The County Supremacy Movement: The Mendacious Myth Marketing

by

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TABLE OF CONTENTS

I. INTRODUCTION

The Trojan Horse was a trick—a device that deceived the men of Troy into losing the war after they had won all the battles. The story of the Trojan Horse was one of many woven together by Homer in *VERGIL'S Aneid* to make the myth of the Trojan War.[1] The genius of Homer transformed a prosaic, never—ending internecine skirmish into a classic masterpiece that still enthralls us.

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1. VERGIL'S *AENEID* AND FOURTH ("MESSIANIC") ECLOGUE IN THE DRYDEN TRANSLATION 31-59 (Howard Clarke ed., Penn. State Univ. Press 1989).

The creation of our nation was attended by embellished occurrences which fall together into the myth of the United States; a workable myth that has shaped our ways to make for the longest enduring government in the world. One myth-maker was the Boston Tea Party, a madcap, sophomoric insult to a distant, imperious monarchy. The story of the Boston Tea Party started the fire that consumed British Colonialism.[2] This right to protest against the government became part of the Bill of Rights, that most important condition precedent to the adoption of the Constitution. In one form or another, there are Boston Tea parties still going on everyday in some part of America in infinite varieties of the constitutional right to seek a redress of grievances.

For the past century, the major grievances of many people living in the western United States have swirled about public lands owned by the United States. The "County Government Movement" promoting adoption of county ordinances asserting supremacy over public lands is the latest skirmish. Continuing controversy is inevitable and endemic when more than half of the land ownership in the twelve western states remains with the federal government as compared with only four percent in the other thirty seven continental states.[3] With the environmental interests regaining some influence in the new Clinton Administration, the private users of public lands through their Western Senators are fulminating about a new "War on the West" as they did with the Carter Administration.[4] "War within the West" is more apt. Beginning when geographer George Perkins Marsh raised concerns about excessive grazing and deforestation on public lands as early as 1864,[5] conservationists, including those living in the midst of apparent degradation, have been writing and talking about misuse and exploitation by private interests of public lands.[6]

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2. John Adams wrote in his diary that night (December 17, 1773): "This destruction of the tea is so bold, so daring, so firm, intrepid and inflexible, and it must have so important consequences, and so lasting, that I cannot but consider it an epochal in history." CATHERINE DRINKER BOWEN, JOHN ADAMS AND THE AMERICAN REVOLUTION 436 (1950).

3. PAUL J. CULHANE, PUBLIC LANDS POLITICS 45 (1981).

4. "Senator [Alan K.] Simpson [R.Wyo.] put it bluntly in a recent floor debate: 'We are defending a Western life style in this Administration's war on the West.' " Timothy Egan, *Wing Tip 'Cowboys' in The Last Stand To Hold On to Low Grazing Fees*, THE N.Y. TIMES, October 29, 1993, at A1, A8.

5. CULHANE, *supra* note 3, at 45 (*citing* GEORGE PERKINS MARSH, MAN AND NATURE: OR, PHYSICAL GEOGRAPHY AS MODIFIED BY HUMAN ACTION (1864)).

6. Works by prominent Western environmental writers expressing concerns about public lands include: WALLACE STEGNER & PAGE STEGNER, AMERICAN PLACES

The county supremacy movement is a new version of the Sagebrush Rebellion, which in turn was simply another spin on how to place the public lands under control of the private commercial users.[7] The Sagebrush Rebellion called for transfer of public lands to private ownership by ranchers with grazing permits. Such transfers would have given the basis for enforceable local control. The county supremacy movement originates in the same cattle country, but its remedy totally lacks any basis for legal enforceability. The county supremacy ordinances have the durability of cow chips. County supremacy is a gaseous myth. The methane falls mainly on the plain.

But it is folly to underestimate the political power of myths. A remarkable collection of powerful thinkers, in what became the United States in the late 18th Century, shaped the myth that became the United States. The fiery rhetoric came from Thomas Paine and Patrick Henry and the solid creative craftsmanship came from James Madison, Alexander Hamilton and John Adams. Thomas Jefferson was into both, and he had Homer's gift to describe the ideal in the present tense. Jefferson's myth is now, here and achievable.

"All men are created equal" begins the Declaration of Independence, a statement of principles that resonated around the world and still does. Two centuries later our government works best when its people and its elected officials are in agreement upon those high principles set forth by our deepest political thinkers, Thomas Jefferson, Abraham Lincoln, Martin Luther King.

In a democracy and perhaps to an even greater degree in all other types of governments, the direction is shaped by myths. The ongoing constant battle for the minds, hearts and guts of men and women is to form, initiate and then implement the most popular and shared myths. As the book, The Voice of the Coyote, so well exemplifies, not all myths are benign, noble, productive, peaceful, cohesive or sensible.[8] Some are just plain bad.

The county supremacy movement is the newest Western myth. It is a Trojan Horse, very different in fact from its outside appearances. It has been hauled into a host of mostly rural county courthouses. In June of 1993, the National Federal Lands Conference claimed to have 175 to 200 counties enlisted in the "county movement."[9] The good

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(1983); WALLACE STEGNER, THE SOUND OF MOUNTAIN WATER (1980); K. ROSS TOOLE, THE RAPE OF THE GREAT PLAINS (1976); WILLIAM VOIGHT, JR., PUBLIC GRAZING LANDS: USE AND MISUSE BY INDUSTRY AND GOVERNMENT (1976).

7. VOIGHT, *supra* note 6, at 8-9.

8. "To many tribes within its range, the coyote stood—and yet stands totteringly—as a god, more significant for cunning than for morals." J. FRANK DOBIE, THE VOICE OF THE COYOTE 265 (1961).

9. *Hope for the Future Why the County Government Movement was Born,*

news for those who fear Greeks (or cowboys) bearing gifts is that the soldiers inside the horse are as wooden and inoperative as the Trojan Horse itself.

II. FROM CO-OPTING TO CONFRONTATION IN CATTLE COUNTRY

The county supremacy movement originated in Catron County, 2,563 people in 6,897 square miles of high and dry cattle country in southwestern New Mexico.[10] The cattlemen, angered by threatened reductions in grazing allotments on federal lands, saw their traditional control over the local United States Forest Service and the Bureau of Land Management (BLM) slipping away.[11] From the time the West was won, the ranchers had run the range, both on their own land and on the land ostensibly in public ownership, by a combination of friendship and good-old-boy relationships with the forest ranger or BLM supervisor combined with intimidation of the occasional independent public employee who showed some concern over the condition of the land and the water instead of the cow.

The environmental tide that created a flood of new legislation at the national level in the 1970's has been battering the Western land management for two decades and finally is beginning to seep

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FEDERAL LANDS UPDATE (National Federal Lands Conference, Bountiful, Utah) June 1993, at 4. The National Federal Lands Conference is a "non-partisan, educational organization located in Bountiful, Utah," which has on its Advisory Council, Ron Arnold, the guru of the Wise Use Movement but which is primarily made up and driven by ranchers such as Wayne Hage fighting Bureau of Land Management and Forest Service reductions on grazing permits on federal lands. National Federal Lands Conference Brochure.

10. UPCLOSE, 1990 CENSUS SOURCE BOOK 837 (West 1991). The population dropped slightly from the 1980 census of 2,720, a factor that may have contributed to the disgruntlement of the County Commissioners. The county is named after Thomas B. Catron who had been United States District Attorney in territorial days and a major political power. WARREN A. BECK, NEW MEXICO, A HISTORY OF FOUR CENTURIES 164 (1982). Catron rose to power on his proven ability in court to defend private claims to land based upon fraudulently manufactured private land claim documents. *Id.* at 174-75. The fee was taken in land and in his career Catron owned or had an interest in at least thirty-four Hispanic grants totalling more than three million acres. PATRICIA NELSON LIMERICK, THE LEGACY OF CONQUEST 237-38 (1987).

