A. Federal Powers Applied Through the Supremacy Clause

2. The Property Clause

For an argument that the decline of the Enclave Clause and the ascent of the Property Clause in the Supreme Court has moved generally in parallel with the evolution of congressional policy over federal lands from a vendor to a custodian to an active manager, see Eugene R. Gaetke, *Refuting the "Classic" Property Clause Theory*, 63 N.C. L.REV. 617 (1985). For a comprehensive history and ringing endorsement of a broad interpretation of the Property Clause, see Peter Appel, *The Power of Congress "Without Limitation": The Property Clause and Federal Regulation of Private Property*, 86 MINN. L.REV. 1 (2001). For an argument that the Property Clause frames an attitude through which the Supreme Court has fashioned a kind of constitutional common law that favors retention of federal land in national ownership, national over state and local authority, and environmental conservation, see John D. Leshy, *A Property Clause for the Twenty–First Century*, 75 U. COLO. L.REV. 1101–25 (2004).

The ecological effects of wild horse and burro grazing on western public lands exacerbate some of the climate-change harms to vegetation, soil, hydrology, and other wildlife. Robert L. Beschta et al., *Adapting to Climate Change on Western Public Lands: Addressing the Ecological Effects of Domestic, Wild, and Feral Ungulates*, 51 ENVTL. MGT. 474 (2013).

The financial costs to the BLM for implementing the WFRHBA continue to rise. That issue, as well new technology related to contraceptive tools to reduce feral animal populations, are addressed in Robert Garrott & Madan Oli, *A Critical Crossroad for BLM's Wild Horse Program*, 341 SCIENCE 847 (2013).

Nuclear Waste Disposal

Nordhaus, McBride, and Epifani, *Nuclear Power at the Crossroads*, 30 ENVTL. FORUM, Mar./Apr. 2013 at 34, discusses both recent developments in the Yucca Mtn. dispute as well as their relationship to revival of the atomic power industry.

Property Clause Power over non-federal lands:

Other decisions reach similar results as Minnesota v. Block. *In Free Enterprise Canoe Renters Association v. Watt*, 549 F. Supp. 252 (E.D. Mo. 1982), *aff'd*, 711 F.2d 852 (8th Cir. 1983), the court relied on Minnesota v. Block to hold that the National Park Service could prohibit the use of state roads within the Ozark National Scenic Riverway for canoe pickups by canoe renters who lacked a Park Service permit. *United States v. Lindsey*, 595 F.2d 5 (9th Cir. 1979) was a repeat of *Alford*, upholding the prosecution of a person who built a campfire without permission on state land within the boundaries of Hells Canyon National Recreation Area, contrary to a Forest Service regulation.

3. Other Constitutional Authorities

On the relative reach of the Commerce and Property clauses, see Columbia River Gorge United—Protecting People and Property v. Yeutter, 960 F.2d 110, 113–14 (9th Cir. 1992) (federal legislation authorizing the establishment of a bi-state commission to regulate land use along the scenic Columbia River Gorge, which includes federal, state, and private lands along the river, was upheld under the Commerce Clause, the court noting that the Property Clause might also have been used, although it did not decide that question).

See also Peter Appel, *The Power of Congress "Without Limitation": The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1, 122 (2001) ("Congress could prohibit individuals from harming endangered and threatened species off federal property if members of those species sometimes occupy federal lands and if Congress reasonably concludes that extraterritorial preservation of such species preserves the overall value of federal lands"); Holly Doremus, *Patching the Ark: Improving Legal Protection of Biological Diversity*, 18 ECOLOGY L.Q. 265, 292 (1991) (Kleppe's reasoning "could justify federal protection of virtually any biological resource").

For other engaged judicial opinions on how the Commerce Clause supports (or limits) the reach of the ESA, see *National Assoc. of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (Endangered Species Act's application to protect a species of fly with a small, wholly intrastate habitat was within Congress's constitutional power to regulate interstate commerce); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000) (same result with respect to prohibition of taking endangered red wolf on private land, with Judge Luttig explicitly acknowledging in a dissent that Congress "could plainly regulate" in the area of endangered species under the Property Clause, at 509).

