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The Constitution in Congress: The Public Lands, 1829–1861

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The War of 1812 ushered in an era of nationalism in the United States.¹ Led by three young advocates of broad federal authority in the House of Representatives, the “Great Triumvirate” of Henry Clay, Daniel Webster, and John C. Calhoun, the postwar Congress set out to employ the powers of the central government liberally to promote the national economy. It was Clay, the “Great Pacificator” from Kentucky and longtime Speaker of the House, who gave the program its name: the American System. It had three principal components: more protective tariffs, a new Bank of the United States, and federal support for “internal improvements”—a network of roads and canals supplemented by expenditures for the enhancement of natural waterways.² As we shall see, a fourth element came to play a crucial part in the nationalist plan: aggressive disposition of the vast storehouse of public land.

The immediate postwar period was a time essentially without political parties—which, as the reader will recall, some of our most influential Framers had never favored. The once mighty Federalists, badly beaten at the polls in 1800 and tarred with suspicions of disloyalty after the Hartford Convention in 1814, dwindled, starved, pined, and ul-

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¹ See generally George Dangerfield, *The Awakening of American Nationalism, 1815–1828* (Harper & Row 1965).

² See David P. Currie, *The Constitution in Congress: The Jeffersonians, 1801–1829* 250–89 (Chicago 2001).

timately died. James Monroe, who received all but one of the electoral votes in his 1820 reelection campaign, presided over a so-called "Era of Good Feelings" (marred chiefly by portentous sectional conflict over the admission of Missouri) in which virtually everyone professed to be a Jeffersonian Republican.³

The suppression of party labels, however, could not long conceal the existence of deep philosophical differences over the constitutional division of power between the states and the central government—especially as, particularly after Missouri, a certain breed of Southerner contrived to perceive a threat to slavery behind every exercise of federal authority. Virginia Representative John Randolph summed up this way of thinking in 1824: The government that could build highways could free the slaves.⁴

It was not long before political parties began to reemerge. Opponents of broad federal power initially flocked to Andrew Jackson, hero of the Battle of New Orleans. His election to the presidency in 1828 marked an epochal shift in federal-state relations. For the years between Jackson's inauguration in 1829 and the outbreak of civil war in 1861 would be dominated by his new Democratic Party, which claimed to speak for the Common Man. More realistically, perhaps, it spoke for free enterprise, for laissez faire, for states' rights, and increasingly, as witnessed by the eventual defection of a number of influential Northerners, for slavery.⁵

Opposition groups coalesced during the 1830s into the Whig Party, so called to highlight its antagonism to what its variegated adherents regarded as President Jackson's deplorable inclination to expand executive power. The dominant element of the Whig coalition revolved around such nationalistic leaders as Clay and Webster, who stood for a broad interpretation of federal powers to promote the economy. But there were other elements too, most notably the essentially states-rights Southern Whigs like John Tyler, who shared with his "consolidationist" fellows little more than a common antipathy to Andrew Jackson and his policies.⁶

³ See generally George Dangerfield, *The Era of Good Feelings* 95–196 (Harcourt, Brace, & World 1952). The Missouri controversy is discussed in Currie, *The Jeffersonians* at 232–49 (cited in note 2), the Hartford Convention in id at 164–91.

⁴ 41 *Annals of Cong* 1308 (Jan 30, 1824) (Gales and Seaton 1856).

⁵ See, for example, Bray Hammond, *Banks and Politics in America* 328–29, 345–46 (Princeton 1957); Editors' Introduction to Glyndon G. Van Deusen, *The Jacksonian Era: 1828–1848* xi–xii (Harper & Row 1959).

⁶ See the revealing observation of Tyler's son, biographer, and editor that when his father became President a real Virginian finally held the reins of state again "after the reign of nationalism for sixteen years"—a period that included the presidencies of both Jackson and Martin Van Buren. Lyon G. Tyler, *2 Letters and Times of the Tylers* 14 (Da Capo 1970).

The Whigs were a short-lived party; they fell to pieces under the strain of intersectional conflict in the 1850s. But they were never the dominant party. Of the nine presidential elections from 1828 to 1860, the Whigs won only two (in 1840 and 1848). Congress too was largely in Democratic hands.

The slavery question was never far below the surface of debates of this period over the interpretation of federal powers; John C. Calhoun, who had abandoned his early nationalism to rescue South Carolina from the Tariff of Abominations, maintained that the great Nullification crisis of 1832–33 was really about slavery.⁷ That institution would receive more than its share of explicit attention during congressional debates over abolitionist petitions and later over the organization of new territories.⁸ But there is also a second story to be told of the not so palmy days between Jackson's inauguration in 1829 and Lincoln's in 1861: The determined and ultimately successful effort of a succession of largely Democratic Presidents and their congressional supporters to limit federal intervention in the economy, whether in the form of support for internal improvements, maintenance of a national bank, establishment of protective tariffs, or disposition of the public lands.

The nationalist program already had its ups and downs, having suffered serious and partly unanticipated reverses at the hands of Presidents Madison and Monroe. In John Quincy Adams, on the other hand, federal authority had found a friend, and by March 3, 1829 the American System was in full flower. The National Bank was in its second incarnation; protective tariffs had just been raised to unprecedentedly high levels; and internal improvements sprouted like weeds on the Capitol lawn.⁹

Andrew Jackson became President the next day. In his rather noncommittal Inaugural Address he blandly promised to respect, among other things, "the rights of the separate States."¹⁰ By the time of his first Annual Message, delivered in December, states' rights had become a central theme. Pointedly warning against "all encroachments upon the legitimate sphere of State sovereignty," Jackson not only reminded his readers that the Constitution limited federal power but also (like Madison before him) insisted that "the great mass of legisla-

⁷ Letter from Calhoun to Virgil Maxcy (Sept 11, 1830), in Clyde N. Wilson, ed, 11 *The Papers of John C. Calhoun* 226, 229 (South Carolina 1978).

⁸ See generally David P. Currie, *The Constitution in Congress: Descent into the Maelstrom, 1845–1861* (forthcoming 2004).

⁹ See Currie, *The Jeffersonians* at 250–89 (cited in note 2).

¹⁰ James D. Richardson, ed, 2 *A Compilation of the Messages and Papers of the Presidents* 436, 437 (Mar 4, 1829) (US Congress 1900).

tion relating to our internal affairs was intended to be left where the Federal Convention found it—in the State governments.”¹¹

If proponents of broad federal power found these pronouncements unsettling, they were right.¹² Before Jackson left office in 1837, Clay’s entire system was in shambles. Jackson’s veto of the Maysville Road bill put an end to most federal support for roads and canals.¹³ His veto of the bill to recharter the Bank of the United States took the government out of the banking business until the Civil War.¹⁴ The Compromise of 1833, to defuse the Nullification crisis, promised progressive reduction of the tariff.¹⁵

My views of these developments will appear in the third volume of my ongoing study of extrajudicial interpretation of the Constitution.¹⁶ The present Article deals with the fourth dimension of the great contest over federal economic power during this period: the scope of Congress’s authority under Article IV, § 3, “to dispose of . . . the Territory or other Property belonging to the United States.”¹⁷

I. THE BACKGROUND

When Virginia surrendered the Northwest Territory to the United States in 1784, it ceded title as well as sovereignty.¹⁸ Much of the land beyond the Ohio River was inhabited only by Indians. As the Supreme Court would explain in *Johnson v Macintosh*,¹⁹ once their rights were extinguished by treaty, the territorial sovereign would become undisputed owner of the soil.²⁰ The same pattern prevailed when the

¹¹ Id at 442, 452 (Dec 8, 1829). Compare Federalist 45 (Madison), in Jacob E. Cooke, ed, *The Federalist* 308, 313 (Wesleyan 1961) (“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.”).

¹² While rather firmly endorsing the principle of a protective tariff, Jackson’s Annual Message plainly suggested constitutional as well as policy objections to internal improvements and to the Bank. See Richardson, ed, *2 Messages and Papers of the Presidents* at 451–62 (cited in note 10).

¹³ See Andrew Jackson, Veto Message (May 27, 1830), in id at 483, 487.

¹⁴ See Andrew Jackson, Veto Message (July 10, 1832), in Richardson, ed, *2 Messages and Papers of the Presidents* at 576 (cited in note 10).

¹⁵ See 4 Stat 629, 629, § 1 (Mar 2, 1833). Presidential vetoes thus killed other elements of the American System; South Carolina’s opposition killed the protective tariff.

¹⁶ David P. Currie, *The Constitution in Congress: Democrats and Whigs, 1829–1845* (forthcoming 2004). For earlier installments, see David P. Currie, *The Constitution in Congress: The Federalist Period, 1789–1801* (Chicago 1997); Currie, *The Jeffersonians* (cited in note 2).

¹⁷ General studies of public land policy during this period include George M. Stephenson, *The Political History of the Public Lands from 1840 to 1862* (Badger 1917); Benjamin H. Hibbard, *A History of the Public Land Policies* (Peter Smith 1939); Roy M. Robbins, *Our Landed Heritage: The Public Domain, 1776–1970* (Nebraska 2d ed 1976).

¹⁸ See Deed of Cession, 11 Va Stat 571, 574 (Mar 1, 1784), and the Authorizing Statute, 11 Va Stat 326, 327 (Dec 20, 1783).

¹⁹ 21 US (8 Wheat) 543 (1823).

²⁰ See id at 593–94.

United States acquired additional territory from North Carolina,²¹ Georgia,²² France,²³ and Spain.²⁴ Thus over the years the United States became the proprietor of vast areas of land that came to be known as the public domain.

From the beginning it was contemplated that the territory thus acquired would eventually be admitted to statehood. The celebrated Northwest Ordinance, adopted by the Confederation Congress in 1787, expressly provided for division of the territory it covered into states, as Virginia had stipulated;²⁵ the treaties by which Louisiana and Florida were acquired prescribed prompt "incorporation" of the inhabitants into the United States.²⁶ Before 1829 eight new states had been established in what had once been territories: Tennessee, Ohio, Louisiana, Indiana, Mississippi, Illinois, Alabama, and Missouri.²⁷

Statehood put an end to federal sovereignty over the territories, but not to federal ownership of the lands. Statutes providing for the admission of new states not only reserved federal title to the public domain within their borders; they contained explicit provisions designed to insulate federal lands from state taxation.²⁸

²¹ See 1 Stat 106 (Apr 2, 1790).

²² See Articles of Agreement and Cession (Apr 24, 1802), in Walter Lowrie, ed, 1 *American State Papers: Public Lands* 113, 114 (Duff Green 1834).

²³ See Treaty between the United States and the French Republic, Art III, 8 Stat 200, 202 (Apr 30, 1803) (Louisiana).

²⁴ See Treaty of Amity, Settlement, and Limits, between the United States and his Catholic Majesty [of Spain], Art 6, 8 Stat 252, 256–58 (Feb 22, 1819, ratified Feb 19, 1821) (Florida).

²⁵ See Northwest Ordinance (July 13, 1787), in 32 *Journals of the Continental Congress, 1774–1789* 334, 342 (GPO 1936) (Roscoe R. Hill, ed), reprinted in 1 Stat 50 n (a), 53 (Aug 7, 1789); Virginia's Deed of Cession, 11 Va Stat at 572–73. See also the earlier congressional resolution inviting the states to cede their Western claims for this purpose, Resolution (Sept 6, 1780), in 17 *Journals of the Continental Congress, 1774–1789* 806, 806–07 (GPO 1910) (Gaillard Hunt, ed). All of this was in accord with Maryland's request in making the cession of Western claims a condition of ratifying the Articles of Confederation. See Instructions of the General Assembly of Maryland (May 21, 1779), in 14 *Journals of the Continental Congress, 1774–1789* 619, 621–22 (GPO 1909) (Worthington Chauncey Ford, ed).

²⁶ Treaty between the United States and the French Republic, Art III, 8 Stat at 202; Treaty of Amity, Settlement, and Limits, between the United States and his Catholic Majesty [of Spain], Art 6, 8 Stat at 256–58.

²⁷ See Currie, *The Federalist Period* at 217–22 (cited in note 16); Currie, *The Jeffersonians* at 87–94, 219–49 (cited in note 2). Kentucky, originally a part of Virginia, had been admitted, with that state's consent, without passing through territorial status. See also the peculiar case of Vermont, which likewise was never a territory. Both cases are considered in Currie, *The Federalist Period* at 97–101 (cited in note 16).