11. The cowboy myth is powerful politics. In October of 1993 a filibuster by Western Senators to stop a rise in federal grazing fees held up the $12 billion Interior budget. Grazing permit holders numbered only 28,000 in 11 western states with a population of 50 million, but Senator Alan K. Simpson (R. Wyo.) characterized the filibuster as "defending a Western life style." Egan, *supra* note 4, at A1, A8.

through. There are new directions to reduce animal units months (AUM) and to recognize that "multiple use of public lands" could include recreation and wildlife.[12]

The cattlemen were losing control of the federal bureaucracy, but they still controlled and were part of the county government. So surfaced the disingenuous scheme to give the county government control of the federal lands and take back what was slipping away. Hence the Catron County Interim Land Use Policy Plan.[13]

The Catron County Interim Land Use Policy Plan was a land grab by which the county asserted jurisdiction, i.e., control, over all federal and state lands, waters and wildlife within the county.[14] The Catron County Plan directs that no federal agency may undertake a change in management or operation without approval by the county commissioners.[15] No acquisition of land or disposal can be made without county commissioner approval.[16]

A stated objective is to promote an actual reduction in federal and state ownership by disposal of "isolated tracts," compelling sale to private interests.[17] No wilderness is allowed[18] and no wild and scenic rivers may be created without county concurrence.[19] The county is the designated planning agency for all future actions on state and federal lands.[20]

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12. DENZEL & NANCY FERGUSON, SACRED COWS AT THE PUBLIC TROUGH, 228-31, (1983); RANDAL O'TOOLE, REFORMING THE FOREST SERVICE 166-69 (1988).

13. Catron County, N.M., Ordinance 004-91 (May 21, 1991), *reprinted in* National Federal Lands Conference Update 1 (August 1992) [hereinafter Catron County Plan]. James W. Catron, presumably a descendant of Thomas Catron, is retained attorney for Catron, Sierra and Torrance Counties. He participated in the drafting of the Catron Plan and is an outspoken promoter of the County Government Movement. SOUTHWEST ENVIRONMENTAL CENTER, A REPORT ON THE COUNTY MOVEMENT 15 (Sept. 30, 1992). Jim Catron was described by a conservationist attending a Federal National Lands Conference meeting in Kalispell, Montana, on March 13, 1993, as "a fiery speaker whose scornful sneer grew in intensity during the day." Memorandum from Steve Thompson to Interested Individuals (March 17, 1993) (on file with author). Confrontation must run in the Catron genes. Thomas B. Catron was "[f]requently accused of unprofessional conduct as a lawyer, of corruption as a politician, and intimidation and threats as a political boss, he made almost as many bitter enemies as he had close friends." BECK, *supra* note 10, at 301.

14. Catron County Plan, *supra* note 13, at 1.

15. Catron County Plan, *supra* note 13, at 2.

16. Catron County Plan, *supra* note 13, at 2.

17. Catron County Plan, *supra* note 13, at 2.

18. Catron County Plan, *supra* note 13, at 4.

19. Catron County Plan, *supra* note 13, at 2.

20. Catron County Plan, *supra* note 13, at 2.

III. THE CONTINUING AMERICAN REVOLUTION

As with state rights, county rights have a simplistic appeal. Rebelling against government has been in the hearts of the ordinary American citizens ever since Colonial days. To a considerable degree, the American Revolution never came to an end. No sooner had the British left than we began bashing the Continental Congress. Shay's Rebellion led to the Philadelphia Convention and the creation of the Constitution for the United States.[21] The creation of the Constitution was a rebellion against the Continental Congress and the existing government.

Even in times of very popular presidents—George Washington, James Monroe, Teddy Roosevelt, Franklin Roosevelt—there have always been strident dissenters complaining about the federal government. There is a stream, that sometimes widens into a river, flowing through our history from the Whiskey Rebellion through the Know Nothing movement to the Populists to Ross Perot. The best government is the least government. The next best government is local government. Those people back there don't understand our territory or our ways.

The authors of the Catron County Plan came up with the mantra of "custom and culture," words of indefinite and uncertain meaning.[22] To an anthropologist whose profession is a study of customs and of culture, the combination of the terms in the Catron County Plan is meaningless.[23]

In the 9,000 years of prehistory in which traces of Native Americans can be identified in the Southwest, there was no single culture or custom but rather an ever changing and shifting of ways in which people lived.[24] White Men, who conquered the American

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21. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 at 412-13 (1969).

22. The words "custom and culture" appear in the introduction, the preamble and under "Land Disposition," "Agriculture," "Timber and Wood Products" (twice) and "Cultural Resources, Recreation, Wildlife, and Wilderness." Catron County Plan, *supra* note 13, at 1-3.

23. In Boundary Backpackers v. Boundary County, No. CV93-9955 (Idaho 1st Jud. Dist. Ct. Jan. 27, 1994), one of the plaintiffs is Lew Langness, Ph.D., a retired U.C.L.A. anthropology professor. In an affidavit dated October 4, 1993, Prof. Langness described any attempt to define "custom and culture" in the county or to direct planning in accordance with custom and culture as completely lacking scientific, political or legal validity. Affidavit of Lew Langness at 3, Boundary Backpackers v. Boundary County, No. CV93-9955 (Idaho 1st Jud. Dist. Ct. Jan. 27, 1994).

24. In his chapter on the Indians of the Southwest, Alvin M. Josephy, Jr.

West and sought to eradicate the natives and their ways of life, had an ephemeral culture: light, multiply and move on.[25]

It is entirely appropriate that the major commercial, mythic figure for the Southwest is Billy the Kid, a reckless, marauding, gun-slinging juvenile delinquent who died early without any significant accomplishments to his name other than a number of unmotivated murders. This reckless punk lacked even the social affability to lead or participate in a gang yet he idealized rebellion, albeit, without a cause.[26] The promoters of the county supremacy movement sought, as all myth-makers must, to find and claim deep historical roots. It is easier to believe in an idea given rebirth, to believe in the good old days that never were.

IV. STATES SUPREME UNDER ARTICLES OF CONFEDERATION

The National Federal Lands Conference claims the origin of its effort to protect the private, commercial utilization of public property in the United States Constitution.[27] The historical roots exist for the county supremacy movement, but they are in the Articles of Confederation,[28] not the Constitution. The Articles of Confederation were agreed upon in the Continental Congress by the 13 colonies,

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identifies seven cultures. ALVIN M. JOSEPHY, JR., THE INDIAN HERITAGE OF AMERICA 146 (1968), The identifiable prehistory each evolved from a previous culture and then in turn evolved into another up to the first exposure to the Spaniards: Desert Culture, Mogullon Culture, Anasazi Culture, Hohokam Culture, Hakataya Culture, Pueblo Culture and Cochise Culture. These cultures were adapted and modified by the different tribes and sub-tribes. *Id.* at 146-180.

25. "Rather than 'settling' the region, mining rushes picked up the American West and gave it a good shaking . . . . " LIMERICK, *supra* note 10, at 100.

26. In an article entitled *Billy The Kid Country*, biographer Robert M. Utley observed that "[r]espectable New Mexico historians lament the public's obsession with Billy The Kid." Robert Utley, *Billy The Kid Country*, AMERICAN HERITAGE, Apr. 1991, at 65. Billy The Kid was portrayed as captain of a fifty man outlaw gang and the governor put a $500 price upon his head, but Utley says he was in reality only a small time criminal involved in "horse thievery, mail robbery and maybe counterfeiting." *Id.* at 76.

