

HISTORY ON AN EQUAL FOOTING: OWNERSHIP OF THE WESTERN FEDERAL LANDS

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[T]he Federal Government must retreat from its claim of ownership and pretension to manage the public lands; the Feds must GO!!¹

Nye County presents its vision of a very different America than the one presently known. Nye's America has no national parks, no national wildlife refuges, and no national forests, because Nye maintains that all this property was transferred to the States long ago.²

INTRODUCTION

On July 4, 1994, Nye County Commissioner Dick Carver began driving a county-owned bulldozer draped in an American flag to re-open a washed-out road in the Toiyabe National Forest in Nye County, Nevada.³ The United States Forest Service ("USFS") had denied Carver authorization to operate the machine on federal land,⁴ stating that the road could not be reopened until completion of an archaeological survey. Carver defied both this statement and a USFS agent who stood in front of the bulldozer holding a sign ordering Carver to stop.⁵ Two days later, Carver requested that criminal charges be filed against the USFS

1. Nevada's Public Lands Reviewed in Light of the Equal Footing Doctrine of the United States Constitution, 1995-2 Op. Dist. Att'y of Eureka County, Nev. 10 (Apr. 3, 1995) [hereinafter Eureka County District Attorney Opinion] (on file with the *University of Colorado Law Review*).

2. Reply Memorandum of Points and Authorities in Support of Plaintiff's Amended Motion for Partial Summary Judgment on Counts I and IV of the Complaint and in Opposition to Defendant's Cross-Motion for Summary Judgment on Counts I and IV at 1, *United States v. Nye County*, 920 F. Supp. 1108 (D. Nev. 1996) (No. CV-S-95-00232-LDG (RJJ)) [hereinafter Federal Brief] (on file with the *University of Colorado Law Review*).

3. See Stipulation of Undisputed Material Facts at 5, *United States v. Nye County*, 920 F. Supp. 1108 (D. Nev. 1996) (No. CV-S-95-00232-LDG (RJJ)) (on file with the *University of Colorado Law Review*); Erik Larson, *Unrest in the West*, TIME, Oct. 23, 1995, at 52.

4. See Stipulation of Undisputed Material Facts, *supra* note 3, at 5.

5. See *United States v. Nye County*, 920 F. Supp. 1108, 1111-12 (D. Nev. 1996).

employees who had interfered with his activities.⁶

From the USFS perspective, Carver was breaking the law by bulldozing on federal land without prior authorization. However, resolutions passed by Nye County⁷ explicitly stated that the County did not accept the federal government's right to own or manage these public lands.⁸ From this contrary point of view, Carver's action was a legitimate exercise of county authority over a county road, and he was justified in requesting prosecution of the USFS employees who had ordered him to stop.⁹

In the last few years, more than 100 western counties have passed "ordinances . . . that repudiate federal control of public lands."¹⁰ The most ambitious ordinances in this "County Movement" expressly claim that the states, not the federal government, own the public lands.¹¹ The validity of these claims has been litigated in federal court,¹² and the legal support for these

6. See *Forest Service Charged with Obstructing Public Official*, DEATH VALLEY GATEWAY GAZETTE, July 7, 1994, at 1.

7. See, e.g., Nye County, Nev., Resolution 93-48 (Dec. 7, 1993) (on file with the *University of Colorado Law Review*).

8. Although both the states and the federal government currently manage different sets of "public lands," the term as used in this paper refers to lands traditionally known as the federal public lands; that is, generally those lands managed by the Bureau of Land Management, the Forest Service, and the National Park Service.

9. Nye County, Nev., Resolution 93-48 (Dec. 7, 1993) claimed that the County owned all trails and roads on public lands within Nye County. This resolution was found unconstitutional to the extent that it applies to trails or roads on public lands for which no valid federal right-of-way exists. See *Nye County*, 920 F. Supp. at 1118-20. The reasoning underlying this decision is discussed throughout this comment.

10. Charles McCoy, *Cattle Prod: Catron County, N.M., Leads a Nasty Revolt over Eco-Protection*, WALL ST. J., Jan. 3, 1995, at 1. Most of these are known as "Catron County Ordinances" that require federal agencies to notify counties of proposed actions and the effects upon the local "custom and culture." See Eric Pryne, *Challenging Federal Power over the Land*, SEATTLE TIMES, Oct. 18, 1994, at A1. Catron-type ordinances oppose certain federal regulation, but generally accept federal ownership of the public lands and thus are not a subject of this comment. See, e.g., Catron County, N.M., Ordinance 004-91 (May 21, 1991) (repealed by Catron County, N.M., Ordinance 003-92 (Oct. 6, 1992)).

11. See, e.g., Nye County, Nev., Resolution 93-48 (Dec. 7, 1993) (on file with the *University of Colorado Law Review*).

12. See *United States v. Vogler*, 859 F.2d 638 (9th Cir. 1988) (holding that the Property Clause gives the federal government the authority to regulate unauthorized heavy equipment use and mining on the public lands); *United States v. Nye County*, 920 F. Supp. 1108 (D. Nev. 1996) (holding that the federal government's retention of title to the public lands is constitutionally authorized); *Hat Ranch, Inc. v. Babbitt*, 932 F. Supp. 1 (D.D.C. 1995) (dismissing suit requesting determination of ownership of the public lands because statute of limitations for Quiet Title Act had passed); *United States v. Gardner*, 903 F. Supp. 1394 (D. Nev. 1995) (holding that the federal

claims is the subject of this comment.

The County Movement's anti-federal ownership arguments rest upon two major contentions. The first is that the Federal Constitution does not empower the federal government to retain public lands. Even assuming the power to retain these lands, the second contention is that the federal government today has nothing to retain because title to the lands passed to the states at the time of statehood under the equal footing doctrine.

As these contentions may surprise those who have never thought to question federal control of the public lands, Part I presents an account of the history and doctrines essential to understanding anti-federal claims.¹³ Part II gauges the legality of the provisions found in many state constitutions disclaiming state ownership of the public lands. Part III reviews the constitutional and case law support for federal retention of the public lands. Part IV examines the applicability of dry land ownership claims based on the equal footing doctrine and reviews the original intent of the doctrine and its interpretation by the U.S. Supreme Court. Finally, the conclusion assesses the merits of the anti-federal view of American history.

I. A LITTLE HISTORY IS A DANGEROUS THING

*History runs through the [Nye County] case like a strand of barbed wire. Briefs for both sides cite the 1848 Treaty of Guadalupe Hidalgo . . . as if it were signed yesterday.*¹⁴

In its suit challenging federal ownership of the public lands, Nye County claimed that the United States' theory depended on "[p]icking and choosing among historical events."¹⁵ The federal

government is authorized under the Constitution to retain and pass rules for the public lands).

13. The term "anti-federal" will be used in this comment to refer to the viewpoint that asserts that the federal government does not have the right to own or manage the public lands. This is not meant to connote a general objection to all federal authority, although such sentiment is often evinced by members of the "County Movement."

14. Larson, *supra* note 3, at 66. The Treaty of Guadalupe Hidalgo ended the Mexican-American War, giving the United States control of most of today's American Southwest for \$15 million. See BENJAMIN HORACE HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES 20-21 (1965).

15. Defendant's Cross Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment on Counts I and IV at 13, United States v. Nye County, 920 F. Supp. 1108 (D. Nev. 1996) (No. CV-S-95-00232-LDG (RJJ))

government, meanwhile, claimed that the County's argument was "[u]nsupported by history, law, or common sense."¹⁶ Reconciling the opposing viewpoints requires moving past the rhetoric and taking an unbiased look at the origins and history of the federal public land estate.

A. *Beginnings*

First-year law students learn that determining ownership of a piece of property often requires tracing its "chain of title" back to the original grantor. In the case of the public lands, this tracing reveals that the original owners of the property generally did not intend to transfer their ownership, as Native Americans were summarily dispossessed by the "rule of discovery."¹⁷

Following English "discovery" and settlement, title to the original Thirteen Colonies, and all the vacant lands within them, was thus deemed to be vested in the English Crown.¹⁸ All rights inherent in this title were legally transferred to the several states after the American Revolution.¹⁹ According to the general American understanding, these incidents of sovereignty that the states acquired from the Crown included title to the lands underlying navigable waters.²⁰

[hereinafter Nye County Brief] (on file with the *University of Colorado Law Review*).

16. Federal Brief, *supra* note 2, at 3.

17. See, e.g., *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 567 (1823) ("Discovery is the foundation of title, in European nations, and this overlooks all proprietary rights in the natives.") (Marshall, C.J.).

18. See *Shively v. Bowlby*, 152 U.S. 1, 14 (1894).

19. See *id.* at 14, 15.

20. See *Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987).

Under English common law the English Crown held sovereign title to all lands underlying navigable waters. Because title to such land was important to the sovereign's ability to control navigation, fishing, and other commercial activity on rivers and lakes, ownership of this land was considered an essential attribute of sovereignty. Title to such land was therefore vested in the sovereign for the benefit of the whole people. When the 13 Colonies became independent from Great Britain, they claimed title to the lands under navigable waters within their boundaries as the sovereign successors to the English Crown. Because all subsequently admitted States enter the Union on an "equal footing" with the original 13 States, they too hold title to the land under navigable waters within their boundaries upon entry into the Union.