²⁸ See, for example, the Louisiana Enabling Act § 3, 2 Stat 641, 642 (Feb 20, 1811), as noted in Currie, *The Jeffersonians* at 223 (cited in note 2). For brief consideration of the persistent question whether this arrangement was consistent with the equal-footing principle that many nineteenth-century congressmen and the Supreme Court, in *Coyle v Smith*, 221 US 559, 566–68 (1911), found implicit in Article IV, see Currie, *The Jeffersonians* at 294–95 (cited in note 2). See also President Martin Van Buren, First Annual Message (Dec 5, 1837), in Richardson, ed, 3 *Messages and Papers of the Presidents* 373, 384 (cited in note 10):

From the beginning it was also contemplated that the federal government would make conveyances of public lands. Virginia's 1784 Deed of Cession for the Northwest Territory, for example, declared that the grant was made on the following condition, among others:

That all the lands within the territory so ceded to the United States, and not reserved for, or appropriated [for other purposes] . . . , 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 . . . , according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and bona fide disposed of for that purpose, and for no other use or purpose whatsoever.²⁹

The Confederation Congress accordingly provided in 1785 that land in the ceded territory be surveyed and sold at auction for not less than \$1 per acre,³⁰ and Article IV, § 3 of the new Constitution accordingly provided that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

As I have related in earlier installments of this study, Congress made early and frequent use of its authority to dispose of the public lands. The First Congress made grants to Revolutionary veterans and to French settlers at Vincennes,³¹ as the Virginia cession had envisioned.³² The Fourth Congress reaffirmed the policy of the 1785 Ordinance, authorizing the Government to sell off individual parcels for not less than \$2 per acre.³³ It also directed the transfer of a named tract to "the society of United Brethren for propagating the gospel among the heathen."³⁴

A position at one time assumed that the admission of new States into the Union was incompatible with a right of soil in the United States and operated as a surrender thereof, notwithstanding the terms of the compacts by which their admission was designed to be regulated. This position has been wisely abandoned.

²⁹ 11 Va Stat at 574. For the corresponding language of the authorizing statute, see 11 Va Stat at 328.

³⁰ See An Ordinance for Ascertaining the Mode of Disposing of Lands in the Western Territory (May 20, 1785), in 28 *Journals of the Continental Congress, 1774-1789* 375, 377-78 (GPO 1933) (John C. Fitzpatrick, ed.).

³¹ See 1 Stat 182 (Aug 10, 1790) (veterans); 1 Stat 221 (Mar 3, 1791) (settlers). See also Currie, *The Federalist Period* at 107 n 412 (cited in note 16).

³² See 11 Va Stat at 573.

³³ See 1 Stat 464, 466-67, § 4 (May 18, 1796), discussed in Currie, *The Federalist Period* at 207 (cited in note 16). For Alexander Hamilton's 1790 report, see Lowrie, ed, 1 *American State Papers: Public Lands* at 4 (cited in note 22).

³⁴ See 1 Stat 490, 491, § 5 (June 1, 1796). See also Currie, *The Federalist Period* at 207 n 5 (cited in note 16). For a later grant in a similar vein, authorizing sale of a specified tract in Wisconsin to an Episcopal Missionary Society, see 12 Stat 22 (June 1, 1860); for discussion of President Madison's veto of an intervening bill to grant public land to a religious institution, see Cur-

When Ohio became a state in 1803, Congress granted it certain salt springs within its borders for public use, one section in each township “for the use of schools,” and a percentage of the proceeds of federal land sales to build roads to and through the state.³⁵ Subsequent statutes respecting the admission of other new states contained similar provisions.³⁶ Later Congresses built upon this precedent to grant lands to subsidize additional roads and canals.³⁷ In 1815 Congress authorized a grant of land for the relief of earthquake victims at New Madrid, in the Missouri Territory.³⁸ In 1819 and in 1826 Congress made land grants to support “asylums” for the “deaf and dumb”—not in the territories but in the states of Connecticut and Kentucky.³⁹

Not all these dispositions were effected without constitutional controversy. Yet by the time Andrew Jackson became President in 1829 there was an impressive body of legislative precedent for a wide variety of dispositions of public land. Controversies over the constitutionality of other such dispositions pervaded the entire period from 1829 to 1861.

rie, *The Jeffersonians* at 323–24 (cited in note 2).

³⁵ See 2 Stat 173, 175, § 7 (Apr 30, 1802); Currie, *The Jeffersonians* at 90–92 (cited in note 2).

³⁶ See Currie, *The Jeffersonians* ch 8 (cited in note 2). The Indiana act added a grant for the purpose of establishing a seminary of higher learning. *Id.* at 226 & n 51. For similar grants to new states during the period of the present study, see note 82 and accompanying text.

³⁷ See Currie, *The Jeffersonians* at 282 & n 205 (cited in note 2).

³⁸ See 3 Stat 211 (Feb 17, 1815), discussed in Currie, *The Jeffersonians* at 291 (cited in note 2). Congress’s extraordinary powers over the territories, where federalism concerns were absent, likewise help to explain the later grant of land in the Florida Territory to promote “the propagation or cultivation of valuable tropical plants.” 5 Stat 302, 302, §§ 1–4 (July 7, 1838). It should be noted, however, that although the experiments in question were to be conducted in the Territory, one stated reason for subsidizing them was to determine the suitability of such plants for “gradual acclimation throughout all our southern and southwestern States.” *Id.* (preamble). Compare the ongoing dispute over Congress’s power to establish institutions for national purposes in the District of Columbia. See Currie, *The Jeffersonians* at 291–92, 313–15 (cited in note 2). See also David P. Currie, *The Smithsonian*, 70 U Chi L Rev 65 (2003).

³⁹ See 6 Stat 229 (Mar 3, 1819); 6 Stat 339 (Apr 5, 1826). See also Currie, *The Jeffersonians* at 292–94 (cited in note 2). Proposals to benefit a similar institution in New York were defeated in 1830 and again in 1832 after the usual debate over Congress’s authority. See Register of Debates in Congress, 21st Cong, 1st Sess 302–04 (Apr 5, 1830) (Gales and Seaton 1826–1837) (Louisiana Sen Edward Livingston, Missouri Sen David Barton, and Pennsylvania Sen William Marks); Register of Debates, 22d Cong, 2d Sess 912–16 (Dec 26, 1832) (New York Rep Erastus Root and Virginia Rep John Y. Mason). In addition, sizeable tracts were withheld from sale and reserved for military purposes or for the settlement of Native Americans. See, for example, 3 Stat 347 (Mar 1, 1817) (timberlands for the Navy); Treaty with the Creek Nation, 7 Stat 120, 121 (Aug 9, 1814). This practice continued during the period of this study. See, for example, 4 Stat 729, 729, § 1 (June 30, 1834) (reserving all unorganized territories (the whole area west of Arkansas and Missouri) for Native Americans displaced from the East); 10 Stat 226, 238, § 1 (Mar 3, 1853) (authorizing military reservations in and around California for Native Americans).

II. THE 1833 DISTRIBUTION BILL

In conformity with Virginia's specification that land in the ceded territories constitute "a common fund" for the benefit of all states, Congress in 1790 required that the proceeds of Western land sales be employed to pay off the national debt⁴⁰—thus making land revenues in essence a substitute for federal taxes. By 1829, President Jackson was able to envision that the debt would soon be extinguished,⁴¹ and it was not long before major debate erupted over what to do with the remaining public lands.

In his first Annual Message to Congress, in 1829, Jackson had already suggested that the anticipated tax surpluses be distributed among the states "according to their ratio of representation"—after amending the Constitution, if necessary.⁴² Three years later, in his fourth Annual Message, he suggested a similar but subtly different disposition of the public domain.

Lands had been ceded to the United States, Jackson asserted, "for the purposes of general harmony and as a fund to meet the expenses of the [Revolutionary] war."⁴³ Those purposes "having been accomplished," he argued, it no longer made sense to regard the public lands as a source of revenue; they should rather "be sold to settlers . . . at a price barely sufficient to reimburse" the government for its costs, and ultimately any remaining parcel should be "surrendered to the States respectively in which it lies."⁴⁴

The following year, however, essentially on constitutional grounds, President Jackson vetoed a bill that would for a time have distributed the proceeds of public land sales to the states.⁴⁵

His first objection was that the distribution scheme was unequal. The bill would have given an initial 12.5 percent of the revenue from public land sales to those states in which the lands were situated.⁴⁶ That, the President argued, was improper. Because the lands were to be held for the common benefit of the whole country, states in which public lands lay had no special claim.⁴⁷

⁴⁰ 1 Stat 138, 144, § 22 (Aug 4, 1790).

⁴¹ See Andrew Jackson, First Annual Message (Dec 8, 1829), in Richardson, ed, 2 *Messages and Papers of the Presidents* 442, 451 (cited in note 10).

⁴² Id at 452.

⁴³ Andrew Jackson, Fourth Annual Message (Dec 4, 1832), in Richardson, ed, 2 *Messages and Papers of the Presidents* 591, 600 (cited in note 10).

⁴⁴ Id at 600–01.

⁴⁵ See Andrew Jackson, Veto Message (Dec 4, 1833), in Richardson, ed, 3 *Messages and Papers of the Presidents* 56, 64–66 (cited in note 10).

⁴⁶ See id at 64.

⁴⁷ See id. Daniel Webster had made the same point the year before, in protesting what he perceived as the creeping heresy "that these lands, by right, belong to the States respectively in which they happen to lie":

Jackson's reservations, however, went deeper. The bill directed that initial grants to the public-land states be applied "to objects of internal improvement and education" and the balance of revenues "to such purposes as the legislatures of the said respective States shall deem proper."⁴⁸ Thus the bill in both respects offended the principles Jackson had laid down in vetoing the bill for support of the Maysville Road:

The leading principle then asserted was that Congress possesses no constitutional power to appropriate any part of the moneys of the United States for objects of a local character within the States. . . . If the money of the United States can not be applied to local purposes *through its own agents*, as little can it be permitted to be thus expended *through the agency of the State governments*.⁴⁹

Questions of consistency aside,⁵⁰ there was much to be said for Jackson's objections. The notion of equality in the distribution of public land benefits, to be sure, seems not to have risen to constitutional proportions. As Treasury Secretary Albert Gallatin had argued in his notable 1808 report on internal improvements, pro rata distribution of federal tax revenues among the states made no sense, and nothing in the Constitution seemed to require it.⁵¹ Tax revenues were to be spent where the general welfare demanded, not by mathematical adherence

The lands are well known to have been obtained by the United States, either by grants from individual States, or by treaties with foreign powers. In both cases, and in all cases, the grants and cessions were to the United States, for the interest of the whole Union; and the grants from individual States contain express limitations and conditions, binding up the whole property to the common use of all the States for ever.

Speech at Worcester (National Republican Convention) (Oct 12, 1832), in Charles M. Wiltse and Alan R. Berolzheimer, eds, 1 *The Papers of Daniel Webster: Speeches and Formal Writings* 531, 545 (University Press of New England 1986).

⁴⁸ Jackson, Veto Message (Dec 4, 1833) at 65 (cited in note 45).

⁴⁹ *Id.* at 65–66. Jackson also complained that the bill distributed the proceeds according to "Federal representative population" rather than "the general charge and expenditure provided by the compacts" of cession, *id.* at 64, but this subtle distinction hardly seems of constitutional dimension in light of the general language of Article IV. In support of his interpretation Jackson invoked the concluding clause of that Article, which provides that "nothing in this Constitution shall be so construed as to Prejudice any claims of the United States, or of any particular State." See *id.* His detractors seem right that this provision was meant only to reserve boundary questions, not to limit disposal of what were concededly federal lands. See Register of Debates, 22d Cong, 2d Sess 134 (Jan 19, 1833) (Mississippi Sen George Poindexter) (citing Madison's Federalist 43).

⁵⁰ Nothing in his present veto message, Jackson argued, impaired his earlier suggestion that (as he now for the first time explained) the *worthless* ("refuse") lands remaining unsold ultimately be surrendered to the states where they lay. See Jackson, Veto Message (Dec 4, 1833) at 69 (cited in note 45).

⁵¹ See Albert Gallatin, Report on Roads and Canals (Apr 6, 1808), in Walter Lowrie and Walter S. Franklin, eds, 1 *American State Papers: Miscellaneous* 724, 740 (Gales and Seaton 1834).

to state lines.⁵² The history adumbrated above suggested that land revenues were meant to be an alternative to taxes, and they had long been so employed. In light of the absence of *any* explicit limitation on Congress's authority to "dispose of" the public domain, it is hard to find Congress *more* constrained in disbursing land revenues than in spending money raised by taxation.

But Jackson was on firmer ground in insisting that Congress was no *less* constrained when disbursing the proceeds of public lands. South Carolina Senator Robert Y. Hayne had taken the same stance in opposing the distribution bill in 1832: If land proceeds were not subject to limitations on the disposition of tax revenues, there was no limit to congressional spending.⁵³ Tennessee's veteran Senator Felix Grundy echoed Hayne's argument a few months later:

My proposition is . . . that the lands belong to neither the new nor the old States, nor to both of them combined, but to the Federal Government; and that their proceeds cannot be applied to other objects than those to which the United States can constitutionally appropriate money.⁵⁴

As Jackson would say in his veto message, Congress could spend tax moneys neither for education nor for local improvements, and therefore, Grundy concluded, it could not accomplish the same end indirectly by distributing land proceeds to the states.⁵⁵ In the words of Illinois Senator Elias Kane, federal funds could be expended only for national purposes; and Congress could not delegate to the states its authority to determine what the general welfare required.⁵⁶

Subsequent generations are attuned to the argument that, by attaching certain conditions to grants, Congress invades rights reserved to the states.⁵⁷ Jackson and his congressional supporters took the

⁵² See Currie, *The Jeffersonians* at 282–83, 293–94 (cited in note 2).

