

COMMENTS

WILD BURROS, FENCES, AND ARPA: VIEWING THE ARCHAEOLOGICAL RESOURCES PROTECTION ACT AS PROPERTY CLAUSE LEGISLATION

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INTRODUCTION

The Archaeological Resources Protection Act of 1979 (ARPA)¹ was created to cure the “deficiencies”² of the Antiquities Act of 1906.³ In 1974, the Ninth Circuit, under the void-for-vagueness doctrine, declared portions of the Antiquities Act to be unconstitutional.⁴ For many years, however, the Act functioned as a “law enforcement tool”⁵ through which looters of public archaeological sites could be prosecuted for their illicit deeds.⁶ Although the scope of protection under

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¹ Archaeological Resources Protection Act of 1979, Pub. L. No. 96-95, 93 Stat. 721 (codified as amended at 16 U.S.C. §§ 470aa-mm (2001)). The following federal government agencies have issued uniform regulations for purposes of ARPA implementation: the Department of the Interior (43 C.F.R. § 7 (2001)), the Department of Agriculture (36 C.F.R. § 296 (2002)), the Tennessee Valley Authority (18 C.F.R. § 1312 (2002)), and the Department of Defense (32 C.F.R. § 229 (2002)).

² 125 CONG. REC. 21,239 (1979) (“Because of certain deficiencies in existing law [the Antiquities Act of 1906], it has become evident that new authority is critically needed to insure adequate protection of these priceless resources.”) (statement of Sen. Bumpers); see also Stephanie Ann Ades, *The Archaeological Resources Protection Act: A New Application in the Private Property Context*, 44 CATH. U. L. REV. 599, 601 (1995) (“Congress enacted ARPA because its predecessor, the Antiquities Act of 1906, contained unconstitutionally vague terms and therefore no longer was effective in combating archaeological looting.”).

³ Antiquities Act of 1906, ch. 3060, 34 Stat. 225 (codified at 16 U.S.C. §§ 431-433 (2001)). This Act protects “any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned by the Government of the United States.” *Id.* at § 433.

⁴ See *United States v. Diaz*, 499 F.2d 113, 115 (9th Cir. 1974) (holding that terms such as “object of antiquity” were undefined within the Antiquities Act and thus were “fatally vague” and in violation of the Due Process Clause of the Constitution).

⁵ Francis P. McManamon, *Ownership and Protection of Heritage: Cultural Property Rights for the 21st Century: Cultural Resources and Protection under United States Law*, 16 CONN. J. INT’L L. 247, 265 (2001).

⁶ SHERRY HUTT et al., *ARCHAEOLOGICAL RESOURCES PROTECTION* 20 (1992).

the Antiquities Act has diminished due in part to the rise of ARPA, the Act still remains in force for violations of paleontological materials and historic sites less than 50 years old.⁷

Some scholars praise ARPA for having the clarity and more readily enforceable provisions that the Antiquities Act lacked.⁸ Others caution that ARPA should not be viewed as a “panacea” for the preservation and prevention of destruction of archaeological resources located on lands under the aegis of federal law.⁹ I am inclined to turn my attention and energy elsewhere.

The primary focus of this Comment is on the language of the Property Clause¹⁰ of the United States Constitution and its potential applicability to ARPA. The Property Clause states, in relevant part, “[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States”¹¹ I will embark on a journey into the constitutional realm of ARPA, using as my backdrop the Property Clause. Specifically, I am searching for an answer to the following question: Can we view ARPA as valid Property Clause legislation under the *Kleppe v. New Mexico*¹² standard? Although the legislative history of the Act does not indicate that ARPA was enacted pursuant to the Property Clause,¹³ with respect to the “public lands” of the Act, ARPA comports with the *Kleppe* Property Clause standard. Yet, ARPA cannot be deemed Property Clause legislation with respect to the Act’s coverage of “Indian lands”¹⁴ because such lands fall outside of the scope of the Property Clause.¹⁵

⁷ *Id.* at 22. At least one commentator claims that the Antiquities Act continues to serve the following three functions: 1) the Act announced the basic public policies regarding archaeological resources in the United States; 2) it afforded the President power to designate places for “special preservation, commemoration, and interpretation;” and 3) the Act required “professionalism and a scientific approach to excavation, removal, or other investigation of archaeological resources on the public lands.” McManamon, *supra* note 5, at 257.

⁸ See, e.g., McManamon, *supra* note 5, at 266 (stating that ARPA’s definition of the resources covered by the law, its list of proscribed activities and the concomitant penalties, and its distinction between felony and misdemeanor sanctions “improved on the Antiquities Act”).

⁹ See, e.g., HUTT, *supra* note 6, at 31 (stating that although ARPA does not have a panacea function, it “is a tool that provides opportunities not available under traditional criminal statutes”).

¹⁰ U.S. CONST. art. IV, § 3, cl. 2.

¹¹ *Id.*

¹² 426 U.S. 529, 536 (1976). See *infra* text accompanying notes 53-68 for a discussion of the *Kleppe* standard of Property Clause legislation.

¹³ See generally 125 CONG. REC. 17,391, 21,237 (1979) for the substance of congressional debates pertinent to ARPA’s enactment.

¹⁴ ARPA employs the term “Indian” to describe Native Americans. For purposes of consistency, in this Comment, I will use the term “Indian lands” to describe lands owned by Native Americans. It is not my intention to offend anyone by the use of this term.

¹⁵ See U.S. CONST. art. IV, § 3, cl. 2 (limiting Congressional powers of disposition and regulation to “[t]erritory or other [p]roperty belonging to the United States”).

I have organized my inquiry in the following manner. First, I will consider two competing constructions of the Property Clause. Second, I will introduce major provisions of ARPA. Finally, I will evaluate ARPA under the *Kleppe v. New Mexico*¹⁶ standard of Property Clause legislation. Moreover, I acknowledge that there may be policy considerations and/or potential effects upon application of ARPA that may result from my analysis. In this Comment, however, I am merely concerned with providing a constitutional context for ARPA's enactment through a discussion of the Property Clause.

I. THE PROPERTY CLAUSE: THE "CLASSIC THEORY"¹⁷
V. THE "REAL CLASSIC THEORY"¹⁸

There is an intellectual debate over the proper interpretation of the Property Clause.¹⁹ On the one hand, there is a camp of individuals ("classic theorists") that ardently support constrained congressional power over lands deemed to fall under the Property Clause.²⁰ On the other hand, there is another camp of individuals ("real classic theorists"), backed by the Supreme Court of the United States, that advocate an expansive reading of the Clause.²¹ This section will consider the opposing views amongst the two groups.²²

¹⁶ *Kleppe*, 426 U.S. at 536.