Id. at 195-96 (citations omitted). A recent article claims that this quotation reflects an erroneous conception of the Crown's ability to alienate lands underlying navigable waters under English common law. See James R. Rasband, *The Disregarded Common Parentage of the Equal Footing and Public Trust Doctrines*, 32 *LAND & WATER L. REV.* 1 (1997). This viewpoint and its implications concerning the origin

After the Revolution, seven of the states also held title to large tracts of "western" land, stretching to the Mississippi.²¹ Following cries of unfairness from the six remaining landless states,²² the western claims were ceded to the national government for the "use and benefit . . . of the United States."²³ Conditions on certain of the cessions²⁴ also required that the new territory be divided into states that would be admitted into the Union with the "same 'rights of sovereignty, freedom, and independence, as the other States.'"²⁵ This concept was soon enunciated as requiring new states to be admitted on an "equal footing" with the original states—language that would first appear in the Ordinance of 1784 and the succeeding Northwest Ordinance of 1787, which provided for the disposal of the ceded lands.²⁶ Unfortunately, under the Articles of Confederation, the national government that accepted these cessions was "without the least color of constitutional authority" to receive them from the states.²⁷

of the equal footing doctrine are discussed in Part IV.B.

21. These states were Massachusetts, Connecticut, New York, Virginia, North and South Carolina, and Georgia. See PAUL W. GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* 49 (1968).

22. Typical were Maryland's instructions to her delegates in Congress in 1778, requiring that the western lands "wrested from the common enemy by blood and treasure of the Thirteen States, should be considered as common property." HIBBARD, *supra* note 14, at 9 & n.2.

23. THOMAS DONALDSON, *THE PUBLIC DOMAIN* 69 (3d ed. 1884) (quoting language from Virginia's Act of Cession of 1783).

24. Only Connecticut, Virginia, North Carolina, and Georgia put conditions on their cessions. See HIBBARD, *supra* note 14, at 10.

25. See, e.g., GATES, *supra* note 21, at 52 (quoting Virginia's Act of Cession of 1783).

26. The Northwest Ordinance, passed under the Articles of Confederation, was reauthorized by the First Congress. See *An Act to Provide for the Government of the Territory Northwest of the River Ohio*, ch. 8, 1 Stat. 50 (1789). A committee of the Confederation Congress (including Thomas Jefferson) coined the phrase "equal footing" to describe how new states formed from the ceded lands should enter the Union. See David E. Engdahl, *Comments on "Equal Footing"* 1 (July 31, 1994) [hereinafter Engdahl, *Comments on Equal Footing*] (unpublished manuscript prepared for the Program on "Counties, States and Federal Lands" in Las Vegas, Nev., on file with the *University of Colorado Law Review*). The phrase (or a version of it) "fast became boilerplate, and appears in the admission documents of almost every subsequent State." *Id.*

27. Albert W. Brodie, *A Question of Enumerated Powers: Constitutional Issues Surrounding Federal Ownership of the Public Lands*, 12 PAC. L.J. 693, 696 (1981) (quoting THE FEDERALIST No. 38).

B. *The Federal Constitution and Land Ownership*

The Constitution of 1787 empowered the new federal government to own and retain land, fixing this authority at two locations in the document. The first is the "Enclave Clause," under which Congress has the power to hold land for a list of specified purposes "and [for] other needful Buildings."²⁸ This clear constitutional mandate to own and govern property remains unchallenged.²⁹ Although the Clause requires that the land be obtained with consent of the state's legislature,³⁰ Congress may legislate with "complete sovereignty" over property held by the U.S. government and used for the purposes enumerated in the Enclave Clause.³¹

The second location is the "Property Clause," which gives Congress the power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."³² The Property Clause "provides the basis for governing the Territories of the United States"³³ and this power over public lands "entrusted to Congress is without limitations."³⁴ These quotations embody a view of federal authority that inflames anti-federal supporters: that large areas of land within states remain "territories" of the federal government, although (to the anti-federalist) it is questionable whether the Constitution actually gave Congress such unlimited authority over the public lands.³⁵

28. U.S. CONST. art. I, § 8, cl. 17.

To exercise exclusive Legislation in all Cases whatsoever over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.

Id.

29. See, e.g., *Pacific Coast Dairy v. Department of Agric.*, 318 U.S. 285 (1943) (upholding the exclusive jurisdiction of the United States in a federal enclave).

30. Current interpretation holds that the United States can acquire the land without permission of the state (as in condemnation, for example), but still exercises exclusive jurisdiction if the state later gives its "consent." See *Paul v. United States*, 371 U.S. 245, 264 (1963).

31. See *S.R.A., Inc. v. Minnesota*, 327 U.S. 558, 562 (1946).

32. U.S. CONST. art. IV, § 3, cl. 2.

33. *Kleppe v. New Mexico*, 426 U.S. 529, 539-40 (1976).

34. *Id.* at 539 (quoting *United States v. San Francisco*, 310 U.S. 16, 29 (1940)).

35. The support for accepting the anti-federalist interpretation of current public

The Property Clause follows closely upon the heels of Article IV's "New States Clause," which allows Congress to admit states to the Union.³⁶ It did not take long after the Constitution's ratification for Congress to begin wielding this power to accept states formed from the federal land estate.

C. *Restrictions and Grants*

Following the anomalous admission of Vermont in 1791,³⁷ Kentucky and Tennessee were the first new states carved from the ceded lands, joining the Union only under the restrictions of their cession documents.³⁸ The enabling acts following the admission of Ohio, however, contained more severe restrictions, including the requirement that the new states disclaim any rights to the remaining public lands within their borders.³⁹ To make the

land policy is, of course, the focus of this comment. There are a number of possible interpretations of the federal government's authority over the public lands, such as the above-mentioned "Catron County Ordinance" view. *See supra* note 10. Another viewpoint not further discussed here is Professor David Engdahl's formulation of the "classic Property Clause doctrine." Engdahl agrees that the Enclave Clause vests exclusive jurisdiction in the federal government over land acquired with state consent and used for one of the enumerated purposes. However, Engdahl supports (what he calls) "the classic Property Clause doctrine." This view holds that the Property Clause clearly gives the federal government the power to *own* the public lands (even post-statehood), but that *governance* power over these federally retained lands resides in the states. Thus, Engdahl feels that the above quotation from the *Kleppe* Court is at odds with traditional concepts of federalism. This interpretation may lend support to proponents of "Catron County Ordinances," but is noteworthy in this comment for its endorsement of the constitutionality of federal ownership of the public lands. *See Engdahl, Comments on Equal Footing, supra* note 26; David E. Engdahl, *Sovereignty and Accountability* (Oct. 21, 1995) [hereinafter Engdahl, *Sovereignty and Accountability*] (unpublished manuscript prepared for seminar on Political Accountability and Popular Sovereignty in Phoenix, Ariz., on file with the *University of Colorado Law Review*).

36. *See* U.S. CONST. art. IV, § 3, cl. 1. Note that "New States *may be admitted*." *Id.* (emphasis added). Congress is not required to grant statehood and admission to requesting territories. *See also* *Permoli v. New Orleans*, 44 U.S. 589 (1845) (holding that Congress has the power to decide if a proposed state's constitution meets the requirements to be granted admission).

37. Not one of the original Thirteen Colonies, Vermont had refused to be controlled by either New Hampshire or New York. After ratifying the new Constitution, "Vermont was the only state admitted into the Union without conditions of any kind, prescribed either by the Congress or by the state from which it was carved." GATES, *supra* note 21, at 286.

38. *See id.* at 286-87. Kentucky and Vermont were admitted in 1792 and 1796 respectively. *See supra* notes 23-26 and accompanying text for discussion of the cessions.

39. *See* GATES, *supra* note 21, at 288-91.

limitations more palatable, Ohio was the first of many states to whom the federal government granted land in every township for common schools and the right to five percent of the proceeds of sales of the remaining public lands within the state.⁴⁰

The pattern of disclaimers in exchange for land grants would be repeated in almost every subsequent enabling act, engendering controversy for decades.⁴¹ New states complained that they had not entered the Union on an equal footing with the original states,⁴² while older states objected to the school land grants and the federal government's failure to use all of the proceeds of the land sales for the benefit of all of the states.⁴³ The older states fared poorly in this battle, and their small gains have been described as "a mere bagatelle compared with the 181 million acres given to the new states for various purposes . . . [y]et the West would not permit the East to forget that the Original States had retained all their public lands within their final borders."⁴⁴

To ground this controversy in particulars, it is helpful to look at the relevant documents that are at the heart of Nye County's claims. Nevada's Enabling Act allowed the territory to form a state government that would be admitted "upon an equal footing with the original states, in all respects whatsoever."⁴⁵ This was conditioned, however, upon Nevada's Constitutional Convention passing an irrevocable ordinance "forever disclaim[ing] all right and title to the unappropriated public lands lying within said

40. See *id.* at 291. The amount of land granted to newly admitted states would increase in later years.

41. It is vital to note that the original states had retained title to the "vacant lands" within their borders that had not been appropriated before the Revolution, notwithstanding the lands that seven of the states chose to cede to the national government. See *id.* at 55-56. Subsequently entering states objected to giving up property rights that the original states had been allowed to keep. This dispute led to a number of "distribution bills" that proposed different schemes for use of revenues from public land sales, as well as congressional debate over the proper balance of power between old and new states. See HIBBARD, *supra* note 14, at 171-97.

42. In 1828, Governor Edwards of Illinois voiced these complaints and claimed that the Constitution did not allow the federal government to retain the public lands. This is the same claim made recently by Nye and Otero Counties. See GATES, *supra* note 21, at 9.

43. In 1821, a report by the Maryland Legislature stated that the western lands had been won "by the common sword, purse, and blood of all the States . . . [and thus could not be turned] to the use and benefit of any particular State or States, to the exclusion of the others, without a . . . violation of the spirit of our national compact." *Id.* at 6.

44. *Id.* at 27.