⁵³ See Register of Debates, 22d Cong, 1st Sess 1163 (July 2, 1832).

⁵⁴ Register of Debates, 22d Cong, 2d Sess 112 (Jan 17, 1833). See also id at 1906 (Mar 1, 1833) (Alabama Rep Clement C. Clay); id at 217–18 (Jan 24, 1833) (Missouri Sen Thomas H. Benton) (adding that tax revenues too were "property" of the United States of which Congress had power to "dispose" under Article IV).

⁵⁵ See id at 114–15 (Jan 17, 1833); Jackson, Veto Message (Dec 4, 1833) at 66 (cited in note 45).

⁵⁶ See Register of Debates, 22d Cong, 2d Sess 66 (Jan 7, 1833). Calhoun also argued that Congress could not "denationalize" federal funds by distributing them pell-mell to the states. See id at 234 (Jan 25, 1833). This argument is independent of the question whether President Monroe was right that Congress was authorized to spend for any subject of national import, or whether it could do so only when necessary and proper to the execution of other express or implied powers. See Currie, *The Jeffersonians* at 280–81 (cited in note 2).

⁵⁷ See, for example, *United States v Butler*, 297 US 1, 72–73 (1936) (holding the Agricultural Adjustment Act payments to farmers to reduce production unconstitutional on this ground); *South Dakota v Dole*, 483 US 203, 206–09 (1987) (holding that Congress may condition disbursement of federal highway funds to the states on adoption of a drinking age of twenty-one).

sharply contrasting position that grants *without* strings exceeded congressional authority.⁵⁸

Citing as precedent earlier land grants to support asylums for the deaf and dumb,⁵⁹ nationalist leader Henry Clay insisted that Congress had unlimited authority to dispose of the public lands.⁶⁰ Clay persuaded Congress but not the President, and Jackson had the last word. Clay and others stormed and fumed over Jackson's pocket veto, but they lacked both the competence to override it and the votes to try again;⁶¹ there was to be no general distribution of land proceeds to the states while a Democrat was President.⁶²

III. THE 1841 DISTRIBUTION LAW

In 1840, however, when the Whigs rejected their leader in favor of the sphinx-like William Henry Harrison,⁶³ the Democrats finally lost the presidency. With the cat temporarily absent, the mice got down to work. In 1841 Congress passed another distribution law, and this time

⁵⁸ Cf *Butler*, 297 US at 83 (1936) (Stone dissenting) ("Expenditures would fail of their purpose and thus lose their constitutional sanction if the terms of payment were not such that by their influence on the action of the recipients the permitted end would be attained."). This was not the first time such arguments had been made against unconditional grants to the states. See Currie, *The Jeffersonians* at 294–95 (cited in note 2).

⁵⁹ See note 39 and accompanying text.

⁶⁰ See Register of Debates, 22d Cong, 1st Sess 1114–15 (June 20, 1832); id at 1163 (July 2, 1832). See also Register of Debates, 22d Cong, 2d Sess 129–36 (Jan 19, 1833) (Sen Poindexter); id at 161 (Jan 21, 1833) (Ohio Sen Thomas Ewing); Register of Debates, 23d Cong, 1st Sess, Appendix at 205, 207–09 (May 2, 1834) (Report of the Senate Committee on the Public Lands). Opponents of the 1833 distribution bill ignored these precedents; later advocates of limitations on the power to dispose of public property tended to dismiss them as aberrations. See, for example, notes 131–32 and accompanying text. Representative Clement Clay distinguished the more common grants made in connection with the admission of states on a ground later to become familiar: As others would say in defense of grants to construct railroads, these transfers were consistent with the trust imposed on Congress because they tended to enhance the value of other public lands. See Register of Debates, 22d Cong, 2d Sess 1912 (Mar 1, 1833) and text accompanying notes 98–107.

⁶¹ Pocket vetoes cannot be overridden. See US Const Art I, § 7; *Pocket Veto Case*, 279 US 655 (1929). The bill had passed the Senate by only three votes the first time. While Henry Clay maintained that several absentees might have been persuaded to vote to pass it over the veto, he acknowledged that intervening changes in membership had dimmed the prospects of ultimate success. See Register of Debates, 23d Cong, 1st Sess 1606 (May 2, 1834). His new distribution bill, though favorably reported, was never taken up. Id.

⁶² But see the 1836 "deposit" provision, discussed in Currie, *Democrats and Whigs* at ch 3 (cited in note 16), whose transparent purpose and effect were to transfer general funds of the Government to the states.

⁶³ Harrison, his biographer wrote, "was seldom the initiator of programs, and he was not conspicuous for advocacy of any particular political ideas . . ." Dorothy Burne Goebel, *William Henry Harrison: A Political Biography* 379–80 (Indiana Library 1926). He did receive a few kudos, however, for instigating a modest pro-settler reform of the public-land laws as Delegate from the Northwest Territory in 1800. See Robbins, *Our Landed Heritage* at 18 (cited in note 17).

the President signed it.⁶⁴ Harrison having died in the interim, the President was John Tyler.⁶⁵

President Tyler, though grudging in his interpretation of Congress's power to appropriate tax revenues for internal improvements,⁶⁶ took a broad view of its authority to dispose of public lands. Finding that in the straitened financial circumstances that had prompted his predecessor to call the legislature into special session a number of states suffered from a crushing burden of debt, Tyler invited Congress to relieve them:

[A] distribution of the proceeds of the sales of the public lands, provided such distribution does not force upon Congress the necessity of imposing upon commerce heavier burthens than those contemplated by the act of 1833, would act as an efficient remedial measure by being brought directly in aid of the States. As one sincerely devoted to the task of preserving a just balance in our system of Government by the maintenance of the States in a condition the most free and respectable and in the full possession of all their power, I can no otherwise than feel desirous for their emancipation from the situation to which the pressure on their finances now subjects them. And while I must repudiate, as a measure founded in error and wanting constitutional sanction, the slightest approach to an assumption by this Government of the debts of the States, yet I can see in the distribution adverted to much to recommend it. The compacts between the proprietor States and this Government expressly guarantee to the States all the benefits which may arise from the sales. The mode by which this is to be effected addresses itself to the discretion of Congress as the trustee for the States, and its exercise after the most beneficial manner is restrained by nothing in the grants or in the Constitution so long as Congress shall consult that equality in the distribution which the compacts require.⁶⁷

⁶⁴ See 5 Stat 453 (Sept 4, 1841).

⁶⁵ Was he really the President? He said so, and history has accepted his judgment. The text of the Constitution is not so clear (US Const Art II, § 1, cl 6), and not everybody agreed with him. See David P. Currie, *His Accidency*, 5 Green Bag 2d 151 (2002).

⁶⁶ See John Tyler, Veto Message (June 11, 1844), in Richardson, ed, 4 *Messages and Papers of the Presidents* 330, 331 (cited in note 10).

⁶⁷ John Tyler, Special Session Message (June 1, 1841), in Richardson, ed, 4 *Messages and Papers of the Presidents* 40, 47 (cited in note 10). Earlier, we are told, Whigs had advocated that Congress assume debts that the financially strapped states had incurred, largely to finance ambitious internal-improvement schemes that Jacksonian philosophy forbade Congress to subsidize directly. See Robbins, *Our Landed Heritage* at 78–79 (cited in note 17). By the time of Tyler's message they had largely abandoned assumption in favor of the indirect means of distributing federal largesse. See *id.* In the disillusionment that followed their initial enthusiasm, a number of states would soon adopt constitutional provisions severely restricting state and even local sup-

No, Mr. Tyler was not gifted in his use of the written word. Paraphrasing is risky at best, but let me try. (1) The states were unable to pay their debts, and Congress ought to help them to the extent it could. (2) Congress had no power to assume state obligations directly. (3) To distribute the proceeds of land sales to the states would enable them to pay their debts and thus serve the same purpose as a forbidden assumption. (4) The federal government held the public domain for the benefit of the states, and to that end Congress could dispose of it however it liked, provided that the states were treated equally. (5) It was imperative, however, that tariffs not be increased beyond the levels agreed upon in the Compromise of 1833. (6) Congress ought therefore to think seriously about distributing land revenues to the states, but only so long as the money was not needed to meet federal expenses. Tyler's conception of Congress's power to dispose of the public lands was as capacious as that of Henry Clay.

Legislative debate was brief and offered little that was new.⁶⁸ Congress took Tyler's advice, and he signed the resulting bill.⁶⁹

Following the pattern of the bill Jackson had vetoed in 1833, the 1841 statute granted an initial percentage of land proceeds to western states in which the land was sold.⁷⁰ This time, however, there was no restriction on how these funds should be used.⁷¹ After deducting administrative expenses, the remaining revenue was to be divided among the states, the territories, and the District of Columbia "according to their respective federal representative population" and "applied by the Legislatures of the said states to such purposes as the said Legislatures

port for internal improvements. See Carter Goodrich, *Government Promotion of American Canals and Railroads, 1800-1890* 59, 71-72, 80, 138-39, 145-49 (Columbia 1960).

⁶⁸ Nathan Clifford of Maine in the House, Silas Wright, Jr. of New York, and Levi Woodbury of New Hampshire in the Senate repeated that the source of funds was irrelevant; Congress could spend land proceeds only for those purposes for which it could spend tax money. See Cong Globe, 27th Cong, 1st Sess 128 (June 29, 1841) (Blair and Rives 1833-1873) (Rep Clifford); id at 325-26 (Aug 20, 1841) (Sen Wright); Cong Globe, 27th Cong, 1st Sess, Appendix at 247 (Aug 25, 1841) (Sen Woodbury). Missouri Senator Thomas Hart Benton added that land revenues distributed to the states would have to be replaced by taxation; he seemed to be suggesting that Congress was indirectly financing local projects with tax money. Id at 228 (Aug 13, 1841). Most interesting was Calhoun's observation that many of the public lands had been purchased with tax revenues to begin with: "By what art, what political alchymy, could the mere passage of the money through the lands free it from the constitutional shackles to which it was previously subject?" Id at 333 (Aug 24, 1841). Supporters of distribution had the votes and largely held their tongues; Robert C. Winthrop of Massachusetts, in the House, echoed Tyler's argument that Congress could dispose of land for whatever purpose it wished. Id at xi (July 2, 1841).

⁶⁹ See 5 Stat 453 (Sept 4, 1841).

⁷⁰ See 5 Stat at 453, § 1. This time the states' share was 10 percent, and the new states of Arkansas and Michigan were included. Id.

⁷¹ See id at 453-54, § 2. A later section granted the same states additional lands "for purposes of internal improvement," which the following section defined as "[r]oads, railways, bridges, canals and improvement of water-courses, and draining of swamps." Id at 455, §§ 8, 9.

may direct.”⁷² These provisions were wholly inconsistent with President Jackson’s veto message, but the Democrats had lost both Congress and the presidency.⁷³

The distribution act was to be permanent,⁷⁴ but its operation was to be suspended if a foreign war broke out⁷⁵ or if customs duties were raised beyond the levels provided for in the Compromise of 1833.⁷⁶ The expenses of war might create a need for land revenues, and Tyler had made it a condition of distribution that it be accomplished without imposing additional duties.⁷⁷ Tariffs had to be raised in 1842 to cover government expenses, and distribution was accordingly suspended.⁷⁸ The Mexican War, which would have suspended distribution in any case, “buried it under a national debt sufficiently heavy to keep it down for many years.”⁷⁹ In 1848, after the war was over, President Polk spoke of distribution in the past tense and branded it an uncon-

⁷² Id at 453, § 2. Section 4, id at 454, required that such grants be first applied to the payment of debts owing to the United States, but that did not remove the constitutional objection. As opponents argued, Congress had no general authority to pay state debts. See Thomas Hart Benton, *2 Thirty Years' View; or, A History of the Working of the American Government for Thirty Years, from 1820 to 1850* 241 (Appleton 1854) (“There was no prohibition upon the payment of the State debts: that was a departure from the objects of the Union too gross to require prohibition.”). See also the discussion of the 1790 assumption of state revolutionary debts in Currie, *The Federalist Period* at 76–78 (cited in note 16).

⁷³ See Donald B. Cole, *Martin Van Buren and the American Political System* 372–73 (Princeton 1984). South Carolina, at Calhoun’s urging, initially refused to accept its share of the money, see Charles M. Wiltse, *3 John C. Calhoun: Sectionalist, 1840–1850* 59 (Bobbs-Merrill 1951), and the 1844 Democratic Platform denounced distribution as “alike inexpedient in policy and repugnant to the Constitution.” Kirk H. Porter and Donald B. Johnson, eds, *National Party Platforms, 1840–1964* 4 (Illinois 1966).

⁷⁴ See 5 Stat at 454, § 5 (“This act shall continue and be in force until otherwise provided by law . . .”).

⁷⁵ See id.

⁷⁶ See id at § 6.