¹⁷ See David E. Engdahl, *State and Federal Power Over Federal Property*, 18 ARIZ. L. REV. 283, 296 (1976) (employing the term "classic property clause doctrine" to describe an interpretation of the Property Clause that greatly limits the Article IV powers of Congress). I have borrowed the term "classic theorist" from Eugene R. Gaetke, *Refuting the "Classic" Property Clause Theory*, 63 N.C.L. REV. 617, 620 (1985).

¹⁸ See Eugene R. Gaetke, *Refuting the "Classic" Property Clause Theory*, 63 N.C.L. REV. 617, 655 (1985) (employing the term "real classic theory" to describe the Supreme Court's view of the Property Clause under *Kleppe v. New Mexico*, 426 U.S. 529 (1976)). Gaetke describes the "real classic theory" as being more expansive than the "classic theory." *Id.*

¹⁹ See *id.* at 619 (noting that the different constructions of the Property Clause "range to the extremes"); see also Engdahl, *supra* note 17, at 291-292 ("The fact that this one clause [the Property Clause] is taken as the source both of federal power over property not within the borders of any state, and of federal power over property that is within a state which has constitutional powers of its own, has given rise to considerable confusion.").

²⁰ Gaetke, *supra* note 18, at 619-620. Throughout this Comment, the "classic theorist" term will be used to describe individuals who subscribe to the "classic property clause doctrine" as enunciated by Engdahl, *supra* note 17, at 296.

²¹ Gaetke, *supra* note 18, at 654-55. Throughout this Comment, the "real classic theorist" term will be used to describe individuals who subscribe to the "real classic theory" as defined by Gaetke. *Id.* at 655.

²² For an extensive discussion of the historical development of the Property Clause and the opposing viewpoints on the proper construction of the Clause see Gaetke, *supra* note 18. I will highlight the basic elements of each perspective that Gaetke expounds upon in an effort to create a framework for a Property Clause application to ARPA.

A. *The "Classic Theorist" Notion of the Property Clause*

There are two "alternative contentions" that comprise the "classic theory" of the Property Clause: First, the unconstitutionality of federal retention of title to public lands within a state; and second, if such retention of title is permissible, the limitation of congressional power as a proprietor over private property located within a state.²³ Barring two exceptions, the second contention of the "classic theory" does not recognize the preemptive effects of legislation enacted pursuant to the Property Clause over contrary state law.²⁴

1. *Federal Retention of Title to Public Lands within a State*

Some "classic theorists" claim that the Property Clause does not bestow upon the federal government the right to hold title to public lands that are located within a state.²⁵ Under this view, Congress may only exercise its Property Clause power over public lands that have not yet been admitted into the Union.²⁶ Once a state is admitted into the Union, "classic theorists" argue that Congress must cede its Property Clause dominion over the public lands and transfer ownership to the state or private individuals.²⁷ "Classic theorists," nevertheless, recognize congressional power under the United States Constitution, Article I, Section 8, Clause 17 as a "mechanism" through which Congress may obtain valid title to lands within a state and "exclusive legislation" over those lands even after a territory has been admitted into the Union.²⁸

²³ *Id.* at 620-21.

²⁴ *Id.* at 651.

²⁵ *Id.* at 621. *Cf.* Engdahl, *supra* note 17, at 292-93:

It was not contemplated . . . that by acquiring territory the United States should accumulate and permanently hold a vast national domain outside the bounds of the states which constituted the Union . . . [B]oth federal title and the federal exercise of governmental jurisdiction in these lands were regarded as temporary—a transitional phase.

²⁶ Gaetke, *supra* note 18, at 621.

²⁷ *Id.*

²⁸ *Id.* at 633; *see id.* at 619 n.5 (stating that Congress has power over "certain federal lands" (also known as "federal enclaves") under U.S. CONST. art. I, § 8, cl. 17). These powers enable Congress:

to exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority 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, dock-Yards and other needful Buildings.

Id.

2. Congress as a Proprietor of Private Property within a State

Other “classic theorists” assert that if it is constitutional for the federal government to hold title to lands within a state under the Property Clause, Congress’ power over those lands is restricted to that of a proprietor over his private property.²⁹ It follows then that because of Congress’ limited power as a proprietor over the federal lands, states are empowered to exercise the same governmental jurisdiction over these lands as they would over private property also located within the state.³⁰ Thus as a landowner, Congress’ will must yield to contrary state law, and this necessarily subordinates federal Property Clause legislation to contrary state law.³¹

Nonetheless, as noted above, “classic theorists” who would limit Congress’ authority under the Property Clause to that of a proprietor maintain that there are two instances in which federal Property Clause legislation has preemptive effect over contrary state law.³² First, preemptive effect is given to Property Clause legislation that is created in order to maintain congressional control over the acquisition of title to federal lands and states cannot control such land distribution.³³ This exception is rooted in the unequivocal power that the Property Clause grants to Congress “[t]o dispose of Territory or other Property belonging to the United States.”³⁴

Second, preemptive effect over contrary state law is justified when Congress enacts Property Clause legislation pursuant to a desire to protect federal lands from a perceived harm.³⁵ In the eyes of the “classic theorist,” the “harm” that is being perpetrated against the federal land appears in the form of “physical threats to the land.”³⁶ Accordingly, Congress, out of necessity, is warranted in taking action to cease such harm.³⁷ *Camfield v. United States*³⁸ is the foundation upon which the “classic theorists” build their second exception.³⁹ It is essential to discuss this case in some detail because the Supreme Court

²⁹ *Id.* at 621. For a discussion of how Congress’ role as a proprietor of private property differs from that of an “ordinary proprietor” see Engdahl, *supra* note 17, at 308-10, 361-62.

³⁰ Gaetke, *supra* note 18, at 621.

³¹ *Id.* at 621-22. See Engdahl, *supra* note 17, at 310 (stating that although Congress as a proprietor may use its property in many ways, such uses are within the purview of state governmental jurisdiction and are not endowed with federal preemptive authority).

³² Gaetke, *supra* note 18, at 651.

³³ See *id.* at 651-52 n.224 (citing *Wilcox v. Jackson*, 38 U.S. (13 Pet.) 498, 516-17; *Bagnell v. Broderick*, 38 U.S. (13 Pet.) 436, 450-51 (1839)).

³⁴ Gaetke, *supra* note 18, at 652.

³⁵ *Id.*

³⁶ *Id.* at 653.

