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## Are U.S. Public Lands Unconstitutional?

John D. Leshy

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# Are U.S. Public Lands Unconstitutional?

JOHN D. LESHY\*

*Arguments are sometimes made—most recently in a paper commissioned by the State of Utah, and by a lawyer for a defendant facing charges for the armed takeover of a National Wildlife Refuge in Oregon in 2016—that U.S. public lands are unconstitutional. This article disputes that position. It digs deeply into the history of the public lands, going back to the very founding of the nation. It seeks to show that the arguments for unconstitutionality reflect an incomplete, defective understanding of U.S. legal and political history; an extremely selective, skewed reading of numerous Supreme Court decisions and federal statutes; a misleading assertion that states have very limited governing authority over activities taking place on U.S. public lands; and even a misuse of the dictionary. At bottom, the arguments rest on the premise that the U.S. Supreme Court should use the U.S. Constitution to determine how much if any land the U.S. may own in any state. For the Court to assume that responsibility would be a breathtaking departure from more than 225 years of practice during which Congress has made that determination through the political process, and from a century and a half of Supreme Court precedent deferring to Congress. It would also be contrary to the Court's often expressed reluctance to revisit settled public land law, upon which so many property transactions depend.*

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\* Distinguished Professor of Law Emeritus, University of California, Hastings College of the Law. I appreciate the helpful suggestions of Gregory Ablavsky, Eric Biber, Michael C. Blumm, Daniel Feller, John Freemuth, Bill Hedden, John F. Nagel, Zachary Price, and John Ruple on earlier drafts, as well as the excellent assistance of the editorial team of the *Hastings Law Journal*. Any errors are the author's alone.

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## INTRODUCTION

From time to time, arguments have been advanced that the answer to the question posed in the title to this article is “yes.” Articles taking that position date back to the 1940s,<sup>1</sup> in connection with the unsuccessful efforts by a number of coastal states to establish their ownership of submerged lands on the Outer Continental Shelf through litigation.<sup>2</sup> More recently, several articles embrace the idea that there are significant constitutional limits on the U.S. government’s power to own public lands.<sup>3</sup>

This article disputes that position. It focuses in part on the legal analysis prepared by the Legal Consulting Services Team for the Utah Commission for the Stewardship of Public Lands established by the Utah State Legislature in 2015 (“Utah Paper”).<sup>4</sup> That paper concludes that “legitimate legal theories exist to pursue litigation in an effort to gain ownership or control of the public lands” in Utah.<sup>5</sup> In a potent reminder that constitutional arguments can have tangible consequences, the Utah Paper has been cited by, among others, the lawyer for Ammon Bundy, who, claiming that U.S. ownership of public lands was unconstitutional, spearheaded the armed takeover of the Malheur National Wildlife Refuge in Oregon in early 2016.<sup>6</sup>

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1. See, e.g., Robert E. Hardwicke, Carl Illig, & C. Perry Patterson, *The Constitution and the Continental Shelf*, 26 TEX. L. REV. 398 (1948); C. Perry Patterson, *The Relation of the Federal Government to the Territories and the States in Landholding*, 28 TEX. L. REV. 43 (1949).

2. See *infra* text accompanying notes 364–366, 431–442.

3. See, e.g., Albert W. Brodie, *A Question of Enumerated Powers: Constitutional Issues Surrounding Federal Ownership of Public Lands*, 12 PAC. L.J. 693 (1981); Spencer Driscoll, *Utah’s Enabling Act and Congress’s Enclave Clause Authority: Federalism Implications of a Renewed State Sovereignty Movement*, 2012 B.Y.U. L. REV. 999 (2012); Donald J. Kochan, *Public Lands and the Federal Government’s Compact—Based “Duty to Dispose”: A Case Study of Utah’s H.B. 148—The Transfer of Public Lands Act*, 2013 B.Y.U. L. REV. 1133 (2013); Carolyn M. Landever, *Whose Home on the Range? Equal Footing, the New Federalism and State Jurisdiction on Public Lands*, 47 FLA. L. REV. 557 (1995); Robert G. Natelson, *Federal Land Retention and the Constitution’s Property Clause: The Original Understanding*, 76 U. COLO. L. REV. 327 (2005); see also Louis Touton, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 COLUM. L. REV. 817 (1980). David Engdahl published a detailed paper arguing that states had more constitutional authority over public lands within their borders than they realized or the courts had acknowledged, but he did not dispute the constitutionality of U.S. ownership of public lands inside states. David E. Engdahl, *Federalism and Energy: State and Federal Power over Federal Property*, 18 ARIZ. L. REV. 283, 366 (1976) (“[I]t is entirely in the discretion of Congress whether the United States will retain its property, or dispose of it by lease, sell it, or give it away.”).

4. JOHN W. HOWARD ET AL., LEGAL ANALYSIS OF THE LEGAL CONSULTING SERVICES TEAM PREPARED FOR THE UTAH COMMISSION FOR THE STEWARDSHIP OF PUBLIC LANDS (Dec. 9, 2015) <http://le.utah.gov/interim/2015/pdf/00005590.pdf>. The current authorization for the Commission is available at UTAH CODE 63C-4b-103 (2016).

5. HOWARD ET AL., *supra* note 4, at 1.

6. Defendant’s Memorandum of Points and Authorities in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction at 4, 8, 13, *United States v. Ammon Bundy*, No. 3:16-CR-00051 (D. Or. May 9, 2016).

The Utah Paper is the most recent comprehensive collection of arguments for why the U.S. Supreme Court should craft and enforce constitutional limits on U.S. ownership of public lands within states. It was prepared after the Utah Governor signed the “Transfer of Public Lands Act” into law in 2012, which set a December 31, 2014 deadline for the United States to turn over its public lands to the State.<sup>7</sup> Not long after that, the Utah Legislature appropriated several hundred thousand dollars to fund preparation of the Utah Paper.<sup>8</sup> This paper recommended that the Legislature appropriate up to fourteen million dollars to litigate the matter.<sup>9</sup> As Utah seems to be serious about litigating the matter, the Utah Paper merits some examination.

Because arguments for constitutional limits on U.S. landholdings draw heavily on history, this article digs rather deeply into the history of the public lands in Congress and the courts. In particular, it seeks to shed new light on a puzzling Supreme Court decision, *Pollard v. Hagan*, which is a mainstay of the argument.<sup>10</sup> It also briefly addresses arguments based on the Enclave Clause of the U.S. Constitution.<sup>11</sup> This article draws on, but is somewhat different from, other articles that have defended the constitutionality of U.S. landownership.<sup>12</sup>

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7. See H.B. 48, 2012 Gen. Sess. (Utah 2012); see also *Transfer of Public Lands Act and Study*, UTAH’S PUB. LAND POL’Y COORDINATING OFF., <http://publiclands.utah.gov/current-projects/transfer-of-public-lands-act> (last visited Jan. 20, 2018).

8. Brian Maffly, *Utah Legislature Is Investigating Questioned Billings from Public-Land-Transfer Lawyers, Consultants*, SALT LAKE TRIB., (July 8, 2016, 8:45 PM), <http://archive.sltrib.com/article.php?id=4095491&itype=CMSID>.

9. HOWARD ET AL., *supra* note 4, at 145; see also Brian Maffly, *Republicans OK \$14M Land-Transfer Lawsuit, Say Utah Must Regain Sovereignty*, SALT LAKE TRIB., (Dec. 9, 2015, 10:42 PM), <http://archive.sltrib.com/article.php?id=3287281&itype=CMSID>.

10. *Pollard v. Hagan*, 44 U.S. 212 (1845). See text accompanying notes 214–276 *infra*.

11. U.S. CONST. art. I, § 8, cl. 17. See, e.g., Driscoll, *supra* note 3; Natelson *supra* note 3.

12. See, e.g., Peter A. Appel, *The Power of Congress “Without Limitation”: The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1 (2001); Robert Barrett, *History on an Equal Footing: Ownership of the Western Federal Lands*, 68 U. COLO. L. REV. 761 (1997); Michael C. Blumm & Olivier Jamin, *The Property Clause and Its Discontents: Lessons from the Malheur Occupation*, 43 ECOLOGY L.Q. 781 (2016); Richard D. Clayton, *The Sagebrush Rebellion: Who Should Control the Public Lands?*, 1980 UTAH L. REV. 505 (1980); George Cameron Coggins, Parthenia Blessing Evans, & Margaret Lindberg-Johnson, *The Law of Public Rangeland Management I: The Extent and Distribution of Federal Power*, 12 ENVTL. L. 535, 567–78 (1982); Paul Conable, *Equal Footing, County Supremacy, and the Western Public Lands*, 26 ENVTL. L. 1263 (1996); Eugene R. Gaetke, *Congressional Discretion under the Property Clause*, 33 HASTINGS L.J. 381 (1981); Eugene Gaetke, *Refuting the “Classic” Property Clause Theory*, 63 N. C. L. REV. 617 (1985); Dale Goble, *The Myth of the Classic Property Clause Doctrine*, 63 DENV. U. L. REV. 495 (1986); Robert B. Keiter & John C. Ruple, *A Legal Analysis of the Transfer of Public Lands Movement*, WALLACE STEGNER CTR. FOR LAND, RES. & THE ENV. (2014); Nick Lawton, *Utah’s Transfer of Public Lands Act: Demanding a Gift of Federal Lands*, 16 VT. J. ENVTL. L. 1 (2014); A. Constandina Titus, *The Nevada “Sagebrush Rebellion” Act: A Question of Constitutionality*, 23 ARIZ. L. REV. 263 (1981). I previously addressed some of these issues in John D. Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics, and Federal Lands*, 14 U.C. DAVIS L. REV. 317 (1980). I have also

As used in this article and for the most part in the Utah Paper, “public lands” refers to any lands to which the United States holds title. This clarification is necessary because there is no universally accepted meaning of the term “public lands” in U.S. law. For example, in the 1964 law establishing the Public Land Law Review Commission (“PLLRC”), Congress defined it to include lands managed by the Bureau of Land Management (“BLM”), the U.S. Forest Service, the National Park Service and the U.S. Fish and Wildlife Service.<sup>13</sup> Five years later, in the Wild, Free-Roaming Horses and Burros Act, Congress defined it to include only lands administered by the BLM and U.S. Forest Service.<sup>14</sup> Five years after that, in the Federal Land Policy and Management Act (“FLPMA”), which implemented many of the recommendations of the PLLRC, Congress defined it to refer only to those federally-owned lands administered by the BLM.<sup>15</sup>

This article proceeds as follows. Part I summarizes how the nation’s founders dealt with the public lands, starting with the cessions to the nation of claims to western lands by seven of the original states through the drafting and ratification of the Constitution, including its Property and Enclave Clauses and its Clause governing the admission of new states.

Part II covers public land policy up to the Civil War. It examines congressional debates in the late 1820s, when an argument very similar to the argument of the Utah Paper was put forth but gained no traction in the Congress. This Part also covers the principal Supreme Court decisions of this era addressing the scope of national power over public lands, focusing mostly on *Pollard v. Hagan* and *Dred Scott v. Sandford*.

Part III summarizes how the Congress and the Supreme Court have addressed national power over public lands since the Civil War, including how the Court has narrowed *Pollard v. Hagan* and ignored its broad dicta.

Part IV examines the Utah Paper’s “Compact Theory.” It explores the circumstances surrounding Utah’s admission to the Union and whether those circumstances give Utah a colorable claim to own public lands.

Part V focuses more broadly on the “equal footing” and “equal sovereignty” arguments in the Utah Paper.

Part VI addresses a number of remaining problems with the position advocated in the Utah Paper. These include its

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benefited from the generosity of Gregory Ablavsky, who allowed me to review a draft of his article. See Gregory Ablavsky, *The Rise of Federal Title*, 106 CALIF. L. REV. (forthcoming 2018).

13. Pub. L. No. 88-606, § 10, 78 Stat. 982, 985 (1964).

14. 16 U.S.C. § 1332(e) (1971).

15. 43 U.S.C. § 1702(e) (1976).

mischaracterization of current federal public land policy regarding divestiture, the vagueness of its claims to public lands and the judicial remedy it seeks, the fact that Utah has a political remedy for its alleged grievances, and the lack of success of past assertions of claims that western states have claims to public lands.

## I. HOW THE NATION'S FOUNDERS DEALT WITH THE PUBLIC LANDS

### A. THE ORIGINS OF THE NATION'S PUBLIC LANDS<sup>16</sup>

Understanding the constitutional basis of the nation's public lands requires going back to the founding of the nation. Even before the Declaration of Independence on July 4, 1776, representatives of the thirteen original states had started work crafting Articles of Confederation that they intended to be the governing charter of the new national government. The Articles would not, by their own terms, take effect until they were ratified by all thirteen states.

A dispute prevented the Articles from being formally ratified for several years. Because their colonial charters had very imprecise boundaries, seven of the original states had claims to western lands beyond the Appalachian Mountains. Six did not.<sup>17</sup> The latter, led by Maryland, balked at ratifying the Articles until the claims to western lands were relinquished. The stalemate left the nation without a formally constituted government at the very time it was fighting to gain its independence.

Eventually, the nation's founders came to accept Maryland's argument that those western lands should "be considered as common property" of the nation, because they were being "wrested from the common enemy by blood and treasure of the thirteen states."<sup>18</sup> The seven states with claims to western lands agreed to cede them to the national government, and upon that assurance, the Articles of Confederation were ratified. With the cession of that "common property" west of the Appalachian crest, the national government took

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16. This story is told in numerous places, including JOSEPH J. ELLIS, *THE QUARTET: ORCHESTRATING THE SECOND AMERICAN REVOLUTION*, 1783–1789 5–6, 12–16, 32–34 (2015); PAUL W. GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* 49–57 (1968); Appel, *supra* note 12.

17. A useful map showing the claims to the western lands can be found at *State Cessions*, WIKIPEDIA, [https://en.wikipedia.org/wiki/State\\_cessions](https://en.wikipedia.org/wiki/State_cessions) (last visited Jan. 20, 2018).

18. GATES, *supra* note 16, at 50 (quoting Declaration of Maryland Assembly, Jan. 6, 1779); see also MERRILL JENSEN, *THE ARTICLES OF CONFEDERATION* 202–04 (1940); 14 J. OF THE CONTINENTAL CONG. 621 (May 1779); 17 J. OF THE CONTINENTAL CONG. 806–08 (Sept. 1780). In considering the relationship of the national government to the states in this founding era, it is important to note that, in Professor Richard Morris's words, the "federal Union not only preceded the States in time, but initiated their formation," because states were a "creation of the Continental Congress, which . . . brought them into being." Richard B. Morris, *The Forging of the Union Reconsidered: A Historical Refutation of State Sovereignty over Seabeds*, 74 Colum. L. Rev. 1056, 1057, 1089 (1974); see also Garry Wills, *A Necessary Evil* (1999) 60–61.

ownership of some 230 million acres of land, an area nearly equal to that of the thirteen original states. These were the beginning of the nation's public lands.

This accomplishment can be summarized in four documents. The first is the October 10, 1780 Resolution of Second Continental Congress that urged the states with western land claims to cede them to the United States. It called for these lands to be “disposed of for the common benefit of all the United States,” and further specified that the land grant and settlement process shall proceed “at such times and under such regulations as shall hereafter be agreed on by the United States in Congress assembled.”<sup>19</sup>

The second, Virginia's 1784 cession to the United States of the western lands it claimed, called for these ceded lands to be “considered as a common fund for the use and benefit of the United States” and that the lands “shall be faithfully and bona fide disposed of for that purpose, and for no other use or purpose whatsoever.”<sup>20</sup>

The third is the famous Northwest Ordinance adopted by the Congress of the Confederation in 1787. Among other things, it established a framework for admitting new states out of the Northwest Territory, and specified that those new States “shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the bona fide purchasers.”<sup>21</sup>

The last and most important is the United States Constitution, which replaced the Articles of Confederation in 1788. It gives Congress nearly unfettered discretion regarding whether, when, and on what terms new states may be admitted to the Union.<sup>22</sup> Further, its so-called Property Clause gives Congress “power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”<sup>23</sup>

The Property Clause's main purpose was to provide an explicit foundation for the national government's authority over public lands.<sup>24</sup> Before the Constitution was adopted, the Congress of the Confederation had established the nation's first public land policies in three ordinances enacted in 1784, 1785 and 1787 (the latter known as the Northwest Ordinance). Although these Ordinances reflected the consensus of opinion at the time, they had been adopted, as James Madison wrote in the Federalist Papers, “without the least color of

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19. See 18 J. OF THE CONTINENTAL CONG. 915 (Oct. 10, 1780); see also GATES, *supra* note 16, at 51.

20. GATES, *supra* note 16, at 52. For a detailed discussion of the terms of the seven states' cessions of their western land claims, see Goble, *supra* note 12, at 519–20, n.106–07.

21. 32 J. OF THE CONTINENTAL CONG. 334 (1778).

22. U.S. CONST. art. IV, § 3, cl. 1.

23. *Id.* at cl. 2.

24. See, e.g., THE FEDERALIST NO.7 (Alexander Hamilton), Nos. 3, 43 (James Madison).



constitutional authority,”<sup>25</sup> because the Articles of Confederation had not explicitly given the Congress of the Confederation that power.

The Property Clause did not provoke significant discussion at the Constitutional Convention. Armed with its authority, the new U.S. Congress re-enacted the Northwest Ordinance in its entirety at its first session.<sup>26</sup>

#### B. “DISPOSE” DOES NOT MEAN EXCLUSIVELY “DIVEST”

Some who challenge U.S. ownership of public lands assume that “dispose of” and similar words that appear in these founding documents meant *only* divestiture or transfer of ownership or title. This assumption is made explicit in a flat assertion in the Utah Paper: “The term ‘disposed of’ meant ‘sold,’ ‘granted’ or ‘transferred’ in the 18<sup>th</sup> Century. *Webster’s Dictionary, 1828.*”<sup>27</sup>

In fact, Webster’s 1828 Dictionary sets out eight possible definitions of “to dispose of.” Of these, only the three that are quoted in the Utah Paper connote divestiture. The other five, omitted from the Utah Paper, are “to direct the course of a thing,” “to place in any condition,” “to direct what to do or what course to pursue,” “to use or employ,” and “to put away.”<sup>28</sup>

Of course, the nation’s founders could not rely on Webster’s, which was not published until four decades later. Samuel Johnson’s famous Dictionary of the English Language, which was available to the founders (and upon which Webster drew), similarly lists several broad meanings of “dispose,” including “to regulate,” “to place in any condition,” and “to apply to any purpose.”<sup>29</sup>

There is no credible evidence—and the authors of the Utah Paper offer none, other than their cherry-picking of Webster’s 1828 Dictionary—that our nation’s founders intended by the use of “dispose of” to *require* the national government to *divest itself of title* to all of the lands it came to own, to newly-admitted states, or to anyone else.

Over the last century or so, Congress has from time to time used words like “dispose of” or “disposal” in various public land statutes. Even if Congress’s usage during this time had been consistent, it would not have shed much, if any, light on what the nation’s founders meant

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25. THE FEDERALIST NO.38 (James Madison).

26. Northwest Ordinance, 1 Stat. 50 (1789).

27. HOWARD ET AL., *supra* note 4, at 104 n.228.

28. *Dispose*, WEBSTERSDICTIONARY1828.COM, <http://webstersdictionary1828.com/Dictionary/dispose> (last visited Jan. 20, 2018).

29. *To Dispose of*, JOHNSONSDICTIONARYONLINE.COM, [http://johnsonsdictionaryonline.com/?page\\_id=7070&t=617](http://johnsonsdictionaryonline.com/?page_id=7070&t=617) (last visited Jan. 20, 2018). Chambers’ Etymological Dictionary of the English Language traces the origin of “dispose” as borrowed from the Old French from Latin *disponere*, which meant to “put in order,” or “arrange.” CHAMBERS’ ETYMOLOGICAL DICTIONARY OF THE ENGLISH LANGUAGE 133 (Andrew Findlater & Rev. Thomas Davidson eds., 1904).

by those words in the late 18<sup>th</sup> century.<sup>30</sup> But Congress has used these words to mean different things. In the Taylor Grazing Act of 1934 (“TGA”), for example, Congress legislated a new management system for what is now BLM-managed public land “pending its final disposal,” but without specifying whether divestiture of title was the only possible “final disposal” of these lands.<sup>31</sup> In the first section of FLPMA, enacted in 1976, Congress used the words “to dispose of” to refer to divestiture of title, pronouncing U.S. policy as favoring retention of public lands “in Federal ownership, unless” the U.S. determined that “disposal of a particular parcel will serve the national interest.”<sup>32</sup> But in the same era, Congress continued to use the term “dispose of” as applied to public lands to mean something other than transfer of title out of U.S. ownership. For example, statutes enacted in 1956 and 1962 used “dispose of” to refer to shifting responsibility for managing public lands from one federal agency to another federal agency or to a state or local governmental agency, by “lease, transfer, exchange, or conveyance.”<sup>33</sup> In other contexts, Congress continued to use the words “dispose of” to mean something other than divestiture; for example, calling for “disposal of” nuclear waste does not mean transferring title to it, but rather safeguarding or putting it in a contained condition.<sup>34</sup>

#### C. THE CONSTITUTION, “EQUAL FOOTING,” PUBLIC LAND OWNERSHIP, AND THE ROLE OF THE COURTS

The Utah Paper and others, including the American Legislative Exchange Council (“ALEC”), which advocates politically conservative positions to state legislatures, make two interrelated arguments about the Constitution, the public lands, and the admission of new states. The first is that the Constitution’s framers required that new states be admitted on an “equal footing” with existing states. The second is that this idea of “equal footing” extended to holdings of public lands in these states.

ALEC’s model “Resolution on Transfer of Public Lands,” for example, takes the position that framers of the Constitution approved of national ownership of public lands *only* for the purpose of launching

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30. On the use of dictionaries in constitutional interpretation, see *Gompers v. United States*, 233 U.S. 604, 610 (1914) (Holmes, J.); *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 468 n.4 (1988) (Brennan, J., dissenting); Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court’s Use of Dictionaries*, 47 *BUFF. L. REV.* 227 (1999).

31. 43 U.S.C. § 315 (1934).

32. 43 U.S.C. § 1701(a)(1) (1976).

33. See Pub. L. No. 87–590, § 4, 76 Stat. 389, 391 (1962); see also Pub. L. No. 84–485, § 8, 70 Stat. 105, 110 (1956).

34. 42 U.S.C. § 10101(9) (1983) (defining nuclear waste “disposal” to mean its “emplacement in a repository” with “no foreseeable intent of recovery.”).

“new states with the same rights of sovereignty, freedom, and independence as the original states.”<sup>35</sup> That being the case, the ALEC resolution continues, the Constitution did not intend to “authorize the federal government to indefinitely exercise control over western public lands beyond the duty to manage the lands pending the[ir] disposal . . . to create new states.”<sup>36</sup>

It is useful to keep separate these interrelated arguments—that the Constitution requires new states to be admitted on an “equal footing” with existing states, and that this principle extends to public landholdings. Even if a principle of “equal footing” among states is deemed to have a constitutional dimension, it is far from clear that the idea would or should extend to U.S. ownership of public lands inside states.<sup>37</sup>

The Utah Paper also makes a significant further assumption; namely, that the constitutional framers contemplated that the U.S. Supreme Court would play a significant role in policing Congress’s power over public lands in connection with the admission of new states.

The facts support none of these arguments and assumptions. It is true that, years before the Constitution was crafted, the founding generation had spoken positively about new states having some political equality with existing states. Thus, the Second Continental Congress urged in its 1780 Resolution that the seven states with western land claims cede them to the nation so that these lands could be “settled and formed into” new states with “the same rights of sovereignty, freedom and independence, as the other states.”<sup>38</sup>

The Northwest Ordinance, enacted in 1787 by the Congress of the Confederation just as the Constitution was being crafted in Philadelphia, had boiled the words “same rights of sovereignty, freedom and independence” down to the simple phrase of “equal footing.”<sup>39</sup> Specifically, it provided for the “establishment of States, and permanent government therein, and for their admission to *a share in the federal councils on an equal footing with the original States*, at as early periods as may be consistent with the general interest.”<sup>40</sup> The reference to “share in federal councils” signals the understanding of the Ordinance’s framers that “equal footing” referred to equal political status, and did not apply to public lands or U.S. land policy.

In its very next section, this implication is made even clearer. It proposed a compact between the original States and “the people and

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35. See *Resolution on Transfer of Public Lands*, AM. LEGIS. EXCH. COUNCIL (Sept. 29, 2013), <https://www.alec.org/model-policy/resolution-transfer-public-lands/>.

36. *Id.*

37. See *infra* text accompanying notes 47–62, 423–426.

38. See *supra* text accompanying note 19.

39. Northwest Ordinance, 1st Cong., Sess. I, ch. 8, § 13 (July 13, 1787).

40. *Id.*

States” that shall be formed in said territory.<sup>41</sup> That proposed compact had six articles. Article 4 provided, among other things, that the “legislatures of those . . . new States, shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the bona fide purchasers.”<sup>42</sup> Article 5 provided more detail on the statehood process, calling on Congress to admit western territories on specified conditions “on an equal footing with the original States in all respects whatever,” so long as the “constitution and government” of such new states “shall be . . . in conformity to the principles contained in these articles.”<sup>43</sup>

After carefully examining the matter, the leading historian of the Northwest Ordinance concluded that its understanding of “equality” in its reference to “equal footing” was “narrowly defined.”<sup>44</sup> It referred to political status, and not to other subjects like economic or resource equality, or equality as respects U.S. landholdings.<sup>45</sup>

The predecessor to the U.S. Constitution, the Articles of Confederation, did not speak of admitting new states on an equal footing with existing states. Its Article XI gave Canada automatic admission should it choose to apply, which would entitle it “to all the advantages of this Union,” but went on simply to provide that “no other colony shall be admitted into the same, unless such admission be agreed to by nine States.”<sup>46</sup>

The U.S. Constitution took the same approach as the Articles. It includes no general language calling for equality among the states. Article IV, section 4 simply provides that “[n]ew States may be admitted by the Congress into this Union,”<sup>47</sup> and goes on to prohibit Congress from creating a new state by carving it from territory within the jurisdiction of an existing state, or by combining states or parts of states, “without the Consent of the Legislatures of the States concerned.”<sup>48</sup>

Other parts of the Constitution do provide specific guarantees of equality between existing and new states. For example, each State is to have two Senators,<sup>49</sup> a mandate underscored by a separate provision

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41. *Id.* at § 14.

