

LEGAL ANALYSIS

OF THE

LEGAL CONSULTING SERVICES TEAM

PREPARED FOR THE

***UTAH COMMISSION FOR THE
STEWARDSHIP OF PUBLIC LANDS***

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EXECUTIVE SUMMARY

1. Summary of Conclusion

Our task is to evaluate alternative legal theories that Utah may use in court to attempt to gain ownership or control of the public lands with its borders. The Legal Consulting Services team has reviewed the historical record regarding public lands, evaluated various legal theories, taken into account strengths and weaknesses of various arguments, analyzed procedural options available to the State of Utah, and considered the cost of pursuing such litigation. Based on that review and evaluation, it is the opinion of the Legal Consulting Services team that legitimate legal theories exist to pursue litigation in an effort to gain ownership or control of the public lands.¹ We caution, however, that litigation is time consuming, expensive, and never certain in outcome. We further caution that the federal government will most likely vigorously oppose this effort, raising substantive and procedural hurdles to achieving such an outcome. In the interest of preserving attorney client privilege, this public document does not discuss all anticipated defenses and counterarguments thereto.

2. Summary of Applicable Legal Theories

We believe that three primary legal theories are available to Utah to attempt to gain ownership or control of the public lands. These are:

- The Equal Sovereignty Principle
- The Equal Footing Doctrine
- The Compact Theory

We believe all three legal theories have credible support, and have value as the basis for claims in litigation.

¹ The conclusions stated in this Executive Summary are supported in the body of the Legal Analysis that follows.

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i) The Equal Sovereignty Principle

The Equal Sovereignty Principle was recently highlighted by the Supreme Court in *Shelby County v. Holder*,² which challenged the Voting Rights Act's requirement that certain States pre-clear their voting laws with the Department of Justice.³ The Court emphasized the Constitutional requirement that the States in our federal system be equal in sovereignty. The Court applied a heightened level of scrutiny to the pre-clearance requirements because they treated Alabama as unequal in sovereignty, and ruled that the pre-clearance provisions were unconstitutional under the Equal Sovereignty Principle. For the reasons discussed in detail below, we feel that Section 102(a)(1) of the Federal Land Policy and Management Act of 1976 ("FLPMA"), which reversed almost two hundred years of federal public lands policy from one of disposal to one of near permanent retention, treats Utah as unequal in sovereignty as compared to the States with dominion over the land within their borders.

This argument, if adopted by the Court, would most likely result in a declaration that the United States cannot forever retain the public lands within Utah's borders, not an order transferring the public lands to the State of Utah. Therefore, should the Court be persuaded by this argument, a subsequent political solution negotiated by all stakeholders would most likely be required to resolve the issue. A possible outcome of that political process could be Utah's ownership of those lands.

ii) The Equal Footing Doctrine

The Equal Footing Doctrine is based upon the Equal Sovereignty Principle. It requires that States newly admitted to the Union receive all incidents of sovereignty enjoyed by the thirteen original States. The Equal Footing Doctrine considers only sovereign and political rights

² 133 S.Ct. 2612 (2013).

³ The Voting Rights Act of 1965, 42 USC § 1973 *et seq.*

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of the newly admitted States, not economic or geographical differences. The original thirteen States stepped into the shoes of the Crown with regard to dominion over public lands within their borders. Similarly, Vermont, Kentucky, Tennessee, Maine, Texas and Hawaii all came into the Union with dominion over their public lands. As discussed below, dominion over land has historically been viewed as a key incident of sovereignty, and denial of that dominion negatively impacts sovereignty in a variety of ways. Therefore, in order for Utah to have been admitted as a co-equal sovereign with the States with dominion over public lands within their borders, Utah also should have received upon admission dominion over the land within its borders. A ruling by the Court based upon the Equal Footing Doctrine argument would logically result in the transfer of public lands to the State of Utah.

iii) The Compact Theory

The Compact Theory posits that the Utah Enabling Act was an offer, and Utah's acceptance of that offer created a solemn compact. Implicit in that compact was the duty of the United States to timely dispose of the public lands within Utah's borders as it had done with States admitted prior to Utah. There is historical support for the position that the United States promised to dispose of the public lands, maintained a policy requiring disposal of public lands, and acted upon that policy from 1784 through the date of Utah's admission. There is historical evidence that Utah and the United States both expected, at the time of Utah's admission, that the public lands would be disposed of consistent with past practice. There is also historical evidence that the intent of the Property Clause of the Constitution was to dispose of public lands, not to forever retain them. Accordingly, an argument can be made that the United States undertook an obligation to dispose of the public lands within Utah's borders.

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Were the Court persuaded by the Compact Theory, a possible remedy would be to strike down the near permanent retention policy of Section 102(a)(1) of FLPMA. A new policy with regard to federal lands would then be formed through political negotiation with all stakeholders as described above under the Equal Sovereignty Principle.

iv) The Property Clause

The government can be anticipated to argue that the Property Clause grants it plenary power over all federal property, allowing it to permanently retain all federal land as Congress may desire. However, the Court has stated on several occasions that it has never fully explored the scope of power granted by the Property Clause. The Court has never ruled on whether the Property Clause permits the federal government to forever retain the majority of land within the borders of a State. The key Property Clause cases were decided when the policy of the United States required the disposal of public lands. An historical, constitutional, and jurisprudential argument can be made that the Framers intended to grant the power to regulate public lands only in the context of their disposal, not to permanently retain the majority of the land within a State. The historical evidence and jurisprudence supporting the Equal Sovereignty Principle, the Equal Footing Doctrine, and the Compact Theory tend to support this interpretation of the Property Clause.

3. Summary of Recommendation

Based upon our conclusion that legitimate legal bases exist to attempt to gain ownership or control over Utah's public lands, or to attempt to overturn Section 102(a)(1) of FLPMA requiring the near permanent federal retention of Utah's public lands, the Legal Consulting Services team recommends that the Commission and Legislature urge the Governor and the Attorney General of the State of Utah to consider instituting litigation against the United States

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of America under the Original Jurisdiction of the United States Supreme Court. The goal of such litigation would be to attempt to gain ownership of and control over the public lands, and/or to enforce the provisions of the Transfer of Public Lands Act and Related Study (“TPLA”), and/or to seek a declaratory judgment that Section 102(a)(1) of FLPMA be struck down. We recommend considering actions under the Constitution directly, as well as under the Administrative Procedures Act. We further recommend that the Commission authorize the Legal Consulting Services team to prepare a private memorandum fully addressing anticipated substantive and procedural defenses to Utah’s claims, together with a model Complaint, for confidential consideration by the Attorney General in his analysis of this matter.

INTRODUCTION

Nearly 250 years ago, thirteen English colonies in North America declared their independence from the Crown. In doing so, they created thirteen nation-states; sovereign, free and independent not only of Britain but of each other. As nation-states, they had exclusive jurisdiction over the people and territory within their geographical limits. No law of any other State or nation was enforceable or enforced within their borders. They formed their own legislatures, elected their own legislators, had their own executive departments, maintained their own courts, passed their own laws and exercised dominion over all the land they encompassed. They also succeeded to the ownership of any land that had not previously been appropriated, sold or granted by the Crown while recognizing private title to any that had already been appropriated.

When the colonies declared their independence, there was no central government. There was not even a treaty between them through which they could manage affairs common to them all. But England did not recognize the new States' independence, so the States jointly resorted to arms to enforce the independence they had declared. It was not until *five years* after independence that the States developed a treaty – the Articles of Confederation – that created a league of the new nations. Each State's status as independent sovereigns defined its relationship to the world and to one another, and was enshrined in the Articles. That distinct, defined and acknowledged sovereignty governed the establishment of the forms and systems that would eventually result in the establishment of a national government. That distinct sovereignty defines the States even today, and serves as the basis for our *federal* system. While the term “federal” has taken on a secondary meaning in this Nation, it is intended to describe a federation of equal sovereigns.

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As members of a league, each of the thirteen States jealously guarded its attributes and powers of separate sovereignty, and vigorously resisted impingement on its individual prerogatives. As members of a league, they all insisted on equality under the laws and powers of the league, and all States respected that equality. In their conventions and under the rules of the league, each State got one vote. Each had equal power even as all recognized that they were decidedly unequal in population, culture, wealth, economic power and territory.

The States recognized that the vast territory to their west represented opportunity and peril but each recognized that, at some point, that territory would likely be divided into new States. The States agreed that when new States were formed, each new State would be entitled to equal treatment within the league that evolved into a national government under the Constitution. Accordingly, the legislation through which those States were admitted invariably and unmistakably stipulated that they entered the Union of States “on an equal footing in every way” with the original nation-states that first established a league of nation-states: the United States of America.

The nation grew. Vast territories to the west were ceded to the central government by some of the original States. Property was acquired by purchase, annexation, and conquest. States were organized by their settlers and admitted, each on an equal footing with its older sister States. The land acquired by the central government was regularly and promptly transferred, sold, or granted to promote settlement, allow for the establishment of villages, towns and cities, for the development of commerce, and for the spread of civilization across the continent. Indeed, it was the consistent project of the national government to stimulate this westward expansion, and “Manifest Destiny” was national policy. This privatization proceeded promptly and completely so that virtually all the land east of 104°W Meridian is today privately owned and

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available for the advancement of the social, economic and political interests of the people in the several States in which that land lies.

For over 150 years, the federal government maintained a policy of disposing of public lands so that State governments had complete jurisdiction over nearly all the territory within their borders, giving those States the same opportunity for settlement, development, preservation and conservation of parks and recreation areas, and the promotion of culture and commerce that the original States received.

But it never happened west of 104°W Meridian. The federal government has treated States west of that line unequally. It has allowed those States dominion over only a small percentage of the land within their borders. In some States, like Nevada, it is less than 20 percent. In Utah, the federal government controls more than 66 percent of the land – a land area larger than the entire State of New York. Of Utah’s 54,335,360 acres, 35,890,000 acres are claimed by the federal government.⁴ Federal bureaucrats control more land in Utah than Utah’s Governor. In contrast, the federal government controls just over one quarter of one percent (0.26%) of the State of New York, which has enjoyed the immense prosperity that comes from private control of land, and has disproportionately more political influence than a State half again its size (27 New York members of Congress compared to Utah’s 4).

Utah – like all other western public land States – cannot settle its land. It cannot fully advance commerce. It cannot develop the tax base necessary to fund schools, build roads, finance higher education, promote after-school programs, maintain social programs, and establish parks, recreation and conservation areas that are commonplace in the eastern States.

⁴ Ellie I. Leydsman McGinty, *Rangeland Resources of Utah, Section 2, Land Ownership of Utah*, Utah State University Cooperative Extension Service in cooperation with State of Utah Governor’s Public Lands Policy Coordination Office (2009).

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Utah cannot build transit and communications systems common in eastern States because its privately owned lands are broken up by intervening federal lands that Utah cannot condemn for such public improvements. Utah cannot control its own destiny. Utah is, in short, treated decidedly unequally by the federal government.

The federal government actively stimulated economic development and population growth in the 38 States to Utah's east. The federal government, conversely, denies Utah the ability to develop its land and population by forever locking away over 66% of the land within its borders. This disparate and discriminatory treatment is not only inconsistent with fundamental fairness; it is contrary to the Nation's founding principles. In the words of the Supreme Court: "To this we may add that the constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution."⁵

There are solutions. While some argue that there is nothing constitutionally infirm in allowing some States to be treated unequally, history, the law, current trends in Supreme Court jurisprudence and 200 years of constitutional decision making suggest otherwise. We explore those solutions in the pages that follow.

This Report is divided into six parts. Part One addresses the historical background of the public lands of the United States. Part Two briefly states each available legal argument that support Utah's position. Part Three analyzes the available legal arguments in support of Utah gaining ownership or control over the public lands. Part Four analyzes procedural options should Utah attempt to gain ownership or control over the public lands through litigation against the

⁵ *Coyle v. Smith*, 221 U.S. 559, 580 (1911).

federal government. Part Five discusses the anticipated cost of filing an action under the original jurisdiction of the Supreme Court to attempt to gain ownership or control over the public lands. Part Six concludes the brief with the recommendations of the legal team based on all of the above.

PART ONE: HISTORICAL BACKGROUND

It has been said that the law is philosophy applied to history. The law we have been asked to analyze is uniquely informed by early American history. Indeed, it is not possible to understand the law’s meaning and scope without a full understanding of applicable American history, even that history predating the adoption of our Constitution. For that reason, we have consulted primary source material beginning with the early colonization of North America by England and extending through the 20th Century, and analyzed the evolution of legal thinking throughout that period.

We know that we cannot understand text divorced from context. For example, the First Amendment tells us that there is a right of “the people” to “petition the Government for a redress of grievances.” The reference to “the people” does not mean that only groups have the right to petition. History has made clear, and the Court has confirmed, that a classic petition, within the meaning of this clause, is a lawsuit, which even one individual may file.⁶

Similarly, we shall show that the historical context indicates that the equal sovereignty of the States was a foundational principle of our Nation, and that dominion over land was a critical component of that equal sovereignty. When the original Union was being formed under the Articles of Confederation, Maryland insisted that all the landed States should cede their Western

⁶ *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 741 (1983); *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 896–897 (1984) (“[T]he right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government.”); *see*, 5 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW §§ 20.53 – 20.55 (West Thomson-Reuters 5th ed. 2013).

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territories so they could be sold by the United States to pay the Revolutionary War debt “and be settled and formed into distinct republican States which shall become members of the Federal Union and have the same rights of sovereignty, freedom and independence as the other States.”⁷

Each of the original thirteen States, and the next three that entered the Union — Vermont, Kentucky, and Tennessee — received all the vacant, unappropriated Crown lands upon their admission to the Union. States admitted thereafter with public lands obtained dominion over the land within their borders through federal public land policy that stimulated disposal and settlement of that land.

All States understood that the federal government would temporarily hold public lands for so long as it took to sell them to create a common fund to pay the public debt. As the Supreme Court explained in *Pollard v. Hagan*:⁸

This right originated in voluntary surrenders, made by several of the old states, of their waste and unappropriated lands, to the United States, under a resolution of the old Congress, of the 6th of September, 1780, recommending such surrender and cession, to aid in paying the public debt, incurred by the war of the Revolution. The object of all the parties to these contracts of cession, was to convert the land into money for the payment of the 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* (emphasis added).

In short, the historical record shows that when Utah joined the Union — when the United States admitted Utah into the Union and Utah agreed to become a State within the United States — the United States and Utah understood that the United States would, within a reasonable time, dispose of the public lands that it then owned, and admit Utah to the Union with “the same rights of sovereignty, freedom and independence as the other States.” The text of the documents admitting Utah as a State cannot properly be interpreted divorced from that historical context.

⁷ See discussion below at 22 – 28.

⁸ 44 U.S. 212, 224 (1845).

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As we shall see, Congress promised the regular and prompt disposal of public lands under its control many times over the course of the history of the United States. Congress delivered on this promise for nearly two hundred years, actively promoting the settlement, transfer, and development of public lands in State after State. Then, in 1976 Congress reversed its longstanding promise of orderly disposition with the passage of FLPMA. Because Congress breached this understanding, the United States owns very little land east of Colorado and New Mexico but the majority of the land from those points west. If the eastern States had explicitly determined to enjoy disproportionate political and commercial power compared to the western States as was unsuccessfully proposed by Elbridge Gerry at the Constitutional Convention, they would have done exactly what has been done. That result was rejected as unfair and unacceptable by the Framers, and the history and jurisprudence discussed below suggest that the Court would reject it as unfair and unacceptable today.

