

FEDERAL-STATE “NEGOTIATIONS” OVER FEDERAL ENCLAVES IN THE EARLY
REPUBLIC: FINDING SOLUTIONS TO CONSTITUTIONAL PROBLEMS AT THE
BIRTH OF THE LIGHTHOUSE SYSTEM

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INTRODUCTION

In the beginning months of the First Federal Congress, the newly-constituted national legislature offered the states a choice that sounds very familiar to modern ears: we will provide you with funds if you do what we ask. The context, though, was not an attempt by the federal government to use the Spending Clause as a tool for implementing policies otherwise unattainable within the four corners of the Constitution. Rather, the context was the new government’s first intersection with what has become known as the Enclave Clause – an Article I clause that provides for federal acquisition, with state consent, of “exclusive legislation” over lands within state borders.¹ The lands in question back in August 1789 were the dozen or so lighthouses that the states had built over the years.

Throughout the eighteenth century, the colonies, and then states, individually erected and maintained the lighthouses that were relied upon

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¹ The Enclave Clause provides that Congress shall exercise “exclusive legislation . . . over 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, dockyards, and other needful buildings.” U.S. Const. art. 1, §8, cl. 17. From an early date, the power of “legislation” was equated with “jurisdiction.” *See, e.g., United States v. Bevans*, 17 U.S. 337, 388 (1818) (“the power of exclusive legislation (which is jurisdiction) is united with cession of territory”). The first part of article I, section 8, clause 17 provides for exclusive legislation over whatever district would become the seat of the federal government.

by all boat traffic, from local fishermen, to the coasting trade, to foreign shipping.² In the summer of 1789, there were 13 such lighthouses, with additional ones in the making.³ But in July, creation of a federal tonnage policy placed control of a crucial source of state lighthouse funding in federal hands.⁴ Within three weeks, Congress passed a statute (the “Lighthouse Act”) establishing federal responsibility for the nation’s lighthouses.⁵ That those lighthouses were situated on lands within state jurisdiction complicated the matter a bit.

Based on the uniformity of the draft versions of the Lighthouse Act, it appears that Congress was not willing to entirely fund lighthouses without obtaining complete control over the lands on which they stood.⁶ Under the Enclave Clause, however, such control could not be obtained without state consent. And so, Congress adopted a carrot-and-stick type approach: the federal government would operate and maintain the states’ lighthouses, but funding would cease if the states did not cede their lighthouses by August 15, 1790.⁷

² See generally Francis Ross Holland, Jr., *America’s Lighthouses: An Illustrated History* 8-12, 69-82, 105-11 (1988); Dennis L. Noble, *Lighthouses & Keepers* 5; XXV *The State Records of North Carolina* (Walter Clark, ed.) 54 (1906) (Ch. 58 of 1789 laws, providing for erection of lighthouse on “Ocacock Island”); see also Grace, *From the Lighthouses*, 68 *Alb. L. Rev.* 97, ____ (2005).

³ See, *supra*, n. 2.

⁴ Act of July 20, 1789, ch. 3, I Stat. ____. For the use of tonnage duties in funding state lighthouse operations, see Grace, *supra* n. 2, at ____.

⁵ Act of Aug. 7, 1789, ch. 9, I Stat. 53. For a discussion of the connection between the Tonnage Act and the Lighthouse Act, see Grace, *supra* n.2, at ____.

⁶ V *Documentary History of the First Federal Congress 1248-54* (1986). The initial draft, however, tied cession of lighthouse lands only to keeping the lights “in good repair,” with the federal government reimbursing monies for supporting the lights (*i.e.* keeping them lit) regardless. During the drafting process, all expenses became linked to cession by the states.

⁷ Act of Aug. 7, 1789, ch. 9, I Stat. 53. Because the existing lighthouses were on state-owned properties,

That the states took the carrot and consented to cede their lighthouse properties is not in itself that surprising. But what does merit examination is *how* the states ceded their properties.⁸ A number of them attached strings to their cessions, despite having any clear guidance from the Constitution that their consent to exclusive jurisdiction could be conditioned in any way. Indeed, on its face the Enclave Clause reads as an “on/off” switch—either the state grants exclusive jurisdiction, or it does not. Thus, the state responses to the Lighthouse Act provide an example of states engaging in an arguably “loose” construction of the Constitution in order to enhance their bargaining powers vis-à-vis the federal government.

The federal government’s reaction to the conditions was mixed. Some conditions were objected to. Others were either implicitly or explicitly accepted by the federal government without complaint. Where the federal government bent, and where it did not, sheds additional light on early federal-state interactions under the Constitution.⁹

initial cessions under the Lighthouse Act included title as well as jurisdiction. In later years, when new lighthouses were constructed on private property, the federal government obtained title from the owner and a cession of jurisdiction from the state. See, Grace, *supra* n.2, at ____.

⁸ To the author’s knowledge, the only treatment of this story at any length appears in an unpublished PhD dissertation on state-federal interactions in the decade after the Constitution was ratified. Frank L. Esterquest, *State Adjustments to the Federal Constitution 1789-1800* at 65-73 (Univ. of Chicago June 1940) (unpublished dissertation). With minor tweaking (*see infra* at ____), the basic historical narrative set forth by Esterquest provides an accurate and helpful summary of what the states did.

⁹ How the federal and state governments made adjustments in forging their relationship under the Constitution is a topic that has not received much scholarly attention. The Esterquest dissertation (*supra* note ____) remains the most thorough treatment of the issue. For an excellent concise summary of federal-state administrative relations, see Leonard D. White, *The Federalists: A Study in Administrative History* 389-405 (1961).

As history unfolded, the political resolutions worked out by Congress and the state legislatures prefigured solutions ultimately sanctioned by the Supreme Court more than 130 years later. But the path of precedent was not a straight one. Late nineteenth and early twentieth century Supreme Court cases had come out differently. And an early lower court case by Justice Story, riding circuit, provides some evidence that the Supreme Court of the day would have done the same.¹⁰ In sum, the flexible approach to the Enclave Clause acceded to by Congress and the executive branch was arguably ahead of its time.

Before discussing the Enclave Clause issues presented by the federal lighthouse system of the 1790s, and the way in which the federal and state governments resolved those issues, some background into both the Enclave Clause and the Lighthouse Act will be necessary.

I. SETTING THE STAGE FOR FEDERAL-STATE ENCLAVE CLAUSE ISSUES

A. Adoption of the Enclave Clause by the Constitutional Convention

The records of the Constitutional Convention contain three versions of the draft language that ultimately became the Enclave Clause: (1) The version given to the Committee of Detail for their consideration, which empowered Congress to “procure and hold for the use of the United States landed property for the erection of forts, magazines, and other necessary

¹⁰ See, *infra*, at ____.

buildings;”¹¹ (2) The version presented by Farrand’s as part of the Pinckney Plan, but most likely a draft by the Committee of Detail, empowering Congress to “provide such dockyards and arsenals, and erect such fortifications, as may be necessary for the United States, and to exercise exclusive jurisdiction therein;”¹² and (3) The version ultimately presented to the Convention by the Brearley Committee, which gave Congress the authority to exercise “exclusive legislation” over “all Places purchased for the erection of Forst, Magazines, Arsenals, Dock Yards and other needful buildings.”¹³

Unlike the first two draft wordings, the language reported by the Brearley Committee assumed Congressional power both to obtain property and to erect the structures mentioned. Thus, its sole focus was the grant of power to exercise “exclusive legislation” over lands used for such structures. This language ultimately became the Enclave Clause, with one important amendment. Based on Elbridge Gerry’s contention that such power might be used to “enslave any particular State,” it was recommended (and agreed to) that exercise of the power be dependent on state consent.¹⁴

During the ratification process, the Enclave Clause did not escape the attention of those who were suspicious of federal authority. Indeed,

¹¹ Max Farrand, *The Records of the Federal Convention of 1787*, Vol. II at 321 (1911).

¹² *Id.* Vol. III, App. D at 598; [Rossiter]

¹³ Farrand, *note* ____, Vol. II at 505.

¹⁴ *Id.* at 510.

though it was not the subject of lengthy debate, it formed the basis for amendments suggested by the ratifying conventions of New York, North Carolina, Pennsylvania, and Virginia. The two different amendments suggested by those states (North Carolina, Pennsylvania, and Virginia offered the same amendment) were both aimed at limiting the operation of federal power within the enclaves.¹⁵ New York's proposal – that the Enclave Clause not be construed as authorizing Congress to make any law preventing state law from extending to any enclave – addressed how enclaves were to relate to the states within which they were placed.¹⁶ The other proposed amendment – that the right of exclusive legislation, both over the capital and over federal enclaves, extend only to regulations regarding “the police and good government thereof” – more broadly addressed a concern that Congress' power over federal lands not be used abusively (even, perhaps, in derogation of enumerated powers).¹⁷

Reflections of the latter concern can perhaps be seen in lighthouse cession laws that expressly linked federal jurisdiction to continued use of the lands for the purposes of lighthouse operations.¹⁸ In addition, two other issues raised during ratification debates (but not included in any proposed

¹⁵ That was the same issue raised by Gerry during the Constitutional Convention. Debaters during ratification argued that the state consent requirement adequately answered any fears of abuse. *Compare* 3 Elliot's Debates 51 (Henry, June 5, 1788) *with id.* at 434-35 (Nicholas, June 16, 1788), 455 (Madison, June 17, 1788).

¹⁶ 1 Elliot's Debates 330.

