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Power of Federal government to
acquire lands for national forest
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POWER OF FEDERAL GOVERNMENT TO ACQUIRE LANDS FOR NATIONAL FOREST PURPOSES.

APRIL 20, 1908.—Referred to the House Calendar and ordered to be printed.

U.S.C.H.
Mr. JENKINS, from the Committee on the Judiciary, submitted the
following

REPORT.

[To accompany H. Res. No. 365.]

The Committee on the Judiciary received from the House the following:

Whereas the President in his message to the Congress at its present session, on December third, nineteen hundred and seven, makes the following recommendation:

"We should acquire in the Appalachian and White Mountain regions all the forest lands that it is possible to acquire for the use of the nation. These lands, because they form a national asset, are as emphatically national as the rivers which they feed, and which flow through so many States before they reach the ocean;" and

Whereas there have been introduced into the House of Representatives bills for the acquirement of national forests in the Southern Appalachian Mountains and the White Mountains, the same being H. R. 10456 and H. R. 10457, which provide as follows:

"That the Secretary of Agriculture is hereby authorized and directed, in this discretion, to acquire for national forest purposes, by purchase or gift, lands more valuable for the regulation of stream flow than for other purposes, and situated on the watersheds of navigable streams in the Southern Appalachian Mountains within the States of Maryland, Virginia, West Virginia, North Carolina, South Carolina, Georgia, Alabama, Kentucky, and Tennessee, and in the White Mountains within the States of New Hampshire and Maine. * * *

"That the Secretary of Agriculture may do all things necessary to secure the safe title in the United States to the lands to be acquired under this act; but no payment shall be made for any such lands until the title shall be satisfactory to the Attorney-General and shall be vested in the United States.

"That the sum of five million dollars is hereby appropriated to carry out the provisions of this act, out of any moneys in the Treasury not otherwise appropriated, and said sum shall be available immediately and until expended for said purpose: *Provided*, That the Secretary of Agriculture shall each year make a detailed report to Congress of the lands purchased under this act, and the cost thereof." Therefore be it

Resolved, That so much of the President's message, above referred to, which relates to the acquisition of lands in the Southern Appalachian and White Mountains "for the use of the nation" be referred to the Committee on the Judiciary of the House of Representatives, together with the questions involved in the bills referred to, directing the Secretary of Agriculture to acquire for national forest purposes lands in the Southern Appalachian and White Mountains, within the States named, with instructions to said committee to report fully at an early date their views as to the power of the Federal Government by legislation to acquire, by purchase, condemnation, or otherwise, the lands referred to in said bills, situated in the States mentioned, and to appropriate money therefor, and also what power and authority the Federal Government has by legislation to acquire for the purpose of forest reserves lands within a State wherein the Government of the United States has no public domain, and to make appropriation therefor.

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We respectfully report that the committee has obeyed the instructions of the House and had under consideration the aforesaid communication. The instructions are to report the views of the committee as to the power of the Federal Government, by legislation, to acquire by purchase, condemnation, or otherwise, the lands referred to, situated in the States mentioned in the preamble, and to appropriate money therefor; and also what power and authority the Federal Government has by legislation to acquire for the purpose of national forest purposes lands within a State wherein the Government of the United States has no public domain, and to make appropriation therefor.

To restate the question, in other words to be gathered from the entire communication, Has Congress the power to enter a State and take from the owner thereof lands for forest purposes more valuable for the regulation of stream flow than for other purposes? The committee have been aided in their research by arguments made on behalf of the constitutionality of the measure and also in favor of the unconstitutionality of the same. The committee is not unmindful of the interest taken by many people in this matter, many believing that if Congress has the power and would exercise it, it would be beneficial, but it is purely a question of power. In this matter the committee is limited to answering a constitutional question, which must be gathered from the communication sent by the House to this committee, and can not consider any question of policy. It is said on behalf of the constitutionality of the proposed measure that the object is the regulation of stream flow in navigable rivers, while the instrument sent by the House to this committee says, in part: "To acquire for national forest purposes lands more valuable for the regulation of stream flow than for any other purposes."

In order to determine the question, reference will have to be made to the Constitution. It is universally agreed that the Government of the United States is one of limited power; that the power of the United States is to be found in the Constitution of the United States; that the Government of the United States is not only one of limited power, but the powers are enumerated. After stating what powers are conferred on Congress by enumeration, follows a provision for carrying the express powers into effect, authorizing Congress to make all laws necessary and proper for carrying into execution the enumerated powers in the Constitution. The construction of this paragraph was very aptly and wisely stated in *McCulloch v. Maryland* (4 Wheat., 316), by Marshall, Chief Justice, who said:

But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.

The express enumerated power so strongly relied upon is the one that confers upon Congress the power to regulate commerce between the States. The question addressed to this committee is much more important than the average person may think. It is very easy for those in favor of a proposition to lose sight of any constitutional question involved. As the nation grows and expands many appeals for relief are made for Federal power by the people, apparently of the

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 belief that the National Government is capable of immense powers of legislation for the general welfare of the people. When the people are not in sympathy with the exercise of Federal power they are extremely sensitive, and the best and only way is to pursue the pathway so clearly defining the line of demarcation between State and Federal power. There is nothing more dangerous to the peace, prosperity, and perpetuity of this nation than for Congress to execute powers not conferred. The people will always be loyal to the States, and the nation will always be in need of the assistance and support of the people; and the best way to obtain the sympathy and support of the people for the National Government is for the Congress of the United States to keep within the limitations conferred by the Constitution.

It was said by Taney, Chief Justice, in *Martin v. Waddell* (1842), 16 Pet. (U. S.), 410, that—

when the Revolution took place the people of each State became themselves sovereign, and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the General Government.

This language was repeated by McKinley, J., in *Pollard v. Hagan* (1845), 3 How. (U. S.), 229. The Constitution of the United States confers no power of eminent domain or of legislation over State territory, except that contained in the seventeenth clause, eighth section, first article, relating to the seat of government and places purchased with the consent of the State for forts, magazines, etc. Hence it was said by the court, in the case last cited, that, even if Georgia had in her compact of cession to the United States of the territory of Alabama granted the municipal right of sovereignty and eminent domain—

such stipulation would have been void and inoperative, because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain within the limits of a State or elsewhere except in the cases in which it is expressly granted.

Hence it was held in that case that the shores of navigable waters and the soils under them were not granted by the Constitution of the United States, but were reserved to the States, respectively, and that Alabama, though a new State, had after admission the same rights, sovereignty, and jurisdiction over the subject as the original States. This was reaffirmed in *Gilman v. Philadelphia* (1865), 3 Wall. (U. S.), 713.

These authorities invite attention to two important matters bearing on the question, one the extent of ownership by the people and the States, of the navigable waters and the soils under them, and the riparian rights of the people and States: All of which are involved, when the United States seeks to acquire lands for forest purposes, and affected by the constitutional question.

The other not constitutional but extremely important, as to whether the States or National Government shall exercise jurisdiction over lands so acquired. The United States can only exercise authority when lands are purchased by the consent of the legislatures of the States, in which the same shall be for the erection of forts, magazines, and arsenals, dock yards, and other needful buildings; therefore, it seems plain that the United States can not, even with the consent of the States, exercise jurisdiction, and if the United States purchases lands as contemplated, the same will forever remain subject to State power.

The National Government can not acquire land for national forest purposes unless that power is conferred upon Congress by the Constitution. Congress can not exercise this right unless it is necessary to accomplish some object within the authority of Congress. A government of limited power can not afford to exercise a power it does not enjoy when the exercise of the power is at the expense of the creator of the government of the limited power. The people created the National Government by adopting the Constitution, giving it limited power only, and defined the powers by enumeration. So jealous were the States of the new sovereign, and so determined to enjoy rights not delegated, that, notwithstanding it was universally conceded by the framers of the new government that no power could be exercised unless conferred by the Constitution, the tenth amendment to the Constitution was adopted.

Powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

In speaking of this amendment, the Supreme Court of the United States, in *Kansas v. Colorado* (206 U. S., 46), said in part:

This amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if in the future further powers seemed necessary they should be granted by the people in the manner they had provided for amending that act.

All power is vested in the United States, the several States, or the people of the United States. What power is not enjoyed by the United States is with the States or the people. The States and the people have some constitutional rights, even if there is nothing more involved than some mountainous country and forests of timber of no great commercial value. If the Federal Government lacks the power, and the States give their consent to the legislation, it will not confer power on the United States, as the States can not enlarge the powers of the Federal Government in that way. The National Government can not afford to invade a State and take from the people, in violation of their reserved rights, the navigable waters and the soils under them, and riparian rights of the people and the States, and private lands or the lands of a State, for any purpose unless the power exists, and if the power exists and is legitimate and within the scope of the Constitution, its exercise can not be questioned by the courts and ought to be acquiesced in by the people; but if the power does not exist, no matter how necessary, proper, and beneficial to the people, its exercise can and in time will be questioned, and the people will lose confidence in the National Government if attempts are made to violate their rights and exercise powers not conferred by the Constitution.

The National Government can never be maintained and perpetuated unless it keeps within its just powers. An unwarranted exercise of power when not conferred by the Constitution may be overlooked when necessary to save the life of the nation. It will never be overlooked or forgotten if there be unwarranted Federal action or the rights of the people or the States are involved, even if the occasion and demand is great. It may look like a small and unimportant matter and meet the approval of public opinion for the Federal Government to invade a State and condemn lands for forest purposes.

But if the power is lacking the principle is great, and it is the duty of Congress to jealously guard the rights of the States and not attempt to exercise powers not conferred. There is no dispute but what the National Government has authority to take land by right of eminent domain whenever the use of the land is necessary in furtherance of the execution of any power given the National Government by the Constitution.

No one questions but what the United States can acquire lands for military purposes; for the erection of public buildings, such as post-offices and court-houses; in the interest of coast survey; for the purpose of erecting light-houses, under the powers conferred by the Constitution. But in each such case the controlling question is as to whether or not the use to which the land is to be put is a public one. That is, in other words, the power to act must be found in the Constitution, and after the power is ascertained it must be found that the use is public. It is unnecessary to determine whether the use is public when the power is wanting. In other words, as more directly applicable to this matter, Congress having power to regulate commerce between the States have an unquestioned right to improve navigable streams, and may, for that purpose and to that end, take land whenever in the judgment of Congress it is necessary to the proper exercise of that power. But an entirely different question is presented when the United States attempts to acquire forest lands because it is claimed by some, not by all, that it will cause it to rain and thereby increase the flow of the stream. If the use of the land is to assist in the execution of some power of government a different question is presented.

The important question arises: Has the National Government the power under the Constitution to acquire lands for the purpose of national forestry purposes, according to the words of the resolution? If so, unquestionably Congress has power to make all laws necessary and proper to carry that power into execution. There is no difference as far as the question herein is concerned between the right to purchase and the right to condemn. For the purpose of answering the House, the acquisition by purchase and condemnation may be treated together, and acquisition by the words "or otherwise" may be treated as including gifts or excluded as immaterial. A careful reading of all the enumerated powers contained in the Constitution fails to disclose any authority on the part of Congress to acquire lands in a State by condemnation or purchase for national forestry purposes. Not that express power to acquire lands for national forestry purposes must be found in the Constitution in so many words among the enumerated powers, but an express power must be first found that can be executed by the acquisition of lands for forestry purposes. The express power is placed in the Constitution to authorize Congress to act. Then the question arises: Is the proposed act to acquire lands within the meaning of the Constitution necessary and proper to carry the express power into execution?

Marshall, Chief Justice, has told Congress how legislation can be constitutional within that power. Congress must have discretion to exercise the power in a manner most beneficial to the people. The end must be legitimate and within the scope of the Constitution, then all appropriate means plainly adapted to that end, not prohibited but consistent with the letter and spirit of the Constitution, are constitutional. As illustrated, by the power given Congress "to raise and

support armies." It is supposed that Congress will exercise the power most beneficial to the people as to the size of the Army, pay of the Army, and how cared for, etc. And all power of Congress to provide for the particular thing named is not to be found in express words in the Constitution. The same might be said of the familiar power to establish post-offices and post-roads that will secure the transportation and delivery of the mails, and appropriate buildings. As applied to the matter before the committee, unless an aid and betterment of navigation, it is clearly unconstitutional.