See Michael C. Blumm and George Kimbrell, *Gonzalez v. Raich, the Comprehensive Scheme Principle, and the Constitutionality of the Endangered Species Act*, 35 ENVTL. L. 491 (2005).

B. Federal Preemption and Intergovernmental Immunities

1. Preemption

Robert Fischman and Angela King, *Savings Clauses and Trends in Natural Resources Federalism*, 32 WILLIAM AND MARY ENVIRONMENTAL LAW & POLICY REVIEW 129 (2007) describe the various interpretive approaches courts apply to make sense of savings clauses.

2. Intergovernmental Immunities and Cooperative Federalism

On the tax consequences of North Dakota's limitation on the term of conservation easements, See Jon J. Jensen, *Limitations on Easements in North Dakota May Have Unintended Consequences for Qualified Conservation Easement Charitable Contributions*, 87 N.D. L. Rev. 343 (2011).

Little Lake Misere Land Co. and North Dakota v. United States are discussed in John D. Leshy, *A Property Clause for the Twenty–First Century*, 75 U. COLO. L.REV. 1101, 1117–23 (2004), as examples of the Court developing a kind of "constitutional common law" that calls close questions in favor of national rather than state or local control over national lands (an idea contrary to the general notion that most property law in the country is state law), and calls close questions in favor of conservation rather than development of those lands.

On federal reserved water rights of the type not recognized in state water law, see John D. Leshy, *Water Rights for Federal Land Conservation Programs: A Turn-of-the-Century Evaluation*, 4 WATER L.REV. 273 (2001).

On adverse possession, *compare Symposium, Time, Property rights, and the Common Law*, 64 WASH. U.L.Q. 793, 832-33 (1986) (Prof. Ellickson discussing reasons for not allowing adverse possession of government lands) *with* Walter Q. Impert, *Whose Land Is It Anyway? It's Time to Reconsider Sovereign Immunity from Adverse Possession*, 49 UCLA L. REV. 447 (2001).

Cooperative Federalism

In Lawrence County v. Lead–Deadwood School Dist., 469 U.S. 256 (1985), the Court held that counties are free to spend PILT funds for any governmental purposes, and that the states cannot place restrictions on such county expenditures. The Court reviewed the legislative history showing concern for "the local governments that bore the brunt of the expenses associated with federal lands, such as law enforcement, road maintenance, and the provision of public health services."

Other forms of federal-lands-based aid to state and local governments are somewhat more obscure. The Federal Highway Act has traditionally increased the federal contributing share for construction of interstate and other federal highways in any state where the percentage of federal and Indian landholdings in that state (other than national forests, parks, and monuments) exceeded 5 percent of the state's total land area. 23 U.S.C. § 120.

The Congressional Research Service prepares useful reports describing various federal revenue sharing programs of land management agencies. The most recent is M. Lynne Corn, PILT (Payments in Lieu of Taxes): Somewhat Simplified (7-5700 RL31392) (July 25, 2012).

On place-based legislation, see John Nagle, *Site-specific Laws*, 88 NOTRE DAME L.REV. 2167 (2013); Martin Nie & Michael Fiebig, *Managing The National Forests Through Place-Based Legislation*, 37 ECOLOGY L.Q. 1 (2010).

Delegation

The emergence of public-private collaborations has scarcely been confined to federal lands and resources. Compare "negotiated rulemaking" that was somewhat in vogue in administrative law circles a few years back. There is a burgeoning general commentary on the subject; e.g., Jody Freeman, *Collaborative Governance in the Administrative State*, 45 U.C.L.A. L.REV. 1 (1997) (collecting many sources). For a discussion of some recent federal lands collaborative exercises, see Keeping Faith with Nature 273–327 (2003).