³⁷ *Id.*

³⁸ 167 U.S. 518 (1897).

³⁹ Gaetke, *supra* note 18, at 652.

relies upon its reasoning in *Camfield* to reach its holding in *Kleppe v. New Mexico*.⁴⁰

In *Camfield*, the United States sued the defendants, adjacent landowners, for building a fence that enclosed several acres of federal lands, thereby impeding the plaintiff's and interested settlers' use of and access to the federal lands.⁴¹ The United States initiated proceedings against the defendants based upon the Act of Congress of February 25, 1885, referred to as "[a]n act to prevent unlawful occupancy of the public lands."⁴² The district court held that the defendant's enclosure of the federal lands constituted a violation of the Act, and the court of appeals affirmed.⁴³

The Supreme Court held that the fence was a nuisance and that Congress, by virtue of the Act, had the authority to order the abatement of the fence.⁴⁴ Congress was imbued with such preemptive authority even though the Act "directly conflicted with state common law which permitted the fencing of private lands."⁴⁵ The fence was a nuisance because, although it was constructed entirely on the defendants' land, it had the effect of closing off the adjacent federal lands; this was an improper enclosure and therefore a contravention of the Act.⁴⁶

The Court also recognized the federal government's police power over its lands within a state and in doing so implied its desire to preserve the congressional policy behind the Act.⁴⁷ The Court deferred

⁴⁰ 426 U.S. 529 (1976).

⁴¹ *Camfield*, 167 U.S. at 519.

⁴² Unlawful Occupancy of Public Lands Fencing Act, ch. 149, 23 Stat. 321 (1885). The Act provides:

That all enclosures of any public lands in any State or Territory of the United States . . . erected or constructed by any person, party, association or corporation to any of which land included within the enclosure the person, party, association or corporation making or controlling the enclosure had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith with a view to entry thereof at the proper land office under the general laws of the United States at the time any such enclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construction or control of any such enclosure is hereby forbidden and prohibited; and the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States in any State or any of the Territories of the United States, without claim, color of title or asserted right, as above specified as to enclosure, is likewise declared and hereby prohibited.

Id. at 521-22.

⁴³ *Camfield*, 167 U.S. at 521.

⁴⁴ *Id.* at 525.

⁴⁵ See Gaetke, *supra* note 18, at 652-53 (citing *Camfield*, 167 U.S. at 523).

⁴⁶ See *Camfield*, 167 U.S. at 525 (stating that the law would be unnecessary if it were construed to apply only to fences built upon public lands because the government, as a proprietor, could prosecute for trespass).

⁴⁷ See *id.* ("The general Government doubtless has a power over its own property analogous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case.")

to the congressional policy of the “protection of the public, or of intending settlers, [by] forbid[ding] all enclosures of public lands.”⁴⁸ Contrary to the “classic theorists” claim that the Court was protecting the plaintiff’s lands from harm, Professor Gaetke argues that Congress was interested in “protecting its policy for the use of federal lands, not the federal lands themselves.”⁴⁹ The Court’s opinion appears to be in accordance with this view.⁵⁰

B. The “Real Classic Theory” of Property Clause Legislation

According to Professor Gaetke, the “real classic theory” of Property Clause legislation is encapsulated in the Supreme Court’s decision in *Kleppe v. New Mexico*.⁵¹ This theory is not only a broad construction of the Property Clause, but also is preemptive of contrary state law.⁵²

In *Kleppe v. New Mexico*,⁵³ the plaintiffs, the State of New Mexico, the New Mexico Livestock Board and its director, and a purchaser of seized burros, sought a declaratory judgment that the Wild Free-Roaming Horses and Burros Act⁵⁴ was unconstitutional and they petitioned the court for an injunction against the Act’s enforcement.⁵⁵

⁴⁸ *Id.*

⁴⁹ Gaetke, *supra* note 18, at 654.

⁵⁰ *Camsfield*, 167 U.S. at 525.

⁵¹ Gaetke, *supra* note 18, at 654-55. See generally Engdahl, *supra* note 17, at 349-58 for a discussion of how the Supreme Court “unwittingly revolutionized its article IV property clause doctrine” and misconstrued and misapplied its previous Property Clause jurisprudence in *Kleppe v. New Mexico*, 426 U.S. 529 (1976). *Id.* at 349.

⁵² Gaetke, *supra* note 18, at 654-55. According to Engdahl, *supra* note 17, at 349, the Supreme Court in *Kleppe* unnecessarily construed the Property Clause in a manner that was inconsistent with “the cardinal thesis of the classic article IV property clause doctrine.” For a discussion of four grounds upon which the *Kleppe* Court could have upheld the New Mexico Estray Law and declined to make, as Engdahl states, a “depart[ure] from property power precedents,” see Engdahl, *supra* note 17, at 349-50.

⁵³ 426 U.S. 529 (1976).

⁵⁴ The Wild Free-Roaming Horses and Burros Act, Pub. L. No. 92-195, 85 Stat. 649 (1971) (codified at 16 U.S.C. §§ 1331-1340). Section 1331 provides:

Congress finds and declares that wild free-roaming horses and burros are living symbols of the historic and pioneer spirit of the West; that they contribute to the diversity of life forms within the Nation and enrich the lives of the American people; and that these horses and burros are fast disappearing from the American scene. It is the policy of Congress that wild free-roaming horses and burros shall be protected from capture, branding, harassment, or death; and to accomplish this they are to be considered in the area where presently found, as an integral part of the natural system of the public lands.

Id. at § 1331.

⁵⁵ *Kleppe*, 426 U.S. at 534. New Mexico at the time had also enacted an “estrays” law in cooperation with the Secretary of the Interior, who was given the authority under the Wild Free-Roaming Horses and Burros Act to “enter into cooperative agreements with other landowners and with state and local governmental agencies in furtherance of the Act’s purposes.” *Id.* at 532. In *Kleppe*, the New Mexico Livestock Board had used its “authority” under the state analogue to the Wild Free-Roaming Horses and Burros Act to remove such animals from public

The district court held that the Act was unconstitutional and permanently enjoined the Secretary of Interior from enforcing it.⁵⁶