42. *Id.* at § 14, art. 4.

43. *Id.* at art. 5.

44. PETER ONUF, STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE 68 (1987).

45. See James R. Rasband, *The Disregarded Common Parentage of the Equal Footing and Public Trust Doctrines*, 32 LAND & WATER L. REV. 1, 32–34 (1997); John Hanna, *Equal Footing in the Admission of States*, 3 BAYLOR L. REV. 519, 523 (1951).

46. ARTICLES OF CONFEDERATION of 1781, art. XI.

47. U.S. CONST. art. IV, § 3, cl. 1.

48. *Id.*

49. *Id.* art. I, § 3.

that “no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”<sup>50</sup> The Constitution also guarantees each State representation in the House of Representatives<sup>51</sup> and the Electoral College.<sup>52</sup> It gives each State one vote for President in the event no candidate receives a majority of votes of the Electoral College.<sup>53</sup> It provides that federal laws on bankruptcy and naturalization, and “all Duties, Imposts and Excises,” shall be uniform “throughout the United States.”<sup>54</sup> And it directs the United States to “guarantee to every State in this Union a Republican Form of Government.”<sup>55</sup>

But the Constitution makes no general reference to states being on an “equal footing” with each other, with respect to public land ownership or, for that matter, anything else.

The Utah Paper ignores much of this history, except for some cherry-picking. As it notes twice,<sup>56</sup> the framers of the U.S. Constitution rejected a proposal by delegate Elbridge Gerry of Massachusetts to give the original thirteen states greater representation in Congress than new states. The Utah Paper argues that this shows an intent on the part of the framers to constitutionalize a broad principle of “equal footing.”

But the Utah Paper neglects to note that the framers *deleted*, from the end of the draft clause authorizing Congress to admit new states to the Union, the words “on the same terms with the original States.”<sup>57</sup> As noted earlier, language similar to this had been included in the 1780 resolution of the Second Continental Congress and in the Virginia cession of its western land claims in 1784.<sup>58</sup>

Even this limited conception of equal footing failed to make it into the U.S. Constitution. Instead, the framers of the U.S. Constitution decided to delete the language that new states be admitted “on the same terms with the original states.”<sup>59</sup> This was done on a motion by delegate Gouverneur Morris, one of the principal architects of the Constitution.<sup>60</sup> In approving Morris’s motion, the framers brushed aside the opposition of another of the Constitution’s principal architects, James Madison, who argued that “Western States neither would nor ought to submit to a Union which degraded them from an equal rank with the other States.”<sup>61</sup>

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50. *Id.* art. V.

51. *Id.* art. I, § 2, cl.1.

52. *Id.* art. II, § 1, cl.2.

53. *Id.* amend. XII.

54. *Id.* art. I, § 8, cl. 1, 4.

55. *Id.* art. IV, § 4.

56. HOWARD ET AL., *supra* note 4, at 12, 40.

57. See 3 RECORDS OF THE FEDERAL CONSTITUTION OF 1787 325, 465 (Max Farrand ed., 1911).

58. See *supra* text accompanying notes 19–20; GATES, *supra* note 16, at 73–74.

59. MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 109 (1913).

60. *Id.*

61. *Id.*; see also DAVID P. CURRIE, THE CONSTITUTION IN THE CONGRESS: THE JEFFERSONIANS,

The constitutional history thus plainly reflects the framers' decision to leave the terms for admitting new states, including any guidance regarding public lands, entirely up to future Congresses, except for the provisions cited earlier providing specific guarantees of equality or uniform treatment to new states.<sup>62</sup> In their view, the national political process—not some constitutional principle—would govern the disposition of public lands in relation to new states as they are admitted.

Furthermore, although the Utah Paper recommends that Utah seek to enlist the Supreme Court in its campaign to gain ownership of public lands, it offers no evidence—and none exists—that the framers of the Constitution contemplated a role for the courts in determining how Congress would “dispose” of the public lands.

America's founding generation could well have anticipated that Congress would, over time, divest the United States of ownership of many of those lands it came to own from the seven states' cession of their western land claims, and to admit new states to the Union as settlement expanded onto those lands. Having just fought a war to gain independence, the founders wanted to keep the new nation unified as the western lands were settled and the nation grew. Controlling the terms of settlement through public land policy and the admission of new states was key to maintaining that unity, and that required, in historian Peter Onuf's words, a “strong national government.”<sup>63</sup>

While divestiture of public lands was an important means for advancing settlement, and the admission of new states an important means to keep the nation unified, there is no credible evidence that the founders intended to put the national government under any legal obligation to divest itself of ownership of all the public lands, whether to new states or anyone else. Indeed, such an objective would have made no sense to the politically savvy founders. There is no question that they, and the states they hailed from, regarded these lands as being bought with their “blood and treasure,” and they expected these lands to be used for the “common benefit” of the entire nation.<sup>64</sup> Thus, they were very unlikely to support relinquishing all control over them to new states.

The founders' shared understanding left ample room for Congress to decide to “dispose of” some public land by keeping it in national ownership in order to serve some national purposes. And that is exactly what happened. Over the next two centuries, the United States decided

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1801–1829 243–45, 294–95 (2001); GATES, *supra* note 16, at 73–74; Goble, *supra* note 12, at 526–28.

62. See *supra* notes 47–55 and accompanying text.

63. ONUF, *supra* note 44, at xiii.

64. See *supra* text accompanying note 18–19.

to retain ownership of some lands for such uses as military bases, Indian reservations, mineral reservations, national parks, forest reserves, wildlife refuges, national monuments, historic sites, nuclear waste repositories, and so forth. This outcome was fully consistent with the founders' general approach. They designed a system intended, as historian Joseph Ellis put it, "less to resolve arguments than to make argument itself the solution;" not to offer specific guidance on many issues but "instead to provide a political arena in which arguments about those contested issues could continue in a deliberative fashion," and a "political platform wide enough to allow for considerable latitude within which future generations could make their own decisions."<sup>65</sup>

Congress admitted thirty-seven new states after the original thirteen, in individual pieces of legislation. In nearly all of these, Congress provided that the new state was admitted on an "equal footing" with existing states. "Equal footing" language was included in the Utah Enabling Act Congress adopted in 1894, which established the terms upon which Utah could seek admission to the Union,<sup>66</sup> and in President Grover Cleveland's proclamation admitting Utah to the Union two years later.<sup>67</sup> But in nearly every case, including Utah's, admission legislation also included language like that in section 4 of the Northwest Ordinance, prohibiting new states from ever interfering with the decisions of the United States regarding public lands.<sup>68</sup>

#### D. AN ASIDE: THE ENCLAVE CLAUSE OF THE U.S. CONSTITUTION

The U.S. Constitution contains another measure, the so-called "Enclave Clause," that bears on ownership of property by the national government. Its first half is fairly straightforward, giving the U.S. Congress total control over the seat of the national government and the District of Columbia. Its second half, however, is one of the more puzzling provisions in the entire Constitution. Adopted after only a few minutes of debate,<sup>69</sup> its obscure and awkward language has never had any significant impact on public land policymaking. Presumably for this reason, the Utah Paper does not put much reliance on the Enclave Clause, citing it only once in 150 pages.<sup>70</sup>

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65. ELLIS, *supra* note 16, at 172, 219.

66. 28 Stat. 107 (1894).

67. Admission of Utah as a State, 29 Stat. 876 (1896).

68. *See supra* text accompanying notes 42–43. Admission legislation for a few early-admitted states like Ohio provided the same thing less directly, by requiring that the new state's constitution "not be repugnant to" the Northwest Ordinance, which contained this disclaimer. How the Supreme Court has considered the "equal footing" idea or its cousin, "equal sovereignty," in the modern era is discussed in the text accompanying notes 413–491.

69. *See* Engdahl, *supra* note 3, at 288, n.10.

70. HOWARD ET AL., *supra* note 4, at 99.

The Enclave Clause is relied on, sometimes rather heavily, by others who maintain that U.S. permanent ownership of public lands is unconstitutional.<sup>71</sup> These include allies of those who engineered the armed takeover of the Malheur National Wildlife Refuge in Oregon in early 2016.<sup>72</sup>

The Enclave Clause reads, in pertinent part:

“Congress shall have power to exercise exclusive Legislation in all Cases whatsoever over . . . the Seat of the Government of the United States [such as, the District of Columbia], and *to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.*”<sup>73</sup>

The italicized text raises many questions; to wit:

—Does the Clause have anything to do with ownership of lands, or does it deal only with Congress’s power to exercise “exclusive legislation,” presumably meaning the power to make laws respecting certain “Places”?

—If the reference to “Places” includes lands, does it apply only to lands containing military or defense installations? Does it apply to lands used for purposes other than the “erection of” structures?

—If it does apply to lands, does it prevent the U.S. from acquiring land inside a state *without the state’s consent*, if the United States does not exercise “exclusive” legislative authority over such lands?

—Does it apply only to such “Places” found within the original thirteen states, which had few public lands within their borders? In those states, the United States had a greater need to purchase lands to carry out national objectives like defense.

—Does it apply to lands the United States *already owns* inside states admitted by Congress to the Union after the original thirteen? The United States owned substantial amounts of land within the borders of nearly all of those states at the time of their admission.<sup>74</sup>

—Does it have any application to the purchase by the United States of Indian lands found within a state, especially if such purchases were done in order to make those lands fully available for national purposes unencumbered by Indian aboriginal title?<sup>75</sup>

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71. See Patterson, *supra* note 1, at 58–62; Natelson, *supra* note 3, at 346–58.

72. See, e.g., Michael Lofti, *Who Actually “Owns” America’s Land? A Deeper Look at the Bundy Ranch Crisis*, THE DAILY SHEEPLE (Apr. 13, 2014), [http://www.thedailysheep.com/who-actually-owns-americas-land-a-deeper-look-at-the-bundy-ranch-crisis\\_042014](http://www.thedailysheep.com/who-actually-owns-americas-land-a-deeper-look-at-the-bundy-ranch-crisis_042014).

73. U.S. CONST., art. I, § 8, cl. 17 (emphasis added). The words “by the consent of the Legislature of the State” were added on the floor of the Constitutional Convention. See RECORDS OF THE FEDERAL CONSTITUTION, *supra* note 57, at 510; Engdahl, *supra* note 3, at 288, n.10.

74. The principal exception was Texas, which was an independent sovereign when it was annexed to the United States in 1845. See *infra* text accompanying notes 108–109, 431–442.

75. See *Johnson v. M’Intosh*, 21 U.S. (8 Wheat) 543, 572–93 (1823) (recounting the history of recognition of Indian title to lands from 1492 onward).



—How does the Enclave Clause relate, if at all, to the Property Clause? Is there any significance to the fact that the Enclave Clause is in Article I of the Constitution, where most, but not all, of congressional powers are listed, while the Property Clause is placed in Article IV, alongside Congress's power to admit new states and various other matters?<sup>76</sup>

#### E. THE ENCLAVE CLAUSE IN THE U.S. SUPREME COURT

No generally accepted answers to those many questions have ever been put forward.<sup>77</sup> Most important, the courts, including the U.S. Supreme Court, have provided almost no guidance on how they should be answered. In fact, other than furnishing a basis for the establishment of the seat of the national government in the District of Columbia, the Enclave Clause has played almost no role in the nation's affairs, including setting policy for the nation's public lands.

In his magisterial treatise on the U.S. Constitution, published in 1833, U.S. Supreme Court Justice Joseph Story noted that the Clause dealt with exclusive jurisdiction, not ownership. Story maintained that other parts of the Constitution gave Congress authority to acquire and use lands for national purposes. As he wrote, "surely it will not be pretended, that congress could not erect a fort, or magazine, in a place within a state, unless the state should cede the territory."<sup>78</sup> Even if a state acted to prohibit landowners from selling their land to the United States, Congress would, according to Story, "possess a constitutional right to demand, and appropriate land within the state" for "any public purposes indispensable for the Union, either military or civil," if it paid "just compensation."<sup>79</sup>

From early on, the national government and state governments generally accepted that the national government had plenary authority over negotiations with Indian tribes to resolve their rights to land.<sup>80</sup> The Enclave Clause was never regarded as bearing on that question.

For almost a century, the Supreme Court paid little attention to the Enclave Clause. Then, in an 1885 decision, *Fort Leavenworth Railroad v. Lowe*,<sup>81</sup> the Court, in a unanimous decision authored by Justice Stephen J. Field, exhumed it from its obscure grave and, after finding it had almost nothing important or useful to say about public land

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76. Engdahl, *supra* note 3, at 291 n.24 (offering an explanation for this placement); Goble, *supra* note 12, at 499 n.22 (disputing the characterization in Brodie, *supra* note 3, at 720–21, that the placement of these clauses has significance).

77. For a general critique of arguments that the Enclave Clause undermines Congress's power over public lands, see Goble, *supra* note 12, at 498–502.

78. JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1141 (1833).

79. *Id.*

80. *See, e.g., Johnson*, 21 U.S. (8 Wheat) at 543; *see also Ablavsky*, *supra* note 12.

81. *Fort Leavenworth R.R. v. Lowe*, 114 U.S. 525 (1885).

policymaking, effectively reburied it.<sup>82</sup> Field acknowledged that the Enclave Clause could be read to prevent the U.S. from acquiring lands within a state without that state's consent.<sup>83</sup> "Since the adoption of the constitution," Field dryly observed, "this view has not generally prevailed."<sup>84</sup> He went on to note that if "any doubt has ever existed" as to the national government's power in this regard, such doubt "has not had sufficient strength to create any effective dissent from the general opinion."<sup>85</sup>

In fact, from very early on, the United States acquired land and other property inside states for various public purposes without obtaining state consent. In 1790, for example, Congress enacted a law authorizing the President to purchase a tract of land at West Point in New York for military purposes.<sup>86</sup> The law made no reference to obtaining state consent.<sup>87</sup> Ten years before *Fort Leavenworth*, the Court had firmly established the U.S. government's authority to acquire property inside states by eminent domain when needed for proper governmental purposes, in a case called *Kohl v. United States*.<sup>88</sup>

In *Fort Leavenworth*, the Court affirmed the view earlier expressed by Justice Story in his treatise, and noted that the power of eminent domain upheld in *Kohl* could not be "dependent upon the caprice of individuals, or the will of state legislatures."<sup>89</sup> Field also noted that the United States had, from time to time, "reserved certain portions" of its "immense domain" from sale or other disposition, in order to use those lands to serve national objectives, and this had never been seen as raising Enclave Clause issues.<sup>90</sup>

There are several hundred instances where states have formally ceded exclusive or near-exclusive jurisdiction over particular tracts of public lands to the United States. Lands covered by such cessions nevertheless constitute but a small fraction of the total acreage of public lands.<sup>91</sup> In fact, no current compendium of such cessions is maintained

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82. The expression is borrowed from Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34 (1962).

83. *Fort Leavenworth*, 114 U.S. at 530–31.

84. *Id.*

85. *Id.*

86. 1 Stat. 129 (1790).

87. Compare William Baude, *Rethinking the Federal Eminent Domain Authority*, 122 YALE L.J. 1738, 1760–62 (2013), with Christian R. Bursset, *The Messy History of the Federal Eminent Domain Power: A Response to William Baude*, 4 CALIF. L. REV. CIRCUIT 187 (2013); see also Ablavsky, *supra* note 12, at § V(C).

88. *Kohl v. United States*, 91 U.S. 367 (1875); see also text accompanying *infra* notes 318–319.

89. *Fort Leavenworth*, 114 U.S. at 531; see also text accompanying notes 78–79 *supra*.

90. *Id.* at 532. For a full discussion of *Fort Leavenworth*, see Appel, *supra* note 12, at 67–71.

91. See, e.g., Engdahl, *supra* note 3, at 284–87 (discussing a multi-year study by the Interdepartmental Committee for the Study of Jurisdiction over Federal Areas Within the States that resulted in a two volume report published in 1956 and 1957).

anywhere,<sup>92</sup> which itself speaks volumes about how little influence the Enclave Clause has had on public land policy and management.<sup>93</sup>

Since *Fort Leavenworth*, the Enclave Clause has maintained its obscurity and irrelevancy to public land policy. It makes an occasional appearance in odd pieces of litigation, but even then usually does not control the outcome. In 1899, for example, the Court took up the question whether the United States, in operating a military hospital on federally-owned land in Ohio, had to abide by state law requiring warning labels on oleomargarine.<sup>94</sup> As it turned out, Ohio had ceded exclusive jurisdiction over this land to the United States in 1868, but Congress had relinquished jurisdiction back to Ohio in 1871.<sup>95</sup> The Court regarded the cession and retrocession as irrelevant, and agreed with the military authorities that they were “not subject to the direction or control of” the state, because the hospital was “under the direct and sole jurisdiction” of the United States.<sup>96</sup>

The Court has continued to construe the Enclave Clause as having limited force. In its 1938 decision in *Collins v. Yosemite Park & Curry Company*, for example, the Court noted with considerable understatement that the Clause “has not been strictly construed,” and that the U.S. has “large bodies of public lands” that are used for “forests, parks, ranges, wild life sanctuaries, flood control, and other purposes which are not covered by [the Enclave Clause].”<sup>97</sup> In its 1976 decision in *Kleppe v. New Mexico*,<sup>98</sup> the Court unanimously rejected New Mexico’s argument that the Enclave Clause limited the exercise of Congress’s authority under the Property Clause. The latter, the Court observed, gives Congress full power to enact legislation respecting public lands, and any such legislation “necessarily overrides conflicting state laws under the Supremacy Clause.”<sup>99</sup>

Given this history, it would be truly stunning were the Supreme Court now to decide, after nearly a quarter of a millennium, to give the Enclave Clause a meaningful role to play in public land policymaking. Apparently the authors of the Utah Paper do not seriously disagree, for the Paper gives it almost no attention.<sup>100</sup>

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92. Engdahl, *supra* note 3 at 284–85 n.5.

93. See PUB. LAND L. REV. COMM’N, ONE THIRD OF THE NATION’S LAND 277–79 (1970).

94. *Ohio v. Thomas*, 173 U.S. 276 (1899).

95. *Id.*

96. *Id.* at 281, 284.

97. *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 528–30 (1938). Justice McReynolds concurred in the result.

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

99. *Id.* at 543; see also *id.* at 538–43.

100. HOWARD ET AL., *supra* note 4, at 99.

## II. PUBLIC LAND POLICY UP TO THE CIVIL WAR

The Utah Paper and others arguing for constitutional restrictions on U.S. public land ownership generally pay little attention to the history of public land policy in the nation's early decades. They mostly focus simply on the Supreme Court's 1845 decision in *Pollard v. Hagan*, discussed at some length below.<sup>101</sup> But the history of congressional policymaking in this era illuminates the constitutional understanding, as explained in what follows.

In the half-century beginning with the Louisiana Purchase in 1803, through the Gadsden Purchase in 1853, the U.S. acquired the remainder of the territory now occupied by the lower forty-eight states.<sup>102</sup> As with the original public lands west of the crest of the Appalachian Mountains to the Mississippi River, these new lands were acquired with the "blood and treasure" of the existing states, and were expected to be used for the "common benefit" of all the United States.

All of these lands became public lands owned and administered by the national government, with two qualifications and one exception. The first qualification had to do with lands that had been granted by the sovereign that owned the lands before the United States. The U.S. uniformly honored such grants if it determined they were validly made and maintained.<sup>103</sup>

The second qualification was that many of these lands were subject to what came to be known as Indian or aboriginal title, the rightful legal claim by Native Americans to lands they had long occupied. Native claims had been recognized by the Law of Nations since not long after Columbus's first voyage in 1492.<sup>104</sup> Under the Constitution<sup>105</sup> and a series of so-called "Non-Intercourse Acts" enacted by early Congresses,<sup>106</sup> only the national government possessed the power to purchase or otherwise extinguish Indian title. This monopoly on dealing with Indians on land issues helped affirm national power over public lands generally.<sup>107</sup>

The exception was Texas, where the U.S. took ownership of almost no lands, because Texas was an independent nation when the U.S. annexed it.<sup>108</sup> The statute authorizing Texas's admission to the Union

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101. See *infra* text accompanying notes 214–287.

102. The story is well-told in RICHARD KLUGER, *SEIZING DESTINY* (2007); see also GATES, *supra* note 16 at 77–86.

103. See GATES, *supra* note 16, at 87–119.

104. See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat) 543, 574 (1823).

105. U.S. CONST., art. I, § 8, cl. 3 (vesting Congress with authority to regulate commerce "with the Indian Tribes.").

106. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 37–41 (2005 ed.).

107. See, e.g., Ablavsky, *supra* note 12, at 53–55 (forthcoming 2018); see also STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER* (2005).

108. See GATES, *supra* note 16, at 299.

specifically and uniquely provided that the new state “shall retain all the vacant and unappropriated lands lying within its limits.”<sup>109</sup>

The national government had an immense task of sorting through many different claims to land in order to establish clear title in the United States. Even the western lands ceded to the national government by the seven landed states were encumbered with many claims arising out of grants purportedly made by those states, and by deals that some of them had struck with Indians, before the cessions were effectuated. The U.S. made strenuous efforts to resolve all these conflicting rights and claims in order to create certain title resting on federal law.<sup>110</sup>

During this era, Congress made divestiture the primary objective of public land policy. It encouraged the settlement of western lands with people loyal to the United States, and thus helped keep the nation bound together as it expanded across the landscape. Sale of public lands also could generate revenue that would help retire the national debt. In fact, however, sales of public land during this era generated comparatively little revenue for the U.S. Treasury, compared to the tariff or customs duties imposed on imported goods.<sup>111</sup>

Congress also gave away many public lands to states, soldiers, speculators, squatters, farmers, highway, canal and railroad builders, and assorted others. These transfers reflected Congress’s determination that they served purposes of great benefit to the nation as a whole. Many of them were made on congressionally-specified conditions or restrictions in order to carry out national policy objectives like promoting public education, national unity, and national defense.<sup>112</sup>

Almost from the beginning, however, Congress decided to retain some public lands in national ownership, in states as well as in the U.S. territories. In terms of the language of the founding documents discussed earlier, Congress decided from time to time that it was for the “common benefit” of the nation to “dispose of” some public lands by “reserving” them in U.S. ownership. The reasons for these so-called “reservations” varied, but most of the early ones were to carry out Indian, military, and economic policy. Early on, for example, tracts of public land containing salt deposits, minerals, hot springs, and forests valuable for naval ships and other uses were excluded from divestiture programs, and retained in U.S. ownership.<sup>113</sup> During this same era, the U.S. government sometimes acquired title to other lands inside states,

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109. 5 Stat. 797, 798 (1845).

110. See generally Ablavsky, *supra* note 12.

111. See GATES, *supra* note 16, at 132–36, 142–43, 165–67, 802–03.

112. See, e.g., *id.* at 249–386.

113. *Id.* at 532–34; JENKS CAMERON, THE DEVELOPMENT OF GOVERNMENTAL FOREST CONTROL IN THE UNITED STATES 28–71 (1928).

both the original thirteen and newer admitted states, for similar purposes.<sup>114</sup>

In the nation's first several decades, Congress proceeded relatively slowly on divestiture measures. It was reluctant simply to throw open the public lands to wholesale occupation and settlement, mostly out of concern that settlers might not be loyal to the nation. As early as 1804 and 1807 Congress made it illegal to occupy public lands without U.S. permission.<sup>115</sup> Divestiture was slowed even more by a financial panic in 1819 and resulting economic upheaval, which was attributed in part to speculative abuses of public land purchases on credit.<sup>116</sup>

The relatively slow pace of divestiture brought forth complaints from prospective settlers and profit-seeking land speculators.<sup>117</sup> In the 1820s, as the national economy slowly recovered from depression, and the national debt was approaching zero, support grew in the newer western states for changing public land policy to divest ownership of more public lands, faster, and at lower prices. In the late 1820s, this coalesced around various proposals that were collectively, and somewhat misleadingly, labeled "graduation." The idea was gradually, over a period of years, to reduce the price of public lands offered for sale that remained unsold.<sup>118</sup>

Meanwhile, older states grew concerned that faster divestiture would deprive them of the opportunity to reap value from the public lands they still regarded as having been acquired with their "blood and treasure." They began to agitate for what came to be known as "distribution," as in distributing some of the value of public lands directly to older states. It took various forms. One idea was to give grants of public land in the western regions directly to older states, which they could sell. Another was to give older states a direct cut of the revenues from public land sales.<sup>119</sup>

Generally speaking, members of Congress from newer states tended to favor "graduation," and members from older states favored "distribution." The contest between these two ideas was, however, made more complicated by several things. There was continuing pressure from squatters who rushed west, occupied public lands, and sought title. Laws authorizing conveyances to squatters, which dated back to colonial times, were known as "preemption" laws.<sup>120</sup> The label was apt,

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114. CAMERON, at 28–71; *see also* text accompanying *supra* note 86.

115. 2 Stat. 283, 289 § 14 (1804, lands in the Louisiana Territory); 2 Stat. 445 (1807, all public lands).

116. *See* DANIEL FELLER, *THE PUBLIC LANDS IN JACKSONIAN POLITICS* 22, 37–38 (1984).

117. *Id.* at 9–21.

118. *Id.* at 68–69.

119. *Id.* at 45–46, 109–12.

120. *See* Ablavsky, *supra* note 12, at text accompanying n. 92–93 (citing AMELIA CLEWLEY FORD, *COLONIAL PRECEDENTS OF OUR NATIONAL LAND SYSTEM AS IT EXISTED IN 1800* 112–42 (1910)).

because allowing squatters to buy the public land they were occupying in effect preempted the operation of public land laws requiring survey before sale by auction or before making land grants to states and others for various purposes. Congress had resisted enacting preemption laws out of concern that it could lead to settlement by those with questionable fidelity to the nation. Over time, as settlement proceeded and new states were admitted, this concern diminished somewhat.<sup>121</sup>

Another complicating factor was an ongoing, largely sectional conflict over tariffs. The South favored lower tariffs to facilitate developing overseas markets for its agricultural products. Manufacturers, concentrated in New England, favored higher tariffs to protect against foreign competition.<sup>122</sup> There were also continuing disagreements over the extent to which the national government should support public works projects like canals and roads inside states—which were dubbed “internal improvements”—and whether public lands should be used to provide such support.<sup>123</sup> Finally, the nation’s original sin—slavery—weighed more and more heavily on all such policy discussions, as the cotton kingdom based on slavery became more entrenched and the abolition movement gradually gained strength.<sup>124</sup>

In his third annual message to Congress in December of 1827, President John Quincy Adams noted that more than half of the public lands, or about 140 million acres, had been surveyed, and almost twenty million acres sold.<sup>125</sup> The system by which this “great national interest has been managed,” he noted, was the product of “long, anxious, and persevering deliberation” that had been “[m]atured and modified by the progress of our population and the lessons of experience,” and proved “eminently successful.”<sup>126</sup> The remaining public lands are still, he wrote, “the common property of the union, the appropriation and disposal of which are sacred trusts in the hands of Congress.”<sup>127</sup> Adams was not keen on proposals to accelerate divestiture of the public lands. Whereas, in historian Daniel Feller’s phrase, the public lands had been a “centripetal force” promoting national unity, Adams feared that more divestiture, particularly by means of land grants to states, would have a “centrifugal” effect, driving the states apart.<sup>128</sup>

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121. FELLER, *supra* note 116, at 24, 126–31.