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

territory."⁴⁶ Six months later, the territory of Nevada approved an ordinance containing this exact language.⁴⁷ This disclaimer of right to the public lands is similar to that found in many of the prior and subsequent states' constitutions.⁴⁸

II. DISCLAIMING THE DISCLAIMERS

*[The disclaimer] ordinance is invalid, unconstitutional and does not bind the State of Nevada because it was not enacted pursuant to the Constitution, but rather in defiance thereof.*⁴⁹

One of the first hurdles facing anti-federal supporters is finding a way to moot the states' explicit disavowals of ownership of the public lands. The most straightforward approach is to attempt to show that the provisions are not legally enforceable based on Supreme Court precedents⁵⁰ and basic common law doctrines⁵¹ that question their validity. This argument, like most other anti-federal ownership claims, rests atop the 1845 case of *Pollard v. Hagan*.⁵²

46. *Id.*

47. See NEV. CONST. ordinance.

48. For example, virtually identical language can be seen in the Montana Enabling Act, ch. 180, 25 Stat. 676, 677 (1889), and the Utah Enabling Act, ch. 138, 28 Stat. 107, 108 (1894), and later repeated in ordinances in the constitutions of both states.

49. Eureka County District Attorney Opinion, *supra* note 1, at 15.

50. See, e.g., *Coyle v. Smith*, 221 U.S. 559 (1911); *Pollard v. Hagan*, 44 U.S. 212 (1845).

51. An argument can be made that the unequal bargaining position between the United States and a supplicant territory requesting expected admission led to an unconscionable "contract" that required the territory to give up land to join the Union. "Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.28 (Supp. 1996) (quoting *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965)). Of course, this leaves open the factual question of whether the enabling acts were "unreasonably favorable" in light of the promised school grant lands. See *supra* notes 39-44 and accompanying text.

Another argument analogizes from corporation law, contending that a pre-statehood constitutional convention cannot bind the state to give up its land claims. "An agreement between a promoter and a third person made in behalf of a proposed corporation . . . is not a contract but at most a 'gentlemen's agreement' involving a revocable 'offer' to be communicated to the proposed corporation after its formation." HARRY G. HENN & JOHN R. ALEXANDER, LAWS OF CORPORATIONS § 109 (3d ed. 1983).

52. 44 U.S. 212 (1845).

In *Pollard*, the Supreme Court ruled that the United States could not transfer title to land that lay under the navigable waters of the Mobile River because this title had passed to Alabama at statehood and the United States thus had no title left to transfer.⁵³

Alabama is therefore entitled to the sovereignty and jurisdiction over all the territory within her limits . . . to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine, is to deny that Alabama has been admitted into the union on an equal footing with the original states. . . . Then to Alabama belong the navigable waters, and soils under them.⁵⁴

Another issue raised in the case was how Alabama could have had the power to own the parcel because, like most other states, it had disclaimed title to all unappropriated public lands within its borders. The Court rejected the assertion that a bare agreement between a state and Congress can effectively waive the state's rights, concluding that the disclaimer "cannot operate as a contract between the parties, but is binding as a law."⁵⁵ Thus, if the disclaimer does not have force as a contract, then it is binding only insofar as Congress has the constitutional authority to promulgate such a law.

This reasoning was developed in *Coyle v. Smith*⁵⁶ into a simple logical progression: if a state enters the Union on an equal footing with the original states, then its powers of sovereignty and jurisdiction cannot be reduced by any pre-statehood condition that would not be valid congressional legislation after

53. *See id.* The opinion briefly discussed the historical claims of both Georgia (to the later-ceded lands) and Spain (to lands later granted by treaty) to the land containing the disputed parcel. *See id.* at 225-28. The difference between the restrictions on ceded lands and the absence of a disposal mandate on land acquired by other treaties is discussed below in Part III.B.

54. *Id.* at 228-29. This was an early formulation of the principles discussed by Justice O'Connor in *Utah Division of State Lands v. United States*, 482 U.S. 193 (1987). *See supra* note 20. The concept and implications of the equal footing doctrine will be discussed in Parts IV and V.

55. *Pollard*, 44 U.S. at 224. This principle was further elucidated by the Court in *Van Brocklin v. Anderson*, 117 U.S. 151 (1886), which stated that the disclaimers were only declaratory and conferred no new right or power upon the United States. *See id.* at 167.

56. 221 U.S. 559 (1911).

admission.⁵⁷ *Coyle* applied this principle by striking down a provision in Oklahoma's Enabling Act that fixed a location for the state's capital,⁵⁸ a directive that Congress clearly would not have the power to impose on an existing state.

The holdings from these two cases are sufficient to show that the disclaimer clauses are irrelevant to a discussion about ownership of the public lands. An element of an enabling act can be invalidated if it lays beyond congressional power, regardless of any agreement by a territorial convention.⁵⁹ Thus, the enabling act requirements that states give up their claims to the public lands within their borders are meaningless if the United States does not have the power to retain these lands. Of course, if the federal government does have this power, then its current ownership of the public lands is beyond question.

III. OWNING ONE-THIRD OF THE NATION'S LAND

*When the people accepted the power of the nation to become the owner of such immense areas as were involved in the Louisiana Purchase and in the conquests and purchases from Mexico, it was a practical necessity that a long-range Federal public lands program could not be terminated within a state by its admission.*⁶⁰

As stated above, the Framers gave the new national government the power to own land in the Constitution of 1787.⁶¹ The authority granted in the Property Clause was probably intended to allow retention and disposal of the recently obtained ceded lands.⁶² The following section of this comment examines the support for such a view and whether the Framers' intentions should control public land policy today.

57. *See id.* at 573.

58. "Has Oklahoma been admitted upon an equal footing with the original states? If she has, she . . . may determine for her own people the proper location of the local seat of government. She is not equal in power to them if she cannot." *Id.* at 579.

59. That is, if a congressional action (such as a provision in an enabling act) is unconstitutional, then no agreement will suffice to cloak it in constitutional garb.

60. John Hanna, *Equal Footing in the Admission of States*, 3 BAYLOR L. REV. 519, 529 (1951).

61. *See supra* notes 28-34 and accompanying text.

62. *See supra* notes 21-26 and accompanying text.

A. Federal Land Ownership Under the Constitution

The Enclave Clause can quickly be rejected as the mechanism providing the federal government with authorization to retain the vast public lands holdings. It is clear that use of federal land for national forests and parks falls beyond the scope of the Clause's contemplated federal land ownership uses, which include forts, dockyards, and arsenals.⁶³ Further, the Enclave Clause requires "consent of the Legislature of the state,"⁶⁴ which would be difficult to obtain in some public land states today.⁶⁵

If it exists, constitutional authorization for federal ownership of the public lands must then be found in the Property Clause.⁶⁶ This provides a textual arrow in the anti-federal quiver because (unlike the Enclave Clause) the Property Clause is not located in Article I with Congress's other enumerated powers.⁶⁷ Anti-federal

63. See *supra* notes 28-31 and accompanying text.

64. See *supra* notes 28-31 and accompanying text. Remember that the consent of the territorial conventions, as seen in the disclaimer ordinances, is not the same as consent of the state's legislature. However, this consent requirement has been vitiated by Supreme Court rulings such as *Kohl v. United States*, 91 U.S. 367 (1876) (granting the power of eminent domain to the federal government), and *United States v. Gettysburg Electric Railway*, 160 U.S. 668 (1896) (granting the federal government the right to buy land from individuals for many purposes).

65. See, e.g., NEV. REV. STAT. § 321.596 (1979) (declaring that unappropriated public lands in Nevada belong to the state, not to the federal government).

66. This comment's comparatively brief discussion of the Property Clause can be supplemented by reference to many other scholars' attempts to find the "true meaning" of the Clause. See, e.g., Brodie, *supra* note 27; David E. Engdahl, *State and Federal Power over Federal Property*, 18 ARIZ. L. REV. 283 (1976); Louis Touton, Note, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 COLUM. L. REV. 817 (1980); cf. Eugene R. Gaetke, *Refuting the 'Classic' Property Clause Theory*, 63 N.C. L. REV. 617 (1985); Dale D. Goble, *The Myth of the Classic Property Clause Doctrine*, 63 DENV. U. L. REV. 495 (1986).

67. See *United States v. Lopez*, 115 S. Ct. 1624 (1995).

The [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.

Id. at 1633 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819)). The "enumerated powers doctrine" stemming from *McCulloch* has been summarized as follows: "So long as it would be reasonable for Congress to view a problem as connected to one of the Constitution's grants of power, the law is valid." JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 3.3 (5th ed. 1995).

Although most congressional actions can be constitutionally justified as taxation-related (see U.S. CONST. art. I, § 8, cl. 1) or as regulation of commerce (see U.S. CONST. art. I, § 8, cl. 3), sometimes the government is barred from an action because no authorization can be found in the Constitution. This was the case in *Lopez*, where

supporters have claimed that the failure to designate the Property Clause's authority as one of Congress's specifically granted powers rules out an interpretation of the Clause as allowing the United States to retain and regulate public lands post-statehood.⁶⁸

In keeping with this intentionalist interpretation,⁶⁹ anti-federal supporters have used another name for the provision: "[T]he *Territory Clause* does not grant title or ownership rights to the United States."⁷⁰ According to this view, the delegates at the Constitutional Convention intended to give the new government the power to hold the state-ceded lands before their sale and subsequent admittance as new states, but certainly did not contemplate the United States retaining any of the public domain post-statehood.⁷¹ The Property Clause's granted powers to dispose of and to govern (but not explicitly to retain) land, and its location in the same section as the New States Clause, lend credence to this theory.

Following this premise, anti-federal claimants assert that the United States was intended to act merely as a trustee over the public lands until they became new states.⁷² This contention obtains support from language in the ubiquitous *Pollard* decision, which describes the United States' power over the lands as ending upon fulfillment of its trust obligations.⁷³ This is the chain of

the Supreme Court held that punishing possessors of firearms near schools was not an action within the ambit of the Commerce Clause. See *Lopez*, 115 U.S. at 1635.

68. See, e.g., Brodie, *supra* note 27, at 721 ("[This power] was not so inserted [into Article I] because it was felt that the federal government should own no property for any purpose other than for the implementation of its enumerated functions.").