Then the further question arises: Is the acquisition of lands for forest reserves a necessary and proper act to carry into execution the power to regulate commerce? Still further: Is Congress exercising a constitutional discretion most beneficial to the people when it seeks to acquire mountains and forests, unless it appears the best, cheapest, and most legitimate means to control the flow of streams and improvement of navigation? An express power must be found in the Constitution. It was impossible for the Constitution to call by name or state all Congress could do. For to mention any specific act under any one express power would exclude things not mentioned and limit unnecessarily the power of Congress; therefore much is left to the wise and just discretion of Congress in legislating pursuant to the express power granted. And the limitation of that power, so aptly stated by Marshall, Chief Justice, can not be improved upon. But it is plain to be seen that legislation pursuant to an express power is subject to the limitations cited.

Would it be constitutional for Congress in the exercise of its discretion to buy a site for a small public building, to condemn 40 acres of land and interfere with as many people when 1 acre of land would be sufficient? When an express power is found that will justify legislation to carry that power into execution, it is still subject to constitutional limitations. Is the power sought to be exercised by Congress fairly deducible from the express power granted? Is the power to acquire land for forestry purposes fairly deducible from the power to regulate commerce? Would it be an honest exercise of discretion for the manifest interests of the people? This feature must be closely scanned or everything popular and demanded by the people will soon be considered constitutional, and constitutional law will soon be a thing of the past.

A careful reading of the resolution discloses that the object sought is not the regulation of commerce; that the object of the acquisition of land is for national forest purposes, though incidentally it may be an aid to commerce. And it has been suggested that the *United States v. Gettysburg Electric Railway Company* (160 U. S., 668), decided in 1896, is authority for the constitutionality of the proposed measure. In that case the United States sought to condemn lands for the purpose of preserving the lines of battle at Gettysburg, Pa., and for marking with tablets the position occupied by the various commands of the armies of the Potomac and of northern Virginia on that field. The Supreme Court held that the right of condemnation existed; that the power to acquire and condemn existed, having been conferred by the Constitution, and that the use to which the lands were to be put was a public one. The Constitution gives Congress the power to declare war; to raise and support armies; to provide and maintain a navy. It was held by the court that the end to be attained was within

that power. The facts brought the case within the doctrine of Marshall, Chief Justice, and the court in part said:

That the battle of Gettysburg was one of the great battles of the world. The numbers contained in the opposing armies were great; the sacrifice of life was dreadful, while the bravery and, indeed, heroism displayed by both the contending forces ranked with the highest exhibition of those qualities ever made by man. The importance of the issue involved in the contest of which this great battle was a part can not be overestimated. The existence of the Government itself and the perpetuity of our institutions depended upon the result. Valuable lessons in the art of war can now be learned from the examination of this great battlefield in connection with the history of the events which there took place. Can it be that the Government is without power to preserve the land and properly mark out the various sites upon which this struggle took place? Can it not erect monuments provided for by those acts of Congress or even take possession of the field of battle in the name and for the benefit of all the citizens of the country for the present and for the future? Such a use seems necessarily not only a public use, but one so closely connected with the welfare of the Republic itself as to be within the powers granted Congress by the Constitution for the purpose of protecting and preserving the whole country.

This case certainly must be regarded as an extreme application of the doctrine of Marshall, Chief Justice. If there is any doubt in the mind of any person after reading the Constitution, that doubt will be readily dispelled by the foregoing doubtful case and the further case of *Kansas v. Colorado* (206 U. S., 46). The United States intervened. From the statement of the case it appears that the United States was seeking to reclaim about 60,000,000 acres of land belonging to the United States within the arid region, and in the opinion of the court, speaking of the claim of the United States, it is said on page 86:

It rests its petition of intervention upon its alleged duty of legislating for the reclamation of arid lands.

And on page 87 the court further says:

Turning to the enumeration of the powers granted to Congress by the eighth section of the first article of the Constitution, it is enough to say that no one of them by any implication refers to the reclamation of arid lands.

Section 8 contains the power of Congress to regulate interstate commerce, yet the court says on page 88:

We must look beyond section 8 for Congressional authority over arid lands.

And on page 91, the court further says:

But, as our national territory has been enlarged, we have within our borders extensive tracts of arid lands which ought to be reclaimed, and it may well be that no power is adequate for their reclamation other than that of the National Government. But if no such power has been granted none can be exercised.

And the court reached the conclusion that the United States under the Constitution could not for want of power reclaim arid lands under the commerce clause of the Constitution or any other express power. There is practically no difference between reclaiming arid lands for agricultural purposes and acquiring lands for forestry purposes. The facts in the case, the conclusions reached by the court, and the views of those insisting upon the constitutionality of the proposed legislation, can profitably be restated by an extract taken from an argument made and brief filed on behalf of the constitutionality of the proposed measure:

The United States of America filed its petition of intervention, and alleged that within the watershed of the Arkansas River are 1,000,000 acres of public lands, uninhabitable and unsalable unless rendered so by the impounding of waters in this watershed to reclaim this land, that legislation of Congress has sanctioned the use of

these waters in this arid region, and that under the reclamation act of June 17, 1902, \$1,000,000 have been expended in procuring sites for reservoirs and dams.

This contention brought directly to the court the question whether the amount of the flow of the waters of the Arkansas River is subject to the authority and control of the United States. The United States claimed that in and near the river, as it runs through Kansas and Colorado, are large tracts of arid lands; that the National Government itself is the owner of many thousands of acres, and that it has the right to make such legislative provision as in its judgment is needed for the reclamation of all these arid lands and for that purpose to appropriate the accessible waters.

This claim, says the Supreme Court, involves the question whether the reclamation of arid lands is one of the powers granted to the General Government. Certainly it is not, for in the enumeration of the powers granted to Congress by the eighth section of the first article of the Constitution we can not find one which by any implication refers to the reclamation of arid lands. * * *

That clause only decides that the reclamation of arid lands is not one of the powers granted to the General Government, and it was not claimed to be a means by which an express power was to be carried into execution.

A concession that the reclamation of arid lands is not within any power of Congress.

Assuming and conceding that Congress has plenary power over all navigable streams under the commerce clause of the Constitution, the important question is, Is the pending measure needed to improve navigation? Would it be the consensus of opinion on the part of a large number of men, competent to speak upon the subject, that the acquisition of lands for forestry purposes is needed within the constitutional discretion of Congress to improve navigation? The power simply includes the ordinary means of executing the power with reference to the power and dignity of the nation, the rights of the States and of the people, the object, purpose, and end sought without attempt to exercise powers not conferred. If not expressed, is it properly incident to an express power necessary to its execution? But it is argued that the end sought is the control of stream flow to improve navigation. No one questions the right and power of Congress, under its power to regulate commerce between the States, to make all laws necessary and proper to carry that power into execution, which will include the improvement of navigation. Unquestionably Congress has the power to improve navigation under its power to regulate commerce, for commerce includes navigation and intercourse, transportation by water as well as by land, and control of all accessible waters. The main proposition is to acquire lands for forestry purposes—just how that will regulate stream flow or improve navigation is, for the present, rather speculative.

It is very clear that the only end sought is the retention and preservation of forests—that is, an increase of the flow of the stream—and improvement of navigation is not the end sought, not the principal matter. Unquestionably Congress has power to increase the flow of streams and improve navigation under its power to regulate commerce. Hence it is argued that the retention and preservation of forests will increase the flow of streams and improve navigation so as to invoke the commerce clause of the Constitution, and, under that power, acquire lands for forestry purposes without any reference to the effect upon the flow of streams or improvement of navigation. If the end sought is the increase of the flow of streams and improvement of navigation, and that is the principal matter, why not apply to Congress for the improvement of the rivers involved; and, if Congress in its wisdom decides upon the improvement, no person will risk his repu-

tation by insisting that it is necessary and proper to acquire the mountains and forests involved in order to improve the navigation.

What is the primary question? In common fairness it must be said, the acquisition of lands for forestry purposes, and that the improvement of navigation is but an incidental matter. This is not said to beg the question but to better develop the constitutional question involved. Does any person believe for a moment that if a proposition was made to Congress to appropriate \$5,000,000 for the improvement of the navigation of the rivers involved it would command one vote. Has it not been determined by Congress at the present time not to make any appropriation for the improvements of rivers and harbors this year. It is a very important question and should be rightly determined. We should not enter upon such an unknown sea of difficulties, unless the power is clear, for no one can tell when this expenditure of public money will end.

The United States is the moving party, not the States. That is, the States are not taking any action whatever against the United States; are not interfering with the flow of any stream or assuming any right or control over navigation or commerce. On the contrary, it is the United States asserting the right to enter States and take by purchase, gift, or condemnation lands for national forestry purposes. The interested States may be willing, the people of these States may be willing, that Congress should in this manner exceed its powers for their benefit, but this does not justify unconstitutional action upon the part of Congress, and will sooner or later be cited as a precedent—as a usurpation of power on the part of Congress.

The lands to be selected may be more valuable for the regulation of stream flow than for any other purpose and yet might not be an aid to navigation or even increase the flow of the stream, and not be valuable for either. How will the transfer of the title to these mountains and forests to the United States increase the flow of the stream or improve navigation? The argument on behalf of the measure seems to establish several propositions: That the reclamation of the forests is a public one for the benefit of the people; that the removal of the forests permits the rainfall to run at once over the land into the streams and soon disappear; that the retention of the forests increases the quantity of leaves and other vegetable matter, so that the rainfall percolates into the ground. It must be conceded that the flow of the stream depends upon the quantity of rainfall and its velocity. Good sense discloses that in times of great and continuous drought it takes an immense amount of rain to affect the flow of a stream. If rain falls slowly it percolates into the ground—swamps and low places—and not until the ground is well soaked is there an appreciable effect upon stream flow.

No person will want to risk his reputation by saying that commerce by water transportation can be successfully carried on by means of rainfall or that the acquisition of lands by the United States will increase rainfall or improve navigation. When there is large quantities of snow passing away and rainfalls producing floods, the flow of the stream will necessarily be increased, but practically as soon as the flood ceases the stream flow will recede to normal depths, and the water in the ground can not be depended upon to provide for navigation. In order to follow and accurately determine the matter, the

nature of the transaction must be considered. It is either to acquire lands for forestry purposes or to improve navigation of streams. If the former, it can not be done, for there is no express power. If the latter, it can not be done under the construction given by Marshall, Chief Justice. For to purchase mountains and forests to improve navigation would not be exercising a discretion most beneficial to the people. The end would not be legitimate; not within the scope of the Constitution; it would not be an appropriate means adapted to that end, and would not consist with the letter or spirit of the Constitution.

In *Kansas v. Colorado* the Supreme Court of the United States denied the right of the United States to reclaim arid lands, while the case concedes it would be a great public benefit and have a tendency to improve navigation. It is not a question of strict construction of the Constitution on the one hand and of a broad and liberal construction on the other, but an ascertainment of the line of demarcation between State and Federal power, with justice to both.

Where in the Constitution is to be found the power in the National Government to reclaim its own arid lands or to acquire arid lands for the purpose of reclamation? Nowhere, not even under the power to regulate commerce. When the reclaimed lands will likely increase the rainfall, thereby increasing the flow of the stream, answers the Supreme Court in *Kansas v. Colorado*. Where in the Constitution is to be found any power in the National Government to acquire lands for national forestry purposes? Nowhere, answers the Constitution and the Supreme Court of the United States in *Kansas v. Colorado*, for the case in *Kansas v. Colorado* and the question before your committee are absolutely identical.

The action of Congress to be constitutional must depend upon the powers enumerated in the Constitution. To justify action one at least of the enumerated powers must expressly provide for the legislation, or it must be justified by that power in the constitutional manner indicated, as in case of power to declare war. Here is an express power, and Congress can for any reason make a declaration of war against any nation, and its action can not be questioned by the courts. But having declared war many questions may arise as to necessary and proper action to make the declaration of war effective, and this must be determined by construction, as to its being necessary and proper; whether an appropriate means to carry the war power into execution in a manner most beneficial to the people. Is the end legitimate and within the scope of the Constitution? For these matters are not expressly provided for—such as the size of the Army, how raised, by enlistment or draft; as to discipline, whether regulars or volunteers; as to the arm of service, the term of service. All of this and many more show what legislation is a necessary and proper execution of the power.