27. "Madison provided in Federal Papers No. 45 a lengthy discussion about the sovereignty of the state versus the federal. He stated that, in conflict, the state must be superior as it is the entity that creates the federal government, and the people must be superior to the state, as it is the people who created the states. Thus, in the design of the Founding Fathers, it was the people who were the sovereigns of our nation." Wray Schildkrecht, *Hope For The Future - Why The County Government Movement Was Born*, FEDERAL LANDS UPDATE (Nat. Fed. Lands Conf., Bountiful, Utah) June 1993, at 1.

28. THE ARTICLES OF CONFEDERATION (U.S. 1777).

now become states on November 15, 1777, after commencement of the American Revolution. The combative purpose was stated in Article III:

> The said states hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their Liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.[29]

This system of government did not work well in wartime. The inability of the Continental Congress to provide leadership and, more important, adequate funding to support the army made the achievements of George Washington and the ultimate victory all the more remarkable.[30] When peace came, the national government fell apart, or more accurately, never came together. In his speeches to the New York Ratifying Convention in June of 1788, Alexander Hamilton said he found in the existing government "weaknesses to be real, and pregnant with destruction."[31]

The foremost weakness was the total independence of each state. The financing arrangement of the national government was similar to what exists in the United Nations today and was subject to the same erratic compliance. Congress would make requisitions for funds pro-rated among the several states. It was up to the states to comply or not according to their desires and financial abilities. When Hamilton was speaking, New York and Pennsylvania were the only states which had fully complied with the requisitions issued by the Continental Congress.[32] All the other states were delinquent and New Hampshire and North Carolina had paid nothing at all.[33]

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29. THE ARTICLES OF CONFEDERATION (U.S. 1777), *reprinted in* 1 THE COMPLETE ANTI-FEDERALIST 101 (Herbert J. Storing ed., 1981).

30. "Washington could not act without consent of Congress. His troops needed clothing, barracks, shoes, medicines. He sent express riders to Philadelphia nearly every day. Congress, instead of answering, sat down and argued." BOWEN, *supra* note 2, at 544.

31. Alexander Hamilton, Remarks at the New York Ratifying Convention, (June 20, 1788), *in* SELECTED WRITINGS AND SPEECHES OF ALEXANDER HAMILTON 196 (Morton J. Frisch ed., 1985) (hereinafter Alexander Hamilton).

32. *Id.* at 198.

33. *Id.*

The problems with the Articles of Confederation went far beyond the ability to raise sufficient money to accomplish national purposes. These states were acting as independent sovereign nations:

> The New Jersey merchant shipping his products across his own borders paid a tariff duty either at New York or at Philadelphia, a situation which James Madison compared to a cask tapped at both ends. The Connecticut farmer similarly found himself charged excises either at New York or Boston; while on the Chesapeake, fishermen discovered that they were caught in a net of taxes and others in retaliation from both Maryland and Virginia, since both states claimed jurisdiction over the main waters of the bay.[34]

Foreign countries refused to bargain with a Congress which had little authority to enforce a new treaty which it might sign.[35] The certificates issued by the Continental Congress were not redeemed; states were manufacturing their own money which was not accepted across the border.[36]

In an exchange of correspondence with John Jay in 1786, George Washington described the Confederation as "error to correct" and was pessimistic as to the likelihood of changes occurring:

> I do not conceive we can exist long as a Nation, without having lodged somewhere a power which will pervade the whole Union in as energetic a Manner, as the authority of the different State governments extends over the several States. To be fearful of vesting Congress, constituted as that body is, with ample authorities for national purposes, appears to me the very climax of popular absurdity and madness. Could Congress exert them for the detriment of the public without injuring themselves in an equal or greater proportion? Are not their interests inseparably connected with those of their constituents?[37]

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34. William F. Swindler, *The Letters of Publius*, AMERICAN HERITAGE June 1961, at 4, 6.

35. BOWEN, *supra*, note 2, at 544.

36. BOWEN, *supra*, note 2, at 544.

37. THE JAY PAPERS II: THE FORGING OF THE NATION (1786), *reprinted in* AMERICAN HERITAGE Dec. 1968, at 24, 96.

V. CONSTITUTIONAL CONVENTION CREATES A NATION

Madison, Hamilton and the majority of the delegates in Philadelphia sought to forge the authority that would create a nation. Hamilton told the delegates that the Constitution was intended to remedy the existing situation where either a federal standing army could be called upon to enforce the requisitions or the federal treasury would be bereft: "What, Sir, is the cure for this great evil? Nothing, but to enable the national laws to operate on individuals, in the same manner as those of the states do."[38]

Especially for a lawyer who drinks in the Constitution as his mother's milk, it is difficult to believe that there could ever have been opposition to its adoption. With Founding Fathers of the stature of Madison, Hamilton, Jefferson, Adams, John Jay, James Wilson and John Marshall, supported by respected and popular leaders such as Benjamin Franklin, George Washington and Edmund Randolph, who would dare oppose? In fact, the opposition was formidable.

By most any measure the Articles of Confederation were an abysmal failure, but many believed that the Constitutional Convention far exceeded the intent expressed by the Continental Congress in creating it. That intent was understood to be only to find the necessary changes to make the existing system work better.

The New York delegates, New York Supreme Court Justice Robert Yates, and Speaker of the New York Assembly John Lansing, wrote to New York Governor George Clinton explaining that they had left before the conclusion of the Constitutional Convention[39] because they felt their charge had been limited to revising the Articles of Confederation:

> From these expressions we were led to believe, that a system of consolidated government could not, in the remotest degree, have been in the contemplation of the legislature of this state; for that so important a trust as the adopting measures which tended to deprive the state government of its most essential rights of sovereignty, and to place it in a dependent situation, could not have been confided by implication; and the

38. Alexander Hamilton, *supra* note 31, at 199.

39. The departure of Yates and Lansing left Hamilton as the only New York delegate. The Constitution was not all that he wanted, but it was sufficiently superior to the Articles so that he willingly signed for New York and then carried a laboring oar in the Federalist papers and at the New York convention to win ratification. BOWEN, *supra* note 2, at 290-91.

> circumstance, that the acts of the convention were to receive a state approbation in the last resort, forcibly corroborated the opinion, that our powers could not involve the subversion of a constitution, which being immediately derived from the people, could only be abolished by their express consent, and not by a legislature, possessing authority vested in them for its preservation.[40]

The arguments of the anti-federalists are the same heard today in Catron County and now in Boundary County and wherever the county government folk gather. The national government will subvert "the legislative, executive and judicial powers of the individual states."[41] The new federal government will be "destitute of accountability to its constituents."[42]

VI. ANTI-FEDERALISTS: PRESERVE STATES' RIGHTS

Luther Martin, Attorney General of Maryland, who had been a delegate to the Constitutional Convention, was a major player and speaker in those deliberations. In the debate that followed, Martin carried forth all of the doubt and criticisms he had voiced loudly during the Constitutional Convention to become the most outspoken opponent of the delegates who had been in Philadelphia.