¹⁷ 2 Elliot's Debates 545 (Penn.); 3 *id.* at 660 (Va.); 4 *id.* at 245 (N.C.); *see* 3 Elliot's Debates 51 (Henry, June 5, 1788).

¹⁸ *See, infra*, ____.

amendments to the Constitution) ended up becoming relevant during the very first lighthouse cessions under the Enclave Clause: (1) the fear that federal enclaves could become “sanctuaries” enabling fugitives from state justice to “escape with impunity” to lands where “the states had no power to punish them;”¹⁹ and (2) an interpretation of the state consent requirement as empowering states to stipulate the terms of the grant.²⁰

The concern over fugitives led to the primary Enclave Clause dispute resolved in the 1790s. The power of states to set conditions was also implicated in the early lighthouse cessions, with political resolutions that didn’t receive court sanction until over 130 years later. Before addressing the Enclave Clause issues that played out in practice during the early years of the republic, it will be useful to provide some brief information about the creation of the lighthouse system.

B. Creation of the Federal Lighthouse System

When passage of the Tonnage Act swallowed up a crucial state source of lighthouse funding, the federal government magnanimously stepped in to temporarily fund lighthouse operations and maintenance. But after one year, the states would have to make a choice: Any state wanting

¹⁹ 3 Elliot’s Debates 454-45 (Tyler, June 17, 1788). When a member of the Virginia ratifying convention suggested that the nation’s capital in particular would become a haven for felons, Richard Henry Lee [chq] provided a response whose accuracy may seem more subject to question these 200 years later: “Were the place crowded with rogues, he asked if it would be an agreeable place of residence for the members of the general government Would the people be so lost to honor and virtue, as to select men who associate with the most abandoned characters?” *Id.* at 435 (Grayson, June 16, 1788), 435-36 (Lee). But in addition to relying on public virtue, Lee also contended that protecting felons in either the capital or other federal enclaves would be contrary to the Constitution. *Id.* at 436.

the federal government to permanently take on responsibility for the state's lighthouses would have to cede jurisdiction over its lighthouse properties to the federal government. What transpired, as I have previously described elsewhere,²¹ can be summarized as follows:

To the ever wary Samuel Adams, then serving as Lieutenant-Governor of Massachusetts, the choice presented by the Lighthouse Act was not a real choice at all—states were being forced to consent by economic coercion. Adams suggested to Elbridge Gerry (a member of the Committee that had drafted the legislation) that Congress would face the same fate as the British government if, by governing “too much,” it so insisted on unnecessarily forcing states to give the federal government exclusive jurisdiction over their lighthouses. What particularly rankled Adams was the combined effect of the Tonnage and Lighthouse Acts: “The Means of supporting these Buildings in this State are taken from its Legislature---It is presumed not to be intended that this Legislature shall be told at the End of the Year, you must cede your Lighthouse to Congress & the Territory on which it stands together with the exclusive Power of Legislation, or it shall be of no Use to your state.”²²

²⁰ *Id.* at 439 (Madison, June 16, 1788); 4 Elliot's Debates 219 (Iredell).

²¹ Grace, *From the Lighthouses* at 124-25.

²² Letter from Samuel Adams to Elbridge Gerry, Sept. 1789, *reprinted in* 17 DHFFC, *supra* note 6 at 1645.

Whether others did not consider Congress' behavior as unseemly, or whether practical realities won the day, state legislatures fell into line with federal policy and gave up their lighthouses fairly promptly, and without much sign of controversy.²³ The only significant holdout was, perhaps not surprisingly, Rhode Island, which did not cede its lighthouse until 1793—three years after it had finally ratified the Constitution in May 1790. However, the state was never cut off from federal lighthouse monies because Congress passed a series of one-year extensions of its cession deadline.²⁴ Thus, even where push could potentially have come to shove,

²³ For the dedicated reader, a summary of existing lighthouse cessions is provided:

By June 1790, six states had ceded their lighthouses, their enactments covering the vast majority of the lighthouses then in operation: Pennsylvania (Ch. LII, Sept. 28, 1789); Virginia, (Ch. V, Nov. 13, 1789); South Carolina (Jan. 20, 1790); New York (Ch. 3, Feb. 3, 1790); Connecticut (May 2, 1790); Massachusetts (June 10, 1790).

In June 1790, New Hampshire's House of Representatives had approved a joint committee's recommendation to cede the lighthouse. For reasons that remain unclear—but that appear to be related to a debate over how much land should be ceded—nothing happened until February 1791, when the state ceded a *larger* amount than had been proposed a year earlier. XXII Early State Papers of New Hampshire 68 [June 14, 1790] (1891); Whipple to Hamilton, July 23, 1790, printed in VI Syrett 508; Act of Feb. 14, 1791, ch. 71, 1791 N.H. Laws 10.

New Jersey and Delaware, both of which had lighthouses located within their boundaries but controlled by other states, ceded their rights in November 1790 and January 1791, respectively. It is conceivable that the federal government did not immediately recognize the need for cessions from those two jurisdictions. See Hamilton to Washington, June 18, 1790, Report on Lighthouses (stating that there were no lighthouses in either state).

In November 1790, North Carolina ceded two properties that had been set aside for lighthouses (one of which was already under construction). N.C., Ch. II, Nov. 1790. Strictly speaking, the Lighthouse Act only called for cession of existing lighthouses, but the premature cession of course would of course redound to the monetary benefit of North Carolina.

Georgia did not cede its lighthouse until December 1791, but the condition of the lighthouse between August 1789 and 1791 is unclear. Holland, *America's Lighthouses* 107; John Habersham to Alexander Hamilton, Nov. 2, 1790, digested in VII Syrett 136 (discussing plans for construction of a lighthouse on Tybee Island).

²⁴ R.I. (May 1793). See 1st Cong., sess. II, ch. 32 (July 22, 1790); 1st Cong., sess. III, ch. 24 (Mar. 3, 1791); 2nd Cong., sess. I, ch. 17 (Apr. 12, 1792). As of August 1790, Rhode Island was still collecting light money for its lighthouse at Newport, and the shipping trade complained of their obligation to pay tonnage to the United States and light money to the state. William Ellery to Hamilton, dated August 23, 1790, in VI Syrett 552. The next month, Rhode Island fixed the problem, repealing its lighthouse regulations because "the provision made by Congress, for defraying the expense of light houses within the United States, is extended to this state." Records of the State of Rhode Island and Providence Plantations in New England (ed. John Russell Bartlett), vol. X at 391 (AMS Press 1968). Nothing was done about cession, however.

The matter was first raised by Rhode Island's legislature in May 1791. At that point, the lower house passed a bill for cession, but the bill was stopped in the upper house "by the opposition made to it principally by the Governour," who "declared against making any cession to the United States." Ellery to Hamilton, May 9, 1791, in VIII Syrett at 332. In November 1791, William Ellery recorded opponents of the cession as having told a

the federal government kept the carrot of federal monies dangling a bit longer and employed gentle behind the scenes lobbying rather than holding firm to established deadlines.²⁵

Evidence suggests, not surprisingly, that the availability of federal monies was the motivating factor for the states' unanimous decisions to cede their lighthouses to the federal government. For example, in Massachusetts, after the first reading of the Senate's bill providing for the cession of the state's public lighthouses, the House ordered "that the Commissary General lay before the House an account of the expenses of the

leading member of the lower house that "there was time enough to cede hereafter, and [they] thought it best to hold their right as long as they could." Ellery to Hamilton, Nov. 11, 1791, in IX Syrett at 493. *See also* Ellery to Hamilton, July 4, 1791, in VIII Syrett at 529 (noting that the United States was continuing to defray expenses until July 1792, and was allowing states that additional time to make cessions).

And so, as long as the United States kept extending the cession deadline, and continuing to fund the lighthouse, the legislature felt no pressure to act. This state of affairs dragged on for two years. The legislative history is silent as to the motives underlying the cession opponents, but one wonders whether there is any connection between the fact that one of the members of the upper house (Jerathmel Bowers) apparently had title to the land on which the Newport lighthouse stood. In his letter to Hamilton noting the Governor's opposition to cession, Ellery passed on the port surveyor's opinion that after the legislature shall have ceded their right and title, "Mr. Bowers will not convey the fee to the United States, he is so tenacious of landed property" Ellery to Hamilton, May 9, 1791, in VIII Syrett at 332. *See also* Ellery to Hamilton, Aug. 2, 1790, in VI Syrett at 550; Ellery to Hamilton, Mar. 7, 1791, VIII Syrett at 163.

²⁵ Although Rhode Island was the only holdout, circumstances (discussed in Part II) led Congress to grant a series of deadline extensions through mid-1798. *See* 2nd Cong., sess. II, ch. 27 (Mar. 2, 1793) (one-year extension); 3rd Cong., sess. I, ch. 59 (June 7, 1794) (same); 3rd Cong., sess. II, ch. 37 (Mar. 2, 1795) (same); 4th Cong., sess. I, ch. 43 (May 30, 1796) (two years). The extensions from 1793 to 1795 likely resulted from a question concerning the adequacy of the cessions that had been passed by a handful of state legislatures. *See, infra*, at ____.