69. Whether or not this interpretation is in fact a "correct" reading of the Property Clause, it clearly seeks authority by appealing to the original intent of the Framers.

70. Nye County Brief, *supra* note 15, at 25 (emphasis added).

71. See C. Perry Patterson, *The Relation of the Federal Government to the Territories and the States in Landholding*, 28 TEX. L. REV. 43, 53-55 (1949).

72. See, e.g., Memorandum of Points and Authorities in Support of Otero's Cross Motion for Summary Judgment and Opposition to United States' Motions for Summary Judgment and to Dismiss at 44, *Hat Ranch, Inc. v. United States*, 932 F. Supp. 1 (D.D.C. 1995) (No. 95-0172 (JR)) [hereinafter Otero County Brief] (on file with the *University of Colorado Law Review*).

73. See *Pollard v. Hagan*, 44 U.S. 212 (1845).

The object of all the parties to these contracts of cession, was to convert the land into money for the payment of the [Revolutionary War] debt, and to erect new states over the territory thus ceded; and as soon as these purposes could be accomplished, the power of the United States over these lands, as property, was to cease.

reasoning leading to the conclusion that Article IV authorizes federal ownership of land for no purpose beyond its trustee role. Interestingly, support for this assertion comes from *Dred Scott v. Sandford*,⁷⁴ in which the Supreme Court interpreted the Property Clause as having no power beyond the cession of lands.⁷⁵ Looking only at this argument, it would appear that the Constitution does not allow the federal government to own and govern the public lands.⁷⁶ However, presenting only this side of the argument does not present history on an equal footing.

Whenever the United States shall have fully executed these trusts, 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.

Id. at 224; *see also* *Barker v. Harvey*, 181 U.S. 481, 490 (1901) (“The words “public lands” are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws.”) (quoting *Newhall v. Sanger*, 92 U.S. 761, 763 (1875)).

To illustrate another extreme regarding the *Pollard* decision, one anti-federal supporter claimed more than 60 years ago that the *Pollard* Court deliberately placed fraudulent obscurities in the opinion that would lay a foundation for future extension of federal power. *See* GEORGE EDWARDS, PUBLIC DOMAIN OR GOVERNMENT BY LAW 218-20 (1934). It is difficult to understand Edwards’ claims, or to see them as anything but a caustic political diatribe. As evidence of this, Edwards later claims that the extension of Property Clause power beyond a trust framework was a prelude to “[t]he natural development of Federal usurpations, which began with the adoption of the Second Constitution, [which] was the Franklin Roosevelt dictatorship, its sinister significance unsuspected by an anxious, groping people.” *Id.* at 348-49.

74. 60 U.S. (19 How.) 393 (1856).

75. The Supreme Court found:

[The Property Clause] was intended for a specific purpose. . . . It was to transfer to the new Government the property then held in common by the States, and to give to that Government power to apply it to the objects for which it had been destined by mutual agreement among the States before their [Confederation] was dissolved. It applied only to the property which the States held in common at that time, and has no reference whatever to any territory or other property which the new sovereignty might afterwards itself acquire.

Id. at 436.

76. A similar argument is made for the Property Clause’s phrase “other property.” Brodie claims that the term was “conceivably penned to provide for those areas across the Mississippi that would come eventually under this country’s control.” Brodie, *supra* note 27, at 720. He goes on to claim that “other property” is meant to be read coequally with “territory,” so that neither authorizes current federal ownership. *See id.* at 721.

B. Trustees by Contract, not by Constitution

The above argument contains two major flaws: its selective review of history and citation,⁷⁷ and its "static . . . anachronistic" view of the Constitution.⁷⁸ The starting point of examination is the argument that the failure to locate the Property Clause with the other enumerated powers somehow lessens its reach and authority. First, regardless of its location, the Clause clearly reads that "Congress *shall have Power* to dispose of and make all needful Rules and Regulations."⁷⁹ This broad grant of authority is not reduced by its location.⁸⁰ Second, other well-recognized congressional powers lay outside Article I,⁸¹ and no one claims that their scope should thus be limited.

Of course, the main thrust of this critique must be the invalid conclusion that Article IV only allows federal *trustee* ownership of land prior to the land becoming a state. Based on the anti-federal arguments presented above, as well as common sense, it seems very possible that the Founders intended "territory" in the Property Clause to refer to the state ceded lands.⁸² However, this does not lead to the conclusion that the Property Clause imposes limitations on federal disposal of this "territory."⁸³ Such a

77. This comment has attempted to portray a complete and sympathetic presentation of anti-federal ownership arguments. The author has not intended to construct a strawperson of incomplete citation which is then demolished for that failing. A fuller reading of the case law cited above by anti-federal supporters, and consideration of the many other relevant decisions, will hopefully reveal the poverty of their reading of the Property Clause.

78. Hanna, *supra* note 60, at 528.

79. U.S. CONST. art. IV, § 3, cl. 2 (emphasis added).

80. In fact, the separation of the Property Clause from the Enclave Clause (in different articles) shows the difference between the powers granted under each. Specifically, the Property Clause has no requirement of state consent, unlike the enumerated Enclave power.

81. See, e.g., U.S. CONST art. III, § 1 (providing that Congress may "ordain and establish" inferior courts); U.S. CONST art. IV, § 3 (providing that Congress may admit new states); see also Goble, *supra* note 66, at 499 n.22.

82. See Patterson, *supra* note 71, at 53-54.

83. In rejecting Nye County's claim that the Constitution does not authorize federal retention of the public lands, the Nevada District Court referred to a broad Supreme Court interpretation of the Property Clause from over 150 years ago:

"[t]he term territory, [as used in the Property Clause], is merely descriptive of one kind of property; and is equivalent to the word lands. And Congress has the same power over it as over any other property belonging to the United States; and this power is vested in Congress without limitation . . ."

United States v. Nye County, 920 F. Supp. 1108, 1117 (D. Nev. 1996) (quoting United

conclusion neglects consideration of the most salient characteristic of the grants: the cession documents themselves required the federal government to dispose of the lands to create new states.⁸⁴ Even the *Pollard* Court stated that "the United States hold the public lands within the new states by force of the deeds of cession."⁸⁵ Thus, the federal government's mandated trustee role arose not from the Property Clause, but simply from the conditions placed upon the cessions.⁸⁶

Since individual states granted the ceded lands to the United States, they had the same power as any grantor to put restrictions upon the lands' subsequent use.⁸⁷ However, the foreign sovereigns that signed the Louisiana Purchase and the Treaty of Guadalupe Hidalgo (among other treaties and agreements) did not place restrictions on such disposal, nor did they require the federal government to create new states out of the lands west of the Mississippi.⁸⁸ As the text of the Property Clause is silent on

States v. Gratiot, 39 U.S. (14 Pet.) 526, 537 (1840)). The Supreme Court opinion also noted that disposal of the public lands must be left to the discretion of Congress. See *Gratiot*, 39 U.S. 526.

This accords with the text of the Clause, which seems to call for a broad reading (granting the power "to dispose of and *make all needful Rules and Regulations*"). U.S. CONST. art. IV, § 3, cl. 2 (emphasis added). The proposed intentionalist interpretation that would limit the reach of the Clause requires some damage to the plain meaning of these words.

84. See *supra* notes 23-25 and accompanying text. "[U]pon condition that the territory so ceded shall be laid out and formed into States . . . and that the States so formed shall be distinct republican States, and admitted members of the Federal Union." DONALDSON, *supra* note 23, at 68-69 (quoting from Virginia's Act of Cession (1783)).

85. *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 224 (1845).

86. Professor Gaetke has claimed that the restrictions in the cessions (which arose from a political compromise between the Confederation and the seven states holding "western" land) did not even mandate the trustee relationship that this comment assumes arguendo:

Three factors, however, suggest caution in basing an interpretation of constitutional powers over federal lands on the cessions under the compromise. First, the classic theorists arguably are wrong in their interpretation of the terms of the compromise. Second, the compromise itself was of questionable legal validity. Third, the terms of the compromise may well have been altered by the subsequent ratification of the Constitution.

Gaetke, *supra* note 66, at 626.

87. See ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* § 2.3 (2d ed. 1993).

88. See, e.g., DONALDSON, *supra* note 23, at 126-32 (providing text of Treaty of Guadalupe Hidalgo (1848)). Proponents of "Catron County Ordinances" claim that the Treaty of Guadalupe Hidalgo provided that the United States would "recognize the customs and usages" of former Mexican citizens. Mark Dowie, *With Liberty and*

the subject, there can be no disposal or trustee requirements on these lands without bargained-for restrictions in the transfer documents.

C. *The Manifest Destiny of a Dynamic Constitution*

Let us assume that the Framers intended the Property Clause to refer only to the "territory" between the Appalachians and the Mississippi. Regardless, the history of our westward expansion makes clear that this conception of the Clause has been superseded and the nation has forged a new constitutional land ownership understanding.

Taking anti-federal theory to its endpoint, one could claim that none of the United States' land purchases have been valid because they were made without any constitutional authority.⁸⁹ However, more than 150 years after the last major land purchase in the lower forty-eight states, few Americans would deny the federal government's right to have acquired the lands they live in or that these lands were purchased by (and for) all of the United States.⁹⁰ Given the validation of these public acquisitions, the federal government needed the practical ability to take actions regarding its vast, largely uncharted, new domain. The Supreme Court made clear in *Light v. United States*⁹¹ that this power is located in the Property Clause: "The full scope of this paragraph has never been definitely settled. Primarily, at least, it is a grant of power to the United States of control over its property."⁹² The

Firepower for All, OUTSIDE, Nov. 1995, at 60, 65. Even to the extent that support for this claim can be found in Articles VIII and IX, the Treaty makes no provision regarding future disposal of the land. See DONALDSON, *supra* note 23, at 126-32.