The Equal Sovereignty Principle and the Equal Footing Doctrine, together with the legal and historical precedent discussed below, conclude that the federal government must treat all States as equal. Indeed, Utah’s enabling act promised that she would be admitted on “an equal footing with the original States.” It was against the historical background of equal treatment that Congress and Utah engaged in the admission process, and documented an understanding that the United States would continue the timely disposal of the public lands within Utah’s borders, just as the United States had always done in previously admitted States with public lands. In fact, however, Congress breached this understanding. As a result of that breach, Utah has been treated as decidedly less than an equal sovereign, a result, as the Supreme Court recently reaffirmed in *Shelby*,⁹ the Constitution does not allow.

⁹ *Supra* note 1.

Now, let us turn to the historical and legal background that led to this situation.

1. The Nature of Sovereignty

The concept of sovereignty has existed throughout organized human history. In early history, it was an assumption left largely undefined except by custom. It involved the rights inherent in organizations of human beings, whether formally defined as governments or as collections of ethnic people acting in concert to achieve collective goals. Sovereignty, in the conduct of collective human activity, is the right of a people or a government to conduct its internal affairs in accordance with its discrete rulemaking mechanisms. The “sovereign,” whether a monarch, sultan, dictator, or nation-state, has the power to: make laws for the governance of a people; impose taxes; enforce laws; enter into agreements and treaties with other sovereign peoples and states; conduct national trade; raise armies and navies; act on behalf of the state in relation to other sovereigns; conduct national and internal defense for the protection of the state and its people; and acquire, own and dispose of land in the name of the sovereign by right of purchase, conquest or discovery.¹⁰

A national government must act on behalf of the population it governs in its relations with foreign powers and as an internal organizing force for the management of a society. It is invested with independence and the power to act for a people. The incidents of sovereignty, therefore, are all powers necessary for the advancement of a nation.¹¹ Government’s overarching jurisdiction invests it with coercive power sufficient for the protection of its citizens, though our

¹⁰ *Johnson and Graham’s Lessee v. M’Intosh* 21 U.S. 543, 595-596 (1823); Biersteker, Thomas; Weber, Cynthia (1996). *State Sovereignty as Social Construct*. Cambridge Studies in International Relations 46. Cambridge University Press; Blackstone’s Commentaries, Book 1, Chapter 7; Commentaries On the Constitutions and Laws, Peoples and History, of the United States: And Upon the Great Rebellion and Its Causes; Ezra Champion Seaman, Ann Arbor, 1863; page 173.

¹¹ *Id.*

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government is founded on the principle that its legitimate purpose is the protection of individual liberty.¹²

The sovereign power of the British Empire was historically vested in the Crown. The Crown enjoyed all of the referenced powers of sovereignty when England began its early exploration of North America through the voyages of Sir Humphrey Gilbert in 1579. The Crown extended its sovereign reach throughout North America upon colonization and claimed the land in the name of the Crown.¹³

2. *Sovereign Acquisition of Territory*

a) *Acquisition by Conquest*

Until the rise of empire, collective human affairs were tribal, ethnic, and relatively small. Early annals of tribal conflict indicate that tribes or city-states engaged in wars that resulted in conquest and the concomitant acquisition of the land of those they conquered. With the rise of empire began the collection and organization of large multi-ethnic populations and the acquisition of huge territories. No one questioned the legitimacy of territorial acquisition by right of conquest, and no legal mechanism existed for contesting the seizure of land through force.¹⁴ Imperial expansion, then, was largely carried out by conquest among competing empires.

¹² *Declaration of Independence*: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.”

¹³ *M’Intosh*, 21 U.S. at 576-578.

¹⁴ Seaman, page 173; *M’Intosh*, 21 U.S. at 573; Sharon Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice*, Oxford University Press, 1996; pps. 120-130.

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b) Acquisition by Discovery

Later, during the Age of Discovery, a theory arose that was largely accepted by the leading imperial powers: acquisition by right of discovery. The rise of the nation-state beginning in the 15th Century was accompanied by the development of a nascent system of international law, beginning with the Treaty of Westphalia in 1648, that began the international codification of what had previously been an assumption: that nations can engage in territorial expansion by right of discovery.¹⁵

In *Johnson and Graham's Lessee v. M'Intosh*,¹⁶ Chief Justice John Marshall wrote:

It is supposed to be a principle of universal law that if an uninhabited country be discovered by a number of individuals who acknowledge no connection with and owe no allegiance to any government whatever, the country becomes the property of the discoverers, so far at least as they can use it. They acquire a title in common. The title of the whole land is in the whole society. It is to be divided and parceled out according to the will of the society, expressed by the whole body or by that organ which is authorized by the whole to express it.

Justice Marshall explained:

But as [the European Powers] were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements and consequent war with each other, to establish a principle which all should acknowledge as the law by which the right of acquisition, which they all asserted should be regulated as between themselves. This principle was that discovery gave title to the government by whose subjects or by whose authority it was made against all other European governments, which title might be consummated by possession.¹⁷

¹⁵ Henry Kissinger (2014). "Introduction and Chpt 1". *World Order: Reflections on the Character of Nations and the Course of History*, (hereinafter, "Kissinger").

¹⁶ 21 U.S. 543, 596 (1823).

¹⁷ *Id.* at 573.

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c) *Title to Unoccupied Colonial Lands Vested in the Crown by Discovery*

Thus did the British Empire lay claim to much of North America and exercised its sovereign privilege by asserting title to all “unoccupied” land.¹⁸

According to the theory of the British Constitution, all vacant lands are vested in the Crown, as representing the nation, and the exclusive power to grant them is admitted to reside in the Crown as a branch of the royal prerogative [*sovereignty*]. It has been already shown that this principle was as fully recognized in America as in the Island of Great Britain. All the lands we hold were originally granted by the Crown, and the establishment of a regal government has never been considered as impairing its right to grant lands within the chartered limits of such colony. In addition to the proof of this principle, furnished by the immense grants already mentioned of lands lying within the chartered limits of Virginia, the continuing right of the Crown to grant lands lying within that colony was always admitted. A title might be obtained either by making an entry with the surveyor of a county in pursuance of law or by an order of the governor in council, who was the deputy of the King, or by an immediate grant from the Crown. In Virginia, therefore, as well as elsewhere in the British dominions, the complete title of the Crown to vacant lands was acknowledged.¹⁹

The British Empire successively claimed all lands described in the royal charters that established its colonies in Virginia, Pennsylvania, Delaware, Maryland, North Carolina, South Carolina, Georgia, New Hampshire, New York, Connecticut, Rhode Island, New Jersey and Massachusetts by right of Crown sovereignty.²⁰

In the United States we have adopted a fundamental principle of the English law, derived from the maxims of the feudal tenure, that ‘the king [State] is the original proprietor or lord paramount of all the land in the kingdom, and the trust an only source of title. It is a settled doctrine with us that all valid individual title to land within the United States is derived from grants from or under the authority of the governments of England, Sweden, Holland, France, Spain, Russia, Mexico, the chartered and crown colonies or the Government of the United States and the several States of the Union.’²¹

¹⁸ Grotius, *The Law of War and Peace*, Book II, Chapt. II, page 191.

¹⁹ *M’Intosh*, 21 U.S. at 595-596.

²⁰ *The Public Domain. Its History*; Thomas Donaldson; Report to House of Representatives of the United States of America; Public Lands Commission; Government Printing Office, 1884, Chapter 2, (hereinafter, “*Donaldson*”).

²¹ *Donaldson*, at page 158.

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The English possessions in America were claimed by right of discovery. Having been discovered by the subjects of the King of England and taken possession of same in his name, by his authority or with his assent, they were held by the King as the representative of and in trust for the nation; all vacant lands, and the exclusive power to grant them, were vested in him.²²

3. *Nature of Land Ownership in Colonial North America*

a) *Socage and the Sovereignty of the Crown Over Land*

Under the charter of King James I, the lands of the first and second colonies of Virginia were to be held by the mildest form of feudal tenure, “free and common socage.” Under this regime, title to land continued to rest in the sovereign and those granted tenure received it subject to the rendering of duties to the landholding lord (the Crown of England, in most cases).²³

Blackstone described it as follows:

Socage, in its most general and extensive signification, seems to denote a tenure by any certain or determinate service. And in this sense it is by our ancient writers constantly put in opposition to chivalry, or knight-service, where the render was precarious and uncertain.²⁴

Landholding in the colonies under “socage” was a lesser form of right than that known today. It was not quite fee simple ownership, in that it confirmed the sovereign rights of the Crown, and the Crown’s sovereign ownership of the land. “The usual tenure of the colonial grants, after Raleigh’s first one, was free and common socage.”²⁵ In the New York Colony, for example: “These lands were granted to the duke in free and common socage, with a yearly rent. The rights of eminent domain, subject to the sovereignty of the King, went with the land

²² *Shively v. Bowlby*, 152 U.S. 1, 14 (1894).

²³ *Duhaime’s Law Dictionary*.

²⁴ *Blackstone’s Commentaries*, Book II, Chapter 6, page 79.

²⁵ *Donaldson*, at 156.

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grant.”²⁶ This confirmed the primacy of the Crown and its ownership of land, occupied and otherwise, as an incident of its sovereignty.

b) Abolishment of Feudal Ownership

This situation adhered until the adoption of the Northwest Ordinance of 1787. The Ordinance, adopted by the Confederation Congress, was the first general legislation in the United States on the subject of real property and it changed the nature of land ownership throughout the now free States.²⁷ After the American Revolution, most of the States abolished all forms of feudal ownership, including free and common socage, and the Northwest Ordinance abolished the practice as a matter of national policy.

4. Independence

In 1774, the Royal Colonies met in convention, referred to as the “Continental Congress,” to discuss their joint grievances with the Crown. Delegates from twelve of the thirteen colonies were appointed by their various legislative bodies to represent the interests of their respective colonies. The convention drafted documents of protest at the colonies’ treatment at the hands of the Crown. When the colonists’ remonstrances were unsuccessful, a second convention was called and representatives of all the colonies attended.

The Second Continental Congress, described in more detail below, proceeded in the same manner. It served as a convention of colonies – soon to be independent States – to seek ways to act jointly with respect to issues of common concern. It was a conclave of separate and independent colonies intended to move those colonies to act in concert with one another with respect to colonial relations with the Crown. It convened in the summer of 1775, some months after armed hostilities signaled that the American war for independence had begun. Its delegates,

²⁶ *Ibid.* at 43.

²⁷ *Id.*

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again chosen by their respective colonies, represented the separate interests of their respective colonies.

On May 6, 1776, Virginia declared its independence from the Crown, and the other colonies followed on July 4, 1776.²⁸ By these acts, the colonies effectively became free and independent nations inheriting all sovereign rights and powers of the Crown within their borders.²⁹

In June 1776, the Convention of Virginia formally declared, that Virginia was a free, sovereign, and independent state; and on the 4th of July, 1776, following, the United States, in Congress assembled, declared the Thirteen United Colonies free and independent states; and that as such, they had full power to levy war, conclude peace, etc. I consider this as a declaration, not that the United Colonies jointly, in a collective capacity, were independent states, etc. but that each of them had a right to govern itself by its own authority, and its own laws, without any control from any other power upon earth.³⁰

5. *The Original States Succeeded to Ownership of all Crown Land*

The term “state” -- meaning “a political body, or body politic; the whole body of people united under one government”³¹ -- was purposefully chosen by the Founders to signify that each colony was a sovereign body enjoying all powers of sovereignty inhering in nation-states. The term “nation-state” was a topic of considerable discussion in the 18th Century and enjoyed broad intellectual and political currency. It was intended to describe a discrete, independent government exercising exclusive jurisdiction over a defined geographical area. The notion, sometimes referred to as “Westphalian sovereignty,” grew out of the resolution of the devastating, decades-long European wars of the 17th Century through the Treaty of Westphalia of

²⁸ *M’Intosh*, 21 U.S. at 558.

²⁹ *Ware v. Hylton* 3 U.S. (Dall.) 199, 223 (1796); *see also Alden v. Maine* 527 U.S. 706, 713 (1999).

³⁰ *Ware*, 3 U.S. at 224.

³¹ Webster’s Dictionary, 1828.

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1648 which initiated a nascent regime of international law.³² The new “states” adopted the title to describe what they intended as the nature of the newly sovereign States. Each State operated (and still operates) independently of every other State. Each established and maintained separate court systems, legislatures, executives, regulatory schemes, systems of taxation and governance, criminal and civil laws, voting qualifications, and so forth.³³

Before these solemn acts of separation from the Crown of Great Britain, the war between Great Britain and the United Colonies, jointly, and separately, was a civil war; but instantly, on that great and ever memorable event, the war changed its nature, and became a PUBLIC war between independent governments; and immediately thereupon ALL the rights of public war (and all the other rights of an independent nation) attached to the government of Virginia; and all the former political connection between Great Britain and Virginia, and also between their respective subjects, were totally dissolved; and not only the two nations, but all the subjects of each, were in a state of war; precisely as in the present war between Great Britain and France. Vatt. Lib. 3. c. 18, s. 292 to 295. lib. 3. c. 5. s. 70. 72 and 73.³⁴

The separate and complete sovereignty of the original States was sufficiently important to the founding generation that they enshrined it in their first formal treaty, the Articles of Confederation, Article II.³⁵ The States’ succession to the sovereignty of the Crown has repeatedly been reaffirmed by the Court.³⁶ As independent sovereigns, the States established separate governments; adopted State constitutions; enacted criminal and civil statutes; imposed taxes and imposts; established and maintained courts; and succeeded to all other incidents and

³² *Kissinger*, Chapter 1.

³³ *Ware*, 3 U.S. at 224.

³⁴ *Id.*

³⁵ “Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.”

³⁶ See *Ware v. Hylton*, 3 U.S. 199 (1796); *Martin v. Waddell* 41 U.S. 367 at 367 (1842) (“When the Revolution took place, the people of each state became themselves sovereign...”); *Shively v. Bowlby* 152 U.S. 1, 14-15 (1894) (“And upon the American Revolution, all the rights of the Crown and of Parliament vested in the several States. . .”).

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prerogatives of the sovereignty previously enjoyed by the Crown in North America,³⁷ including ownership of all vacant and unappropriated land within their borders.³⁸

Each of the original thirteen States – and the three that followed, Vermont, Kentucky and Tennessee – succeeded to ownership of all vacant, unappropriated Crown lands and disposed of same over time for their own part thereafter.³⁹

6. Conflicting Western Land Claims

Both before and after independence, the States competed with one another in commerce and trade, foreign policy, and territory. The States had their own monetary systems and placed tariffs on the trade of goods between one another. Each raised its own militia and maintained its own defenses.⁴⁰

No area of controversy was more heated than the landed States' claims to the "Western Lands," consisting mainly of what were referred to as "vast waste lands" east of the Mississippi River and south of Canada.⁴¹ Of the thirteen colonies, six had carefully defined western borders and no claims to any western lands, while seven asserted colorable claims to the western lands.⁴² Three – Virginia, North Carolina and Georgia -- laid claim to land extending to the Pacific Ocean.⁴³ Virginia, the first colony, had vast land claims -- as far north as present-day Canada and as far west as present day California -- and jealously guarded those claims. The map below

³⁷ See, Curtis, *History of the Origin, Formation, and Adoption of the Constitution of the United States*, Harper Bros., 1860; Vol.1, page 38.

³⁸ *Donaldson* at 33, 36, 38, 39, 41, 42, 44, 45, 47, 50, 52, 53 and 55.

³⁹ *Id.*

⁴⁰ See generally Peter S. Onuf, *The Origins of the Federal Republic: Jurisdictional Controversies in the United States, 1775 – 1787* (1983). See also Gordon S. Wood, *The Creation of the American Republic, 1776 – 1787* (1969); Bernard Bailyn, *The Ideological Origins of the American Revolution* (1967).