The extension to 1796 could have been caused by the fact that one lighthouse in Massachusetts was not ceded until June 23, 1795. The lighthouse in question (Brant Point, on Nantucket) had been destroyed by storm in 1788. It was not in existence in June 1790, and was rebuilt by the town at some time between then and 1795. Months before the legislature ceded it to the federal government, Treasury Department official supervising the lighthouse system had specifically written that cession was necessary for the light to remain in the federal lighthouse establishment. *See* Admont G. Clark, *Lighthouses of Cape Cod—Martha's Vineyard—Nantucket Their History and Lore* 141; Holland, *supra*, note ____, at 72; Hamilton to Washington, dated June 18, 1790 (listing only 6, not 7, lighthouses in Massachusetts); Tench Coxe to Coffin, dated Mar. 3, 1795 (NARA microfilm roll M63); Mass. 1795, Ch. 17 (June 23, 1795). (Brant Point was one of only a handful of lights built locally in the 1790s, and then turned over to the United States. *See* III House Journal 577 (Jan. 30, 1800) (petition from merchants and citizens who built Clark's Point light at their expense); 5th Cong., Sess. II, Ch. 78 (July 16, 1798) (compensating Savannah commissioners of pilotage for erection of beacon and placement of buoys at entrance of port).

There is no historical evidence explaining why Congress enacted an additional two-year extension in 1796, but it is possible that the extension was intended to cover existing and subsequent projects for the construction of new lighthouses. *See, infra*, note ____ (describing lengthy period of time for proper cession of land

Light Houses, the annual cost of lighting the same, and the probable amount of the necessary repairs.”²⁶ The bill passed swiftly the next day.²⁷

However, economic motive should not be mistaken for a lack of principle. The actions of the state legislatures suggest that, as a whole, they simply did not share Sam Adams’ views of lurking danger. One can contrast the Massachusetts’ legislature’s response to the Lighthouse Act with its response to the federal government’s request for cession of a fort (“Castle Island”) in Boston harbor during the 1794 national defense crisis. In the latter instance, the legislature stonewalled for years, and the public debate included a letter to a local newspaper proclaiming “Let us . . . not be too lavish in surrendering our territory to Congress.”²⁸

It is impossible to say whether other available funding sources, such as lotteries, would have been workable alternatives to states weighing whether to comply with the Lighthouse Act.²⁹ But it is telling that no state

for construction of Georgetown light in South Carolina).

²⁶ Notation on bill jacket for Lighthouse Bill, and House Journal entry for June 8, 1790 (p.71), both on file at the Massachusetts State Archives.

²⁷ House Journal entries for June 9 (pp. 73, 78), on file at the Massachusetts State Archives. North Carolina’s act of cession specifically included a whereas clause referring to the fact that “the funds heretofore appropriated by this state [for lighthouses] are now vested in [Congress]. . . .” Act of Nov. 1, 1790, ch. 2, 1790 N.C. Laws 65. See letter from Philadelphia Merchants, *supra*, note ____.

²⁸ Esterquest at 107 n.1, quoting from the Independent Chronicle, June 5, 1794. At the time Massachusetts turned over its lighthouses in 1790, it was scrambling together money for the garrison at Castle Island. See, e.g., Mass. Acts and Resolves Ch. 95, June 24, 1789; Ch. 23 Jan. 22, 1790; and Ch. 59, June 23, 1790 (funding the garrison’s pay roll by borrowing funds, or borrowing on credit of particular taxes). Yet it continued to fund the garrison—without the aid of tonnage duties, which had previously been relied on—for years after that, and held on to the fort until 1798. Esterquest at 101-03, 106-08.

²⁹ State use of lotteries to generate funds for improvements (as well as other legislative purposes) continued after 1789, and other forms of taxes were at least conceivable means of replacing monies lost to the federal government. South Carolina is a good example of both. In 1791, South Carolina instituted a license fee on billiard tables and liquor shops in order to provide a pilot and pilot boat for the port of Georgetown. Although the federal government left state pilot regulations in place in the Lighthouse Act, South Carolina’s fund for pilots had run dry, apparently because the legislature felt that the right to collect duties for pilot services had been ceded

decided to give them a try. Evidently, the concept of having a federal lighthouse keeper on a federal enclave within state territory did not sufficiently raise the hackles of many. Moreover, the positive collective state response to the Lighthouse Act is reflective of contentment with the Act's broader implications: there was to be a national lighthouse system, organized and controlled by the federal government, with federal officials making personnel decisions and decisions on whether or where new lighthouses were to be built.

The significance of the latter decisions should not be lightly dismissed. Indeed, regardless of the principled position staked out by Sam Adams in his letters to Elbridge Gerry, Adams' motivation in writing them was an attempt to protect a friend from losing his job under the new federal lighthouse regime.³⁰ Needless to say, Adams was not the only such lobbyist.

Nor were employment decisions the only topic for lobbyists. Within months of the Lighthouse Act taking effect, a Massachusetts merchant lobbied George Washington for construction of new lighthouse on the

to the federal government. Esterquest at 191-92.

In 1795, South Carolina authorized a lottery for clearing out and removing obstructions in the Savannah River in order to open navigation between points in their state and Augusta, Georgia. S.C. (Dec. 12, 1795), p.19. *See also* V Statutes at Large of South Carolina (Thomas Cooper, ed.) 263 (Act No. 1615, Dec. 12, 1795, authorizing a lottery for promotion of useful manufactures); 322 (Act No. 1690, Dec. 16, 1797, appointing commissioners to clear out and make the Saluda river navigable, and authorizing them to raise subscriptions or establish a lottery to carry out the purposes of the act) (1839).

³⁰ Letter from Samuel Adams to Elbridge Gerry, Aug. 20, 1789, *reprinted in* 16 DHFFC, *supra* note ____, at 1362; Letter from Samuel Adams to Elbridge Gerry, Aug. 22, 1789, *reprinted in* 16 *id.* at 1371.

Island of Seguin.³¹ Federal lighthouse projects required federal justification, and merchants and state politicians looking to obtain a new lighthouse for their shores understood the magic “national interest” language they needed to include in their petitions to Congress.

On the other hand, a remarkable letter by the federal government’s superintendent of lighthouses in Massachusetts amply demonstrates that federal-state lobbying could also be a two-way street. When the superintendent, Benjamin Lincoln, had to follow up with the Massachusetts governor regarding an expected cession of land for a new federal lighthouse, his emphasis on the project’s local benefits leave the modern reader wondering about the constitutionality of Congress’ motives:

I learn that the cession has not been made. I am therefore induced to state this to your Excellency which I do in the most perfect confidence that as the Law for erecting the Light *sprang more from consideration of peculiar advantages to our fishermen & coasters than general utility to the navigation of the Union* the measure will meet the early attention and support of the Legislature of this State.³²

Whether or not Lincoln’s obvious sales pitch can be taken at face value, it was certainly the case that national interests did not always align

³¹ Samuel Goodwin to George Washington, Nov. 25, 1789, *reprinted in* 4 Papers of George Washington, Presidential Series at 323 (information about Goodwin appears at p.302).

³² B. Lincoln to Governor Strong, dated June 5, 1800, contained in the bill jacket for Ch. 7 of the Acts of 1800 (June 12, 1800) (emphasis added), on file in the Massachusetts State Archives. The letter was read in both houses of the Massachusetts legislature, and was included in the bill jacket for the legislation that was passed one week later.

perfectly with local interests—interests that themselves might be split into competing lobbying groups.³³

In sum, the states' acceptance of a federally operated lighthouse system may have been an obvious economic decision, but it was not cost free. Giving up control over lighthouses meant more than giving up having to purchase the oil and light the wicks. It also meant more than giving up personnel and construction decisions. And under the federal acquisition policy that so irked Sam Adams, turning lighthouses over to the federal government meant that states would have to give the federal government exclusive jurisdiction over properties within their boundaries.

The history of state responses to the Lighthouse Act reflects that state legislatures were not as troubled by such jurisdictional grants as Sam Adams was. On the other hand, they did not uniformly cede their lighthouses without qualification. Given both the lure of federal funding and state acquiescence to broad federal involvement in lighthouse operations, one might expect that states simply answered the call of the Lighthouse Act by ceding their lighthouses with no strings attached. And, indeed, some states did just that. Other states, though, were concerned about the details regarding the nature of the cessions they were being asked

³³ *See, e.g.*, II House Journal 73 (Feb. 26, 1794) (petition seeking placement of light on Shell-Castle Island instead of Ocracock Island); II House Journal 328 (Feb. 16, 1795) (petition seeking erection of light on Damascove Island instead of Seguin Island).

to make—and, no doubt, recognized that the federal government’s desire to acquire exclusive control over the lighthouse properties gave them some bargaining leverage.³⁴ Those states addressed those concerns by imposing conditions in their acts of cession.

In doing so, they were protecting themselves with a tool not explicitly provided to them by the Enclave Clause. On its face, the Enclave Clause presents an on/off switch: either a state consents to exclusive jurisdiction, or it does not. The states that conditioned their consent were seeking a middle ground. Sometimes the federal government yielded that ground, sometimes it did not. The remainder of the paper addresses how the federal government responded to the types of conditions sought by states that qualified their consent.