The doctrine as to what can be done pursuant to an express power so as to make it operative and effective presents a most interesting question in our constitutional history. There is great danger of the powerful influence of two extremes, one for anything within the will of Congress, the other to so limit power as to prevent legislation when wise, necessary, and constitutional. We should in the interest of the people avoid both extremes. Congress should never shrink from exercising all of its full power, when beneficial to the people, and always be careful to avoid an unconstitutional exercise of power. The

constitutionality of the proposed measure is worthy of careful consideration for the effect of the proposed legislation upon the future of the nation.

If Congress has power to acquire the lands in question, there is nothing to prevent the national power from acquiring any and all lands of a State and all the worthless lands of all the States the people desire to sell, and it will increase friction between the State and Federal Government over the question of jurisdiction. Forests and worthless lands will be for sale all over the nation, and the power of the States will be subordinate to the desire of the people to unload on the nation lands that the poorest emigrants will not locate upon. So we agree that the power to regulate commerce is expressly provided for, and according to the broad definition given that term by the courts and the commercial world much can be constitutionally done, and the growing wants of the people will call for full exercise of all the power Congress enjoys. But this will not justify Congress assuming the reclamation of forests under the remote and speculative claim that it will improve navigation.

It does not change the Constitutional aspect, because the lands can be purchased by agreement with the owners; but if the power is exercised and the owners refuse to sell they will have to submit to the land being taken from them, and this raises a very important question—whether the Government would be discharging its Constitutional duty in taking from private owners their property. Even assuming that the Government can go and take property, it certainly must be absolutely needed for the use of the Government, for, as the Supreme Court of the United States said in *Van Brocklin & Another vs. State of Tennessee & Others*, 117 U. S., 151, page 158:

The United States did not and can not hold property, as a monarch may, for private or personal purposes. All the property and revenues of the United States must be held and applied, as all taxes, duties, imposts, and excises must be laid and collected, to pay the debts and provide for the common defense and general welfare of the United States.

It does not satisfy the Constitution that it would be beneficial to the people or popular with them; or that the Government can use the same, or that the Government needs it. The power to acquire it must first be ascertained independent of all these considerations, and then if the power is ascertained, the question arises as to whether or not the end is legitimate, whether it is fairly and honestly exercised in a manner beneficial to the people. It must absolutely be needed for the use of the Government, in the furtherance of some one of the enumerated powers.

It can not be doubted that the original idea is the acquisition of lands for forestry purposes. This is easily ascertained from what has been said in various ways in advocacy of the measure. The improvement of navigation to those supporting the proposition is a matter of secondary, if of any importance, suggested so as to bring it under the commerce clause.

There is another feature of the case to be considered, tending to show that the primary object is the acquisition of lands for forest purposes, and not for the improvement of navigation. Congress will not be following constitutional lines if it attempts, under the circumstances of the case, to improve navigation by acquiring lands, for

Congress has no constitutional authority to act when there is no commerce. That is, it would be exceeding its power, within the definition of Marshall, C. J.

Every person interested knows that Congress does not intend by the purchase or by the acquisition of the lands to take any steps affirmatively toward the improvement of the rivers affected; that the improvement of navigation will go on just the same with or without the acquisition of the lands, and the talk of improvement of navigation and the regulation of commerce is to secure the lands for forest purposes, without reference to the effect upon navigation or commerce. It is a matter of common knowledge that the purchase of the lands will not bring commerce; that the increase of the flow of streams is not called for in the interest of commerce; that many of the streams have never been used and can not be made navigable as instrumentalities of commerce.

In other words, the demand for the acquisition of the lands is not in the interest of either navigation or commerce. It is well known that many acres of the land sought for forest purposes will not be needed or considered in connection with either navigation or commerce, and under any theory can not be made very favorable for either. As showing at least how necessary it is that the question be thoroughly examined and carefully understood several of the earnest advocates of the measure insist that it is not necessary to take the land. The same object can be accomplished by the Federal Government preventing the cutting of the timber, and thereby improve navigation. It is too plain for discussion that the sole purpose and object is the acquisition of lands for forest purposes; that the thought of improving navigation or regulating commerce is not to be seriously considered; that the purchase of the lands will not improve navigation; that there is no commerce to be subserved. It is a well-known fact that much of the land in question is so remote that, while it would be considered a part of the forest reserve, it could under no circumstances be considered valuable for increase of the flow of streams or for the purposes of navigation. So the whole proposition must be considered as an acquisition of lands for forest purposes.

It does not require any evidence of the situation outside of the record for Congress to act correctly. That is, the communication sent to the committee by the House is full enough. Congress can not shirk its constitutional duty, for the proposition is plainly and sufficiently presented to Congress. Can Congress acquire lands for forest reserves? Can Congress acquire lands for forest purposes because of the increase of the flow of the stream and consequent regulation of commerce?

If this can be constitutionally done, under the commerce clause of the Constitution, the doors will be opened wide enough to dispense with all State power and rights and do anything that is popular with the people or quite generally demanded. If the constitutionality of the measure is to be determined by the amount of an appropriation, we shall have no guide for future action except the amount of money involved. Some of the States of the Union have been very sensitive about excessive Federal power, but raise no voice against its exercise when the benefits accrue to them. Forever hereafter they should hold their peace.

Restating the proposition briefly: Congress has express power to regulate commerce between the States; but a great question presents itself when it is asked what can be done under and pursuant to that power. The Constitution says Congress shall have power to make all laws necessary and proper to carry that power into execution. The fact that Congress has express power to make all laws necessary and proper to carry the enumerated powers into execution does not enlarge the power of Congress, for without it, unquestionably, Congress can do the same thing—that is, exercise all powers to the same extent as now. Still, we have but a limited idea as to what can be done, even when we keep in mind the rule laid down by Marshall, C. J., and carefully consider the many things the Supreme Court has said Congress has power to do. The great growth of the nation in population, business, and commerce make many demands upon Congress for legislation under that power, and no narrow construction should be adopted that will prevent proper Congressional action. No statement can be made that will include all Congress can do under that power. The boundaries can not be marked or limits to its exercise of legislative power prescribed.

The framework of the Constitution shows how thoroughly the Fathers understood what they were doing. The best way to reach a correct conclusion is to consider what is proposed, what is the matter sought to be done, the end contemplated. With that ascertained, the question is, Can it be constitutionally accomplished within the construction stated by Marshall, C. J., the proposition being for Congress "to acquire for national forest purposes lands more valuable for the regulation of stream flow than for any other purposes." Under what power, we ask? The answer is, the power to regulate commerce. Assuming the fact to be that the land is more valuable for the regulation of stream flow than for any other purpose, does it prove, within the meaning of the Constitution, that its purchase will improve navigation?

We fully appreciate the width and depth of the power that must be ascertained by construction, and readily concede that the power is so great that Congress has the right to improve navigable streams, and for that purpose may take lands. But are we, when we acquire lands for national forest purposes, regulating commerce or improving navigable streams? If we acquire all of the lands in the United States for national forest purposes, will it improve navigable streams or in any manner operate as a regulation of commerce? Assuming that under its power to regulate commerce Congress has power to improve navigable streams, would anyone say Congress was exercising that discretion with respect to the means employed, most beneficial to the people, when, in attempting to improve the navigation of streams, it acquires for national forest purposes lands more valuable for stream flow than for any other purposes?

It does not change the constitutional character of the matter when the selection is limited to lands more valuable for stream flow than for any other purposes. That is, the fact that it is so valuable, will not make it constitutional to take the lands for national forest purposes. Is the taking of lands for national forest purposes a substantial and practical way of improving navigation? Would the end be legitimate? Would the means employed be appropriate and plainly adapted

to that end? How much will navigable streams be improved by the United States purchasing lands for national forest purposes, even if more valuable for stream flow than for any other purposes? Has Congress exercised that discretion with respect to the means employed in the manner most beneficial to the people when it undertakes to improve navigable streams by acquiring lands for forest purposes more valuable for the regulation for stream flow than for any other purpose? Could it fairly be said that by so doing Congress has kept itself within the scope of the Constitution? Are these means that can be employed under the Constitution, or would the same be employed even as a business proposition?

If the purchase of the lands will not improve navigable streams, notwithstanding the same are taken for national forest purposes, it is not constitutional. There is no constitutional means for the United States to acquire lands unless it is necessary and proper to carry into execution some one of the enumerated express powers of government, and then strictly within the construction given by Marshall, C. J. Can it be said that the United States can enter any State and acquire lands for public parks? If not, the United States can not enter a State and take lands for forest purposes.

If the primary purpose is to improve navigation, Congress can declare to what extent the improvement shall be made, and, having exercised its discretion, the courts can not go behind it. But when Congress continues the exercise of its powers, improving navigation to the extent of declaring that there shall be taken for national forest purposes lands more valuable for the regulation of stream flow than for any other purpose, this discretion can be questioned in the courts. At the outset, therefore, it becomes the duty of Congress to consider whether such action is constitutional. Whether this high duty assigned to it is being executed in a manner most beneficial to the people. Whether the acquisition of the land is legitimate. Is it an honest, fair, and constitutional exercise of power? Is the acquisition of the lands necessary for the improvement of navigation?

As suggested in *Kansas v. Colorado*, if this is necessary for the welfare of the people let us amend the Constitution, but do not violate great principles of constitutional law under the guise of regulating commerce. The power of Congress is ample to satisfy the wants of the people, as far as regulating commerce is concerned, but not broad enough to acquire lands for forestry purposes.

In answer to the foregoing resolution of inquiry the committee submit the following:

Resolved, That the committee is of the opinion that the Federal Government has no power to acquire lands within a State solely for forest reserves; but under its constitutional power over navigation the Federal Government may appropriate for the purchase of lands and forest reserves in a State, provided it is made clearly to appear that such lands and forest reserves have a direct and substantial connection with the conservation and improvement of the navigability of a river actually navigable in whole or in part, and that any appropriation made therefor is limited to that purpose.

Resolved, That the bills referred to in the resolutions of the House (H. R. 10456 and H. R. 10457) are not confined to such last-mentioned purpose and are therefore unconstitutional."

VIEWS OF RICHARD WAYNE PARKER.

The resolution adopted by the committee is as follows:

Resolved, That the committee is of the opinion that the Federal Government has no power to acquire lands within a State solely for forest reserves; but under its constitutional power over navigation the Federal Government may appropriate for the purchase of lands and forest reserves in a State, provided it is made clearly to appear that such lands and forest reserves have a direct and substantial connection with the conservation and improvement of the navigability of a river actually navigable in whole or in part, and that any appropriation made therefor is limited to that purpose.

Resolved, That the bills referred to in the resolutions of the House (H. R. 10456 and H. R. 10457) are not confined to such last-mentioned purpose and are therefore unconstitutional.

I agree with the resolution adopted by the committee that the bills submitted are unconstitutional, that the important duty of establishing and maintaining forest reserves within each State is for that State, and that the United States has no interest even in the flow of streams, except for the regulation of commerce, including the maintenance, improvement, and construction of navigable channels, whether natural or artificial, which may be used in interstate and foreign commerce; but I find myself unable to agree that in the interests of navigation the United States can purchase and control thousands of square miles of dry land and take that land out of the control and taxable jurisdiction of the several States. It is not to my mind at all clear that such power was given by the Constitution or can be included within the power to regulate commerce; nor is it at all clear that any State legislature has the right to convey away part of the State for purposes not within the United States Constitution and to bar all future legislatures and the people of the State from the benefits resulting from improvement and taxation of those lands.