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40. *Robert Yates & John Lansing: Reasons of Dissent*, NEW YORK JOURNAL, Jan. 14, 1788, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 16-17 (Herbert J. Storing ed., 1981). The Complete Anti-Federalist is a seven volume publication wherein Professor Storing set upon the goal of putting into print every writing circulated by any person who was opposed to the adoption of the Constitution. Many of these were in fictional names such as Brutus, Centinel, Protus, Cato, or A Farmer or A Federal Republican. The remarkable work became his life work. It was completed and delivered to the publisher, complete with its preface and index whereupon Prof. Storing died at the age of 49. Professor Storing was not convinced:

> The Anti-federalists lost the debate over the Constitution not merely because they were less clever arguers or less skillful politicians but because they had the weaker argument. They were, as Publicus said, trying to reconcile contradictions. There was no possibility of instituting the small republic in the United States, and the anti-Federalists themselves were not willing to pay the price that such an attempt would have required.

Id.

41. *Essays of Brutus*, NEW YORK JOURNAL, Oct. 1787 - Apr. 1788, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 420 (Herbert J. Storing ed., 1981).

42. Samuel Bryan, *Letters of Centinel*, PHILADELPHIA INDEPENDENT GAZETTEER, Oct. 1787 - Apr. 1788, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 157 (Herbert J. Storing ed., 1981).

Subsequent observers have described Martin, a hard drinking, debt-ridden but very able attorney, as an ultraconservative posing as a poor man's advocate.[43] That description aptly fits the spokespeople for the Federal National Lands Conference and others in the Wise Use Movement.[44]

Martin's anti-federalist writings are redundant with italics. In reading, you can almost hear his voice rising in excitement as he railed against the Constitution: "It was urged, that the government we were forming was not in reality a *federal* but a *national* government, not founded on the principles of the *preservation*, but the *abolition* or *consolidation of all State governments* . . . ."[45]

Martin voiced the view that was reiterated by the anti-federalists that a central government would be too far distant from the people being governed:

> If the inhabitants of the different States consider it as a grievance to attend a *country court* or the *seat* of their *own government*, when a little inconvenient, can it be supposed that they would ever *submit* to have a *national government* established, the *seat* of which would be *more than a thousand miles removed from some of them?* It was insisted that the governments of a *republican nature*, are those *best* calculated to *preserve* the *freedom* and *happiness* of the citizen—That governments of *this kind*, are *only calculated* for a territory but *small* in its extent; that the *only* method by which an extensive continent like America could be *connected* and *united* together consistent with the principles of freedom, must be by having a *number* of *strong* and *energetic State*

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43. IRVING BRANT, JAMES MADISON, FATHER OF THE CONSTITUTION 1787-1800, at 65-66 (1950). In the convention his major interest was representing "wealthy debtors" who wanted the state to issue paper money which would then depreciate making payment of debts easier and who were therefore strongly opposed to any creation of federal currency. *Id.* at 66.

44. "We must organize ourselves in the same way the civil rights activists in the 1960's did to produce a voting block. The rural west has been a victim because they have not organized. If loggers were unionized and the unions would take the position of protecting the jobs of the loggers, we would have a voting block. PEOPLE VOTE, NOT SPOTTED OWLS." Jim Faulkner, *How Federal Agencies Violate the Mandate and Intent of Congressional Law*, FEDERAL LANDS UPDATE (Nat. Fed. Lands Conf., Bountiful, Utah) April 1992, at 5 (quoting Jim Catron).

45. Luther Martin, Esq., The Genuine Information Delivered to the Legislature of the State of Maryland Relative to the Proceedings of the General Convention Lately Held at Philadelphia (1788), *in* 2 THE COMPLETE ANTI-FEDERALIST 45 (Herbert J. Storing ed., 1981).

> *governments* for securing and protecting the rights of *individuals* forming those governments, and for regulating all their concerns . . . .[46]

The fundamental change made at the Constitutional Convention was the abolition of the wording and the intent expressed in Article II of the Articles of Confederation: "Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."[47]

"Centinel" fought the elimination of Article II which he quoted and then observed how ominous was the change in the Constitution: "*Positive* grant was not *then* thought sufficiently descriptive and restraining upon Congress, and the omission of such a declaration *now*, when such devolutions of power are proposed, manifests the design of reducing the several States to shadows."[48]

"A Democratic Federalist" put the second article into italics and then capital letters for the purpose of highlighting that declaration "is entirely omitted in the proposed Constitution."[49] The Continental Congress under the Confederation was merely an executive body without power to raise money but the Constitution bode a sea change:

> [T]he federal rulers are vested with each of the three essential powers of government—their laws are to be *paramount* to the laws of the different States, what then will there be to oppose their encroachments? Should they ever pretend to tyrannize over the people, their *standing army,* will silence every popular effort, it will be theirs to explain the powers which have been granted to them; Mr. Wilson's distinction will be forgot, denied or explained away, and the liberty of the people will be no more.[50]

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46. *Id.* In addition to the basic emphasis, Martin used dashes, commas and semicolons but never periods so that he wrote not in sentences, but in paragraphs or pages.

47. THE ARTICLES OF CONFEDERATION (U.S. 1777), *reprinted in* 1 THE COMPLETE ANTI-FEDERALIST 101 (Herbert J. Storing ed., 1981).

48. Samuel Bryan, *Letters of Centinel.* PHILADELPHIA INDEPENDENT GAZETTEER, Oct. 1787 - Apr. 1788, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 157 (Herbert J. Storing ed., 1981).

49. James Wilson, *Essay of A Democratic Federalist*, PENNSYLVANIA HERALD, Oct. 17, 1787, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST 59 (Herbert J. Storing ed., 1981).

50. *Id.*

"A Federal Republican" urged that Article II be reinstated as part of the proposed Bill of Rights.[51] "An Old Whig" recognized that the Articles of Confederation were a failure comparable to a virulent disease that would lead the people "willing to swallow any medicine, that gives the faintest hope of relief" but he was sure that the change would "in a great measure destroy, if it do not totally annihilate, the separate governments."[52]

Luther Martin saw in the change the creation the formation of "not in reality a *federal* but a *national* government, not founded on the principles of the *preservation*, but the *abolition* or *consolidation* of all *State governments*."[53]

Melancton Smith, a prominent New York and Poughkeepsie business-man who had served in the first Provincial Congress in New York, in the Continental Congress and as sheriff of Dutchess County, was the principal anti-Federalist spokesman opposing Alexander Hamilton in the debate at the New York Ratifying Convention.[54] Smith saw the adoption of the Constitution as being nothing less than the abolition of state constitutions which would be an event fatal to the liberties of Americans: "These liberties will not be violently wrested from the people; they will be undermined and gradually consumed."[55]

The preamble to the Catron County Interim Land Use Policy Plan states a demand to reclaim those liberties phrased in terms Smith could have used in 1788:

> Further, we reaffirm the fundamental rights of mankind as enumerated in the Declaration of Independence and acknowledged the limited nature of government as intended by the nation's Founding Fathers. Based on these cherished traditions, We declare that all natural resource decisions affecting Catron County shall be guided by the principles of protecting private property rights, protecting local custom and culture, maintaining traditional economic structures through

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51. Veritas Politica, *A Review of the Constitution Proposed by the Late Convention by A Federal Republican*, PENNSYLVANIA HERALD, October 27, 1787, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST 85 (Herbert J. Storing ed., 1981).

52. *Essays of An Old Whig*, PHILADELPHIA INDEPENDENT GAZETTEER, Oct. 1787 - Feb. 1788, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST 30-32 (Herbert J. Storing ed., 1981).

