PPL Montana*, however, repeatedly referred to 'the' public trust doctrine and directly and categorically rejected any federal constitutional foundation for that doctrine, without qualification or reservation." (citing *PPL Montana*, 132 S. Ct. at 1234–35)).

[216] *See Juliana*, 947 F.3d at 1165 ("[T]he [district] court held that the plaintiffs had stated a public trust claim grounded in the Fifth and the Ninth Amendments.").

Congress with the sacred task of protecting our collective resources with needful regulation. We stand confronted with "the most pressing environmental challenge of our time."[217] It would do a disservice to the principles of the Founders, and frankly to all of humanity, if we willingly neglected to utilize all of the tools at our disposal. That is especially true when the heretofore overlooked tool fits the task in purpose, scope, and theoretical design.

[217] Petition for Certiorari at 22, Massachusetts v. EPA, 549 U.S. 497, 505 (2007).