II. EARLY FEDERAL RESPONSES TO STATE CONDITIONS UPON ENCLAVE CLAUSE CESSIONS

A. Continued State Jurisdiction for Purposes of Civil and Criminal Legal Process

Lighthouses, of course, were intended to safeguard lives and property from the hazards of the sea. But they weren’t meant to protect people running from the law. State legislatures, like the ratification conventions before them, recognized the possibility that a grant of exclusive

³⁴ If the federal government were simply, out of a sense of fairness, offering a chance for federal monies, with no desire to actually be taken up on that offer, then all state leverage would have disappeared. However, both Congress (in extending cession deadlines and in providing for additional lighthouses), and the Treasury Department (which administered the early lighthouse program with great vigor), exhibited an unadulterated desire to run a strong federal lighthouse program. As noted above, though born out of federal tax policy, the federal

federal jurisdiction could turn lighthouse properties into sanctuaries for people seeking to avoid state judicial process.³⁵ Three states—Massachusetts, New Hampshire, and Rhode Island—included jurisdictional “carve-outs” in their initial cessions of lighthouses, asserting a retention of power to execute all civil and criminal process on the ceded lands.³⁶ In 1792, New York followed suit when it ceded jurisdiction over unimproved land to be used for the construction of a lighthouse at Montauk.³⁷

Although the jurisdictional carve-outs were no more than an attempt by a handful of states (notably New England and New York) to ensure that state judicial process could reach all of its citizens, the Washington administration became concerned that the states’ reservation of jurisdiction over lighthouse lands violated both Congress’ lighthouse legislation and the Constitution. The Massachusetts and New Hampshire provisions may well have escaped federal notice initially, but the language in New York’s passage of the Montauk cession in December 1792 did not.

lighthouse program became a proud symbol of federal action.

³⁵ Report from N.H. House of Representatives Committee on the propriety of ceding the light house in their State to the United States, dated Feb. 8, 1791, recommending that land be ceded “reserving to this State the right of pursuing & apprehending all person who may escape from the pursuit of any officers of this State and take refuge within said Territory” (on file at New Hampshire Department of Records Management and Archives; copy on file with the author).

³⁶ Act of June 10, 1790, ch. 4, 1790 Mass. Laws 77; Act of Feb. 14, 1791, ch. 71, 1791 N.H. Laws 10; Act of May 1793, 1793 R.I. Laws 21. The proviso in Massachusetts’ cession act read as follows: “*Provided also*, That all civil and criminal processes under the authority of this Commonwealth, or any officers thereof, may be executed on any of said lands, or in any of said buildings; in the same way and manner, as if the jurisdiction had not been ceded as aforesaid.” Act of June 10, 1790, ch. 4, 1790 Mass. Laws 77.

³⁷ N.Y., Ch. 4, Dec. 18, 1792.

In May 1792, Secretary of Treasury Alexander Hamilton appointed Commissioner of Revenue Tench Coxe to supervise federal lighthouse operations.³⁸ In early 1793, Coxe reviewed the recent Montauk cession and forwarded it to Hamilton with his opinion that New York's reservation of jurisdiction was inconsistent with both the Constitution's Enclave Clause and Congress' law regarding creation of a light at Montauk.³⁹ Hamilton, in turn, sought the opinion of Attorney General Edmund Randolph.

Randolph's analysis raised, and in good lawyerly fashion dodged, any Constitutional question presented by New York's potentially "non-exclusive" cession of jurisdiction, but the Attorney General opined that the state law was fatally inconsistent with Congress' Montauk statute:

When I first read your letter, inclosing the cession of Montok-point, I suspected, that it would be necessary to travel into a wide constitutional field. I was apprehensive, that I should be obliged to inquire, whether congress, even if they were so disposed, could accept a cession, with a reservation of state-jurisdiction. But when I adverted to the act, which directs a light-house to be built on Montok-point, it became obvious, that congress did not mean to accept this cession, with a mutilated jurisdiction. The words are: "As soon as the jurisdiction shall have been ceded:" that is, as soon as New-York shall have relinquished her jurisdiction. It is

³⁸ A. Hamilton to T. Coxe, May 22, 1792, reprinted in XI Syrett 416. The circumstances underlying Coxe's appointment in May 1792 are described in Jacob E. Cooke, *Tench Coxe and the Early Republic* 239-42 (1978).

³⁹ T. Coxe to A. Hamilton, Jan. 3, 1793, reprinted in XIII Syrett 447. In April 1792, Congress passed a statute providing for construction of a lighthouse "as soon as the jurisdiction of such land on Montok Point in the state of New York . . . shall have been ceded to the United States." 2d Cong., Sess. I, Ch. 18 (Apr. 12, 1792).

manifest, that this has not been done; and therefore the act of New-York is not commensurate with the act of congress.⁴⁰

Believing New York's cession to be inadequate, the administration determined that it could not proceed with construction of the Montauk light until the matter of jurisdiction was resolved.⁴¹ And apparently by chance, though no doubt with his antennae raised, only two weeks after having written to Hamilton about the Montauk law Coxe reviewed a report containing a copy of Massachusetts' June 1790 cession statute and similarly informed Hamilton that the Massachusetts proviso appeared to violate both the Lighthouse Act and the Constitution.⁴² If New York's retention of jurisdiction was not valid, neither was any other state's.

The Washington administration sought to resolve the exclusive jurisdiction problem in Congress, as Coxe explained in a letter updating New York's senators and representatives regarding the Montauk light:

The Attorney General having given an opinion of the insufficiency of the cession considered in connection with the act of Congress, and the act of cession having in consequence been laid by the President before

⁴⁰ E. Randolph to Secretary of the Treasury, Jan. 7, 1793, reprinted in XIII Syrett 472-73.

⁴¹ T. Coxe to the Honorable the Senators & members of the House of Representatives of the Congress of the U.S., N. York, dated Sept. 7, 1793, NARA microfilm roll M63; American State Papers, Misc. (Class 10), vol. 1, Ser. 37, No. 58 (committee report communicated to the House on Dec. 17, 1794).

⁴² T. Coxe to A. Hamilton, Jan. 19, 1793, reprinted in XIII Syrett 503. In his letter, Coxe suggested to Hamilton that Randolph's opinion be obtained regarding whether Massachusetts' cession was made "in such manner as to be availing and of effect" under both the Constitution and federal statute. There is no evidence that any additional opinion was obtained from Randolph, and it is conceivable that Hamilton would have concluded that the Montauk opinion he already had obtained sufficiently answered the same questions arising under the Massachusetts law.

the Legislature, it remains to qualify the Law of the Union, or of the state, so as to produce the necessary concordance. It appears at present not improbable that due consideration of the subject may produce about the beginning of the next session a suggestion from the executive in favor of a new act of Congress comprehending all the lighthouse Lands, to proceed upon the Idea of a concurrent Jurisdiction in the Federal and state governments.⁴³

Thus, although Coxe's letter mentions the possibility of a change in state law, the administration's approach (as seen in the last sentence of the quote above) focused on seeking a modification from Congress permitting cessions of something less than exclusive jurisdiction. Though the matter proceeded slowly,⁴⁴ in January 1794, Washington sent a message to both houses of Congress that included the following paragraph:

The laws respecting light-house establishments require, as a condition of their permanent maintenance, at the expense of the United States, a complete cession of soil and jurisdiction. The cessions of different States having been qualified with a reservation of the right of serving legal process within the ceded jurisdiction, are understood to be inconclusive, as annexing a qualification not consonant with the terms of the law. I present this circumstance to the view of Congress,

⁴³ T. Coxe to the Honorable the Senators & members of the House of Representatives of the Congress of the U.S., N. York, dated Sept. 7, 1793, NARA microfilm roll M63. In fact, Washington had simply laid the Montauk statute before Congress, without Randolph's opinion and without any apparent elaboration on the issue. Message from the President, Feb. 27, 1793, printed in Journal of the House.

⁴⁴ In February 1793, Washington laid New York's Montauk statute before Congress. House Journal, 2d Cong., 2d session, p.721 (Feb. 27, 1793). Nine months later, in November 1793, the incomplete cessions were listed as a topic to be communicated in Presidential speeches and messages. Objects to be communicated in Speech & Messages, Nov. 1793, reprinted in XV Syrett 429-30: "XIII Communication of the state of cessions of Light Houses. The Cession in various instances has not been intire; it has reserved a partial right of jurisdiction for *process*; consequently is not strictly conformable to law."

that they may judge whether any alteration ought to be made.⁴⁵

As suggested by Coxe's letter to the New York congressmen, the President was comfortable with the concept of a limited concurrent jurisdiction, but was simply uncomfortable accepting cessions that he did not believe himself authorized to accept.⁴⁶

Congress ended up yielding to the states' jurisdictional carve-outs, but it took them an extra fourteen months after Washington's message to do so. Given that the House rejected a cession bill in June 1794, the delay must have been attributable at least in part to disagreement within Congress.⁴⁷ However, rejection of the bill came only weeks after the House had passed a resolution deeming the Montauk cession "good and sufficient,"⁴⁸ and any disagreement regarding a permanent fix might well have stemmed from either separation of powers concerns or from the draft bill having gone broader than necessary (or desired) in describing the scope of permissible reservations: The bill had its origins in a House committee recommendation that a "committee be appointed to bring in a bill to authorize the President of the United States to receive cessions of land . . . notwithstanding the jurisdiction of the State may be reserved, except so far

⁴⁵ House Journal, 3d Cong., 1st session, p.46 (Jan. 21, 1794).

⁴⁶ As Leonard White has pointed out, Washington's general practice of deference to Congress led him to submit messages that suggested subjects for consideration without officially indicating which policy he thought they should pursue. Leonard D. White, *The Federalists* 54-55 (1961). It is difficult to imagine, though, that Congress would not have been aware of a preference by Washington that Congress yield on the point.

⁴⁷ House Journal, 3d Cong., 1st Sess., June 4, 1794.