No one can exaggerate the importance of the establishment and maintenance of forest reserves, especially upon the headwaters of our various rivers. Their necessity is being realized by all the States. In New York and New Jersey the mountain area is fast being segregated for the water supply of great cities. The roots of the monarchs of the forest hold back rainfall, regulate and even the flow of streams, moderate freshets, protect the slopes from wash and waste and the river bottoms and channels from deposits of sand and gravel, and preserve a flow for the dry season. Forests even seem to temper the climate, and they constantly lay by stores of lumber that is becoming more and more valuable every day. These are great public considerations, but, like many other public matters, they seem to belong to the several States. It is true that, directly or indirectly, floods and freshets from the headwaters will affect the channel and navigation of a stream and may have to be provided against. Such provision by engineering works on the streams, as by dams, ponds, etc., is certainly within the

power of the United States, whose rights over navigable channels used in interstate and foreign commerce are paramount for the construction, improvement, and maintenance of such channels.

There seems, however, to be a recognized legal distinction between rights in the stream and rights on the land whose surface sheds the rainfall into that stream. We may note examples.

No action lies by any person against his neighbor for flow of surface water.

No action lies for changes in the amount or character of stream flow by ordinary use of the land higher up, such as clearing, tillage, etc., even if the stream be muddied so as, for instance, to damage a paper mill. These principles are established in a host of cases, wherein it was held that every man's right is subject to the right of his neighbor to use his own property in the ordinary way. In like manner it may well be held that the rights of the United States in the waters are subject to the rights of the people of the various States to use the dry land in ordinary ways, as they may deem proper, and that a grant of power to construct navigable waterways may not be used to divest them of that land except so far as it is necessary to engineering work connected with such waterways. By the act of April 28, 1888 (25 Stat. L., 94), any land may be acquired needed to maintain, operate, or prosecute work for the improvement of rivers and harbors for which provision has been made by law. This statute is quoted in Mr. Brantley's views, page 30, and seems to cover the entire jurisdiction of the United States. If it be true that headwater forests are land that is so needed, the claim can be made under this statute in court. To my mind it is certainly doubtful, and I can not concur in the opinion of the committee on this point.

It seems still more a question whether any State can be divested by the legislature of its control over its territory. The importance of mountain land to every State is growing day by day, if only for aqueducts. The State holds the rainfall and streams as a sacred trust for its own citizens, whose life depends upon a daily supply of water. This principle has just been laid down by the Supreme Court in the case of the State of New Jersey against the Hudson County Water Company. It can never be foreseen what value may lie in territory which the State is asked to grant away and put out of the march of improvement.

For these reasons I am unable to concur in so much of the resolution adopted by the committee as declares the power of the United States to acquire forests within the States in aid of navigation. The question is at least doubtful.

To restate the matter briefly:

The United States have no interest in the rivers except for purposes of navigation, and it may fairly be said that the rivers of the Atlantic slope are not navigable above the tidal flow.

It is very hard to see how buying the whole surface of the ground is a question of navigation. There has to be some distinction between land and water. Of course the building of banks and dams, the dredging or digging of the bottom, new channels, or even dams for water supply to a canal are all matters which require the purchase of land, but this is for works on the stream. It is going beyond anything which has ever been hinted to suggest that because the water that falls

from the skies runs off the surface into navigable streams that therefore this surface becomes a mere incident of navigation. The United States is a Government of limited powers. In this particular respect it stands in precisely the same position as if it had been authorized by the State to control, maintain, improve, and build navigable waterways anywhere within the State. If these powers were given to a corporation, together with the great governmental power of eminent domain, it could take whatever land should be found necessary for channels or works of navigation, including dams, ponds, feeders, banks, new channels, or cut-offs, but such a company would certainly not have the power to condemn and take dry ground not needed for these works on the theory that the rainfall ran off this ground into their canals. Such a power would mean that they could shut up whole sections of that State against settlement, improvements, and increased taxable value. Such powers would not be implied in such a grant, nor should they be implied in the grant to the United States by the Constitution.

It is truly said that clearing the ground increases freshets and encourages the formation of bars to the injury of navigation. Tillage does the same, perhaps to a greater extent. So does building a city, paving streets, roofing the houses, and all the devices by which we turn the whole rainfall into the streams as soon as engineering can send it there. The influence upon navigation in these cases is "direct and substantial," but it can hardly be asserted that therefore the United States could acquire the farm or the city, although the committee resolution holds that the Federal Government may appropriate "for the purchase of lands * * * in a State, provided it is made clearly to appear that such lands have a direct and substantial connection with the maintenance and improvement of the navigability of a river actually navigable in whole or in part." It has been held that the United States can have no title in docks, wharves, and piers, or in the soil under the river, except for engineering works to aid navigation. The same principle applies, and "control stops with the shore."

RICHARD WAYNE PARKE.

VIEWS OF MESSRS. LITTLEFIELD, DIEKEMA, AND BANNON.

No money can be constitutionally appropriated from the Federal Treasury except for the accomplishment of a Federal purpose, the proper discharge or exercise of a Federal function. It has long been settled that the Federal Government is a Government of granted, enumerated powers, under which only such undefined powers can be exercised as are "appropriate and plainly adapted" to the effective practical exercise of the granted, enumerated powers. (*Kansas v. Colorado*, 206 U. S., 88.)

When a project is suggested as the subject-matter of a Federal appropriation, the only question to be determined is, does the project come fairly within the scope of these granted enumerated powers or the undefined powers "appropriate and plainly adapted to" their effective practical exercise. If it does not, then the Federal Government has no constitutional power to appropriate the public money to accomplish such a purpose. The mere size of a project, the fact that it involves immense values, affects millions of people, is distributed throughout the whole geographical area of the United States, leading the unintelligent and uninformed for those reasons to describe it as national, does not even remotely tend to establish the fact that it is included within any granted enumerated power or an undefined power "appropriate and plainly adapted to" its effective and practical exercise.

Bigness no doubt appeals to the imagination and engenders desire for Federal control, but this consideration has no place in determining a result which depends upon the exercise of the reasoning faculties. The fact that the project is large or small, unimportant or important, does not reach the threshold of the discussion in determining whether it is included in a granted power. Nor is it a question as to whether certain powers could be more advantageously and effectively exercised by the Federal Government, and therefore ought to have been granted. It is not a question as to what ought or might have been granted; the only question is what is the power that was granted. It is claimed and it is true that the preservation of the forests by the application of scientific methods of conservation is essential to the maintenance of an adequate supply of timber, lumber, and fuel, etc., and means the preservation of natural resources of almost incalculable value. It is also claimed, and we think correctly, that the preservation of the forests is of very great importance in the development, maintenance, and conservation of water powers along the streams that have their rise in the watersheds covered by these forests. Our attention has not been called to, and we have not been able to find, any power granted to the Federal Government to which

either directly or by reasonable implication or necessary inference either of these purposes may with any propriety be referred.

Moreover it seems clear that the Government can only constitutionally acquire property for a constitutional Federal purpose, which clearly constitutes a public use, and therefore what it can constitutionally acquire by purchase it also has the right to acquire by the exercise of eminent domain. Certainly eminent domain can not be exercised except for a public use. Measured by this standard the purpose disclosed in the bills referred to in the resolution (H. R. 10456, H. R. 10457—they are identical in terms) is clearly not a Federal purpose and would not justify any appropriation. The purpose upon which they are predicated is, section 1, "To acquire *for National forest purposes*" and in section 3, "Shall have consented to the acquisition of such land by the United States *for National forest purposes.*" We are unable to find, and our attention has not been called, to any grant of power to the Federal Government which includes even indirectly these purposes. (206 U. S., 46.) It is, however, claimed that although these bills do not proceed upon that hypothesis, that the appropriation can be justified on the ground of the relation of the forests on the watershed, to the navigability of the streams that have their sources in such watersheds.

It is said that the deforesting of the watersheds precipitates into the streams soil and silt that is carried downstream until it accumulates in such quantities as to substantially obstruct navigation, and make it necessary to remove such obstruction in order to preserve their navigability; and that the watershed when properly covered with forest retains the rainfall, so that it is gradually distributed throughout the year, and thus increases the flow in navigable portions of the river, so as to preserve their navigability when otherwise they would be unnavigable during the dry portions of the year, and that for the purpose of thus protecting and preserving the navigability of the navigable portions of the river, Congress can make these appropriations for the acquisition and control of the forests on the watersheds. The control of the navigable waters of the United States has been recognized as within the Federal jurisdiction and subject to all necessary appropriate legislation in a long line of decisions from (not to go farther back) *Gilman v. Philadelphia* (3 Wall., 724), in which the court said:

Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable rivers of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep these open and free from any obstruction to their navigation interposed by the States, or otherwise; to remove such obstructions where they exist; and to provide, by such sanctions as they deem proper, against the occurrence of the evil and for the punishment of the offenders.

to *Kansas v. Colorado* (*supra*), where the court denied the petition of the United States to intervene to protect its alleged interests in the irrigation of arid lands, holding that the United States had no constitutional power to provide for the irrigation of lands other than its own, the court expressly stating that such denial was—

without prejudice to the rights of the United States to take such action as it shall deem necessary to preserve or improve the navigability of the Arkansas River. (117.)

The power of the Federal Government to remove obstructions from navigable rivers, either by dredging, removal of rocks and ledges, and compelling necessary changes in the construction of bridges, is repeatedly exercised and universally conceded. That the exercise of this power is not confined to the portion of the stream that is within the navigable limits, but extends to obstructions in existence or contemplated, above the point of navigability, is settled by the case of *United States v. Rio Grande Irrigation Company*. (174 U. S., 690.) This was a case where the United States, by the Attorney-General, filed a bill in equity to restrain the defendants from constructing a dam across the Rio Grande River in the Territory of New Mexico, and it was conceded that the Rio Grande River in the limits of New Mexico was not navigable.

The court below denied the prayer and dismissed the bill and this decision was reversed and the case sent back, with instructions to the court below—

to order an inquiry into the question as to whether the intended acts of the defendants in the construction of a dam and in appropriating the waters of the Rio Grande will substantially diminish the navigability of that stream within the limits of present navigability; and if so, to issue a decree restraining these acts to the extent that they will so diminish.

In the course of the opinion by Mr. Justice Brewer (which was unanimous) the court, after referring to the fact that the city of New York had appropriated the waters of the Croton River, a nonnavigable river and a tributary of the Hudson River, and stating that it could do so without question "unless thereby the navigability of the Hudson should be disturbed," used as a significant illustration of the power of Congress the following language: "On the other hand, if the State of New York should, even at a place above the limits of navigability, by appropriation for any domestic purposes, diminish the volume of water which, flowing into the Hudson, make it a navigable stream, to such an extent as to destroy its navigability, undoubtedly the jurisdiction of the National Government would arise and its power to restrain such appropriation be unquestioned." (709.)

In *United States v. Lynah* (188 U. S., 445), it appeared that the United States for the purpose of improving the navigability of the Savannah River constructed "certain dams, training walls, and other obstructions" which it was claimed flooded the lands belonging to Lynah so "as to substantially destroy their value." The question in the case was whether "the Government in the exercise of its powers of eminent domain and regulation of commerce" had taken the property of the plaintiff below and should make compensation therefor. It is obvious that if the Congress had no constitutional power to improve the navigability of the river by holding back its flow by the dam, its acts would have been tortious and not the legal basis for the exercise of the right of eminent domain. The case was elaborately argued and there was a vigorous dissenting opinion by some of the ablest members of the court, the majority holding, however, "that there has been a taking of the lands for public uses, and that the Government is under an implied contract to make just compensation therefor." There is no intimation in either the arguments or the opinions that there was any question as to the right of the Government to erect and maintain the dam for the purposes indicated and the case must have proceeded upon the theory that exercise of

such a right was a constitutional exercise of power. Indeed, the minority opinion in substance declares that the damage was "caused by the lawful exercise of the United States of its power to improve navigation," but insists that it was "*damnum absque injuria*."

We may therefore consider it settled that the United States may constitutionally expend money in damming the waters of a river to improve its navigability. As the Government has the right to take the land of a private individual at one point in a river by the exercise of the right of eminent domain, for the purpose of improving its navigability, it is difficult to see why it can not acquire the land of other individuals, at any other point on the river from its source to its mouth, by purchase or eminent domain (involuntary sale by the owner), for the same purpose to accomplish the same result, especially in view of the fact that it is held that the construction of a dam may be restrained, if it impairs the navigability of the river, though it may be located above the navigable point in a nonnavigable part of the river. The particular means used can not determine the constitutionality of the exercise of the power. If the means are appropriate the result accomplished is the test. If an artificial reservoir may be created and maintained at one point, no reason is perceived why a natural reservoir may not be restored and maintained at another point, if the purpose and result be the same. The Government has undoubted power to remove obstructions from the navigable part of the river, to prevent obstructions from being placed therein or over the same, to prevent obstructions in the nonnavigable portions that impair its navigability. It would seem to follow that if reforesting the watershed at its source was an appropriate means "plainly adapted to that end" of preventing the depositing in the river of accumulations that would obstruct its navigable portion, that Congress would have the right to acquire and control them for that purpose.