53. Martin, *supra* note 45, at 45.

54. Melancton Smith, Speech (June 1788), *in* 6 THE COMPLETE ANTI-FEDERALIST 148 (Herbert J. Storing ed., 1981).

55. *Id.* at 171.

self-determination, and opening new economic opportunities through reliance on free markets.[56]

Melancton Smith reiterated the point that the country was too big for adequate representation from such a distance: "It is not possible to collect a set of representatives, who are acquainted with all parts of the continent."[57]

"A Farmer From Pennsylvania" argued that the virtues of the Articles of Confederation were to provide local government by people who were well acquainted with the territory rather than a distant national direction:

> The peculiar advantages and distinctive properties of a federal republic are, that each state or member of the confederation may be fully adequate for every local purpose, that it may subsist in a small territory, that the people may have a common interest, possess a competent knowledge of the resources and expenditure of their own particular government, that their immediate representatives in the state governments will know and be known by the citizens, will have a common interest with them, and must bear a part of all the burdens which they may lay upon the people, that they will be responsible to the people, and may be dismissed by them at pleasure; . . . .[58]

Instead, the creators of the Constitution were determined to have it submitted to the state ratifying conventions which would be composed of specially elected delegates. The outcome of these elections was that the urban voters overran the rural voters who far outnumbered them:

> And though such people [living in cities] constituted only a small fraction of the population, they had a political advantage over their country cousins. To a large percentage of Americans who lived outside towns, an arduous trip of a day or even two or three days was necessary to appear at a polling

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56. Catron County Plan, *supra* note 13, Preamble, § 1. The Boundary County Interim Land Use Policy Plan Preamble is identical. *See* Boundary County, Idaho Ordinance 92-2, Preamble (Aug. 27, 1992).

57. Speeches by Melancton Smith (June 1788), *reprinted in* 6 THE COMPLETE ANTI-FEDERALIST 171 (Herbert J. Storing ed., 1981).

58. *The Fallacies of the Freeman Detected by a Farmer*, PHILADELPHIA FREEMAN'S JOURNAL, Apr. 16, 1788, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST 185 (Herbert J. Storing ed., 1981). As with Luther Martin, the farmer wrote in paragraphs, not sentences.

> place. Accordingly, the difficulty of movement dictated that many of the most removed and (most local—minded) citizens, even when not indifferent to the outcome of the contest over ratification, would not bother to take part in it. In the several elections held for delegates to state ratifying conventions, some 480,000 of the roughly 640,000 adult males in the country would not participate—some of them because of being disenfranchised by the law, the vast majority because it was simply too much trouble.[59]

The dissenters from the Pennsylvania Ratifying Convention reported that "upwards of *seventy thousand* freemen who were intitled [sic] to vote in Pennsylvania, the whole convention has been elected by about *thirteen thousand* voters, and though *two thirds* of the members of the convention have thought proper to ratify the proposed constitution, yet those *two thirds* were elected by the votes of only *six thousand and eight hundred* freemen."[60] It may have been a bare majority of a minority who voted in the state ratification conventions that approved the Constitution, but once in Congress, all those elected thereunder accepted the fact that there was indeed a united states rather than a confederation of independent states. The anti-federalists were soon enough dead and buried, but their ideas have continued to resurface even though constitutionally unsustainable.

VII. JOHN C. CALHOUN AND NULLIFICATION

The most sophisticated argument came in the nullification theory whose principal author and spokesman was John C. Calhoun, Senator from South Carolina and Vice President under Andrew Jackson. The nullification theory was made in response to the Tariff Act of 1828, "the tariff of Abominations," as it was called in the South because it discriminated strongly against that region.[61]

Even though he was now Vice-President instead of Senator, Calhoun felt obligated to prepare the statement of grievances against

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59. FOREST MCDONALD, E PLURIBUS UNUM, THE FORMATION OF THE AMERICAN REPUBLIC 1776-1790, at 318-19 (1965).

60. *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents*, PENNSYLVANIA PACKET AND DAILY ADVERTISER, Dec. 18, 1787, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST 150 (Herbert J. Storing ed., 1981).

61. Lewis W. Koenig, *The Rise of the Little Magician*, AMERICAN HERITAGE, June 1961, at 28, 90.

the tariff as requested by the South Carolina Legislature.[62] Calhoun read the Federalist papers and drew an anti-federalist conclusion which has been summarized by his biographer John Niven as follows:

> Originally, the states had been completely sovereign but had delegated certain enumerated powers to the national government. These were all specified and hence circumscribed while those retained to the states and the people were not . . . . The states held the substance of original sovereignty; the central government within prescribed limits exercised the collective will of the people expressed through the states.[63]

The nullification doctrine would give to an individual state veto power over a specific federal action such as the tariff but Calhoun argued that all that was sought was "balance, not supremacy."[64]

The general government must be confined "strictly to the sphere prescribed by the constitution, and preventing it from interfering with the peculiar and local interests of the country."[65] Calhoun's view of the relation between the federal government and the states was very close to a mandatory coordination. Nullification "assumed the relation of the principal with its agent, the states being the principals, and the federal government their agent, and the Constitution the contract between the two, whereby all powers not specifically enumerated were reserved to the states."[66]

South Carolina took Calhoun's theory and ran with it to declare in state convention that the Tariff Acts of 1828 and 1832 were null and void in South Carolina, that federal officers would be prohibited from trying to enforce them and that any federal attempt at coercion would compel South Carolina to leave the Union.[67]

Nullification was the subject of a full-fledged debate in the grand manner then done in the United States Senate with days set aside for capacity audiences listening to the intellectual gladiators.[68] Calhoun was joined by fellow Carolinian Robert Y. Hayne. In opposition was Senator Daniel Webster who talked for two days:

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62. JOHN NIVEN, JOHN C. CALHOUN AND THE PRICE OF UNION 158 (1988).
63. *Id.* at 160.
64. *Id.*
65. *Id.* at 181.
66. *Id.* at 188.
67. Bruce Catton, *The Moment of Decision*, AMERICAN HERITAGE, Aug. 1964, at 49, 50.
68. NEVIN, *supra* note 62, at 170.

> The first day he spent repudiating Hayne's charges, gradually shifting his emphasis to a constitutional position that stressed the supremacy of the national government within its prescribed limits. His argument followed closely Marshall's opinion in the McCulloch case. He brushed aside Calhoun's compact theory of state sovereignty and pointed out that the Constitution was the supreme law of the land acting through the states directly upon the people.[69]

On April 13, 1830, an elaborate dinner was arranged at Brown's Indian Queen Hotel to celebrate Jefferson's birthday with the President, Vice-President, cabinet and everyone of importance in Washington in attendance.[70] The tariff was the subject of discussion of a talk by Hayne but in the background was nullification which created an air of tension. This tension climaxed when Andrew Jackson rose and made a toast staring directly at his vice-president saying: "Our union . . . [i]t must be preserved."[71] Calhoun responded: "The Union . . . next to our liberty most dear. . . . May we all remember that it can only be preserved by respecting the rights of the states and by distributing equally the benefits and burdens of the Union."[72]

The breach was irreparable. When the South Carolina legislature passed the ordinance declaring nullification, President Jackson declared that nullification was tantamount to treason.[73] Calhoun resigned as vice-president on December 28, 1832.[74] South Carolina did not enforce its ordinance and, with changes in the tariff, the issue receded in the background. However, the real underlying issue was slavery. Calhoun believed that the Southern states must have the right of nullification and veto power over federal legislation or else the Abolitionists would seize control of the federal government and ultimately drive the "white population from the Southern Atlantic States."[75] In his last speech before the Senate on March 3, 1850, read by another because he was so ill, Calhoun declared that the rights of the states had been swept away and control of the central government had been seized by the North leaving no possibility for the Southern slave states except secession.[76]

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69. NEVIN, *supra* note 62, at 171.
70. NEVIN, *supra* note 62, at 172.
71. NEVIN, *supra* note 62, at 173.
72. NEVIN, *supra* note 62, at 173.
73. NEVIN, *supra* note 62, at 190.
74. NEVIN, *supra* note 62, at 193.
75. NEVIN, *supra* note 62, at 197.
76. Richard M. Ketchum, *Faces from the Past*—XXII, AMERICAN HERITAGE,

The Civil War was not fought over the nullification doctrine; it never gained credibility even in the South.[77] Calhoun's arguments in favor of nullification were crushed in the debates with Webster. There were no prominent supporters after his death.