89. Even one of the Founding Fathers addressed this question. Gates describes Jefferson as "seriously doubt[ing]" whether he should purchase the Louisiana Territory without an authorizing amendment to the Constitution. See GATES, *supra* note 21, at 77.

90. See Hanna, *supra* note 60, at 528-29.

If there were doubts as to the power of the United States to acquire Louisiana, Alaska . . . and elsewhere, these have been resolved decisively in favor of the Federal government, not only by the Supreme Court but by the people through their elected representatives in the Congress and the presidency. One may question the wisdom of some or all of these developments, but one can scarcely raise at this time the question of national power in respect of them.

Id.

91. 220 U.S. 523 (1911).

92. *Id.* at 536-37 (quoting *Kansas v. Colorado*, 206 U.S. 46, 89 (1906)). As these pages from *Light* also contain statements that were taken out of context in Nye

Court stated that this power allows the federal government to dispose of the land, reserve it for other purposes, or *withhold it indefinitely*.⁹³ This interpretation was recently followed in *United States v. Gardner*,⁹⁴ in which the court stated that “[t]he United States retains and manages federal lands within the State of Nevada . . . pursuant to its powers under the Constitution, primarily the Property Clause”⁹⁵

Although the Supreme Court’s reading differs from the anti-federalists’ proposed intentionalist interpretation of the Property Clause,⁹⁶ the two views may be merely representative of their different eras. As described above, the superannuated original understanding was based on assumptions that did not contemplate the growth of the nation past the Mississippi River. Post-Civil War America required a more current interpretation that reflected the reconceptualized nature of federal land ownership.⁹⁷

County’s brief, *see* Nye County Brief *supra* note 15, at 20, it is helpful to examine more of the decision’s language:

But “the Nation is an owner, and has made Congress the principal agent to dispose of its property.” . . . “Congress is the body to which is given the power to determine the conditions upon which the public lands shall be disposed of.” “The Government has with respect to its own land the rights of an ordinary proprietor to maintain its possession and prosecute trespassers. It may deal with such lands precisely as an ordinary individual may deal with his farming property. It may sell or withhold them from sale. . . .”

The United States 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. It is true that the “United States do not and cannot hold property as a monarch may for private or personal purposes.” But that does not lead to the conclusion that it is without the rights incident to ownership, for the Constitution declares [the Property Clause, U.S. CONST. art. IV, § 3, is recited in full].

Light, 220 U.S. at 536 (citations omitted).

93. *See id.* This power subsumes the definition of public lands from *Barker v. Harvey*, 181 U.S. 481, 490 (1901), which described public lands as “*subject to sale*,” not lands required to be sold. *See supra* note 73.

94. 903 F. Supp. 1394 (D. Nev. 1995). The United States sued after the Gardners had allowed their cattle to graze for two years on an area of the Humboldt National Forest closed to grazing, disregarding Forest Service orders to remove the cattle. *See id.* at 1398-99. The court ordered the cattle removed and required the Gardners to pay more than \$7000 in unauthorized grazing use fees. *See id.* at 1403.

95. *Id.* at 1400. The court stated that “without merit is the Gardners’ assertion that the United States has no authority to retain the public lands in its possession. This proposition was long ago rejected by the Supreme Court.” *Id.* at 1401 (citing *Light v. United States*, 220 U.S. 523 (1911)).

96. *See supra* notes 67-75 and accompanying text.

97. An analogy can be drawn to the interpretation of congressional power under the Commerce Clause. An early case held that this power did not extend to regulation of manufacturing. *See United States v. E.C. Knight Co.*, 156 U.S. 1

Beyond the lack of restrictions in the acquisition documents for the later-acquired western lands and the need for authority to govern and dispose of these lands, other circumstances supported the need for a new paradigm. For instance, the Supreme Court had already begun to disregard the Framers' apparent intent in the late 1800s by holding that the federal government does have the power to condemn land within a state without the state's consent.⁹⁸ Even the accidents of geography demanded a changed understanding, as the new western lands were different than those east of the Mississippi. As much of the West cannot be easily farmed, the large-scale disposal of land for agricultural use intended by a raft of disposal statutes was not realistic.⁹⁹ Additionally, the conservation movement gained popularity around the turn of the century and signaled a change in popular perceptions and values concerning the public lands.¹⁰⁰

If the United States has complete ownership power over the public lands under the Property Clause,¹⁰¹ then the federal government would not have been required to transfer any of the non-ceded land to the states.¹⁰² These lands, purchased with taxes paid by the people of all the states, belonged to the entire

(1895). However, this early view was made obsolete by the shift from intrastate to interstate markets and the growth of the administrative state during the New Deal, so that more recent cases have recognized an expansive reading of the Clause. See, e.g., *Perez v. United States*, 402 U.S. 146 (1971) (allowing the regulation of purely local "loan sharking" activities because of the overall effect of organized crime on interstate commerce). Although this new reading should and does have limits, see *United States v. Lopez*, 115 S. Ct. 1624 (1995) and discussion *supra* note 67, it is unrealistic to imagine that the complex economics of our modern nation could be governed using an eighteenth century definition of "commerce."

98. See *Hanna*, *supra* note 60, at 529 (citing *United States v. Gettysburg Elec. Ry.*, 160 U.S. 668 (1895); *Kohl v. United States*, 91 U.S. 367 (1875)).

99. See WALLACE STEGNER, *BEYOND THE HUNDREDTH MERIDIAN* 219-23 (1982). Stegner discusses the difficulties of the Homestead Act of 1862, the Desert Land Act of 1877, and the Timber and Stone Act of 1878. See *id.*

100. See *GATES*, *supra* note 21, at 28.

101. Based on analysis of basically the same precedents discussed here, the Nevada District Court made the following declaration:

IT IS DECLARED that, as set forth in this Court's decision, the United States owns and has the power and authority to manage and administer the unappropriated public lands and National Forest System lands within Nye County, Nevada.

United States v. Nye County, 920 F. Supp. 1108, 1120 (D. Nev. 1996).

102. Without restrictions mandating that the lands become states, the above analysis (based on *Light v. United States*) showed that the United States took the subsequent lands (by the Louisiana Purchase, Treaty of Guadalupe Hidalgo, Gadsden Purchase, Seward's Alaskan purchase) without any binding requirements to dispose of the land.

nation. Anti-federalists oppose this interpretation because of the claimed unfairness it has worked on western states where "vast tracts" have been "held for the benefit of all the people," while "the overwhelming majority of the public lands" were surrendered to the states east of the 100th meridian.¹⁰³

This is the same "unfairness" argument that has been made by the subsequently admitted states since the founding of the Republic,¹⁰⁴ and the logic has lost none of its continuing weaknesses. First, if the lands belong to all of the states, then the national government can dispose of the lands in any fashion it desires. As the national government is composed of representatives from all the states, there is nothing inherently unfair about this mode of decisionmaking. Second, as discussed above, the western lands are qualitatively different than the earlier settled eastern lands¹⁰⁵ and are thus legitimately deserving of different treatment. Finally, the subsequently admitted states have shared in the distribution of land sale revenues *and* received huge land grants for schools and other purposes, unlike the original states.¹⁰⁶

103. See Brodie, *supra* note 27, at 703.

It is inconsistent to argue that western lands are to be held for the benefit of all the people, but that eastern, southern, northern, or midwestern lands were not intended to be so held.

If this theory is correct, then arguably all of the lands acquired by the federal government should have been held in perpetuity by Congress.

... [T]he theory becomes one of eastern parochialism, with all of the lands being held for all the people, with the exception of the land in the original thirteen colonies, which are held only by those respective states.

It should be noted that such a plan to abolish the states was proposed at the Constitutional Convention and was rejected by the delegates.

Id. (footnote omitted).

104. See *supra* notes 40-44 and accompanying text.

105. See *supra* note 99 and accompanying text.

106. See *supra* note 43 and accompanying text. In fact, according to a recent analysis of federal land privatization proposals, the unfairness of current public lands policy is actually tilted toward benefiting western states. See Dale A. Oesterle, *The Public Land: How Much Is Enough?*, 23 *ECOLOGY L.Q.* 521, 558 (1996). After claiming that changes in federal policy have led some former federal subsidy beneficiaries (for example, ranchers and timber interests) into "the complete denial of any federal authority over federal lands," Oesterle writes:

These states' rights advocates, however, are beginning to wake up to a real problem. Under the current system of federalism they get more back from the federal government than they give in taxes. Indeed, it is a mystery why other states in our federal system have allowed the western states to receive a positive return on their federal tax payments for so long.

Id.; see also *infra* note 178.

D. The "Compact"

In recent litigation, both Nye and Otero Counties presented a variation on the argument that the federal government could not own the public lands.¹⁰⁷ The counties claimed that the federal government had "breached its compact" with the states of Nevada and New Mexico by "repudiating its duty to dispose of the public lands."¹⁰⁸ In other words, the United States could not still own the public lands because it had broken its agreement to distribute the lands. In the *Nye* suit, the County claimed that the United States offered the terms of this compact in Nevada's Enabling Act, and Nevada accepted by enacting the ordinance to its state constitution.¹⁰⁹

The main support for this contention, the County claimed, came from the United States' "obligation, practice and commitment to dispose of public lands in the west."¹¹⁰ The County described 200 years of a consistent program, evidenced by various territorial acts, of obtaining land and then disposing of it to promote settlement, and the creation of future states.¹¹¹ This "program" was supported by the "Territory Clause" (an anti-federal name for the Property Clause), which the County claimed does not give the United States the power to retain title to public lands.¹¹² As further support, the County emphasized language from Nevada's Enabling Act that required "[t]hat five percentum of the proceeds of the sales of all public lands lying within

107. See Nye County Brief, *supra* note 15; Otero County Brief, *supra* note 72. The two briefs were prepared by the same lawyers and presented basically the same arguments, often following each other verbatim.