The Supreme Court reversed, announcing that the standard for determining whether an act of Congress comports with the Property Clause is to ask whether the regulation can be upheld as “needful” and “respecting” public lands.⁵⁷ The Court, cautioned, however, that while courts interpret laws, Congress has discretion to assess what is “needful” under the Property Clause.⁵⁸ Although the Court conceded that it had not yet passed upon the ultimate reach of congressional power under the Property Clause, it reiterated its previously held stance that “[the] power over the public land thus entrusted to Congress is without limitations.”⁵⁹ The Court also proclaimed that Congress has powers as a proprietor and a legislature over public lands.⁶⁰ Accordingly, Congress, as a proprietor over its lands, can protect its lands from trespass and injury—a right bestowed upon a landowner—and it can make rules and regulations respecting those lands in its capacity as a legislature.⁶¹

The *Kleppe* Court, upon determining that the Wild Free-Roaming Horses and Burros Act was “needful” and “respecting” the public lands, sanctioned the congressional policy underlying the legislation.⁶² The congressional policy at stake in *Kleppe* was Congress’ ability to use its Article IV Property Clause power to “protect ‘all unbranded and unclaimed horses and burros on public lands of the United States . . . from capture, branding, harassment, or death.’”⁶³ In affording the congressional policy protection, the Court warned that, though the Property Clause permitted Congress to exercise plenary power over federal lands within a state, the Clause did not im-

lands in response to a landowner’s claim that the animals were interfering with his grazing rights on the same land. *Id.* at 533. The Board seized the burros and sold them at a public auction. *Id.* at 534. The Bureau of Land Management’s request for the return of the burros to public land was unheeded. *Id.*

⁵⁶ *Id.* at 534.

⁵⁷ *Id.* at 535-36.

⁵⁸ See *id.* (citing *United States v. San Francisco*, 310 U.S. 16, 29-30 (1940); *Light v. United States*, 220 U.S. 523, 537 (1911)).

⁵⁹ *Id.* at 539 (citations omitted).

⁶⁰ *Id.* at 540.

⁶¹ *Id.*

⁶² *Camfield v. United States*, 167 U.S. 518 (1897) is illustrative of a prior instance in which the Supreme Court offered support for congressional policy when it upheld federal legislation pertinent to public lands. In reference to *Camfield*, the *Kleppe* Court stated: “[W]e have approved legislation respecting the public lands ‘[i]f it be found to be necessary for the protection of the public, or of intending settlers [on public lands].’” See *Kleppe*, 426 U.S. at 540 (quoting *Camfield v. United States*, 167 U.S. 518, 525 (1897)). According to Professor Gaetke, the congressional policy that the *Camfield* Court sought to protect was “the use of federal lands.” See Gaetke, *supra* note 18, at 654.

⁶³ *Id.* at 531.

part to Congress the authority to control the public policy of a state.⁶⁴ Presumably the Court was concerned about potential federalism issues that could arise if Congress began dictating state public policy through the exercise of its enumerated powers.

In addition to supporting congressional policy in the case of “needful” rules or regulations “respecting” federal lands, the Court also addressed the preemptive effect of such legislation.⁶⁵ The Court stated:

Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause.⁶⁶

The Court thus undoubtedly endorsed the preemptive effect of valid Property Clause legislation over conflicting state law.

Finally, by making reference to the *Camfield* decision, the Court acknowledged that, while the Property Clause governs congressional power to enact laws that pertain to federal lands, Congress can make laws under its Article IV power that may affect private lands.⁶⁷ Although the Court declined to determine the “permissible reach of the Act over private lands under the Property Clause,”⁶⁸ it seems likely that, upon determination of the issue, the Court will require Congress to show a nexus between conduct on private lands and the effects of this conduct on public lands to justify the creation of restrictive legislation.⁶⁹

II. THE ARCHAEOLOGICAL RESOURCES PROTECTION ACT OF 1979

Before considering whether ARPA fits into the Property Clause legislative mold cast by the Supreme Court in *Kleppe v. New Mexico*,⁷⁰ it is necessary to introduce the major provisions of the Act. This section is devoted to the enactment of ARPA and an overview of a few of its current provisions.

⁶⁴ See *id.* at 540 (citing *United States v. San Francisco*, 310 U.S. 16, 30 (1940)).

⁶⁵ *Id.* at 542-43.

⁶⁶ *Id.* at 543 (citations omitted).

⁶⁷ See *id.* at 546 (citing *Camfield*, 167 U.S. at 525).

⁶⁸ *Id.* at 547.

⁶⁹ See *Camfield*, 167 U.S. at 525 (“If it be found necessary for the protection of the public, or of intending settlers, to forbid all enclosures of public lands, the Government may do so, though the alternate sections of private lands are thereby rendered less available for pasturage.”) (emphasis added).

⁷⁰ 426 U.S. 529 (1976).

A. *The Antiquities Act of 1906: The Predecessor of ARPA*

The Antiquities Act of 1906,⁷¹ recognized as the “nation’s first general purpose cultural resource management statute,” was a culmination of legislative efforts to stop the increasing removal of “archaeological resources”⁷² from public lands.⁷³ According to one author, the ultimate purpose of the Antiquities Act was “to promote investigation of historic sites by the scientific community, rather than by amateurs . . . so that artifacts and remains would end up in public museums.”⁷⁴ Several commentators agree that the Antiquities Act, although a noble endeavor, did not effectively stymie the growth of archaeological looting incidences.⁷⁵ The Ninth Circuit’s 1974 decision in *United States v. Diaz*,⁷⁶ in which it held the Antiquities Act unconstitutional under the void-for-vagueness doctrine, marked the end of the Act’s enforcement in several western states.⁷⁷ Consequently, the

⁷¹ Ch. 3060, 34 Stat. 225 (codified at 16 U.S.C. §§ 431-433 (2001)).

⁷² ARPA defines “archaeological resource” as:

any material remains of past human life or activities which are of archaeological interest Such . . . [items] include . . . pottery, basketry, bottles, weapons No item shall be treated as an archaeological resource under regulations under this paragraph unless such item is at least 100 years of age.

16 U.S.C. § 470bb(1) (2001).

⁷³ THOMAS F. KING, *CULTURAL RESOURCE LAWS & PRACTICE: AN INTRODUCTORY GUIDE* 13 (1998).

⁷⁴ Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 579 (1995) (quoting Leonard D. DuBoff, *Protecting Native American Cultures*, OR. ST. B. BULL., Nov. 1992, at 9, 10).

⁷⁵ See 125 CONG. REC. 21,240 (1979) (statement of Sen. Hatfield):

[T]he Antiquities Act . . . which has provided the legal basis for protecting America’s prehistoric and historic heritage, is no longer adequate. Artifact hunters and collectors have been descending on national forests, parks, and public lands in ever increasing numbers. Depredations have occurred primarily in the Southwest but extend to all States.