The foresting of the watershed at the source of a river and the prevention of the accumulation of obstruction within its navigable limits, or the improvement of its navigability by increasing the flow of the water therein during the dry season must, in our judgment, be something more than theoretical, technical, fanciful, or negligible. It must be physical, tangible, actual, and substantial, demonstrable by satisfactory competent testimony, in order to justify an appropriation for that purpose. The protection or the improvement of the navigability of the river must also be the real, effective, sole, and not the incidental, purpose of the appropriation. It would not justify an appropriation when the real purpose is the conservation of the supply of the raw material for forestry products, or the development of water powers and the protection or improvement of the navigability of the river is only theoretical or incidental thereto. The improvement or conservation of the navigability of the river must be the only purpose for which the appropriation is made. In such case the fact, if it be a fact, that other useful purposes are also served, does not militate against the exercise of the power to accomplish the real purpose of the appropriation, as a matter of law. As a matter of law, such purposes can not be a part of the purpose, although as a matter of fact they may be among the necessary incidentals of the result. In this connection what constitutes navigability should be stated. This is well settled.

In *The Daniel Ball* (10 Wall., 463) the court said—

those rivers must be regarded as public navigable rivers in law which are navigable in fact, and they are navigable in fact when they are used or are susceptible of being used in their ordinary condition for highways or commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water, and they constitute navigable waters of the United States within the meaning of the acts of Congress in contradistinction of the navigable waters of the State, when they form in their ordinary conditions by themselves or by uniting with other waters a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water. * * *

And—

It would be a narrow rule to hold that in this country unless a river was capable of being navigated by steam or sail vessels it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact and becomes in law a public river or highway—

the court said in *The Montello* (20 Wall., 441). These cases have been cited and approved in numerous cases, which are collected in notes to United States Reports, vol. 7, p. 366, and vol. 8, p. 328. Whether the deforesting of the land described in the bill has any physical and tangible connection with the navigability of the rivers which have their sources in the respective watersheds was a subject of controversy before our committee, and upon that question of fact we express no opinion, but upon the hypothesis above set forth we are of the opinion that for that specific purpose, and that purpose only, an appropriation can lawfully be made, and that the legislation therefor must in terms be confined to that purpose. It also follows that no land can lawfully be acquired in excess of what is necessary for the carrying out of that purpose, and the bills before us are not properly limited as to the amount that can be lawfully acquired for the one constitutional purpose for which the appropriation can be made.

C. E. LITTLEFIELD.

G. J. DIEKEMA.

HENRY BANNON.

I concur with the foregoing views except that I regard it as at least very doubtful whether the United States can in any event acquire land in the several States for forest purposes. I file separate views on that subject.

RICHARD WAYNE PARKER.

VIEWS OF MR. BRANTLEY.

The Committee on the Judiciary has before it House resolution No. 208, which reads as follows—

Whereas the President, in his message to the Congress at its present session, on December third, nineteen hundred and seven, makes the following recommendation:

“We should acquire in the Appalachian and White Mountain regions all the forest lands that it is possible to acquire for the use of the nation. These lands, because they form a national asset, are as emphatically national as the rivers which they feed, and which flow through so many States before they reach the ocean;” and

Whereas there have been introduced into the House of Representatives bills for the acquirement of national forests in the Southern Appalachian Mountains and the White Mountains, the same being H. R. 10456 and H. R. 10457, which provide as follows:

“That the Secretary of Agriculture is hereby authorized and directed, in his discretion, to acquire for national forest purposes, by purchase or gift, lands more valuable for the regulation of stream flow than for other purposes, and situated on the watersheds of navigable streams in the Southern Appalachian Mountains within the States of Maryland, Virginia, West Virginia, North Carolina, South Carolina, Georgia, Alabama, Kentucky, and Tennessee, and in the White Mountains within the States of New Hampshire and Maine. * * *

“That the Secretary of Agriculture may do all things necessary to secure the safe title in the United States to the lands to be acquired under this Act; but no payment shall be made for any such lands until the title shall be satisfactory to the Attorney-General and shall be vested in the United States.

“That the sum of five million dollars is hereby appropriated to carry out the provisions of this Act, out of any moneys in the Treasury not otherwise appropriated, and said sum shall be available immediately and until expended for said purpose: *Provided*, That the Secretary of Agriculture shall each year make a detailed report to Congress of the lands purchased under this Act, and the cost thereof;” Therefore be it

Resolved, That so much of the President’s message, above referred to, which relates to the acquisition of lands in the Southern Appalachian and White mountains “for the use of the nation” be referred to the Committee on the Judiciary of the House of Representatives, together with the questions involved in the bills referred to, directing the Secretary of Agriculture to acquire for national forest purposes lands in the Southern Appalachian and White mountains, within the States named, with instructions to said committee to report fully at an early date their views as to the power of the Federal Government by legislation to acquire, by purchase, condemnation, or otherwise, the lands referred to in said bills, situated in the States mentioned, and to appropriate money therefor, and also what power and authority the Federal Government has by legislation to acquire for the purpose of forest reserves lands within a State wherein the Government of the United States has no public domain, and to make appropriation therefor.

It is to be noted that said resolution refers to the committee a certain portion of the President’s message, together with certain questions involved in two House bills, to wit, H. R. 10456 and 10457; that is, the questions involved in “Directing the Secretary of Agriculture to acquire for national forest purposes lands in the Southern Appalachian and White mountains within the States named.” The resolution then instructs the committee to report fully at an early date their views, first, “as to the power of the Federal Government by legislation to acquire by purchase, condemnation, or otherwise, the lands referred to in said bills, situated in the States mentioned, and to appropriate money therefor;” and, second, “What power and authority the

Federal Government has by legislation to acquire for the purpose of forest reserves lands within a State wherein the Government of the United States has no public domain, and to make appropriation therefor."

The power of the General Government to acquire land in a State by purchase, condemnation, or otherwise being unquestioned, where the same is necessary to some governmental use, authorized by the Constitution, it becomes necessary in the very outset of the investigation directed to be made to inquire as to the uses for which it is proposed to acquire the land and the forest reserves referred to in said resolution. In *McCulloch v. Maryland* (4 Wheaton, 421) it is said:

Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adequate to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.

Our inquiry must be, first, as to whether the owning of lands and forest reserves in a State by the General Government is itself the end sought to be attained by acquiring them or whether such acquiring is designed as a means to some other end. This inquiry must be determined before we can pass on the question of whether the end is legitimate and within the scope of the Constitution. The importance of this inquiry is further apparent in the light of the statement of the Supreme Court in 117 U. S., 158, in the case of *Van Brocklin v. Tennessee*, to wit:

The United States do not and can not hold property as a monarch may for private or personal purposes. All the property and revenues of the United States must be held and applied as all taxes, duties, imposts, and excises must be laid and collected "to pay the debts and provide for the common defense and general welfare of the United States."

Unless, therefore, it shall appear that said lands and forest reserves are proposed to be held and used in some way for the general welfare, under some power delegated to Congress by the Constitution, it requires no argument to demonstrate that Congress has no power to acquire or to hold them.

THE PROPOSED USE OF FOREST RESERVES.

Directing our inquiry, therefore, in the first place to the proposed uses of the said land and forest reserves, it is essential to carefully scrutinize all the language of the said House bills 10456 and 10457, and as well the history of said bills, in so far as the same is shown in the proceedings of the previous Congress and in the results of the act of the previous Congress. Proceeding with the investigation in this way, we find that the agricultural bill approved March 4, 1907, required the Secretary of Agriculture to investigate the watersheds of the Southern Appalachian and White Mountains—

and to report to Congress the area and natural conditions of said watersheds, the price at which the same can be purchased by the Government, and the advisability of the Government purchasing and setting apart the same as national forest reserves for the purpose of conserving and regulating the water supply and flow of said streams in the interest of agriculture, water power, and navigation.

The important thing here to be observed is that the Fifty-ninth Congress in ordering said survey distinctly directed that information be furnished as to the advisability of acquiring the proposed forest reserves, not as an end in itself, but as a means to other specified ends, to wit, "for the purpose of conserving and regulating the water

supply and flow of said streams in the interest of agriculture, water power, and navigation."

It is a just assumption that the Fifty-ninth Congress felt authorized in appropriating money for this survey, and it is to be noted that one of the ends sought to be achieved by the survey, whatever may be said of the others, was clearly within the Constitutional power of Congress and that end is the conserving and regulating the water supply of certain streams in the interest of navigation. I have examined the report of the Secretary of Agriculture made in pursuance of said direction of the Fifty-ninth Congress. The same is embraced in Senate Document No. 91, Sixtieth Congress, first session. In this report the Secretary states among other things, that "all the waters gathered by the Southern Appalachian and White Mountains flows to the sea through navigable rivers," and he submits an argument supported by facts presented by him that the preservation of the forests in these mountains would equalize the flow of these rivers, tending to the avoidance of floods and freshets and to a greater volume of water in time of drought. His argument is that forest reserves in these mountains would aid navigation in all streams having their source in these mountains. The committee does not undertake to pass judgment on this argument, but refers to it in order to determine whether or not there is any Constitutional purpose sought to be accomplished by the proposed forest reserves. Gentlemen, presumably competent to advise on such matters have appeared before the committee and urged that the preservation of the forests on the Southern Appalachian and White Mountains would materially aid the navigability of certain navigable rivers, but as just stated, the committee does not feel that it has jurisdiction or is called upon to report a conclusion on the facts involved in this argument.

We next take notice of H. R. 10456 and H. R. 10457, the language in each being the same. The description of the lands to be acquired under these bills is, first, "lands more valuable for the stream flow than for other purposes," and, second, lands "situated on the watersheds of navigable streams." This language clearly indicates a relation of some kind between these lands and the streams having their origin in them and a purpose to utilize that relation in the interest of such streams. Provision is made in the bill for allowing private parties to control any minerals that may be on the lands acquired, and as well that merchantable timber may be removed by such parties under regulations to be prescribed by the Government. Provision is also made for private parties to obtain lands "chiefly valuable for agriculture," that the Government may chance to acquire in its purchases of forest lands. All these provisions point directly to the conclusion that one of the purposes of these bills, if not the primary purpose, is to control the watersheds of the streams rising in these mountains in the direct interest of these streams. The exclusion of minerals, merchantable timber, and agricultural lands from the reserves leaves no other conclusion to be fairly reached. That this conclusion is correct, is shown, I think, in the language of section 10 of the bills, to wit: "That the Secretary of Agriculture may for further protection of the watersheds of said navigable streams," do certain other things. In other words, all that precedes in the bills is for the purpose of protecting the watersheds of navigable rivers, and what follows in section 10 is for the further protection of such watersheds.

THE REAL INQUIRY.

Assuming that this conclusion as to the purpose of these bills is correct, the real inquiry that is presented to the committee relates to the power of Congress under the Constitution to acquire lands and establish forest reserves in a State where no public domain now exists for the purpose of improving or adding to the navigability of certain navigable rivers. The committee is not called upon to determine whether, as a matter of fact, the growth of forests or the preservation of forests on mountains would aid the navigability of navigable rivers having their source in such mountains. That question, presumably, the House has reserved for its own decision. The committee is called upon to report simply on the question of power, assuming the existence of the facts necessary to the exercise of the power. The power of Congress over navigation and to appropriate money for the improvement of rivers and harbors has been so universally acquiesced in for so long a period of time as to be now unquestioned. This power is derived from the commerce clause of the Constitution. As far back as 3 Wallace, 724, in the case of *Gilman v. Philadelphia*, the Supreme Court said:

Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose and to the extent necessary of all the navigable waters of the United States which are accessible from a State other than that in which they lie. For this purpose they are the public property of the nation and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the State or otherwise; to remove such obstructions when they exist, and to provide by such sanctions as they may deem proper against the occurrence of the evil and for the punishment of offenders. For these purposes, Congress possesses all the power which existed in the States before the adoption of the National Constitution and which have always existed in the Parliament in England. It is for Congress to determine when its full power shall be brought into activity and as to the regulation and sanction which shall be provided.