108. See Nye County Brief, *supra* note 15, at 13; Otero County Brief, *supra* note 72, at 17. Both counties claimed that the foundations of the compacts were the Federal Constitution and "the history of the westward migration and settlement of the United States." Nye County Brief, *supra* note 15, at 14.

109. See Nye County Brief, *supra* note 15, at 14. For a discussion of this specific ordinance, see *supra* notes 45-47 and accompanying text.

110. Nye County Brief, *supra* note 15, at 14-15.

111. See *id.*

112. See *id.* at 25. This is basically the Property Clause interpretation discussed above, which claims that the Clause permits federal ownership only in a "trustee" capacity. See *supra* notes 66-73 and accompanying text. According to this view, the United States most blatantly violated the Territory/Property Clause's prohibition on retention with the passage of the Federal Land Policy and Management Act in 1976, which called for retention of the public lands. See 43 U.S.C. §§ 1701-1722 (1994).

[Nevada], *which shall be sold* by the United States subsequent to the admission of [Nevada] into the Union . . . shall be paid to [Nevada].”¹¹³ The County thus claimed that the italicized language required the federal government to sell the remaining public lands within the state in order to give Nevada its five percent.

Unfortunately for this argument, the existence of such a “compact” is unsupported by law or history. The trustee argument made here is inappropriately taken out of its ceded lands context,¹¹⁴ and the Property Clause has not been interpreted to bar federal retention of public lands since *Dred Scott*. The federal government has made no agreement to dispose of all public lands; in fact, “if Congress should determine that the great body of public lands within the state of Minnesota should be reserved from sale for an indefinite period it might do so”¹¹⁵

As part of their “compact” argument, the counties denied the validity of the enabling acts’ requirement that the new states disclaim their rights to the public lands (and the resulting constitutional ordinances).¹¹⁶ In this context, Nye County’s claim that other language from Nevada’s Enabling Act *should* be given legal effect seems disingenuous. Further, the County’s interpretation of the “five percentum . . . which shall be sold” provision contradicts the legislative history of the section. During debate over the Act, Congress rejected a proposal that would have made the five percent applicable to past as well as future land sales.¹¹⁷ This seems to show that “which shall be sold” was intended to refer to those public lands that *would* be sold in the future, and was not intended to require that all public lands in Nevada be sold.

113. Ch. 36, § 10, 13 Stat. 30 (1864) (emphasis added). This is the successor to the provision inserted in Ohio’s Enabling Act to induce the territory to agree to disclaim ownership of its unappropriated public lands. See *supra* notes 38-39 and accompanying text.

114. See *supra* Part III.B.

115. *Stearns v. Minnesota*, 179 U.S. 223, 243 (1900).

116. See Nye County Brief, *supra* note 15, at 16-18; Otero County Brief, *supra* note 72, at 19-20; see also *supra* Part II.

117. See GATES, *supra* note 21, at 309.

IV. DRY LAND, SOVEREIGNTY, AND "THE EQUAL FOOTING FANTASY"¹¹⁸

*[E]quality of states means primarily an equivalent status as to political matters, but it does include certain areas of property significance*¹¹⁸

The equal footing doctrine is the creative crux of anti-federal ownership claims. It is the magic bullet intended to reveal that the federal government does not even own the public lands that it rules like a territory.¹²⁰ As described above,¹²¹ the doctrine reflects the notion that no state is superior to any other and that all states enter the Union "upon an equal footing with the original states, in all respects whatsoever."¹²² Anti-federal supporters claim that western states should have received title to the public lands within their borders at statehood, to ensure equality of property rights with the original thirteen.¹²³ This section examines the scope of the doctrine's equality.

A. "High Time the Intent of the Pollard Court Was Carried Out"¹²⁴

The linchpin of anti-federal arguments is *Pollard v. Hagan*,¹²⁵ which stated the equal footing doctrine requirement that land underlying navigable waters pass to new states upon admission because the original states retained their submerged lands following the Revolution.¹²⁶ The claim that states should retain

118. See Federal Brief, *supra* note 2, at 5.

119. Hanna, *supra* note 60, at 534.

120. See Mark Thompson, *Ranchers Try New Theories to Oust Federal Government*, COLO. J., Aug. 11, 1995, at 1 (comments of Roger Marzulla, lawyer for Nye County).

121. See *supra* notes 25-26 and accompanying text.

122. Nevada Enabling Act, ch. 36, 13 Stat. 30 (1864). This language from Nevada's Enabling Act is representative of most formulations of the equal footing concept.

123. See *supra* notes 41-44.

124. Eureka County District Attorney Opinion, *supra* note 1, at 20.

125. 44 U.S. (3 How.) 212 (1845).

126. See *id.*; see also *supra* notes 52-55 and accompanying text. In *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367 (1842), the Supreme Court held that submerged lands passed to the original thirteen states as an incident of sovereignty from the English Crown. *Pollard* extended this holding to the subsequent states.

title to all unappropriated lands within their borders has been stated as a simple syllogism:

Because land under rivers was an incident of sovereignty under the British Crown, and because all vacant lands also belonged to the Crown as an incident of sovereignty, it therefore follows that when the Crown's sovereignty passed to the States, all of the vacant land, both under navigable waters and in uplands, likewise passed to the States as an incident of their new-found sovereignty.¹²⁷

In other words, since the *Pollard* Court ruled that title to submerged lands passed to the states upon statehood, then title to the public lands must also have passed automatically to the states. Although the *Pollard* opinion only obliquely hints at this conclusion, anti-federal supporters point to Justice Catron's dissent, in which he claimed that the majority's holding was "as applicable to the high lands of the United States as to the low lands and shores."¹²⁸

To the present day, the Supreme Court continues to uphold the validity of the equal footing doctrine and its vesting of submerged land title in the states,¹²⁹ along with favorable mentions of *Pollard*.¹³⁰ Other support for the theory that the equal footing doctrine transferred all the public lands to the states comes from *Coyle v. Smith*,¹³¹ which used the doctrine to invalidate an enabling act requirement that the state capital be located in Guthrie.¹³² The Court's reasoning focused on the inequality of admitting a state with restrictions to which the original states were not subject. In its suit, Nye County claimed that the *Coyle* Court had spoken in broad terms that prevented

127. Eureka County District Attorney Opinion, *supra* note 1, at 20. This argument was described in greater detail in R. MCGREGGOR CAWLEY, *FEDERAL LAND, WESTERN ANGER* 96-101 (1993).

128. *Pollard*, 44 U.S. at 235 (Catron, J., dissenting). Catron also described the case as "the most important controversy ever brought before this court . . ." *Id.*

129. See, e.g., *Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987) (holding that title to the land underlying Utah Lake passed to Utah upon statehood, despite pre-statehood federal reservation of the land for a reservoir).

130. See, e.g., *Oregon ex. rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 373-74 (1977).

131. 221 U.S. 559 (1911); see *supra* notes 56-58 and accompanying text.

132. See *Coyle*, 221 U.S. at 579.

any restriction from being put upon subsequently entering states, such as giving up claims to the public lands.¹³³

As described above, the debate over the fairness of subsequent states giving up title to "their" public lands concerned Congress for more than a century,¹³⁴ but anti-federal supporters claim that the Supreme Court has never ruled on whether the equal footing doctrine should vest title to the dry uplands in the states.¹³⁵ The argument for state ownership of the public lands is thus summarized: "[O]pponents have failed to offer either a legal or logical reason why dry land, the unappropriated uplands, should be treated differently than the unappropriated submerged lands"¹³⁶ As will be shown below, there are a myriad of reasons, both logical and precedential, that explain why the federal government retained ownership of the "dry" public lands and reveal the anti-federal misunderstanding of the equal footing doctrine.

B. *Submerged Lands*

The anti-federal interpretation of the equal footing doctrine suffers from many of the maladies of revisionist history: omitted facts, misconstrued precedent, and the subservience of accuracy to a political agenda. This subsection explores some of these flaws and attempts to show that the equal footing doctrine was not intended, has never been, and cannot be applied to the "dry" public lands.

As described above,¹³⁷ American courts have ruled that title to land underlying navigable waters passed to the original states

133. See Nye County Brief, *supra* note 15, at 53.

134. See *supra* notes 40-43 and accompanying text.

135. See, e.g., Nye County Brief, *supra* note 15, at 57-58; Eureka County District Attorney Opinion, *supra* note 1, at 9-10. Another anti-federal supporter writes of the *Pollard* decision: "If the question before the court had been about land *above high water*, based upon the historical dicta in that case, the court would have found that that land, too, was state land (after entry into the Union)." William C. Hayward, United States Federal Lands, Part II, Who Really Owns It: A Brief 85 (Revised April 20, 1995) (unpublished manuscript, on file with the *University of Colorado Law Review*) (emphasis added).

136. Eureka County District Attorney Opinion, *supra* note 1, at 10. This argument relies on the assumption that the Constitution does not authorize federal retention of the public lands, an argument that has been critically discussed throughout this entire comment.

137. See *supra* Part I.A.

because such title had been vested in the English Crown "for the benefit of the whole people"¹³⁸ and title to these lands was thus a "circumstance of sovereignty."¹³⁹ The *Pollard* Court used this reasoning to require that subsequently admitted states receive title to all lands underneath navigable waters within their borders so that they could enter the Union on an equal footing with the original thirteen states.¹⁴⁰ Although this decision could be understood to mean that the federal government cannot convey or retain any of these submerged lands, fifty years later *Shively v. Bowlby*¹⁴¹ explicitly disavowed such a broad reading as based on dicta and held that the federal government *could* alienate submerged lands pre-statehood.¹⁴² As alluded to by negative implication in *Shively*¹⁴³ and followed by subsequent decisions,¹⁴⁴ the presumption that Congress did not intend to alienate the submerged land cannot be overcome "unless the intention was

138. *Utah Div. of State Lands v. United States*, 482 U.S. 193, 196 (1987). It is interesting to note that "the English rule limit[ed] Crown ownership to the soil under tidal waters," and the Supreme Court *extended* this doctrine to submerged land under navigable waters. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 479 (1988).