Statements by other legislators are also illuminating:

Under the Antiquities Act of 1906, the penalties for such activities amount to a maximum of \$500 and 90 days in jail. Coupled with the unlikelihood of being caught in the vastness of western Federal lands and the holdings by the Ninth Circuit Court of Appeals that the Antiquities Act was unconstitutionally vague, the potential profit to be gained by illegal excavation far outweighed any potential risk.

Id. at 17,394 (statement of Rep. Clausen); see also Gerstenblith, *supra* note 74, at 579 (“The effectiveness of the statute against unauthorized excavation, however, suffered from years of lax enforcement and relatively minor penalties.”); Ades, *supra* note 2, at 601 (“Congress enacted ARPA because its predecessor, the Antiquities Act of 1906, contained unconstitutionally vague terms and therefore no longer was effective in combating archaeological looting.”).

⁷⁶ 499 F.2d 113, 115 (9th Cir. 1974) (holding that the Antiquities Act of 1906 was unconstitutionally vague because the statute used “undefined terms of uncommon usage” such as “ruin” and “object of antiquity”).

⁷⁷ See HUTT, *supra* note 6, at 24 (“[T]he statute [the Antiquities Act] could no longer be used in those states included in the [N]inth [C]ircuit: Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.”). Senator Domenici underscored the effect of the *Diaz* decision during the Congressional debates concerning the enactment of ARPA:

end of the 1970s was a particularly opportune time for congressional members to introduce legislation that would potentially remedy the looting⁷⁸ problems that the Antiquities Act could not.⁷⁹

B. ARPA: Focal Points of the Statute

ARPA is a multi-part statute that has two specific purposes:⁸⁰

- 1) to secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands, and
- 2) to foster increased cooperation and exchange of information between governmental authorities, the professional community, and private individuals having collections of archaeological resources and data which were obtained before the date of the enactment of this Act [Oct. 31, 1979].⁸¹

Therefore, ARPA acknowledges that one way to facilitate the protection of archaeological resources is to encourage education and freedom of information between those who will be responsible for effectuating ARPA's programs and policies and those who have extensive knowledge and/or access to archaeological resources.⁸²

Section 470bb of the Act outlines several definitions that are critical to the understanding and application of ARPA.⁸³ Of particular interest are the definitions of "archaeological resource,"⁸⁴ "public

The way the law is drawn today, in one whole section of the country, because of a circuit court opinion, we have no laws that can be enforced against that kind of public domain thievery. This was called to our attention out in the Southwest by U.S. attorneys who could not prosecute, who were very much concerned about finding a constitutional way to define an artifact, which would permit them to prosecute.

See 125 CONG. REC. 21,240 (1979) (statement of Sen. Domenici).

⁷⁸ See HUTT, *supra* note 6, at 16 (defining archaeological looting as the "illegal unscientific removal of archaeological resources" and stating that "[l]ooting occurs predominantly on public and tribal lands" though it "may also take place on private property if unscientific removal of archaeological resources is carried out without the permission of the owners").

⁷⁹ See *id.* at 27 ("While inconsistent court rulings made the need for congressional action apparent, a number of groups were actively lobbying for new and pervasive legislation. The efforts of the Society for American Archaeology were responsible for marshalling interested people to draft prototype legislation and obtain the attention of congressional sponsors.").

⁸⁰ Representative Clausen stated that the primary goal of ARPA legislation was to protect archaeological resources from "ruinous pillaging and excavation." See 125 CONG. REC. 17,394 (1979) (statement of Rep. Clausen).

⁸¹ 16 U.S.C. § 470aa(b) (2001).

⁸² *Id.* See McManamon, *supra* note 5, at 266 ("ARPA also notes that in order to better protect and learn about the archaeological record of the United States, cooperation is needed among government authorities, professional archaeologists and organizations, and interested individuals.").

⁸³ See 16 U.S.C. § 470bb (2001).

⁸⁴ *Supra* note 72 for the text of the "archaeological resource" definition under 16 U.S.C. § 470bb(1) (2001).

lands,”⁸⁵ and “Indian lands.”⁸⁶ By explicitly defining the above, the drafters of ARPA were endeavoring to ensure that the same void-for-vagueness fate of the Antiquities Act did not befall ARPA.⁸⁷

Section 470ee of the Act represents a major shift towards more stringent enforcement measures and a level of general deterrence that the Antiquities Act lacked.⁸⁸ Section 470ee(c) is particularly important because it extends ARPA protection to archaeological resources that are not derived from public or Indian lands once these objects are obtained in violation of *any* state or local law and are transported in interstate or foreign commerce.⁸⁹ Section 470ee(c) became controversial in the 1990s when Arthur Gerber became the first individual to compel a federal court to determine whether or not ARPA applied to private lands.⁹⁰

In *United States v. Gerber*,⁹¹ the United States sued the defendant Gerber, for violating Section 470ee(c) of ARPA.⁹² Although Gerber pleaded guilty to transporting Indian artifacts through interstate commerce—artifacts that he had stolen from a burial mound on private land in violation of Indiana state trespass and conversion laws—he reserved the right to appeal because he claimed that ARPA was in-

⁸⁵ 16 U.S.C. § 470bb(3) (defining “public lands” as “lands owned and administered by the United States as part of the (A)(i) national park system, (A)(ii) national wildlife refuge system, or (A)(iii) the national forest system” and (B) lands to which the United States holds fee title, but not including lands “on the Outer Continental Shelf and lands which are under the jurisdiction of the Smithsonian Institution”).

⁸⁶ 16 U.S.C. § 470bb(4) (defining “Indian lands” as “lands of Indian tribes, or Indian individuals, which are either held in trust by the United States or subject to a restriction against alienation imposed by the United States, except for any subsurface interests in lands not owned or controlled by an Indian tribe or an Indian individual”).

⁸⁷ See 125 CONG. REC. 21,240 (1979):

For many years it was a crime to steal valuable artifacts. It is just that a court has ruled that, since we did not define the term “artifact,” we were going to have to let criminals loose. The purpose of this bill is to plug that loophole, and at the same time grant those who have a reasonable and logical right to use the public domain to further their education and knowledge of American history to do so, without taking from it valuable artifacts.

Id. (statement of Sen. Domenici).

⁸⁸ See 125 CONG. REC., 21,239 (1979) (“It is hoped that this legislation will serve as a deterrent to the increasing incidence of looting archaeological treasures found on those lands.”) (statement of Sen. Bumpers).

⁸⁹ See 16 U.S.C. § 470ee(c) (“No person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange, in interstate or foreign commerce, any archaeological resource excavated, removed, sold, purchased, exchanged, transported, or received in violation of any provision, rule, regulation, ordinance, or permit in effect under State or local law.”).