122. *Id.* at 58–59, 86–94.

123. *Id.* at 58–66. See generally Alison L. LaCroix, *The Interbellum Constitution: Federalism in the Long Founding Moment*, 67 STAN. L. REV. 397 (2015).

124. FELLER, *supra* note 116, at 25–26, 94.

125. John Quincy Adams, Third Annual Message (Dec. 4, 1827).

126. *Id.*

127. *Id.*

128. *Id.*

A. 1827–1830: CONGRESS PAYS NO HEED TO ARGUMENTS PREFIGURING THOSE IN THE UTAH PAPER

While Congress was considering competing proposals for graduation, distribution, and preemption, a handful of its members put forward, for almost the first time in American history, a core argument made in the Utah Paper—that newly admitted states had the constitutional right to own all the public lands within their borders simply by virtue of being admitted to the Union. The idea was called cession, as it called upon the United States to “cede” title to all public lands to new states.

Cession was a much more extreme position than “graduation.” The latter called for the Congress to make more public lands available for transfer to states, or to private entities, at gradually diminishing prices over time. Cession advocates argued that the states (and not private entities) had an immediate right to those lands, for free and without restriction. A similar argument had been put forward by the state of Tennessee not long after it had been admitted to the Union in 1797, but Congress rebuffed it, and the argument disappeared from the national scene for three decades.<sup>129</sup>

A leading advocate of cession was an otherwise obscure freshman U.S. Senator from Alabama named John McKinley. One of his biographers called him an “enigmatic trimmer,”<sup>130</sup> referring to the fact that that over his career he switched political affiliations based on expediency. “Trimmer” is a nautical term referring to adjusting sails to accommodate wind changes. McKinley was, over his political career, by turns a devoted Federalist, a supporter of Henry Clay, and finally a Jacksonian Democrat.<sup>131</sup> Before he advocated cession, he had supported “graduation” and using grants of public lands for public works projects inside states.<sup>132</sup> Starting with a speech in the Senate in February 1827, he began to question whether the national government could “control a great portion of the land within the limits” of the western states if those states were to be on an “equal footing” with the older states.<sup>133</sup>

Near the end of March 1828, as the Senate was considering a “graduation” proposal, McKinley made “probably the best speech” he ever delivered,<sup>134</sup> a lengthy, rambling, and at times incoherent harangue. In it he offered several different arguments for cession.<sup>135</sup> He

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129. See Ablavsky, *supra* note 12; GATES, *supra* note 16, at 287–88.

130. John Michael Dollar, John McKinley: Enigmatic Trimmer (Sept. 3, 1981) (M.A. thesis, Samford University) (on file with author). “Trimmer” is a nautical term. *Id.* at iii.

131. *Id.* at iii–iv.

132. *Id.* at 91.

133. 19 REG. DEB. 315–17 (1827).

134. Dollar, *supra* note 130, at 91.

135. 20 REG. DEB. 507–21 (1828).



began defensively, acknowledging that in trying to show that the U.S. has “no constitutional right or claim to the lands in the new States,” he was running directly into the “influence of an established system, long in practice, and the force of precedent.”<sup>136</sup> Thus, he conceded, some would regard his arguments as “wild, visionary, and untenable.”<sup>137</sup> He then proceeded to offer up a grab-bag of arguments, some half-baked and some not baked at all, drawn from a wide variety of legal sources, including the law of nations and the U.S. Constitution.

Ignoring the Property Clause, he called the Enclave Clause the Constitution’s “only grant of power” to the U.S. regarding public lands.<sup>138</sup> He deduced from it and various other sources that title to the public lands was automatically transferred to new states upon their admission to the Union. He called the Northwest Ordinance of 1787 illegal because, in his view, by maintaining national authority over the public lands, it violated the terms by which Virginia ceded its western land claims to the United States.<sup>139</sup> Even were that not the case, he argued, the Ordinance was “repealed and superseded by the Constitution of the United States.”<sup>140</sup> This ignored the fact that the first Congress under the Constitution, exercising its Property Clause power, had re-enacted the Ordinance.<sup>141</sup>

His most bizarre argument was that it was unconstitutional for Congress to insist, as it routinely did,<sup>142</sup> that new states agree never to interfere with the U.S. disposition of the public lands. The United States had “no right to annex any condition whatever to the admission of the new States into the Union,” he argued, because the Constitution forbids the States from entering into any “treaty, alliance, or confederation.”<sup>143</sup> By the law of nations, he maintained, the states of the union “have no power to enter into compacts to abridge their sovereignty,” and if the Constitution prohibits the States from making treaties, it is “equally prohibitory for the United States to enter into such treaties or compacts with the states.”<sup>144</sup> This argument ignored the fact that states were not states until Congress decided to admit them to the Union.

Despite such blustery rhetoric, McKinley the “trimmer” had, nine days earlier—in trying to convince his colleagues to support his bill to grant 400,000 acres of public lands to his state of Alabama for

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136. *Id.* at 508.

137. *Id.*

138. *Id.* at 510–11.

139. *Id.* at 509–10.

140. *Id.* at 510.

141. Act of Aug. 7, 1789, ch. 8 1 Stat. 50 (1789).

142. See *supra* text accompanying notes 41–43, 68; see also *infra* text accompanying notes 373–375, 423–442.

143. 20 REG. DEB. 511–12 (referring to U.S. CONST., art. I, § 10).

144. 20 REG. DEB. 511–12.

navigation improvements on its rivers—conceded that “new states had been admitted into the union” on the condition that they “should have no sovereignty over” the public lands.<sup>145</sup>

At times, McKinley’s speech took the form of a political suicide mission. He criticized people in the older states—whose representatives comprised a solid majority of the Congress—for being “ignorant of the peculiar wants and wishes” of the people in the newer states and territories for whom they were legislating on public lands matters.<sup>146</sup> He went even further, darkly hinting that newer states might have grounds to secede from the Union if they did not get title to the public lands.<sup>147</sup> They would, he told his colleagues, have “good cause to make the same complaint, on the subject of the public lands, against the United States, that the colonies did against the King of Great Britain.”<sup>148</sup> He vowed that he and those of like view would “continue to complain until we obtain our rights.”<sup>149</sup>

A handful of other politicians spoke in favor of cession, and a few western state legislatures gave it some support,<sup>150</sup> but it went nowhere in the Congress or in the nation.<sup>151</sup>

Almost two years later, in another floor speech in early 1830, Senator McKinley threw in the towel on cession. At first he bragged that he had been “the first to advance the doctrine that the new States, in virtue of their sovereignty, had a right to the public lands within their respective limits, and that the United States could not constitutionally hold them.”<sup>152</sup> He went on to concede, however, that the question of cession had, “for the present,” been “decided against him” by Congress’s lack of interest in the subject.<sup>153</sup>

McKinley understated the matter. Nearly all his colleagues, and the national political establishment, including such disparate figures as Henry Clay, John Quincy Adams, John C. Calhoun, Albert Gallatin, and Andrew Jackson, were absolutely opposed to the idea of ceding all public lands to newly admitted states.<sup>154</sup> So was one of the primary authors of the Constitution, former two-term President James Madison.<sup>155</sup>

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145. *Id.* at 454 (Mar. 17, 1828).

146. *Id.* at 521.

147. *Id.* at 518.

148. *Id.*

149. *Id.* at 521.

150. FELLER, *supra* note 116, at 108–09.

151. *Id.* at 94–95.

152. 21 REG. DEB. 15 (1830).

153. *Id.*

154. *See, e.g.*, FELLER, *supra* note 116, at 77–78, 92, 109, 149.

155. JAMES MADISON, LETTERS AND OTHER WRITINGS OF JAMES MADISON 187–88 (1865); FELLER, *supra* note 116, at 77–78, 220 (quoting AMERICAN STATE PAPERS: DOCUMENTS OF THE CONGRESS OF THE UNITED STATES IN RELATION TO THE PUBLIC LANDS, at 441–44 (1860)).

The nearly unanimous rejection of the cession arguments was perfectly understandable. According to Daniel Feller, eastern politicians were “becoming frankly disgusted” with the westerners’ relentless pursuit of benefits from the national government, in language that was by turns “haughty and threatening” and “unctuous and flattering.” Criticizing some of the newer states for mishandling their generous grants of public lands, many eastern members, in Feller’s words, “compared the pleas of Westerners to the whining of a spoiled child.”<sup>156</sup>

In his response to McKinley’s February 1827 speech, for example, Senator John Holmes of Maine suggested the newer states were simply dressing up their greed in a constitutional garb.<sup>157</sup> He pointedly observed that those *seeking* statehood carefully avoided making such claims, because “they well knew that it would be a great argument against their admission to the Union.”<sup>158</sup> McKinley’s arguments were, Holmes said, “absolute heresy; as against the Constitution, against reason, and against right.”<sup>159</sup> He dismissed the notion that variations in public landholdings put newer states on an unequal footing with older states. All states were, he said, equal in “point of right,” and the Constitution made “perfectly plain” that this was all that was required, even if the states were not equal in, as he put it, “point of property.”<sup>160</sup>

Southerners were equally dismissive. Congressman William Martin of South Carolina vowed to resist the “preposterous claims” of the cession advocates.<sup>161</sup> One North Carolina Congressman vowed to thwart their “grasping usurpations,”<sup>162</sup> and another called the constitutional argument for cession “one of the most extravagant pretensions that could possibly be urged.”<sup>163</sup>

Even most members of Congress from the newer states disliked the cession argument. They understood the political reality that advocating for it did them more harm than good as they pressed the Congress for various benefits—more grants of public lands for a wide variety of purposes, lower prices for public land offered for sale, more relief for debtors who had purchased public land on credit, and enactment of laws giving squatters the right to purchase public lands—that were premised on the fact that the national government did in fact own these lands.

Ardent advocates of more liberal divestiture of public lands to support western expansion, like President Andrew Jackson and

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156. FELLER, *supra* note 116, at 135.

157. 19 REG. DEB. 317 (1827).

158. *Id.*

159. *Id.*

160. *Id.*

161. FELLER, *supra* note 116, at 126.

162. *Id.* at 109.

163. *Id.* at 134.

Missouri Senator Thomas Hart Benton, refused to embrace the extreme position that all public lands had to be ceded to new states. Benton viewed cession as fomenting sectional conflict that could be “most destructive to the harmony of the States.”<sup>164</sup> He painted a picture of the “whole country” becoming “alarmed, agitated, and enraged, with mischievous inquires: the South about its slaves and Indians; the West about its lands; the Northeast on the subject of its fisheries, its navigation [sic], its light houses, and its manufactories. What would be the condition of the Union, what the chance for the preservation of harmony,” he asked, “if each part struck at the other in a system of pernicious and alarming inquiries?”<sup>165</sup>

The *coup de grace* was delivered in early 1830 in the course of the Webster-Hayne debate in the United States Senate, one of the most famous in all of congressional history.<sup>166</sup> While the debate is remembered mostly for its discussion of state sovereignty and national unity, both Daniel Webster of Massachusetts and Robert Hayne of South Carolina took the occasion to cast cold water on the cession argument a few days after McKinley’s last major speech on the subject.

Webster denied that there was “anything harsh or severe in the policy of the government towards the new States of the West.”<sup>167</sup> On the contrary, he said, the U.S. has been “liberal and enlightened” in its public land policy,<sup>168</sup> and he recounted in detail the cession of the western land claims and the understanding of the nation’s founders regarding Congress’s power over public lands.<sup>169</sup> He strenuously challenged the argument that revenue derived from public lands sales “consolidates” the national government and “corrupts the people.”<sup>170</sup> Far from corrupting the people, he argued, using public lands to promote public education and build canals and roads provides “benefits and blessings, which all can see, and all can feel.”<sup>171</sup> A use of public lands that “opens intercourse, augments population, enhances the value of property, and diffuses knowledge” cannot be a “dangerous and obnoxious policy.”<sup>172</sup> He turned to sarcasm, criticizing those who attack public land policy as “hurrying us to the double ruin of,” on the one hand, “a Government, turned into despotism by the mere exercise of

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164. 21 REG. DEB. 23 (1830).

165. *Id.* at 36.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 37–38.

170. *Id.* at 38.

171. *Id.*

172. *Id.* at 38–39.

acts of beneficence,” and on the other, “a people corrupted, beyond hope of rescue, by the improvement of their condition.”<sup>173</sup>

Hayne criticized cession as “untenable” constitutional nonsense that had been put forward “for the first time only a few years ago.”<sup>174</sup> He acknowledged that states might have grounds for complaining if the U.S. continued to hold title to “immense bodies of land” within their borders.<sup>175</sup> Even then, however, their complaint would be political, not legal; that is, it “cannot affect the question of the legal or constitutional right” of the U.S. to hold these lands.<sup>176</sup> Hayne warned advocates of cession that their argument “will never be recognized by the Federal Government,” but only trigger a backlash.<sup>177</sup> The newer states would simply be viewed as greedily grasping for public lands acquired with the “blood and treasure” of existing states and intended to be used for the “common benefit” of the entire nation. As he delicately put it, the argument “will have no other effect than to create a prejudice against the claims of the new States,” while they are “constantly looking up to Congress for favors and gratuities.”<sup>178</sup>

After that, arguments for cession quickly sank, as the leading historian of public land policy of that era put it, “like a stone.”<sup>179</sup> Some years later, President Martin Van Buren noted in his first annual message to Congress that the cession argument—which he described as asserting “that the admission of new States into the Union . . . was incompatible with a right of soil in the United States and operated as a surrender thereof, notwithstanding the terms of the compacts by which their admission was designed to be regulated”—had been “wisely abandoned.”<sup>180</sup>

The lack of political support in Congress for cession was perfectly understandable as a matter of raw politics. Members of Congress were chosen by those in existing states. Not representing territorial interests seeking statehood, they tended to regard the territories as supplicants. Members representing older states had no interest in giving most or all public lands to new states upon admission, because that did not acknowledge their contributions (in “blood and treasure”) to the acquisition of these lands from foreign governments and Indian tribes, and because they were not convinced that the newly-admitted states would in fact use these lands for the “common benefit” of all the states.

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173. *Id.* at 39.

174. *Id.* at 34.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. FELLER, *supra* note 116, at 134.

180. Martin Van Buren, First Annual Message (Dec. 5, 1937), <http://www.presidency.ucsb.edu/ws/index.php?pid=29479&st=&st1=> (last visited Jan. 20, 2018).

Members representing newer states with substantial amounts of public lands heeded the warnings of their colleagues around the country that arguing for cession made them appear avaricious; as Daniel Feller put it, the cause “was hopeless; worse yet, the prejudice against it [in the Congress] . . . was sabotaging efforts for more modest reform”<sup>181</sup> that might accelerate divestiture of public lands to settlers and others.

This political dynamic never changed over time. As once new states gradually matured and became more settled, they adopted the attitude of older states toward public lands, wanting to ensure that those lands be used for the “common benefit” of the nation.<sup>182</sup> In 1821, for example, in opposing Maryland’s proposal for a “distribution” law, the Ohio legislature had argued that it and other newer states had just as much claim to the vacant and unappropriated lands in the old states as those old states had in the public lands within the newer states’ borders. But by 1830 Ohio, now increasingly settled, had ceased to be a western state, economically and culturally, and its elected representatives took positions on public lands issues that were closer to those of the older states than newer ones.<sup>183</sup>

Those who question the constitutionality of public lands usually pay little attention to this rich and instructive history. The Utah Paper, for example, quotes only from a House Public Land Committee report from 1828 on a “graduation” bill that spoke of an “*implied* engagement of Congress” to cause public lands “to be sold, within a reasonable time.”<sup>184</sup> Others cite advocates of cession or related materials,<sup>185</sup> but without noting either the context or the result—that the argument was a political rather than a legal one, and that it fell flat in the Congress. After the Civil War, as the U.S. began to retain more and more public lands in national ownership, some in the newer states from time to time revived arguments for cession, but had no more success than before.<sup>186</sup>

#### B. THE U.S. SUPREME COURT’S VIEW OF NATIONAL POWER OVER PUBLIC LANDS BEFORE THE CIVIL WAR

Before the Civil War, the U.S. Supreme Court generally recognized that Congress had very broad authority over lands to which the U.S. took title, with two principal exceptions discussed further below.<sup>187</sup> The

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181. FELLER, *supra* note 116, at 134.

182. *Id.* at 132–35.

183. *Id.* at 132–33.

184. HOWARD ET AL., *supra* note 4, at 105 (emphasis added).

185. See, e.g., Patterson, *supra* note 1, at 69–72; Kochan, *supra* note 3, at 1159; see also Ken Ivory, *Illinois Won the First Sagebrush Rebellion*, FEDERALISM IN ACTION (Mar. 31, 2016), <http://www.federalisminaction.com/2016/03/illinois-won-first-sagebrushrebellion/#sthash.jlipfoFD.dpbs>.

186. GATES, *supra* note 16, at 482–92.

187. Pollard v. Hagan, 44 U.S. 212 (1845); Dred Scott v. Sandford, 60 U.S. 393 (1857); see also

Court's first important decisions regarding public lands had to do with the property rights of Native Americans. It decided not only that Indians had rights to territory they had traditionally occupied, but that resolution of their claims to land was "committed exclusively to the government of the union," and not the states, by the "settled principles of our constitution."<sup>188</sup>

In its 1839 decision in *Wilcox v. Jackson*,<sup>189</sup> the Court unanimously upheld the executive branch's practice of appropriating or reserving public lands inside states for military use, for erecting trading houses with Indians, and for constructing lighthouses. While Congress by that point had begun enacting "preemption" laws authorizing the sale of public land to squatters under certain circumstances,<sup>190</sup> it had typically carefully excluded from the operation of such laws public lands that had "been reserved for the use of the United States," or "reserved from sale by act of Congress, or by order of the President, or which may have been appropriated for any purpose whatsoever. . . ."<sup>191</sup>

The next year, 1840, the Court decided *United States v. Gratiot*.<sup>192</sup> The case arose when the United States sued to recover a fee owed by industrialists who were smelting lead removed from public lands in the state of Illinois under lease from the United States. The industrialists defended the lawsuit by advancing one of the major arguments of the Utah Paper; namely, that the Property Clause gives Congress "the power only to sell, and not to lease such lands," and so the United States had no right to collect the fee.<sup>193</sup>

The lower court's decision in *Gratiot* was written by Supreme Court Justice John McLean, sitting as Circuit Justice.<sup>194</sup> McLean, who had been Commissioner of the General Land Office in the early 1820s, noted in his opinion that "at one time" arguments had been made that public lands "rightfully belonged to the state[s]," apparently referring to the cession arguments John McKinley and others had made in Congress in 1827–1830.<sup>195</sup> McLean concluded that the Property Clause "was intended to secure the exercise of the power over the property of the Union within the states," and was unaffected by the admission of a new state to the Union.<sup>196</sup>

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text accompanying *infra* notes 214–309.

188. *Worcester v. Georgia*, 31 U.S. 515, 562 (1832); see also *Johnson v. M'Intosh*, 21 U.S. (8 Wheat) 543 (1823).

189. *Wilcox v. Jackson*, 38 U.S. 498 (1839).

190. See text accompanying notes 120–121 *supra*.

191. *Wilcox*, 38 U.S. at 511 (quoting the Preemption Act, 4 Stat. 420 (1830)).

192. *United States v. Gratiot*, 39 U.S. 526 (1840).

193. *Id.* at 538.

194. *United States v. Gratiot*, 26 F. Cas. 12 (D. Ill. 1839).

195. *Id.*

196. *Id.*

In the Supreme Court, the industrialists' lawyer, Missouri Senator Thomas Hart Benton, told the Court that the public lands "are 'to be disposed of' by Congress; not 'held by the United States.'" This meant, Benton argued, that the "Constitution gives the power of disposal; and disposal is not letting or leasing."<sup>197</sup> He went on to argue that Congress's power in the Property Clause to "make all needful Rules and Regulations" respecting the public lands referred only to "the power to dispose of the lands. The rules are to carry the disposal into effect; to protect them; to explore them; to survey them."<sup>198</sup>

In response, the U.S. Attorney General argued that the "unusually broad" language of the Property Clause of the Constitution fully justified Congress's exercise of sweeping authority over the public lands.<sup>199</sup> He pointed out that the "whole management of the public domain rests upon these few words," which has allowed Congress to cede public lands "for special purposes," to fix "limitations . . . on the sovereign powers of the states," to set aside "school lands," to keep "timber and salt-springs" for "public use," and to permanently secure the "spots on which many of our fortifications and public buildings are placed."<sup>200</sup> Because "[a]ll this has been done, in repeated instances, for nearly sixty years," the Attorney General warned, it would be an "unwarranted restriction" to "confine the language of the Constitution, therefore, to a mere delegation to Congress of a power to sell the territory, or to examine and prepare it for sale."<sup>201</sup>

Benton's arguments failed to persuade a single Justice. The Court unanimously held that the Property Clause gave Congress power over public lands "without limitation," that their "disposal must be left to the discretion of Congress," and that Illinois "cannot claim a right to the public lands within her limits."<sup>202</sup>

As it happened, former Alabama Senator John McKinley was serving on the Supreme Court when *Gratiot* was decided, having been appointed by Martin Van Buren in 1837. He did not, however, participate in *Gratiot* or any other cases during that term, apparently because of illness.<sup>203</sup>

The Utah Paper dismisses the Court's statement in *Gratiot* that Illinois had no claim to the reserved public lands as without "precedential value," because it was "not the result of briefing, argument and deliberation."<sup>204</sup> Benton's argument about the meaning

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197. *Gratiot*, 39 U.S. at 532.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 537–38.

203. *See* 39 U.S. at vii (Court Reporter's notes showing which justices were absent this term).

204. HOWARD ET AL., *supra* 4, at 93–94.



of the Property Clause is, however, clearly set out in the official report of the case.<sup>205</sup>

Two years after *Gratiot*, the Court decided *Martin v. Waddell*.<sup>206</sup> It did not address the Property Clause, but deserves brief consideration here because it is a precursor to *Pollard v. Hagan*, the centerpiece of the Utah Paper's constitutional argument. Martin claimed the right to harvest oysters in rivers and bays in New Jersey under laws enacted by the state of New Jersey in 1824.<sup>207</sup> Waddell claimed ownership of the oyster beds under a grant tracing back to the 17th century rulers of England, who had chartered the colony of New Jersey.<sup>208</sup>

The Court ruled in favor of Martin. The majority opinion by Chief Justice Taney, applying what it called "settled" English law, concluded that the grant from the Crown to Waddell's predecessor in title could not have conveyed ownership of the beds of navigable waters merely as private property, because the Crown retained "dominion and property in navigable waters, and in the lands under them," as a "public trust" that must be administered "for the common benefit."<sup>209</sup> Careful analysis by Professor James Rasband has undermined the Court's summary of English law on this point.<sup>210</sup> Rasband concludes that English law created only a presumption against alienation rather than a prohibition of it.<sup>211</sup>

The Court in *Martin* went on to hold that, once the U.S. became independent from England, the thirteen original states, including New Jersey, succeeded to the Crown's position.<sup>212</sup> These states thus held "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," that is, the United States.<sup>213</sup>

The United States was not a party to *Martin v. Waddell*, so any interest it might have claimed in the submerged lands at issue was not before the Court.

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205. *Gratiot*, 39 U.S. at 532.

206. *Martin v. Waddell*, 41 U.S. 367 (1842).

207. *Id.* at 369.

208. *Id.*

209. *Id.* at 411.

210. Rasband, *supra* note 45, at 25–29.

211. *Id.* at 11–14; see also James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL'Y F. 1, 69–80 (2007).

212. *Martin*, 41 U.S. at 367.

213. *Id.* at 140. Justices Thompson, who wrote the Court's opinion in *Gratiot*, and Baldwin; dissented.

C. *POLLARD V. HAGAN*

On January 1, 1845, the Court issued its decision in *Pollard v. Hagan*.<sup>214</sup> Dicta in the majority opinion furnish the principal support for the Utah Paper and articles making a similar argument. Specifically, the majority opinion made several broad and startlingly novel assertions about the U.S. Constitution that were not only completely at odds with historical practice and understanding, but went far beyond what was necessary to decide the case before the Court. As a result, these pronouncements had little influence on future public land policy. The Utah Paper nevertheless relies heavily on them.<sup>215</sup>

The question presented was whether the principle announced in *Martin* applied to submerged lands in Alabama, admitted in 1819. Here the authority of the United States was at issue, because Pollard claimed title under a grant from the U.S. in 1836. Hagan claimed title under a grant the state of Georgia had made to his predecessor in 1795, when the land was still part of Georgia's western land claims,<sup>216</sup> claims that were not finally ceded to the U.S. until 1802. Neither the U.S. nor the State of Alabama was, however, a party in *Pollard*.

There was no compelling reason for the Court in *Pollard* to extend *Martin*'s principle to Alabama and other states admitted after the U.S. was established. The original states had, by virtue of their colonial charters, a direct relationship with the rulers of England. New states admitted after the original thirteen had no such relationship, because the United States had come in between these new states and the foreign governments that originally laid claim to these lands (subject, of course, to Native American claims). This gave the United States a powerful argument that it, and not the newer-admitted states, succeeded to the foreign governments' ownership of submerged lands. Moreover, Georgia had ceded its western land claims, including the lands submerged under navigable waters, to the U.S. well before Alabama was admitted to the Union. All this arguably gave the United States plenary power to choose whether to convey the land to new states, or to grantees like Pollard, or to retain ownership for public purposes.