⁴¹ Onuf, *supra*,

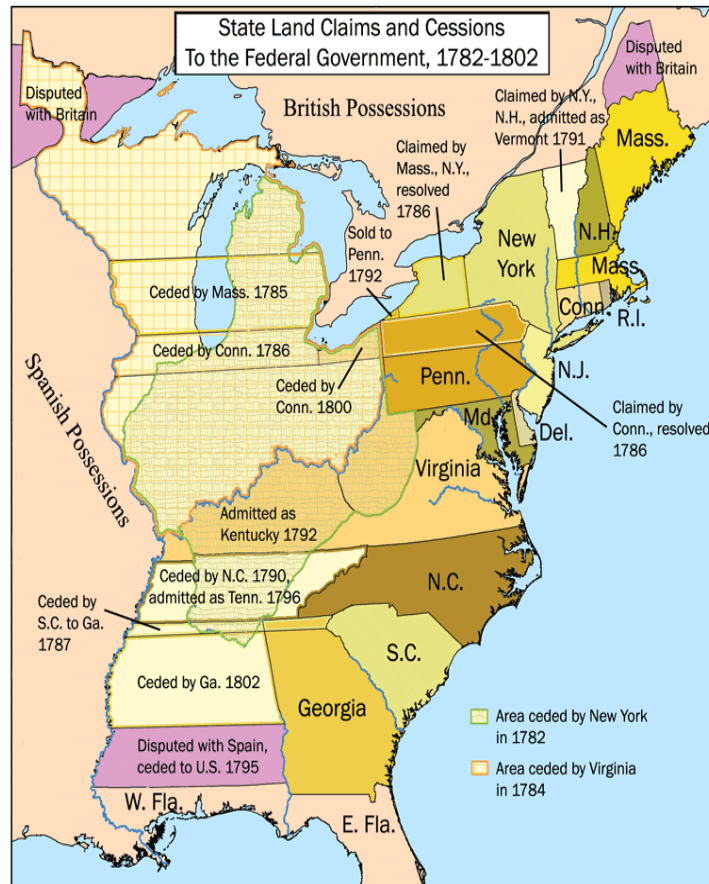
⁴² *Id.*

⁴³ *Donaldson*, *The Public Domain: Its History, with Statistics, Report of the United States Public Land Commission, 1884* (Government Printing Office), Chapter 2.

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illustrates various conflicting claims east of the Mississippi and cessions to the Federal government circa 1782 to 1802.



In 1774, when the First Continental Congress was assembled, the continent was rife with competing claims to western lands and sometimes pointed debate among the colonies with respect to the defensibility of those claims.⁴⁴ The conflict was driven, at least in part, by an

⁴⁴Both New York and New Hampshire claimed present day Vermont. Virginia claimed land Pennsylvania felt was within its borders; Virginia, Massachusetts, Connecticut and New York all claimed overlapping parts of present day Ohio, Indiana, Missouri, and Michigan; Virginia and New York both claimed overlapping parts of present day Kentucky, Tennessee and West Virginia; and North Carolina, South Carolina, and Georgia all claimed overlapping parts of present day Tennessee, Alabama and Mississippi.

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appreciation of the tremendous wealth the lands represented.⁴⁵ The conflicts also encouraged separatist movements that threatened the unity and strength of the not yet fully united colonies.⁴⁶

In addition to the problems created by the conflicting claims among the “landed” States to western lands, the very fact that these claims were made created problems between the “landed States,” on the one hand, and the “landlocked States” on the other. Maryland was the first to express its great concern that the landlocked States would be politically and economically consumed by their larger neighbors. The conflicting interests related to the western lands seemed insurmountable. Just when the colonies most needed unity, they became paralyzed over an impasse with respect to the western lands issue. We describe the Western Lands Impasse and its resolution in detail because it is critical to the proper understanding of the Equal Sovereignty Principle, the Equal Footing Doctrine, and the Property Clause.⁴⁷

⁴⁵ Landed colonies were dedicated to the preservation of their western land claims for purposes of future growth and influence, and for revenue generated to the colonies through the sale of land. Indeed, the sale of western lands was a primary source of revenue during this period. Moreover, “landed” colonies had granted western land as in-kind payment to officers and soldiers who served in the French and Indian Wars. During the Revolutionary War, “landed” States once again granted western lands in return for military service. The seeming vast western expanse was being mortgaged by the “landed” States for current needs, even absent resolution of the numerous conflicting claims noted above. *See generally* Onuf, *supra*.

⁴⁶ Independence and revolution loosened traditional binds. Those on the frontier fully believed in self-governance and independence, and those feelings were not aimed solely at King George, but were soon transferred to those who sought to rule from a remote State capital. New York and New Hampshire faced the separatist movement led by Ethan Allen in Vermont. Pennsylvania and Connecticut engaged in armed conflict, resulting in bloody battles over the separatist movement in what is now the Wyoming Valley area of Pennsylvania. Massachusetts tried to accommodate a separatist movement in Maine. North Carolina dealt with a separatist movement that eventually formally became the State of Franklin, in what is now eastern Tennessee. Virginia fended off efforts to carve off its western land claims to form the new Colonies of Vandalia (1769) and Transylvania (1775). *See generally*, Onuf, *supra*.

⁴⁷ The compromise reached to settle the Western Lands Impasse is the basis of the Equal Sovereignty Principle, the Equal Footing Doctrine, and the Property Clause. It can be traced from the demands of Maryland as early as 1776, through resolutions of Congress beginning in 1779, the formal compromise reached by resolution of Congress in 1780, the land cessions of the various landed States, the Ordinance of 1784, the Land Ordinance of 1785, the Northwest Ordinance of 1787, the Property Clause adopted by the Constitutional Convention in 1787, the land cessions that followed the ratification of the Constitution, and the equal footing clauses of every enabling act for every subsequently admitted State. In short, it is the historical root of public lands owned by the United States, their disposal for the benefit of all the States, and the admission of new States of equal sovereignty to the original States.

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7. *The Western Lands Impasse*

Maryland's concern over its lack of western land and the extent of its neighbors' claims to that land was not without justification. On September 16, 1776, for example, the Continental Congress called upon Maryland to raise eight battalions to support the War effort.⁴⁸ Congress resolved that each soldier would be paid a cash bounty of twenty dollars and a land bounty of 100 acres.⁴⁹ Maryland, though willing to raise eight battalions, could not comply with Congress' request to provide each soldier with a bounty of 100 acres of land.⁵⁰ It simply did not have the land.⁵¹ With no unappropriated land at its disposal, Maryland instead offered to pay its troops a bounty of ten dollars in gold in place of the 100 acres of land.⁵²

While Maryland had no unappropriated lands, Virginia claimed vast territories to the west based on the Charter granted it by James I in 1609.⁵³ Under that Charter, Virginia claimed well over half of what would later become the continental United States. Maryland feared it would become insignificant in comparison to its larger sister States unless it took a stand against allowing certain States to claim exclusive ownership to the western lands.⁵⁴ Accordingly, on November 9, 1776, Maryland staked its first formal claim to the western lands when the Maryland Convention issued a proclamation that western land:

⁴⁸ Journals of Congress, September 16, 1776.

⁴⁹ *Id.*

⁵⁰ The Provisional Government of Maryland (1774-1777), John Archer Silver (1895), at 55.

⁵¹ A "battalion" was roughly 500 troops. Maryland was being asked, therefore, to set aside around 400,000 acres of land as bounty payments.

⁵² The Provisional Government of Maryland, *supra*, at 56.

⁵³ That Charter granted:

[A]ll those lands, countries and territories situate, lying and being in that part of America called Virginia, from the point of land called Cape or Point Comfort, all along the sea-coast to the northward two hundred miles and from the said Point or Cape Comfort, all along the sea-coast to the southward two hundred miles; and all that space and circuit of land lying from the sea-coast of the precinct aforesaid, up into the land throughout, from sea to sea, west and north-west; and also all the islands lying within one hundred miles along the coast of both seas of the precinct aforesaid.

Donaldson, *supra*, at 32.

⁵⁴ Silver, *supra*, 57 – 59; Onuf, *supra*, at 88 - 89.

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secured by the blood and treasure of all, ought in reason, justice, and policy, to be considered as a common stock, to be parceled out by Congress into free, convenient, and independent governments, as the wisdom of that body shall direct; but, if those (the only lands that this Convention apprehend that can) should be provided by Congress at the expense of the United States to make good the proffered (*sic*) bounties, every idea of their being a common stock must be given up.⁵⁵

Thus, within months of the Declaration of Independence, Maryland made it clear that it believed it had an equal claim to the unappropriated western lands; that the lands should be considered as a “common stock”; and that they should be parceled out into new free and independent States under the direction of the United States, not by any individual State.

The problem became more urgent, in Maryland’s view, when the taxation provision of Article VIII of the proposed Confederation was considered. Under Article VIII, each of the thirteen States was to provide the common treasury of the United States with a percentage of the new central government’s expenditures “in proportion to the value of all land within each State, granted or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint.”⁵⁶ Given this equation, the small but more developed State of Maryland could end up paying a larger proportion of the central government’s expenses than larger but less developed States.⁵⁷ Maryland would also be forced to pay this levy through

⁵⁵ Proceedings of the Convention, November 9, 1776.

⁵⁶ Under this equation, the land to be counted was *only* that land which had been “granted or surveyed for any person.” Also, the value of buildings and improvements were to be taken into account in developing the proportion each state would be required to pay. So, the more granted and surveyed land with buildings or improvements that existed within a state, the greater the proportion of the expenses of the central authority that state would have to pay. This point was critical to the state of Maryland, where all of its land had been granted and surveyed and much of it improved or contained valuable buildings. The result was the entire state of Maryland and all of its buildings and improvements would be counted when deciding how much that State would provide the central government.

⁵⁷ Maryland’s fears in this regard were ameliorated when, as a practical matter, the Confederated Congress adopted population as a proxy for developed land and wealth in calculating each State’s share of the central

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taxing its citizens, while Virginia could simply sell some of its western land to meet its obligations. It was clear to Maryland that it would become a second-class State if it were to agree to the Articles of Confederation without resolving the western lands issue.⁵⁸

On November 15, 1777, Congress adopted the Articles of Confederation and issued them to the States for ratification.⁵⁹ Instead of ratifying the Articles, however, on May 21, 1779, Maryland issued the Continental Congress an ultimatum demanding that the western lands be ceded to the central government to be sold and admitted as equal States when certain benchmarks had been achieved.⁶⁰ In support, Maryland made several arguments. First, Maryland reiterated its 1776 position that since it was risking blood and treasure to defeat the British, it should share equally in the western lands won in the war. Second, Maryland advanced a long-term national view, arguing that the landed States' conflicting and overlapping claims would tear the Union apart after the war. This concern was not unfounded in light of the bloody conflicts between Pennsylvania and Connecticut in the Wyoming Valley region. Maryland reasoned that if all the States benefited in common from the sale of the western lands, the community of interests would also solidify the disparate States into one nation.

Third – and perhaps most urgently – Maryland argued that the western lands could comprehensively resolve the issue of national finance, and address the problems created by the tax system of Article VII. Maryland proposed, therefore, the sale of the western lands both to pay off the immense war debt and to finance the new federal government going forward.

government's budget. This proxy was later used in 1787 during the Constitutional Convention to form the basis for proportional representation of the States in the Electoral College.

⁵⁸ Donaldson, *supra*, at 60 – 62. *See generally*, Herbert B. Adams, Ph.D., *Maryland's Influence Upon Land Cessions to the United States*, 1885, at 22 – 40.

⁵⁹ Donaldson, *supra*, at 57.

⁶⁰ Donaldson, *supra*, at 60 – 62.

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Finally, Maryland was unwilling to join a union where the landed States could carve their vast western land claims into numerous vassal states that would do their bidding – effectively giving them surrogate votes and increased political power in Congress. Maryland insisted that all newly admitted States be equal sovereigns, not vassal states. Maryland thus proposed the following solution:

We are convinced, policy and justice require that a country unsettled at the commencement of this war, claimed by the British Crown, and ceded to it by the Treaty of Paris, if wrested from the common enemy by the blood and treasure of the thirteen States, should be considered as a common property, subject to be parceled out by Congress into free, convenient and independent governments, in such manner and at such times as the wisdom of the assembly shall hereafter direct.⁶¹

Maryland simply refused to join the union on less than equal terms and insisted that all subsequently formed States be nothing less than equal as well. Maryland held out until all States agreed that the western lands would be held not by any one State, but would instead be held by the United States government until they could be sold and the proceeds used as a “common fund” to offset Article VIII levies on the States by Congress.⁶²

8. *The Cession of Western Lands by The Landed States*

Maryland’s ultimatum of 1779 won the day. Later that year, when Virginia opened a land office to sell off tracts of its western land, the Continental Congress passed the following resolution:

Whereas the appropriation of vacant lands by the several States, during the continuance of the war, will, in the opinion of Congress, be attended with great mischiefs, therefore,

Resolved, That it be earnestly recommended to the State of Virginia to reconsider their late act of assembly for the opening their land office; and that it be recommended to said State, and all States similarly circumstanced, to forbear

⁶¹ Donaldson, *supra*, at 61.

⁶² Adams, *supra*.

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settling or issuing warrants for unappropriated lands, or granting same during the continuance of the present war.⁶³

New York was first to answer the call and by its Deed of Cession, ceded all its western landholdings in trust for the benefit of all signatories to the Articles of Confederation. The Act of New York's legislature on March 7, 1780, which became effective on March 1, 1781, encapsulated the purposes for the cessions:

Whereas nothing under Divine Providence can more effectually contribute to the tranquility and safety of the United States of America than federal alliance, on such liberal principles as will give satisfaction to its respective members: And Whereas the Articles of Confederation and perpetual Union recommended by the honorable Congress of the United States of America have not proved acceptable to all of the States, its having been conceived that a portion of the waste and uncultivated territory within the limits of claims of certain States ought be appropriated as a common fund for the expenses of war; And the people of the State of New York being on all occasions disposed to manifest their regard for their sister States and their earnest desire to promote the general interest and security, and more especially to accelerate the federal alliance, by removing, as far as it depends upon them, the before-mentioned impediment to its final accomplishment

The Act then ceded New York's western lands to the United States with the proviso:

That the territory which may be ceded or relinquished by virtue of the act, wither with respect to the jurisdiction, as well as the right or pre-emption of soil only, shall be and enure (*sic*) for the use and benefit of such of the United States as shall become members of the federal alliance of the said States, and for no other use or purpose whatever.⁶⁴

On September 6, 1780, the Continental Congress, for its part, further backed Maryland's position, and passed the following resolution:

Congress took into consideration the report of the committee to whom were referred the instructions of the general assembly of Maryland to their delegates in Congress respecting the Articles of Confederation and the declaration therein referred to, the act of the legislature of New York on the same subject, and the remonstrance of the general assembly of Virginia; which report was agreed to, and is in the words following:

⁶³ Donaldson, *supra*, at 63.

⁶⁴ Donaldson, *supra*, at 63.