⁴⁸ House Journal, 3d Cong., 1st Sess., May 12, 1794.

as respects the real or personal property of the United States.”⁴⁹ In contrast, the legislative solution ultimately agreed upon in March 1795 did not focus on granting the executive branch authority to accept cessions, and did not extend federal acceptance to reservations beyond those concerning state process. Rather, the new law simply declared that cessions reserving jurisdiction for execution and service of state civil and criminal process *shall* be deemed sufficient under federal laws providing for support or erection of lighthouses, beacons, buoys and public piers.⁵⁰

Had Congress satisfied itself that a mere reservation of jurisdiction for process did not violate its lighthouse-related laws, the matter may well have ended with Congress’ own interpretation of its statutes leaving the status quo in place. As it was, the March 1795 statute reflects that Congress concurred with the executive branch that state and federal law were in conflict, and decided that it would be appropriate to modify federal law and accept something less than a complete cession. Thus, Congress agreed to yield to the States’ retention of jurisdiction for process, and agreed to accept something less than the complete jurisdiction originally contemplated in their lighthouse statutes.

⁴⁹ American State Papers, Misc. (Class 10), Vol. 1, Ser. 37, No. 52 (“Reservations in the Cessions of Land for Light-Houses”), 3d Cong., 1st Sess., May 23, 1794. The wording of the recommendation is puzzling, given that the committee, in reviewing state cessions that reserved jurisdiction for service of process, concluded simply that cessions “under such limitations” would be “fully sufficient for the purpose for which such cessions are required...” *Id.*

⁵⁰ 3rd Cong., Sess. II, Ch. 40 (Mar. 2, 1795). The statute further provided that where the federal government held lands ceded without such reservation of jurisdiction, it would act as if a reservation for process had been made. *Id.* at ____.

Less clear is whether Congress was operating on the assumption that it could constitutionally accept less than the “exclusive” authority mentioned in the Enclave Clause. As we saw above, both the Attorney General and the Commissioner of Revenue questioned whether the Constitution permitted states to qualify their consent to federal enclaves by retaining some state jurisdiction over the enclave. If retention of jurisdiction were not permitted by the Enclave Clause, then a federal statute permitting such state jurisdiction would itself be unconstitutional.

However, there are two ways the March 1795 law could be squared with the Constitution: (1) interpreting the Enclave Clause as providing for exclusive jurisdiction where a state so consents, but permitting the federal government to accept something less than exclusive jurisdiction based on a “qualified” consent; or (2) interpreting the power to execute process as something that does not truly interfere with Congress’ exclusive control over federal enclaves. The historical record does not permit a firm conclusion as to Congress’ thinking on this question.

On the one hand, the legislative history explicitly approves of state “reservation of concurrent jurisdiction.”⁵¹ On the other hand, the law as enacted did not use the phrase “concurrent jurisdiction.” And although that

⁵¹ American State Papers, Misc. (class 10), Vol. 1, Ser. 37, No. 58 (“Concurrent Jurisdiction Granted to Those States That Have Ceded Lands for Light-Houses Without Reservation”) (report by Committee recommending bill); House Journal, Jan. 22, 1795 (following Committee recommendations by passing resolution appointing a committee to draft a bill).

language does appear in the House Committee's report, the committee had concluded that the "reservation of concurrent jurisdiction" did not obstruct the purposes underlying the federal government's cession requirement. From there, it may be a matter of semantics whether the Committee was sanctioning true "non-exclusive" federal control, or whether it was simply suggesting that the state cessions in question did not truly threaten the exclusive nature of the federal government's control.

The constitutionality of the March 1795 law was not going to be tested in court anytime soon—not with Congress yielding to state demands and the executive branch concurring in the policy. But as state-federal jurisdictional issues arose over federal enclaves, early 19th century judges did end up wrestling with the constitutionality of Congress' approach in the March 1795 law.

In United States v. Cornell, 25 F. Cas 646, 2 Mason 60 (D. R.I. 1819), the defendant was charged with committing a criminal act on federal property. The act occurred in a federal fort built on land acquired by the United States subject to a Rhode Island law containing a proviso retaining the power to execute state process on the federal land. Justice Story (riding circuit in New England), instructed the jury regarding whether the alleged acts occurred in a place within the "sole and exclusive jurisdiction" of the United States (and thus subject to federal court jurisdiction). Story's

analysis applied the second argument laid out above, that state service of process did not render federal jurisdiction non-exclusive.⁵² And he further suggested that if the service of process proviso were *not* interpreted that way, it could well run afoul of the Constitution:

For it may well be doubted whether congress are by the terms of the constitution, at liberty to purchase lands for forts, dockyards, &c. with the consent of a state legislature, where such consent is so qualified that it will not justify the ‘exclusive legislation’ of congress there. It may well be doubted if such consent be not utterly void. ‘Ut res magis valeat quam pereat,’ we are bound to give the present act a different construction, if it may reasonably be done; and we have not the least hesitation in declaring that the true interpretation of the present proviso leaves the sole and exclusive jurisdiction of Fort Adams in the United States.⁵³

Thus, Congress’ approach to the service of process issue in 1795 eventually received judicial sanction. But if the presence of the phrase “concurrent jurisdiction” in the legislative history represents an interpretation of the Constitution as broadly permitting state imposition of conditions upon federal jurisdiction over federal enclaves, such an

⁵² *Id.* at 649 (stating that the state law did not contain any reservation of concurrent jurisdiction or legislation; that the proviso was apparently intended to prevent federal lands from becoming a sanctuary for fugitives who committed acts within state jurisdiction; and concluding that “[t]here is nothing incompatible with the exclusive sovereignty or jurisdiction of one state, that it should permit another state, in such cases, to execute its processes within its limits.”). *See also* Commonwealth v. Clary, 8 Mass. 72 (1811) (dismissing indictment because offense charged occurred on territory under exclusive control of the federal government, notwithstanding state’s reservation of right to serve process).

⁵³ Cornell, 25 F. Cas. at 649. Earlier in his instructions, Justice Story opined that when a state legislature consents to the purchase of federal lands, the land purchased “by the very terms of the constitution ipso facto falls within the exclusive legislation of congress, and the state jurisdiction is completely ousted.” *Id.* at 648 (stating that “the consent of the state legislature is by the very terms of the constitution . . . a virtual surrender and cession

interpretation likely would have been rejected in the early nineteenth century by Justice Story.⁵⁴ Moreover, the Supreme Court did eventually reject that interpretation in 1885.

Nearly sixty years after Justice Story's opinion, the Supreme Court set forth a framework for handling jurisdictional issues regarding federal enclaves that incorporated Story's interpretation that a state's consent to federal purchase of lands automatically vests exclusive authority over the lands in the federal government.⁵⁵ Conditions on federal exclusive legislative authority could only be imposed by a state in situations where the federal government acquired its land in some method other than purchase with state consent.⁵⁶ In sum, under nineteenth century jurisprudence the Enclave Clause did not permit for anything other than exclusive jurisdiction, and the power of consent could not be used to impose conditions qualifying federal jurisdiction.

of its sovereignty over the place").

⁵⁴ In his commentaries on the Constitution, Justice Story suggested that the reservation for service of process had not been thought inconsistent with the enclave clause because "the state process, *quoad hoc*, becomes the process of the United States, and the general power of exclusive legislation remains with congress. Story, Commentaries on the Constitution of the United States § 1225 (1858) [vol. II at p. 127].

⁵⁵ *Fort Leavenworth R. Co. v. Lowe*, 114 U.S. 525, 532 (1885) ("When the title is acquired by purchase by consent of the legislatures of the states, the federal jurisdiction is exclusive of all state authority."). The Court concluded that such a proposition followed "naturally from the language of the constitution." *Id.* at 537-38.

⁵⁶ *Id.* at 537-39. See *Newcomb v. Inhabitants of Rockport*, 66 N.E. 587, 589 (Mass. 1903) ("the distinction which now prevails is between land purchased of a state with the consent of its Legislature, over which, by the terms of the Constitution, the jurisdiction of the United States is exclusive, and land over which the state merely cedes jurisdiction. In the latter case, if the states attaches conditions, their validity depends upon whether they interfere with the use for which the jurisdiction is ceded.").

Siding again with Justice Story, the Court deemed service of process reservations as not "interfering in any respect with the supremacy of the United States" over federal enclaves. *Fort Leavenworth R. Co.*, 114 U.S. at 533.

The law after that became a bit more muddled, until the Supreme Court in 1937 eventually reversed course and upheld the Constitutionality of state restrictions on federal exclusive jurisdiction in cessions under the Enclave Clause.⁵⁷ In a nutshell, federal property law was transformed from expressing a prohibition against conditional cessions under the Enclave Clause; to recognizing jurisdictional cessions not only with regard to article I federal enclaves, but with regard to property held under article IV of the Constitution (“article IV cessions”); to permitting article IV cessions to be accompanied by any conditions desired by the states; to determining that Enclave Clause cessions could similarly be qualified by state conditions.⁵⁸

Prior to *James v. Dravo Contracting Co.*, it had already been established that when the federal government acquired property in some way other than a purchase with state consent, the state could subsequently cede jurisdiction with reservations. In *Dravo Contracting*, the Court recognized that “[t]he result to the federal government is the same whether consent is refused and cession is qualified by a reservation of concurrent

⁵⁷ *James v. Dravo Contracting Co.*, 302 U.S. 134, 148-49 (1937). As the Supreme Court pointed out, permitting such restrictions could serve both state *and* federal purposes. *Id.* at 148 (concluding that there is “no reason why the United States should be compelled to accept exclusive jurisdiction or the state be compelled to grant it in giving its consent to purchases”); *Silas Mason Co. v. Tax Comm’n*, 302 U.S. 186, 208 (1937) (mere fact that federal government needs land “does not necessitate the assumption by the Government of the burdens incident to an exclusive jurisdiction”).