The Secretary of Agriculture has informed us that all the navigable rivers having their source in the mountains referred to, and that it is claimed would be benefited by the proposed forest reserves, "flow to the sea." They are all therefore "accessible from a State other than those in which they lie" and are "subject to all the requisite legislation by Congress" for their control in the regulation of commerce. Congress having the power "to keep them open and free from any obstructions" and "to remove such obstructions," and having the power "to provide by such sanctions as they may deem proper against the occurrence of the evil," and also "to determine when its full power shall be brought into activity," and also to determine "as to the regulation and sanctions which shall be provided," it would seem to be incontrovertible under this authority that Congress has the power to acquire and own the proposed forest reserves if in its judgment such forest reserves would aid navigation. The question, it seems to me, is one of discretion, not one of power.

The Savannah River is one of the rivers that it is claimed would be directly benefited by the proposed forest reserves. In the case of *South Carolina v. Georgia et al.* (94 U. S., 4), the second headnote reads: "Congress has the same power over the Savannah River that it has over the other navigable waters of the United States."

In the opinion the court says, page 9:

That the power to regulate interstate commerce and commerce with foreign nations, conferred upon Congress by the Constitution, extends to the control of navigable rivers between States—rivers that are accessible from other States at least to the extent of improving their navigability—has not been questioned during the argument nor could it be with any show of reason. From an early period in the history of the Government it has been so understood and determined.

The court quotes the extract from *Gilman v. Philadelphia* (3 Wallace, 724) just above and says:

Such has uniformly been the construction given to that clause of the Constitution which confers upon Congress the power to regulate commerce.

In a Wisconsin case reported in 96 U. S., 387, the same involving certain river and harbor improvements and the laws of Congress in reference to them, the court in speaking of these laws, says:

They amount to the declaration of the Federal Government that we here interpose and assert our power. We take upon ourselves the burden of this improvement which properly belongs to us and that hereafter this work for the public good is in our hands and subject to our control. Nor can there be any doubt that such action is within the constitutional power of Congress. It is a power which has been exercised ever since the Government was organized under the Constitution.

In the celebrated case of *Gibbons v. Ogden* (9 Wheaton), the court said, page 190:

The power over commerce, *including navigation*, was one of the primary objects for which the people of America adopted their Government, and must have been contemplated in forming it.

Again, on page 195, the court says:

The deep streams which penetrate our country in every direction pass through the interior of almost every State in the Union, and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised wherever the subject exists.

CONGRESS HAS POWER BEYOND NAVIGABLE PORTIONS OF STREAMS.

The power of Congress over navigation extends beyond that portion of a navigable stream that is actually navigable, and it covers every navigable river in the United States. Congress long ago exercised its power over a navigable river beyond the point of its navigability, and the Supreme Court has upheld its act in so doing.

In the act of September 19, 1890 (26 Stat., 454, paragraph 10), it is provided:

That the creation of any obstruction, not affirmatively authorized by law, to the *navigable capacity* of any waters, in respect of which the United States has jurisdiction, is hereby prohibited, etc.

Again, in the river and harbor act of March 3, 1899, in section 10, it is provided—

That the creation of any obstruction not affirmatively *authorized by Congress* to the navigable capacity of any of the waters of the United States is hereby prohibited.

Note must be given to the broader language used in the later act and to the substitution of "authorized by Congress" for "authorized by law." Both these laws are construed in a case reported in 174 U. S., 690. Here a dam was proposed to be erected in the waters of a navigable river, but at a point far above where the river was actually

navigable. The United States Government sought to enjoin the building of the dam on the ground that it would interfere with the navigable portion of the river by decreasing the supply of water. The lower court's decision was adverse to the Government. A reversal was had in the Supreme Court and the case remanded with directions in which there is ordered an—

inquiry into the question whether the intended act of the defendants in the construction of a dam and in appropriating the waters of the Rio Grande will substantially diminish the navigability of that stream within the limits of present navigability and, if so, to enter a decree restraining these acts to the extent that they will so diminish.

In the opinion, page 703, the court, in speaking of the power of a State to permit the appropriation of flowing waters for such purposes as it deems wise, said there were two limitations to this power. The first, that a State can not in the absence of authority from Congress so legislate as to destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of the waters; the second—

that it is limited by the superior power of the General Government to secure the uninterrupted navigability of *all navigable streams* within the limits of the United States. In other words, the jurisdiction of the General Government over interstate commerce and its natural highways vests in that Government the right to take all needed measures to preserve the navigability of the navigable water courses of the country, even against any State action.

The court further discussed the act of September 19, 1890, as amended and reenacted July 13, 1892, 27 Stat., 110 (quoted above) and said, page 708:

It was an exercise by Congress of the power oftentimes declared by the court to belong to it of national control over navigable streams. * * *

It is urged that the true construction of this act limits its applicability to obstructions in the navigable portion of a navigable stream, and that as it appears that although the Rio Grande may be navigable for a certain distance above its mouth, it is not navigable in the Territory of New Mexico, the statute has no applicability. The language is general and must be given full scope. It is not a prohibition of any obstruction to the *navigation*, but any obstruction to the *navigable capacity*, and anything, *wherever* done, or however done, within the limits of the jurisdiction of the United States which tends to destroy the navigable capacity of one of the navigable waters of the United States is within the terms of the prohibition. Evidently Congress, perceiving that the time had come when the growing interests of commerce required that the navigable waters of the United States should be subjected to the direct control of the National Government, and that nothing should be done by any State tending to destroy that navigability without the explicit assent of the National Government, enacted the statute in question, and it would be to improperly ignore the scope of this language to limit it to the acts done within the very limits of navigation of a navigable stream.

If Congress has the power, as this opinion declares, to legislate against obstructions that interfere with the "navigable capacity" of navigable streams "wherever done, or however done, within the limits of the United States," and regardless of whether done in the navigable portions of such streams, why has not Congress an equal power to legislate in the same way to *increase* the "navigable capacity" of such streams? If it be a fact that denuding the mountains of their forest results in filling up the navigable streams in their navigable portions with silt, dirt, or débris, causing obstructions therein, why has not Congress the same power to prevent the formation of such obstructions that it has to remove such obstruction after they have been formed? If Congress has the power to remove a dam, placed far above the navigable portion of a navigable stream, because it is an obstruction to the navigable

portion of the stream, in that it decreases the flow of water, why has not Congress equal power to remove any other obstructions in the stream at any point between the ending of navigation and the source of the stream, if such obstruction decreases the flow of water in the navigable portion of such stream? If it be a fact that destroying the forests on the mountain side results in a greatly reduced flow of water during periods of drought in all streams having their origin in such mountains, why has not Congress the same power where such streams are navigable to prevent the destruction of such forests that it has to prevent a dam at some other point on the nonnavigable portion of the stream? Why is not one thing just as important to be done as the other in the interest of navigation? Is not prevention more important than cure, and particularly so when in all the experience of our Government cure by dredging has never been anything but a temporary cure? In the light of the authority just quoted, there appears to be involved in the resolutions referred to the committee, only questions of fact and matters of policy. The existence of the power involved about appears to be amply assured.

The case of *Kansas v. Colorado*, reported in 206 U. S., 46, is not an authority against the existence in Congress of such power, but, on the contrary, in so far as it touches this particular question of power, the opinion clearly indicates its existence. In this case the Supreme Court denied the power of the United States to control the waters of a river in a State for the purpose of reclamation of arid lands, the court holding that the reclamation of arid lands within a State is not within the Constitutional power of Congress. But the court said, page 86:

It follows from this that if in the present case the National Government was asserting as against either Kansas or Colorado that the appropriation for the purposes of irrigation of the waters of the Arkansas was affecting the navigability of the stream it would become our duty to determine the truth of the charge. But the Government makes no such contention. On the contrary, it distinctly asserts that the Arkansas River is not now and never was practically navigable beyond Fort Gibson in the Indian Territory, and nowhere claims that any appropriation of the waters by Kansas or Colorado affects its navigability.

In the syllabus, the existence of the specific power being discussed is clearly recognized, to wit:

While Congress has general legislative jurisdiction over the Territories and may control the flow of waters in their streams it has no power to control a like flow within the limits of a State, *except to preserve or improve the navigability of the stream.*

Here is express recognition of the power of Congress, within a State, to control the flow of a stream, for the purpose of preserving or improving its navigability.

If it be a fact that a forest on the mountain side will control the flow of a stream having its origin in the mountain, and that such control will preserve or will improve the navigability of the stream, why is not the language quoted direct authority for Congress to preserve the forests on such mountain side?

The syllabus just quoted from *Kansas v. Colorado*, amply supported as it is by the full text of the opinion, furnishes authority for the contention that Congress has no constitutional power to control the flow of a stream within a State for the purpose of aiding agriculture or improving water power which are two other alleged purposes of forest reserves, as shown in the order for survey contained in the act of

March 4, 1907, but at the same time it furnishes equally strong authority for the proposition that Congress may control such stream flow for the purpose of preserving or improving the navigability of such streams.

It can not be seriously argued that because Congress in aiding navigation will at the same time produce other beneficent results, that Congress has no power to aid navigation. The control and regulation of the flow of water in a stream would undoubtedly improve the value of the water power on such stream, but it would to a greater extent improve the navigability of the stream. If such stream was navigable there could be no use made of its water power by a State or individuals that would interfere with its "navigable capacity," and its water power, controlled as it would be by the State, whatever might be its value, would be subservient to the preservation of its navigability. If by controlling stream flow, freshets and floods could be avoided or substantially reduced in volume or in frequency, agriculture would undoubtedly be benefited, because agricultural lands would be saved the deposits destroying their fertility and left on them by overflows; but would not this be a mere incident? Must Congress be denied its undoubted power to improve and preserve the navigability of navigable streams because in so doing there will be other beneficial results? Congress has never made an appropriation for any public improvement in any community, whether for harbor improvements or buildings, that has not resulted in benefiting the community in many ways, and yet the appropriation has always been justified because intended for a distinct constitutional purpose.

The incidental benefits in other directions that have followed have never stood in the way of an appropriation for a legitimate end.

PREVIOUS ACTS OF CONGRESS.

The direct question as to the power of Congress to aid navigation by acquiring land within a State to be used as forest reserves has never arisen, so far as I am advised; but both Congress and the Supreme Court have repeatedly recognized the power of Congress to acquire, by purchase or condemnation, lands within a State for the purpose generally of aiding navigation.

I am not prepared to advise that this power is limited to any specific area of land short of what is actually necessary for the particular constitutional purpose of aiding navigation.

The act of April 28, 1888 (25 Stat., 94), reads:

The Secretary of War may cause proceedings to be instituted in the name of the United States, in any court having jurisdiction of such proceedings, for the acquirement by condemnation of *any land*, right of way, or material needed to enable him to maintain, operate, or prosecute work for the improvement of rivers and harbors, for which provision has been made by law, such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted: *Provided, however*, That when the owner of such land, right of way, or material shall fix a price for the same, which in the opinion of the Secretary of War shall be reasonable, he may purchase the same at such price without further delay: *And provided further*, That the Secretary of War is hereby authorized to accept donations of lands or material required for the maintenance or prosecution of such works.

In 188 U. S., 445, is reported a case for damages against the United States, caused by overflowing lands as the result of putting in dams and training walls in the Savannah River. The damages were allowed.

In the syllabus, the court says:

Notwithstanding that the work causing the injury was done in improving the navigability of a navigable river, and by the Constitution Congress is given full control over such improvements, the injuries can not be regarded as purely consequential, and the Government can not appropriate property without being liable to the obligation created by the fifth amendment of paying just compensation.