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That having duly considered the several matters to them submitted, they conceive it unnecessary to examine into the merits or policy of the instructions or declarations of the general assembly of Maryland, or of the remonstrance of the general assembly of Virginia, as they involve questions a discussion of which was declined, on mature consideration, when the Articles of Confederation were debated; nor, in the opinion of the committee, can such questions be now revived with any prospect of conciliation; that it appears more advisable to press upon those States which can remove the embarrassments respecting the western country, a liberal surrender of a portion of their territorial claims, since they cannot be preserved entire without endangering the stability of the general confederacy; to remind them how indispensably necessary it is to establish the Federal Union on a fixed and permanent basis, and on principles acceptable to all its respective members; how essential to public credit and confidence, to the support of our army, to the vigor of our councils, and success of our measures; to our tranquility at home, our reputation abroad, to our very existence as a free, sovereign and independent people; that they are fully persuaded the wisdom of the respective legislatures will lead them to a full and impartial consideration of a subject so interesting to the United States, and so necessary to the happy establishment of the Federal Union; that they are confirmed in these expectations by a review of the before-mentioned act of the legislature of New York, submitted to their consideration; as far as depends on that State, the impediment arising from the western country, and, for that purpose to yield up a portion of territorial claim for the general benefit; whereupon

Resolved, That copies of the several papers referred to the committee be transmitted, with a copy of the report, to the legislatures of the several States, and that it be *earnestly recommended to those states, who have claims to the western country, to pass such laws, and give their delegates in Congress such powers as may effectively remove the only obstacle to a final ratification of the Articles of Confederation*; and that the legislature of Maryland be earnestly requested to subscribe to said Articles.⁶⁵

On October 10, 1780, the Continental Congress fully adopted Maryland's proposal. It resolved:

That the unappropriated lands that may be ceded or relinquished to the United States, by any particular State, pursuant to the recommendation of Congress of the 6th day of September last, shall be disposed of for the common benefit of the United States, and be settled and formed into distinct republican States, and have the same rights of sovereignty, freedom and independence as the other States: that each State that shall be so formed shall contain a suitable extent of territory, not less than on hundred nor more than one hundred and fifty square miles, or as near

⁶⁵ Donaldson, *supra*, at 64 (emphasis in original).

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thereto as circumstances will admit: that the necessary and reasonable expenses which any particular State shall have incurred since the commencement of the present war, in subduing any British posts, or in maintaining forts or garrisons within and for the defence (*sic*), or in acquiring any part of the territory that may be ceded or relinquished to the United States, shall be reimbursed.

That the said lands shall be granted or settled at such times, and under such regulations, as shall hereafter be agreed on by the United States, in Congress assembled, or any nine of them.⁶⁶

The pressure on Maryland to ratify the Articles was tremendous since France, long the primary financial backer of the fledgling States, refused to provide actual military assistance until the Articles were ratified.⁶⁷ Despite this immense pressure, it was only after the States with western land claims all agreed in principle to cede those lands to the United States, to be sold so the proceeds could be used as a “common fund” for the benefit of all States, and then parceled out into new equal States, that Maryland finally consented. New York ceded its western lands to the United States effective on March 1, 1781, and Maryland ratified the Articles that same day. Almost immediately, the French sent thousands of troops as well as their fleet and the Revolutionary War ended in victory for the United States only five-and-a-half months later.

The Articles of Confederation were thus effective on March 1, 1781, about a year after New York first agreed to cede its western holdings. When the Articles were finally ratified by Maryland, the Confederation was still, however, more a compact among sovereign States than a formal central government, as subsequent events would demonstrate.

⁶⁶ *Ibid.*

⁶⁷ See Votes and Proceedings of the Legislature of the State of Maryland, October 1780, pages 40 – 41 and 49 - 50.

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9. *The Articles of Confederation*

The Articles of Confederation underscored the sovereign nature of the several States. It starts with Article II which states:

Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.

It proceeds with Article III, which reads:

The said States hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever.

These provisions hardly describe a central government with overarching national power. As a result, the States were not compelled to do anything, even take minimal steps to support the central authority with sufficient funding to keep it operating. In the end, the Confederation's weakness prompted the Constitutional Convention of 1787 that resulted in the Constitution that created a more muscular central government.

10. *The Virginia Cession and Creation of the Northwest Territory*

On March 1, 1784, Virginia, the largest owner of western landholdings, presented a Deed of Cession ceding to

the United States in Congress assembled, for the benefit of the said States all right, title, and claim, as well of soil as jurisdiction, which this Commonwealth hath to the territory or tract of country within the limits of the Virginia charter, situate, lying and being, to the northwest of the river Ohio, subject to the terms and conditions contained in the before-recited act of Congress of the thirteenth day of September last; that is to say, upon condition that the territory so ceded shall be laid out and formed into States, containing a suitable extent of territory, not less than one hundred nor more than one hundred and fifty miles square, or as near thereto as circumstances will admit: and that the States so formed shall be distinct republican States, and admitted members of the Federal Union; having the same rights of sovereignty, freedom and independence of the other States.

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The deed went on to say that the lands

shall be a considered as a common fund for the use and benefit of such of the United States as have become or shall become members of the Confederation or federal alliance of the said States, Virginia inclusive, according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and bona fide disposed of for that purpose and for no other use or purposed whatsoever.⁶⁸

The western lands ceded by Virginia under this act became known as the Northwest Territory.

11. *The Northwest Ordinance and the Admission of New States*

While the Articles provided for the admission of new Colonies (Article XI), it did not set forth the circumstances and requirements for the admission of new States. It also failed to provide the power for Congress to own real property. The Confederation Congress attempted to remedy this lack of power through the adoption of a series of ordinances styled as compacts among the States. On March 1, 1784, Thomas Jefferson submitted a plan for temporary government in the lands ceded by New York and Virginia. It provided that on application of voting citizens, Congress could authorize them to organize a convention for the adoption of a constitution for the territory and to create a temporary government for managing the affairs of the territory. When the territory had a sufficient number of inhabitants, its citizens could apply for permission to form a permanent government.

That whenever any of the said States shall have of free inhabitants as many as shall then be in any one of the least numerous of the thirteen original States, such State shall be admitted by its delegates into the Congress of the United States *on an equal footing with the said original States* (emphasis added).

After a number of amendments, the Ordinance was adopted on April 23, 1784. Among the additions was a provision requiring that upon admission, its provisions would be formed into a “charter of compact” between the existing States and the newly admitted States. The

⁶⁸ Donaldson, *supra*, at 63-67.

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Ordinance also provided for the “primary disposal of the soil” by the United States in Congress assembled and forbade the new States from interfering with that disposal. Ultimately, the Ordinance of 1784 came to be viewed as deficient in that it failed to establish and protect the property rights and individual liberty of the inhabitants of the new territories. This omission was perceived as inhibiting the desired sale of the land and settlement of the territory required to retire the War debt and fund the operations of the United States.⁶⁹

The Ordinance of 1784 remained in effect, however, until it was replaced by the Ordinance of 1787, the “Northwest Ordinance”. The Northwest Ordinance was much more detailed and provided for the instruments of government and management of the western lands. It described the offices and institutions that would be established in the territories and the laws that would be made and enforced. It also detailed the property and individual liberty rights of the pioneers who would settle the land, a precursor to the Bill of Rights. Finally, it elaborated upon the requirements and circumstances for the admission of new States.⁷⁰ These purposes are made clear in the penultimate paragraph of the Ordinance’s preamble:

And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory; to provide also for the establishment of States and permanent governments therein, *and for their admission to a share in the federal councils on an equal footing with the original states* at so early periods as may be consistent with general interest (emphasis added):

It is hereby ordained and declared by the authority aforesaid, That the following articles shall be considered as articles of compact, between the original States and the people and States in the said territory, and forever remain unalterable, unless by common consent.

⁶⁹ See generally, Statehood and Union, Chapter 3, Peter S. Onuf (Indiana University Press, 1987).

⁷⁰ *Id.*

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The document went on to list the provisions of a compact between the new States and the original States. Among those provisions was one providing for the primary disposal of the land by “the United States in Congress assembled.”

The legislatures of those districts, or new States, shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary, for securing the title in such soil, to the bona-fide purchasers.

It also provided:

And whenever any of the said States shall have sixty thousand free inhabitants therein, such State shall be admitted, by its delegates, into Congress of the United States, *on an equal footing with the original States, in all respects whatever*; and shall be at liberty to form a permanent constitution and State government (emphasis added).

The Northwest Ordinance was a revolutionary document that had profound effects on a number of areas of American life. It not only provided for the management and governing of territorial land, it abolished the last vestiges of feudal ownership of land as a matter of national policy and provided for the regular and prompt disposal of unoccupied and unappropriated land under United States control.

The Constitutional Convention was in progress at the time the Northwest Ordinance was adopted by the Confederation Congress. State leaders constituted a very small pool of important people and communication between the two bodies was ongoing. The Framers were aware of this important development in national policy. When they adopted Article IV of the Constitution – the States’ Relations Article⁷¹ – they understood that in doing so they were endorsing the Northwest Ordinance at the very commencement of the Constitutional regime. The first Congress under the Constitution removed any doubt by re-adopting the Northwest Ordinance among its first orders of business in 1789.

⁷¹ *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 379 (1978).

12. The Constitutional Convention

The Constitutional Convention was convened in Philadelphia in the summer of 1787. At the same time, the United States in Congress Assembled under the Articles of Confederation was meeting in New York. While the Convention worked on structuring a more effective central government, the Confederation Congress continued to wrestle with the western lands issue.

Implementation of the equal sovereignty principle -- set forth first in Maryland's proclamation of November 9, 1776; elaborated upon in Maryland's ultimatum of May 21, 1779; restated by Congress through its Resolution of October 10, 1780; affirmed in the Western Lands Report of 1784 and the Ordinance of 1784; and emphasized twice in the Northwest Ordinance of 1787 -- was a primary topic of debate at the Constitutional Convention of 1787.

a) Proportional versus Equal Representation of the States

James Madison fired the opening volley and seized the agenda by drafting fifteen succinct resolutions that would come to be known as the Virginia Plan.⁷² The Virginia Plan was presented to the Convention on May 29, 1787, only four days after it was called to order, by Edmund Randolph, the Governor of Virginia.⁷³ Perhaps the most significant change from the Articles proposed by the Virginia Plan was proportional representation in the central government. The Plan called for two houses, a lower house based on Britain's House of Commons, and an upper house based on the House of Lords. According to the Plan, the seats in the lower house were to be proportioned on the basis of each State's wealth or population. This

⁷² The Constitutional Convention: A Narrative History from the Notes of James Madison, at 8, Edward J. Larson and Michael P. Winship (Random House, 2005) (Larson & Winship).

⁷³ *Ibid.* at 13.

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was seen as fair to the larger, more heavily populated States, such as Virginia, Pennsylvania, and Massachusetts since those States contributed more to the operation of the government.⁷⁴

The issue was first debated on June 9, 1787, with proportional representation strongly opposed by New Jersey, Delaware and Maryland, and just as strongly supported by Pennsylvania, Virginia, and Massachusetts, along with the southern States of North Carolina, South Carolina, and Georgia, which were not densely populated but were geographically quite large, and therefore anticipated rapid population growth.⁷⁵ With the votes balanced in this manner, on June 11, against the advice of Roger Sherman of Connecticut, the Convention voted in favor of proportional representation in both the upper and lower houses. In each instance, with only eleven States with sufficient delegates present to vote, the vote was carried by the block of large States: Massachusetts, Virginia, Pennsylvania, North Carolina, South Carolina and Georgia.⁷⁶

In reaction to these votes, displaying the level of dissatisfaction of the small States with both houses being based on proportional representation, New Jersey moved for an adjournment so that an alternative to the Virginia Plan could be developed.⁷⁷ On June 15, William Patterson submitted the New Jersey Plan to the Convention as an alternative to Madison's Virginia Plan. The New Jersey Plan called for a unicameral legislature where each State would have one vote, as in the Articles. This was rejected by the block vote of seven large States. Thus, the Convention maintained its position requiring proportional representation in both the lower and upper houses of the legislature, putting the small States at a decided disadvantage.⁷⁸ On June 19,

⁷⁴ *Ibid.* at 37 - 40.

⁷⁵ *Ibid.* at 37.

⁷⁶ *Ibid.* at 40 - 42.

⁷⁷ *Ibid.* at 43.

⁷⁸ *Ibid.* at 42 - 51.

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Luther Martin of Maryland defended the principle that the United States was a federation of co-equal States.⁷⁹ On June 27, the patience of the small States had come to an end, as was made clear from a long, fiery speech by Luther Martin flatly rejecting the Virginia Plan and insisting upon a federation of equal States.⁸⁰

b) Formation of the Connecticut Compromise

By June 30, the Convention was at an absolute standstill on the point of proportional representation. As summed up by Benjamin Franklin:

The diversity of opinions turns on two points. If a proportional representation takes place, the small states contend that their liberties will be in danger. If an equality of votes is to be put in its place, the large states say their money will be in danger⁸¹

The debate grew increasingly heated, with Gunning Bedford, Jr. of Delaware suggesting that unless there was a compromise and at least an equal vote in the Senate, the small States would confederate and join forces with a foreign power in order to protect themselves from the

⁷⁹ *Ibid.* at 52. As recorded in Madison's notes: "Mr. MARTIN said he considered that the separation from Great Britain placed the thirteen states in a state of nature towards each other [i.e., they were independent of each other]; that they would have remained in that state till this time but for the confederation; that they entered into the confederation on the footing of equality; that they met now to amend it on the same footing; and that he could never accede to a plan that would introduce an inequality and lay ten states at the mercy of Virginia, Massachusetts, and Pennsylvania."

⁸⁰ *Ibid.* at 60. ("Mr. MARTIN contended at great length and with great eagerness that the general government was meant merely to preserve the state governments, not to govern individuals; that its powers ought to be kept within narrow limits; that if too little power was given to it, more might be added, but that if too much, it could never be resumed; ... that an equal vote in each state was essential to the federal idea and was founded in justice and freedom, not merely in policy; that though the states may give up this right of sovereignty, yet they had not, and ought not; ... that the propositions on the table were a system of slavery for ten states; that as Virginia, Massachusetts, and Pennsylvania have 42/90 of the votes, they can do as they please without a miraculous union of the other ten; that they will have nothing to do but to gain over one of the ten to make them complete masters of the rest; that they can then appoint an executive and judiciary and legislate for them as they please; ... that instead of a junction of the small states as a remedy, he thought a division of the large states would be more eligible. This was the substance of a speech which was continued more than three hours. He was too much exhausted, he said, to finish his remarks and reminded the house that he should tomorrow resume them.")

⁸¹ *Ibid.* at 70.

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large States.⁸² On July 2, a motion by Connecticut for equal representation in the future Senate was put to a vote, and the result was a tie. The Convention was formally deadlocked over the issue.⁸³

Rather than disband, the Convention voted to put the matter to a Grand Committee consisting of one representative from each of the eleven States with enough delegates to be eligible to vote at the time.⁸⁴ On July 5, this Grand Committee placed a compromise on the table. In the lower house, the States would be represented proportionally based on population and wealth. In the upper house, each State would be represented equally as they had been under the Articles. To address the large States' concern that the small States would plunder their wealth, all spending bills would originate only in the lower branch, where the large States would control through proportional representation based on population.⁸⁵ After further debate, the Convention accepted the Grand Committee's proposal. This compromise, proposed repeatedly throughout the debates by delegates from Connecticut, came to be known as the "Connecticut Compromise".⁸⁶ All that was left was to devise the mechanism to reallocate seats in the lower house as population and wealth grew or shifted from State to State over the years. A census was agreed upon as the required mechanism.

c) The Census Provision and Shifting Representation Based on State Population

Interestingly, deciding on the details of the census provision was controversial. On July 10, Gouverneur Morris, from Pennsylvania, worried that as the newly admitted western States grew in population and wealth, as they were anticipated to do, the Atlantic States would be

⁸² *Ibid.* at 70 - 71.

⁸³ *Ibid.* at 72 - 74.

⁸⁴ *Id.*

⁸⁵ *Ibid.* at 74.

⁸⁶ *Ibid.* at 40; 90 - 91.