For a detailed history of the development of Enclave Clause case law, see David E. Engdahl, “State and Federal Power over Federal Property,” 18 *Ariz. L. Rev.* 283 (1976).

⁵⁸ *Id.* at 304-06, 321-24, 331. Compare *United States v. Cornell*, 25 F. Cas 646, 2 Mason 60 (D. R.I. 1819) and *Fort Leavenworth R. Co. v. Lowe*, 114 U.S. 525, 532 (1885) (discussed *supra* at ____, supporting proposition that Enclave Clause cessions are absolute) with *James v. Dravo Contracting Co.*, 302 U.S. 134, 148-49 (1937) (holding that the Enclave Clause does not require that state consent be without reservations, and concluding that there is “no reason why the United States should be compelled to accept exclusive jurisdiction or the state be

jurisdiction, or consent to the acquisition is granted with a like qualification.”⁵⁹ However, as David Engdahl has pointed out, shortly before *Dravo Contracting* the Court had reaffirmed the view that qualifications to a state’s cession or consent could not validly be made under the Enclave Clause (even though they could be made in article IV cessions).⁶⁰ So the common sense reasoning in *Dravo Contracting* created a rather sudden change in Enclave Clause interpretation.⁶¹

Speaking more broadly in *Dravo Contracting*, the Supreme Court elaborated on state authority to impose qualifications upon its consent under the Enclave Clause:

Clause 17 contains no express stipulation that the consent of the state must be without reservations. We think that such a stipulation should not be implied. We are unable to reconcile such an implication with the freedom of the state and its admitted authority to refuse or qualify cessions of jurisdiction when purchases have been made without consent, or property has been acquired by condemnation.⁶²

As shown by the discussion in the following section, the twentieth century shift from the dominant nineteenth century judicial view (and the roots of

compelled to grant it in giving its consent to purchases.”).

⁵⁹ *Dravo Contracting Co.*, 302 U.S. at 147-48.

⁶⁰ See Engdahl, 18 *Ariz. L. Rev.* at 322 (citing *Surplus Trading Co. v. Cook*, 281 U.S. 647 (1930) and *United States v. Unzeuta*, 281 U.S. 138 (1930)).

⁶¹ The change in thinking was significant enough to result in a Congressional redefinition of federal jurisdiction under Title 18. Whereas jurisdiction over crimes on federal lands previously extended only to places of “exclusive” jurisdiction, a 1940 amendment expanded Title 18’s reach to places of “concurrent” jurisdiction as well. See *United States v. Bin Laden*, 92 F. Supp.2d 189, 208-11 (S.D.N.Y. 2000) (setting out history of Enclave Clause judicial interpretation and amendments to Title 18).

⁶² *Dravo Contracting Co.*, 302 U.S. at 148-49.

the latter can be heard in Attorney General Randolph's apprehension when the Montauk cession issue reached him in 1793) actually appears to be a return to the solutions worked out in practice by the late eighteenth century federal and state governments. But neither Congress nor the Executive branch expressly resolved the matter in the 1790s, coming no closer than the March 1795 statute to addressing constitutional issues in handling other conditions imposed (or attempted to be imposed) by the states in ceding lighthouse lands.

B. Conditioning the Terms of Consent

A number of states imposed time or use restrictions on the effectiveness of their consent. In the case of existing lighthouses, some states conditioned their grant of jurisdiction on the United States' continued operation of the lights, providing that if the lights fell into disrepair, the cessions were to be deemed void.⁶³ Similarly, in situations where states were ceding properties upon which lighthouses were to be constructed, they placed a time limit upon the federal government's construction work—if the lighthouse was not built within the given time period, the cession would be void.⁶⁴

⁶³ Mass., Ch. IV, June 10, 1790; R.I., May 1793. South Carolina and Georgia similarly included provisos conditioning their grants on continued support and repair of the lights, though without explicitly providing that the remedy for breach would be a voiding of the consent. S.C., Jan. 20, 1790; GA, Dec. 15, 1791.

⁶⁴ Virginia, Ch. V, Nov. 19, 1789 (7 years to erect light at Cape Henry); Mass., Ch. X, Feb. 19, 1794 (4 years to erect light on Seguin Island); N.C., Ch. I, July 1794 (3 years to erect light at Cape Hatteras). Virginia and Massachusetts also included a post-construction "use" limitation on their consent, stipulating that the cession would become void if, after construction, the lights were to be allowed to fall into disrepair. (Virginia's cession, however, would only become void if the disrepair itself continued for seven years.)

Not only were the “use” restrictions purporting to govern existing lighthouses received with silence,⁶⁵ but—more significantly—the time limitations for construction of new lighthouses were taken quite seriously by the executive branch. In fact, the Treasury Department asked North Carolina for a new cession law after it had failed to get the Cape Hatteras light erected within the state-mandated deadline.⁶⁶

Had the states not limited their cession laws with time or use restrictions, could they subsequently have sought in court to void their previously-given consent? Including the restrictions eliminated uncertainty and provided states with a remedy if the federal government failed to fulfill the purposes (as defined by the state) for which the land had been ceded. In essence, the states were imposing the conditions upon which their consent would be rendered void. And the federal government accepted the states’ ability to do that. Did the Constitution require—or even permit—it to do so?

⁶⁵ In 1793, Coxe reviewed the Massachusetts cession law from three years earlier and expressed an objection only to a different part of the law, discussed *infra*. XIII Syrett at 503, Coxe to Hamilton, dated Jan. 19, 1793.

Years later, when South Carolina ceded land for creation of a new lighthouse in the Georgetown harbor, the federal government took exception to the cession because it contained a number of conditions. Though not focused on specifically in the government’s objection, one of the conditions in the cession was a “use” restriction. For discussion of this matter see *infra*, note ____.

⁶⁶ Coxe to Senators and Representatives of N.C. in Congress, July 20, 1797, NARA Microfilm roll M63 (stating that the cession was rendered null and void because the time-limit expired, and asking the favor of procuring a new cession with the same terms as before “except the limitation”).

Years before, President Washington had conveyed to Congress an earlier North Carolina statute that conveyed title and jurisdiction of land on Occacock [Ocracoke] Island and Cape Island [Cape Fear]. Included with the legislation were the original conveyances of land that North Carolina had previously received from the land’s owners at the time that North Carolina was planning its own lighthouses. In transmitting these documents to Congress, Washington specifically drew Congress’ attention to the conditions in the original conveyances that required the lights to be built before October 8, 1800 (Cape Fear) and January 1, 1801 (Ocracoke). Washington to The Senate and The House of Representatives, Oct. 27, 1791, reprinted in *The Writings of George Washington*,

The general history of precedent involving restrictions on exclusive jurisdiction has been outlined above.⁶⁷ In its 1937 *Dravo Contracting* opinion, the Supreme Court ultimately upheld the Constitutionality of a state law containing a jurisdiction “reverter” clause similar to the clauses in the 18th century state lighthouse-related laws.⁶⁸ On the other hand, where the state is silent and does not impose either an explicit reverter of jurisdiction or a condition based on how the land is to be used, the use of federal land for unintended purposes does not divest the federal government of exclusive jurisdiction under the Enclave Clause.⁶⁹ Thus, reverter clauses are not superfluous; they do indeed constitute a (permissible) limitation of the federal government’s authority over ceded enclaves.

The complex article I and article IV doctrinal maneuvers required for the Supreme Court to end up where it did in 1937 could hardly have been obvious in the 1790s. And yet, the federal officials in charge of the lighthouse program appear to have understood intuitively what the Supreme

vol. 31, at 406-07 (1939).

⁶⁷ See *supra* at ____.

⁶⁸ *James v. Dravo Contracting Co.*, 302 U.S. 134, 148-49 (1937). Among other conditions, the state law in *Dravo Contracting* provided that the jurisdiction ceded “is to cease if the United States fails for five consecutive years to use any such land for the purposes of the grant.” *Id.* at 144-45. The Court rejected a claim, based on the *Cornell* and *Fort Leavenworth R.R. Co.* cases, that the state’s qualifications on its consent were inoperative under the Enclave Clause.

⁶⁹ See *Humble Pipe Line Co. v. W.E. Waggoner*, 376 U.S. 369, 372-73 (1964), and cases cited therein. See also *United States v. Heard*, 270 F. Supp. 198, 200-01 (W.D. Mo. 1967) (if cession is made conditional only for certain purposes, then jurisdiction reverts if reason for condition is terminated); *United States v. D.K. Johnson*, 994 F.2d 980, 986 (2d Cir. 1993) (state can—but did not—condition continued jurisdiction upon use of land for specified purposes; grant of jurisdiction should be interpreted broadly, because the government’s “needs change and jurisdiction ceded to the United States should not revert to the state merely because the function of ceded property evolves over time”); *United States v. Redstone*, 488 F.2d 300, 302 (8th Cir. 1973) (fact that ceded

Court expressed over 140 years later: that the power to give or withhold consent provides political leverage that practicalities might dictate yielding to.