⁹⁰ *Ades, supra* note 2, at 613. See *United States v. Gerber*, 999 F.2d 1112, 1113 (7th Cir. 1993) (“The issues are novel because this is the first prosecution under the Act of someone who trafficked in archaeological objects removed from lands other than either federal or Indian lands.”).

⁹¹ 999 F.2d 1112 (7th Cir. 1993).

⁹² *Id.* at 1113. For the text of the ARPA provision under which Gerber was charged, see 16 U.S.C. § 470ee(c), *supra* note 89.

applicable to artifacts that were removed from private lands.⁹³ On appeal, the Seventh Circuit held that Section 470ee(c) of ARPA was applicable to artifacts removed from private lands, lands not owned by the federal government or by Indian tribes or Indian individuals.⁹⁴

Notwithstanding the ingenious arguments that Gerber asserted in order to limit all of ARPA's provisions to public and Indian lands, the Seventh Circuit declined to restrict the Act's application to artifacts derived solely from such lands.⁹⁵ Gerber offered cogent evidence from ARPA's legislative history that Congress was unequivocal in its desire to limit the scope of the Act to archaeological looting and preservation on public and Indian lands, but not on private lands.⁹⁶ The court explained, however, that the legislative history's focus on public and Indian lands stemmed from the abundance of archaeological sites located on these lands.⁹⁷ The court also examined the congressional intent behind Section 470ee(c).⁹⁸ The Seventh Circuit stated: "[s]ubsection (c) appears to be a catch-all provision designed to back up state and local laws protecting archaeological sites and objects wherever located."⁹⁹ The court also noted that it was unlikely that Congress would impose such stringent penalties and fines for ARPA violations that pertained solely to artifacts that are removed from public and Indian lands.¹⁰⁰

Moreover, the Seventh Circuit rejected Gerber's argument that Section 470ee(c)'s application was limited to artifacts removed from private lands in violation of state and local laws specifically aimed at protecting such objects.¹⁰¹ The court conceded that the state or local

⁹³ See *Gerber*, 999 F.2d at 1113.

⁹⁴ See *id.* at 1116 ("We conclude that section 470ee(c) is not limited to objects removed from federal and Indian lands.").

⁹⁵ *Id.* at 1115-17.

⁹⁶ *Id.* at 1115. See 125 CONG. REC. 17,393-94 (1979) ("I want to emphasize in the boldest terms possible what this bill does not do . . . [i]t does not affect any lands other than the public lands of the United States and lands held in trust by the United States for Indian tribes or individual Indian allottees.") (statement by Rep. Udall).

⁹⁷ See *Gerber*, 999 F.2d at 1115 ("That the statute, the scholarly commentary, and the legislative history are all focused on federal and Indian lands may simply reflect the fact that the vast majority of Indian sites - and virtually all archaeological sites in the Western Hemisphere are Indian - are located either in Indian reservations or on the vast federal public lands of the West.").

⁹⁸ *Id.*

⁹⁹ *Id.* See *Ades*, *supra* note 2, at 622 n.196 ("[T]he intent behind this act is to protect unique or one-of-a-kind items in a true archaeological setting." (citing 125 CONG. REC. 17,395 (1979) (statement of Rep. Pashayan))).

¹⁰⁰ See *Gerber*, 999 U.S. at 1116 ("It is also unlikely that a Congress sufficiently interested in archaeology to impose substantial criminal penalties for the violation of archaeological regulations . . . would be so parochial as to confine its interests to archaeological sites and artifacts on federal and Indian lands merely because that is where most of them are.").

¹⁰¹ See *id.* at 1116-17 (stating that Gerber's interpretation might "compel states desiring federal assistance in protecting Indian artifacts in non-federal, non-Indian lands within their bor-

law that is violated must be related to Section 470ee(c), but stated that this did not mean that the specific law had to be limited to the protection of archaeological resources.¹⁰² The court concluded that, because Indiana's trespass and conversion laws were related to the protection of archaeological resources,¹⁰³ the violation of such state or local laws would invoke the protection afforded by Section 470ee(c).¹⁰⁴

III. ARPA AND THE "REAL CLASSIC THEORY" OF PROPERTY CLAUSE LEGISLATION

Recall that under the "real classic theory"¹⁰⁵ of Property Clause legislation the Supreme Court asks one fundamental question: Can the congressional regulation/legislation be sustained as "needful" and "respecting" public lands?¹⁰⁶ I will now evaluate whether ARPA can be wholly conceived of as Property Clause legislation under the "real classic theory" by examining two aspects of the statute. I will consider whether 1) the meaning of "public lands" as defined by ARPA, Sec-

ders to pass laws that might duplicate protections already adequate conferred on landowners sitting atop undiscovered archaeological sites by existing laws of general applicability").

¹⁰² See *id.* at 1116 ("[W]e agree with the general point, that the Act is limited to cases in which the violation of state law is related to the protection of archaeological sites or objects But we do not think that to be deemed related to the protection of archaeological resources a state or local law must be limited to that protection.").

¹⁰³ See *id.* (stating that Indiana's trespass and conversion laws had "objectives that include but are not exhausted in the protection of Indian artifacts and other antiquities").

¹⁰⁴ *Id.*

¹⁰⁵ According to one group of "classic theorists," the federal government is holding public lands that are protected under ARPA unconstitutionally because under the "classic theory," "the property clause does not authorize federal retention of title to public lands within the boundaries of states" unless the federal government holds such lands pursuant to the U.S. Constitution art. 1, § 8, cl. 17. Gaetke, *supra* note 18, at 621 nn.22-23. Thus, it is likely that these "classic theorists" would *not* deem it necessary to discuss whether ARPA is valid Property Clause legislation. Furthermore, the group of "classic theorists" who subscribe to the belief that Congress may act as a proprietor over its lands within a state may be willing to recognize ARPA as valid Property Clause legislation in two instances. First, Congress, as a proprietor of private property, may act to prohibit trespass and theft of objects contained on its land. See *Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976) ("[T]he Property Clause gives Congress the power over the public lands 'to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them'" (quoting *Utah Power & Light Co. v. United States*, 243 U.S. 389, 405 (1917) (overruled on other grounds))). Yet, in this instance, it is questionable whether ARPA would be granted preemptive effect if Congress merely uses its authority as a private proprietor to protect its lands. Second, ARPA could be viewed as legislation that is protecting public lands from "harm" and thus preemptive of contrary state law. It seems likely that the "loss and destruction" of archaeological resources could be construed as harm that is being perpetrated against public and Indian lands. See 16 U.S.C. § 470aa(b) (2001) (stating the following as one purpose of ARPA: "to secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands").