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outvoted by the western States. He therefore floated the idea that regardless of shifting population and wealth, newly admitted States to the west should never be allowed to gain sufficient seats to outvote the founding Atlantic States.⁸⁷ The following day, July 11, this argument was strongly countered by George Mason of Virginia, who, as recorded in Madison's notes, stated:

From the nature of man we may be sure that those who have power in their hands will not give it up while they can retain it.... He must declare he could neither vote for the system here, nor support it in his state. Strong objections had been drawn from the danger to the Atlantic interests from new western states. Ought we to sacrifice what we know to be right in itself, lest it should prove favorable to states which are not yet in existence? If the western states are to be admitted into the Union, as they arise, they must, he would repeat, be treated as equals.... It has been said they will be poor and unable to make equal contributions to the general treasury. He did not know but that in time they would be both more numerous and more wealthy than their Atlantic brethren. The extent and fertility of their soil made this probable.... He urged that numbers of inhabitants, though not always a precise standard of wealth, was sufficiently so for every substantial purpose.⁸⁸

A mandatory census, required to be performed at set times, was viewed as necessary to prevent the States in power from refusing to reallocate the seats, thereby freezing out the new States, or States that had grown in population and wealth since the last census. As stated by Governor Randolph of Virginia on July 12:

The danger will be revived that the ingenuity of the legislature may evade or pervert the rule so as to perpetuate the power where it shall be lodged in the first instance.⁸⁹

Randolph then proposed a mandatory census provision, very near to the final provision, that passed. In the end, population was decided as the only measure, as it was felt to also closely approximate wealth.

⁸⁷ *Ibid.* at 82 - 83.

⁸⁸ *Ibid.* at 83 - 84.

⁸⁹ *Ibid.* at 88 - 89.

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d) The Northwest Ordinance and Equal Treatment of Future Western States

On July 13, 1787, the Confederation Congress adopted the Northwest Ordinance.⁹⁰ On July 14, 1787, the issue of always having the Atlantic States maintain voting power over the newly admitted western States was once again raised, this time by Elbridge Gerry of Massachusetts, who proposed that the Constitution mandate that the combined Congressional voting power of the western States to be admitted in the future could never outweigh the combined Congressional voting power of the original thirteen Atlantic States. As reflected in Madison's notes:

Mr. Gerry wished before the question should be put, that the attention of the House might be turned to the dangers apprehended from Western States. He was for admitting them on liberal terms, but not for putting ourselves into their hands. They will if they acquire power like all men, abuse it. They will oppress commerce, and drain our wealth into the Western Country. To guard against these consequences, he thought it necessary to limit the number of new States to be admitted into the Union, in such a manner, that they should never be able to outnumber the Atlantic States. He accordingly moved "that in order to secure the (liberties of the) States already confederated, the (number of) Representatives in the 1st. branch (of the States which shall hereafter be established) shall never exceed in number, the Representatives from such of the States (as shall accede to this confederation.) . . . There was a rage for emigration from the Eastern States to the Western Country and he did not wish those remaining behind to be at the mercy of the Emigrants. Besides foreigners are resorting to that Country, and it is uncertain what turn things may take there."⁹¹

The motion was defeated.⁹² The concept of political power shifting among the States on the basis of population was accepted and memorialized. The newly admitted States envisioned by the Northwest Ordinance passed the day before would indeed, under the Constitution, "share in the federal councils on an equal footing with the original States" as required by the Northwest Ordinance itself.

⁹⁰ Journals of the Continental Congress, v. 32, p. 334-343

⁹¹ Yale Law School, Lillian Goldman Law Library, Avalon Project, Madison's Notes, July 14, 1787.

⁹² *Id.*

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e) The Electoral College

The tension between the large and small States arose again with respect to the method of selecting the President. Large States, led by Pennsylvania's Gouverneur Morris, favored direct election by the people. Small States, realizing their votes would be rendered meaningless, objected, arguing that ordinary people were too uninformed to make such an important decision. They suggested election by the Legislature. Morris rejected this as making the President a creature of the Legislature.⁹³ Eventually, on July 19, yet another compromise was reached with the creation of the Electoral College. The electors would presumably be better informed than the people, yet since the Electoral College would be a temporary body, the executive could neither come under its influence nor seek its favor.⁹⁴ Over a series of sessions, a compromise was reached where the electors would be selected by the State legislatures, and each State would have electors equal to the combined number of seats it held in both the House and the Senate.⁹⁵ Accordingly, the large States, through their larger populations as measured by the census, would have a larger say in the selection of the President.

f) Formation of Article IV, Section 3

With regard to the Property Clause itself, Article IV, Section 3, there was surprisingly little debate. Most of the heavy lifting with regard to the acceptance of western lands ceded by the States to the United States, the terms under which that land was held, and the admission of new States, had already been accomplished either by the Continental Congress or the Confederation Congress, despite the notable absence of any power to own property under the Articles, or a process for admitting new States.

⁹³ Larson & Winship, *supra*, at 92.

⁹⁴ *Ibid.* at 96 - 101.

⁹⁵ *Ibid.* at 138 - 143.

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On August 18, Madison proposed the following power be added to the Constitution:

“To dispose of the unappropriated lands of the U. States.”⁹⁶

The proposal was referred to the Committee of Detail. Although there was later debate on the new States admission clause that would later become Article IV, Section 3, Clause 1,⁹⁷ and on methods of protecting existing western claims by the several States that had yet to cede their unappropriated western lands,⁹⁸ there was no discussion of the proposed power to dispose of the unappropriated lands. The issue was not taken up again by the Convention until August 30, when Gouverneur Morris of Pennsylvania proposed the following language:

The Legislature shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the U. States; and nothing in this constitution contained, shall be so construed as to prejudice any claims either of the U. S. or of any particular State.⁹⁹

This language was approved by the Convention, and later slightly revised into the current Property Clause, which reads:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any Claims of the United States, or of any particular State.

⁹⁶ Yale Avalon Project, *supra*, Madison’s Notes, August 18, 1787.

⁹⁷ *Ibid.*, August 30, 1787.

⁹⁸ *Id.*

⁹⁹ *Id.* Note the similarity between the power granted under the Property Clause and the language of the Northwest Ordinance, passed by the Confederation Congress just a few weeks before, which read:

The legislatures of those districts or new States, shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the bona fide purchasers.

13. Actions by the United States Following Ratification of the Constitution

a) Reenactment of the Northwest Ordinance

As noted above, one of the first acts by Congress following ratification of the Constitution was to re-enact the Northwest Ordinance. On August 7th, 1789, *An Act to provide for the Government of the Territory Northwest of the river Ohio* passed by Congress and was signed into law by President George Washington. That bill was the reenactment of the Northwest Ordinance so that “the ordinance of the United States in Congress assembled, for the government of the territory north-west of the river Ohio may continue to have full effect[.]”¹⁰⁰ Thus, following implementation of the Property Clause, the Ordinance that, by its terms, “shall be considered as articles of compact between the original States and the people and States in the said territory and forever remain unalterable” was confirmed by Congress. This act confirmed the process for the admission of new States and the “primary disposal of the soil” within the territory ceded by New York, Virginia, Massachusetts, Connecticut, and South Carolina to the United States.

b) Further Cessions by Original States

The first State to cede its western land claims to the United States under the Constitution was North Carolina, on April 2, 1790. The act authorizing the deed stated in part:

Whereas the United States, in Congress assembled, have repeatedly and earnestly recommended to the respective States in the Union, claiming or owning vacant western territory, to make cessions of part of the same, as a further means, as well as of hastening the extinguishment of the debts, as of establishing the harmony of the United States. . . .

¹⁰⁰ 1 Stat. 50.

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The deed of cession expressly provided that the ceded lands

shall be considered as a common fund, for the use and benefit of the United States of America, North Carolina inclusive, according to their respective and usual proportion in the general charge and expenditure, and shall be faithfully disposed of for that purpose, and no other purpose whatsoever . . . that the territory so ceded shall be laid out and formed into a State or States . . . the inhabitants of which shall enjoy all the privileges, benefits and advantages set forth in the ordinance of the late Congress for the western territory of the United States . . .

The second State to cede its Western Land claims to the United States under the Constitution, and the last of the original seven landed States to cede its land, was Georgia. On April 24, 1802, Congress passed the *Articles of agreement and cession between the United States and Georgia*.¹⁰¹ That agreement set forth certain key conditions, as follows:

First. That out of the first net proceeds of the sales of the lands thus ceded, which net proceeds shall be estimated by deducting, from the gross amount of sales, the expenses incurred in surveying, and incident to the sale, the United States shall pay, at their Treasury, one million and two hundred and fifty thousand dollars to the State of Georgia, as a consideration for the expenses incurred by the said State, in relation to the said territory; and that for the better securing as prompt a payment of the said sum as practicable, a land office for the disposition of the vacant lands thus ceded, to which the Indian title has been, or may hereafter be, extinguished, shall be opened within a twelvemonth after the assent of the State of Georgia to this agreement, as hereafter stated, shall have been declared. . . .

Thirdly. That all lands ceded by this agreement to the United States shall, after satisfying the above-mentioned payment of one million two hundred and fifty thousand dollars to the State of Georgia and the grants recognized by the preceding conditions, be considered as a common fund for the use and benefit of the United States, Georgia included, and shall be faithfully disposed of for that purpose, and for no other use or purpose whatever. . . .

Fifthly. That the territory thus ceded shall form a State, and be admitted as such into the Union . . . on the same conditions and restrictions, with the same privileges, and in the same manner, as provided in the ordinance of Congress of the thirteenth day of July, one thousand seven hundred and eighty seven, for the government of the western territory of the United States, which ordinance shall, in all its parts, extend to the territory contained in the present act of cession, that article only excepted which forbids slavery.

¹⁰¹ Donaldson, *supra*, 80 – 81.

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Georgia ratified the agreement and ceded its Western Land claims on June 16, 1802, bringing to a close the westward expansion of the United States through territorial cessions by the original thirteen States.¹⁰²

14. The Creation and Status of the Public Domain

The “public domain” is unappropriated land, i.e., that it is land that is not owned privately. It stands to reason that land that is not otherwise owned falls in ownership to the state or government exercising sovereignty over the territory in which the land is located. No entity other than the sovereign – whether that be a monarch, a dictator or a representative republic – can or does make such a claim. When North America was claimed in the name of the Crown, by right of discovery, the land became the “public domain” of England. England’s claim was by right of discovery as the right of a sovereign discoverer.

As noted, the original States succeeded to all sovereign rights on independence, including the ownership of all unappropriated land within their borders. For reference, such land is referred to in official documents variously as “unoccupied lands,” “public lands,” “waste lands,” and “unappropriated lands.” For the landed States, that also included the unexplored western lands that were ultimately ceded to the Continental, Confederation, and Constitution Congresses. Evidence of its status as sovereign lands is that cession was necessary to put the lands in the hands of the United States. That cession was the beginning of the public domain in the hands of a national government in the United States.

¹⁰² *Id.*

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But it was not the beginning of the public domain within the United States. Upon independence, the States succeeded to ownership of the unappropriated land within their borders and they thereafter regularly disposed of same by sale and land grant to promote settlement.¹⁰³

Massachusetts: “She adopted the Constitution of the United States February 6, 1788 and thereby became a member of the Union. She succeeded to the Crown in the ownership of vacant and unoccupied lands and became proprietor of the same class of land in Maine. These were all disposed of under State Law.”¹⁰⁴

New Hampshire: “She adopted the Constitution of the United States June 21, 1788, and thereby became a member of the Union. The State became successor to the Crown as to the vacant and unoccupied lands and disposed of them by and under the direction of the laws of her legislature.”¹⁰⁵

Connecticut: The State of Connecticut became the successor to the Crown to western and unoccupied lands, which she disposed of by State laws.¹⁰⁶

Rhode Island: “She adopted the Constitution of the United States May 29, 1790, and thereby became a member of the Union. She became successor of the crown lands and rents, which after 1776 were controlled and disposed of her under State laws.”¹⁰⁷

Vermont: “The State became successor of the crown to vacant and unappropriated lands, and other crown rights to lands.”¹⁰⁸ (It is noteworthy that Vermont was admitted after the original thirteen States.)

New York: “The State of New York succeeded to the crown rights over unoccupied lands and realty and by legislation disposed of vacant lands, and covenanted or otherwise disposed of quit-rents.”¹⁰⁹

Maine: “After [its admission to the Union], Maine, being sovereign, took charge of her own lands, and made no cessions to the National government.”¹¹⁰ (Maine, too, was admitted after the original thirteen States.)

¹⁰³ *Donaldson*, pps. 33, 36, 38, 39, 41, 42, 44, 45, 47, 50, 52, 53 and 55.

¹⁰⁴ *Ibid.* at 36.

¹⁰⁵ *Ibid.* at 39.

¹⁰⁶ *Ibid.* at 40.

¹⁰⁷ *Ibid.* at 41.

¹⁰⁸ *Ibid.* at 42.

¹⁰⁹ *Ibid.* at 44.

¹¹⁰ *Ibid.* at 38.

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Pennsylvania: “All the State lands of Pennsylvania were thereafter disposed of by the direction of the Commonwealth.”¹¹¹

South Carolina: “On May 23, 1788, she adopted the Constitution of the United States and was thereby admitted to the Union. The State became successor to the Crown in the ownership and disposition of the unappropriated and unoccupied public lands therein and made disposition of the same”¹¹²

The original States kept their unappropriated lands through independence, the Revolution, the Confederation, and long after the adoption of the Constitution. They ceded no land within the borders they defined as their sovereign territory to the United States even as they ceded their western territories either to the Continental, Confederation, or Constitution Congresses.

15. Further Acquisitions of Land by The United States

After the first cessions by the original States, the United States acquired land by purchase, conquest and treaty. In 1803, the United States made the Louisiana Purchase. President Jefferson had significant concerns over the constitutionality of the purchase but was able to put those misgivings aside sufficiently to complete the transaction.¹¹³ On March 2, 1805, Congress extended the provisions of the Northwest Ordinance to the governance of the new land by 2 Stat. at L.322 chap.23.

Thereafter, the United States acquired Florida from Spain by purchase on February 22, 1819; annexed Texas in 1828; took a large portion of the Southwest, including California and large portions of what is now New Mexico, Arizona, Nevada, Utah, Wyoming and Colorado, by conquest under the Treaty of Guadalupe Hidalgo in 1848; purchased large portions of what is

¹¹¹ *Ibid.* at 47.

¹¹² *Ibid.* at 53.

¹¹³ *Ibid.* at 100.

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now Kansas, Colorado and New Mexico from Texas in 1850; and acquired the rest of the land now comprising New Mexico and Arizona by the Gadsden Purchase of 1854.¹¹⁴

16. Disposition of Public Lands

Immediately upon cession, the United States began to develop plans for the orderly disposition of the unappropriated land it now owned. Alexander Hamilton, as Secretary of the Treasury, presented a plan for the disposition of the public lands on July 20, 1790. It was entitled “*Plan for the Disposition of the Public Lands*” and articulated its goals and purposes and described the manner in which the disposition was to be carried out. The Plan did not include any provision for the retention of any of the land. “Disposition” in this instance meant sale or grant of land to people and companies for purposes of settlement and for the extension of civilization westward on the North American continent.¹¹⁵

That in the formulation of a plan for the disposition of the vacant lands of the United States there appear to be two leading objects of consideration: one, the facility of advantageous sales, according to the probable course of purchase; the other the accommodation of individuals now inhabiting the western country or who may hereafter emigrate thither. The former, as an operation of finance, claims primary attention; the latter is important as it relates to the satisfaction of the inhabitants of the western country. It is desirable, and does not appear impracticable, to conciliate both.

Secretary Hamilton’s report was followed by the “Act For Sale of Lands in Northwest Territory” – which Congress urged be promptly carried out – that provided that the proceeds of the sales of all land currently held or thereafter acquired by the United States “constitute a portion of the sinking fund of the United States for the redemption of public debt”.