139. *United States v. Nye County*, 920 F. Supp. 1108, 1114 (D. Nev. 1996). Based on an impressive presentation of the development of English law concerning ownership of these lands, Rasband has claimed that the conventional American conception of the Crown's inability to alienate submerged tidal lands ignores that Parliament *could* alienate such lands in the name of the public interest (since Parliament "represented" this interest). See Rasband, *supra* note 20, at 15-16. Rasband thus claims that the English common law "prima facie rule" established a rebuttable presumption that title to these submerged lands remained in the Crown. See *id.* According to Rasband, this presumption was misunderstood by American courts to be an outright vesting of all title to these lands in the Crown—a misunderstanding that has clouded the common origins of the equal footing doctrine and the public trust doctrine. See *id.* at 16-17.

140. See *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 224-30 (1845).

141. 152 U.S. 1 (1894). The *Shively* opinion surveyed the relevant law of the original states, and discussed the decisions that the Supreme Court had handed down on the issue of the equal footing doctrine vesting title to submerged land in the states. See *id.*

142. See *id.* at 47-48.

143. See *id.* at 57. The Court held that the pre-statehood federal conveyance relied upon by the appellants in *Shively* did not explicitly include the land underlying the navigable waters of the Columbia River, and thus the appellees had title to this submerged land by virtue of their post-statehood grant from Oregon. See *id.* at 57-58.

144. See, e.g., *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 635 (1970) (holding that the United States had validly conveyed title to land underlying the Arkansas River to the Cherokee and Choctaw Nations); *United States v. Holt State Bank*, 270 U.S. 49 (1926) (holding that a federal grant of land to the Chippewas of Minnesota had not included the bed of Mud Lake and title had thus passed to Minnesota).

definitely declared or otherwise made very plain."¹⁴⁵ This well-recognized, though sparingly used, ability of Congress to retain land that would otherwise pass to the states through the equal footing doctrine demonstrates that the doctrine should not be used too sweepingly to convey property rights.

Even if we assume, *arguendo*, that all lands underlying navigable waters should pass to the states, the history and application of the doctrine illustrate that it has never applied to the "dry lands." In *Shively*, the Court stated that the soils underlying waters subject to tidal ebbs and flows are held in trust for the new states to administer in the same manner as the original states.¹⁴⁶ But the *Shively* Court distinguished these areas by pointing out that Congress had allowed occupancy of "those lands, whether in the interior, or on the coast, above high water mark," to encourage settlement.¹⁴⁷ It is difficult to imagine that the Supreme Court could have thought that "dry" lands could pass to the states under the equal footing doctrine, when it clearly distinguished the dry uplands (with federally encouraged settlement) from submerged lands that passed to the states (barring explicit federal intent).

About twenty years later, the Supreme Court made explicit this distinction between title to submerged and dry lands upon a state's admission. In an action to quiet title to an island in the middle of the Snake River in *Scott v. Lattig*,¹⁴⁸ the Court first noted that title to the bed of the navigable river had passed to Idaho upon statehood.¹⁴⁹ However, the Court distinguished title to the island's "dry land":

But the island, which we have seen was in existence when Idaho became a State, was not part of the bed of the stream or land under the water, and therefore its ownership did not pass to the State or come within the disposing influence of its laws. On the contrary, although surrounded by the waters of the

145. *Holt State Bank*, 270 U.S. at 55. Rasband has described this presumption as the American federal common law successor to the English common law "prima facie rule." See Rasband, *supra* note 20, at 55-56.

146. See *Shively*, 152 U.S. at 57-58.

147. See *id.* at 49. Given that the facts of *Shively* concerned a disputed plat that extended from the shoreline into the submerged land, it seems likely that the quoted language refers specifically to shorelands.

148. 227 U.S. 229 (1913).

149. See *id.* at 242. Despite its reliance upon the equal footing doctrine for this statement, at no point in the opinion does the Court use the phrase "equal footing."

river and widely separated from the shore, *it was fast dry land, and therefore remained the property of the United States . . .*¹⁵⁰

Thus, the Supreme Court has not even allowed the equal footing doctrine to crawl onto the dry land of islands surrounded by navigable waters.¹⁵¹

In fact, after 150 years of rulings that have modified the reach of the equal footing doctrine on real property interests, it has yet to be applied to non-submerged lands. Originally, only lands submerged beneath navigable waters were subject to the equal footing doctrine, using the English common law test for navigability that depended upon the ebb and flow of the tide.¹⁵² Numerous cases have extended application of the doctrine, vesting title in the states to lands under the navigable waters of inland lakes.¹⁵³ Even land covered by non-navigable tidal waters has been ruled to pass to the states.¹⁵⁴ On the other extreme, some categories of submerged lands have been excluded from the reach of the equal footing doctrine.¹⁵⁵ Despite these expansions and contractions of the doctrine's scope, the dry uplands have never been included.

Beyond the utter lack of support for the doctrine vesting states with ownership of uplands,¹⁵⁶ many other opinions seem to bar such an interpretation. Arizona raised the equal footing doctrine as an argument against federal reservation of water rights for Indian reservations in *Arizona v. California*.¹⁵⁷ The Supreme Court held that *Pollard* and its progeny "involved only

150. *Id.* at 244 (emphasis added).

151. In *Texas v. Louisiana*, 410 U.S. 702 (1973), the Court showed the continuing validity of *Scott v. Lattig* with a discussion that approvingly followed the earlier decision. See *Texas*, 410 U.S. at 713-14.

152. See *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 435 (1892).

153. See, e.g., *Utah Div. of State Lands v. United States*, 482 U.S. 193, 203 (1987); *Illinois Cent. R.R.*, 146 U.S. at 436-37.

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

155. See, e.g., *United States v. California*, 332 U.S. 19, 38-39 (1947) (declining to "extend the *Pollard* inland-water rule" to give California ownership of the three-mile marginal belt along its coast); *Oklahoma v. Texas*, 258 U.S. 574, 591 (1922) (holding that no part of the Red River within Oklahoma is navigable, so the title to the riverbed did not pass to the state upon admission).

156. The only language in an opinion that suggests that the doctrine is applicable to "dry" lands is found in Justice Catron's dissent in *Pollard*. See *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 235 (1845); see also *supra* note 128 and accompanying text.

157. 373 U.S. 546, 597 (1963).

the shores of and lands beneath navigable waters" and thus could not limit federal Property Clause powers.¹⁵⁸ This recent statement of limitation seems to exclude application of the doctrine to dry lands. This exclusion was supported fourteen years later in *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*,¹⁵⁹ in which Justice Rehnquist stated that the role of the doctrine ends after determining the boundaries of riverbeds acquired by states.¹⁶⁰ An earlier case, *United States v. Oregon*,¹⁶¹ held that the federal government's title to land underlying non-navigable waters is unaffected by creation of a new state.¹⁶² Certainly then, the United States' title to non-submerged land must be at least as unaffected by the equal footing doctrine.

The Supreme Court's bar of any extension of the doctrine to uplands¹⁶³ is supported by a comparison to congressional interpretation of equal footing. In the articles annexing Texas to the United States, Congress called for Texas' admission "on an equal footing with the existing States" and provided that Texas, "when admitted into the Union . . . shall retain all the vacant and unappropriated lands lying within its limits."¹⁶⁴ Even though almost every state entered with the same "upon an equal footing" language in their congressional authorizations, Texas retained the public lands within its borders while most other states disclaimed these rights.¹⁶⁵ This shows that ownership of unappropriated "uplands" turned on congressional fiat, not on the workings of the equal footing doctrine.¹⁶⁶

158. *Id.* at 597-98.

159. 429 U.S. 363 (1977).

160. *See id.* at 376.

161. 295 U.S. 1 (1935).

162. *See id.* at 14.

163. *See United States v. Nye County*, 920 F. Supp. 1108, 1117 (D. Nev. 1996) ("In sum, the entire weight of the Supreme Court's decisions requires a finding that title to the federal public lands within Nye County did not pass to the State of Nevada upon its admission pursuant to the equal footing doctrine.").

164. Joint Resolution for Annexing Texas to the United States, 5 Stat. 797, 798 (1845). More than 100 years later, the Supreme Court limited this grant with a determination that Texas did not have title to tidal lands that the original states had not possessed. *See United States v. Texas*, 339 U.S. 707 (1950).

165. Of course, Texas was an independent republic before admission and the United States owned no pre-statehood public lands within Texas' boundaries, although the federal government did receive all of Texas' property pertaining to public defense, including forts, "ports and harbors, navy and navy-yards." *See GATES, supra* note 21, at 299 (quoting 5 Stat. 798 (1845)).

166. A similar argument can be made by recalling the origin of the equal footing doctrine in language contained in the cession instruments and the Northwest

C. *The Real Equal Footing Doctrine*

As the Texas example shows, the equal footing doctrine has little to say about property rights, because this was not intended to be its focus. As related above, the doctrine was first enunciated by a committee of the Confederation Congress, which "coined the 'equal footing' phrase as equivalent to the words, 'the same rights of sovereignty, freedom, and independence, as the other states.'"¹⁶⁷ The *Pollard* Court itself echoed this language when explaining its "equal footing" decision as designed to ensure state "sovereignty."¹⁶⁸

According to this interpretation, "equal footing" does not speak to property rights; it instead refers to rights that could perhaps be characterized as "political."¹⁶⁹ In addition to explaining *Pollard's* protection of states' title to submerged land as an incident of sovereignty, this view easily accommodates the holding of *Coyle*, which protected the right of a new state to fix the location of its capital.¹⁷⁰ This also explains how dozens of enabling acts could allow new states to enter on an equal footing with the original thirteen, while simultaneously requiring the states to disclaim property rights.¹⁷¹ One writer has stated that

Ordinance. See *supra* notes 24-26 and accompanying text. The guarantees of "equal footing" in these documents were alongside explicit instructions to the United States to sell the portions of the lands in question. It seems clear that equal footing, even as intended by the parties that created the concept, did not bar federal retention and disposal of public lands.