¹⁰⁶ *Kleppe v. New Mexico*, 426 U.S. 529, 536 (1976).

tion 470bb(3), and 2) the meaning of “Indian lands” as defined by ARPA, Section 470bb(4) both support a view of ARPA as Property Clause legislation under *Kleppe v. New Mexico*.¹⁰⁷ I have chosen these two sections as focal points for my analysis because the “public lands” definition of ARPA is what brings the Act into the general purview of the Property Clause, and the “Indian lands” definition is a major component of the Act that prevents it from being construed strictly as Property Clause legislation.¹⁰⁸

A. Part One: Property Clause Application to ARPA’s “Public Lands”

Part one of the ARPA-Property Clause analysis is straightforward. The legislative history of ARPA is replete with testimonials by members of Congress and others who advocated a new act that would provide enhanced protection and preservation of archaeological resources.¹⁰⁹ Congress thus determined that ARPA legislation was “needful.” Whether or not ARPA “respects” public lands is also amenable to simple resolution. “Public lands” under ARPA are lands in which the United States owns fee title.¹¹⁰ Under the Property Clause, public lands are lands that belong to the United States.¹¹¹ Therefore, it is indisputable that ARPA, in part, is legislation that pertains to archaeological resources that are located on lands that belong to the United States.¹¹²

B. Part Two: Property Clause Application to ARPA’s “Indian Lands”

Part two of the ARPA-Property Clause analysis cannot be disposed of with comparable ease because “Indian lands,” as defined by ARPA,

¹⁰⁷ *Id.*

¹⁰⁸ I have chosen only to focus on the “Indian lands” definition as one aspect of ARPA that prevents it from being construed solely as Property Clause legislation. I am not of the opinion that this is the only provision of the Act that presents similar difficulties. In particular, § 470ee(c) of the Act bases its jurisdictional hook to ARPA on congressional power to regulate interstate and foreign commerce pursuant to the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3. Thus it is reasonable to conclude that in creating § 470ee(c) Congress did not rely on its Article IV Property Clause authority.

¹⁰⁹ See generally 125 CONG. REC. 17,393-96, 21,239-43 (1979) for various statements by members of Congress regarding the demonstrated need for ARPA legislation as a response to the largely unchecked looting activities that the Antiquities Act could not effectively extinguish. See also *supra* notes 2-9 and accompanying text (discussing the “deficiencies” of the Antiquities Act, such as “lax enforcement” and vaguely defined terms of the Act, and ARPA’s anticipated solution to the vexing problems of the Antiquities Act).

¹¹⁰ 16 U.S.C. at § 470bb(3). See 125 CONG. REC. 17,394 (1979) (“The term ‘public land’ was amended to clarify that only lands which are owned in fee title by the United States are covered by this act.”) (statement of Rep. Clausen).

¹¹¹ U.S. CONST. art. IV, § 3, cl. 2.

¹¹² 16 U.S.C. § 470aa(b) (2001).

are not lands that belong to the United States.¹¹³ Consequently, it would be improper to conclude that Congress included “Indian lands” within ARPA’s scope by virtue of its Article IV Property Clause authority to legislate over lands belonging to the United States.¹¹⁴ Under ARPA, “Indian lands” are “lands of Indian tribes, or Indian individuals, which are either held in trust by the United States or subject to a restriction against alienation imposed by the United States,” but are essentially lands in which the United States does not own the fee title.¹¹⁵ The Act’s legislative history appears to be in accordance with this interpretation. For example, Senator Dale Bumpers proposed the following amendment to the “Indian lands” definition of the ARPA Bill, S. 490: “The term ‘Indian lands’ means land the fee title to which is held by Indian tribes, or Indian individuals, either in trust by the United States or subject to a restriction against alienation imposed by the United States.”¹¹⁶ Why are “Indian lands” not defined as lands to which the United States holds fee title? Perhaps the answer to this query may be found in the corpus of Indian trust law. While a thorough analysis of the Indian trust doctrine is truly beyond the scope of this Comment, I will briefly consider the meaning of this doctrine for purposes of ARPA’s “Indian lands” definition.

1. *The Indian Trust Doctrine*

The Indian trust doctrine is derived from the common law,¹¹⁷ and the term is used to describe the federal-tribal relationship between the United States and Indians.¹¹⁸ In *Cherokee Nation v. Georgia*,¹¹⁹ the seminal case for the Indian trust doctrine, Chief Justice Marshall declared that the relationship between the United States and Indians

¹¹³ See *id.* § 470bb(4).

¹¹⁴ See U.S. CONST. art. IV, § 3, cl. 2 (authorizing congressional authority to legislate over “Territory or other Property belonging to the United States”); *Kleppe v. New Mexico*, 426 U.S. 529, 536 (1976) (upholding “needful regulation respecting the public lands” as valid Property Clause legislation).

¹¹⁵ 16 U.S.C. § 470bb(4) (2001).

¹¹⁶ See 125 CONG. REC. 21,239 (1976) (“The third and final amendment clarifies the term ‘Indian lands’ to mean those lands in which fee title is held by Indian tribes, or Indian individuals.”) (statement of Sen. Bumpers).

¹¹⁷ See FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 220 (Rennard Strickland ed., 1982) (“The concept of a federal trust responsibility to Indians evolved judicially. It first appeared in . . . *Cherokee Nation v. Georgia*.”); see also Susan D. Baer, *The Public Trust Doctrine—A Tool to Make Federal Administrative Agencies Increase Protection of Public Land and Its Resources*, 15 B.C. ENVTL. AFF. L. REV. 385, 428 (1988) (citing *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831)).

¹¹⁸ COHEN, *supra* note 117, at 207. Cohen also noted that the trust responsibility restricts congressional as well as federal administrative power. *Id.* at 221, 225.

¹¹⁹ 30 U.S. (5 Pet.) 1 (1831).