By Act of May 10, 1800, Congress introduced the system of disposition of public lands that it followed until all disposition was stopped with the adoption of FLPMA in 1976. The Act

¹¹⁴ *Ibid.* at 108-138.

¹¹⁵ *Ibid.* at 198-200.

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of 1800 provided for a system of land offices, sales, auctions, receipt of bids and financing that was intended to provide for the regular and prompt sale or grant of all unappropriated land held or acquired by the United States.¹¹⁶

The overarching motive of all policy with respect to the disposition of public land was in the advance of civilization and the expansion of the nation and its commerce through the use of land not only as a resource but as an inducement for the promotion of settlement. The essential conditions for receiving a preference in ownership were the actual entry upon, residence in a dwelling, and improvement and cultivation of a tract of land. As a consequence, Congress adopted the Pre-Emption Acts over a period of years that gave ownership preference to people who would settle land and put it to useful purposes. Pre-emption was a premium in favor of, and condition for, making permanent settlement and a home. It was a preference for actual tilling and residing upon a piece of land. The original Act of 1801 was followed by sixteen acts over a forty-year period which ultimately resulted in the survey, division and offering of discrete parcels of land to those willing to settle it. By statute of June 30, 1880, Congress extended settlement on unsurveyed as well as surveyed land, and the extension of credit to the person residing on it.¹¹⁷

The pre-emption system arose from the necessities of settlers, and through a series of more than 57 years of experience in attempts to sell or otherwise dispose of the public lands. The early idea of sales for revenue was abandoned and a plan of disposition for homes was substituted. The pre-emption system was the result of law, experience, Executive orders, departmental rulings, and judicial construction. It had been many-phased, and was applied by special acts to special localities with peculiar or additional features, but it has always and to 1880 contains the germ of actual settlement, under which thousands of homes have been made and lands made productive yielding a profit in crops to the farmer and increasing the resources of the Nation.¹¹⁸

¹¹⁶ *Ibid.* at 203.

¹¹⁷ *Ibid.* at 214-215.

¹¹⁸ *Id.*

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In 1862, Congress adopted the Homestead Act. Under the Homestead Act, public lands were *given* to settlers who would occupy, improve and cultivate them for a term of years. Such settlers received a patent free of acreage charges, with fees paid by the homesteader sufficient to cover the cost of survey and transfer of title. This Act resulted in settlement across the nation and the development of homes, towns, communities and commerce to the general benefit of the nation.

Budget records show that the sale of public lands constituted a significant portion of federal revenue until the Sixteenth Amendment was ratified in 1913, after which the sale of public lands tailed off. The United States government stopped aggressively disposing of land by 1920.

PART TWO: SUMMARY OF LEGAL ARGUMENTS

We conclude that three primary legal theories support the transfer of public lands. We view these theories as interrelated, working together and supporting one another. We briefly state those theories here as a reference for further analysis in the next section of this analysis.

1. **The Equal Sovereignty Principle:** This theory is based on history, the structure of the Constitution, and jurisprudence. It recognizes that for a federal republic such as the United States to function, each member of the republic must be equal in sovereign power. Because of the Connecticut Compromise, political power in the National government is allocated among the States on the basis of State population as measured by the decennial census. It is on this basis that the seats in the House of Representatives and Electors in the Electoral College are distributed. Moreover, spending bills can originate only in the House, giving more populous States greater budgetary control. The federal government, through its longstanding public land policy, actively promoted the dense settlement of twenty-three eastern States admitted after the original thirteen, but changed that policy before Utah was settled. This places Utah at a competitive disadvantage in the constitutional competition among the States for political power at the federal level, denying Utah equal sovereignty. The fact that no federal land can be taxed also places Utah at a sovereign disadvantage in its ability to fund self-governance, as recognized by the Payment in Lieu of Taxes and Secure Rural Schools payments. Threatened withholding of these payments exposes Utah to political pressure inconsistent with sovereign equality. Additionally, Utah is denied the ability to exercise standard police powers within its borders, and to condemn federally owned land to create highways for commerce and economic

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development, incidents of sovereignty commonly exercised by eastern States. This disparate treatment by the federal government can be argued to violate the Equal Sovereignty Principle.

2. **The Equal Footing Doctrine:** This theory is based on the Equal Sovereignty Principle, historical precedent, and jurisprudence holding that new States must be admitted to the Union on an equal footing with the original thirteen. The original thirteen States succeeded to all rights, prerogatives, forms and incidents of sovereignty inhering in the Crown of England, among which were: the power of self-governance; the laying of taxes; the creation of instruments for the adoption of legislation; condemnation of land for public purposes; the means and manner of law enforcement; and the ownership of all unappropriated land. When the original States declared their independence, they assumed all of the Crown's sovereign rights, including the ownership of all unappropriated land. When Utah was admitted, by contrast, the United States retained all unappropriated land. Dominion over land is an incident of State sovereignty necessary for, *inter alia*, competing with other States for national political power, taxing land to fund self-governance, exercising police powers, and exercising condemnation powers to make public improvements. Utah has therefore been denied equal sovereignty with the original States.
3. **The Compact Theory:** This theory posits that a compact was formed between Utah and the federal government under which Utah agreed to allow the federal government to retain land within its borders and the federal government agreed to promptly and completely dispose of that land by sale or grant. Thus, the federal government would own no such land over a period of time, thereby putting Utah on an equal footing with

the original States, and treating Utah as a co-equal sovereign. The near permanent retention by the federal government of the unappropriated land within Utah's borders breaches this compact. This breach also arguably violates both the Equal Sovereignty Principle and the Equal Footing Doctrine.

- 4. The Property Clause:** The Court has never fully explored the scope of power granted to Congress under the Property Clause. The key Property Clause cases were handed down when the policy of the United States called for the disposal of public lands. The Court has never ruled on whether the Property Clause permits the federal government to forever retain the majority of land within the borders of a State. An historical, constitutional, and jurisprudential argument can be made that the Framers intended to grant the power to regulate federal lands only in the context of disposal, not to permanently retain the majority of the land within a State. The historical evidence supporting the Equal Sovereignty Principle, the Equal Footing Doctrine, and the Compact Theory tends to support this interpretation of the Property Clause.

PART THREE: LEGAL ANALYSIS

1. Introduction

The federal government's aggressive disposal of public land stimulated dense settlement across the eastern half of the nation. However, the federal government curtailed its aggressive policy with the majority of the land in eleven continental western States and Alaska left unappropriated. As a consequence, the eastern States enjoy disproportionate commercial, political, and sovereign power compared to the western States. The majority of land in the western States is unavailable to the citizens of those States. Settlement is permanently prohibited, resources are locked away, commerce is diminished, and State governments are deprived of access to sources of revenue for self-governance available to their sister States in the east. They are also deprived of other fundamental incidents of sovereignty including condemnation and police powers over the bulk of the land within their borders. Western States cannot reasonably build roads, infrastructure, and communications systems, or fund schools and other social programs and amenities, or set aside parks, recreation and conservation areas, or protect the health, safety, and welfare of their citizens in the same way as State governments in the east.

The retention of the majority of the land within the boundaries of sovereign States is inconsistent with the historical relationship between States and the federal government during the Nation's first century and a half. It is also inconsistent with the experience of the original thirteen States and six subsequently admitted States. As a result, there has been considerable attention paid to a situation many in the West view as unfair. With the foregoing history as context, we review and analyze the legal theories noted above that may be useful to address this situation.

2. The Equal Sovereignty Principle

a) Historical Roots

The Equal Sovereignty Principle is so deeply rooted in the Nation's history it predates even the Constitution. The Principle proceeds from the colonies' assertion of independence from the Crown as independent nation-states and is in the very nature of a federation of sovereign states. Each colony declared itself an independent "state," succeeding to the sovereign rights that inhered in the Crown until independence.¹¹⁹ The Principle is also confirmed by an unbroken line of Supreme Court decisions stretching from the early days of the Republic until today.

The theoretical underpinning of the Equal Sovereignty Principle is the fundamental equality that necessarily inheres in a federal republic. Concerted action by members of a federal republic might inure to unequal benefit for one member or another, but each member is entitled to equal treatment by the central authority. For example, victory in the Revolutionary War ensured that each State could follow its own path in the development of its economy. Each State received equal treatment from joining together in the War by receiving independence. But each State profited in accordance with its unique circumstances. The economies of Massachusetts and New York grew exponentially as they each exploited their unique positioning and capacity to engage in maritime trade. Virginia's economy outgrew several of the other States because of its ability to exploit markets for the products it grew. Each State grew at its own pace but each State received – equally – the protection of the joint federation.

¹¹⁹ "In June 1776, the Convention of Virginia formally declared, that Virginia was a free, sovereign, and independent state; and on the 4th of July, 1776, following, the United States, in Congress assembled, declared the Thirteen United Colonies free and independent states; and that as such, they had full power to levy war, conclude peace, &c. I consider this as a declaration, not that the United Colonies jointly, in a collective capacity, were independent states, &c. but that each of them had a right to govern itself by its own authority, and its own laws, without any control from any other power upon earth." *Ware v. Hylton* 3 U.S. 199, 224 (1796).

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This is a discussion that proceeds in a different context today. We say that every American is equal under the law, which is to say that each is entitled to equal treatment at the hands of government. But some are more creative; others more assertive; others luckier; still others more disciplined. As a result, Americans are not equal to one another *in fact*. They are unequal in wealth, resources, accomplishment and a host of other things but that is the nature of freedom. Each person has the freedom to achieve what is in his capacity to achieve. Equality of result is not something that is anticipated under our system or guaranteed under the Constitution. Equal opportunity, however, is.

So it was with the States at the Founding.

The States were not unaware that some States were larger than others; that some had larger populations and some smaller; that some were richer and some poorer. That awareness, was, in part, what motivated Maryland to refuse execution of the Articles of Confederation. Maryland's critical dissent threatened the entire Revolutionary project, but it ensured that the nation that followed was a federal republic of States equal in sovereignty. That federal structure has protected individual freedom through the diffusion of governmental power.

The Court has only recently referred to the necessary equality of the States as the "Equal Sovereignty Principle." But the concept is an ancient one that gathers much of its jurisprudential strength from the many cases decided under the Equal Footing Doctrine that we explore in more detail below. The Equal Footing Doctrine, which requires newly admitted States to enjoy sovereign and political rights equal to those of the original States, is the natural conclusion of the Equal Sovereignty Principle. The Equal Footing Doctrine necessarily pre-supposes that the original thirteen States are, in fact, equal sovereigns. Thus, while the Equal Footing Doctrine

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requires admission of States on an equal basis, the Equal Sovereignty Principle requires that States continue to enjoy equal sovereignty in order for our federal system to properly function.

b) Jurisprudence

As early as 1845, in *Permoli v. New Orleans*,¹²⁰ the Court noted the constitutional requirement that the States be equal sovereigns:

The act of Congress of the 8th April, 1812, which admitted Louisiana into the union, acknowledged that very equality with her sovereign sisters, which is here asserted. The first section provides – ‘That the said state shall be one, and is hereby declared to be one, of the United States of America, and admitted into the union on an equal footing with the original states, in all respects whatever.’ It is not the mere assertion of her equality, in this clause, which establishes her equality – it only pronounces that equality which the Constitution establishes. If she be equal, however, she must be equally exempt from the legislation of Congress, past or future, as her elder sisters.¹²¹

In *Withers v. Buckley*,¹²² the Court wrote: “Clearly, Congress could exact of the new State the surrender of no attribute inherent in her character as a sovereign independent State, or indispensable to her equality with her sister States, necessarily implied and guaranteed by the very nature of the Federal compact.” This is important to note, since some have concluded that the Equal Footing Doctrine applies only to title to submerged lands. This conclusion is belied by the numerous cases relying on the Equal Footing Doctrine to uphold the constitutional mandate of State sovereign equality absent any issues relating to submerged lands. These are the cases the Roberts Court has relied upon to enunciate the Equal Sovereignty Principle that has always been the foundation of the Equal Footing Doctrine.¹²³ Prior to that time, this line of cases was

¹²⁰ 44 U.S. 589 (1845).

¹²¹ *Id.* at 107.

¹²² 61 U.S. 84, 93 (1858).

¹²³ See *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193, 203-204 (2009); and *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

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merely thought of as the political branch of the Equal Footing Doctrine. The Roberts Court has instead referred to it as the Equal Sovereignty Principle, but its judicial pedigree is a long one.

For example, in *Escanaba & Lake Michigan Transport Co. v. City of Chicago*,¹²⁴ the Court relied on the Equal Footing Doctrine to uphold the City of Chicago's right to maintain bridges across the Chicago River that blocked commercial traffic on the river below as an incident of sovereignty enjoyed by the original States, despite language in the Acts of Congress enabling the creation of and admitting the State of Illinois, that mandated that the navigable waters of the new State, including the Chicago River, "shall be common highways and forever free." The same result was reached by the Court under the Equal Footing Doctrine in *Cardwell v. American River Bridge Co.*,¹²⁵ *Sands v. Manistee River Imp. Co.*,¹²⁶ and *Withers v. Buckley*.¹²⁷ Similarly, in *Ward v. Racehorse*,¹²⁸ the Court relied on the Equal Footing Doctrine to rule that Wyoming could regulate hunting by American Indians within the State, since the original thirteen States and all other States admitted after them could regulate hunting within their borders, despite treaty language appearing to demand otherwise.

Soon thereafter, in *Bolln v. Nebraska*,¹²⁹ the Court again relied on the Equal Footing Doctrine to rule that Nebraska could prosecute a felony by filing an information rather than an indictment, even though under the Enabling Statute admitting Nebraska it appeared that only an indictment could be used. Eleven years later, in *Coyle v. Smith*,¹³⁰ perhaps the Court's most complete analysis of the political branch of the Equal Footing Doctrine, the Court ruled that

¹²⁴ 107 U.S. 678 (1883).

¹²⁵ 113 U.S. 205 (1885).

¹²⁶ 123 U.S. 288 (1887).

¹²⁷ 61 U.S. 84 (1857).

¹²⁸ 163 U.S. 405 (1896).

¹²⁹ 176 U.S. 83 (1900).

¹³⁰ 221 U.S. 559 (1911). *Coyle* is discussed in more detail below under the Equal Footing Doctrine but it provides powerful jurisprudential support for the concept of equal sovereignty.

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Oklahoma could decide where to put its State capital, despite contrary language in the Enabling Statute.

The Equal Sovereignty Principle finds support beyond the Equal Footing Doctrine cases, however. For example, in *Alden v. Maine*,¹³¹ the Supreme Court upheld the right of States to the protection of sovereign immunity, even as against claims under federal law, on the basis of the equality of the States. In that case, police officers in Maine sued the State in federal court for violation of the Federal Fair Labor Standard Act of 1938. The Court affirmed dismissal on the basis that Maine had not consented to suit and was entitled to the protection of sovereign immunity as an incident of its sovereignty as a sovereign State. The Court stated:

Although the Constitution establishes a National government with broad, often plenary authority over matters within its recognized competence, the founding document "specifically recognizes the States as sovereign entities." *Seminole Tribe of Fla. v. Florida*, *supra*, at 71, n. 15; accord, *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779, 115 L. Ed. 2d 686, 111 S. Ct. 2578 (1991) ("The States entered the federal system with their sovereignty intact"). Various textual provisions of the Constitution assume the States' continued existence and active participation in the fundamental processes of governance. See *Printz v. United States*, 521 U.S. 898, 919, 138 L. Ed. 2d 914, 117 S. Ct. 2365 (1997) (citing Art. III, § 2; Art. IV, §§ 2-4; Art. V). The limited and enumerated powers granted to the Legislative, Executive, and Judicial Branches of the National government, moreover, underscore the vital role reserved to the States by the constitutional design, see, e.g., Art. I, § 8; Art. II, §§ 2-3; Art. III, § 2. Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of the national power. The Amendment confirms the promise implicit in the original document: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., Amdt. 10; see also *Printz*, *supra*, at 919; *New York v. United States*, 505 U.S. 144, 156-159, 177, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992).