While not about nullification, the Civil War was a dramatic manifestation of the power of the federal government over the states. The states rights movement in the south in the Truman and Eisenhower years with all its racist overtures was an effort to refight the Civil War politically. The Southern descendants of the slave owners lost again both constitutionally and at the ballot boxes. But the maverick myth retains its appeal. Return the power to the people, more accurately to "our kind" of people. Never mind the Constitution. Never mind the Civil War. Forget about the crushing of Calhoun, the defeat of George Wallace. Let the county claim control.

VIII. CATRON PLAN TO NULLIFY FEDERAL CONTROL

The Catron County Interim Land Use Ordinance seeks county supremacy over the federal government in many areas, eliminating wilderness, requiring county approval of land, wildlife and timber management plans, directing sale of isolated federal tracts. In other areas the ordinance keys to coordination. However worded, it is difficult to distinguish the objective sought in Catron County from the nullification, not of all federal laws, but of those federal policies plans and practices related to land, water and wildlife which were not to the liking of the county government.

The Catron County "Interim Land Use Policy Plan Concerning the Use of Public Lands and Public Resources and Protection of the Rights of Private Property," is all encompassing.[78] It purports to

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Oct. 1967, at 18, 19.

77. The nullifiers did not have unanimous support even in South Carolina. Virginia sent a representative to ask the South Carolina legislature to repeal its nullification ordinance. No other state took similar action. After the debate with Webster, Calhoun took his few supporters out of the chamber and the bill was the subject of the debate passed 32 to 1. PAGE SMITH, THE NATION COMES OF AGE 70-73 (1981).

78. The Ordinance subject to challenge in Boundary Backpackers v. Boundary County, No. CV93-9955 (Idaho 1st Jud. Dist. Ct. Jan 27, 1994) has virtually identical wording. Federal National Lands Conference urges the counties not to change the language from the Catron County model "suggestions for organizers your county for proper self government." *Id.* at 3. Handout to attendees at the National Federal Lands Conference, Post Falls, Idaho (June 12, 1993) (on file with author). The suggestions conclude with an admonition not to make improvisations in the Catron Plan but to "stay on the proven path." *Id.* at 3.

assert county control over all public lands, waters and wildlife in the county owned by the State of New Mexico and the United States.

The intent to subordinate state and federal management to the county control is explicit: "[A]ll federal and state agencies shall comply with the Catron County Land Use Policy Plan and coordinate with the County Commission for the purpose of planning and managing federal and state lands within the geographic boundaries of Catron County, New Mexico."[79]

State and federal agencies must submit written reports on all proposed actions to the county before the state and federal agency may undertake any action.[80] Neither the state nor the federal government may add additional land to its public holdings without offsetting an equivalent acreage by transfer to private ownership from existing public land ownership.[81] Prior county approval is required before a state or federal agency can make any changes in wildlife habitat, wildlife recovery plans, timber sales, volume projections, restricted access, road closures and primitive or wilderness state designation.[82] The preparation of economic impact statements must be made before any federal or state agency can change any land uses.[83] Catron County is the designated lead planning agency for all federal and state lands, waters and natural resources.[84] Any federal proposal for wild and scenic river designation in Catron County must comply with the county water use plan.[85] The ordinance prohibits the designation of any wilderness area within the county.[86] "Isolated" federal tracts of land are to be disposed of.

The rebirth of the Sagebrush Rebellion intent to have virtually all federal lands transferred to private ownership is set forth in the introduction with a "demand" that all lands not designated as "specific lands"[87] be "relinquished to the citizens."[88] There are 27

79. Catron County Plan, *supra* note 13, at 1.
80. Catron County Plan, *supra* note 13, at 1.
81. Catron County Plan, *supra* note 13, at 2.
82. Catron County Plan, *supra* note 13, at 2.
83. Catron County Plan, *supra* note 13, at 2-3.
84. Catron County Plan, *supra* note 13, at 2-3.
85. Catron County Plan, *supra* note 13, at 4.
86. Catron County Plan, *supra* note 13, at 4.
87. Catron County Plan, *supra* note 13, at 1.
88. "Specific Lands" include the seat of the government and "all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-yards, and other needful Buildings." U.S. CONST. art. I, § 8, cl. 17.

"shall" and "shall nots" directed to the federal agencies, occasionally including the state agencies.[89]

IX. SUPREME COURT: CONGRESS IS SUPREME

Article IV of the United States Constitution known as the Property Clause provides: "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; and nothing in the constitution shall be so construed as to prejudice any claims of the United States, or of any particular state." The power of Congress over federal lands under the Property Clause is virtually without limitation. The clearest statement came in *Kleppe v. New Mexico*.[90] New Mexico had enacted a law giving the state power to control wild horses on federal lands.[91] Congress had enacted the Wild Free-Roaming Horses and Burros Act to prohibit the taking of wild horses.[92]

New Mexico argued that under the Property Clause the powers granted to Congress were narrowly limited and did not include protection of wild animals living on federal property but not belonging to the United States. Justice Marshall for a unanimous court gave the Property Clause an expansive reading granting Congress complete power over public lands: "And while the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved, we have repeatedly observed that '[t]he

89. The Catron Plan contains in the introduction 6 "shalls"; in "Land Disposition" 11 "shalls;" in "Water Resources" 5 "shalls;" in Agriculture" 1 "shall"; in Timber and Wood Products, 1 "shall;" in "Cultural Resources, Recreation, Wildlife and Wilderness," 1 "shall not," in "Access and Transportation," 1 "shall," and in Monitoring and Compliance, 1 "shall," all requiring compliance by the state and federal agencies with Catron County.

90. 426 U.S. 529 (1976).

91. *Id.* at 531. It is somewhat bizarre to have the Catron County Interim Land Use Policy Plan coming out of the State of New Mexico which provided the opportunity in *Kleppe* for the strongest statement of federal dominance over federal land ever to come from the United States Supreme Court.

92. *Id.; see* 16 U.S.C. §§1331-1344 (1988). The Act is arguably the most ecologically unsound "conservation" legislation passed in recent times. Wild horses and burros are exotic species which compete with native wildlife for forage, destroy vegetation and cause soil compaction and erosion just as do their twins, the domestic livestock. The emotional appeal of horses lead to the initial passage of the Act and continues to erupt at any effort for control. When the National Park Service proposed removing 20 wild horses from the Ozark National Scenic Riverways, 1,000 people protested including the local Congressman. The removal decision was narrowly upheld on appeal. Wilkins v. Lujan, 995 F.2d 850 (8th Cir. 1993).

power over the public lands thus entrusted to Congress is without limitations.' "[93]

Congress retained the power under the Property Clause to enact laws respecting those lands and when it did, such laws overrode state laws under the Supremacy Clause, while states did have jurisdiction over federal lands within its boundaries.[94] When the state law conflicted with federal law, federal law must prevail: "A different rule would place the public domain of the United States completely at the mercy of state legislation."[95]

Ten days earlier the Supreme Court held that the State of Kentucky could not require federal installations to obtain state air contaminant permits even though the Clean Air Act[96] arguably directed coordination between the states and the Environmental Protection Agency.[97] Congress had exclusive legislative authority over federal property through the Supremacy Clause as carried out in the plenary powers clause so "that the activities of the Federal Government are free from regulation by any state."[98]

The Catron Plan attempts to tell the federal and state agencies how they must run their shop and what they can and cannot do on state and federal public lands. These county provisions deliberately attempt to interfere with federal management as directed by a number of federal statutes including the Endangered Species Act:[99] "Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict. U.S. Constitution, Article VI."[100]

When Congress acts, the effect of the Supremacy Clause may be to preempt state law:

> [S]tate law can be pre-empted in either of two ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as

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93. *Kleppe,* 426 U.S. at 536-37.