The majority in *Pollard* ignored these reasons for not extending *Martin v. Waddell*, and held for Hagan. It concluded that

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214. See *id.*

215. See, e.g., HOWARD ET AL., *supra* note 4, at 11, 73 (*Pollard* is the "seminal case"), 80, 89–90, 92–93, 108–10.

216. Actually, whether the submerged land at issue in *Pollard* was part of Georgia's western land claim had been disputed in an earlier, related piece of litigation. Spain's ownership of the Florida region had given it a claim to that land at issue in *Pollard*, but the Supreme Court had decided five years earlier that its claim had already been settled by agreement with the United States. See *Pollard's Heirs v. Kibbe*, 39 U.S. 353, 378–81 (1840). For a more detailed review of the lengthy dispute that culminated in *Pollard*, see Keith E. Whittington, *Judicial Review of Congress Before the Civil War*, 97 GEO. L.J. 1257, 1312–15 (2009).

newly-admitted states, like the original thirteen, automatically became owners of the beds of navigable waters upon their admission to the Union.

*Pollard's* majority opinion was written by none other than Justice John McKinley, who as a U.S. Senator seventeen years earlier had unsuccessfully tried to persuade his colleagues to support cession. McKinley is widely regarded as one of the most obscure and least productive Justices in the annals of the Court.<sup>217</sup> In fourteen years on the bench, he wrote fewer than two dozen opinions, including dissents.<sup>218</sup> His opinion in *Pollard*, covering eleven pages of the U.S. Reports, was the longest of his judicial career<sup>219</sup> and, according to one biographer, “the majority opinion for which he is best known.”<sup>220</sup>

Historian Carl Swisher noted that McKinley was “hampered by poor health and serious illnesses.”<sup>221</sup> At the time, Supreme Court Justices spent considerable time riding circuit in the hinterlands. McKinley himself had by far the largest circuit to traverse, a “burden,” Swisher noted, about “which he perennially complained.”<sup>222</sup> While riding circuit may have interfered with opinion writing, Swisher surmised that McKinley’s limited productivity might have been a “sheer lack of ability” for which circuit riding simply provided a convenient excuse.<sup>223</sup> Swisher’s ultimate assessment was that McKinley made “no significant contribution to legal thinking in any form.”<sup>224</sup>

217. See Frank H. Easterbrook, *The Most Insignificant Justice: Further Evidence*, 50 U. CHI. L. REV. 481, 501–02 (1983); see also 39 U.S. at vii; 42 U.S. at lxxi; 47 U.S. at unnumbered page following title pages (court reporter’s notes show that over his fourteen year tenure, McKinley participated in no cases in four different Supreme Court terms, 1840, 1843, 1848 and 1850).

218. See, e.g., David P. Currie, *The Most Insignificant Justice: A Preliminary Inquiry*, 50 U. CHI. L. REV. 466, 472 (1983).

219. Easterbrook, *supra* note 217, at 500 (Appendix D).

220. STEVEN P. BROWN, JOHN MCKINLEY AND THE ANTEBELLUM SUPREME COURT: CIRCUIT RIDING IN THE OLD SOUTHWEST 202 (2012).

221. CARL B. SWISHER, 5 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD: 1836–64 67 (1974).

222. *Id.* at 66–67; see also BROWN, *supra* note 220, at 6–7. Swisher also described how McKinley, while on the Court, purportedly to “promote convenience of travel,” had moved his home from Alabama to Louisville, Kentucky, outside his circuit, where he was a member of a manufacturing firm. *Id.* In his Reporter’s notes in Volume 49 of the U.S. Reports, Howard had incorrectly attributed McKinley’s absence from the Court’s January 1850 Term to illness. He corrected the record in Volume 50. Compare 49 U.S. (8 How.) iii n. superscript \* (1850), with 50 U.S. (9 How.) iii (1851) (“ERRATUM. The note in the eighth volume, stating that ‘Mr. Justice McKinley was prevented, by indisposition, from attending the Court during the January term, 1850,’ is incorrect; as Mr. McKinley was engaged during that period in holding an important session of the U.S. Circuit Court at New Orleans.”). See Easterbrook, *supra* note 217, at 491 n.40.

223. SWISHER, *supra* note 221, at 262.

224. *Id.* at 67; see also Herbert U. Feibelman, *John McKinley of Alabama—Legislator, U.S. Congressman, Senator, Supreme Court Justice*, 22 ALA. LAWYER 422, 424 (1961) (“Not one of the decisions . . . involved a major constitutional question”); BROWN, *supra* note 220, at 9–10 (arguing that McKinley has been unduly disparaged, but concedes that none of his opinions were “landmark in nature”).

McKinley had created a stir shortly after joining the Court when, sitting as circuit justice, he held that an out-of-state corporation could not enforce contracts made within a state without that state's approval. When he learned of this judgment, one of his Supreme Court colleagues, John McLean, wrote to another colleague, Joseph Story, expressing serious concern that national financial establishment interests would lose confidence in the courts if the judgment were to stand, and disparaged McKinley's apparent metamorphosis from an extreme Federalist to an equally extreme advocate of states' rights.<sup>225</sup> On review, the Supreme Court reversed McKinley.<sup>226</sup>

McKinley's disjointed, muddled opinion in *Pollard* was described by Professor James Rasband in 1997 as "hardly a model of clarity," with "broad dicta" that had "little to recommend it."<sup>227</sup> By "serving up broad dicta rather than carefully addressing the precise issue before it," Rasband observed with some understatement, McKinley's opinion "stumbled into error and injected confusion into the law."<sup>228</sup> A similar conclusion was reached by a legal commentator in 1851, who called McKinley's dicta in *Pollard*—that Congress had little authority over public lands—a "radical error" that was not supported by "argument or authority," and "clearly mistaken."<sup>229</sup>

McKinley asserted that in "any of the new states," the U.S. had a "right of soil" only for "temporary purposes," to execute the "trusts" created by the "deeds of cession" from the states like Georgia with western land claims, and the "trust created by the treaty" by which the U.S. made the Louisiana Purchase.<sup>230</sup> Quoting from those "deeds of cession" and from the clauses of the Constitution dealing with the admission of new states and Enclaves,<sup>231</sup> he asserted that every new state could exercise the same governmental powers as the original states, "except so far as they are, temporarily, deprived of control over the public lands."<sup>232</sup>

McKinley went on to claim that the cessions of western lands by the original states had only two narrow purposes. The first was to bind the United States to convert the public lands ceded to it "into money for the payment of the [national] debt," and the second was "to erect new

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225. Dollar, *supra* note 130, at 189 (citing a May 5, 1838 letter from McLean to Story in the Story papers in the Massachusetts Historical Society in Boston); see also BROWN, *supra* note 220, at 151–56; 160–63.

226. *Bank of Augusta v. Earle*, 38 U.S. 519 (1839).

227. Rasband, *supra* note 45, at 36.

228. *Id.*

229. See Henry F. Page, *Power of Congress over Shores of Rivers*, 8 W. L.J. 346, 351 (1851).

230. *Pollard v. Hagan*, 44 U.S. 212, 221 (1845).

231. *Id.*

232. *Id.*

states over the territory thus ceded.”<sup>233</sup> He wrote that “as soon as these purposes could be accomplished the power of the United States over these lands, as property, was to cease.”<sup>234</sup> Once the U.S. “shall have fully executed these trusts,” in other words, the “municipal sovereignty of the new states will be complete, throughout their respective borders, and they, and the original states, will be upon an equal footing, in all respects whatever.”<sup>235</sup>

McKinley’s opinion mentions the Constitution’s Property Clause, but gives it an interpretation that the Court specifically rejected in its unanimous decision in *Gratiot*<sup>236</sup> five years earlier. That is, McKinley seems to accept Senator Benton’s argument in that case—an argument the Court curtly rejected—that the Property Clause gives Congress the power only to make “rules and regulations respecting the sales and disposition of the public lands,” implicitly defining “disposition” to mean only divestiture.<sup>237</sup>

McKinley’s sweeping *Pollard* dicta was also at odds with a view McKinley himself had expressed for the Court only four years earlier. In *United States v. Fitzgerald*,<sup>238</sup> McKinley ruled in favor of a person who obtained title to formerly public land in the State of Louisiana under a federal preemption law, because the evidence showed that the U.S. had “neither reserved” the land in question “from sale nor appropriated [it] to any purpose whatever.”<sup>239</sup> But McKinley also noted, citing the Property Clause, that if the government had earlier reserved or appropriated the land for its own use, it would have prevailed under the Court’s 1839 decision in *Wilcox v. Jackson*.<sup>240</sup>

McKinley’s *Pollard* opinion also ignored the Court’s unanimous decision in *United States v. Gear*,<sup>241</sup> handed down a few weeks earlier. *Gear* followed the Court’s earlier decision in *Wilcox v. Jackson*,<sup>242</sup> and held that because mineral lands the U.S. reserved by the 1807 legislation upheld in *Gratiot* were not subject to the divestiture laws, the lower court properly enjoined removal of minerals from them without U.S. approval.<sup>243</sup>

McKinley’s opinion twice referred to provisions in statehood enabling acts, including Alabama’s, that required new states to disclaim

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233. *Id.* at 224.

234. *Id.*

235. *Id.*

236. *See supra* text accompanying notes 192–205.

237. *Pollard*, 44 U.S. at 225.

238. *United States v. Fitzgerald*, 40 U.S. 407 (1841).

239. *Id.* at 421.

240. *See supra* text accompanying notes 189–191.

241. *United States v. Gear*, 44 U.S. 120 (1845).

242. *See supra* text accompanying notes 189–191.

243. *Gear*, 44 U.S. at 120.

“all right and title to” the public lands the U.S. retains within their borders.<sup>244</sup> He eventually concluded, without elaboration, that no “compact” between Alabama and the United States “could diminish or enlarge” the right to ownership of the lands at issue in *Pollard*.<sup>245</sup> This was because, he wrote, to deny Alabama the ownership of the beds of navigable waters would be “to deny that Alabama has been admitted into the union on an equal footing with the original states,” because the Court had already concluded in *Martin v. Waddell* that the original states owned the beds of navigable waters.”<sup>246</sup>

McKinley’s opinion was the first time a Supreme Court opinion had referred to “equal footing” among the states.<sup>247</sup> As discussed earlier, while the “equal footing” idea dated back to the 1780s, the idea that it gave states some sort of claim to equal treatment as far as the U.S. public lands were concerned was completely at odds with the understanding of the nation’s founders and the practice that had prevailed since the nation’s founding.<sup>248</sup> McKinley cited no precedent, and his turbid discussion left it, as Professor Hanna put it in 1951, “by no means certain” what he was saying regarding landholdings.<sup>249</sup>

The similarities between McKinley’s muddled political arguments for cession in the Senate from 1827 to 1830 and his sweeping, legally novel dicta in *Pollard* are unmistakable. Of course he was not the first, nor would he be the last, Justice to convert political arguments into pronouncements on the meaning of the Constitution. The contemporary political landscape suggests, however, that McKinley’s agenda may have been far more ambitious than simply awarding new states the right to take title to all public lands.

*Pollard* was handed down a few weeks after the 1844 presidential election in which Democrat James K. Polk narrowly defeated Whig Henry Clay. Seven years earlier, when he was Speaker of the House, Polk had urged Andrew Jackson to appoint John McKinley to the Supreme Court. Jackson had demurred, and appointed someone else, but when that nomination was declined, Jackson’s successor Martin Van Buren appointed McKinley to the bench. This was not long, ironically, before Van Buren noted that arguments like then-Senator

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244. *Pollard v. Hagan*, 44 U.S. 212, 224, 229 (1845).

245. *Id.*

246. *Id.* at 229.

247. See Rasband, *supra* note 45, at 36; Whittington, *supra* note 216, at 1314 (“*Pollard* gave judicial articulation to the ‘equal footing’ doctrine.”). Nine years before *Pollard*, the Court had cryptically spoken of Louisiana’s admission on the “same footing” as other states in deciding that, under Spanish Law, the City of New Orleans rather than the U.S. owned a parcel of land in the City. *Mayor of New Orleans v. United States*, 35 U.S. 662, 736–37 (1836). McKinley’s *Pollard* opinion did not cite this case.

248. See *supra* text accompanying notes 38–62, 129–186.

249. Hanna, *supra* note 45, at 531.

McKinley had made in Congress for cession had been “wisely abandoned.”<sup>250</sup>

The central issue in the 1844 presidential contest was whether and how fast the United States would expand west; specifically, whether it would annex Texas and seek to acquire other territory out to the Pacific. The expansion issue was inextricably bound up with the question whether the practice of slavery would be allowed in the newly-acquired areas, or in states admitted from them. Beginning with the Northwest Ordinance of 1787, Congress had always assumed the power to dictate whether slavery could be practiced in the territories, and the Property Clause was generally accepted as the source of this authority.<sup>251</sup> The famous Missouri Compromise of 1820, by which Congress had purported to ban slavery north of a line it drew on the map in the western territory, had wide support when it was adopted, including from representatives of slavery interests like John Calhoun of South Carolina.<sup>252</sup>

But the debate intensified as the slavery-dependent cotton kingdom sought to expand, the abolition movement gained strength, and sectional tensions rose. Increasingly the argument over slavery and national expansion was made in terms of what the Constitution allowed Congress to do. As historian Don Fehrenbacher put it, the “crucial change in the slavery controversy occurring during the 1840s” was “not the introduction of new principles or formulas, but rather the constitutionalizing of the argument.”<sup>253</sup>

Polk’s victory in the 1844 election signaled that expansion was likely inevitable, as was the need for Congress to confront the issue of slavery in the west.<sup>254</sup> Several different positions were urged by slave interests, abolitionists, and others who were simply trying to keep the Union from splitting apart on this issue. The most extreme pro-slavery position was that Congress had no power over slavery. The most extreme anti-slavery position was that Congress had plenary power over the matter, both in the territories and, through conditions it could attach to statehood enabling acts, inside newly-admitted states. A middle ground was that each territory or new state could decide the matter for itself.<sup>255</sup>

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250. See Frank Otto Gatell, *John McKinley*, in 1 JUSTICES OF THE UNITED STATES SUPREME COURT, 1789–1969: THEIR LIVES AND MAJOR OPINIONS 769, 773 (Leon Friedman & Fred L. Israel eds., 1969); Dollar, *supra* note 130, at 184–85. Regarding Van Buren’s comments on cession, see *supra* note 180.

251. See DON E. FEHRENBACHER, SLAVERY, LAW, AND POLITICS: THE DRED SCOTT CASE IN HISTORICAL PERSPECTIVE 74–88 (1981).

252. *Id.* at 101–13.

253. *Id.* at 140.

254. *Id.* at 124–27.

255. See generally *id.* at 137–47.

There was a related question, closely connected to the slavery debate: whether the United States had authority to acquire property by eminent domain, and whether this might be an avenue toward abolition.<sup>256</sup> In this respect, it is noteworthy that McKinley's *Pollard* opinion at one point stated it was "necessary to enter into a more minute examination of the rights of eminent domain, and the right to public lands."<sup>257</sup> The relevance of "rights of eminent domain" to the narrow issue before the Court in *Pollard* was obscure at best, and McKinley never clarified the matter.<sup>258</sup> He added to the mystery by capaciously defining "eminent domain," which he put in italics, as the "right which belongs to the society, or to the sovereign, of disposing, in case of necessity, and for the public safety, of all the wealth contained in the state."<sup>259</sup>

To be sure, *Pollard* did not, on its face, have anything to do with slavery any more than it did the subject of eminent domain, however defined. But because the extent of Congress's power over public lands and other property in new states, as well as its power of eminent domain, had become of great importance to slavery's defenders, it is not at all far-fetched to suggest that one of McKinley's objectives in his discursive *Pollard* opinion was to cut short, or at least influence, congressional debate over the status of slavery in the western lands. The more limited Congress's authority was under the Property Clause, especially vis-à-vis the admission of new states, the more difficult it would be for Congress to limit or abolish slavery in newly-acquired territories, or states created out of them. In this connection, it is worth noting that the first time McKinley had put forth arguments about cession in the Senate in 1827, eighteen years before *Pollard*, he had pointedly referred to the Missouri Compromise in raising the question of whether Congress could "fix any condition on the admission of new State into the Union" if that would "impair the sovereignty of the State."<sup>260</sup>

McKinley's *Pollard* opinion might, in other words, have been prefiguring the Supreme Court's direct intervention in the slavery controversy a dozen years later in its *Dred Scott* decision.<sup>261</sup> And if that was his agenda, he might have been pleased to see his *Pollard* opinion referred to in congressional debates, court decisions, and opinions of

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256. See, e.g., Betty L. Fladeland, *Compensated Emancipation: A Rejected Alternative*, 42 J. S. HIST. 169, 171–73 (1976); Burslet, *supra* note 87, at 198–99.

257. *Pollard v. Hagan*, 44 U.S. 212, 222 (1845).

258. Hanna, *supra* note 45, at 531. For the scholarly debate about the existence and extent of the national government's authority to acquire land through eminent domain before the Civil War, see works cited *supra* note 87.

259. *Pollard*, 44 U.S. at 223.

260. 19 REG. DEB. 316 (1827).

261. See *infra* text accompanying notes 288–305.



the U.S. Attorney General on matters that related to the slavery issue in the years that followed.<sup>262</sup> But if McKinley thought that his *Pollard* opinion might have laid such questions to rest, he was sadly mistaken, for if anything it seemed simply to increase the intensity of the national debate on the future of slavery.

McKinley was no stranger to politics. His shift in allegiance from Henry Clay to Andrew Jackson had helped him secure his first election to the Senate back in 1826.<sup>263</sup> He was the first U.S. Supreme Court Justice ever to have previously served in the U.S. House, Senate, and a state legislature. Moreover McKinley was, as constitutional historian Carl Swisher rather tactfully put it, “no rebel against Southern institutions.”<sup>264</sup> According to one of McKinley’s biographers, the 1830 federal census showed him owning three slaves, and the 1850 census showed him owning eighteen slaves, nine of which were listed as fugitives.<sup>265</sup> This biographer observed that when McKinley became a follower of Andrew Jackson in the mid-1820s, he also became a “very loud proponent of states’ rights,” and over time, as the South “felt more and more the loss of sovereignty to the central government, his cheers for states’ rights became a loud roar.”<sup>266</sup>

When McKinley served in the House and the Senate intermittently for nearly a decade from 1826 on, the issue of slavery was rarely debated. Still, in one of his last speeches in Congress, as a member of the House in February 1835, he had strongly objected to that body considering what he called an “impudent” petition to abolish slavery in the District of Columbia that had been proposed by “a firebrand from one of the Northern States.”<sup>267</sup> The Congress had no right, he said at that time, to lay its “hands upon his property.”<sup>268</sup>

Near the beginning of his opinion in *Pollard*, McKinley seemed to allude to the heated, ongoing debate about the future of slavery in the territories and new states to be carved out of them, by noting that the issue before the Court—which appeared to be a pedestrian dispute over ownership of a tract of submerged land in Alabama—was of “great importance to all the states of the union, and particularly the new ones.”<sup>269</sup>

Justice Catron’s dissent from what he called the “startling novelty” of McKinley’s sweeping assertions in *Pollard* likewise lends some support to the idea that McKinley had a bigger, more political

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262. See Burslet, *supra* note 87, at 200–02.

263. BROWN, *supra* note 220, at 59, 62–63.

264. SWISHER, *supra* note 221, at 532.

265. Dollar, *supra* note 130, at 174 n.22.

266. *Id.* at 203.

267. 23 REG. DEB. 1395 (1835).

268. *Id.*

269. *Pollard v. Hagan*, 44 U.S. 212, 220 (1845).

agenda.<sup>270</sup> McKinley's construction of the Constitution was, Catron wrote, "so obscure" that it had "lain dormant, and even unsuspected, for so many years." Catron criticized McKinley not only for seeming to overthrow prior Court decisions "either directly or in effect," but also because he "declared void" an act of Congress that had purported to settle title to the submerged lands at issue. This was one of the rare times in the nation's first few decades that the U.S. Supreme Court had voided an act of Congress on constitutional grounds.<sup>271</sup>

To be sure, Catron noted, McKinley's dicta had not been unknown "in the political discussions in the country," which presumably was a delicate way to reference the arguments for cession that then-Senator McKinley and others had made in 1827–1830. But those questions, Catron wrote, should continue to be left to "the political departments" of the government.<sup>272</sup> "[N]o state complains, nor has any one ever complained," he wrote, "of the infraction of her political and sovereign rights" by the U.S. in executing the "great trust" imposed on it "to dispose of the public domain for the common benefit."<sup>273</sup>

Catron was also clear-eyed about the possible incendiary effects of McKinley's view of the Constitution. Because neither Alabama nor the U.S. was a party to the case, it was, in his view, particularly inappropriate for the Court to decide in favor of a "mere trespasser in the midst of a city" who was asserting what he called the state's sovereign right simply "for his individual protection, in sanction of the trespass."<sup>274</sup> McKinley was, Catron charged, stirring up conflict between states and the national government where none existed: "The states and the United States are not in hostility; the people of the one are also the people of the other."<sup>275</sup>

The implications of McKinley's sweeping statements were particularly troublesome, Catron wrote, insofar as they purported to apply "to the high lands of the United States" as well as to submerged lands, because of "the amount of property involved."<sup>276</sup>

Unfazed by or perhaps unaware of the warnings in Catron's dissent, McKinley's opinion never addressed the revolutionary implications of its sweeping assertions. If national power over public lands was so limited, what was the legal status of military bases, and the public land areas set aside for Indians, and the mineral lands and other reservations of public land the U.S. had made since 1787? Were they

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270. *Id.* at 232.

271. See Whittington, *supra* note 216, at 1267.

272. *Pollard*, 44 U.S. at 232.

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.* at 231–32, 235.

still valid?<sup>277</sup> Did it make any difference whether the public lands were reserved before or after a new state was created? What was the status of the many millions of acres of public land the U.S. still owned in Alabama and other new states? What was the effect on all those land grants, which totaled millions of acres, the U.S. had already made inside new states before or after they were admitted to the Union, many of which included conditions and restrictions?

Catron's trenchant criticism of McKinley's dicta invites speculation as to why his lone dissent did not attract support from other Justices. One answer might be found in the last paragraph of McKinley's opinion. There, following nearly two dozen paragraphs laden with sweeping declarations that Congress's power over public lands was very limited, was the statement that the "preceding course of reasoning" had led the Court to reach quite narrow conclusions, to wit:

First, The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively. Secondly, The new states have the same rights, sovereignty, and jurisdiction over this subject as the original states. Thirdly, The right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy in this case.<sup>278</sup>

In the end, then, all the Court actually decided in *Pollard* was to extend its previous decision in *Martin v. Waddell*<sup>279</sup> to states admitted after the original thirteen. McKinley's narrow conclusion sidestepped some of the problems identified in Catron's dissent, should McKinley's sweeping dicta be applied to public lands other than land submerged under navigable waters. The narrowness of the decision seemed to be confirmed the next year, when Justice Catron wrote a decision for a unanimous Court holding that a state law cutting off actions to recover possession of property did not apply to resolve a dispute between two private claimants over who had the better claim to certain public lands in the state of Louisiana.<sup>280</sup> Without referring to *Pollard*, Catron concluded that state law did not apply because the Property Clause gave Congress "power of disposal and of protection" of the public lands, which meant that "Congress alone can deal with the title, and no State law, whether of limitations or otherwise, can defeat such title."<sup>281</sup>

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<sup>277</sup>. Among those reservations was one that Congress had made of public land at Hot Springs, Arkansas, in 1832, four years before Arkansas became a state. In 1848, in failing health, McKinley spent several days recuperating there. BROWN, *supra* note 220, at 210–11.

<sup>278</sup>. *Pollard*, 44 U.S. at 230.

<sup>279</sup>. See *supra* text accompanying notes 206–213.

<sup>280</sup>. *Jourdan v. Barrett*, 45 U.S. 169, 184–85 (1846).

<sup>281</sup>. *Id.* at 185.

Disregard of *Pollard's* dicta is also apparent in an opinion Supreme Court Justice McLean rendered in 1852 as a Circuit Justice. In that case, McLean rejected the argument that the state of Michigan, “by virtue of her sovereignty, had a right to all the lands within her limits,” noting that the argument had been made in political debates several years earlier, where it was “received everywhere with less favor than its advocates anticipated.”<sup>282</sup> As a “question of law,” McLean wrote, “we have no hesitancy in saying the argument is groundless. The state of Michigan can exercise no power whatever over the public lands within her limits. She is expressly prohibited from doing this by a compact agreed to in the admission of the state into the Union.”<sup>283</sup>

Given all this, what is one to make of McKinley’s sweeping dicta that preceded *Pollard's* narrow conclusion? This was in an era in which, according to historian G. Edward White, one Justice would typically prepare an opinion of the Court, but not circulate it to the other Justices before delivering and dispatching it to the Court’s reporter for eventual publication.<sup>284</sup> The “different jurisprudential universe” that then prevailed, White points out, “meant that the reasoning of an opinion of the Court . . . usually represented only the view of one Justice.”<sup>285</sup> This gave judicial opinions “diminished status” as precedents.<sup>286</sup>

As it turned out, the extent to which the McKinley’s sweeping dicta reflected anything more than his own views made no difference. As discussed in more detail below, the Court has paid very little attention to his assertions in the public lands context.<sup>287</sup>

#### D. *DRED SCOTT V. SANDFORD*

With this fateful 1857 decision, handed down a dozen years after *Pollard*, the Supreme Court inserted itself even more directly in the debate over slavery and the breadth of Congress’s Property Clause power.<sup>288</sup> Scott, born a slave, had lived for years in the free territory of Wisconsin, where slavery was forbidden under the terms of the Missouri Compromise, as well as in the free state of Illinois. He petitioned for his freedom when his master took him back to the state of Missouri, where slavery was lawful. Chief Justice Taney’s opinion rejecting Scott’s claim was the most prominent of the several opinions written by various Justices in the case.<sup>289</sup> It is mostly remembered for

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282. *Turner v. Am. Baptist Missionary Union*, 24 F. Cas. 344, 345 (C.C.D. Mich. 1852).

283. *Id.*

284. G. Edward White, *The Internal Powers of the Chief Justice: The Nineteenth-Century Legacy*, 154 U. PA. L. REV. 1463, 1477–84 (2006).

285. *Id.* at 1482–83 (emphasis removed).

286. *Id.* at 1483.