⁷⁷ See John Tyler, Special Session Message at 47 (cited in note 67), quoted in the text accompanying note 67. Indeed Tyler vetoed no fewer than three bills for violation of this condition. Two would have increased tariffs while overriding the suspension of distribution; the third would have repealed the proviso itself so as to permit both distribution and higher tariffs in the future. See John Tyler, *Veto Messages* (June 29, 1842; Aug 9, 1842; Dec 14, 1842), in Richardson, ed, *4 Messages and Papers of the Presidents* 180, 181–82; 183, 184–86; 255, 255 (cited in note 10). See Tyler’s concise explanation of the first of these vetoes in the message accompanying the second:

I did not think that I could stand excused, much less justified, before the people of the United States, nor could I reconcile it to myself to recommend the imposition of additional taxes upon them without at the same time urging the employment of all the legitimate means of the Government toward satisfying its wants.

Id at 185. To give away land revenues for state purposes at a time when the federal Government needed them to meet current expenses, he added, was “highly impolitic, if not unconstitutional.” Id at 187. For the story of these vetoes, see Stephenson, *Political History of the Public Lands* at 73–87 (cited in note 17).

⁷⁸ See 5 Stat 548, 567, § 30 (Aug 30, 1842).

⁷⁹ Stephenson, *Political History of the Public Lands* at 90 (cited in note 17).

stitutional element of the discredited American System.⁸⁰ Although the statute was not repealed, distribution was apparently never resumed.⁸¹

IV. THE IRON HORSE

President Polk had no difficulty, however, in approving the usual land grants to the new states of Florida, Iowa, and Wisconsin for such apparently local purposes as state government, transportation, and schools.⁸² Two days before leaving office, in March 1849, he signed a bill granting Louisiana most “swamp and overflowed lands . . . unfit for cultivation” within its borders, in order “to aid the State . . . in constructing the necessary levees and drains to reclaim” them.⁸³ Whig President Millard Fillmore did the same for other states in 1850.⁸⁴ On the same day he signed the second swamp bill Fillmore also endorsed the grant of 40 to 160 acres to veterans of the War of 1812, the Mexican War, and various Indian wars, and to their immediate survivors.⁸⁵

How some of the grants Polk approved could be reconciled with standard Democratic theory as spelled out in Jackson’s veto of the 1833 distribution bill would take a bit of explaining. The debates on yet another disposition from the time may prove informative in this regard, for 1850 was also the year in which President Fillmore approved a massive land grant to support construction of the Illinois Central Railroad.⁸⁶

The rise of the railroad had prompted many Democrats in Congress, especially those from the West, to reexamine their party’s traditional hostility to federally subsidized improvements. As early as 1830

⁸⁰ See James K. Polk, Fourth Annual Message (Dec 5, 1848), in Richardson, ed, 4 *Messages and Papers of the Presidents* 629, 656–58 (cited in note 10).

⁸¹ The 1842 suspension “proved permanent, for the tariff never again went back to the twenty per cent level” prescribed by the 1833 statute. Matthias N. Orfield, *Federal Land Grants to the States with Special Reference to Minnesota* 101 (Minnesota 1915). The total amount distributed under the 1841 law was roughly \$630,000. See Letter from the Secretary of the Treasury, Ex Doc No 64, 7 *Senate Executive Documents*, 50th Cong, 1st Sess (Jan 27, 1888); Thomas Donaldson, *The Public Domain: Its History, with Statistics* 256, 753, 1260 (GPO 1884).

⁸² See 5 Stat 788, 788, § 1 (Mar 3, 1845) (Florida); 5 Stat 789, 789–90, § 6 (Mar 3, 1845) (Iowa); 9 Stat 56, 58, § 7 (Aug 6, 1846); 9 Stat 233, 233, § 2 (May 29, 1848) (Wisconsin). No such grants were made to Texas, which (having never been a territory) retained its public lands on admission to the Union. See Joint Resolution for Annexing Texas to the United States, 5 Stat 797, 798 (Mar 1, 1845); 9 Stat 108, 108 (Dec 29, 1845) (Joint Resolution admitting Texas as a state). For prior land grants establishing this practice, see notes 35–36 and accompanying text.

⁸³ 9 Stat 352, 352, § 1 (Mar 2, 1849).

⁸⁴ See 9 Stat 519, 519, § 1 (Sept 28, 1850) (granting to Arkansas the “swamp and overflowed lands, made unfit thereby for cultivation” that fell within its boundaries); id at 520, § 4 (extending the Arkansas provision to “each of the other States of the Union in which such swamp and overflowed lands . . . may be situated”).

⁸⁵ See 9 Stat 520, 520, § 1 (Sept 28, 1850).

⁸⁶ See 9 Stat 466 (Sept 20, 1850).

the nationalistic Daniel Webster of Massachusetts, in light of the understandable reticence of South Carolina's Democratic Senators, had presented a petition inviting Congress to aid in the construction of a railroad that would ultimately connect South Carolina to Cincinnati on the Ohio River.⁸⁷ He got nowhere in the adverse climate of the Jackson years, and for two decades railroad construction proceeded essentially without federal bounty.⁸⁸ Requests for assistance multiplied, however, and by mid-century western Democrats had settled on a new formula that would permit Congress to subsidize their pet projects without tearing down the barriers that states-rights partisans had erected to federal spending for other internal improvements. The breakthrough came during a rare hiatus in Democratic control of the executive branch; but the resourceful and indefatigable sponsor of the Illinois Central bill was the young Democrat Stephen A. Douglas, who had represented Illinois in one House or the other since 1843.⁸⁹

In addition to granting the state of Illinois a right of way over public lands for a railroad from Chicago and Galena to "a point at or near the junction of the Ohio and Mississippi Rivers,"⁹⁰ the Act conveyed to the state, "for the purpose of aiding in making the railroad . . . every alternate section of land designated by even numbers, for six

⁸⁷ Webster's remarks upon presentation of the petition to the Senate may be found in the Register of Debates, 21st Cong, 1st Sess 21–22 (Jan 18, 1830). For interesting background on the petition, see Letter from William Aiken to Daniel Webster (Jan 9, 1830), in Charles M. Wiltse and David G. Allen, eds, 3 *The Papers of Daniel Webster: Correspondence* 4, 4–5 (University Press of New England 1977) (soliciting Webster's aid on behalf of South Carolina railroad company's petition to the Senate because "objects predicated on constitutional grounds . . . induce[d South Carolina's Senators] . . . to oppose" the petition); Letter from South Carolina Senator Robert Y. Hayne to Daniel Webster (Jan 15, 1830), in Wiltse and Allen, eds, 3 *The Papers of Daniel Webster* at 9, 9 (stating his conviction that the petition was "at variance, with the principles for which the State of South Carolina was contending, in relation to the powers of the federal government"). See also Merrill D. Peterson, *The Great Triumvirate: Webster, Clay, and Calhoun* 172 (Oxford 1987) (explaining that Webster presented the petition at the request of Sen Hayne).

⁸⁸ Railroads were given, however, "either full or partial rebates on the duties on iron imported for rails"; and four railroads "received free right of way through federal lands and the use of stone and timber from them." See Goodrich, *American Canals and Railroads* at 169–70 (cited in note 67). In addition, railroads benefited from Government surveys made at federal expense until the relevant statute was repealed in 1838. See 4 Stat 22, 22–23 (Apr 30, 1824) (authorizing the President to "cause the necessary surveys, plans, and estimates, to be made of the routes of such roads and canals as he may deem of national importance"); 5 Stat 256, 257, § 6 (July 5, 1838). See generally George R. Taylor, *The Transportation Revolution* 94–95 (Holt, Rinehart & Winston 1964).

⁸⁹ A similar bill, also sponsored by Senator Douglas, had passed the Senate in 1848 but narrowly failed in the House. See Cong Globe, 30th Cong, 1st Sess 214 (Jan 20, 1848) ("A bill granting to the State of Illinois the right of way and a donation of public land for making a railroad connecting the Upper and Lower Mississippi with the chain of the northern lakes at Chicago."); id at 723 (May 3, 1848) (Senate passage by a vote of 24 to 11); id at 1071 (Aug 12, 1848) (House rejection by a vote of 78 to 74).

⁹⁰ 9 Stat at 466, § 1.

sections in width on each side of said road”⁹¹ Similar provisions were made for Alabama and Mississippi in order to subsidize extension of the road from the Ohio to Mobile, on the Gulf Coast.⁹²

When Senator Douglas introduced the bill in April 1850, Georgia Whig William Dawson objected. The United States held the public lands in trust, said Dawson, either “for the people at large or for the States”; it had no right to donate any part of the trust property “to any portion of the *cestui que trusts* to the exclusion of the other.”⁹³

William Seward, Whig Senator from New York, disputed Dawson’s premise. Congress had express authority to dispose of public lands,⁹⁴ “without any limitations prescribed upon our discretion.”⁹⁵ The Constitution imposed no specific trust; there was no need to distribute lands or their proceeds equally among all citizens. Congress should exercise its power, “like every other power of the Government, . . . with judgment, wisdom, and a due regard to the best interests of the country.”⁹⁶ It was in the country’s best interest to dispose of land for the construction of railroads that would promote settlement and cultivation of the public domain.⁹⁷

Douglas, in contrast, conceded Dawson’s premise that public lands were held in trust for the entire nation, but he disputed Dawson’s conclusion. Like any trustee, he argued, Congress might lawfully dispose of public lands in any manner that increased the value of the trust fund; and by granting land to promote railroads the Government enhanced the value of the remaining soil.⁹⁸ “[B]y running this road

⁹¹ Id at § 2.

⁹² See id at 467, § 7. There was precedent for this plan: While the sympathetic John Quincy Adams was President, Congress had granted lands to Illinois, Indiana, and Ohio to subsidize the construction of canals. See 4 Stat 234 (Mar 2, 1827) (Illinois); 4 Stat 236 (Mar 2, 1827) (Indiana); 4 Stat 305 (May 24, 1828) (Ohio). See also Goodrich, *American Canals and Railroads* at 142, 169 (cited in note 67). A later grant to Wisconsin for the same purpose under Democratic auspices, see 5 Stat 245, 245, § 1 (June 18, 1838), was distinguishable, as Wisconsin at the time was still a territory, over which no state had authority. Thus the Illinois Central grant, as Goodrich wrote, introduced a new era of federal aid for internal improvements in the states. See Goodrich, *American Canals and Railroads* at 169–70 (cited in note 67).

⁹³ Cong Globe, 31st Cong, 1st Sess 849 (Apr 29, 1850).

⁹⁴ See US Const Art IV, § 3 (“to dispose of . . . the Territory or other Property belonging to the United States”).

⁹⁵ Cong Globe, 31st Cong, 1st Sess 851 (Apr 29, 1850).

⁹⁶ Id.

⁹⁷ See id. See also id at 850 (Sen Henry Clay).

⁹⁸ See id at 849. To ensure that the Government be none the poorer for having parted with some of its acreage, the Act required that alternate sections not granted to the states “shall not be sold for less than double the minimum price of the public lands.” 9 Stat at 466, § 3. See also Cong Globe, 31st Cong, 1st Sess 845 (Apr 29, 1850) (Illinois Sen Stephen Douglas). “This arrangement,” Illinois Representative John McClermand had said almost two years earlier in debating a similar bill, “will secure to the Government as much for one-half of the land as it otherwise could obtain for the whole.” Cong Globe, 30th Cong, 1st Sess, Appendix at 1137 (Aug 12, 1848).

through [the Pine Barrens] of Mississippi and Alabama," explained the venerable Henry Clay, "you will . . . bring into market an immense amount of lands, increasing their value to the benefit of the treasury of the United States."⁹⁹

Dawson had begun the debate by observing that he could perceive no distinction between granting land to subsidize a railroad and appropriating money for the same purpose.¹⁰⁰ As South Carolina Senator Andrew Butler noted, the Democratic Party was on record as denying (in its Baltimore Platform of 1844) that Congress had power to establish a general system of internal improvements;¹⁰¹ if Congress could evade this limitation by simply granting land instead of money, said Dawson, "all controversy about internal improvements will have ceased"¹⁰²

Alabama Democrat William R. King, whose state was to benefit from Douglas's bill pursuant to an amendment he himself had offered,¹⁰³ thought there was a difference:

As regards our constitutional power on this subject, we have always drawn a distinction between appropriations out of the Treasury direct, and the right of the Government to dispose of the public domain for the internal improvements of the States, so that the part not so disposed of will be increased in value, or as a great land owner would dispose of part of his own lands for the benefit of the remainder.¹⁰⁴

⁹⁹ Cong Globe, 31st Cong, 1st Sess 850 (Apr 29, 1850). The argument was not new; a House Committee had suggested as early as 1806 that Congress should support improvement of Ohio River navigation in part because it would enhance the value of the public lands. See Currie, *The Jeffersonians* at 119 (cited in note 2).

¹⁰⁰ See Cong Globe, 31st Cong, 1st Sess 845 (Apr 29, 1850).