167. Engdahl, Comments on Equal Footing, *supra* note 26, at 1.

168. See *Pollard v Hagan*, 44 U.S. (3 How.) 212 (1845).

Alabama is therefore entitled to the sovereignty and jurisdiction over all the territory within her limits Then to Alabama belong the navigable waters, and soils under them

.....

. . . To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty

Id. at 228-30.

169. Part III.B of this comment found fault with an originalist interpretation of the Property Clause, based upon its rejection through subsequent decades as Congress and the courts supported and endorsed an expansion of federal landholding unimagined by the Framers, yet permitted by the literal language of the Constitution. As explained by the remainder of this section, the "originalist" view of equal footing described above has actually been followed by Congress and the courts since its inception, and is thus due deference as the controlling interpretation.

170. See *Coyle v. Smith*, 221 U.S. 559 (1911); see *supra* notes 56-58 and accompanying text.

171. Regardless of the efficacy of the disclaimers, their appearance alongside

“[e]qual footing’ is just a shorthand affirmation that this allocation of governance jurisdiction [within their borders] holds for new States, as well as old.”¹⁷²

Although the Supreme Court has treated the equal footing doctrine as a constitutional guaranty,¹⁷³ a number of commentators have observed that the roots of the doctrine lay outside the Constitution.¹⁷⁴ As explained above, the doctrine was first enunciated as national policy in the Northwest Ordinance of 1787, passed by the Confederation Congress.¹⁷⁵ The Framers of the Constitution considered a proposal that “new states shall be admitted on the same terms with the original states,” but rejected this formulation for the language contained in the New States Clause.¹⁷⁶ When the Northwest Ordinance was adopted by the First Congress in 1789, it statutorily endorsed the equal footing doctrine. This pedigree would suggest that the doctrine is a congressional creation, and subject to Congress’s modification.

Such an interpretation explains how enabling acts have treated states differently, yet allowed all to enter on an “equal footing.” For example, Vermont and Kentucky entered the Union without limitations, but subsequent states had to agree to restrictions such as tax exemptions for federal land sales, disclaimers of public land, and guarantees of religious freedom.¹⁷⁷ The enabling acts granted vastly different amounts of land¹⁷⁸ and allowed states of wildly varying sizes¹⁷⁹ to enter the Union, yet all

the calls for “equal footing” in the enabling acts shows that equal footing must have always been intended not to apply to ownership of the public lands.

172. Engdahl, Comments on Equal Footing, *supra* note 26, at 2.

173. See, e.g., *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977) (“Thus under *Pollard’s Lessee* the State’s title to lands underlying navigable waters within its boundaries is conferred not by Congress but by the Constitution itself.”).

174. See, e.g., Gaetke, *supra* note 66, at 634 n.127; Patterson, *supra* note 71, at 62-64.

175. See *supra* note 26 and accompanying text.

176. GATES, *supra* note 21, at 73; see *supra* note 26 and accompanying text; see also *supra* note 36.

177. See GATES, *supra* note 21, at 285-318.

178. See GATES, *supra* note 21, at 806. Gates relates that federal land grants (for schools and many other purposes) gave Florida over 24 million acres, while New Mexico received nearly 13 million acres and Nevada was granted about three million acres. See *id.*

179. Although it comprises 656,424 square miles, Alaska was admitted on an equal footing with the original states, as was Indiana with its (comparatively) tiny 36,420 square miles. See INFORMATION PUBLICATIONS, ALMANAC OF THE 50 STATES 11, 115 (1993). Compare these figures to some of the “lucky” original states that kept

remained on an "equal footing" with the original states. Along with other differences,¹⁸⁰ these disparities in property rights show that equal footing "is no more disturbed by federal ownership, per se, of vast tracts of land, than by the fact that some States and not others have seaports, or great industrial centers, or oil."¹⁸¹

Regardless of its roots, the Supreme Court has recognized the aforementioned intentions and workings of the doctrine:

The 'equal footing' clause has long been held to refer to political rights and to sovereignty. It does not, of course, include economic stature or standing. There has never been equality among the states in that sense. Some States when they entered the Union had within their boundaries tracts of land belonging to the Federal Government; others were sovereigns of their soil. Some had special agreements with the Federal Government governing property within their borders. Area, location, geology, and latitude have created great diversity in the economic aspects of the several States. The requirement of equal footing was designed not to wipe out those diversities but to create parity as respects political standing and sovereignty.¹⁸²

As this account expressly recognizes that the federal government has owned different amounts of land in the several states, it is clear that the equal footing doctrine was not intended to and has

the unappropriated lands within their borders: Maryland, 12,407 square miles; Massachusetts, 10,555 square miles; New Jersey, 8,722 square miles; Connecticut, 5,544 square miles; Delaware, 2,057 square miles; Rhode Island, 1,214 square miles. *See id.* at 163, 171, 243, 51, 59, 315.

180. Minnesota has more than 15,000 lakes, many of them navigable, along with other navigable rivers. If the equal footing doctrine demanded absolute equality of states in every detail, Minnesota could object that the accident of her geography makes her more susceptible to Commerce Clause regulation (of navigable waters) than other states. Similar arguments could be raised by states with large Native American populations, objecting to congressional oversight under the Article I, § 8 power. *See Gaetke, supra* note 66, at 643 nn.176-77.

181. Engdahl, Comments on Equal Footing, *supra* note 26, at 5.

182. *United States v. Texas*, 339 U.S. 707, 716 (1950) (citations omitted). The next line states, "Yet the 'equal footing' clause has long been held to have a direct effect on *certain* property rights." *Id.* (emphasis added). The opinion goes on to discuss how "dominion over navigable waters and property in the soil under them" are so much a part of sovereignty, that these lands pass to the state. *Id.* Actually, this case features the equal footing doctrine working in reverse, as title to the three miles of land underlying the marginal sea was taken from Texas and vested in the United States because the original states had not owned the land underlying their marginal seas. *See id.* at 719-20.

not been interpreted to transfer the public lands to state ownership.¹⁸³

V. CONCLUSION

Many of the arguments examined in this comment were made in lawsuits challenging federal ownership of the public lands, or in manifestos by westerners angry with their "territorial" status. This dissatisfaction is perhaps easier to understand when one looks at a map of Nevada and sees that eighty-seven percent of the land in the state is owned by the United States.¹⁸⁴ The frustration that some Nevadans feel with "the remote and arrogant paper-pushers of Washington City"¹⁸⁵ stems at least partly from perceptions among some westerners (notably ranchers) that the federal government does not understand their needs and way of life.¹⁸⁶ Unfortunately, this discontent has been transformed into unwise arguments like those examined here.

Although the states' disclaimers are unimportant to this discussion, there is no justification for denying the United States ability under the Property Clause to own the public lands. This ownership has been validated by decades of national public policy, fashioned by representatives from all of the states, and supported by judicial decisions. The equal footing doctrine, as intended and practiced, has no impact on this land ownership.

183. Noting that federal land ownership is overwhelmingly concentrated in the West, one author proposed that the equal footing doctrine be seen as a limitation upon exercise of Property Clause power; otherwise the federal government's ability to govern its vast landholdings "could lead to serious infringement of the sovereignty of the Western states." Touton, *supra* note 66, at 835-38. Touton's solution would "prevent federal action not supportable by powers other than that to make rules and regulations respecting federal property." *Id.* at 838. In addition to eviscerating the Property Clause and contradicting *Kleppe v. New Mexico*, 426 U.S. 529 (1976), this viewpoint again ignores the historical national validation of our public lands policies, the huge benefits these policies have bestowed upon western states, and a century of Supreme Court opinions that have not extended the equal footing doctrine to bar such federal rulemaking.

184. See Stipulation of Undisputed Material Facts, *supra* note 3, at 4.

185. *Here Comes the Judge*, LAS VEGAS REV.-J., Dec. 27, 1995, at 10B.

186. See, e.g., WAYNE HAGE, STORM OVER RANGELANDS: PRIVATE RIGHTS IN FEDERAL LANDS (1989); WILLIAM C. HAYWARD, UNITED STATES FEDERAL LANDS: PARTS I & II (1995) (on file at Natural Resources Law Center, University of Colorado School of Law). For excellent, balanced descriptions of policy conflicts in the West, see CAWLEY, *supra* note 127, 127, and MARION CLAWSON, THE FEDERAL LANDS REVISITED (1983).

The impression one receives from examining these claims is that the current "anti-federal supporters" are just the latest opponents of federal public land policy—a tradition that dates to the founding of the Republic. Describing "current" views more than twenty-five years ago in his seminal *History of Public Land Law Development*, Paul Gates prophetically also stated the claims of this generation's opponents:

These western states came to think of the extensive Federal lands within their borders, reserved or withdrawn from entry, as retarding their progress, and keeping them in thrall to a remote government not capable of understanding their needs. Too often, they forgot that substantial portions of the returns from minerals, lumbering, grazing, and water power development on the public lands were flowing into reclamation development or the building of access roads and other improvements in their section.¹⁸⁷

Perhaps recognition by westerners of the benefits they have received, along with acceptance by the federal government of its responsibilities based on the West's historic dependence on the federal public lands, will result in an end to zero-sum games like that recently played out in Nye County.

187. GATES, *supra* note 21, at 772.