287. See *infra* text accompanying notes 350–370.

288. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

289. See FEHRENBACHER, *supra* note 251; Landever, *supra* note 3, at 9, 41. McKinley had died five

its assertion that, at the time the U.S. Constitution was framed and adopted, not just slaves but the entire “unfortunate race” of African-Americans had “been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations, and so far unfit that they had no rights which the white man was bound to respect.”<sup>290</sup>

But Taney’s opinion went even further than the dicta in *Pollard* in sharply limiting the power of Congress under the Property Clause. That Clause in fact applied, Taney wrote, only to land over which the United States had jurisdiction in 1787. Thus it did not apply to any lands—from Florida to the Pacific Coast—that lay outside the boundaries of the United States, as they existed at the conclusion of the Revolutionary War:

[T]he power there given [in the Property Clause], whatever it may be, is confined, and was intended to be confined, to the territory which at that time belonged to, or was claimed by, the United States, and was within their boundaries as settled by the treaty with Great Britain, and can have no influence upon a territory afterwards acquired from a foreign Government. It was a special provision for a known and particular territory, and to meet a present emergency, and nothing more. . . . [It] has no reference whatever to any territory or other property which the new sovereignty might afterwards itself acquire.”<sup>291</sup>

Reminiscent of McKinley’s *Pollard* opinion, Taney’s discussion of the Property Clause consisted of many pages<sup>292</sup> of what historian Don Fehrenbacher, in his Pulitzer Prize-winning book on the case, called “rambling, repetitious prose” offering a “bizarre explication” that was “difficult to take . . . seriously.”<sup>293</sup> The Court had never before, and has never after, viewed the Property Clause as applying only to property the U.S. owned in 1787. Like McKinley in *Pollard*, Taney in *Dred Scott* utterly ignored the Court’s earlier unanimous decision in *Gratiot*, in which Taney had participated. While Taney did not cite *Pollard*, concurring Justice John Campbell of Alabama, who had taken McKinley’s seat on the Court in 1853, did, to bolster his argument that Congress had no power to enact the Missouri Compromise.<sup>294</sup>

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years before. The *Dred Scott* Court had a full complement of nine Justices, including four northerners, two of whom—McLean of Ohio and Curtis of Massachusetts—dissented. McLean had joined the majority in *Pollard*, but Curtis was not yet on the Court. Nelson of New York and Grier of Pennsylvania, neither of whom were on the Court when *Pollard* was decided, wrote concurring opinions in *Dred Scott*.

290. *Dred Scott*, 60 U.S. at 407; see FEHRENBACHER, *supra* note 251.

291. *Dred Scott*, 60 U.S. at 432, 436.

292. *Id.* at 432–45.

293. FEHRENBACHER, *supra* note 251, at 367.

294. *Dred Scott*, 60 U.S. at 508–09. Campbell would resign his seat in early 1861 to become Assistant Secretary of War for the Confederate States of America.

Taney's sharp limit on Congress's power under the Property Clause not only meant the Missouri Compromise was unconstitutional, it had potentially huge implications for public land policy in general, comparable to those posed by McKinley's dicta in *Pollard*. It called into question hundreds of statutes establishing public land policy in the vast regions the nation had acquired since 1787, and hundreds of thousands, if not millions, of land transactions that were based upon them. Surely Taney appreciated those implications, having served as Andrew Jackson's Attorney General and then Treasury Secretary, where he had supervisory authority over the General Land Office, which administered the public lands.

In his dissent in *Dred Scott*, Justice John McLean, who had earlier served as the Commissioner of the General Land Office, underscored the importance of recognizing settled congressional authority over the public lands and the western territories.<sup>295</sup> Without it, he wrote, settlement and expansion through the formation of "flourishing States, West and South," would not have happened.<sup>296</sup> He called it most unwise to abandon "a settled construction of the Constitution for sixty years," an "impressive lesson of practical wisdom" which had "secured to the country an advancement and prosperity beyond the power of computation."<sup>297</sup> "If the great and fundamental principles of our Government are never to be settled," he warned, "there can be no lasting prosperity," and the Constitution will "become a floating waif on the billows of popular excitement."<sup>298</sup>

The consequences of the *Dred Scott* decision were hardly theoretical. The slave states could collectively block any amendments to the Constitution that might repair the damage. Its view of the Property Clause spelled doom for the idea that the nation's public lands could be a tool for peaceably ending the nation's cleavage over slavery through the political process. By reading into the Constitution the idea that African-Americans could have no rights, and that the Property Clause gave Congress no authority to address slavery in territories acquired since the Constitution was adopted, the Court's decision made sectional civil war nearly inevitable.

The Supreme Court has never formally overruled *Dred Scott*. The Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution—the so-called Civil War Amendments—overruled Taney's view of the status of African-Americans. But these amendments did not affect *Dred Scott*'s holding that the Property Clause had a limited geographic scope.

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295. *Id.* at 529.

296. *Id.* at 544.

297. *Id.*

298. *Id.* at 544–45.

Interestingly, while the Utah Paper relies heavily on *Pollard*, it fails to mention *Dred Scott*, even though that decision is the strongest authority for its position. The omission is made more curious by the fact that one of the Paper's authors<sup>299</sup> had some years earlier tendered an *amicus* brief relying heavily on *Dred Scott* in support of a petition for Supreme Court review filed by a Nevada rancher who was arguing, among other things, that the U.S. had no constitutional authority over public lands.<sup>300</sup>

The reason the Utah Paper ignores *Dred Scott* is probably because it is the most thoroughly discredited decision in Supreme Court history, earning practically universal condemnation among historians and constitutional scholars.<sup>301</sup> Professor Akhil Reed Amar succinctly summarized the consensus critique: Taney's opinion "did violence to the Constitution's text, structure, enactment history, and early implementation."<sup>302</sup>

Senator Thomas Hart Benton, a defender of slavery but an ardent unionist,<sup>303</sup> wrote a book about the *Dred Scott* decision a few months after it was decided. He criticized the Court for putting itself squarely in conflict with the "uniform action of all the departments of the Federal government from its foundation to the present time."<sup>304</sup> That positioning, Benton wrote, cannot be accepted without "reversing that action, and admitting the political supremacy of the court, and accepting an altered Constitution from its hands and taking a new and portentous point of departure in the working of the government."<sup>305</sup> Much the same could be said about the effect of accepting the arguments of the Utah Paper and those taking similar positions.

The *Dred Scott* decision fully deserves its infamy. It ushered in human carnage on American soil never seen before or since. Meanwhile, like hundreds of thousands of Americans whose lives would be ended prematurely, and like Roger Brooke Taney himself—who died

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299. John W. Howard, *see* HOWARD ET AL., *supra* note 4, at i.

300. *United States v. Gardner*, 107 F.3d 1314 (9th Cir. 1997), *cert. denied*, 522 U.S. 907 (1997). Nearly a half-century earlier, Taney's decision was also cited without apology by a Texas law professor for the proposition that states own submerged public lands off the nation's coasts. Patterson, *supra* note 1, at 55, n.26, n.28.

301. *But see* MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (2006).

302. AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY*, 265 (2005).

303. Benton's stance against secession later earned him a chapter in John F. Kennedy's Pulitzer Prize-winning book *PROFILES IN COURAGE* (1955).

304. T.H. BENTON, *HISTORICAL AND LEGAL EXAMINATION OF THAT PART OF THE DECISION OF THE SUPREME COURT OF THE UNITED STATES IN THE DRED SCOTT CASE, WHICH DECLARES THE UNCONSTITUTIONALITY OF THE MISSOURI COMPROMISE ACT, AND THE SELF-EXTENSION OF THE CONSTITUTION TO TERRITORIES, CARRYING SLAVERY ALONG WITH IT* (1857), *quoted in* *Downes v. Bidwell*, 182 U.S. 244, 276 (1900).

305. *Id.*; *see also* FEHRENBACHER, *supra* note 251, at 425–26, 686.

in late 1864,<sup>306</sup> on the same day his home state of Maryland abolished slavery—*Dred Scott's* view of the Property Clause, like Justice McKinley's sweeping dicta in *Pollard*, would not survive the Civil War.

The Supreme Court has almost never mentioned *Dred Scott's* view of the Property Clause since it was decided. A rare exception came in 1900, when the Court took pains to be gentle in dismissing it. It was “unfortunate,” said Justice Henry Brown, writing for the Court in *Downes v. Bidwell*,<sup>307</sup> that Justice Taney addressed the Property Clause issue in *Dred Scott* “in view of the excited political condition of the country at the time.”<sup>308</sup> Brown rejected the idea that Taney's view of the Property Clause should control the question before the Court—the source and extent of Congress's power over the Territory of Puerto Rico. In considerable understatement, Brown found it simply “sufficient to say that the country did not acquiesce in [Taney's] opinion,” because the Civil War that followed “produced such changes in judicial, as well as public, sentiment as to seriously impair” its authority.<sup>309</sup>

### III. THE SUPREME COURT'S TREATMENT OF CONGRESS'S POWER OVER PUBLIC LANDS AFTER THE CIVIL WAR

With peace restored, the Supreme Court did not take long to restore its pre-*Pollard*, highly deferential view of Congress's power over public lands. The course was firmly set in three unanimous decisions handed down over a five-year period, each written by Justice Stephen J. Field.<sup>310</sup>

In *Grisar v. McDowell* (1867),<sup>311</sup> the Court noted with approval that “from an early period in the history of the government it has been the practice of the President to order, from time to time, as the exigencies

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306. A few months after Taney's death, speaking on a bill to appropriate funds to prepare and display a bust of Taney with those of his predecessors in the Supreme Court, Senator Charles Sumner of Massachusetts called his *Dred Scott* opinion “more thoroughly abominable than anything of the kind in the history of courts,” where judicial “baseness reached its lowest point,” “sustained by a falsification of history.” FEHRENBACHER, *supra* note 251, at 578–79.

307. *Downes*, 182 U.S. at 274.

308. *Id.*

309. *Id.*

310. Justice Field was appointed to the Supreme Court by Abraham Lincoln in 1863. Originally from the east, he had joined the Gold Rush to California in 1848 and served on the California Supreme Court for six years, four as Chief Justice, before joining the U.S. Supreme Court. CARL BRENT SWISHER, STEPHEN J. FIELD: CRAFTSMAN OF THE LAW, 25–118 (1930). Field later wrote the most searching exploration of the Constitution's Enclave Clause. *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 524 (1885), discussed in the text accompanying note 81–90 *supra*.

311. 73 U.S. 363 (1867). Field's opinion did not mention the Property Clause. It upheld President Fillmore's reservation of public lands in San Francisco from sale two months after California became a state, in order to set them apart for unspecified “public uses.” It rejected a claim to the land by a person who relied on the City's inchoate “pueblo right,” said to derive from Mexican law that had applied at the time the U.S. acquired the area which became California. *Grisar's* rejection of the claim seemed to contradict the Court's 1836 decision in *Mayor of New Orleans v. United States*, which upheld a municipal claim to land based on Spanish law. *See supra* text accompanying note 247.



of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses.”<sup>312</sup>

In *Gibson v. Chouteau* (1871),<sup>313</sup> the Court held that a state law statute of limitations did not apply to a dispute between competing claimants to public land in Missouri, because the Property Clause vests Congress with a power over public lands that is “subject to no limitations,” giving it the “absolute right” to decide when and under what conditions to transfer the property to others, and states cannot “interfere with this right or embarrass its exercise.”<sup>314</sup>

In *The Yosemite Valley Case, Hutchings v. Low* (1872),<sup>315</sup> the Court narrowly interpreted statutes authorizing divestiture of public lands in order to “preserve[] a wise control in the government over the public lands, and prevent[] a general spoliation of them under the pretense [sic] of intended settlement and pre-emption.” Otherwise, Justice Field wrote, Congress would be deprived “of the power to reserve such lands” for such “public uses” as “arsenals, fortifications, lighthouses, hospitals, custom-houses, court-houses, or for any other of the numerous public purposes for which property is used by the government.” The public purpose the government was seeking to serve in that case was permanently protecting for public enjoyment, through strict limitations imposed by federal law, astoundingly scenic lands the Congress granted to the state of California.<sup>316</sup>

In hindsight, these decisions reaffirming Congress’s broad powers over public lands were practically inevitable. The Civil War had changed forever the attitude of the American people about national power in relation to states. Even with slavery now formally outlawed by constitutional amendment, it would have been untenable for the Court to take seriously McKinley’s sweeping dicta in *Pollard*, and Taney’s constricted view of the Property Clause in *Dred Scott*. To do so would have been tantamount to insisting to Congress that, if it wanted to admit a new state into the Union, it would necessarily be relinquishing all control over all public lands in that state. To say Congress would have had difficulty accepting this is to understate the matter. After *Dred Scott* and the Civil War, the Court’s stature in the governing system was at a low ebb, and the representatives of the people in the states had more reason than ever to appreciate the “blood and treasure” they had expended to secure those lands for the Union.

Justice Field did not mention *Dred Scott* in any of these three decisions. His deference to Congress in these public lands cases is in sharp contrast to his general reluctance to defer to legislative authority,

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312. 73 U.S. at 381.

313. *Gibson v. Chouteau*, 80 U.S. 92 (1871).

314. *Id.* at 99.

315. 82 U.S. 77 (1872). This decision did not mention the Property Clause.

316. *Id.* at 86.

and his championing of economic liberty, which helped pave the way for the era of “substantive due process” in U.S. constitutional law.<sup>317</sup>

Ever since these decisions, the Supreme Court has uniformly adhered to *Gratiot* and the idea that the U.S. Government has sweeping authority over its public lands. The following is a sampling of those decisions. Some do not directly address the Property Clause, but are included because they reveal the consistency with which the Court both understood, and approved of, the policies of the Congress to acquire and reserve large amounts of public land in national ownership for such broad purposes as preserving scenery, wildlife, features of historic or scientific interest, and other things that can be lumped under the general heading of environmental conservation. Taken as a whole, they illustrate just how thoroughly Congress’s power to hold public lands inside states for broad public uses is woven into the fabric of American law, just as those lands themselves are now thoroughly woven into American culture.

— *Kohl v. United States* (1875) (unanimous)<sup>318</sup> (the U.S. government has authority “to appropriate lands or other property within the states for its own use, to enable it to perform its proper functions,” because such authority “is essential to its independent existence and perpetuity,” and states cannot interfere with its exercise).<sup>319</sup>

— *Van Brocklin v. Tennessee* (1886) (unanimous)<sup>320</sup> (lands owned by the U.S. inside the state of Tennessee are not subject to state taxation, because the U.S. “has the exclusive right to control and dispose of” public lands and “no [s]tate can interfere with this right, or embarrass its exercise”) (citing, among others, *Gratiot*, *Pollard*, and *Gibson v. Choteau*).<sup>321</sup>

— *United States v. Gettysburg Elec. Ry. Co.* (1896) (unanimous)<sup>322</sup> (U.S. has authority to acquire, from unwilling sellers, private lands inside a state for preservation and public instruction. The

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317. See e.g., SWISHER, *supra* note 310, at 426–27 (1930); PAUL KENS, JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO T 164, 266 (1997).

318. 91 U.S. 367 (1875). Only Justice Field dissented, solely on the ground that, in his view, Congress had not enacted the legislation he thought needed to exercise the authority. See *id.* 378–79.

319. *Id.* at 368.

320. 117 U.S. 151 (1886).

321. *Id.* at 168.

322. 160 U.S. 668 (1896). Four years earlier, in *Shoemaker v. United States*, 147 U.S. 282, 297 (1893), the Court noted that at one time, “in the memory of [living persons],” the idea that government could acquire private property for a public park, over the objection of its owner, would have been regarded as a “novel exercise of legislative power.” But now, the Court observed, practically all cities around the country had such parks, “for exclusive use as a pleasure-ground, for rest and exercise in the open air,” and state courts had rejected constitutional challenges to the government acquiring private property for such a use, deeming it “advantageous to the public for recreation, health, or business.” *Id.* at 297. The Court went on to uphold an 1890 act of Congress authorizing the U.S. to acquire private property in the District of Columbia in order to establish Rock Creek Park. *Id.* at 322. *Gettysburg* essentially reached the same result regarding acquisition of private land outside the District of Columbia, within the state of Pennsylvania. See *Gettysburg*, 160 U.S. at 669, 686.

Pennsylvania lands were the site of the pivotal Civil War Battle of Gettysburg, and the Court noted that for the U.S. to “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” would “show a proper recognition of the great things that were done there,” and enhance every citizen’s “love and respect for those institutions;” therefore the government’s authority “to condemn for this purpose need not be plainly and unmistakably” linked to any particular constitutional power).<sup>323</sup>

—*Camfield v. United States* (1897) (unanimous)<sup>324</sup> (U.S. can prohibit enclosures of its public lands, including outlawing fences that in fact enclose those lands even though they are located entirely on adjacent private lands, because the admission of a State does not deprive Congress of “the power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power”).<sup>325</sup>

—*Light v. United States* (1911) (unanimous)<sup>326</sup> (rejecting the argument that “Congress cannot constitutionally withdraw large bodies of land from settlement without the consent of the State where it is located,” because the U.S. can “prohibit absolutely or fix the terms on which its property may be used. As it can withhold or reserve the land it can do so indefinitely”).<sup>327</sup>

—*Utah Power & Light Co. v. United States* (1917) (unanimous)<sup>328</sup> (“the settled course of legislation, congressional and state, and repeated decisions of this court have gone upon the theory that the power of Congress [under the Property Clause] is exclusive[.] . . . From the earliest times Congress by its legislation, applicable alike in the States and Territories, has regulated in many particulars the use by others of the lands of the United States[.] . . . The States and the public have almost uniformly accepted this legislation as controlling, and in the instances where it has been questioned in this court its validity has been upheld and its supremacy over state enactments sustained”).<sup>329</sup>

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323. *Gettysburg*, 160 U.S. at 682–83.

324. 167 U.S. 518 (1897).

325. *Id.* at 525–26.

326. 220 U.S. 523 (1911). HOWARD ET AL., *supra* note 4, at 97, unpersuasively asserts that the “fundamental legitimacy of federal [land] ownership was neither joined nor decided in *Light*.”

327. *Light*, 220 U.S. at 535–36.

328. 243 U.S. 389 (1917). The Court’s opinion was written by Willis Van Devanter. His endorsement of the position that Congress had sweeping authority over public lands contrasts with his constricted view of other constitutional powers of Congress. Toward the end of his judicial career, he would vote to strike down key pieces of New Deal legislation, leading Franklin Roosevelt to propose his “court-packing” plan. *See, e.g.*, JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT 2–3 (2010). Before he was appointed to the Court by President Taft in 1910, Van Devanter had lived in Wyoming and then served as the Assistant U.S. Attorney General for the Interior Department. In *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336–37 (1963), Justice Douglas’s opinion for the Court noted that “as Assistant Attorney General for the Interior Department from 1897 to 1903, [Van Devanter] did more than any other person to give character and distinction to the administration of the public lands.”

329. 243 U.S. at 404–05.

—*McKelvey v. United States* (1922) (unanimous)<sup>330</sup> (“It is firmly settled that Congress may prescribe rules respecting the use of the public lands. It may sanction some uses and prohibit others, and may forbid interference with such as are sanctioned.”).<sup>331</sup>

—*Ashwander v. Tennessee Valley Auth.* (1936)<sup>332</sup> (the Property Clause’s grant of power to Congress is “made in broad terms,” so that “it lies in the discretion of the Congress, acting in the public interest, to determine of how much of [its] property it shall dispose.” The Court cited decisions back to and including *Gratiot*, and dismissed *Pollard v. Hagan* as dealing only with “the title of the States to tidelands and the soil under navigable waters within their borders.”).<sup>333</sup>

—*United States v. San Francisco* (1940)<sup>334</sup> (“Congress may constitutionally limit the disposition of the public domain to a manner consistent with its view of public policy,” and has “complete power” over “public property entrusted to it.” The Court also cited *Gratiot* for the proposition that Congress’s Property Clause power is “without limitations,” and made no reference to *Pollard*.)<sup>335</sup>

—*United States v. Wyoming* (1947) (unanimous)<sup>336</sup> (noting the “necessity” for Congress to reserve “tracts of public lands to accomplish such important purposes as preserving the national forests . . . establishing public parks, and the like,” and finding the United States “not inhibited from making such reservations and dispositions” of public lands “as required by the public interest and as authorized by applicable statutes”).<sup>337</sup>

—*Arizona v. California* (1963)<sup>338</sup> (rejecting the argument, based “largely upon statements in [*Pollard*],” that the United States has no power, after Arizona became a state, to “reserve waters for the use and benefit of” public lands in the State, because *Pollard* involved “only the shores of and lands beneath navigable waters,” and “cannot be accepted as limiting the broad powers of the United States to regulate government . . . lands” under the Property Clause, a matter upon which the Court emphatically expressed “no doubt.”).<sup>339</sup>

—*Kleppe v. New Mexico* (1976) (unanimous)<sup>340</sup> (holding that while the “furthest reaches of the power granted by the Property Clause have not yet been definitively resolved, we have repeatedly observed”

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330. 260 U.S. 353 (1922). Justice Van Devanter wrote this opinion as well.

331. *Id.* at 359.

332. 297 U.S. 288 (1936). Only Justice McReynolds dissented. *Id.* at 356–71. In a separate opinion joined by three other Justices, Justice Brandeis wrote that he would not have reached the constitutional issue because he thought the case could have been resolved without doing so, but also noted that he had no dispute with the Court’s “conclusion on the constitutional question.” *Id.* at 341.

333. *Id.* at 336–37.

334. 310 U.S. 16 (1940). Again Justice McReynolds was the sole dissenter, without opinion. *Id.* at 32.

335. *Id.* at 29–30.

336. 331 U.S. 440 (1947).

337. *Id.* at 453–54.

338. 373 U.S. 546 (1963). There were no dissents from this part of the Court’s opinion. *See id.* at 627–42 (Douglas, J., dissenting on other grounds).

339. *Id.* at 597–98.

340. 426 U.S. 529 (1976).

that the power “thus entrusted to Congress is without limitations,” citing *Gratiot* several times, and making no reference to *Pollard*).<sup>341</sup>

—*United States v. Locke* (1985)<sup>342</sup> (in upholding Congress’s power to forfeit property interests in the public lands that have not been properly recorded, the Court noted that the U.S., “as owner of the underlying fee title to the public domain, maintains broad powers over the terms and conditions upon which the public lands can be used, leased, and acquired.”).<sup>343</sup>

—The Court has also many times followed what it has called “the established rule” that grants of public lands “are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it.”<sup>344</sup> While most of the cases applying this canon have rejected claims by private parties, at least one decision applied the canon against a state agency.<sup>345</sup>

#### A. SUMMARY CONCLUSION ON THE PROPERTY CLAUSE

Given the Court’s numerous, consistent decisions upholding Congress’s broad power over public lands stretching back a century and a half, the Utah Paper correctly concedes that the Property Clause is “likely” the U.S.’s “most powerful argument.”<sup>346</sup> It fails even to mention most of these decisions, and says little about those it does address, except to contend, lamely, that they do not answer the question “whether the public lands belong to the United States or should properly have transferred to State ownership on admission to the Union.”<sup>347</sup>

That is a brave assertion, but it is practically unimaginable that the Supreme Court—or indeed any one of its Justices, no matter how skeptically he or she might regard other assertions of national power—could be persuaded to reject the plain language and unmistakable thrust of all these decisions, by accepting the Utah Paper’s contention that the question is still open whether Congress has the constitutional power to own public lands inside a state indefinitely.

While *Kleppe* and some of these other decisions speak of Congress’s Property Clause power as “without limitations,” no one would deny that the Constitution’s other specific limitations on Congress’s power would apply. For example, Congress could not use its

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341. *Id.* at 539–41.

342. 471 U.S. 84 (1985).

343. *Id.* at 104.

344. *United States v. Union Pac. R.R. Co.*, 353 U.S. 112, 116 (1957). *See generally* John D. Leshy, *A Property Clause for the Twenty-First Century*, 75 U. COLO. L. REV. 1102, 1106–13 (2004) (discussing cases displaying the “remarkable lengths” to which the Court has construed grants of land by the United States in its favor).

345. *See United States v. Grand River Dam Auth.*, 363 U.S. 229, 235–36 (1960).

346. HOWARD ET AL., *supra* note 4, at 113.

347. *Id.* at 98.

Property Clause power to prohibit political speechmaking on public lands, for that would violate the specific command of the First Amendment.<sup>348</sup> That is, however, a constitutional matter very different from limiting Congress's power over public lands on the basis of judicially-fashioned notions of "equal footing" or "equal sovereignty" that do not appear in the Constitution.<sup>349</sup>

#### B. *POLLARD'S VIABILITY SINCE THE CIVIL WAR*

For the most part, *Pollard's* narrow holding—that states automatically, at statehood, succeed to ownership of a narrow class of lands within their borders; namely, certain submerged lands—has survived.

The courts have clarified some of McKinley's language in *Pollard*; for example, he several times referred to the "shores" of navigable waters, without elaboration,<sup>350</sup> but ever since, *Pollard* has been construed as not applying to land along the shores above the highwater mark.<sup>351</sup> McKinley's opinion mostly spoke of lands under "navigable waters," but also noted evidence showing that the land there at issue was covered by water "at high tide."<sup>352</sup> Since the Civil War, the Court has made clear that *Pollard* applies both to lands under navigable waters, even if the waters are not tidally influenced,<sup>353</sup> and to lands under waters that are tidally influenced, even if not navigable.<sup>354</sup>

But the Court has, on several occasions, ignored McKinley's sweeping statements to the effect that, because ownership of the beds of navigable waters is essential to a state's sovereignty, the U.S. only holds those lands temporarily in trust for new states, and cannot transfer title to those submerged lands to others while the land is in territorial status.<sup>355</sup> These decisions show, in other words, that many of McKinley's sweeping statements, purporting to be of constitutional principle leading to the result he reached, are not, in fact, a constitutional doctrine at all. In 1894, for example, the Supreme Court explained that, "[n]otwithstanding the *dicta* contained in some of the opinions of this court . . . to the effect that Congress has no power to grant any land below high water mark of navigable waters in a Territory of the United States [that is, before statehood], it is evident that this is not strictly true."<sup>356</sup> Indeed, the Court has long acknowledged that the

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348. See Appel, *supra* note 12.

349. See *infra* text accompanying notes 413–474.

350. See *Pollard v. Hagan*, 44 U.S. 212, 225, 230 (1845).

351. See, e.g., *PPL Mont. LLC v. Montana*, 565 U.S. 576, 589–91 (2012).

352. See *Pollard*, 44 U.S. at 220–21, 229–30.

353. *Barney v. Keokuk*, 94 U.S. 324, 338 (1877).

354. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476 (1988).

355. *Pollard*, 44 U.S. at 230. See *supra* text accompanying notes 230–232.

356. *Shively v. Bowlby*, 152 U.S. 1, 47–48 (1894).

U.S. can defeat a new state's *Pollard*-rooted claim of ownership of the beds of navigable waters, simply by conveying ownership of them to third parties *before* statehood.<sup>357</sup> This is, as Professor Rasband has pointed out, inconsistent with the rationale McKinley put forth in *Pollard*.<sup>358</sup>

Other Supreme Court decisions have narrowed *Pollard*'s narrow holding even further; to wit:

—The Court has for more than a century held that *Pollard* does not apply to islands or other “fast lands” surrounded by submerged lands to which *Pollard* applies.<sup>359</sup>

—The Court has held that *Pollard* does not apply to lands that accrete or attach to submerged lands, because of the “long-established” rule of federal common law that accretions of land belong to the owner of the uplands.<sup>360</sup>

—The Court has held that the U.S. can defeat a state's claim of ownership of the beds of navigable waters by reserving them *for its own uses* before statehood, if it does so clearly.<sup>361</sup> As Professor Rasband has pointed out, the Court's adoption of the idea that the U.S. intention be made plain reflects the English common law rule that the U.S. Supreme Court misconstrued in *Martin v. Waddell*.<sup>362</sup>

—The Court has several times confirmed that *Pollard* does not apply to the beds of *non-navigable* waters on the public lands, which remain in U.S. ownership after statehood. Ironically, the leading case on this point involved submerged lands that comprise much of the Malheur National Wildlife Refuge in Oregon, the scene in early 2016 of an armed takeover by a private group of radicals who claimed there was no constitutional basis for the U.S. to own it.<sup>363</sup>

—In a series of cases, the Court has held that *Pollard* does not give coastal states ownership of submerged lands off their coasts.<sup>364</sup> In its brief in the first of these cases, the U.S. Justice Department refused to endorse *Pollard*'s narrow holding, describing as “unsound” the “concept of ownership as an attribute of sovereignty” and governed by notions of equal footing.<sup>365</sup> In ruling for the United States, the Court

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357. See, e.g., *Goodtitle v. Kibbe*, 50 U.S. 471, 478 (1850).

358. See Rasband, *supra* note 45, at 54–57.

359. See, e.g., *Scott v. Lattig*, 227 U.S. 229, 244–45 (1913); *Texas v. Louisiana*, 410 U.S. 702, 713–14 (1973). State ownership may extend to tiny islands in navigable waters that are “little more than rocks rising very slightly above the level of the water” and which are “of no apparent value.” *United States v. Chandler-Dunbar Water Power Co.*, 209 U.S. 447, 451 (1908).

360. *California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 285–86 (1982).

361. See, e.g., *Utah Div. of State Lands v. United States*, 482 U.S. 193, 200–03 (1987); *United States v. Alaska*, 521 U.S. 1, 33–60 (1997); *Alaska v. United States*, 545 U.S. 75, 78–79 (2005).

362. See Rasband, *supra* note 45, at 55–57.

363. See, e.g., *United States v. Oregon*, 295 U.S. 1 (1935).

364. See, e.g., *United States v. California*, 332 U.S. 19, 36–38 (1947).

365. See Hanna, *supra* note 45, at 521 n.5 (citing Brief for the United States, at 143); see also *California*, 332 U.S. at 30–31; Landever, *supra* note 3, at 592 n.223, 593–94 n.232.

noted the Justice Department's position without specifically addressing it.<sup>366</sup>

—The Court has held that, where a state (or the state's successor in title) owns submerged lands, the “navigational servitude” grounded in national power over navigation means that, in many circumstances, the U.S. has no duty to compensate the owner of submerged lands for impairing or even destroying its property interest.<sup>367</sup> For example, the Court has held that the “power of the federal Government in respect of navigation” is so “dominant” that if its exercise injures the streambed the owner cannot obtain compensation because the injury is deemed to result from “the lawful exercise of a power to which that property has always been subject.”<sup>368</sup>

The net result of all these decisions is that—despite Justice McKinley's sweeping assertion that the U.S. may own lands only for the “temporary purposes” of raising revenue and admitting new states—even *Pollard's* narrow holding has been greatly eroded. It is now, as the Supreme Court has made clear, merely a “default rule” giving states the presumption of title to submerged lands under waters that are navigable at statehood.<sup>369</sup> That presumption can be defeated if the U.S. has earlier conveyed ownership of such submerged lands to others. It can also be defeated if the U.S. had kept those submerged lands for its own purposes by actions revealing an intent to defeat a state's expectancy of ownership.<sup>370</sup>

In sum, even *Pollard's* narrow holding—though masquerading as an impregnable constitutional principle, helped along by McKinley's sweeping dicta—has been treated merely like a common law presumption which can be overcome by either the executive or the legislative branches of the national government without invading any rights a state may claim.

#### IV. THE UTAH PAPER'S “COMPACT THEORY”

The Utah Paper argues that the state and the U.S. government entered into a “compact” when the U.S. admitted Utah into the Union. In this “compact,” according to the Utah Paper, “Utah agreed to allow” the U.S. to retain ownership of land within its borders, and in return the U.S. “agreed to promptly and completely dispose of that land by sale or grant.”<sup>371</sup> The Paper does not argue that the commitment was express; instead, it finds it “[i]mplicit” in the Utah Enabling Act.<sup>372</sup>

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366. See *infra* text accompanying notes 431–442.

367. See 2 WATERS AND WATER RIGHTS § 35.02(c) (1.01) (Amy K. Kelley, ed., 3rd ed. 2017).

368. See, e.g., *United States v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 312 U.S. 592, 596–97 (1941); see also *United States v. Grand River Dam Auth.*, 363 U.S. 229, 231–32 (1960).

369. *Idaho v. United States*, 533 U.S. 262, 272–73 (2001).

370. *Id.* at 273.

371. HOWARD ET AL., *supra* note 4, at 52–53. The Supreme Court has made it clear that, while a statehood enabling act and the counterpart provisions in a state constitution are, “in form at least,” a



Nothing in the circumstances of Utah's admission supports this claim. It is true that the 1894 Utah Enabling Act, like that of most other states, proposed to admit the new state on an "equal footing with the original states."<sup>373</sup> But section 3 of the Enabling Act, like those of almost all the states that were admitted to the Union after the original thirteen, also required the people of Utah to "*forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof,*" and to agree that those lands "*shall be and remain subject to the disposition of the United States.*"<sup>374</sup> It also provided that the state "*shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this Act.*"<sup>375</sup>

In the Utah Enabling Act, the United States also offered to make generous grants of public land to the new state. These included giving the state four sections of public land in every township, or about one-ninth of the total area of the state, to support the common schools.<sup>376</sup> Earlier-admitted states received only one or two sections in every township for this purpose.<sup>377</sup> The Enabling Act also gave the state of Utah more than a million acres of public land for an assortment of purposes,<sup>378</sup> including 500,000 acres for the "establishment of permanent water reservoirs for irrigating purposes."<sup>379</sup> Congress had never before provided a new state with such a grant.<sup>380</sup>

But the Enabling Act also excluded any public lands "*embraced in permanent reservations for national purposes,*" and went on to exclude all other public lands "*embraced in Indian, military, or other reservations of any character,*" until such "reservations" are "extinguished" and the lands made available for divestiture.<sup>381</sup>

Eighteen months after the Enabling Act was enacted, President Cleveland proclaimed the admission of Utah "into the Union on an equal footing with the original States." But he did so only after declaring that the "terms and conditions prescribed by the Congress" for the state to qualify for admission "have been duly complied with," including that the State had adopted an "ordinance irrevocable without the consent of

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compact between the United States and the new state, to the extent the compact deals with lands, it "involves no question of equality of status." *Stearns v. Minnesota*, 179 U.S. 223, 244-45 (1900); see also text accompanying notes 423-430 *infra*.

372. *Id.* at 3.

373. Utah Enabling Act, ch. 138, 28 Stat. 107 (1894).

374. *Id.* at 108 (emphasis added).

375. *Id.* at 110 (emphasis added).

376. § 6, 28 Stat. at 109.

377. See *GATES*, *supra* note 16, at 314.

378. §§ 7-8, 12, 28 Stat. at 109-10.

379. § 12, 28 Stat. at 110.

380. See *GATES*, *supra* note 16, at 314; see also *Lawton*, *supra* note 12, at 27-28.

381. 28 Stat. at 109 (emphasis added).

the United States,” that made the “various stipulations” recited in the Enabling Act.<sup>382</sup>

When measured against all this *explicit* language reserving full authority in the U.S. over the public lands it was retaining in the new state, the Utah Paper’s argument that the U.S. nevertheless was making, at the same time, an *implicit* commitment to divest itself of ownership of all those retained public lands is, in a word, far-fetched.

Professor Kochan puts forward a variation of the Utah Paper’s argument. He maintains that the statehood arrangement actually involved *Utah in effect agreeing to convey clear title to public lands to the United States*, and the United States in return accepting “a duty to dispose of the public lands” it thus “acquired” through the Utah Enabling Act and the state’s disclaimer.<sup>383</sup> He cites nothing in the circumstances of Utah’s admission, or of the admission of any other state before or afterward, that supports this interpretation, for none exists. Utah had no claim, credible or otherwise, to public lands prior to or at statehood.<sup>384</sup>

Starting from this wrong-headed assumption that Utah was somehow conveying public land to the United States as part of the statehood arrangement, Professor Kochan interprets language in the Enabling Act as indicating the U.S. was assuming the obligation to divest itself of ownership of all public lands in the new state’s borders. But he misreads the key section, § 3:

That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof; and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto *shall have been extinguished by the United States*, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.<sup>385</sup>

Professor Kochan focuses on the italicized words to suggest the United States was anticipating that it would not hold onto title to public lands forever. The same language appears in section 6 of the Enabling Act, which provides that the state cannot be credited with public lands “embraced in Indian, military, or other reservations of any character . . . until the reservation *shall have been extinguished* and such lands be restored to and become a part of the public domain.”<sup>386</sup>

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382. Proclamation No. 9, 29 Stat. 876–77 (1895).

383. Kochan, *supra* note 3, at 1146, 1151.

384. The exception that proves this as a rule is Texas. As noted earlier, Texas was an independent republic when it joined the Union, and its annexation by the U.S. acknowledged that it retained title to public lands within its borders. *See supra* text accompanying notes 108–109.

385. 28 Stat. at 108 (emphasis added).

386. 28 Stat. at 109 (emphasis added).

The most natural reading of “shall have been” is as a conditional statement of what might happen in the future. Reading it instead to create a legal obligation on the part of the United States, as Professor Kochan does, is inconsistent with other parts of the Enabling Act, with its setting, and indeed, as discussed earlier, with almost the entire history of the statehood admission process dating back to the founding of the nation.<sup>387</sup>

Professor Kochan similarly misinterprets language in section 9 of the Enabling Act, which gives the new state five percent “of the proceeds of the sales of public lands lying within said State, which *shall be sold* by the United States subsequent to the admission of said State into the Union . . .”<sup>388</sup> He argues that this “mandatory language removes from the federal government the choice to never dispose and instead retain” unappropriated public lands.<sup>389</sup>

Once again he packs much more freight on the word “shall” than it can bear in this context. Its most natural reading is again merely stating what might happen in the future, rather than legally committing the U.S. government to sell all the public lands it owns in the state. It was perfectly understandable that the drafters of the Enabling Act would want to make clear that the United States was not obliged to pay the new state of Utah five percent of the proceeds of sales of public lands within its borders that had *preceded* Utah’s entry into the Union. Thus, they took pains to limit the U.S. revenue-sharing obligation to public lands “which shall be sold . . . subsequent to the admission” of Utah.<sup>390</sup> That this is the correct reading is shown by the fact that identical language appears in the Nevada Enabling Act. While it was being considered in the Congress in 1864, a proposal that would have applied the revenue-sharing to past as well as future sales of public lands was defeated.<sup>391</sup>

Professor Kochan tries to bolster his argument that everyone involved believed the U.S. was committing itself in the Enabling Act to divest itself of ownership of the public lands by referring to a resolution adopted by the Utah State Senate nearly twenty years after statehood, a resolution “exclaiming,” as he put it, Utah’s “understanding that the federal government had made a promise to dispose of the public lands it acquired when Utah became a state.”<sup>392</sup> The language he quotes from the resolution does no such thing. Indeed, it does not even urge the United States to divest itself of ownership of all or even much of the

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387. See *supra* text accompanying notes 38–68, 129–186.

388. 28 Stat. at 110 (emphasis added).

389. Kochan, *supra* note 3, at 1157–58.

390. Nevada Enabling Act, ch. 36, 13 Stat. 30, 32 (1864).

391. *Id.*; Cong. Globe, 38th Cong., 1st Sess. 1558 (1864); Gates, *supra* note 16, at 309; see also Barrett, *supra* note 12, at 781–82.

392. Kochan, *supra* note 3, at 1146.

lands it owns. It merely urges the U.S. to once again “return to the former liberal National attitude toward the public domain,” which it goes on to describe as a “policy that will afford an opportunity to settle our lands and make use of our resources on terms of equality with the older states.”<sup>393</sup>

More fundamentally, Professor Kochan, like the authors of the Utah paper, is engaging in an extremely selective reading of Utah history. Almost from the moment Utah was admitted to the Union, in fact, its political leaders fully supported the federal policy of reserving increasing amounts of public lands within its borders in permanent federal ownership. This remained the mainstream view in Utah for generations after statehood. For example, the first forest reserve on Utah public lands was established by President Grover Cleveland within months of statehood, in early 1897, largely through, according to historian Elmo Richardson, “the personal efforts of [Utah] Governor Heber M. Wells.”<sup>394</sup> Indeed, Wells took the extra step of facilitating the establishment of federal forest reserves by withdrawing state-owned lands enclosed by proposed federal reserves from purchase and settlement.<sup>395</sup>

John Cutler, who succeeded Wells as governor, “continued the close connection between state and federal administrations, and sponsored legislation to preserve additional areas.”<sup>396</sup> In April 1902, the general conference of the Mormon Church voted to “encourage the federal government to withdraw all the [public] lands in watersheds along the Wasatch Front for protection in National Forests.”<sup>397</sup> Most of the forest reserves established in Utah during this period, according to historian Thomas G. Alexander, “resulted from local pressure to protect watersheds.”<sup>398</sup>

Reed Smoot, a Republican who represented Utah in the U.S. Senate from 1903 to 1933, and who was also a high official in the Mormon Church, was an active supporter of President Theodore Roosevelt’s vigorous campaign to reserve many public lands in U.S. ownership more or less permanently.<sup>399</sup> When Congress in 1907 prohibited the President from establishing new forest reserves in six western states, Utah was conspicuously not among them.<sup>400</sup> Smoot

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393. *Id.*

394. ELMO R. RICHARDSON, *THE POLITICS OF CONSERVATION: CRUSADES AND CONTROVERSIES 1897–1913* 12 (1962).

395. *Id.* at 40.

396. *Id.* at 41.

397. THOMAS G. ALEXANDER, *UTAH: THE RIGHT PLACE* 226 (2d ed. 2003) (Statehood Centennial Project of the Utah State Historical Society).

398. *Id.*

399. *Id.* at 302; *see also* RICHARDSON, *supra* note 394, at 12, 26.

400. Forest Service, ch. 2097, 34 Stat. 1269 (1907).

became a champion of the national parks, joining forces with John Muir in the unsuccessful campaign to stop the damming of the Hetch-Hetchy Valley in California's Yosemite National Park, and becoming a primary sponsor of the National Park Organic Act that was adopted in 1916.<sup>401</sup> He later became a primary proponent of Zion and Bryce Canyon National Parks and Cedar Breaks National Monument in Utah, as well as other national parks across the country.<sup>402</sup> As Smoot's efforts illustrated, the "designation of national forests and parks" in this era had gained the "heartly approval of most Utahns," according to Alexander.<sup>403</sup>

Another telling episode in Utah history ignored by the Utah Paper and by Professor Kochan occurred some years later. In 1929, President Hoover wrote a letter to the governors of western states proposing a commission to reevaluate the nation's policy regarding the arid public lands.<sup>404</sup> Republican Representative Don Colton of Utah introduced a resolution to create such a body, explaining on the floor of the House that the lack of "supervision or control" on about 200 million acres of arid public lands has led to severe problems of overgrazing and erosion, with vegetation "being destroyed" and the grazing lands "being ruined," all calling into question "the future of the livestock industry in the West."<sup>405</sup> Congress established the Commission in 1930, and in 1931 it recommended that title to all the public lands in the west believed to be useful primarily for livestock grazing should be offered to the states, with the U.S. retaining only the mineral rights.<sup>406</sup>

Led by Utah Governor George Dern, the western states spurned the Committee's suggestion, and Congress never seriously considered it.<sup>407</sup> Historian Louise Peffer wrote that the lack of support for the idea "clarified opinion" in support of national control and continuing ownership of these lands, removing perhaps the largest obstacle to bringing the arid public "grazing lands into the conservation program;" in effect, giving an "all-clear signal for the enactment of grazing-control legislation" that would be enacted within three years.<sup>408</sup>

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401. Thomas G. Alexander, *Senator Reed Smoot and Western Land Policy, 1905-1920*, 13 ARIZ. & WEST 245, 247-53 (19710).

402. Alexander, *supra* note 397, at 302; Alexander, *supra* note 401.

403. Alexander, *supra* note 401; see also JOHN ISE, UNITED STATES FOREST POLICY, 294-95 (1923) (describing that Utah was generally more supportive of forest reserves than some other western states).

404. Louise Peffer, THE CLOSING OF THE PUBLIC DOMAIN: DISPOSAL AND RESERVATION POLICIES 1900-50 203 (1951).

405. 72 Cong. Rec. 342, 408 (1929); see also Peffer, *supra* note 404, at 203.

406. Peffer, *supra* note 404, at 204.

407. *Id.* at 205-13.

408. *Id.* at 213. The episode is also discussed in GATES, *supra* note 16, at 524-29. The adoption of the Taylor Grazing Act of 1934 is discussed below. See *infra* at text accompanying notes 509-518.

Governor Dern explained the states' reasoning to a congressional committee. The United States, he testified, had already granted the states "millions of acres of this same kind of land . . . which is yielding no income. Why should they want more of this precious heritage of desert?"<sup>409</sup> In that same testimony, Governor Dern argued that if the ownership of the lands was to be transferred, the states ought to be able to take title to the minerals as well. He did not, however, claim that the states had a legal right to the minerals or the land surface, noting that it was "not the law" that the state had an "equal footing" claim to all the public lands.<sup>410</sup>

Once the lack of interest in transferring arid lands to the states became obvious, Utah Representative Don Colton introduced a bill to provide mechanisms for the U.S. to manage livestock grazing and restore the health of these lands abused by overgrazing.<sup>411</sup> Although he left Congress in 1932, his idea was picked up by Congressman Edward Taylor of Colorado, and President Roosevelt signed it into law in 1934.<sup>412</sup>

#### V. "EQUAL FOOTING" AND "EQUAL SOVEREIGNTY"

The Utah Paper argues that the Constitution contains, and invites the judiciary to enforce, a principle of "equal footing" or "equal sovereignty" among the states. Besides *Pollard v. Hagan*, it primarily relies on the Supreme Court's decisions in *Coyle v. Smith*,<sup>413</sup> and *Shelby County v. Holder*.<sup>414</sup> The weaknesses of *Pollard v. Hagan* have been previously discussed at length,<sup>415</sup> and, as noted earlier, the drafters of the U.S. Constitution excised an "equal footing" idea from the final draft of the provision authorizing Congress to admit new states.<sup>416</sup>

The Court's modern embrace, by a five-to-four margin, of the "equal sovereignty" idea in *Shelby County* has been controversial. Justice Ginsburg wrote a lengthy, critical dissent on the point.<sup>417</sup> One scholar called the suggestion that the U.S. must treat states equally as a "chimera, without support in constitutional text, history, or precedent."<sup>418</sup> The eminent legal thinker Richard Posner was equally

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409. Peffer, *supra* note 404, at 208.

410. Granting Remaining Unreserved Public Lands to the States: Hearings on H.R. 5840 Before the House Comm. on the Public Lands, 72d Cong. 1st Sess. 15 (1932).

411. See *infra* text accompanying notes 509–518.

412. *Id.*

413. 221 U.S. 559, 559 (1911); HOWARD ET AL., *supra* note 4, at 58–59.

414. 570 U.S. 129 (2013), *Shelby County* was prefigured by *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009). See HOWARD, *supra* note 4, at 60–61, 75.

415. See *supra* text accompanying notes 227–287.

416. See *supra* text accompanying notes 59–61.

417. *Shelby Cty.*, 570 U.S. 129 (Ginsburg, J., dissenting).

418. Zachary S. Price, *NAMUDNO's Non-Existent Principle of State Equality*, 88 N.Y.U. L. REV. 24, 24 (2013); see also Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207, 1207 (2016).

dismissive, writing that “there is no doctrine of equal sovereignty. The opinion rests on air.”<sup>419</sup> Posner’s assessment has been described as the “consensus critical reaction” to the decision.<sup>420</sup> As Professor John Hanna put it nearly 70 years ago, while the idea can be found in the cession of the landed states and the Northwest Ordinance of 1787, “equal footing is not a constitutional expression,” and it is also “hard to find any other point of agreement about it.”<sup>421</sup>

Whatever *Shelby County* and *Coyle* might mean in other contexts, it deserves emphasis that neither had anything to do with public lands. They applied a generalized notion of state political equality to insulate traditional state prerogatives from congressional interference in very narrow circumstances. *Shelby County* protected Alabama’s sovereign authority to enact and implement some kinds of state laws dealing with voting without first obtaining approval from the U.S. Attorney General or a three-judge court, as required by the federal Voting Rights Act. *Coyle* preserved Oklahoma’s power to fix the geographic location of its state capital, rejecting a limitation on that power which Congress had included in the state’s Enabling Act. *Coyle* has always been understood as having no implications for U.S. ownership of public lands within a state, and as creating no obstacle to enforcing conditions Congress put on a state’s admission to the Union that are authorized by the Property Clause or other parts of the Constitution.<sup>422</sup>

In fact, the U.S. Supreme Court has enforced provisions in statehood enabling acts dealing with public lands in a number of cases. In its 1900 decision in *Stearns v. Minnesota*, for example, the Court distinguished between enabling act provisions that refer to “political rights and obligations,” and those that refer to “property.”<sup>423</sup> Forecasting its decision eleven years later in *Coyle*, it noted that the “full equality” with which a new state enters into the Union “may forbid any agreement or compact limiting or qualifying [that new state’s] political rights and obligations.” It went on to say, however, that “a mere agreement in reference to property involves no question of equality of status, but only of the power of a State to deal with the nation . . . in reference to such property.”<sup>424</sup>

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419. Richard A. Posner, *The Voting Rights Act Ruling Is About the Conservative Imagination*, SLATE (June 26, 2013, 12L16 AM), [http://www.slate.com/articles/news\\_and\\_politics/the\\_breakfast\\_table/features/2013/supreme\\_court\\_2013/the\\_supreme\\_court\\_and\\_the\\_voting\\_rights\\_act\\_striking\\_down\\_the\\_law\\_is\\_all.html](http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/the_supreme_court_and_the_voting_rights_act_striking_down_the_law_is_all.html).

420. Thomas Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. 1087, 1090 (2016).

421. Hanna, *supra* note 45, at 522–23.

422. See Julien C. Monnet, *Violations by a State of the Conditions of Its Enabling Act*, 10 COLUM. L. REV. 591, 596–97 (1910).

423. 179 U.S. 223, 244–46 (1900).

424. *Id.* (emphasis added).

In *Stearns*, the Court upheld provisions in Minnesota's admission statute that gave public land to the state on the condition that it provide favorable tax treatment to a railroad operating on that land. Congress had independent power under the Property Clause, the Court reasoned, to attach that condition to a grant of public land.<sup>425</sup> It was, therefore, irrelevant whether Congress was treating Minnesota differently from other states. In fact, as observed in the most comprehensive analysis of statehood enabling acts, the history of Congress's use of conditions in those acts undermines the Supreme Court's occasional suggestions that "equal footing" has some grounding in the Constitution.<sup>426</sup>

More than a quarter of a century before *Stearns v. Minnesota*, the Court suggested that provisions in statehood enabling acts requiring new states to acknowledge U.S. ownership and control of public lands simply reinforce what is already the case under the Property Clause. In its 1871 decision in *Gibson v. Choteau*, for example, the Court noted that such disclaimers were put in enabling acts simply as a precaution, "to prevent the possibility of any attempted interference with" U.S. control of its public lands. The Property Clause, said the Court, gives Congress the "absolute right" to decide what to do with its property, regardless of what a state may want, and states cannot "interfere with this right or embarrass its exercise."<sup>427</sup> *Coyle v. Smith*<sup>428</sup> reaffirmed this notion, acknowledging that Congress could put conditions on a state's admission to the Union that "are within the scope of the conceded powers of Congress over the subject,"<sup>429</sup> which includes Congress's plenary authority under the Property Clause to retain ownership of public lands in a state after it is admitted.

Other decisions by the Court also rest on the premise that Congress can exercise broad power over public lands in the statehood admission process. For example, several have enforced, long after statehood, restrictions Congress included in statehood enabling acts on a state's use of lands the U.S. granted to it at statehood.<sup>430</sup> The Utah Paper does not address any of these decisions.

In a singular case that provoked a sharp dissent, the Court once did use an equal footing rationale to *reject* a state's claim that it was entitled to more land than other states. This decision, *United States v. Texas*,<sup>431</sup> came in the aftermath of the Court's 1947 decision that *Pollard's* narrow

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425. *Id.* at 251–52.

426. See Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119, 124 (2004).

427. 80 U.S. 92, 99 (1871).

428. 221 U.S. 559 (1911).

429. *Id.* at 574.

430. See, e.g., *Ervien v. United States*, 251 U.S. 41 (1919); *Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295 (1976); see also *ASARCO v. Kadish*, 490 U.S. 605 (1989).