¹⁰¹ See id at 845-46. See Democratic Party Platform of 1844, in Porter and Johnson, *National Party Platforms* at 3 (cited in note 73). President Polk, in his 1847 veto of a bill to improve assorted rivers and harbors, had expressly endorsed Monroe's initial position (which Monroe had abandoned in vetoing the 1822 Tollgate Bill) that Congress had "no right to expend money except in the performance of acts authorized by the other specific grants." James K. Polk, Veto Message (Dec 15, 1847), in Richardson, ed, 4 *Messages and Papers of the Presidents* 610, 619 (cited in note 10), quoting James Monroe, Views of the President of the United States on the Subject of Internal Improvements (May 4, 1822), in Richardson, ed, 2 *Messages and Papers of the Presidents* 144, 164-65 (cited in note 10). This had been Madison's position as well. See 2 *Annals of Cong* 1946 (Feb 2, 1791) (arguing that the general purposes listed in the tax provision "themselves were limited and explained by the particular enumeration subjoined").

¹⁰² Cong Globe, 31st Cong, 1st Sess 849 (Apr 29, 1850). Connecticut Senator John M. Niles, opposing an earlier Illinois Central proposal, had sounded a similar theme: "To say that we can get round the Constitution by granting the public lands, instead of taking the money directly out of the treasury, is certainly trifling with the judgment of this body." Cong Globe, 30th Cong, 1st Sess, Appendix at 535 (May 3, 1848).

¹⁰³ King proposed what was to become § 7 of the new law, authorizing federal aid for the "continuation of said Central railroad from the mouth of the Ohio river to the city of Mobile." See Cong Globe, 31st Cong, 1st Sess 845 (Apr 29, 1850).

¹⁰⁴ Id at 846.

The same distinction, King added, had been explicitly embraced two years before by that latter-day high priest of states' rights, the late John C. Calhoun.¹⁰⁵

Other good Democrats bought the distinction as well. Lewis Cass, the party's 1848 presidential candidate, stated it concisely that year in the Senate.¹⁰⁶ President Franklin Pierce would soon swallow it hook, line, and sinker.¹⁰⁷ Nor was congressional Democratic support for land grants for railroads confined to members from the North. As we have seen, King of Alabama supported the Illinois Central bill; so did both Jefferson Davis and Henry Foote of Mississippi, through whose state the road would also run.¹⁰⁸ The principal division on this question was between East and West, not between North and South.¹⁰⁹

Mississippi and Alabama spokesmen were thus prepared to help themselves to federal land, but they drew the line at helping Kentucky and Tennessee. To reach the Gulf Coast, and thus to provide adequate access to the benefited lands, the road had to cross those states as well, but both were devoid of unappropriated federal land.¹¹⁰ Tennessee Senator John Bell, a respected Whig who would run for President on the Constitutional Union ticket in 1860, accordingly proposed to grant both Tennessee and Kentucky proceeds from the sale of land in Alabama, Mississippi, and Illinois.¹¹¹ King protested at once: To give land to states other than that in which it was situated was a different matter entirely.¹¹² Jefferson Davis agreed: Congress could grant land "to build a road through its unsettled domain, with a view of bringing it into the

¹⁰⁵ See *id.* Indeed it had. In debating the 1848 counterpart of the Illinois Central bill ultimately adopted, Calhoun noted that on this ground, as Vice-President, he had cast the deciding vote in favor of a land grant to finance construction of the Illinois and Michigan Canal. See Cong Globe, 30th Cong, 1st Sess, Appendix at 537 (May 3, 1848).

¹⁰⁶ See Cong Globe, 30th Cong, 1st Sess, Appendix at 537 (May 3, 1848) ("The General Government has no power to make any railroad or canal through any State, but the disposition of a portion of the public domain to raise the value of the rest is clearly within the power of this Government.").

¹⁰⁷ See Franklin Pierce, First Annual Message (Dec 5, 1853), in Richardson, ed, *5 Messages and Papers of the Presidents* 207, 216–17 (cited in note 10). See also Franklin Pierce, Veto Message (May 3, 1854), in *id.* at 247, 253–54.

¹⁰⁸ See Cong Globe, 31st Cong, 1st Sess 870 (Apr 30, 1850) (Sen Davis); *id.* at 847 (Apr 29, 1850) (Sen Foote).

¹⁰⁹ See *id.* at 849 (Apr 29, 1850) (Georgia Sen William C. Dawson):

It is remarkable, that if a citizen and politician goes from any part of the Union to the western States, he forgets all that he may have learned in early life of the powers of the Government in relation to internal improvements, and comes back here a thorough internal-improvement man

¹¹⁰ Kentucky had never belonged to the Federal Government, and Tennessee was "almost entirely covered by [private] claims." See Hibbard, *A History of the Public Land Policies* at 10, 12 (cited in note 17).

¹¹¹ See Cong Globe, 31st Cong, 1st Sess 868 (Apr 30, 1850).

¹¹² *Id.* at 869.

market, or rendering it saleable.”¹¹³ To do so in order to build roads elsewhere, he argued, was a “new feature” that could not be condoned, for he was unable to perceive “any difference between thus granting land or taking money from the treasury to build these works”—and that, of course, conventional Democratic interpretation forbade.¹¹⁴

The rift thus opened was detrimental to the cause of internal improvements, since it meant that Congress could subsidize them only in Florida and the West, where there were abundant federal lands.¹¹⁵ As Bell suggested, the distinction was also without constitutional foundation.¹¹⁶ For the argument in favor of grants to Illinois was that they would enhance the value of property still owned by the United States; grants to Kentucky and Tennessee were equally important to improving the value of Illinois land. Indeed Davis was right that there was no way of distinguishing grants of money for this purpose from grants of land: *Any* federal subsidy that promoted the Illinois railway was necessary and proper to improving the marketability of Illinois public land.

It was not long before Congress granted public lands for additional railroads in Iowa, Florida, Alabama, Louisiana, Wisconsin, and Michigan—all states embracing goodly quantities of federal land.¹¹⁷ President Pierce signed them all.¹¹⁸ He also reiterated his predecessors’ request for aid in the construction of a railroad to the Pacific coast, “by all constitutional means.”¹¹⁹ Sectional jealousies over choice of the

¹¹³ *Id.* at 870.

¹¹⁴ *Id.* For the defeat of Bell’s amendment, see *id.* at 900 (May 2, 1850).

¹¹⁵ Even if the Constitution did not (as Senator Hopkins Turney of Tennessee argued) require that all states benefit proportionally from the disposition of public lands, there was certainly something to his policy argument that the benefits should not accrue exclusively to those states in which the land was situated. See *id.* at 871–72 (Apr 30, 1850). See also Cong Globe, 30th Cong, 1st Sess, Appendix at 535 (May 3, 1848) (Connecticut Sen John M. Niles).

¹¹⁶ See Cong Globe, 31st Cong, 1st Sess 869 (Apr 30, 1850):

If it be constitutional to give land to Mississippi, why is it not constitutional to give it to Tennessee or Kentucky? . . . The only constitutional question that I know of, rests alone upon the question of appropriation, whether of lands or money, for works of this description.

As a good Whig, Bell had no doubt of Congress’s power to appropriate money as well as land for this purpose. See *id.* at 867 (declaring Bell’s support for “such measures when the work projected appears . . . to be one of great public utility”).

¹¹⁷ 11 Stat 9 (May 15, 1856) (Iowa); 11 Stat 15 (May 17, 1856) (Florida and Alabama); 11 Stat 17 (June 3, 1856) (Alabama); 11 Stat 18 (June 3, 1856) (Louisiana); 11 Stat 20 (June 3, 1856) (Wisconsin); 11 Stat 21 (June 3, 1856) (Michigan).

¹¹⁸ He did so even though earlier doubts whether (constitutional questions to one side) the country was going “too fast and too far” in this direction had led him to reopen for public sale more than 30,000,000 acres that had been reserved in anticipation of future grants. Franklin Pierce, Second Annual Message (Dec 4, 1854), in Richardson, ed, *5 Messages and Papers of the Presidents* 273, 290–91 (cited in note 10).

¹¹⁹ Pierce, First Annual Message at 221 (cited in note 107).

route postponed authorization until the Civil War,¹²⁰ but the railroad grants had already broken new ground in the disposition of public lands.

V. THE MAD

Even as they endorsed the railroad precedents, however, Democratic Presidents Pierce and Buchanan would wield the veto with vigor over the decade following the Illinois Central grant to enforce their otherwise narrow views of Congress's constitutional authority to dispose of the public domain.

The first of these vetoes came in 1854, when Congress in a moment of weakness was persuaded to grant land to the states to support asylums for the indigent insane. Various bills to this effect had passed one or the other House, and in one case both Houses, in 1851, 1852, and 1853.¹²¹ Proponents predictably pointed out that Congress had already granted land for an enormous variety of purposes; opponents predictably argued that the precedents were either erroneous or not in point.¹²² These arguments were repeated at greater length in the Senate debate on the bill that passed both Houses in 1854.¹²³

President Pierce's veto message neatly encapsulated the arguments against the bill.¹²⁴ If Congress could provide for the indigent insane, it could provide for "all those among the people of the United States who by any form of calamity become fit objects of public philanthropy" — whether victims of idiocy, destitution, or disease.¹²⁵

I readily and, I trust, feelingly acknowledge the duty incumbent on us all as men and citizens, and as among the highest and holiest of our duties, to provide for those who, in the mysterious or-

¹²⁰ See 12 Stat 489 (July 1, 1862).

¹²¹ See Cong Globe, 31st Cong, 2d Sess 522 (Feb 12, 1851) (Senate); Cong Globe, 32d Cong, 1st Sess 2229 (Aug 16, 1852) (House); id at 2466 (Aug 30, 1852) (Senate); Cong Globe, 32d Cong, 2d Sess 1091 (Mar 3, 1853) (Senate). The 1852 House and Senate versions were not identical; neither was sent to the President.

¹²² Compare Cong Globe, 31st Cong, 2d Sess 508 (Feb 11, 1851) (Mississippi Sen Jefferson Davis) (con); id at 509–10 (Maryland Sen James Alfred Pearce and Arkansas Sen Solon Borland) (pro); Cong Globe, 32d Cong, 1st Sess 2467 (Aug 30, 1852) (Mississippi Sen Stephen Adams) (pointedly inquiring whether care of the insane was a federal or a state responsibility); Cong Globe, 32d Cong, 2d Sess 1091–93 (Mar 3, 1853) (Tennessee Sen John Bell (pro) and Mississippi Sen Stephen Adams (con)).

¹²³ For arguments in support of the bill, see Cong Globe, 33d Cong, 1st Sess 455–56 (Feb 21, 1854) (Vermont Sen Solomon Foot); id at 507–08 (Mar 1, 1854) (Wisconsin Sen Isaac Walker); id at 509 (North Carolina Sen George Badger); id at 560 (Mar 7, 1854) (Mississippi Sen Albert Brown). For arguments in opposition see id at 507 (Mar 1, 1854) (Virginia Sen James Mason); id at 508 (Virginia Sen Robert Hunter); id at 556 (Mar 7, 1854) (Mississippi Sen Stephen Adams); id at 556–61 (Delaware Sen James Bayard).

¹²⁴ Pierce, Veto Message (May 3, 1854) at 247 (cited in note 107).

¹²⁵ Id at 249.

der of Providence, are subject to want and to disease of body or mind; but I can not find any authority in the Constitution for making the Federal Government the great almoner of public charity throughout the United States.¹²⁶

The general welfare clause, Pierce safely concluded, was a limitation on the tax power, not a grant of authority to do whatever was good for the United States.¹²⁷ A bill to spend money from the Treasury to support the indigent insane “would have attracted forcibly the attention of Congress”¹²⁸—in other words, no one would have thought it constitutional. That was enough, he thought, to dispatch the bill that Congress had passed; for from “a constitutional point of view” it was “wholly immaterial whether the appropriation be in money or in land.”¹²⁹ As the Virginia act of cession had expressly provided, the public lands were to constitute “a common fund” for all of the United States and to be disposed of for that sole purpose—not, said Pierce, to achieve “objects which have not been intrusted to the Federal Government, and therefore belong exclusively to the States.”¹³⁰

Finally, wrote Pierce, the only precedents in point were grants made in 1819 and 1826 to subsidize asylums for the “deaf and dumb,” and those grants should never have been made.¹³¹ For those institutions were of no more national significance than “any establishment of religious or moral instruction,” or for that matter “every ear of corn or boll of cotton,” or anything else that “promotes the material or intellectual well-being of the race.”¹³² Pierce did not mention the general distribution law Tyler had approved in 1841; he obviously shared Polk’s view that it had been unconstitutional too.¹³³

Other land grants, Pierce concluded, could easily be distinguished. The public land, he asserted,

is distinguished from actual money chiefly in this respect, that its profitable management sometimes requires that portions of it be appropriated to local objects in the States wherein it may happen to lie, as would be done by any prudent proprietor to enhance the sale value of his private domain. All such grants of land are in

¹²⁶ *Id.*

¹²⁷ See *id.* at 251.

¹²⁸ *Id.* at 253.

¹²⁹ *Id.*

¹³⁰ *Id.* at 254.

¹³¹ See *id.* at 255.

¹³² *Id.* at 255. The refusal of the Framers to include a provision expressly authorizing Congress to establish a university in the District of Columbia, the President added, demonstrated that the Convention considered such matters as local and therefore (except in the District, where Congress possessed the power of “exclusive legislation”), they were reserved to the states. *Id.* at 255–56.