It is difficult to imagine the executive branch in the 1790s standing on Constitutional principle in seeking to override a state's attempt to insure that the federal government use ceded land for its intended purposes, and in a timely manner. Telling a state in 1794 that the Constitution prohibited it from ensuring the federal government would timely use ceded land to build and maintain a lighthouse (as promised) could have been just as difficult as telling a state that the Constitution did not permit state agents to enter federal land to arrest fugitives from justice. And given the potential for an easy solution to any problem that might arise (did the Treasury Department truly have to fear that North Carolina would not extend the time for building a lighthouse?), adherence to the state-imposed condition was likely a safe option (as it turned out to be).

In any event, this much is clear: the flexible approach taken by the federal government outpaced the development of the law in the courts. At the very beginning of the federal-state relationship under the constitutional experiment, the executive branch ceded more authority to the states under

land was no longer used for military purposes was irrelevant to determination of federal jurisdiction).

the Enclave Clause than the judiciary of the day might have required them to.

C. States Seeking A “Quid Pro Quo” In Return For Consent To Exclusive Jurisdiction

States were not blind to the bargaining possibility presented by the federal government’s need for consent. But the overwhelming practice was *not* to engage in such bargaining, perhaps because ultimately they were not anxious to get stuck having to care for lighthouses without tonnage duties, or because they were anxious not to lose new lighthouse construction projects. In the two instances in which states sought to receive “extras” in exchange for their initial cessions under the Lighthouse Act, the results were mixed: South Carolina did not get what it wanted; Georgia did, but it may well have obtained the benefit it was seeking anyway.

Years before passage of the Tonnage Act, a Georgia statute had established a three-pence per ton duty on all shipping entering the port of Savannah, for the purpose of clearing the river. In March 1790, Representative James Jackson unsuccessfully moved to have the appropriations bill include amounts for cleaning up obstructions in the Savannah River.⁷⁰ Later in the session, however, Congress assented (for a limited time) to Georgia’s continued levying of the tonnage for river clean-

⁷⁰ 2 Annals of Congress 1500 (Mar. 15, 1790). Representative Bland feared the precedent that such an appropriation would set: “Should this be granted, every member in this House will come forward with proposals for clearing rivers, and opening canals to the sources of rivers.”

up.⁷¹ When Georgia eventually ceded its light house on Tybee Island, it included a proviso “[t]hat the act allowing three pence per ton for clearing and removing wrecks and other obstructions in the River Savannah, be continued until the same shall be completely cleared.”⁷²

Hamilton objected to the proviso, but only on “separation of powers” principles—he informed Georgia’s congressional delegation that as an executive officer, he could not accept Georgia’s deed of conveyance because “it would carry a clear tho implied engagement for the continuance of a Law, which it is in the power of the Legislature alone to make.”⁷³ Indeed, Congress did end up extending the force of its law well into the 19th century—but without language matching the proviso in Georgia’s law of cession, and in laws that similarly benefited two other states.⁷⁴ Regardless of the fact that one cannot firmly attribute Congress’ actions to Georgia’s linkage of its demand to the issue of jurisdictional cession, the important point is that Hamilton did not object in principle to such linkage. If a state wanted to receive some benefit from Congress in turn for consenting to

⁷¹ Sess. II, Ch. 46, Aug. 11, 1790. The act also included consent for similar tonnage-funded activities established by Rhode Island and Maryland.

⁷² Ga., Dec. 15, 1791.

⁷³ Hamilton to Senators and Representatives of Georgia, dated Nov. 17, 1792, reprinted in XIII Syrett at 155.

⁷⁴ In March 1792, eight months before Hamilton wrote his November 1792 letter, Congress had already enacted a three-year extension of its consent (after having enacted a one-year extension in February 1791). 2nd Cong., sess. I, ch. 10 (Mar. 19, 1792). After that, Congressional approval to the Georgia, Maryland, and Rhode Island laws was again extended in 1796, and consent to the Georgia and Maryland acts was further extended by laws passed in 1800, 1808, 1814, and 1822. [cites]

exclusive federal jurisdiction over an enclave, Hamilton's only concern was that the bargain be struck by the legislative branch, and not the executive.⁷⁵

On the other hand, South Carolina's experience amply demonstrates that the power to bargain is not the same thing as "bargaining power." In ceding the Charleston lighthouse to the United States, South Carolina conditioned its cession with a proviso that the federal government pay any lighthouse expenses incurred prior to the August 15, 1789, date established by the Lighthouse Act, and which had not yet been paid by the state.⁷⁶ Rather than resting on legislative fiat, South Carolina's William Smith moved to amend the appropriations bill to include a clause paying for such expenses.⁷⁷ However, South Carolina's motion was defeated, with objectors standing both on principle (against federal payment of state arrearages) and on claims of "chutzpah"—Representative Fitzsimons declaring Smith and (fellow South Carolinian) Tucker's concern over approximately \$2,000 in expenses to be an "inconsiderable object," particularly "coming from a State, which the United States have agreed to pay five millions of dollars for."⁷⁸ South Carolina let the small matter drop,

⁷⁵ Georgia never amended its December 1791 cession law. In March 1793, after Hamilton had expressed an inability to accept Georgia's deed, Georgia's senators presented the deed directly to the Senate, which ordered that the deed lie on file. 1 Senate Journal 503 (Mar. 2, 1793).

⁷⁶ S.C., Jan. 20, 1790.

⁷⁷ 2 Annals of Congress 1498-99 (Mar. 15, 1790). Smith appears to have been confused, however, in that he moved for expenses arising prior to South Carolina's cession, rather than for expenses arising prior to the Lighthouse Act's August 15, 1789, cutoff date. Under the plain language of the Lighthouse Act, any costs arising between those two dates should have been covered without dispute.

⁷⁸ 2 Annals of Congress 1498-99 (Mar. 15, 1790).

and the federal government did not accede to the state's attempt to unilaterally obtain consideration via the "proviso" clause.

The federal government appears to have similarly ignored, albeit with silence, a separate proviso in the same law, requiring it to place proper leading marks and buoys near the lighthouse being ceded.⁷⁹ However, seven years later, when South Carolina ceded jurisdiction over land intended for construction of a lighthouse in Georgetown harbor, a similar provision did not escape the federal government's notice, and the executive branch called for passage of a new act of cession.

By that time patience with the South Carolina legislature had run thin. Although Congress passed a law providing for erection of the Georgetown light in February 1794, it took more than a year and a half for the legislature to act, and more than two years before Tench Coxe received any word of the cession.⁸⁰ As unhappy as Coxe was with the delay, he was even unhappier when he saw that the South Carolina law provided only for conveyance of the soil, and not cession of jurisdiction.⁸¹

It then took another half year for South Carolina to pass a new law, and their second attempt properly conveyed jurisdiction, but contained provisos requiring that the light be kept in good repair, and requiring the

⁷⁹ S.C. Jan. 20, 1790.

⁸⁰ Coxe to Mr. Smith of S. Carolina, dated May 3, 1796 (NARA M63, roll 1).

⁸¹ Coxe to Isaac Holms, June 15, 1796 (NARA M63, roll 1).

stationing of leading marks and buoys.⁸² This was probably not an unreasonable thing to do, given that the very first law they passed ceding a lighthouse to the federal government in 1790 contained similar provisos. However, this time the federal government did not ignore the provisos.

Secretary of the Treasury Oliver Wolcott sought the opinion of Attorney General Charles Lee, and Lee concluded that South Carolina's conditional grant of jurisdiction did not properly comply with the act of Congress authorizing construction of the Georgetown light.⁸³ The two concerns Lee noted were that the state consent ought to have been "in general terms" because the federal law requiring the state grant did not specify any qualifications or conditions to be appended to it; and that Congress had not appropriated money for buoys. The latter problem appears to have been the only one that similarly troubled Tench Coxe.⁸⁴

The South Carolina legislature obliged with a third act, containing no limitation other than the reservation for service of process.⁸⁵ Given that the state had caused more than a three-year delay in construction of a lighthouse for its own benefit, it was no doubt a wise move for South Carolina to yield—assuming they even cared about the leading marks and buoys, and were not simply parroting earlier legislative language. But it is

⁸² S.C., Dec. 19, 1796.

⁸³ Charles Lee to the Secretary of the Treasury, Jan. 21, 1797 (S.C. Dep't of Archives and History, Governor's Messages to the S.C. General Assembly #701, pp. 49-51).

⁸⁴ Coxe to Daniel Stevens, dated May 11, 1797 (NARA microfilm roll M63, roll 1).

worth noting that nothing in Attorney General Lee's opinion would have precluded them from bargaining with Congress for passage of a law providing for buoys and leading marks. As with Hamilton before him, Lee's concerns appear to have been grounded in considerations of separation of powers and Congressional intent, rather than in Constitutional prohibitions.

In sum, whereas there is clear evidence that the federal government yielded to state concerns over (a) retention of minimal state authority in federal enclaves; and (b) failure by the federal government to build the lighthouses for which land had been ceded, no similar evidence exists indicating that the federal government was willing to provide additional consideration to state governments in return for their consent. However, there is no indication that federal officials felt constitutionally constrained in that regard, and engaging in such bargaining would not have constituted wise national policy. So the resolution of the issue was likely a political one. Which leads us to the last category of conditions to be examined: conditions on the terms by which the federal government could acquire lighthouse land from private citizens.

D. Terms of Acquisition

Although the Lighthouse Act provided states with an economic benefit in return for ceding their existing lighthouse lands, no purchase

⁸⁵ S.C., Dec. 16, 1797.

money was provided for the land itself. This did not escape the notice of some state legislatures. None of the states insisted on compensation for the land, but a handful did provide that if the United States were to compensate any other state for its ceded lands, then they, too, were to receive similar compensation.⁸⁶ The federal government did not compensate any of the states for their initial lighthouse cessions, and there is no indication of any federal concern over the compensation provisions. But one wonders what might have happened if the federal government had determined that one state was particularly deserving of compensation for their improved land.⁸⁷ Would it have considered itself obligated to pay the states that unilaterally imposed conditions of equivalent payment? The answer may indeed be “yes.”