94. U.S. CONST. art. VI, cl. 2.

95. *Kleppe,* 426 U.S. at 543 (citing Camfield v. United States, 167 U.S. 518, 526 (1897)).

96. 42 U.S.C. §§ 7401-7642 (1988).

97. Hancock v. Train, 426 U.S. 167 (1975).

98. *Id.* at 178 (quoting Mayo v. United States, 319 U.S. 441, 445 (1943)).

99. 16 U.S.C. §§ 1531-1544 (1988).

100. Jones v. Rath Packing Co., 430 U.S. 519, 525-30 (1977).

> an obstacle to the accomplishment of the full purposes and objectives of Congress.[101]

Any attempt under the Catron County type ordinance to interfere with the management of public lands by the Forest Service or the Bureau of Land Management would be an unconstitutional "obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[102]

California Coastal Commission v. Granite Rock Co.[103] illustrates just how narrow is the area in which states are allowed to impose some control in federal lands matters. In a very sharply controverted five-to-four decision, the United States Supreme Court reversed the Ninth Circuit decision that held that the effect of the federal public lands statutes upon the Coastal Zone Management Act[104] was to preempt the California Coastal Commission's requirement that a mining company obtain a state permit to work its unpatented mining claims located in a national forest.[105] Justice O'Connor, writing for the majority, drew a distinction between the land use planning and the state environmental regulation:

> Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits. Congress has indicated its understanding of land use planning and environmental regulation as distinct activities. As noted above, 43 U.S.C. § 1712(c)(9) requires that the Secretary of the Interior's land use plans be consistent with state plans only "to the extent he finds practical." The immediately preceding subsection, however, requires that the Secretary's land use plans "provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans."[106]

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101. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984).

102. Ventura County v. Gulf Oil Corp., 601 F.2d 1080, 1086 (9th Cir. 1979) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)), *aff'd without opinion*, 445 U.S. 947 (1980)).

103. 480 U.S. 572 (1987).

104. 16 U.S.C. §§ 1451-1464 (1988).

105. *California Coastal Commission*, 480 U.S. at 594.

106. *Id.* at 587 (citing 43 U.S.C. § 1712(c)(8) (1988)).

Justice O'Connor found similar distinctions in the National Forest Service regulations. The permit requirement sought by the California Coastal Commission was an environmental regulation; otherwise it would have been invalid: "Federal land use statutes and regulations, while arguably expressing an intent to pre-empt state land use planning, distinguish environmental regulation from land use planning."[107] The dissenting justices, Justices Powell and Scalia joined with Justices Stevens and White, argued strongly that the permit requirement from the Coastal Commission was a land use regulation and therefore most certainly preempted.[108]

The Catron Plan concerning the use of public lands and public resources and protection of the rights of private property would under any interpretation be "state land use planning" which all nine justices in *Granite Rock Co.* would agree was preempted by federal law.

In response to requests by two county attorneys facing commissioners wanting to adopt local supremacy ordinances, Montana Attorney General Joseph P. Mazurek issued an informal opinion, concluding that "[a]ny proposed county ordinance that prohibits or limits such action by the federal government is in direct conflict with the United States Constitution and federal legislation."[109] Attorney General Mazurek reviewed in historical detail the comprehensive federal land legislation and regulations which literally covered the earth.[110] The constitutional inhibitions against state control specifically extended to denial of any authority by the county to prevent the federal government from acquiring lands within the county.[111]

X. CUSTOM AND CULTURE CLAPTRAP

The Catron Plan is founded upon the premise articulated by Karen Budd that federal laws allow special deference to local "custom and culture."[112] The Catron Plan repeatedly declares the intent to

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107. *Id.* at 593.

108. *Id.* at 594-614.

109. Letter from Joseph P. Mazurek, Attorney General for the State of Montana, to Mike McGrath & Keith Haker, County Attorneys for Lewis and Clark, and Custer Counties (June 11, 1993) (on file with author).

110. *Id.*

111. *Id.*

112. Karen Budd, Address at Soil Conservation Service Meeting (Dec. 13, 1991). A narrative transcript of the address on videotape is available in Boundary County files produced in Boundary Backpackers v. Boundary County, No. CV93-

protect its custom and culture.[113] The Interim Land Use Policy Plan directs creation of numerous committees to amplify, develop, and beef up[114] the local custom and culture. Bill Welsch of Lewiston in Trinity County in northern California told the *Trinity Journal* that an honest search to discover the local custom and culture would produce something different: "The custom of our past is to seize land by force from the natives, plunder the resources using slave and child labor, wash away land with hydraulic mining and clear-cut virgin forests."[115]

The promoters of the county governments assume that "custom and culture" are almost entirely the local extractive or resource-dependent industries such as logging, mining, ranching and farming. The Budd theory is that once these customs and cultures are identified, the federal agencies must by law and federal regulation defer to them to allow counties to determine policy. Neither the Supremacy Clause nor the Property Clause then become involved because Congress has allowed for state and local control. It is a plausible theory. Congress can certainly yield federal power to allow state and local control. The prime example on federal lands is game management where states are explicitly given authority to set seasons and limits and to enforce those regulations on all federal lands.[116]

9955 (Idaho 1st Jud. Dist. Ct. Jan 27, 1994). Karen Budd stated:

> National Environmental Policy Act has as its goals to, and I quote, "Use all practicable means to preserve important, historic, cultural, and natural aspects of our national heritage." What we started doing was looking up those terms. You know, if you go with the standard definition of "cultural and natural aspects," what you think of is Indian ruins, dinosaur bones, and that's what you think the National Environmental Policy Act is out there to protect. When you start legally defining custom and culture, the, custom and culture is defined as "a right of usage or practice by the people which, by unvarying habit, has become compulsory and has acquired the force of law."

Id.

113. The words "custom and culture" appear six times in the Catron County Plan, *supra* note 13, and the word "cultural" appears five times.

114. Especially in cattle country. Karen Budd told the High Country News that the best way for local governments to participate in public land planning was "to codify their definition of custom and culture." Florence Williams, Sagebrush Rebellion II *Some Rural Counties Seek to Influence Federal Land Use,* HIGH COUNTRY NEWS 11 (Feb. 24, 1992).

115. Constane Mathiessen, *Weaverville, No Place Like Home,* CAL. LAWYER, Aug. 1993, at 33.

116. Federal Land Policy and Management Act of 1976, §302, 43 U.S.C. §1732(a) (1988). State control of hunting and fishing was given precedent over federal regulation in Geer v. Connecticut, 161 U.S. 519, 535 (1896), on the now

The Clean Water Act[117] and the Clean Air Act[118] each provide detailed and specific arrangements for the states to assume the federal programs. However, "custom and culture" is no "Open Sesame" to local control. National Federal Lands Conference spokesmen are similar to the 17th Century European geographers proclaiming the certainty of the Northwest Passage. Laws recognizing deference to "custom and culture" do not exist. The "custom and culture" theory teeters upon the slenderest of reeds. The National Environmental Policy Act,[119] relied upon by Ms. Budd as authority, contains in some 350 words of the introductory declaration of policy, the following as one of six broad general policy directions: "(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice."[120] From this paragraph Ms. Budd has first condensed to "historic, cultural, and natural aspects," then gone to *Webster's Dictionary*[121] to find that "culture" is defined as including "customary beliefs" and then gone to *Bouvier's Law Dictionary*[122] (1867 Edition!) to find a definition of "custom."[123] The Budd syllogism is to take "cultural" out of context, alter the word to "culture," find an outdated dictionary that includes "customary" within a definition of "culture" and then transmute "customary" to "custom." Voila! "Custom and Culture." The result is not statutory construction but creative distortion.