¹³³ For Polk’s view see note 80 and accompanying text.

fact a disposal of it for value received, but they afford no precedent or constitutional reason for giving away the public lands.¹³⁴

Thus the various grants to new states were not only consideration for preserving federal rights (including tax immunity) in the remaining public lands but also “a way to augment the value of the residue and in this mode to encourage the early occupation of it by the industrious and intelligent pioneer.”¹³⁵ Thus the grant of swamp lands for draining served both to eliminate a “nuisance to the inhabitants of the surrounding country. . . which the United States could not justify as a just and honest proprietor” and in so doing to “enhanc[e] the value of the remaining lands belonging to the General Government.”¹³⁶ And thus, Pierce had suggested in an earlier message to Congress, grants for the construction of railways “enhanc[ed] the value and promot[ed] the rapid sale of the public domain”¹³⁷—as Senator Douglas in 1850, we may add, had argued with such signal success.¹³⁸

Pierce’s veto message was a definitive repudiation of President Monroe’s view that Congress could spend for anything that benefited the whole nation¹³⁹ and an equally definitive endorsement of the position that federal lands were merely an alternative source of revenue. Lewis Cass of Michigan, Democratic candidate for President in 1848 and later Buchanan’s Secretary of State, expressed that position clearly and concisely in defending the President’s veto. North Carolina Senator George Badger had professed to find it odd that Pierce thought it unconstitutional to distribute public land to the states:

It is strange, when we have heard, time and again here, that these lands are held by the General Government as the trustee for the States; when we have been told so often, in very glowing terms,

¹³⁴ Pierce, Veto Message (May 3, 1854) at 253–54 (cited in note 107).

¹³⁵ Id at 254. Grants to military veterans, Mississippi Senator Stephen Adams twice explained, were not gratuities either; they were additional compensation for services rendered, and thus, he seemed rightly to imply, necessary and proper to the raising of armies and the conduct of war. See Cong Globe, 33d Cong, 1st Sess 570–71 (Mar 8, 1854).

¹³⁶ Pierce, Veto Message (May 3, 1854) at 254–55 (cited in note 107).

¹³⁷ See Pierce, First Annual Message at 216–17 (cited in note 107). See also Pierce’s Veto Message (Dec 30, 1854), in Richardson, ed, *5 Messages and Papers of the Presidents* 257 (cited in note 10), acknowledging, in the course of explaining an earlier veto of a rivers and harbors appropriation, that the property clause “authorize[d] Congress, in the management of the public property, to make improvements essential to the successful execution of the trust.” Id at 260. Douglas distinguished railroads on this ground in the Senate debate on overriding the veto of the bill to provide for the indigent insane. See Cong Globe, 33d Cong, 1st Sess 1066–67 (May 3, 1854).

¹³⁸ See notes 98–99 and accompanying text. Another debate ensued on a motion to override Pierce’s veto of the asylum bill, but the motion failed to attract even a simple majority. See Cong Globe, 33d Cong, 1st Sess 1620–21 (July 6, 1854).

¹³⁹ See Currie, *The Jeffersonians* at 278–81 (cited in note 2), discussing Monroe’s veto of the Tollgate Bill. See also notes 56 and 101.

that they have been procured by shedding the common blood, or they have been purchased by applying the common treasure; that we are then also told that it is utterly unconstitutional in the trustee to use a portion of the lands which he holds for the benefit of those for whom he holds them.¹⁴⁰

Indeed, added Senator Isaac Walker of Wisconsin, if the public lands were "the patrimony of all the States," as opponents of the bill argued, grants for insane asylums everywhere were far less objectionable than the various grants to individual states that Congress had routinely approved; for the present bill was, he believed, "the first bill . . . which has ever been before Congress proposing to make an equitable and equal distribution of this patrimony among the whole of the States."¹⁴¹

Cass made mincemeat of the argument that either land or tax revenues should be distributed equally among the states. "If, as the Senator says, [Delaware received] four times as much . . . [as] North Carolina, it is because the interest or common benefit of the Confederated Government required it."¹⁴² Forts, for example, must be built where an enemy might otherwise invade the country:

Because the city of New York draws largely upon the public resources for its defenses, it would be a strange pretension that Frankfort, in Kentucky, must be equally fortified, or that there must be a naval dock-yard in Iowa, because there is one in Virginia. Such a demand, if acceded to, would hazard the benefit of all, by the pretense of seeking the benefit of each.¹⁴³

Badger's argument that Congress was trustee for the states and could therefore distribute the land to them was more troublesome, for the famous Virginia cession designated the ceded lands as a fund for "such of the United States as have become, or shall become members of the confederation"¹⁴⁴—and thus arguably for each of the states rather than for the Confederation.¹⁴⁵ But Cass had an answer for that too, and it was a good one. When the cession was made, he explained, the United States had no taxing power; the Federal Government was dependent upon contributions from the several states.¹⁴⁶ To end this

¹⁴⁰ Cong Globe, 33d Cong, 1st Sess 509 (Mar 1, 1854).

¹⁴¹ Id at 508. President Jackson had stressed the requirement of equality in vetoing the general distribution bill in 1833. See text accompanying notes 45–47.

¹⁴² Cong Globe, 33d Cong, 1st Sess, Appendix at 982 (June 13, 1854).

¹⁴³ Id.

¹⁴⁴ 11 Va Stat at 574.

¹⁴⁵ President Tyler had made the same argument in proposing a general distribution in 1841. See text accompanying note 67.

¹⁴⁶ See Cong Globe, 33d Cong, 1st Sess, Appendix at 982 (June 13, 1854).

dependency was one of the reasons for the adoption of the new Constitution; it was also one of the purposes of the cession.

Now, what is the meaning of the terms employed in it, that the land should become a fund for the use and common benefit of the members of the Confederation, according to their usual proportions in the general charge and expenditure, and should be faithfully applied to that purpose, and to no other? That this fund should go towards defraying the expenses of the Confederation, and should be fairly appropriated to that purpose. . . .¹⁴⁷

Thus the cession was “designed . . . for the benefit of the Confederation as such,” not to make the United States a conduit for distributing wealth to the individual states.¹⁴⁸

On this interpretation the bill to finance asylums for the insane was an easy case; grants for this purpose were not necessary and proper to the exercise of any federal powers, not even to management of the public lands. The harder case of a homestead law was soon to reach the desk of Pierce’s successor. In the meantime, however, President James Buchanan would have yet another opportunity to express his views on the purposes for which Congress might legitimately dispose of the public domain.

VI. THE LEARNED

On December 14, 1857 Representative Justin S. Morrill, Republican of Vermont, introduced a bill to distribute public lands to each of the states for the purpose of establishing colleges whose “leading object shall be . . . to teach such branches of learning as are related to agriculture and the mechanic arts.”¹⁴⁹ Congress’s power to dispose of public lands, Morrill argued, was plenary; Congress had made grants for a variety of purposes, including education.¹⁵⁰ If Congress could make educational grants to individual states, it could make them to all states at once; and it was time for Congress to do something to promote agriculture as well.¹⁵¹

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ See *Cong Globe*, 35th Cong, 1st Sess 32 (Dec 14, 1857). The bill itself is printed, with minor modifications, in *id* at 1697 (Apr 22, 1858); the quoted language is taken from § 4. Under § 2 of the bill, states in which there were no federal lands were to be given their proportional share in the form of “land scrip” to be redeemed by private purchasers from lands in any other state. See *id.*

¹⁵⁰ See *id* at 1696 (Apr 20, 1858).

¹⁵¹ See *id* (arguing that his measure was “but an extension of the same principle over a wider field”).

Opponents made the usual objections in both the House and the Senate.¹⁵² Ohio's Democratic Senator George Pugh pointed out with much justice that there was no way to distinguish the present bill from the one President Pierce had just vetoed, for agriculture was no more a federal subject than was the care of the indigent insane.¹⁵³

Pugh made an additional objection that had not been heard before in the context of federal grants. The bill attached a variety of conditions to the grants it authorized: The states were to establish colleges to teach agriculture and the mechanical arts; the corpus of the land proceeds was to be preserved as an endowment for those institutions; the interest was to be expended for their support, but not for the construction of buildings; and so on.¹⁵⁴

Now, sir, if we have the right to require the things which are specified in this section, if they are incident to, or a part of any of the powers possessed by Congress, let us do it directly by legislation; but the section proceeds upon the hypothesis, upon the admission, that these . . . are things which Congress has no right to require, except as conditions to a gift; and in order to acquire that authority, in order to usurp that power from the State Legislatures, we propose to bribe them, by the donation of public lands—bribe them to surrender powers which they did not surrender at the time the Constitution was established.¹⁵⁵

Virginia Democrat James Mason echoed Pugh's concern: The states were to be "bribed by Federal power to conform their domestic policy to Federal will."¹⁵⁶

This was a different argument from that which Pierce had made against the asylum bill and Pugh and others had repeated above. Pugh made the distinction plain in later moving to eliminate the conditions from the bill:

¹⁵² See *id.* at 1740–42 (Apr 22, 1858) (adverse report of the House Committee on Public Lands, presented by Alabama Democrat Williamson Cobb). See also *Cong Globe*, 35th Cong, 2d Sess 720–21 (Feb 1, 1859) (Missouri Sen James Green) (stressing the limited power of the federal government and equating public lands with money); *id.* at 721–22 and 856–57 (Feb 7, 1859) (Mississippi Sen Jefferson Davis) (appropriately distinguishing the military and naval academies as necessary and proper to the maintenance of armies and navies); *id.* at 852–54 (Alabama Sen Clement Clay) (stating that the principles of the bill would abolish limitations on the power of Congress and harm state sovereignty).

¹⁵³ See *Cong Globe*, 35th Cong, 2d Sess 714–15 (Feb 1, 1859).

¹⁵⁴ See *Cong Globe*, 35th Cong, 1st Sess 1697 (Apr 20, 1858).

¹⁵⁵ *Cong Globe*, 35th Cong, 2d Sess 716 (Feb 1, 1859).

¹⁵⁶ *Id.* at 719. See also *id.* at 785–86 (Feb 4, 1859) (Delaware Sen James A. Bayard) (urging his colleagues that if they are to "give the land to the States, [to] give it away, give it unconditionally, and trust to their wisdom in the disposition of it"); *id.* at 852 (Feb 7, 1859) (Sen Clement Clay) (comparing this feature of the bill to the Devil's temptation of Christ).

If you choose to grant public lands to the States in aid of agriculture and for the establishment of colleges, as the first and second sections of the bill provide, do so; but leave it to the wisdom of the States how to apply it, and not undertake to fetter them by conditions imposed in this bill. In fact, objectionable as the whole grant is to my mind, this attempt of Congress to assume control over the legislation of the States, in virtue of the condition, is altogether the worst feature of the bill¹⁵⁷

Even if Congress had power to grant lands for educational purposes, Pugh was saying, it had no right to condition the grant on state action that Congress could not require. This was the argument that would later be made in such conditional-grant cases as *United States v Butler*¹⁵⁸ and *South Dakota v Dole*.¹⁵⁹ It had been made in Congress in connection with conditions attached to federal employment and to naturalization.¹⁶⁰ It had prevailed there in the context of Missouri's admission to the Union.¹⁶¹ It was the now-familiar argument of unconstitutional conditions.

It was not to prevail in Congress in 1858 or 1859. Each House approved the land-grant college bill,¹⁶² and President Buchanan killed it on the basis of the argument his predecessor had employed in rejecting grants for insane asylums: Neither agriculture nor education was an appropriate object of federal bounty.¹⁶³ Buchanan's veto message is a major pronouncement on Congress's power to dispose of the public lands and deserves to be more widely read.

It was clear, Buchanan wrote, that Congress could not appropriate tax revenues to establish colleges; Congress could tax only for federal, not state purposes.¹⁶⁴ The public lands, he continued, were subject to the same restriction:

¹⁵⁷ Id at 785 (Feb 4, 1859).

¹⁵⁸ 297 US 1, 74 (1936) ("Congress has no power to enforce its commands on the farmer to the ends sought by the Agricultural Adjustment Act. It must follow that it may not indirectly accomplish those ends by taxing and spending to purchase compliance.").

¹⁵⁹ 483 US 203, 212 (1987) (Brennan dissenting) ("[R]egulation of the minimum age of purchasers of liquor falls squarely within the ambit of those powers reserved to the States by the Twenty-first Amendment. Since States possess this constitutional power, Congress cannot condition a federal grant in a manner that abridges this right.") (citations omitted).

¹⁶⁰ See Currie, *The Federalist Period* at 62, 193–95 (cited in note 16).

¹⁶¹ See Currie, *The Jeffersonians* at 232–43 (cited in note 2) (recounting the debate over whether Congress could condition Missouri's statehood on the abolition of slavery).

¹⁶² See Cong Globe, 35th Cong, 1st Sess 1742 (Apr 22, 1858) (House); Cong Globe, 35th Cong, 2d Sess 857 (Feb 7, 1859) (Senate).

¹⁶³ See James Buchanan, Veto Message (Feb 24, 1859), in Richardson, ed, *5 Messages and Papers of the Presidents* 543, 546–47 (cited in note 10).