The federal system established by our Constitution preserves the sovereign status of the States in two ways. First, it reserves to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status. The States "form distinct and independent portions of the

¹³¹ 527 U.S. 706 (1999).

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supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.” The Federalist No. 39, p. 245 (C. Rossiter ed. 1961) (J. Madison).

Second, even as to matters within the competence of the National government, the constitutional design secures the founding generation’s rejection of “the concept of a central government that would act upon and through the States” in favor of “a system in which the State and Federal governments would exercise concurrent authority over the people -- who were, in Hamilton's words, 'the only proper objects of government.’” *Printz, supra*, 521 U.S. at 919-920 (quoting The Federalist No. 15, at 109); accord, *New York, supra*, at 166 (“The Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States”). In this the founders achieved a deliberate departure from the Articles of Confederation: Experience under the Articles had “exploded on all hands” the “practicality of making laws, with coercive sanctions, for the States as political bodies.” 2 Records of the Federal Convention of 1787, p. 9 (M. Farrand ed. 1911) (J. Madison); accord, The Federalist No. 20, at 138 (J. Madison & A. Hamilton); James Iredell: Some Objections to the Constitution Answered, reprinted in 3 Annals of America 249 (1976).¹³²

Just two years ago, the Supreme Court again reaffirmed the power and continuing vitality of the Equal Sovereignty Principle in *Shelby County v. Holder*.¹³³ As in *Permolli*, the Principle was applied to basic aspects of retained sovereignty.

In deciding that the preclearance requirement of the Voting Rights Act was unconstitutional, the Court wrote:

Not only do States retain sovereignty under the Constitution, there is also a “fundamental principle of *equal* sovereignty” among the States. *Northwest Austin, supra*, at 203, 129 S. Ct. 2504, 174 L. Ed. 2d 140 (citing *United States v. Louisiana*, 363 U.S. 1, 16, 80 S. Ct. 961, 4 L. Ed. 2d 1025 (1960); *Lessee of Pollard v. Hagan*, 44 U.S. 212, 3 How. 212, 223, 11 L. Ed. 565 (1845); and *Texas v. White*, 74 U.S. 700, 7 Wall. 700, 725-726, 19 L. Ed. 227 (1869); emphasis added). Over a hundred years ago, this Court explained that our Nation “was and is a union of States, equal in power, dignity and authority.” *Coyle v. Smith*, 221 U.S. 559, 567, 31 S. Ct. 688, 55 L. Ed. 853 (1911). Indeed, “the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized.” *Id.*, at 580, 31 S. Ct. 688, 55 L. Ed. 853. *Coyle* concerned the admission of new States, and *Katzenbach* rejected the notion that the principle operated as a *bar* on differential treatment outside that context. 383 U.S. at 328-329, 86 S. Ct. 803, 15 L. Ed. 2d 769. At the same time, as we made clear in *Northwest*

¹³² *Ibid.* at 713-715.

¹³³ 133 S. Ct. 2612 (2013).

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Austin, the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States.”¹³⁴

Critics have suggested that the *Shelby* Court expanded traditional notions of equal sovereignty. Indeed, that was the position taken by the dissenters who expressed some alarm at the notion that States equal in sovereignty and status under the Constitution should expect equal treatment under the law. However, as the historical review above shows, the Equal Sovereignty Principle announced in *Shelby* is embedded in our Nation’s history, Constitution, and jurisprudence. It was foreshadowed by *Northwest Austin Municipal Util. Dist. No. One v. Holder*,¹³⁵ in which the Court observed that the rule in question “differentiates between the States, despite our historic tradition that all the States enjoy equal sovereignty.”¹³⁶ It was overtly stated by the Court in the long line of Equal Footing Doctrine cases unrelated to property discussed above, culminating in 1911 with *Coyle v. Smith*.¹³⁷ It was insisted upon by Maryland as early as 1776 and impacted the formation of public lands, the settlement of western lands, and the structure of the Constitution. This history, the structure of the Constitution, and the case law of the Court, taken together “stand for the proposition that Congress, regardless of the power that it seeks to exercise, is constrained to respect the constitutionally mandated sovereign equality of all of the states.”¹³⁸

¹³⁴ *Id.* at 2623—2624.

¹³⁵ 557 U.S. 193, 203-204 (2009).

¹³⁶ *Id.* at 203.

¹³⁷ 221 U.S. 559. “To this we may add that the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized.” *Id.* at 580.

¹³⁸ Colby, Thomas, In Defense of the Equal Sovereignty Principle. 65 *Duke Law Journal* (forthcoming 2016); GWU Legal Studies Research Paper No. 2015-22; GWU Law School Public Law Research Paper No. 2015-22. Available at SSRN:<http://ssrn.com/abstract=2616889> at 25.

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c) The Relationship Between State Dominion Over Land and State Sovereignty

Dominion over land is necessary for Utah to enjoy equal sovereignty with the thirty-eight States that currently exercise dominion over the land within their borders. Many examples illustrate the relationship between dominion over land and the State sovereignty. We focus on four such examples.

i. State Dominion Over Land: Political Power

In the past, the Government has successfully argued the position that the percentage of land within a State owned by the Federal government is merely an economic issue, unrelated to sovereignty.¹³⁹ In *United States v. Gardner*,¹⁴⁰ for example, a Nevada rancher refused to pay grazing fees, arguing that the United States had no right to own the grazing land. One argument advanced by Gardner was that Nevada was unconstitutionally denied equal sovereign and political rights because the United States owned over eighty percent of the land within the borders of the State.¹⁴¹ In ruling against this argument, the Ninth Circuit reasoned that ownership of land was an economic issue, not an issue that impacted the sovereign or political rights of the State of Nevada. However, as the historical review section above showed, the

¹³⁹ See, e.g., *United States v. Gardner*, 107 F.3d 1314 (9th Cir. 1997); cert. denied, *Gardner v. United States*, 522 U.S. 907 (1997); reh. denied, *Gardner v. United States*, 522 U.S. 1008 (1997). See also, *Nevada ex rel. State Bd. of Agric. v. United States*, 512 F. Supp. 166, 168 (D. Nev. 1981), affirmed on other grounds by *Nevada ex rel. State Bd. of Agric. v. United States*, 699 F.2d 486, 487 (9th Cir. 1983) (“Federal regulation which is otherwise valid is not a violation of the ‘equal footing’ doctrine merely because its impact may differ between various states because of geographic or economic reasons”); *United States v. Medenbach*, No. 96-30168, 1997 WL 306437, at *3 (9th Cir. June 6, 1997) (“the equal footing doctrine is not implicated by the fact that the State of Washington may have within its boundaries more land subject to federal control than do the original thirteen states”); *United States v. Risner*, No. 00-10081, 2000 WL 1545491, at *1 (9th Cir. Oct. 17, 2000) (“Neither the Supreme Court nor this court has ever held that the equal footing doctrine insures equality between the States with respect to property beyond those lands under navigable waters.”).

¹⁴⁰ *Supra*, note 137.

¹⁴¹ *Gardner* preceded the *Shelby* case by many years. The “political” branch of the Equal Footing Doctrine was advanced, not what is post-*Shelby* referred to as the Equal Sovereignty Principle. For an excellent review of the *Shelby* decision and the historical underpinnings and jurisprudential support for the Equal Sovereignty Principle, see Colby, *supra*, note 138.

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ability to increase population through the development of land was the basis of the Connecticut Compromise, and therefore dictated each State's political power through the number of seats in the House of Representatives, its number of electors in the Electoral College, and the extent to which it controlled spending bills originating in the House.

The Articles of Confederation provided for one vote per State, a situation large States found unacceptable. At the Constitutional Convention, large States, such as Virginia, Pennsylvania, and North and South Carolina, argued that because they contributed more to the nation's economic development, tax base, and military, they should have a larger say in the government they were meeting to form (often referred to as the Virginia Plan or Large State Plan). The small States, such as Maryland, Delaware, and New Jersey, steadfastly insisted on one vote each (often referred to as the New Jersey Plan or Small State Plan). Just as the Convention reached an impasse, Roger Sherman of Connecticut proposed a compromise. Instead of one council of government, he proposed two: the Senate, where each State had an equal vote; and the House, where the number of votes cast by each State was calculated based upon its population. This bi-cameral legislative solution was paired with the Electoral College, which gave the larger, more populous States a larger voice in selecting the President, since each State received electoral votes based upon its combined number of House and Senate seats. Finally, since the large States contributed more to the budget, spending bills could originate only in the House, where the large States had more votes due to their larger populations. The census provisions completed this Constitutional design, providing the mechanism to implement the Connecticut Compromise.

Thus began a competition among the States for national political power, with population as the currency of the contest. The larger a State's population, the larger its influence on laws

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passed, spending allowed, and the selection of the Executive.

For well over one hundred years, the federal government's land policy actively encouraged economic development and population growth in newly admitted States. Twenty-three newly admitted States were stimulated by federal land policy to increase their economic base and population, thereby gaining federal political power. Political power has flowed among the States with each decennial census issued, following land development and increased population. Thus Florida, a large State encouraged by federal land policy to develop its population and economy, grew so in population and resulting national political power that it cast the deciding Electoral College votes in the 2000 Presidential race.

While federal land policy nurtured economic and population growth in most newly admitted States, the policy began to change to one of neglect soon after Utah was admitted. In 1976, federal land policy changed to one of near permanent retention. Now, instead of giving away public land to settlers, the federal government forever prohibits Utah's public land from being settled. As a result, Utah is unable to fairly compete among the States for national political power because it cannot populate the sixty-six percent (66%) of its land claimed by the Federal government. Although Utah is a large State, it has been denied the benefit of the Connecticut Compromise received by Virginia and the other large States at the Convention. In the Constitutional competition for national political power, Utah has been stunted by federal policy while other States have been boosted. So long as the federal government owns such a high percentage of its land, Utah is, and always will be, a second class State respect to political standing, a result the Constitution clearly disallows. This inequity distorts the "harmonious

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operation of the scheme upon which the Republic was organized.”¹⁴²

It is ironic that Elbridge Gerry, a delegate to the Constitutional Convention from Massachusetts, proposed to permanently limit the number of House seats and Electoral College votes allocated to western States, so that they could never exceed the combined votes of the original thirteen States. The man for whom Gerrymandering was named a few years later, when he was Governor of Massachusetts, proposed a permanent geographical Gerrymandering of the Nation. This was voted down at the Convention, but due to federal land policy, the functional equivalent of Elbridge Gerry’s proposal has been imposed on the twelve western public land States.

ii. State Dominion Over Land: Police Power

The police power has always been reserved to the States.¹⁴³ The ability to provide for the health, safety and welfare of Utah’s citizens falls to the State, not the federal government. However, the percentage of federal lands within the State impinges on Utah’s ability to exercise police powers in the same manner as the non-public land States, impinging upon its sovereignty. In States with dominion over the land within their borders, State agencies routinely exercise the sovereign police power to protect their citizens, while Utah cannot.

For example, eastern States protect their citizens from fire hazards as an exercise of police power. Utah must depend upon federal agencies, such as the Bureau of Land Management or the Forest Service, for the fire safety of its citizens. Eastern States exercise the sovereign power of the State to patrol the land within their borders to fight crime. Utah, in contrast, is prevented access to a significant percentage of the land within its borders due to

¹⁴² *Shelby*, 133 S. Ct. at 2623 (quoting *Coyle v. Smith*, 221 U.S. 559, 580 (1911) (internal quotation marks omitted)).

¹⁴³ *NFIB v Sebelius*, 132 S. Ct. 2566, 2578 (2012).

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federal roadless areas that local police forces cannot access. The percentage of land over which Utah exercises police power as compared to that over which federal agencies exercise police power is even smaller when the exercise of federal police power over private land adjacent to federal land is considered. The checkerboard layout of private land – embedded in large sections of federal land – allows federal jurisdiction and police power over many private plots. The result is that the primary exercise of the police power in Utah is by the federal government.

In short, eastern States routinely exercise the sovereign police power to protect the health, safety, and welfare of their citizens, but Utah must instead depend upon federal agencies to exercise police powers over the majority of the State. This is inconsistent with the federal system envisioned by the Framers.¹⁴⁴ It denies Utah equal sovereignty with thirty-eight other States.

iii. State Dominion Over Land: Ability to Self-Govern

Self-governance is the hallmark of sovereignty. The power to tax is an incident of sovereignty necessary to fuel self-governance.¹⁴⁵ As stated by Alexander Hamilton in Federalist 30:

Money is with propriety considered as the vital principle of the body politic; as that which sustains its life and motion, and enables it to perform its most important functions. A complete power, therefore, to procure a regular and adequate supply of revenue, as far as the resources of the community will permit, may be regarded as an indispensable ingredient in every constitution. From a deficiency in this particular, one of two evils must ensue; either the people must be subjected to continual plunder, as a substitute for a more eligible mode of supplying the public wants, or the government must sink into a fatal atrophy, and in a short course of time perish.

The Court long ago decided, in *Van Brocklin v. Tennessee*,¹⁴⁶ that federally owned property was not taxable by the States. It was probably never considered by the *Van Brocklin* court, however, that a situation would arise, as it has in Utah, where a State would be denied that

¹⁴⁴ *Printz v United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

¹⁴⁵ *Piqua Branch of State Bank of Ohio v. Knopp*, 57 U.S. 369, 396-97 (1853).

¹⁴⁶ *Van Brocklin v. Tennessee*, 111 U.S. 151 (1886).

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ability to tax the majority of land within its borders. Nevertheless, the ruling stands and applies to all federal land in the Utah. By comparison, therefore, Utah is denied the ability to generate tax revenue, an incident of sovereignty according a long line of Supreme Court decisions, in the same manner as thirty-eight other States.

The federal government has explicitly recognized this disparity in two laws: Payment in Lieu of Taxes (“PILT”),¹⁴⁷ and Secure Rural Schools (“SRS”).¹⁴⁸ Both programs recognize the tax shortfalls public land States experience as a result of federal land ownership and attempt to compensate them accordingly.

As recognized by the House hearings on the PILT legislation:

The Congress recognizes that, because of the location and character of much of the real property owned by the Federal Government, States and local governmental units are often deprived of substantial revenues which they would receive in real property taxes if such property were privately owned. The purpose of this Act is to correct this situation by providing for the making of fair and equitable payments by the Federal Government, in lieu of real property taxes, to such States and local governmental units.¹⁴⁹

As stated in the House Committee Report:

This legislation is designed to reduce the loss of local governments’ revenues due to the existence of non-taxable federal lands within their jurisdictions.¹⁵⁰

Similar statements from the legislative history of the SRS legislation exist.

Accordingly, the United States has recognized the tax disparity created by its policy of forever retaining the public lands within Utah’s borders. As taxation is an established incident of sovereignty, the disparity in the ability of Utah to tax as compared to eastern States should violate the Equal Sovereignty Principle.

¹⁴⁷ 31 U.S.C. § 6902 *et seq.*

¹⁴⁸ 16 U.S.C. § 7111 *et seq.*

¹⁴⁹ House Hearings at 2.

¹⁵⁰ House Committee Report at 32.