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rejected theory of state ownership. The Forest Service enters into cooperative arrangements with the states on hunting and fishing. 36 C.F.R. §241.1 (1993). *See* MICHAEL J. BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW 136-145 (1983).

117. 33 U.S.C. §§ 1342(b), §1370 (1988).

118. 42 U.S.C. §§ 7410, 7411(c), 7414(b).

119. 42 U.S.C. §§ 4321-4370 (1988).

120. 42 U.S.C. § 4331(b)(4) (1988). The word "cultural" also appears in the Wild and Scenic Rivers Act:

> It is hereby declared to be the policy of the United States that certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations.

16 U.S.C. §1271 (1988).

121. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 522 (1971).

122. JOHN BOUVIER, BOUVIER'S LAW DICTIONARY 530 (12th ed. 1867).

123. Handout from Karen Budd-Falen to attendees at the National Federal Lands Conference meetings (on file with author) (list of citations) (on file with author).

Nowhere in the statutes or regulations related to the United States Forest Service, the Bureau of Land Management, the Fish and Wildlife Service, the Endangered Species Act, the Wild and Scenic Rivers Act or the National Environmental Policy Act are the words "custom and culture" to be found. Although the word "custom" may appear by itself in other federal statutes not identified in or related to the Catron County Plan, it does not appear alone in any of the above contexts. Neither does the word "culture" appear alone. "Cultural" has a more limited and refined meaning than "culture:"

> cultural 1: of or relating to the artistic and intellectual aspects or content of human activity . . . 2a: produced by breeding . . . b: of or relating to the culture of a plant . . . 3a: dealing with culture data . . . b: of, relating to, or being the complex of institutionalized traits learned and transmitted by man as a member of society 4: man-made . . . .[124]

The First Amendment allows anyone to hawk any political nostrum without regard to truth or accuracy. It is the politician not the Supreme Court justice, who can make the laws mean anything he or she wants them to. The National Federal Lands Conference is avidly peddling falsehoods[125] to promote its political agenda:

> Did you know that the National Environmental Protection Act (NEPA) *requires that the federal agencies protect your custom, culture and community stability*[126]. . . . Catron

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124. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 522 (1971).

125. In the promotional letter to "Dear Friend," National Federal Lands Conference Vice President Bert N. Smith was selling the "Update" for $65 per year (regular price ($75)). Letter from Bert N. Smith, VP National Federal Land Conf. (July 1, 1992) (on file with author). "Update" is six pages published monthly on cheap stock. The last page typically is an order form for audio tapes ($29.98), videotapes ($59.95) and the County Government and Federal Lands Handbook ($99.95). "Update" gives notice of upcoming conferences, which, despite industry sponsorship, still carries a $50.00 registration fee. The now completed Catron County Comprehensive Land Plan (250-300 pages) is sold by the National Federal Lands Conference for "a mere $250."

126. "Community stability" is, of course, a legitimate political concern often voiced recently in connection with reduction of logging related to spotted owl litigation. "Community stability" is not contained in relevant federal laws or regulations. In her handout "Protecting Community Stability - List of Citations," Karen Budd's identification of "community stability" comes from an 1897 Senate Report and a 1906 Forest Service publication, THE USE BOOK. FOREST SERVICE, U.S. DEPARTMENT OF AGRICULTURE, THE USE BOOK (1906). One of the unrecognized advantages of being five generations in the same place must be having a lot of old books available for research.

> County, New Mexico's Model Interim Land Use Plan . . . will help you protect your civil rights and property rights while you define your custom, culture and community stability.[127]

Unlike political rhetoric or commercial advertising, statutory construction is a very precise and rigid discipline commencing always with the written word. But if in the beginning there is no word, there can be no tenable interpretation. Words are literally the building blocks for statutory construction. "Custom and culture" do not exist. There is nothing there. It took three centuries to dispel the myth of the Northwest Passage.[128] The myth of "custom and culture" and of local control over federal lands can be dispelled in about 30 minutes.

XI. CONCLUSION

In the two hundred years since the formal creation of these United States of America by the adoption of the Constitution, enormous changes have occurred at a rate and scale without precedent. Thirteen states have become fifty. The population has exploded with an incredible diversity of race, creed and color.

Despite marvels of modern communication and transportation, the problems perceived by the opponents of the Constitution continue. It took George Washington and Thomas Jefferson many days to travel from home in Virginia to Philadelphia and then to Washington, D.C., a task that can be accomplished in person in hours and by voice and fax in seconds. Yet the nation's capitol is perceived by many, perhaps by most, Americans as being as far removed from local citizens as predicted in Luther Martin's polemics.

Although the federal public lands are managed on a day-to-day basis by men and women who live here rather than there, those who would derive a living or a profit from the use of those public lands decry distant domination particularly when past practices are curtailed or eliminated by national directive. The county supremacy ordinances are a reaction to assert local control. The motives of those behind the adoption of those local ordinances can be questioned, but their popularity is undeniable.[129]

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127. Form letter to "Dear Friend" from Bert W. Smith, Vice President, National Federal Lands Conference [1] (July 1, 1992) (on file with author).

128. The search for the Northwest Passage was first promoted by Robert Thorne, an English merchant living in Seville in a letter to Henry VIII in 1527. The hope finally flickered out with the ground truth reports of Lewis and Clark. JOHN NOBLE WILFORD, THE MAPMAKERS 140-43, 191-92 (1981); *see also* BEN KEATING, THE NORTHWEST PASSAGE (1970).

129. After suit was filed by the environmentalists against Boundary County,

The validity of the county supremacy ordinances is not questionable. The Property Clause and the Supremacy Clause of the United States Constitution totally and completely eliminate any possibility of local control of any nature. Until and unless Congress explicitly grants to the states authority over federal public lands, and the state legislatures in turn grant that authority to the counties,[130] there will be no local control.

As Nevada Attorney General Frankie Sue Pappa said:

> If the proponents are attempting to overturn *Kleppe*, and are representing that the success of these measures is certain, then they are providing a disservice. Let us at least be honest, and if we are proposing to unsettle established U.S. Supreme Court precedent, say so.[131]

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petitions of the county residents expressing support for the defense of the Boundary County Interim Land Use Policy Plan were submitted to the County Commissioners. Boundary County, Idaho Ordinance 92-2 (Aug. 27, 1992). There were 800 signatures on the petitions in a county which had only 4,946 registered voters in the 1992 general election. Interview with Norma Estep, Boundary County Clerk (additional information available from author).

130. The *Catron Plan*, *supra* note 13, asserts control over state as well as federal public lands. The claim is very likely to be in violation of the state Constitutions. Idaho Attorney General Larry EchoHawk issued an opinion on March 7, 1991, concluding that a Benewah County ordinance asserting management control over certain state lands in the county could not be binding upon the State Land Board. 91 Op. Att'y Gen. 3 (1992).

131. Frankie Sue Del Pappa, Public Lands: The State Perspective, Address Before the Southwest Land Use Institute (May 14, 1993).