¹⁶⁴ Id at 547 ("I presume the general proposition is undeniable that Congress does not possess the power to appropriate money in the Treasury . . . for the purpose of educating the people of the respective States.").

It would require clear and strong evidence to induce the belief that the framers of the Constitution, after having limited the powers of Congress to certain precise and specific objects, intended by employing the words “dispose of” to give that body unlimited power over the vast public domain. It would be a strange anomaly, indeed, to have created two funds—the one by taxation, confined to the execution of the enumerated powers delegated to Congress, and the other from the public lands, applicable to all subjects, foreign and domestic, which Congress might designate; that this fund should be “disposed of,” not to pay the debts of the United States, nor “to raise and support armies,” nor “to provide and maintain a navy,” nor to accomplish any one of the other great objects enumerated in the Constitution, but be diverted from them to pay the debts of the States, to educate their people, and to carry into effect any other measure of their domestic policy. . . . The natural intendment would be that as the Constitution confined Congress to well-defined specific powers, the funds placed at their command, whether in land or money, should be appropriated to the performance of the duties corresponding with these powers. The question is still clearer in regard to the public lands in the States and Territories within the Louisiana and Florida purchases. These lands were paid for out of the public Treasury from money raised by taxation. Now if Congress had no power to appropriate the money with which these lands were purchased, is it not clear that the power over the lands is equally limited? The mere conversion of this money into land could not confer upon Congress new power over the disposition of land which they had not possessed over money. . . . The inference is irresistible that this land partakes of the very same character with the money paid for it, and can be devoted to no objects different from those to which the money could have been devoted.¹⁶⁵

Earlier land grants for educational purposes were distinguished as Pierce had distinguished them five years before: Made “chiefly, if not exclusively, . . . to the new States as they successively entered the Union,” these grants had made nearby retained lands more valuable by enhancing their attractiveness to potential settlers.¹⁶⁶ Finally, Buchanan concluded,

No person will contend that donations of land to all the States of the Union for the erection of colleges within the limits of each

¹⁶⁵ *Id.* at 548–49.

¹⁶⁶ *See id.* at 549–50.

can be embraced by this principle. It can not be pretended that an agricultural college in New York or Virginia would aid the settlement or facilitate the sale of public lands in Minnesota or California.¹⁶⁷

And so Representative Morrill's noble plan to educate farmers and mechanics, like the earlier effort to care for the indigent insane, foundered on sound Democratic conceptions of the boundaries of federal power. The land-grant colleges that were to bear Morrill's name were not to be authorized until 1862, when the presidency was in other and more sympathetic hands.¹⁶⁸

VII. THE FOOTLOOSE

Our survey of public-land controversies during the pre-Civil War period comes to an end with President Buchanan's veto of a homestead bill passed by both Houses in 1860.¹⁶⁹

Homestead bills had been percolating in Congress at least since 1835. The 1841 distribution law had given actual settlers a "pre-emptive" right to buy public lands at the minimum statutory price of \$1.25 an acre.¹⁷⁰ The homestead proposals went further, commonly offering the land scot-free (or on payment of administrative costs) to any citizen who would settle on the land and cultivate it for five years.¹⁷¹ The purpose was to encourage settlement of underpopulated areas.¹⁷²

¹⁶⁷ Id at 550. Congress had granted land to Wisconsin "for the use and support of a university" in 1838, 5 Stat 244 (June 12, 1838), but the precedent was not on point. In the first place, Wisconsin encompassed additional public lands whose value might be enhanced by the existence of an institution of higher learning. Furthermore, the grant was made while Wisconsin was a territory, over which only Congress had legislative power.

¹⁶⁸ See 12 Stat 503 (July 2, 1862). See also 26 Stat 417 (Aug 30, 1890).

¹⁶⁹ See James Buchanan, Veto Message (June 22, 1860), in Richardson, ed, *5 Messages and Papers of the Presidents* 608 (cited in note 10).

¹⁷⁰ See 5 Stat 453, 455–56, §§ 9–10 (Sept 4, 1841). This was not the first time Congress had taken pity on the plight of trespassers who had invested sweat equity in developing the Government's land. Earlier preemption statutes, however, had only forgiven past trespasses, not invited additional ones in the future. See Robbins, *Our Landed Heritage* at 50 (cited in note 17) (discussing the passage and subsequent renewals of the Preemption Act of 1830). For a brief consideration of the history and policy of preemption laws, see President Van Buren's First Annual Message (Dec 5, 1837), in Richardson, ed, *3 Messages and Papers of the Presidents* 373, 388–89 (cited in note 10); for the strange politics of the 1841 provision see Robbins, *Our Landed Heritage* at 72–91 (cited in note 17).

¹⁷¹ For one example of a homestead proposal, see HR 7, 32d Cong, 1st Sess (June 3, 1852), in *A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774–1875*, online at <http://memory.loc.gov/ammem/amlaw/lwhbsb.html> (visited May 15, 2003).

¹⁷² In the later years of this struggle the vote on these proposals was almost perfectly divided on sectional lines. Southerners had discovered, it is said, that "free land meant free soil." Robbins, *Our Landed Heritage* at 109, 179 (cited in note 17). A Canadian newspaper neatly summed up the reason: "The most effective way to shut out slavery is to people the new lands . . . with men whose position places them in natural antagonism to the plantation system." See id at

Opponents attacked the homestead bills on grounds familiar to those who have followed what happened to land grants for agricultural colleges and care of the insane. To President Buchanan those precedents were squarely in point. In his veto of the Morrill bill he had made clear that to "dispose of" the public lands meant to sell them, not to give them away; in the case of homesteads, the nominal consideration of twenty-five cents per acre (to be paid at the end of five years) was "so small that [the transaction] can scarcely be called a sale."¹⁷³ Beyond that, Buchanan had nothing new to say on the constitutional question; he contented himself with quoting the meaty parts of his veto message of the year before.¹⁷⁴

But the homestead bill was not, as Buchanan imagined, a carbon copy of the ill-fated bills to finance insane asylums and agricultural schools. It differed in one critical respect, as repeatedly emphasized by its most irrepressible advocate, Representative (and then Senator) Andrew Johnson of Tennessee.¹⁷⁵

Johnson, the reader knows, would later bear the dubious distinction of being the first President ever impeached. A staunch Unionist who would remain at his congressional post after his state had attempted to secede, he would incur the wrath of congressional radicals by opposing on powerful constitutional grounds their efforts to abolish civilian government in ten southern states. When we first encounter him in the 1840s, Johnson was a green populist legislator with a penchant for demagoguery.¹⁷⁶ But his homestead project was a worthy one, and he defended it with admirable tenacity and skill.

209, quoting an editorial from the *Montreal Herald* as reprinted in the *New York Tribune*, May 26, 1862.

¹⁷³ Buchanan, Veto Message (June 22, 1860) at 609 (cited in note 169).

¹⁷⁴ *Id.* at 609–11.

¹⁷⁵ See *Cong Globe*, 32d Cong, 1st Sess, Appendix at 518 (Apr 29, 1852) (Virginia Rep Fayette McMullen) (giving principal credit for the progress of homestead legislation to Johnson, "for having had the head to conceive, and the energy and perseverance to consummate, so important and philanthropic a measure").

¹⁷⁶ Johnson's first major speech in the House, in 1844, was a tasteless defense of slavery replete with biblical citations and racial slurs. In 1846 he proposed that no federal officer be permitted to serve longer than eight years and that appointments be apportioned among the states according to population. Later the same year, attempting to tar the Whig Party with the discreditable Hartford Convention, he impugned the loyalty of those who questioned the legitimacy of the Mexican War. In 1851 and again in 1852 he proposed a constitutional amendment to limit federal judges to twelve-year terms. See *Cong Globe*, 28th Cong, 1st Sess 212–14 (Jan 31, 1844) (defense of slavery); *Cong Globe*, 29th Cong, 1st Sess 192–93 (Jan 13, 1846) (federal officer limits); *Cong Globe*, 29th Cong, 2d Sess 38–40 (Dec 15, 1846) (Mexican War); *Cong Globe*, 31st Cong, 2d Sess 627 (judicial term limits); *Cong Globe*, 32d Cong, 1st Sess 443 (judicial term limits). Even with respect to homesteads Johnson would make the aberrant argument that the Constitution *required* Congress to distribute land to settlers free of cost, on the ground that the land belonged neither to the United States nor to the states but to the people. See *Cong Globe*, 31st Cong, 1st Sess, Appendix at 950–51 (July 25, 1850) ("Government ha[s] no authority . . . under the Constitution . . . to withhold the usufruct of the soil from its citizens. Man cannot live without

The best congressional debate on the constitutionality of homestead legislation took place in the House of Representatives during the Thirty-Second Congress, in 1852. The bill, as usual, was Johnson's.¹⁷⁷ Democrat John Dawson of Pennsylvania supported it with the broad argument that Congress could dispose of the public lands for any reason it liked¹⁷⁸—an argument that Presidents Pierce and Buchanan would rightly reject in connection with asylums and colleges in the next few years. Thomas Averett of Virginia protested on grounds later to be invoked by Pierce and Buchanan: The purpose of the constitutional provision was to provide a source of revenue to discharge government obligations; Congress had no power to give away the public lands.¹⁷⁹ For those who agreed with Averett that Congress must receive something in return for its land, Joseph Chandler of Pennsylvania had an answer: There could be no better compensation for federal grants than settlement, and under the bill "no man shall come into possession of a single acre of the soil until he enters upon its occupation or improvement."¹⁸⁰

Standing alone, this argument was unconvincing. It was not enough to sustain the constitutionality of homestead grants that the Government got what it wanted in return. It would have got lunatic asylums and agricultural schools if grants for those purposes had been approved. What was crucial was whether what the government got was something it had constitutional power to promote. It was still essential to show that settlement and cultivation of the public domain were necessary and proper to the exercise of some federal power.

Indeed, several Representatives proceeded to show just that. Johnson began the demonstration, taking California as an example. California had been acquired under the treaty power. Why? "[F]or settlement and cultivation."¹⁸¹ Having acquired land in California, Congress was empowered to dispose of it—to promote the purposes for which it was acquired.

Is not the passage of a law to induce settlement and cultivation carrying out one of the highest objects contemplated by the Constitution in regard to the acquisition of territory? . . . [I]f the great object of the acquisition of territory is settlement and cultivation,

the use of the soil; and Government cannot, in compliance with first principles, withhold the essentials of life from the people.").

¹⁷⁷ See HR 7 (cited in note 171); for Johnson's introduction of the bill in the House, see Cong Globe, 32d Cong, 1st Sess 58 (Dec 10, 1851).

¹⁷⁸ See Cong Globe, 32d Cong, 1st Sess at 670 (Mar 3, 1852).

¹⁷⁹ See *id* at 1018 (Apr 1, 1852). See also Cong Globe, 32d Cong, 1st Sess, Appendix at 582–85 (Apr 21, 1852) (Texas Rep Volney E. Howard).

¹⁸⁰ Cong Globe, 32d Cong, 1st Sess 1021 (Apr 8, 1852).

¹⁸¹ Cong Globe, 32d Cong, 1st Sess, Appendix at 528 (Apr 29, 1852).

to give power and potency to the country, is it not strange that, under that other provision of the Constitution "to dispose" of the territory, you cannot dispose of it to accomplish and carry out the very object for which you acquired it?¹⁸²

That the treaty power authorized the acquisition of territory had been accepted ever since the Senate approved the Louisiana treaty in 1803;¹⁸³ Johnson was right that it was not unreasonable to interpret Article IV to permit disposition of property for the purpose for which it had been acquired.

Other speakers applied the same argument to lands that had been ceded to the Federal Government by the states. "The very object for which the cessions were originally sought," quoth David Disney of Ohio, "was for the purpose of causing this territory to be settled, and formed into republican States."¹⁸⁴ Mississippi's John Freeman expanded on this theme:

The object of the States in ceding the lands was, first, to pay the debt incurred by the war of the Revolution, and, second, to settle the public lands and construct them into separate republican States. Now, the debt of the war of Independence has been paid, and the Treasury reimbursed for the purchase of the lands; and I maintain that the Constitution, in connection with the articles of cession, authorizes Congress *to dispose, of* and make all needful rules and regulations in regard to this land, for the purpose of building up the new States of the Confederacy. . . .

Thus the Government has the power to settle these lands. And in order to encourage their settlement, we have the right to grant one hundred and sixty acres to each actual settler. And why? I do not sustain the bill upon the ground that we have the right to convert the Federal Government into a great alms-house for the support of the poor and indigent. . . . I sustain the principle of the bill on the ground that we have the right to pay for public services rendered. . . .¹⁸⁵

¹⁸² Id.

¹⁸³ See Currie, *The Jeffersonians* at 95–114 (cited in note 2).

¹⁸⁴ Cong Globe, 32d Cong, 1st Sess 1283 (May 6, 1852). See also Disney's elaboration of this argument, id at 1312–13 (May 10, 1852).