The acquisition of the extant lighthouses in 1789 was simplified by the fact that the states themselves (with the possible exception of Rhode Island) owned the lands on which the lighthouses had been built. However, once the federal government started constructing new lighthouses, they

⁸⁶ New York (Ch. 3, Feb. 3, 1790); Mass. Act of June 10, 1790, ch. 4, 1790 Mass. Laws 77; Act of May 1793, 1793 R.I. Laws 21.

⁸⁷ Technically speaking, the Enclave Clause only provides for exclusive jurisdiction when land is “purchased” by the federal government. U.S. Const., art. I, §8, cl.17. Assuming that a fair interpretation of the word “purchase” does not include obtaining land for free, one could argue that providing a future economic benefit (lighthouse operation) to the former land owner (the state) does not solve the problem. Certainly, the states with conditional compensation clauses did not equate the promised economic benefit of functioning lighthouses with “compensation” for the land. And so, rather than viewing the conditional compensation clauses only as an attempt to impose a condition on the federal government’s power, perhaps instead the entire set of state laws governing the cession of lighthouses existing in 1789 should also be viewed as an example of the state legislatures’ willingness to reasonably expand upon the Constitution’s precise words. Indeed, it would make little sense to read the Enclave Clause as protecting a state from determining to consensually give some of its land, together with a cession of jurisdiction, to the federal government for free. *See Humble Pipe Line Co. v. W.E. Waggoner*, 376 U.S. 369, 371-72 (1964) (rejecting argument that the Enclave Clause does not apply because

found themselves regularly needing to acquire land from private citizens. But just as states donated their lighthouse lands, private donations were not out of the question either, chiefly for two reasons: the barren land that tended to be used for lighthouses was generally not worth much, and landowners often had a vested financial interest in having local navigation improved with the addition of a lighthouse.⁸⁸ Although private ownership of new lighthouse lands did result in the government having to pay out sums for land acquisition, gifts did occur, and the Treasury Department customarily had its representatives explore the option.⁸⁹

In 1798, shortly after Congress authorized erection of a lighthouse at Eaton's Neck, New York, Commissioner of Revenue William Miller (Tench Coxe's successor) wrote two letters to his employees regarding acquisition of the land by gift or purchase.⁹⁰ In the meantime, though, New York had passed a statute ceding its jurisdiction over whatever land the

land was donated by state, and thus not "purchased").

⁸⁸ Numerous letters of the Commissioner of Revenue (the Treasury Department official whose job included overseeing the lighthouse establishment) discuss the possibility of acquiring land by donation. The following passage, from a May 1795 letter to the supervisor of lighthouses in New York, is typical: "The lots for these purposes are generally given to the United States, on account of the incidental benefits to the adjacent ports and country; or from consideration of Public Spirit, or from the poverty of the soil." T. Coxe to N. Fish, dated May 26, 1795, NARA Microfilm roll M63. See also T. Coxe to Pinchman, Wm Gray, Jr., and Jno Dary, Jun., May 19, 1796, NARA Microfilm roll M63 (lighthouse lands usually given freely, "yet an instance of a purchase has occurred, the soil being very valuable"); T. Coxe to B. Lincoln, July 8, 1796, NARA Microfilm roll M63; T. Coxe to S. Tredwell, Sept. 27, 1797, NARA Microfilm roll M63.

⁸⁹ The land for the lighthouse at Georgetown, S.C., was donated, and prior to the federal government's involvement land was donated to the state of North Carolina for lighthouses at Cape Fear and Ocracoke. S.C., Dec. 12, 1795; N.C. Ch. II, 1790; Coxe to Tredwell, Sept. 27, 1797; Miller to Secretary of Treasury, Sept. 25, 1798. On the other hand, the number of lighthouse properties eventually purchased over the years suggests that Coxe may have overstated the frequency with which gifts could be expected, in an attempt to keep his agents from spending too much for the land the government needed.

⁹⁰ 5th Cong., Sess. II, Ch. XV (Mar. 14, 1798); Miller to Joshua Sands, Apr. 28, 1798, NARA Microfilm roll M63 ("Can the quantity of ground necessary be obtained by gift or purchase, if not by the former at what price—"); Miller to Tredwell, May 31, 1798, NARA Microfilm roll M63 (ordering that the land be obtained by gift or purchase).

United States eventually chose for the lighthouse, and providing that such cession would occur as soon as the President furnished a certificate describing the land chosen and “certifying that the same are purchased of the present proprietor thereof.”⁹¹ Once Miller read the statute, he interpreted the quoted sentence as a condition of acquisition, writing both to his agent in New York and to the Secretary of the Treasury that the New York law required that the land be purchased.⁹²

In short, the Commissioner of Revenue was willing to accept as a condition of a state’s grant of jurisdiction a limitation upon the terms by which the federal government could acquire property. Although the episode specifically concerned federal receipt of a voluntary transfer of private property, it also illustrates the practical limitations on the federal government’s eminent domain power.

Decades later, the Supreme Court affirmed that the federal government’s right to exercise the power of eminent domain could never be

⁹¹ N.Y., Ch. 112 (Apr. 6, 1798).

⁹² In his June 6, 1798, letter to Joshua Sands, Miller included a copy of New York’s cession of jurisdiction and explained that “In the case of the proposed Light-house at Eaton’s Neck it is necessary that a purchase should be made from the present proprietor of the ground which is chosen.” Miller to Sands, June 6, 1798, NARA Microfilm roll M63. Once the deal was struck, he sent the deed to the Treasury Secretary, together with a copy of New York’s statute, and an explanation that the New York statute included a condition “that purchase is made of the proprietor.” It is entirely possible that the State of New York did not intend by its words to rule out the possibility of a gift, but Miller, whose prior correspondence had distinguished between the two methods of acquisition, apparently took the words as he literally understood them. *Cf.* N.C., Ch. 1 (July 1794) (providing that exclusive jurisdiction over land intended for lighthouses and forts shall be “ceded and stand vested” in the United States “as soon as the proprietors of said lands shall convey the same to the United States.”). And it is also possible that Miller was being too technical in his reading, and interpreted the statute more narrowly than necessary. The point, however, is that having read the law as containing a condition, he sought to comply with that condition.

subject to state consent.⁹³ However, as Enclave Clause law developed, the courts recognized the power of a state to withhold or qualify a cession of jurisdiction over lands obtained by the federal government through condemnation.⁹⁴ Thus, although states have no right to interfere with the exercise of federal takings power, the practical effect of the Enclave Clause means that if the federal government wants “exclusive” jurisdiction, it would have to comply with a state prohibition (or qualification) of that power.⁹⁵

The executive branch came face to face with this reality long before it was sorted out in the courts.⁹⁶ Though the implications of state power under the Enclave Clause were far from ironed out in the practices of the 1790s, their seeds were planted in the early practices under the Lighthouse Act.

CONCLUSION

As the Supreme Court stated in 1937: “We have frequently said that our system of government is a practical adjustment by which the national

⁹³ Kohl v. United States, 91 U.S. 367, ___ (1875). The Court did not have any reason to wrestle with the implications of its own suggestion that “[s]uch consent is needed only, if at all, for the transfer of jurisdiction and of the right of exclusive legislation after the land shall have been acquired.” Id.

⁹⁴ James v. Dravo Contracting Co., 302 U.S. 134, 148-49 (1937). See also *Ex parte Hebard*, 11 F.Cas. 1010, 1011 (D. Kan. 1877) (stating that consent required by Constitution only makes sense as limitation on federal government’s acquisition of plenary jurisdiction, rather than on its right of eminent domain).

⁹⁵ This represents a practical limitation on the Supreme Court’s pronouncement that the strength of the eminent domain power lies in the federal government’s ability to use it to avoid an attempt by an individual or a state legislature to attach “harassing conditions” to federal acquisition of property. *United States v. Fox*, 94 U.S. 315, 320 (1876) (upholding against federal challenge a New York law providing that land in New York could only be devised to natural persons and to corporations expressly authorized by New York).

⁹⁶ See also *Grace, From the Lighthouses* at 143-44, 147.

authority may be maintained in its full scope without unnecessary loss of local efficiency.”⁹⁷ One of the first “practical adjustments” that needed to be worked out under the Constitution was the acquisition and treatment of federal lands—lands situated within state borders, but needed for federal operations. Some of the very first parcels obtained were the lighthouses that were put in federal control at the very beginning of the First Federal Congress. Working out the practical adjustments pertaining to acquisition of those parcels led to the first federal legislative gloss on the Constitution’s Enclave Clause.

But operating mostly without legislative or judicial pronouncements, the early federal administration worked out its own adjustments with states that sought to place conditions upon jurisdictional cessions over federal enclaves. Some of those adjustments evince a flexibility of constitutional interpretation that would not be seen in Enclave Clause jurisprudence until the twentieth century. All of them reflect a search for common ground over dual control the federal and state governments had regarding establishment of federal jurisdiction within state boundaries. Whether or not the political decisions made square with a strict reading of the Enclave Clause, it is difficult to quibble with their wisdom.

⁹⁷ *Silas Mason Co. v. Tax Comm’n*, 302 U.S. 186, 208 (1937).