431. 339 U.S. 707 (1950).



holding should not be extended to give coastal states a claim to ownership of submerged lands off their coasts, in part because of the significance of coastal areas to national security.<sup>432</sup> Texas had then brought a separate case, arguing that it should be treated differently from the other coastal states, and asked the Court to find that it had retained ownership of submerged lands off its coasts, because it had been an independent sovereign before it was annexed to the Union and admitted as a new state. This meant its admission to the Union was uniquely<sup>433</sup> the result of genuine bargaining between two independent sovereigns.<sup>434</sup>

The Court rejected its claim. It emphasized that the equal footing clause in statehood enabling acts “does not, of course, include economic stature or standing,” because size, location, geology, and other factors “have created great diversity in the economic aspects of the several States.”<sup>435</sup> The Court noted that a similar diversity existed regarding the amount of public lands within the borders of the various states, because some states “were sovereigns of their soil” when they entered the Union, and some “had within their boundaries tracts of land belonging to the Federal Government,” and many states entered into “special agreements with the Federal Government governing property within their borders,” citing *Stearns*.<sup>436</sup> “The requirement of equal footing,” the Court reaffirmed, “was designed not to wipe out those diversities but to create parity as respects political standing and sovereignty.”<sup>437</sup>

The Court then acknowledged that “equal footing” in the enabling acts has “long been held to have a direct effect on certain property rights,” citing *Pollard* and the cases applying it.<sup>438</sup> It went on to hold that the idea “works the same way in the converse situation presented by this case,” so that it does not carry with it “any implied, special limitation of any of the paramount powers of the United States in favor of a State.”<sup>439</sup> The Court assumed that prior to its annexation, the Republic of Texas “had not only full sovereignty over the marginal sea but ownership of it, of the land underlying it, and of all the riches which it held.”<sup>440</sup> But when Texas ceased being an independent nation, joined the Union, and became a state on an ‘equal footing’ with all the other

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432. *United States v. California*, 332 U.S. 19 (1947).

433. *See supra* text accompanying notes 108–109. Hawaii was an independent sovereign when it was annexed to the U.S. in 1898, but it became only a U.S. territory, and became the fiftieth state only in 1959.

434. *See Hanna, supra* note 45, at 519.

435. *Texas*, 339 U.S. at 716.

436. *Id.*

437. *Id.*

438. *Id.*

439. *Id.* at 717.

440. *Id.*

States, this “concededly entailed a relinquishment of some of her sovereignty.”<sup>441</sup> As in *United States v. California*, the Court underscored the international relations and national security implications raised by Texas’s argument, and held that equal footing prevented Texas from extending her sovereignty “into a domain of political and sovereign power of the United States from which the other States have been excluded.”<sup>442</sup>

#### A. A CLOSER LOOK AT “EQUAL SOVEREIGNTY”

“Equal footing” and “equal sovereignty” seem to be two sides of the same coin because both refer to the power of governing. The Utah Paper, for example, discusses “equal sovereignty” in terms of the power to tax and exercise police powers and the right of eminent domain, and on the very next page discusses “equal footing” (which it describes as “based on the Equal Sovereignty Principle”) in almost exactly the same terms.<sup>443</sup>

Comparing the scope of one state’s power to govern against that of other states is, on its face, a difficult task. How the presence of public lands affects state sovereignty is even more complicated, so correlating the scope of state sovereignty to the amount of public landholding in a particular state is very challenging.

Consider, for example, that states can and routinely do apply many of their laws to activities carried out on public lands. A century ago, Justice Brandeis succinctly stated the general principle the U.S. Supreme Court has long applied: “The police power of the State extends over the federal public domain, at least when there is no legislation by Congress on the subject.”<sup>444</sup> State laws dealing with crimes, torts, contracts and many other subjects routinely apply to most situations arising within state borders whether or not they occur on public lands. The Supreme Court has recognized, for example, that the states have nearly unlimited authority to apply their severance taxes to mines extracting federally-owned minerals from public land.<sup>445</sup> Congress has even permitted states to levy certain taxes on lands over which they have ceded exclusive jurisdiction under the Enclave Clause.<sup>446</sup>

Many state laws governing the use of natural resources within their borders apply to activities on public lands. FLPMA, for example, provides that nothing in it should be construed as “diminishing the

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441. *Id.* at 717–18.

442. *Id.* at 718–20; *see also* Hanna, *supra* note 45, at 534.

443. HOWARD ET AL., *supra* note 4, at 51–52.

444. *Omaechevarria v. Idaho*, 246 U.S. 343, 346 (1918).

445. *See* *Commonwealth Edison v. Montana*, 453 U.S. 609 (1981); *see also* 30 U.S.C. § 189 (2016); *Forbes v. Gracey*, 94 U.S. 762 (1876) (holding states can tax a miner’s interest in a mining claim on federal land).

446. *See* Buck Act, 4 U.S.C. §§ 103–110 (2012) (first adopted in 1947).

responsibility and authority of the States for management of fish and resident wildlife,” or as authorizing federal managers of public lands to require federal permits “to hunt and fish on public lands.”<sup>447</sup> This means that, generally speaking, if one wants to hunt and fish on U.S. public lands that are open to such pursuits, one must secure a license from the state and conform to state game laws.<sup>448</sup> Similarly, the Supreme Court has held that states may apply their general environmental regulations to activities being carried out on public lands.<sup>449</sup> Congress has, moreover, instructed the Interior Secretary to make land use plans prepared for BLM-managed public lands “consistent with state and local plans to the maximum extent” consistent with federal law,<sup>450</sup> and to provide in those plans for “compliance with applicable . . . state . . . air, water, noise, or other pollution standards or implementation plans.”<sup>451</sup>

The application of so many state laws to so much activity on public lands cuts strongly against the idea that the mere presence of U.S.-owned lands limits state sovereignty. Similarly, the mere absence of U.S.-owned lands in a state does not necessarily enhance state sovereignty. To support its contention that Utah’s sovereignty is impaired by the presence of so much public land inside its borders, the Utah Paper points out that most other states have far less federally-owned acreage than Utah does; for example, only one-quarter of one per cent of the area of New York is public land.<sup>452</sup> But the U.S. government exercises a great deal of authority over the nation’s financial industry, which is headquartered in the New York City. Those federal regulations pre-empt all conflicting state authority.

All this is to say that the presence or absence of public lands is not a particularly good measure of the scope of a state’s sovereignty. Yet the Utah Paper makes the remarkable assertion that, in the “competition for national political power,” Utah has been “stunted by federal policy” because the U.S. “owns such a high percentage of its land,” making it a “second class State [with] respect to political standing, a result the Constitution clearly disallows.”<sup>453</sup>

In fact, a cursory examination of the results of the 2016 election and other recent events show that states like Utah, with relatively small populations but a higher proportion of U.S. lands within their borders compared to other states, have an outsized political influence in the U.S. Congress and in the selection of Presidents. This is because the

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447. 43 U.S.C. § 1732(b) (2016).

448. *See, e.g.*, 43 U.S.C. § 1732(b).

449. *See, e.g.*, *California Coastal Comm’n v. Granite Rock Co.*, 480 U.S. 572 (1987).

450. 43 U.S.C. § 1712(c)(9) (2009).

451. 43 U.S.C. § 1712(c)(8).

452. HOWARD ET AL., *supra* note 4, at 8.

453. *Id.* at 64.

Constitution gives every state two Senators, and the Electoral College likewise disproportionately favors states with fewer residents. There are many illustrations of how Utah and other like states have been able to use their disproportionate influence in the national government to leverage the presence of so many public lands within their borders to obtain more federal benefits, not less.

For example, while public lands are immune from state and local property taxes, the U.S. government has long operated several different programs that provide funds to state and local governments to “compensate” them for the fact that they cannot levy property taxes on U.S.-owned public lands.<sup>454</sup> One of these is the so-called PILT (“payments in lieu of taxes”) program, enacted at the same time as FLPMA in 1976.<sup>455</sup> PILT authorizes the U.S. government to provide subdivisions of state governments millions of federal dollars each year to make up for their inability to levy property taxes on public land.<sup>456</sup> As the Supreme Court has noted, the United States “had for many years been providing payments to partially compensate state and local governments for revenues lost as a result of the presence of tax-exempt federal lands within their borders,” and PILT was designed to correct “a number of flaws in the existing programs.”<sup>457</sup>

It is fiendishly difficult to assess whether these programs over- or under-compensate states and localities; that is, whether the U.S. provides more or fewer dollar benefits than a state or local jurisdiction would obtain if the public lands within its borders were state- or privately-owned. The answer depends upon many facts and assumptions including, for example, how much jurisdictions rely on property taxes versus other forms of taxes to fund their governmental operations.<sup>458</sup> In recommending a general PILT program, the Public Land Law Review Commission specified that PILT payments “should not represent full tax equivalence and the state and local tax effort should be a factor in determining the exact amount to be paid.”<sup>459</sup> In this connection, it is noteworthy that Utah’s effective property tax rate on owner-occupied housing is lower than those of forty other states.<sup>460</sup>

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454. M. LYNNE CORN, PILT (PAYMENTS IN LIEU OF TAXES): SOMEWHAT SIMPLIFIED, CONG. RES. SERV. (2015).

455. Pub. L. No. 94-565 (Oct. 20, 1976), codified at 31 U.S.C. §§ 6901–6907.

456. See *infra* text accompanying note 458 (regarding whether such programs over- or under-compensate states and localities).

457. *Lawrence Cty. v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 262 (1985).

458. See COMPENSATING STATE AND LOCAL GOVERNMENTS FOR THE TAX-EXEMPT STATUS OF FEDERAL LANDS: WHAT IS FAIR AND CONSISTENT?, CONG. RES. SERV. (2012).

459. ONE THIRD OF THE NATION’S LANDS, *supra* note 93, at 4.

460. Jared Walczak, *How High Are Property Taxes in Your State?*, TAX FOUND. (Aug. 13, 2015), <https://taxfoundation.org/how-high-are-property-taxes-your-state/>.

In 1979, the U.S. General Accounting Office reviewed these programs and concluded that overall, they over-compensated localities.<sup>461</sup> In 1999, researchers in the U.S. Forest Service reported that while federal payments in lieu of taxes were significantly less than equivalent property taxes overall, in more than sixty percent of the counties examined, the payments at least equaled property taxes.<sup>462</sup> In 2010, an independent research group found that achieving true equivalency would require increasing total federal payments to all counties combined, but that two-thirds of the counties would actually receive lower payments.<sup>463</sup> The consensus, then, seems to be that these programs overcompensate some counties and undercompensate others.

The Utah Paper argues that programs like PILT are not a benefit of continuing public land ownership, but instead are simply an example of how western states are “forced to rely on federal subsidies” to fund “basic operations,” which subjects them to “undue political pressures inconsistent with equal sovereignty.”<sup>464</sup> In fact, however, it is more accurate to say that members of Congress feel the political pressure if they do not appropriate sufficient funds to the PILT program. Such programs are popular in the Congress, especially strongly supported by its western members; indeed, Congress has never failed to fund the program since it was adopted. After the Trump Administration called for cutting PILT appropriations soon after taking office, for example, Congress, led by its members from states with significant amounts of public lands, declined to do so.<sup>465</sup> Utah’s revenue stream from PILT payments has increased nearly 400% since 1999, while per pupil spending has increased only fifty percent, just above the cumulative inflation rate over the same period.<sup>466</sup>

States like Utah with large amounts of public land derive other special benefits from the presence of these lands. For nearly a century, the United States has given each state—either directly, or indirectly

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461. U.S. GEN. ACCOUNTING OFF., ALTERNATIVES FOR ACHIEVING GREATER EQUITIES IN FEDERAL LAND PAYMENT PROGRAMS (1979).

462. Ervin G. Schuster et al., *An Analysis of PILT-Related Payments and Likely Property Tax Liability of Federal Resource Management Lands*, U.S. DEP’T OF AGRICULTURE (1999), [https://www.fs.fed.us/rm/pubs/rmrs\\_gtro36.pdf](https://www.fs.fed.us/rm/pubs/rmrs_gtro36.pdf).

463. See *Federal Land Payments to Counties: Background Analysis, History, and Context*, HEADWATERS ECON. (Dec. 2010), <https://headwaterseconomics.org/county-payments/history-context/reforming-federal-land-payments-to-counties/>; see also *Federal Lands in the West: Liability or Asset?*, HEADWATERS ECONOMICS (Feb. 2017), <https://headwaterseconomics.org/public-lands/federal-lands-performance/>.

464. HOWARD ET AL., *supra* note 4, at 68.

465. See Consolidated Appropriations Act of 2017, Pub. L. 115–31 (signed into law on May 5, 2017, making \$465 million available for PILT).

466. Brenton Peterson, Opinion, *The Biggest Lie in Utah’s Public Lands Debate*, DESERET NEWS (July 19, 2017, 2:05 PM), <http://www.deseretnews.com/article/865685116/Op-ed-The-biggest-lie-in-the-Utah7s-public-lands-debate.html>.

through the Reclamation Fund earmarked for water projects in the western states—ninety percent of the revenues it derives from the development of fossil fuels the U.S. owns within its borders.<sup>467</sup> To take another example, the formula in federal law that allocates federal highway construction dollars among states has long provided extra federal funds to those states with larger amounts of public land within their borders.<sup>468</sup> Although such benefits plainly add to a state’s “power to govern,” the Utah Paper ignores them. Instead, it simply complains that state sovereignty is impaired by the fact that the state must seek U.S. consent in order to build state and local transportation facilities on public lands.<sup>469</sup>

The connection between public lands and a state’s sovereignty can also be explored from the opposite perspective. Would Utah have more “power to govern” if it actually assumed ownership of public lands within its borders? Just about every available study—including one several hundred pages long commissioned by the State of Utah and delivered in late 2014—shows that taking over ownership of public lands would, on balance, likely be a large net drain on state treasuries.<sup>470</sup>

The most obvious, though not the only, reason for this is the increasingly large amounts of federal taxpayer dollars being spent to fight wildfires on public and nearby non-public land. These fires are fought primarily to protect structures on private inholdings and adjacent private lands. Such structures and their immediate environs are, generally speaking, subject only to zoning, construction and fire safety codes, if any, of state and local governments. The rationale for the U.S. bearing nearly all of these firefighting costs is that the U.S. owns significant amounts of public lands in the affected area. In the last couple of decades, primarily because of hotter and drier conditions, and more dwellings being constructed on non-federal lands near public lands, the portion of the total U.S. Forest Service budget that is devoted to firefighting has increased from ten percent to more than fifty percent.<sup>471</sup>

If the federal government were no longer to own public lands, the rationale for the U.S. spending money to fight these fires would largely evaporate. That would almost certainly mean that the responsibility for fighting wildfires would likely fall on state and local governments and

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467. See, e.g., ONE THIRD OF THE NATION’S LAND, *supra* note 93, at 235.

468. See 23 U.S.C. § 120 (2012).

469. HOWARD ET AL., *supra* note 4, at 51, 69–70.

470. See, e.g., *Transfer of Public Lands Act and Study*, *supra* note 7.

471. See, e.g., *Summary: Wildfire Costs, New Development, and Rising Temperatures*, HEADWATERS ECON. (Apr. 2016), <https://headwaterseconomics.org/wildfire/fire-research-summary/>.

the private sector, just as it does in other parts of the country where there are few public lands.

Once again, rather than acknowledging that Utah is the beneficiary of public-land-related federal largesse, the Utah Paper chooses instead, rather cheekily, to portray Utah as the victim, complaining that Utah “must depend upon” the federal land management agencies “for the fire safety of its citizens,” thus “impinging upon its sovereignty” and denying it “equal sovereignty with thirty-eight other states.”<sup>472</sup>

One can understand why both the courts and the Congress might look skeptically upon such arguments, for in essence the authors of the Utah Paper seek to have it both ways: If the federal government does not fully fund wildfire fighting, it is penalizing the state. But if it retains ownership of the public lands that provide the rationale for such funding, it is denying the state “equal sovereignty.”

Skepticism might deepen with the realization that, in other venues, far from complaining about the presence of public landholdings, Utah acknowledges that it derives major economic and public relations benefits from them. The Utah State Department of Tourism has for some time been running a publicity campaign urging people to visit its “Mighty 5” national parks, noting with pride that these public lands “draw several million visitors from around the world each year to marvel at surreal scenery and unforgettable activities.”<sup>473</sup> And those visitors spend money and boost the state’s economy, as many studies document.<sup>474</sup>

## VI. OTHER PROBLEMS

Those advocating for judicially enforceable constitutional limits on U.S. ownership of public lands inside states generally have very little to say about two key issues their position raises: first, how much public landholding in a state violates the Constitution, and second, what is the proper remedy for that violation. The failure to squarely confront these issues undermines the credibility of the position.

New states have been admitted to the Union with widely varying sizes, different geographical settings, climates, natural resources and other features. The U.S. has granted these states very different amounts of public lands, and had kept or acquired ownership of very different amounts of public lands in each. The challenges to the judiciary of drawing a constitutional line through such wide variations, and

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472. HOWARD ET AL., *supra* note 4, at 65–66.

473. *The Mighty 5: Utah's National Parks*, UTAH OFF. OF TOURISM, <https://www.visitutah.com/places-to-go/most-visited-parks/the-mighty-5/> (last visited Jan. 20, 2018).

474. *See, e.g.*, JENNIFER LEAVER, *THE STATE OF UTAH'S TRAVEL AND TOURISM INDUSTRY 2017*, KEM C. GARDNER POL'Y INST., UNIV. OF UTAH (2017).

fashioning a remedy if the line has been crossed, are daunting to say the least.

This can be illustrated by looking at other constitutional clauses. For example, the Constitution commands that Congress treat states equally in the so-called “uniformity” clause, which requires that all “Duties, Imposts, and Excises” be “uniform throughout the states,”<sup>475</sup> a much more explicit command than the idea of “equal sovereignty.” Calling it “an enormously complex problem,” the Court declined an invitation to use this clause to second-guess Congress’s decision to exempt oil produced in the northern part of Alaska from an otherwise generally applicable windfall profits tax.<sup>476</sup>

The Utah Paper argues at one point that only twelve of the fifty states are without “equal sovereignty,”<sup>477</sup> because only eleven other states “are in positions similar to Utah with regard to public lands.”<sup>478</sup> The state of Washington ranks twelfth in the list of states in the percentage of its area in public lands, at twenty-nine percent.<sup>479</sup> Thirteenth is Hawaii, at about twenty percent.<sup>480</sup> The Utah Paper never attempts to explain why some or all of the public lands in Washington are unconstitutional while, at the same time, apparently none of the public lands in Hawaii are. (The nine percent difference between Hawaii and Washington is substantially less than the seventeen percent gap between Utah and Nevada.) At another point, the Utah Paper seems to draw the line at fifty percent, between Oregon (fifty-three percent federal lands) and California (forty-six percent federal lands), for it says that the Supreme Court “has never addressed” whether Congress can “forever retain the *majority* of the land within a State.”<sup>481</sup>

The Paper also never makes clear whether public lands managed by the Defense Department, the U.S. Forest Service, the National Park Service, or the U.S. Fish & Wildlife Service are subject to its “equal sovereignty” claim. The Property Clause of the U.S. Constitution draws no distinctions among the purposes public lands serve. The Utah

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475. U.S. CONST. art. I, § 8, cl. 1.

476. *United States v. Ptasynski*, 462 U.S. 74, 85 (1983); see also *Commonwealth Edison v. Montana*, 453 U.S. 609, 628 (1981) (doubting “whether any legal test could adequately reflect the numerous and competing economic, geographic, demographic, social, and political considerations that must inform a decision” about whether a particular rate of state taxation violates the dormant commerce clause, which “reinforces the conclusion that [such] questions . . . must be resolved through the political process.”).

477. HOWARD ET AL., *supra* note 4, at 65–66.

478. *Id.* at 139; see also *id.* at 62.

479. See CAROL HARDY VINCENT ET AL., FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA, CONG. RES. SERV. (2017). The top seventeen states in percentage of federal land are NV (80), UT (63); ID (62), AK (61) Or (53); CA (46); AZ (39); CO (36); NM (35) MT (29) WA (29); HI (20); NH (14); AR and FL (13); MI and VA (10). *Id.*

480. *Id.*

481. *Id.* at 125 (emphasis added).



Paper's position seems to be that a state, or perhaps a federal court—in any event, not the U.S. Congress—would have the ultimate power to decide how much if any land now found in national parks, forests, or other designations it would be constitutional for the U.S. to own in that state.

The American Legislative Exchange Council (“ALEC”), a nonprofit organization that drafts and advocates conservative legislation for state legislators,<sup>482</sup> is not so reticent. It directly confronts this question in its model resolution on the subject.<sup>483</sup> After calling for all the public lands in the western states to be transferred to the states, the resolution provides that “to promote legitimate federal interests,” the western states should, upon gaining title to all public lands, “agree to affirmatively cede lands for the national park system, the national wilderness preservation system, and lands reserved for federal military use” to the national government under certain conditions.<sup>484</sup> The states would keep the remainder of the public lands for themselves.

The Utah Paper also undermines its argument by conceding several times that the U.S. can retain title to public lands after statehood so long as it does not do so “forever.”<sup>485</sup> In fact, Congress has never said it will hold any or all public land in U.S. ownership “forever.” For example, FLPMA merely creates a presumption against divestiture of BLM-managed land,<sup>486</sup> itself contains some provisions authorizing sales and other transfers of ownership of public lands,<sup>487</sup> and also leaves some other divestiture laws in place.<sup>488</sup>

Even if Congress were to enact a statute repealing all laws authorizing divestiture and declaring its intention to hold title to all public lands “forever,” it could not bind future Congresses. To the extent the Utah Paper contends that only a “permanent” retention of title by the U.S. violates “equal sovereignty,” then, it must fail of its own accord.

The courts have acknowledged that, where public lands are concerned, it is up to the political branches, and not the courts, to

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482. See *ALEC Exposed*, CTR. FOR MEDIA & DEMOCRACY, [http://www.alecexposed.org/wiki/ALEC\\_Exposed](http://www.alecexposed.org/wiki/ALEC_Exposed) (last visited Jan. 20, 2018); see also Lyndsey Gilpin, *How an East Coast think tank is fueling the land transfer movement*, HIGH COUNTRY NEWS (Feb. 26, 2016), <http://www.hcn.org/articles/how-an-east-coast-think-tank-is-fueling-the-land-transfer-movement> (noting that the past chairman of ALEC's Federalism Task Force, Utah state legislator Ken Ivory, is a leading advocate of the position in the Utah Paper, and that the President of the Utah State Senate is a member of ALEC's Board of Directors).

483. See *supra* text accompanying notes 35–36.

484. *Id.*

485. See, e.g., *id.* at 2, 4, 9.

486. See *supra* text accompanying note 32.

487. 43 U.S.C. §§ 1713, 1721, 1722.

488. See e.g., Mining Law of 1872, 30 U.S.C. §§ 21 et ff.; see also Recreation and Public Purposes Act of 1926, 43 U.S.C. §§ 869.

decide such matters. In the Pickett Act of 1910, Congress gave the President authority to withdraw public lands from the operation of divestiture laws for various public purposes, but only “temporarily.” It also provided that such withdrawals “shall remain in force until revoked by him or by an Act of Congress.”<sup>489</sup> The courts have refused to second-guess presidential and congressional judgments as to when a withdrawal ceased to be “temporary,” by leaving in place unrevoked Pickett Act withdrawals many decades old.<sup>490</sup>

The U.S. Supreme Court has often expressed a reluctance to insert itself into disputes involving constitutional principles unless it was convinced that “judicially discoverable and manageable standards”<sup>491</sup> exist to govern the Court’s decisions. The Utah Paper offers no standards, nor do any come readily to mind, by which the courts could determine how much U.S.-owned land inside a state violates a norm of “equal sovereignty.”

A. THE WESTERN STATE ATTORNEYS GENERAL REJECT THE CONCLUSIONS OF THE UTAH PAPER

In August 2014, the Conference of Western [State] Attorneys General (“CWAG”) established a study team composed of lawyers in several state Attorney General offices to examine the legal arguments put forth in the Utah Paper and elsewhere. The team was chaired by the Wyoming Attorney General, and included attorneys from counterpart offices in Alaska, Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah and Washington.<sup>492</sup> While these lawyers had a state perspective, they had little if any financial stake in the conclusions, unlike the contracted-for authors of the Utah Paper, who were trying to persuade the state of Utah to hire them to litigate the case that their Paper concluded could credibly be made.<sup>493</sup>

The CWAG Study Team’s Report, completed in 2016,<sup>494</sup> took issue with the Utah Paper’s conclusions, and the general idea that western states had a judicially enforceable constitutional claim to the public lands. It found the constitutional case for state ownership of public lands to be weak, citing the long, unbroken line of U.S. Supreme Court decisions discussed above.<sup>495</sup> It concluded that Supreme Court

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489. 43 U.S.C. §141, repealed 1976.

490. *See* *Mecham v. Udall*, 369 F.2d 1, 4 (10th Cir. 1966).

491. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

492. *See* REPORT OF THE PUBLIC LANDS SUBCOMMITTEE, WESTERN ATTORNEYS GENERAL LITIGATION ACTION COMM., CONFERENCE OF WESTERN ATTORNEYS GENERAL (2016) [hereinafter CWAG Report].

493. The Utah Paper estimated that if its “Legal Consulting Services Team” were hired to pursue the litigation the team recommended, the total cost to Utah will be on the order of \$14 million. HOWARD ET AL., *supra* note 4, at 145.

494. CWAG Report, *supra* note 492.

495. *Id.* at 16; *see also supra* text accompanying note 492.

precedents “provide little support” for the idea that equal footing or equal sovereignty applies to public land ownership.<sup>496</sup> It also found that the “clear weight of relevant decisions” by the U.S. Supreme Court is that the Enclave Clause does not limit the authority of the U.S. to own public lands.<sup>497</sup>

In July 2016, the Western States Attorneys General voted eleven to one to accept the report.<sup>498</sup> The margin was noteworthy because some of the state Attorneys General who voted to accept the report had earlier expressed support for Utah’s position. In 2014, for example, the Arizona Attorney General had called for the states to do everything they can to “get our land back from the federal government,” and the Colorado Attorney General had said it was time the western state Attorneys General “join together” and take “back that land.”<sup>499</sup>

Noting that each state’s enabling act is different, the CWAG Report did not address Utah’s “compact” theory.<sup>500</sup> However, as explained earlier,<sup>501</sup> the Utah Enabling Act weakens, not strengthens, Utah’s argument that the U.S. had implicitly agreed to divest itself of ownership of all federal lands in the state.