“resembles that of a ward to his guardian.”¹²⁰ At least one modern court has described the trust relationship in terms of the elements of a common-law trust in which the United States is the trustee, the Indian allottees are the beneficiaries, and Indian timber, lands, and funds form the trust corpus.¹²¹

According to Felix S. Cohen, “the trust relationship is one of the primary cornerstones of Indian law.”¹²² Cohen further described the relationship between the United States and Indians as being “premised upon broad but not unlimited federal constitutional power over Indian affairs, often described as ‘plenary,’” and one “distinguished by special trust obligations requiring the United States to adhere strictly to fiduciary standards in its dealings with Indians.”¹²³ Cohen also asserted that case law indicates that a single power, “an amalgam of several specific constitutional provisions” including the Indian Commerce Clause,¹²⁴ the Treaty Clause,¹²⁵ and the Supremacy Clause,¹²⁶ govern such “Indian affairs.”¹²⁷

2. *Is there Property Clause Authority over “Indian Lands”?*

Cohen argued, rather convincingly, that while courts in the past have viewed the Property Clause as a source of authority over Indian lands, such lands cannot properly be characterized as “public lands” to which the United States owns fee title.¹²⁸ *Johnson v. M’Intosh*¹²⁹ stands for the proposition that discovery vested fee simple title of Indian lands in the hands of European colonial powers (the sovereigns), subject to the Indian “right of occupancy” or “Indian title.”¹³⁰ A sovereign was the only one empowered to extinguish the “right of occupancy,” and Indians could not convey title to their lands without

¹²⁰ *Id.* at 17.

¹²¹ See *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (citing RESTATEMENT (SECOND) OF TRUSTS § 2 cmt. h at 10 (1959)).

¹²² COHEN, *supra* note 117, at 221.

¹²³ *Id.* at 207.

¹²⁴ See U.S. CONST. art. I, § 8, cl. 3 (stating Congress has the power to regulate commerce with the Indian tribes).

¹²⁵ See U.S. CONST. art. II, § 2, cl. 2 (granting the Executive branch the power to enter into treaties).

¹²⁶ See U.S. CONST. art. VI, § 1, cl. 2 (“This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land.”).

¹²⁷ COHEN, *supra* note 117, at 211.

¹²⁸ *Id.* at 209.

¹²⁹ 21 U.S. (8 Wheat.) 543 (1823).

¹³⁰ See COHEN, *supra* note 117 n.16, at 209 (citing *Johnson*, 21 U.S. at 574). Essentially, Cohen described “Aboriginal Indian Title” as “unrecognized” title which means Congress has not granted a tribe that holds such titled lands the “full beneficial fee interest in the property” in which the United States cannot recapture previously granted property rights without remitting just compensation to the affected tribe. *Id.* at 485.

the permission of the sovereign.¹³¹ The fee simple ownership of the European powers passed to the United States after it became an independent nation.¹³² While Cohen acknowledges that one could make the argument that “Indian title” lands are technically “[p]roperty belonging to the United States” and hence subject to Property Clause authority, he states that Indian lands are best classified as “private property, subject to broad congressional control and special fiduciary obligations, rather than as public lands or other federal territory or property.”¹³³ This classification is more in line with current conceptions of the trust relationship, in which “[m]ost Indian lands are held in trust by the United States for the exclusive use and benefit of specific tribes.”¹³⁴

3. *Indian Trust Status or Restriction against Alienation of “Indian Lands” under ARPA*

What effect does the foregoing have on the ARPA definition of “Indian lands”? The most obvious answer is that “Indian lands” are not “public lands,” and even though ARPA’s extension of protection to public lands falls squarely within the *Kleppe v. New Mexico*¹³⁵ Property Clause standard, the same cannot be said of ARPA’s application to Indian lands. Furthermore, the statutory definition of “Indian lands” offers maximum protection of archaeological resources on such lands because even if the Indian lands are not held in trust by the United States, they may be subject to a restriction against alienation.¹³⁶

The next logical question, then, would be to ask, under what authority did Congress provide for the protection of archaeological resources on Indian lands? While this question is beyond the reach of this Comment, two potential sources of congressional authority over Indian affairs are noteworthy. First, Cohen claimed that the Indian Commerce Clause¹³⁷ has become the “primary provision supporting modern exercises of federal power over Indians” because the Clause’s breadth extends to transactions between non-Indians and

¹³¹ *Id.* at 487.

¹³² *See id.* (citing *Johnson*, 21 U.S. at 587-88).

¹³³ *Id.* at 209-10.

¹³⁴ *Id.* at 209.

¹³⁵ 426 U.S. 529, 536 (1976).

¹³⁶ *See* COHEN, *supra* note 117 at 520 (“Even land held by a tribe in fee simple is subject to the statutory restraints against alienation . . . despite the fact that title is not held by the United States as trustee.”); *see also* The Nonintercourse Act, Pub. L. 107-36, 4 Stat. 730 (codified at 25 U.S.C. § 177 (2001)) (prohibiting “grant, lease or other conveyance of [Indian] lands” unless made by “treaty or convention entered into pursuant to the constitution”).

¹³⁷ U.S. CONST. art. I, § 8, cl. 3.

tribal Indians that are not “interstate in character.”¹³⁸ Second, by including “Indian lands” in ARPA, Congress may have been attempting to fulfill its role as trustee over Indian affairs. Under this analysis, Cohen stated: “[W]here Congress is exercising its authority over Indians rather than some other distinctive power, the trust obligation apparently requires that its statutes be based on a determination that the Indians will be protected. Otherwise such statutes would not be rationally related to the trustee obligation.”¹³⁹ Even though Congress may not have expressly identified its source of authority for enacting ARPA, it is evident from Section 470aa(a)-(b) of ARPA and the legislative history of the Act that Congress desired to eliminate the incessant plunder and destruction of archaeological resources on public and Indian lands.¹⁴⁰

CONCLUSION

Applying the “real classic theory” of Property Clause legislation to ARPA proves to be a simple task although the legislative history does not mention the Property Clause as the congressional basis for enacting any portion of ARPA.¹⁴¹ The more difficult endeavor, nevertheless, is trying to determine if congressional inclusion of “Indian lands” prevents one from construing ARPA entirely as Property Clause legislation. I conclude that, because ARPA applies equally to public lands and Indian lands alike, the Act cannot be viewed solely as Property Clause Legislation because “Indian lands” are not considered to be lands that belong to the United States.¹⁴² It may be best, therefore, to view the statute as being enacted pursuant to several enumerated congressional powers in an effort to protect and preserve archaeological resources for future generations.

¹³⁸ COHEN, *supra* note 117, at 208.

¹³⁹ *Id.* at 221.

¹⁴⁰ See 16 U.S.C. § 470aa (2001); see also *supra* text accompanying notes 2-9.

¹⁴¹ See generally 125 CONG. REC. 17,391, 21,237 (1979) for the substance of congressional debates pertinent to ARPA’s enactment.

¹⁴² U.S. CONST. art. IV, § 3, cl. 2.