Mr. Justice Brewer said, page 464:

It is earnestly contended in argument that the Government had a right to appropriate this property. *This may be conceded*, but there is a vast difference between a proprietary and a governmental right. * * * Very different from this proprietary right of the Government in respect to property which it owns is its governmental right to appropriate the property of individuals.

All private property is held subject to the necessities of government. The right of eminent domain underlies all such rights of property. The Government may take personal or real property, whenever its necessities or the exigencies of the occasion demand.

Congress has extended its power to nonnavigable waters *adjacent* to navigable waters, and for the express purpose of preventing the navigable waters from being filled up with earth and other material, the identical purpose that it is claimed forest reserves would serve. In 33 Statutes, Law 1147, Congress has empowered the Secretary of War—

to prescribe regulations to govern the transportation and dumping into any navigable waters or *waters adjacent thereto*, of dredgings, earth, garbage, and other refuse materials of every kind or description, whenever in his judgment such regulations are required in the interest of navigation.

Congress has extended its jurisdiction to prevent floods in a navigable river, another purpose that it is claimed forest reserves would serve. In 21 Statutes, Law 38, Congress conferred the power upon and made it the duty of the Mississippi River Commission to mature among others plans “to prevent destructive floods.”

THE POWER GENERALLY TO ACQUIRE LAND.

I stated in the outset that the power of Congress to acquire land in a State by purchase or condemnation was unquestioned, provided a necessity to acquire it for some legitimate governmental use existed.

The authorities for this proposition are ample.

Article 1, section 8, of the Constitution reads:

Congress shall have power 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 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.

This section, however, is not in any respect a limitation on the power of Congress to acquire lands in a State, but is a limitation on the power of Congress to “exercise exclusive legislation.”

In *Kohl v. U. S.*, reported in 91 L. S., 367, 371, the court says:

The powers vested by the Constitution in the General Government demand for their exercise the acquisition of lands in all the States. These are needed for forts, armories and arsenals, for navy-yards and light-houses, for custom houses, post-offices, and court-houses, and for other *public uses*.

Also—

No one doubts the existence in the State governments of the right of eminent domain—a right distinct from and paramount to the right of ultimate ownership. But it is no more necessary for the exercise of the powers of a State government than it is for the exercise of the conceded powers of the Federal Government. That Government is as sovereign within its sphere as the States are within theirs. True, its

sphere is limited. Certain subjects only are committed to it; but its power over those subjects is as full and complete as is the power of the States over the subjects to which their sovereignty extends. The power is not changed by its transfer to another holder. But if the right of eminent domain exists in the Federal Government, it is a right which may be exercised within the States, so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution.

In 109 U. S., 518, the court says:

The power to take private property for public uses, generally termed the right of eminent domain, belongs to every independent Government. It is an incident of sovereignty and, as said in *Boom v. Patterson* 98 U. S., 106, requires no Constitutional recognition.

In *Fort Leavenworth R. R. Co. v. Lowe* (114 U. S., 527), the syllabus states:

In the act admitting Kansas as a State, there was no reservation of Federal jurisdiction over the Fort Leavenworth Military Reservation. The State of Kansas subsequently ceded to the United States exclusive jurisdiction over the same, "saving further to said State the right to tax railroad, bridge, or other corporations, their franchises and property, on said reservation." Held, that the property and franchises of a railroad company within the reservation was liable to pay taxes in the State of Kansas, imposed according to its laws.

On page 530, the court after quoting article 1, section 8 of the Constitution, says:

This power of exclusive legislation is to be exercised, as thus seen, over places purchased by consent of the legislatures of the States in which they are situated, *for the specific purposes enumerated*. * * * Purchase with such consent was the only mode then thought of for the acquisition by the General Government of title to lands in the States. Since the adoption of the Constitution this view has not generally prevailed. Such consent has not always been obtained, nor supposed necessary, for the purchase by the General Government of lands within the States. * * * The consent of the States to the purchase of lands within them *for the special purposes named* is, however, essential under the Constitution, to the transfer to the General Government, with the title of political jurisdiction and dominion. When lands are acquired without such consent, the possession of the United States, unless political jurisdiction be ceded to them in some other way, is simply that of an ordinary proprietor. The property in that case, *unless used as a means to carry out the purposes of the Government*, is subject to the legislative authority and control of the States equally with the property of private individuals. But not only by direct purchase have the United States been able to acquire lands they needed without the consent of the States, but it has been held that they possess the right of eminent domain within the States, using those terms, not as expressing ultimate dominion or title to property, but as indicating *the right to take private property for public uses, when needed to execute the powers conferred by the Constitution*; and that the General Government is not dependent upon the caprice of individuals or the will of State legislatures *in the acquisition of such lands as may be required for the full and effective exercise of its powers*. This doctrine was authoritatively declared in *Kohl v. United States*, 91 U. S., 367.

The court, after quoting from various opinions of other courts and of Attorney-Generals of the United States, concludes, page 539:

Where, therefore, lands are acquired in any other way by the United States, within the limits of a State than by purchase with her consent, they will hold the lands subject to this qualification; that if upon them forts, arsenals, or other public buildings are erected for the uses of the General Government, such buildings with their appurtenances, as instrumentalities for the execution of its powers, will be free from any such interference and jurisdiction of the State as would destroy or impair their effective use for the purposes designed. Such is the law with reference to all instrumentalities created by the General Government. Their exemption from State control is essential to the independence of and sovereign authority of the United States within the sphere of their delegated powers. But when not used as instrumentalities, the legislative power of the State over the places acquired will be as full and complete as over any other places within her limits.

In reference to the particular case before it, the court said, page 539:

It not being a case where exclusive legislative authority is vested by the Constitution in the United States, that cession could be accompanied with such conditions as the State might see fit to annex, not inconsistent with the free and effective use of the fort as a military post.

In answer to the objection that a State has no power to cede away her jurisdiction and legislative power over any portion of her territory, except as such cession follows under the Constitution from her consent to a purchase by the United States for some one of the purposes mentioned in the Constitution, the court says, page 540:

It is undoubtedly true that the State, whether represented by her legislature or through a convention specially called for that purpose, is incompetent to cede her political jurisdiction and legislative authority over any part of her territory to a foreign country without the concurrence of the General Government.

But the court says, page 541:

In their relation to the General Government the States of the Union stand in a very different position from that which they hold to foreign governments. Though the jurisdiction and authority of the General Government are essentially different from those of the State, they are not those of a different country; and the two, the State and the General Government, may deal with each other in any way they may deem best to carry out the purposes of the Constitution.

The question presented in *Van Brocklin v. State of Tennessee* (117 U. S., 151) was whether lands in the State of Tennessee sold for taxes by the United States and bought in by the United States could be taxed by the State while they were owned by the United States. In a most elaborate opinion the court held they could not be so taxed. The syllabus is:

Property of the United States is exempt by the Constitution of the United States from taxation under the authority of a State.

In the opinion this summing up of the power of the United States to acquire and own lands within a State is made, page 154:

So the United States, *at the discretion of Congress*, may acquire and hold real property in any State, whenever such property is needed for the use of the Government, *in the execution of any of its powers*, whether for arsenals, fortifications, light-houses, custom-houses, court-houses, barracks, or hospitals, *or for any other of the many public purposes for which such property is used*; and when the property can not be acquired by voluntary arrangement with its owners it may be taken against their will by the United States, in the exercise of the power of eminent domain, upon making just compensation, with or without a concurrent act of the State in which the land is situated, (10 Peter, 25; 91 U. S., 367; 94 U. S., 315, 320; 109 U. S., 513; 112 U. S., 645; 114 U. S., 525.)

In *Cherokee Nation v. Kansas Railway Company* (135 U. S., 641) the court denied the right of the Cherokee Nation, as the owner of land in the Indian Territory, to prevent a railroad company, under power vested in it by Congress, from condemning such land for right of way. The court said, page 656:

The fact that the Cherokee Nation holds these lands in fee simple under patents from the United States is of no consequence in the present discussion, for the United States may exercise the right of eminent domain, even within the limits of the several States, for purposes necessary to the execution of the powers granted to the General Government by the Constitution.

The court quotes with approval the opinion of Mr. Justice Bradley, in 35 Fed. Rep., 9, 19, as follows, page 656:

The argument based upon the doctrine that the States have the eminent domain or highest dominion in the lands comprised within their limits, and that the United

States have no dominion in such lands, can not avail to frustrate the supremacy given by the Constitution to the Government of the United States in all matters within the scope of its sovereignty. * * * Whatever may be the necessities or conclusions of theoretical law as to eminent domain or anything else, it must be received as a postulate of the Constitution that the Government of the United States is invested with full and complete power to execute and carry out its purposes.

The court further, page 657, said:

The lands in the Cherokee territory, like the lands held by private owners everywhere within the geographical limits of the United States, are held subject to the authority of the General Government to take them for such objects as are germane to the execution of the powers granted to it; provided only that they are not taken without just compensation being made to the owner.

In *U. S. v. Gettysburg Electric Railway*, 160 U. S., 668, it is held not only that the United States has power to hold lands in a State for the purpose of "preserving the lines of battle at Gettysburg, Pa., and for properly marking with tablets the positions occupied by the various commands of the armies of the Potomac and of northern Virginia on that field, and for opening and improving avenues along the positions occupied by troops upon those lines, and for fencing the same, and for determining the leading tactical positions of batteries, regiments, brigades, divisions, corps, and other organizations, with reference to the study and correct understanding of the battle and to mark the same with suitable tablets, each bearing a brief historical legend compiled without praise and without censure," but that the United States has power to condemn lands within a State for such purpose. The court below held that "the intended use of the land is not that kind of a public use for which the United States has the Constitutional power to condemn land," and this holding was reversed by the unanimous opinion of the Supreme Court.

Mr. Justice Peckham, for the court, page 679, said the important question to be determined was whether the use proposed was of that *kind* of public use for which the Government of the United States is authorized to condemn land. He said:

It has authority to do so whenever it is necessary or appropriate to use the land in the execution of any of the powers granted to it by the Constitution.

He said, page 680:

Upon the question whether the proposed use of this land is a public one, we think there can be no well-founded doubt. And also, in our judgment, the Government has the constitutional power to condemn the land for the proposed use. It is, of course, not necessary that the power of condemnation for such purpose be expressly given by the Constitution. The right to condemn at all is not so given. It results from the powers that are given, and it is implied, because of its necessity or because it is appropriate in exercising these powers. Congress has the power to declare war and to create and equip armies and navies. It has the great power of taxation to be exercised for the common defense and general welfare. Having such powers, it has such other and implied ones as are necessary and appropriate for the purpose of carrying the powers expressly given into effect. Any act of Congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country, and to quicken and strengthen his motives to defend them, and which is germane to and intimately connected with and appropriate to the exercise of some one or all of the powers granted by Congress, must be valid. This proposed use comes within such description.

He further said:

The end to be attained by this proposed use, as provided for by the act of Congress, is legitimate and lies within the scope of the Constitution.

He further said, page 683:

Its national character and importance, we think, are plain. The power to condemn for this purpose need not be plainly and unmistakably deduced from any one

of the particularly specified powers. Any number of these powers may be grouped together, and an inference from them all may be drawn that the power claimed has been conferred.

These authorities fully sustain the proposition that Congress has the power to acquire lands in any State for any legitimate governmental use, and that Article I, section 8, of the Constitution, does not limit this power. The limitation of this power that is fixed by the Constitution is that such lands can be acquired only in execution of some power that is delegated to Congress.

POLITICAL POWER AND LEGISLATIVE CONTROL.

If the United States should acquire a forest reserve in a State, a most interesting and important question would arise as to where the political power and legislative control over such forest reserve would vest, and this is a question separate and apart from the question of power in the United States to acquire such reserve. H. R. 10456 and 10457 provide that such reserves shall not be acquired in a State without the consent of such State. The language of section 2 is—

That no deed or other instrument of conveyance shall be accepted or approved by the Secretary of Agriculture under this act until the legislature of the State in which the land lies shall have consented to the acquisition of such land by the United States for national forest purposes.