¹⁸⁵ Id at 1283–84 (May 6, 1852). I have divided the quotation into paragraphs for purposes of clarity. See also id at 1312 (Missouri Rep Willard Hall):

For what purpose has any Government upon the face of God's earth ever acquired territory? Was it not solely and exclusively for the purpose of peopling it? . . . And, sir, we have recognized that this is the only purpose for which we have acquired this [territory], because, from time to time, we have passed laws with reference exclusively to its settlement. We have passed preemption laws to induce people to go and live upon the land. We have established a credit system at one time, and then we have established the cash system at another time,

A splendid argument, n'est-ce pas? Opponents of various donations of public lands had argued, with considerable success, that the scope of Congress's power to dispose of property was defined by the purposes for which the land was acquired.¹⁸⁶ As they had argued, those purposes included the raising of revenue to defray expenses incident to the execution of its other powers. But what the defenders of homesteads added to the debate was a recognition that this was not the only purpose for which territory had been acquired; another was to promote settlement and the erection of new states.

The Northwest Ordinance itself made this clear. The territory was to be divided into states; and there could be no states without inhabitants. Disposing of land to encourage settlement promoted the original purpose of admitting additional states. But the 1780 resolutions of the Continental Congress, paraphrased but not quoted by Representative Freeman, are even more directly in point.

On September 6, 1780 that Congress passed a resolution urging the several states to surrender their Western claims, as New York had already done, "for the general benefit," and to promote "the stability of the general confederacy."¹⁸⁷ A month later Congress enacted the clincher:

Resolved, that the unappropriated lands that may be ceded or relinquished to the United States, by any particular states, pursuant to the recommendation of Congress of the 6 day of September last, shall be 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 . . . ;

That the said lands shall be granted and settled at such times and under such regulations as shall hereafter be agreed on by the United States in Congress assembled¹⁸⁸

It was in vain that Georgia's Alexander Stephens protested that neither the Virginia, the North Carolina, nor the Georgia cession ex-

all the time selling the land at a comparatively low price, . . . with a view of encouraging people to go and live upon it. If we acquire these lands for the purpose of peopling them, I ask the gentleman from Virginia [Mr. Averett] . . . why Congress cannot, in the exercise of a sound discretion, pass a bill, the object of which is to settle the public lands?

¹⁸⁶ See, for example, *id* at 1315 (Rep Howard).

¹⁸⁷ Resolution (Sept 6, 1780) at 806–07 (cited in note 25). The resolution also noted the necessity of strengthening the public credit—an oblique reference, perhaps, to the utility of land as a source of public funds. Representative Disney would later explain what Congress had in mind by suggesting that retention of state claims would endanger our security: "[T]he possession of such large tracts made one state [Virginia] too powerful for the safety of the rest." Cong Globe, 32d Cong, 1st Sess 1313 (May 10, 1852). See also *id* at 1283 (Ohio Rep David Disney).

¹⁸⁸ Resolution (Oct 10, 1780), in 18 *Journals of the Continental Congress, 1774–1789* 914, 915 (GPO 1910) (Gaillard Hunt, ed).

pressly mentioned settlement.¹⁸⁹ As the states had unanimously agreed in Congress, settlement was one of the express purposes to which the land was to be applied; and this history informs the meaning of the corresponding later provision authorizing the new Congress to dispose of the public lands.

In short, Buchanan was right about agricultural colleges, but he was wrong about homesteads. For the two proposals were by no means as analogous as he believed they were; homesteads stood on a far firmer constitutional basis.¹⁹⁰

CONCLUSION

What do we learn from this little excursion into the musty recesses of mid-nineteenth-century congressional and executive materials? For some of us knowledge is its own justification. We read history, as others climb Mt. Everest, because it is there. Goethe made fun of the sycophantic Wagner, who gauchely announced that he wanted to know *everything*;¹⁹¹ I think he stated a fundamental tenet of the academic creed.

All right, some bits of knowledge are more interesting, or more useful, or more valuable than others. For those who care about the Constitution, it can never hurt to learn more about what people have thought it means. That is especially true when, as in the case of public lands, the provisions in question have largely disappeared from public view: The inquiring reader may actually learn something she didn't already know. It is even more true when the opinions one encounters are those of Presidents and members of Congress whose duty it was to construe the relevant provisions and whose interpretations actually determined what the Constitution would mean in practice.

You will notice that I cite no judicial decisions of the time respecting the questions discussed in this Article. That is because there weren't any. The original understanding of the property clause, like that of so many other constitutional provisions, was hammered out in the halls of Congress and in the President's House, not in the courts. Examination of the public-land controversies brings home to us once again the centrality of extrajudicial interpretation.

¹⁸⁹ See Cong Globe, 32d Cong, 1st Sess 1313-14 (May 10, 1852). See also id at 1314 (South Carolina Rep Joseph Woodward) (arguing that although settlement may have been the reason for the cessions, their condition was the payment of debts).

¹⁹⁰ Like land-grant colleges (and the Pacific railroad), homesteads were finally authorized under Republican auspices in 1862. See 12 Stat 392 (May 20, 1862) (homesteads); 12 Stat 489 (July 1, 1862) (Union Pacific); 12 Stat 503 (July 2, 1862) (colleges).

¹⁹¹ "Zwar weiß ich viel, doch möchte ich *alles* wissen." J. W. von Goethe, *Faust* Part I, Act I, Scene 1 in Falck Lebahn, ed, *Faust: A Tragedy* 25 (Longman, Brown 1853) (emphasis added) (with translation at 215).

The meaning of the property clause also mattered in the practical sense. The vastness of the public domain ensured from the first that it would play an enormous role in our economic and political history. It continues to do so today, though constitutional questions no longer dominate discussions of public-land policy. In the first six decades of the nineteenth century, when other federal powers were more narrowly understood than they are today, the public lands were a giant reservoir of potential congressional influence on domestic policy in the capacious fields otherwise reserved to the several states. It is thus not surprising that in those days public-land policy became a major battlefield in the unrelenting struggle between advocates of state and of federal authority.

Not only do the controversies here considered inform us how responsible federal officers construed the property clause; they likewise help us to determine how it ought to be construed. Here, as in so many of its provisions, the Constitution proved not so much a blueprint as a preliminary sketch. Whatever vicissitudes the clause may since have undergone, there is much profit in exploring the question of what it was intended to mean, and on that question I find the presidential and congressional arguments extremely helpful. As always they were variable in quality; as usual some of them were very good. On this issue, as on so many others that arose outside the courts during the early years of the Constitution, it is difficult to imagine what could profitably be said beyond what was said by someone in Congress or the executive branch during the period of this study.¹⁹²

Nor do I think much more is needed to make up one's mind as to the best interpretation of the property provision. Southern Democrats, pathologically apprehensive about potential federal assaults upon slavery, tended to take what seem to me excessively cramped views of congressional authority over such matters as internal improvements, protective tariffs, and the national bank.¹⁹³ Nervous Northern Democrats, terrified of driving the bullying Southerners from the Union, tended to support them, and on the whole the country was the worse for it, in my opinion. With respect to the public lands, however, I believe the Southern position was basically correct, for reasons suggested during the debates we have just been reading.

The power to tax was meant to finance activities otherwise within federal authority, not to enable Congress to meddle with matters that in other respects were none of its business. That is what Madison said, for example, in 1791. He proved it by showing that the General Wel-

¹⁹² Cf. Currie, *The Jeffersonians* at 344 (cited in note 2) (making the same point as to internal improvements and the conditional admission of states).

¹⁹³ See *id.* at ch 9; Currie, *Democrats and Whigs* at chs 1, 3–4 (cited in note 16).

fare Clause had been copied from the Articles of Confederation, where it had plainly served only to identify the source of funds to cover expenditures elsewhere authorized, not to confer an independent power to spend; the Framers in Philadelphia substituted taxation for requisitions on the states but said nothing to indicate any intention to alter the incidental nature of federal spending.¹⁹⁴ Land revenues, in turn, were essentially regarded as an alternative to taxes. Homesteads, to be sure, could easily be supported on the ground that they served to promote settlement of the territories, which was a second explicit purpose of the acquisitions themselves. Grants to finance railroads and other infrastructural improvements serving the affected areas could plausibly be defended, as they were, as enhancing the value of the remaining corpus. Beyond this, however, Congress could not properly go. The lands had been acquired for federal purposes; they could not simply be given away to the states. Finally, there was no more justification for lavishing land revenues on such matters as agricultural education or care of the insane than for expending tax money for the same purpose; neither was necessary or proper to any legitimate exercise of federal authority.

The Supreme Court long ago rejected the interpretation I have just suggested. Nice distinctions respecting Congress's power to dispose of the public lands have long since been washed away. The question is no longer for what purposes Congress may disburse revenue from either land or taxes—anything of national as contrasted with local interest is now fair game—but rather what conditions it may attach to the grants it elects to make¹⁹⁵—a question dealt with only glancingly in the earlier debates considered in these pages. One of these days the authors of the modern counterrevolution against unlimited federal power will have to face the question whether it really is consistent with the new federalism to permit Congress to circumvent limitations on federal regulatory authority by the simple expedient of making the states offers they cannot rationally refuse.¹⁹⁶ Given the respect for precedent practiced by at least two members of the narrow current

¹⁹⁴ The Constitution of the short-lived Confederate States of America, adopted in 1861, was correct in its translation of the General Welfare Clause, giving Congress power to lay and collect taxes "to pay the debts, provide for the common defense, and carry on the Government of the Confederate States." CS Const Art I, § 8, cl 1, in *Statutes at Large of the Provisional Government of the Confederate States of America* 1, 4 (1864).

¹⁹⁵ See *Butler*, 297 US at 53–56, 77–78 (disallowing the condition that farmers reduce their output); *South Dakota v Dole*, 483 US at 205 (upholding the condition of raising the state drinking age).

¹⁹⁶ Compare *United States v Lopez*, 514 US 549, 551–52, 567–68 (1995) (holding Congress without authority to forbid the possession of guns in or near schools), with *South Dakota v Dole*, 483 US at 205, 211–12 (upholding a grant for highway construction on condition that the drinking age be raised).

majority, however,¹⁹⁷ the Court seems most unlikely to go back to Mr. Madison's original conception of the proper subjects of federal largesse.

The historical record nevertheless stands as a yardstick against which to measure the Court's performance, in terms not only of the question of congressional authority but also of the interpretive methodology by which it should be resolved. For another lesson of the materials we have examined is that virtually everyone who participated in the discussion assumed that the meaning of the contested provisions should be determined on the basis of their text, their history, and their purpose. There is nothing very remarkable in that, except that so many legal scholars appear to have different assumptions today. Blackstone had said it in his widely accepted treatise, and both Marshall and Story had repeated it for the Supreme Court: Written laws should be so interpreted, consistently with their language, as to achieve the ends for whose effectuation they were adopted.¹⁹⁸

It was this understanding that underlay the bulk of the arguments made in the antebellum debates over disposition of the public lands. Proponents of unencumbered congressional authority relied on the unrestricted language of the constitutional provision; advocates of limited authority relied upon historical evidence that land revenues were meant to be a substitute for taxes; supporters of homestead legislation pointed to the additional purpose of promoting settlement. Thus the public-land debates confirm once again, as I have said elsewhere, that in the early days just about everybody was what is now called an originalist in constitutional interpretation.¹⁹⁹ What that tells us about the proper approach to interpretation today is itself a question worth debating; if studies such as the present one help to stimulate that discussion, I shall be pleased.

Finally, like other studies of constitutional history, the public-lands controversy deepens our acquaintance with a number of fascinating political actors and introduces us to others whom we may not have known at all. Great names like Henry Clay and John C. Calhoun figure in our story, as they so often did during the forty years in which, together with Daniel Webster, they collectively dominated the deliberations of Congress. Behind his misty pedestal as the personification of democracy and martial valor we begin to get a glimpse into Andrew Jackson's mind, and we are afforded a new perspective on that dogged champion of popular sovereignty, Stephen A. Douglas. Others more

¹⁹⁷ See, for example, *Lopez*, 514 US at 574 (Kennedy and O'Connor concurring).

¹⁹⁸ See William Blackstone, 1 *Commentaries* *59–61; *Gibbons v Ogden*, 22 US (9 Wheaton) 1, 188–89 (1824) (Marshall); *Prigg v Pennsylvania*, 41 US (16 Peters) 539, 610–11 (1842) (Story).

¹⁹⁹ See David P. Currie, *Prolegomena for a Sampler: Extrajudicial Interpretation of the Constitution, 1789–1861*, 44 Wm & Mary L Rev, Section III (forthcoming 2003).

dimly remembered played equally prominent roles and begin to take meaningful shape in the course of our reading: George Badger, Lewis Cass, Franklin Pierce, James Buchanan, Andrew Johnson. Some of the choicest lines, indeed, were spoken by some of the most obscure players: Andrew Butler, William King, George Pugh, David Disney, John Freeman. The wide dispersion of responsibility for extrajudicial interpretation reflected in these pages brings home to us some of the advantages of collective deliberation. Constitutional interpretation was not the exclusive province of superstars like Clay, Webster, and Calhoun; the whole was truly more than the sum of its parts.

If in addition, despite intervening developments in construction of the relevant provisions, others should find in the materials here considered lessons of substantive relevance to modern constitutional controversies, so much the better; I am happy to bequeath my findings to anyone who may find them useful.