#### B. THE UTAH PAPER’S LEGAL CLAIM IS STALE

The United States has owned the majority of land in Utah since it was admitted to the Union more than 120 years ago.<sup>502</sup> Seeking to explain the long delay in raising its “equal sovereignty” argument, the Utah Paper argues that the state had “little reason” to pursue its claim for many decades because the U.S. “repeatedly promised to dispose of” the public lands it retained, and “did so as a matter of stated policy until 1976, when it abruptly decided to stop,” referring to enactment of FLPMA.<sup>503</sup> Each of these assertions is at odds with the facts.

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496. *Id.* at 47.

497. *Id.* at 21.

498. Michelle L. Price, *Attorneys General Cast Doubt on Utah Land Push*, APNEWSBREAK (Sept. 30, 2016), <https://apnews.com/e8a2cd9143e14b3397c5ba8d2bfde9co/apnewsbreak-attorneys-general-cast-doubt-utah-land-push>. The official vote tally was not made public.

499. See Neil Young, *Brnovich Visits Mohave County*, MOHAVE VALLEY DAILY NEWS (Apr. 21, 2014), [http://www.mohavedailynews.com/news/brnovich-claims-he-is-a-better-candidate-than-current-state/article\\_f9d79a72-c927-11e3-9bf5-0019bb2963f4.html](http://www.mohavedailynews.com/news/brnovich-claims-he-is-a-better-candidate-than-current-state/article_f9d79a72-c927-11e3-9bf5-0019bb2963f4.html); Steve Benen, *Colorado A.G. Candidate: It’s Time ‘We Took Back’ Federal Land*, THE MADDOWBLOG (Oct. 15, 2014, 11:38 AM), <http://www.msnbc.com/rachel-maddow-show/colorado-ag-candidate-its-time-we-took-back-federal-land>.

500. CWAG Report, *supra* note 492, at 48.

501. See *supra* text accompanying notes 373–391.

502. See UTAH AUTOMATED GEOGRAPHIC REF. CTR., *Land Ownership* (2017), ArcGIS data, <https://gis.utah.gov/data/cadastre/land-ownership/>.

503. HOWARD ET AL., *supra* note 4, at 112; see also *id.* at 83. FLPMA is found at 43 U.S.C. §§ 1701–82 (2012).

First, as noted earlier, the U.S. never promised, explicitly or implicitly, at statehood, or at any time thereafter, to divest itself of ownership of all public lands in the state.<sup>504</sup>

Second, FLPMA did not “stop” all divestiture of public lands; as noted above, it only established a general and rebuttable presumption against further divestiture, and left some divestiture laws in place.<sup>505</sup>

Moreover, while an underlying theme of the Utah Paper is that Utah and other western states with significant amounts of public lands are victims of a distant, unresponsive national government, it is noteworthy that FLPMA was largely shaped and supported by members of Congress from western states. Fourteen of the seventeen members of the congressional conference committee that crafted the final version of FLPMA, for example, were westerners.<sup>506</sup> Furthermore, FLPMA mostly carried out recommendations of the congressionally-dominated 1970 report of the Public Land Law Review Commission established in 1964,<sup>507</sup> and thirteen of the nineteen signatories to the Commission’s final report were from western states, including eleven of the thirteen congressional members, and three of the six presidentially-appointed members.<sup>508</sup>

Third, FLPMA’s adoption of a presumption against further divestiture was hardly “abrupt.” Large-scale divestiture of federal lands in the lower forty-eight states actually ended in the 1930s, not 1976. Following the abandonment in 1931 of President Hoover’s proposal to transfer arid public lands thought to be suitable primarily for livestock grazing to willing states,<sup>509</sup> Utah Representative Don Colton introduced a bill creating a mechanism in federal law for regulating livestock grazing on these lands, assuming they were going to remain in federal ownership.<sup>510</sup> His bill passed the House in 1932 but got no further.<sup>511</sup> After he was defeated for reelection that fall, Congressman Edward Taylor of Colorado reintroduced a similar bill in the next Congress,<sup>512</sup> and what became known as the Taylor Grazing Act was signed into law by President Franklin Roosevelt in June 1934.<sup>513</sup>

The stated purpose of the Act was to “stop injury to the public grazing lands by preventing overgrazing and soil deterioration,” to

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504. *See supra* text accompanying notes 373–391.

505. *See supra* text accompanying notes 32, 487–488.

506. H.R. REP. NO. 94-1724, at 66 (1976); reprinted in Sen. Comm. on Energy and Nat. Resources, 95th Cong. 2d Sess., Legislative History of the Federal Land Policy and Management Act of 1976, at 871, 936 (1978).

507. *See* Pub. L. No. 88-606, 78 Stat. 982 (1964).

508. *See* ONE THIRD OF NATION’S LAND, *supra* note 93, at iv.

509. *See supra* text accompanying notes 406–410.

510. *See* Peffer, *supra* note 404, at 215. The bill was H.R. 11816, 72d Cong. 1st sess.

511. Peffer, *supra* note 404, at 216.

512. *Id.*

513. *Id.* at 216–20.

provide for their “orderly use, improvement, and development,” and to “stabilize the livestock industry dependent upon the public range.”<sup>514</sup> It authorized the Interior Secretary to establish grazing districts on public lands “chiefly valuable for grazing and raising forage crops,” and to manage these lands to carry out the purposes of the act.<sup>515</sup> In November 1934 and February 1935, President Franklin Delano Roosevelt issued two executive orders withdrawing practically all the public lands that were then still generally available for divestiture from most divestiture laws.<sup>516</sup> In June 1936, Congress effectively approved Roosevelt’s Orders by incorporating them into amendments to the Taylor Grazing Act.<sup>517</sup> The leading historian of the public lands in this era called this combination of congressional and executive actions in 1934-1936 a “radical change in direction of public land policy,” making the idea of public lands open to wholesale divestiture “more a sentimental and political issue than an active factor in American life.”<sup>518</sup>

C. THE SAGEBRUSH REBELLION OF 1979–1981: A POLITICAL GESTURE  
DISGUISED AS A CONSTITUTIONAL CLAIM

In 1979, Nevada launched what became known as the “sagebrush rebellion” by enacting a statute claiming ownership of public lands within its borders managed by the Bureau of Land Management (“BLM”). Arizona, New Mexico, Utah and Wyoming followed suit, and Wyoming also claimed ownership of national forest lands managed by the U.S. Forest Service.<sup>519</sup>

Ostensibly, this “rebellion” sought to convert a version of the political argument for cession offered by John McKinley and a few others in 1827–1830 into a legal claim for ownership of the public lands. In reality, however, it was put forth only as a political gesture. Almost immediately after its “sagebrush rebellion” law was enacted, Nevada’s representatives quietly sought and obtained assurance from the Interior Department that the federal money its local governments

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514. Taylor Grazing Act of 1934, Pub. L. No. 73-482, 48 Stat. 1269 (1934) (prior to 1936 amendment).

515. *Id.* (codified at 43 U.S.C. § 315(f)).

516. *See* Exec. Order No. 6910 (Nov. 26, 1934); *see also* Exec. Order No. 6964 (Feb. 5, 1935); Peffer, *supra* note 404, at 223–24.

517. Pub. L. No. 74-827, 49 Stat. 1976 (1936) (amending § 7 of the Taylor Grazing Act).

518. Peffer, *supra* note 404, at 224.

519. Similar bills were introduced in most of the other western states, but not enacted. *See* Leshy, *supra* note 12, at 317 n.1. The Washington legislature approved a similar statute in 1980, contingent upon the voters approving a proposed amendment to the state constitution revoking the disclaimer regarding public lands, but voters rejected the amendment that fall. Act of Mar. 10, 1980 ch. 116, 1980 Wash. Laws 358. Alaska adopted a similar statute through a ballot initiative in November 1982, but the State Attorney General refused to enforce it, finding that it conflicted with the public lands disclaimer clause in the state constitution. *See* Esther Wunnicke, 1983 WL 42679 (1983).

were receiving under the PILT<sup>520</sup> program—payments that are bottomed on continuing U.S. ownership of public lands—would not be interrupted.<sup>521</sup>

None of the five states that enacted statutes claiming ownership of public lands ever filed litigation or took any other step to enforce its claim. In fact, Nevada declined a clear opportunity to litigate the claim in a case it had earlier filed challenging a U.S. moratorium on the operation of certain public land divestiture laws.<sup>522</sup>

The “rebellion” fizzled out in 1981-1982, and never resulted in any significant divestiture of public land.<sup>523</sup> Some years later, while challenging Congress’s decision to locate a high-level nuclear waste repository in Nevada, the state unsuccessfully argued various theories that the Constitution requires equal treatment among the states.<sup>524</sup>

#### D. A “MINI-REBELLION” IN THE 1990s GAINS NO TRACTION

Some rural western counties and ranchers made an effort to revive the rebellion in the 1990s. Nevada ranchers defending litigation the U.S. brought against them for grazing their livestock on public lands without a permit claimed that U.S. ownership of public lands was unconstitutional. This time, however, no state enacted laws claiming ownership of federal lands. Instead, the Attorneys General of several states, including Alaska, Montana, Nevada, New Mexico and Oregon, filed an *amicus* brief on the side of the United States. Their brief noted that it was “well-established that the United States is the lawful owner of the public lands[,]”<sup>525</sup> even though at least one of the states (Nevada) still had a law on the books claiming ownership of the public lands.<sup>526</sup> The Ninth Circuit ruled against the ranchers and for the United States, and the Supreme Court declined to review the decision.<sup>527</sup>

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520. See *supra* text accompanying notes 454–457.

521. See Richard M. Mollison and Richard W. Eddy, Jr., *The Sagebrush Rebellion: A Simplistic Response to the Complex Problems of Federal Land Management*, 19 HARV. J. ON LEGIS. 97, 125 (1982). The author attended this meeting with Nevada representatives in Washington D.C. in late 1978, where he was serving as Associate Solicitor of the Interior Department for Energy & Resources, with responsibility for the public lands.

522. *Nevada v. United States*, 699 F.2d 486, 487 (9th Cir. 1983).

523. See Robert H. Nelson, *Why the Sagebrush Revolt Burned Out*, REGULATION 27, 33 (May–June 1984), <https://www.cato.org/regulation/mayjune-1984>.

524. *Nevada v. Watkins*, 913 F.2d 1545, 1553–58 (9th Cir. 1990), *cert. denied*, 499 U.S. 906 (1991); *Nuclear Energy Inst. v. Envtl. Prot. Agency*, 373 F.3d 1251, 1303–09 (D.C. Cir. 2004).

525. Brief of the States of New Mexico, Alaska, et al. as Amici Curiae in Support of Appellee at 5, *Gardner v. United States*, 107 F.3d 1314 (9th Cir. 1997) (No. 95-17042).

526. See 1979 NEV. REV. STAT. § 321.5973.

527. *United States v. Gardner*, 107 F.3d 1314 (9th Cir. 1997), *cert. denied*, 522 U.S. 907 (1997).

#### E. DISCONTENTED STATES HAVE ALWAYS HAD A POLITICAL REMEDY

This is another reason why the courts should rebuff any attempt by a state to use the Constitution to wrest ownership of public lands from the United States. The Property Clause gives Congress authority to enact legislation conveying some or all of the public lands in Utah (and everywhere else they are found) to the states or to others—including public lands designated as national parks, forests, wildlife refuges, and even military bases. For example, after the Supreme Court had issued a series of decisions in 1947–1950 rejecting the claim of coastal states to ownership of the submerged lands off the nation’s coasts,<sup>528</sup> these states turned to Congress. In 1953, Congress enacted the so-called Submerged Lands Act. It gave the coastal states title to the submerged lands within three miles of the coast or, in the case of Texas and the portion of Florida bordering the Gulf of Mexico, within three leagues.<sup>529</sup> The Court upheld the legislation against several challenges.<sup>530</sup>

Also relevant here is President Herbert Hoover’s 1931 offer to support congressional legislation to transfer to the states, minus the mineral rights, title to all the public lands in the west believed to be useful primarily for livestock grazing. As discussed earlier, the states, led by Utah’s Governor George Dern, spurned the offer, and Congress never seriously considered it.<sup>531</sup>

#### F. THE CURRENT POLITICS OF PUBLIC LAND TRANSFERS

As this is written, Utah’s efforts to persuade other states to join its quest for ownership of public lands seem to be failing. Unlike the 1979–1980 Sagebrush Rebellion, when five intermountain western states made a formal claim of ownership, no state has joined with Utah. In 2012, by contrast, Arizona voters rejected, by a two to one margin, a proposed amendment to the state constitution that would have claimed “sovereign and exclusive authority” over most public lands in the state.<sup>532</sup> The western states’ Attorneys General have refused to take up

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528. See *supra* text accompanying notes 364–366, 431–442.

529. Submerged Lands Act of 1953, 43 U.S.C. §§ 1301–1315 (2012).

530. See *Alabama v. Texas*, 347 U.S. 272, 273 (1954); *United States v. Louisiana*, 363 U.S. 1 (1960); *United States v. Florida*, 363 U.S. 121 (1960). See generally Sonia Sotomayor, Note, *Statehood and the Equal Footing Doctrine: The Case for Puerto Rican Seabed Rights*, 88 *YALE L.J.* 825, 833 (1979). Professor Hanna, writing before enactment of the Submerged Lands Act, thought the matter was “appropriately within the area of Congressional discretion.” Hanna, *supra* note 45, at 536.

531. See *supra* text accompanying notes 404–410; Peffer, *supra* note 404, at 208–09.

532. See *Official Canvas 2012 General Election—November 6, 2012*, ARIZ. SECRETARY OF ST. 18 (Dec. 3, 2012), <http://apps.azsos.gov/election/2012/General/Canvass2012GE.pdf> (referencing Proposition 120); see also Ballot Pamphlet, Gen. Election (Nov. 6, 2012) text of Proposition 120 [http://apps.azsos.gov/election/2012/info/PubPamphlet/Sun\\_Sounds/english/Prop120.htm](http://apps.azsos.gov/election/2012/info/PubPamphlet/Sun_Sounds/english/Prop120.htm).

the cause.<sup>533</sup> Public opinion polls in every western state consistently show support for continued ownership and management of public lands by the national government. The most recent “Conservation in the West Poll” conducted for Colorado College’s State of the Rockies Project shows that, in six of the seven intermountain western states, a strong majority oppose giving states control over public land. In the only exception, Utah, opinion is divided.<sup>534</sup>

The history of the cession movement in the late 1820s suggests that Utah risks political backlash by continuing to press its claim. There, most members of Congress from other states reacted negatively to the radical argument for cession made by Senator John McKinley and others. History could repeat itself, and the Utah claim might be characterized as an inappropriate grab for public lands acquired with the “blood and treasure” of the earlier-admitted states, “one of the most extravagant pretensions that could possibly be urged,” a “preposterous” and “grasping” claim that might be compared “to the whining of a spoiled child.”<sup>535</sup>

Demographic and economic changes underscore this risk. Seven of the nine fastest-growing states in population in the last few years were western states with substantial amounts of public lands—Idaho, Nevada, Utah, Washington, Arizona, Colorado, and Oregon.<sup>536</sup> Polls show that an important factor driving migration to these states has to do with accessible outdoor recreation opportunities.<sup>537</sup> Several studies comparing economic prosperity across counties in the west show a direct positive correlation between the proportion of protected public lands in a county and its economic well-being.<sup>538</sup> Bloomberg View recently noted that Utah is rated number one in “future livability” among the states based on various economic, health, and lifestyle

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533. See *supra* text accompanying notes 493–500.

534. COLO. COLL. STATE OF THE ROCKIES PROJECT, CONSERVATION IN THE WEST POLL, PUBLIC LANDS 2 (2017), [https://www.coloradocollege.edu/other/stateoftherockies/conservationinthewest/2017/PublicLands\\_Topic\\_17.pdf](https://www.coloradocollege.edu/other/stateoftherockies/conservationinthewest/2017/PublicLands_Topic_17.pdf).

535. See *supra* text accompanying notes 154–178; see also Dale A. Oesterle, *The Public Land: How Much Is Enough?*, 23 *ECOLOGY L.Q.* 521, 558 (1996).

536. See Press Release, U.S. Census Bureau, *Idaho is Nation’s Fastest-Growing State*, *Census Bureau Reports* (Dec. 20, 2017) <https://www.census.gov/newsroom/press-releases/2017/estimates-idaho.html>. In fact, these same western states have been among the fastest growing states in the union nearly every decade since 1900. See Andrew Van Dam, *Why People Really Want to Move to Idaho but are Fleeing Its Neighbor, Wyoming*, *WASH. POST* (Dec. 26, 2017), <https://www.washingtonpost.com/news/wonk/wp/2017/12/26/2017s-fastest-and-slowest-growing-states-are-neighbors-heres-why-their-paths-diverged>.

537. See *supra* note 534.

538. See *West Is Best: How Public Lands in the West Create a Competitive Economic Advantage*, *HEADWATERS ECON.* 19–20 (Nov. 2012), [https://headwaterseconomics.org/wp-content/uploads/West\\_Is\\_Best\\_Full\\_Report.pdf](https://headwaterseconomics.org/wp-content/uploads/West_Is_Best_Full_Report.pdf); see also <https://headwaterseconomics.org/public-lands/public-lands-research/>.



measures, and has one of the top performing economies in the U.S.<sup>539</sup> If one is tempted to think that the sizeable amount of public land in states like Utah leaves them no room to accommodate more people, consider this: Utah, like many other large western states, has considerably more private land per capita than do many other states—about 3.8 acres of private land for every state resident, compared to less than one acre of private land per capita in New York, 1.24 acres in California, 2.18 acres in Ohio, and 3.3 acres in Georgia.<sup>540</sup> These data and trends make it difficult to take seriously the argument that Utah and other states with large amounts of public land are being strangled by the presence of so much public land within their borders.

In the last few decades, a new element has emerged in discussions about public lands; namely, they have become more politically partisan. From the nation's earliest days, disagreements on the most fundamental questions of federal public land policy rarely broke neatly along party lines. While there were occasionally partisan disagreements on particular measures, both parties tended to move together on the broad question of divesting or retaining large tracts of public lands in U.S. ownership. Republicans and Democrats united to keep more than two hundred millions of acres of land in national ownership between 1890 and 1915. The opposition likewise did not break down on party lines. Some of the staunchest opponents of Republican President Theodore Roosevelt's vigorous public land protection policies were members of his own party in Congress.<sup>541</sup> Opinion on these matters did not divide along sectional lines either. Theodore Roosevelt carried every western state in his re-election campaign in 1904.<sup>542</sup>

This consensus tradition of bipartisanship endured into the modern era. Republican President Richard Nixon's 1971 Environmental Message noted that the public lands "belong to all Americans," being "part of the heritage and the birthright of every citizen."<sup>543</sup> Therefore, he wrote, because "we deal with these lands as trustees for the future" they must "be managed wisely," and "their environmental values be carefully safeguarded."<sup>544</sup> Similarly, the 1972 Republican Party Platform extolled

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539. Matthew A. Winkler, Opinion, *Want a Formula for Success? Study Utah*, BLOOMBERG VIEW Apr. 25, 2017, <https://www.bloomberg.com/view/articles/2017-04-25/want-a-formula-for-success-study-utah>.

540. See *New Analysis: More Private and State Lands Per Capita in Western States than Eastern States*, CTR. FOR W. PRIORITIES (Apr. 28, 2015), <http://westernpriorities.org/2015/04/28/new-analysis-more-private-and-state-lands-per-capita-in-western-states-than-eastern-states/>.

541. See, e.g., DOUGLAS BRINKLEY, *THE WILDERNESS WARRIOR: THEODORE ROOSEVELT AND THE CRUSADE FOR AMERICA* 521–22, 642, 676–80 (2009).

542. See *Election of 1904*, *Am. Presidency Project*; <http://www.presidency.ucsb.edu/showelection.php?year=1904>; see also *supra* text accompanying notes 394–403.

543. Special Message to the Congress Proposing the 1971 Environmental Program, 1971 PUB. PAPERS 125 (Feb. 8, 1971), <http://www.presidency.ucsb.edu/ws/?pid=3294>.

544. *Id.* at 5.

the virtues of the public lands, noting that they “provide us with natural beauty, wilderness and great recreational opportunities as well as minerals, timber, food and fiber.”<sup>545</sup> Accordingly, it continued, “[w]e pledge to develop and manage these lands in a balanced way, both to protect the irreplaceable environment and to maximize the benefits of their use to our society. We will continue these conservation efforts in the years ahead.”<sup>546</sup>

By 2016, the bipartisan consensus seemed to have frayed. According to the 2016 Republican Party Platform, federal “ownership or management” of the nation’s public lands “places an economic burden on counties and local communities in terms of lost revenue to pay for things such as schools, police, and emergency services,” so it is “absurd to think that all that acreage must remain under the absentee ownership or management of official Washington.”<sup>547</sup> The Platform called upon Congress to “immediately pass universal legislation providing for a timely and orderly mechanism requiring the federal government to convey *certain* federally controlled public lands to states.”<sup>548</sup> Though conveniently not defining “certain,” nor providing any guideposts for identifying which public lands should be transferred, it went on to call upon “all national and state leaders and representatives to exert their utmost power and influence to urge the transfer of those lands, identified in the review process, to all willing states for the benefit of the states and the nation as a whole.”<sup>549</sup> The 2016 Platform plank on public lands reflects an ideology the Republican Party has been embracing intermittently since the 1994 elections. The 1996, 2000, and 2012 Platforms had included somewhat similar recommendations, though in tones not as strident as the most recent one.<sup>550</sup> The Democratic Party platforms, by contrast, have never mentioned divestiture, but rather have regarded public lands as an important positive feature of American life.<sup>551</sup>

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545. See *Republican Party Platform of 1972*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=25842> (last visited Jan. 20, 2018).

546. *Id.*

547. *The Republican Party, America’s Natural Resources: Agriculture, Energy, and the Environment*, REPUBLICAN PLATFORM (Jul. 24, 2017), <https://www.gop.com/platform/americas-natural-resources/>.

548. *Id.* (emphasis added).

549. *Id.*

550. *Republican Party Platform of 1996*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=25848> (last visited Jan. 20, 2018); *2000 Republican Party Platform*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=25849> (last visited Jan. 20, 2018); *2012 Republican Party Platform*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=101961> (last visited Jan. 20, 2018).

551. See *2016 Democratic Party Platform*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=117717> (last visited Jan. 20, 2018) (section on public lands makes no mention of divestiture).

Only time will tell whether the very different view expressed in more recent Republican Platforms will turn into a viable political movement in Congress to divest the U.S. of ownership or control of significant amounts of land.

#### CONCLUSION

The arguments in the Utah Paper reflect an incomplete, defective understanding of U.S. legal and political history; an extremely selective, skewed reading of numerous Supreme Court decisions and federal laws; a misleading characterization of the extent to which state laws and policy apply on and influence federal policy with respect to public lands; and a misuse of the dictionary. As a result, its conclusion that “legitimate legal theories exist to pursue litigation in an effort to gain ownership or control of the public lands in Utah” is unpersuasive.<sup>552</sup>

For well over two centuries, the national political process has determined the nation’s policy toward its public lands. An unbroken skein of Supreme Court decisions since the Civil War has allowed that process to operate without any questioning by the federal judiciary of the national government’s constitutional authority to retain ownership of public lands and manage them for broad public purposes.

The nation’s long experience with extensive public landholdings has created deeply held expectations built on this clear understanding that fundamental public land policy decisions are made through the political, and not the judicial, process. Accepting the arguments in the Utah Paper would, by overthrowing that understanding, unsettle those expectations. If its bedrock premise—that the federal courts should take responsibility for determining how much if any land the U.S. Constitution permits the national government to own in a state—were accepted, the validity of thousands of federal laws could be thrown into doubt, and hundreds of thousands if not millions of property transactions that have been based upon those laws could be called into question.

Rather than start down such a perilous path, the courts would almost certainly simply follow the Supreme Court’s clear teachings. Besides all the decisions noted earlier, the Court has several times signaled extreme reluctance to revisit settled public land law. In its 1975 decision in *United States v. Maine*,<sup>553</sup> for example, the Court rejected a bid by eastern coastal states to revisit the Court’s 1947 decision in *United States v. California*,<sup>554</sup> which held that the U.S. held “paramount rights” over the offshore waters and their seabeds. In the nearly thirty

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552. HOWARD ET AL., *supra* note 4, at 1.

553. 420 U.S. 515 (1975).

554. 332 U.S. 19 (1947).

years since that decision, Justice White observed for a unanimous Court, “a great deal of public and private business has been transacted” in reliance upon it.<sup>555</sup> That being so, the Court was “quite sure that it would be inappropriate to disturb our prior cases, major legislation, and many years of commercial activity by calling into question, at this date, the constitutional premises of prior decisions.”<sup>556</sup> The plaintiff states, White continued, “have been on notice of the substantial body of authoritative law, both constitutional and statutory, which is squarely at odds with their claims,” and have not “been in the slightest misled.”<sup>557</sup>

In a unanimous 1980 decision involving public lands, the Court noted that it “has traditionally recognized the special need for certainty and predictability where land titles are concerned.”<sup>558</sup> And even when the Court in 1988 simply clarified that *Pollard v. Hagan*’s presumption of state ownership applied to the beds of waters that were tidally influenced at statehood, even if not navigable, Justices O’Connor, Scalia and Stevens protested, charging that this was an “undoing of settled history” dating back more than 150 years that disrupted “the settled expectations of landowners” in “every coastal State.”<sup>559</sup>

In short, the nation’s founders wisely gave Congress, not states or unelected federal judges, the responsibility to direct the future of the nation’s public lands. It is practically certain the U.S. Supreme Court would agree if asked.

Still, because the Constitution empowers Congress to turn public lands over to states or private interests if it so wishes, defenders of public lands should not be complacent. Public lands will remain in U.S. ownership only if that policy continues to command the support of the American people. Put a little differently, each new generation of Americans must decide for itself whether to support the U.S. retaining ownership of these lands.

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555. *Maine*, 420 U.S. at 527.

556. *Id.* at 528.

557. *Id.* at 527–38.

558. *Leo Sheep Co. v. United States*, 440 U.S. 668, 687 (1980).

559. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 485 (1988) (O’Connor, J., dissenting) (citing *Pollard v. Hagan*, 44 U.S. 212, 230 (1845)); see also *Marvin M. Brandt Revocable Tr. v. United States*, 134 S. Ct. 1257, 1260 (2014).

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