Section 4 prohibits any payment for the lands "until the title shall be satisfactory to the Attorney-General and shall be vested in the United States." If the State consents to the passing of the title for national forest purposes and the title is actually approved and passed nothing further will be required by the United States. Section 8 gives to the United States jurisdiction to punish offenses only, leaving all other jurisdiction in the State. Section 7, however, provides that—

The lands acquired under this act shall be permanently reserved, held, and administered as national forest lands under the provision of section twenty-four of the act approved March third, eighteen hundred and ninety-one, volume twenty-six, Statutes eleven hundred and three, and acts supplemental to and amendatory thereof.

This section confers more jurisdiction on the United States than the simple one of punishing offenses.

In my opinion should the United States acquire forest reserves in a State for the purpose of navigation, which it has the constitutional power to do, and no more appeared than the mere fact of acquiring title by the United States whether by purchase or condemnation, the United States would hold such land as any other proprietor in the State, subject to the complete jurisdiction of the State, save in two particulars. The State could not tax the lands, nor could it interfere with the governmental uses for which the United States acquired them. This, I think, is made perfectly clear by the Fort Leavenworth case (114 U. S., 527) and the Van Brocklin case (117 U. S., 151), as well as in some of the other cases already cited. In order for the United States to exercise any other jurisdiction over such lands, the State would have to expressly cede such other jurisdiction. These bills require no cession of jurisdiction by the States. They simply require the consent of the State, that the title shall pass for national forest purposes. The consent to the passing of title would not add anything to the two rights or privileges already referred to, for these the United States would enjoy, even though the State had not consented to the passing of the title.

In the absence of a cession of jurisdiction for that purpose by the State, the United States would have no jurisdiction to set apart such lands as "permanent national forest lands" and control them as such for a purpose wholly unrelated to navigation, nor could the State cede jurisdiction for such purpose, for the power of the State and the power of the United States is each limited to ceding jurisdiction and accepting jurisdiction over lands within a State for a constitutional use, and such use, as we have already seen, is not a constitutional use. Again, forest reserves as an aid to navigation not being "needful buildings," nor in any sense related to the properties or purposes described in article 1, section 8, of the Constitution, it is much to be doubted if the United States, even with the express grant of the State, could exercise "exclusive" legislative power over them. There is some force in the suggestion that article 1, section 8, of the Constitution limits the power of the United States to exercise "exclusive" legislative power in a State to the particular properties and purposes enumerated. Be that as it may, however, it is quite evident that a simple consent of the State that the United States might purchase lands within its domain, would confer no legislative power, exclusive or otherwise, on the United States that would not attach without such consent.

Where land is acquired in a State by the United States for one of the purposes enumerated in article 1, section 8 of the Constitution, and the State consents thereto, the Constitution immediately confers exclusive legislative power over such land upon the United States. In the case of Fort Leavenworth (114 U. S., 527), the court quotes with approval, on page 533, from Mr. Justice Story, in *U. S. v. Cornell* (2 Mason, 60), as follows:

For it may well be doubted, whether Congress is by the terms of the Constitution at liberty to purchase lands, property, dock-yards, etc., with the consent of the State legislature, where such consent is so qualified that it will not justify exclusive legislation of Congress there. It may well be doubted if such consent be not utterly void.

This rule has no application to lands acquired in a State for some constitutional purpose other than those enumerated in article 1, section 8, and in all such other cases where a State cedes jurisdiction it may limit or qualify such cession as it sees proper to do.

In Cooley's Constitutional Law, 3d edition, page 103, the entire matter is summed up as follows:

The Constitution, as we have seen, provides for the exclusive jurisdiction in the United States not only over the seat of government but over other places purchased with the consent of the legislature of the State for the erection of needful buildings. This power of exclusive legislation carries with it exclusive jurisdiction; the full sovereign authority over such places passes under such circumstances into the hands of the National Government. The State, therefore, can not take cognizance of acts committed there, and the inhabitants of those places cease to be inhabitants of the State and can no longer exercise any civil or political rights under the laws of the State. But land within the limits of a State can be acquired for governmental purposes in other ways than by purchase with the consent of the legislature; and if acquired in any other way, exclusive jurisdiction and legislative power do not pass to the United States. The property may be purchased without the consent of the legislature, may be taken under the power of eminent domain, or may be part of territory originally belonging to the United States and not exempted from the jurisdiction of the State at the time of the admission of the State wherein the property lies. In these cases, the interest of the United States is that of an ordinary proprietor, but doubtless, under any circumstances, the Federal property, however acquired, would be free from any such interference and jurisdiction of the State as would destroy its effective use for Federal purposes. The State may also cede jurisdiction to the Federal Government over any such place, and in doing so may make such restrictions or conditions as it may see fit, provided they are not inconsistent with the effective use of the property for the purposes for which it was acquired.

Upon the question now being discussed the decision of Judge Seaman (71 Fed. Rep., 545) is to the point. The syllabus is:

The purchase of lands in a State by the General Government with legislative consent does not ipso facto confer upon the General Government exclusive jurisdiction unless the purchase is for a fort or for some other purpose distinctly named in article 1, section 8, of the Constitution; and in order that exclusive jurisdiction may be acquired over land taken for any other purpose, the act providing therefor and calling for the consent must unequivocally declare that exclusive jurisdiction is intended and necessary, or such necessity must be manifest from the purpose of the act.

Judge Seaman, in his opinion, page 552, says:

It was declared by Chief Justice Spencer in the great and leading case of *People v. Godfrey* (17 Johns, 225), as a fundamental principle, "that the rights of sovereignty are never to be taken away by implication," and the rule thus stated is an accepted canon in the construction of powers between the nations and State. Reading the Wisconsin statute in the light of this rule, and in the view that the purpose was not one for which exclusive legislation was prescribed, either by the Constitution or by Congressional enactments, the omission of the word "exclusive," or some equivalent term, is material, and in my opinion the act must be interpreted as ceding—that is, yielding or surrendering—to the United States such jurisdiction as Congress may find necessary for the object of the cession and for the exercise of which there must be clear enactments to that end within its powers.

The Wisconsin act reads:

That jurisdiction over the several tracts of land hereinafter mentioned be, and hereby is, ceded to the United States of America.

In 114 U. S., 545, *Chicago and Pacific Railway Co. v. McGlinn*, the court referred to the point made in the argument of *Fort Leavenworth v. Lowe et al.*, same volume, that the act of cession by the State of Kansas conferred "exclusive" jurisdiction over the territory to the United States and that any limitations in the act were void. The court said in speaking of *Fort Leavenworth v. Lowe et al.*:

We there held that a building on a tract of land owned by the United States used as a fort or for other public purposes of the Federal Government is exempted as an instrumentality of the Government from any such control or interference by the State as will defeat or embarrass its effective use for these purposes. But in order that the United States may possess exclusive legislative power over the tract, except as may be necessary to the use of the building thereon as such instrumentality, they must have acquired the tract by purchase, with the consent of the State. This is the only mode prescribed by the Federal Constitution for their acquisition of exclusive legislative power over it. We also held that it is competent for the legislature of a State to cede exclusive jurisdiction over places needed by the General Government in the execution of its powers. * * *

This case involved a suit against a railroad company on the reservation for killing a cow, brought in the State court of Kansas, under a Kansas statute. The railroad company contended that the Kansas statute was void, because the United States had exclusive legislative power over the reservation and that the limitation in the act of cession was void. The court said, page 546:

We are clear that this contention can not be maintained. It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country, that is laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign. By the cession public property passes from one government to the other, but private property remains as before and with it those municipal laws which are designed to secure its peaceful use and enjoyment.

In 146 U. S., 325, *Benson v. U. S.*, the Kansas military reservation and the jurisdiction of the United States thereover was again before the Supreme Court. This time in a prosecution before the circuit

court of the United States for murder committed on the reservation. The court, on page 331, said:

It is contended by appellant's counsel that within the scope of those decisions (114 U. S., 525, and 114 U. S., 542) jurisdiction passed to the General Government only over such portions of the reserve as are actually used for military purposes, and that the particular part of the reserve on which the crime charged was committed was used solely for farming purposes. But in matters of that kind the courts follow the action of the political department of the Government (2 Wall., 525, 537). The character and purposes of its occupation having been officially and legally established by that branch of the Government which has control over such matters, is not open to the courts, on a question of jurisdiction, to inquire what may be the actual uses to which any portion of the reserve is temporarily put. There was therefore jurisdiction in the circuit court.

In 162 U. S., 399, *Palmer v. Barrett*, a case from New York, the question arose as to the exclusive jurisdiction of the United States over certain lands adjacent to the navy-yard and hospital in Brooklyn that had been ceded with certain limitations to the United States by the State of New York. The case involved a lease. The court said:

In the absence of any proof to the contrary it is to be considered that the lease was valid and that both parties to it received the benefits stipulated in the contract. This being true, the case then presents the very contingency contemplated by the act of cession, that is, the exclusion from the jurisdiction of the United States of such portion of the ceded land not used for the Governmental purposes of the United States therein specified. *Assuming, without deciding, that if the cession of jurisdiction to the United States had been free from condition or limitation the land should be treated and considered as within the sole jurisdiction of the United States, etc.*

This last clause suggests the doubt heretofore expressed of the existence of unlimited power in the United States to exercise "exclusive" legislative power in a State with the consent of the State. This doubt is strengthened by the following case:

In *Pollard's Lessee v. Hagan et al.* (3 Howard, 212, 223), the court says, in speaking of the act admitting Alabama into the Union:

Nothing remained in the United States, according to the terms of the agreement, but the public lands. And if an express stipulation had been inserted in the agreement, granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative, because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain within the limits of a State or elsewhere, except in the cases in which it is expressly granted.

The court here quotes article 1, section 8, of the Constitution, and says:

Within the District of Columbia and the other places purchased and used for the purposes above mentioned, the national and municipal powers of Government of every description are united in the Government of the Union. And these are the only cases within the United States in which all the powers of Government are united in a single Government, except in the cases already mentioned in the temporary territorial governments, and there a local government exists.

The opinion, further, page 224, recites:

We therefore think the United States hold the public lands within the new States by force of the deeds of cession and the Statutes connected with them, and not by any municipal sovereignty which it may be supposed they possess, or have reserved by compact with the new States for that particular purpose. The provision of the Constitution above referred to shows that no such power can be exercised by the United States within a State. Such a power is not only repugnant to the Constitution, but it is inconsistent with the spirit and intention of the deeds of cession.

It should be said of this opinion that the right of "eminent domain," referred to in it, has reference to ultimate ownership and dominion of property rather than to the right to take private property for public

uses. It is in the latter sense that the right of "eminent domain" has been so frequently held by the Supreme Court to exist in the United States.

Whatever may be the power of the United States to exercise exclusive legislative power within a State, it is not necessary now to determine nor is it necessary to determine what jurisdiction should be ceded by a State in case the United States purchase forest reserves within its domain. It is quite evident that H. R. 10456 and 10457 do not contemplate that such reserves shall be acquired in any State without the consent of such State, and it is equally evident that these bills do not contemplate that the United States shall exercise exclusive legislative power over such reserves when purchased. These questions therefore are not submitted to the committee. Considering the questions that are presented, there ought to be no difficulty in adjusting the question of power over such reserves between the State and the United States. The Supreme Court said in the *Fort Leavenworth v. Lowe* case (114 U. S., 541) that—

The State and the General Government may deal with each other in any way they may deem best to carry out the purposes of the Constitution.

One of the purposes of the Constitution being to preserve and maintain the use of our navigable rivers as aids to commerce, the State and the Federal Government may agree as they deem best to carry out this great purpose. Such agreement can be expressed in the act of Congress by setting forth therein in detail the particular cessions of jurisdiction by the State that would be required by the United States as a condition precedent to purchasing the reserves, and by also setting forth therein the purpose for which such jurisdiction is required. This purpose should plainly appear to be that of aiding navigation. All other purposes should be eliminated. Such an act of Congress, followed by a cession from the State of the required jurisdiction for the purpose stated, would constitute the agreement between the United States and the State and would be clearly within the scope of the Constitution.

IN CONCLUSION.

It is amply apparent from the foregoing statement that Congress has the Constitutional power to acquire lands and forest reserves in a State by purchase, condemnation, or otherwise, as an aid to navigation, if it be made to appear to Congress that such reserves would materially or substantially aid navigation.

WILLIAM G. BRANTLEY.

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