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Moreover, the fact that western States and their local governments -- already reduced in political power as noted above -- are forced to rely upon federal subsidies to fund basic operations, subjects these western States to undue political pressures inconsistent with equal sovereignty. As recently stated by Senator Mike Lee on the floor of the Senate while explaining his vote against the Farm Bill:

Most Americans who live *east* of the Mississippi have no idea that most of the land *west* of the Great River is owned by the federal government. I don't mean national parks and protected wilderness and the rest. We've got a lot of those, and we love them. But that's a fraction of a fraction of the land I'm talking about. I'm just talking about garden variety land, the kind that is privately owned in every neighborhood and community in the country. More than 50% of all the land west of the Mississippi River is controlled by a federal bureaucracy and cannot be developed. No homes. No businesses. No communities or community centers. No farms or farmers' markets. No hospitals or colleges or schools. No little league fields or playgrounds. Nothing.

In my own state, it's 63% of the land. In Daggett County, it's 81%. In Wayne, it's 85%. In Garfield, it's 90%. Ninety percent of their land... *isn't* theirs. In communities like these, financing local government is a challenge. There, like in the east, local government is funded primarily by *property* taxes. But in counties and towns where the federal government owns 70, 80, even 90% of all the land, there simply isn't enough *private* property to tax to fund basic local services:

- another sheriff's deputy to police their streets;
- another truck or ambulance to save their lives and property from fires;
- another teacher to educate their children.

To compensate local governments for the tax revenue Washington unfairly denies them, Congress created -- as only Congress could - the PILT program, which stands for Payment In Lieu of Taxes. Under PILT, Congress sends a few cents on the dollar out west every year to make up for lost property taxes. There is no guaranteed amount. Washington just sends what it feels like.

Imagine if a citizen operated this way with with the IRS.

Local governments across the western United States, and especially in counties like Garfield, Daggett, and Wayne, Utah, completely depend on Congress making good on this promise. Given this situation, there are three possible courses of congressional action. First, Congress could do the right thing and transfer the land to the states that want it. Second, Congress could compromise and fully compensate western communities for the growth and opportunity current law denies them. But in this bill, it's neither. Congress chooses option three: lording its power over western communities to extort political concessions from them,

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like some two-bit protection racket.

“That’s a nice fire department you got there,” Congress says to western communities. “Nice school your kids have. Be a shame if anything should happen to it.”

These states and communities are looking for nothing more than certainty and equality under the law. Yet Congress treats these not as rights to be protected, but vulnerabilities to be exploited.¹⁵¹

The Constitutional Convention dealt extensively with ensuring that certain States could not exert undue political pressure on other States. This was the basis of the extensive debate on proportional representation resulting in the carefully crafted Connecticut Compromise. The Framers in fact predicted that eastern States would collude to hold power over the new western States.¹⁵² They went to great pains to ensure that no State would be placed in the position described above by Senator Lee. This example illustrates the importance of the Equal Sovereignty Principle to the harmonious operation of a federal republic, as stated by the Court in *Coyle*.¹⁵³

vi. State Dominion of Land: Condemnation and Public Improvements

The Court has long recognized the ability to condemn land for public use as an incident of State sovereignty.¹⁵⁴ However, the federal government denies Utah the right to condemn the majority of its land for public purposes, in contrast to thirty-eight other States which can exercise that sovereign power over their land. The inability to condemn federal lands also negatively impacts other sovereign rights of Utah. For example, the Court has recognized that inherent in the sovereignty of the States is the power to make improvements necessary for commerce within

¹⁵¹ Congressional Record for the 113th Congress, Feb. 3, 2014, page S694.

¹⁵² See discussion of the debate over the Census Provision, above at 37.

¹⁵³ *Coyle, supra*, 221 U.S. 559 (1911).

¹⁵⁴ See, e.g., *Kelo v. City of New London*, 545 U.S. 469 (2005), and cases cited therein.

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the State. As the Court emphasized in *Withers v. Buckley*,¹⁵⁵ in response to the argument that the Mississippi Enabling Act prevented the State from changing the course of a navigable river:

It cannot be imputed to Congress that they ever designed to forbid, or to withhold from the State of Mississippi, the power of improving the interior of that State, by means either of roads or canals, or by regulating the rivers within its territorial limits, although a plan of improvement to be adopted might embrace or affect the course or the flow of rivers situated within the interior of the State. Could such an intention be ascribed to Congress, the right to enforce it may be confidently denied. Clearly, Congress could exact of the new State the surrender of no attribute inherent in her character as a sovereign independent State, or indispensable to her equality with her sister States, necessarily implied and guaranteed by the very nature of the Federal compact. Obviously, and it may be said primarily, among the incidents of that equality, is the right to make improvements in the rivers, water-courses, and highways, situated within the State.

Utah is denied the ability to form highways -- or even broadband service -- connecting the State, because of the presence of federal land throughout the State, and its inability to condemn that land for public uses. A map of the ownership of land within the State of Utah follows:

¹⁵⁵ 61 U.S. 84, 93 (1857).

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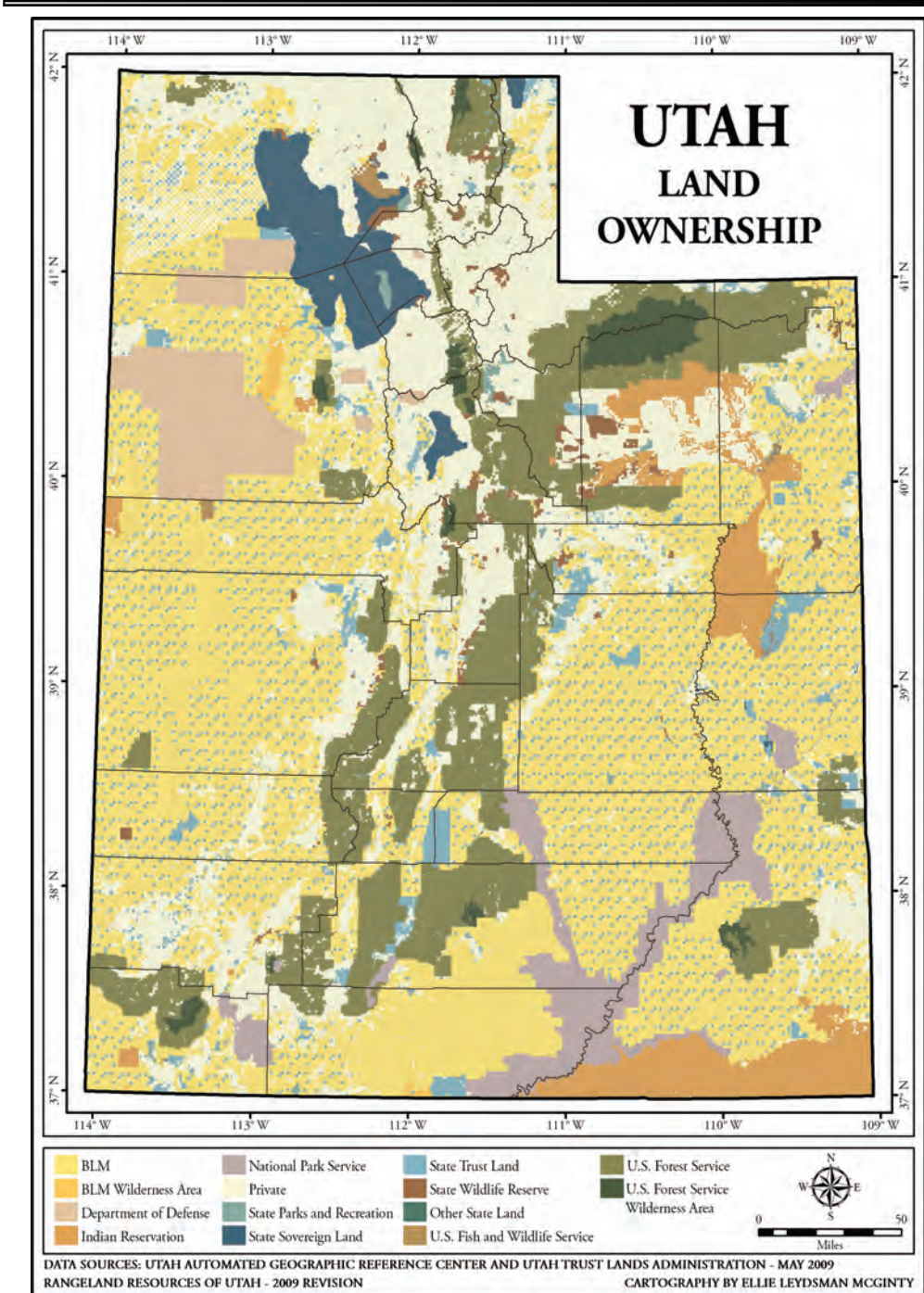


Figure 2.1. Land ownership of Utah.

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Inspection of this map shows that it is next to impossible for Utah to develop a reasonable system of highways, or a communications system, within the State absent condemnation of federal land, which Utah cannot do. As both the power to condemn land for public purposes and the power to create a system of highways to support commerce are sovereign powers long enjoyed by thirty-eight other States, Utah is being denied equal sovereignty with its sister States.

3. *The Equal Footing Doctrine*

The fundamental principle of equal sovereignty has found application in the admission of new States. As we have recounted, the debates over the landed States' claims to vast western landholdings prompted discussion of what should be done with those lands should they be ceded to the central authority. Some of the ceding States made their intentions very clear and Virginia, especially, made its cession conditional. Among those conditions was that any States admitted from those lands be admitted "on an equal footing" with the original States, thus ensuring the survival of the founding paradigm.

Admission on "*equal footing*" thus became a critical condition of the deeds of cession and found its way into the Northwest Ordinance as defining the new States' status upon admission to the Union. That term was then consistently employed on admission of each State that followed.

a) *Legislative Confirmation of Equal Footing*

The concept of "Equal Footing" enabled the growing nation to preserve the founding paradigm and the assumption of State equality that so concerned the original States as it admitted new States across the continent. As a consequence, the language was echoed in every enabling act admitting new States to the Union.

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Ohio, 1802: “An act to enable the people of the eastern division of the territory northwest of the river Ohio to form a constitution and State government and for the admission of such State into the Union on an equal footing with the original States, and for other purposes.”

Louisiana, 1811: “An act to enable the people of the Territory of Orleans to form a constitution and state government, and for the admission of such State into the Union on an equal footing with the original States, and for other purposes.”

Illinois, 1818: “An act to enable the people of Illinois to form a Constitution and State Government, and for the admission of such State into the Union on an equal footing with the original States.”

Utah, 1894: “AN ACT to enable the people of Utah to form a Constitution and State Government, and to be admitted into the Union on an equal footing with the original States.”

North Dakota, South Dakota, Montana and Washington, 1889: “AN ACT to provide for the division of Dakota into two States and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State Governments, and to be admitted into the Union on an equal footing with the original States, and to make donations of public lands to such States.”

b) Equal Footing as a Constitutional Doctrine of General Application

In a series of opinions, the Supreme Court made the Equal Footing Doctrine one of Constitutional moment. Indeed, no one now seriously contests the idea that new States are admitted to the Union on an equal footing with the original thirteen States. A short survey of some of those cases illustrates the Doctrine’s power, reach, and continuing vitality in our constitutional scheme.

The seminal case articulating the Equal Footing Doctrine is *Pollard v. Hagen*.¹⁵⁶ In that case, the plaintiff sought judgment that he was the rightful owner of land previously below the high water mark on Mobile Bay in Alabama by reason of a patent issued to him by the United States government. The Court held that the United States held no such title, title having passed upon statehood to Alabama, which had the sole right of disposition. The Court found that when

¹⁵⁶ 44 U.S. 212 (1845).

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Alabama achieved statehood, it succeeded to all incidents of sovereignty within its borders previously belonging to the United States because new States must be admitted on an equal footing with the original States in all respects whatever.¹⁵⁷

All the Equal Footing cases emphasize the sovereignty of the States and that the “footing” on which they are equal to the original States, is in the forms, rights and incidents of sovereignty to which the original States succeeded from the Crown on independence.

No principle is more familiar than this, that whilst a state has granted a portion of its sovereign power to the United States, it remains in the enjoyment of all the sovereignty which it has not voluntarily parted with . . . In the Constitution, what power is given to the United States over the subject we are now discussing? In a territory they are sovereign, but when a state is erected a change occurs. A new sovereign comes in.¹⁵⁸

The same issue arose in *Shively v. Bowlby*.¹⁵⁹ Shively claimed ownership of land on the basis of a grant by the United States and Bowlby claimed through Oregon. The Court found for Bowlby on the basis of the retained sovereignty of the State and its admission to the Union on an equal footing with the original States that succeeded to the Crown’s sovereign rights in land below the high water mark. The Court wrote:

Clearly, congress could exact of the new State the surrender of no attribute inherent in her character as a sovereign, independent state, or indispensable to her equality with her sister States, necessarily implied and guaranteed by the very nature of the Federal compact.¹⁶⁰

¹⁵⁷ *Id.* at 222 (“And whenever any of the said states shall have sixty thousand free inhabitants therein, such state shall be admitted by its delegates into the congress of the United States, on an equal footing with the original states in all respects whatever”); *id.* at 223 (“When Alabama was admitted into the union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession . . .”).

¹⁵⁸ *Id.* at 215.

¹⁵⁹ 152 U.S. 1 (1892).

¹⁶⁰ 152 U.S. at 34; 14 S. Ct. at 560.

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The issue arose more recently in *Utah Division of State Lands v. United States*,¹⁶¹ in which the Court decided that, under the Equal Footing Doctrine, the bed of Utah Lake transferred to the State of Utah upon statehood; this after nearly a century during which virtually everyone – certainly the federal government – assumed ownership to be in the United States because of vague wording in an 1888 Act that reserved certain lands to the United States. The Court traced the meaning and early understanding of the Equal Footing Doctrine and found that the Doctrine was deeply rooted and very much alive.¹⁶² We discuss this in more detail below.

In *Coyle v. Smith*,¹⁶³ the Court expanded on the nature of sovereignty and the sovereign rights to which each new State succeeds when admitted to the Union on an equal footing with the original thirteen. In *Coyle*, the question was whether or not the people of Oklahoma could move their capital from Guthrie to Oklahoma City when its Enabling Act unambiguously required the capital be maintained at Guthrie.

In *Coyle*, the Court engaged in a detailed analysis of the meaning and impact of sovereignty and the powers and prerogatives of States upon entry into the Union. The Court stated that all States are admitted on an equal footing to the original thirteen. It wrote:

‘This Union’ was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new States, might come to be a union of States unequal in power, as including States whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission. Thus it would result, first, that the powers of Congress would not be defined by the Constitution alone, but in respect to new States, enlarged or restricted by the conditions imposed upon new States by its own legislation admitting them in the Union; and, second, that such new States might not exercise all of the powers

¹⁶¹ 482 U.S. 193 (1987).

¹⁶² *Id.*, at 195.

¹⁶³ 221 U.S. 559 (1911).

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which had not been delegated by the Constitution, but only such as had not been further bargained away as conditions of admission.¹⁶⁴

The argument that Congress derives from the duty of ‘guaranteeing to each State in this Union a republican form of government’ power to impose restrictions upon a new State which deprives it of equality with other members of the Union, has no merit.¹⁶⁵

The Court concluded its opinion by writing:

To this we may add that the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution.¹⁶⁶

Coyle and *Permoli v. New Orleans*¹⁶⁷ conclusively demonstrate that the Equal Footing Doctrine is not merely a creature of submerged lands, as some have claimed, but, rather, a doctrine of general application based on fundamental notions of fairness, equality, federalism and the rights, characteristics and incidents of sovereignty. *Permoli* was a decision that found unconstitutional a requirement that Louisiana include in its State constitution a protection for religious minorities – something not required of Louisiana’s sister States. The Court found that Louisiana was admitted on an equal footing to the original thirteen which suffered no such restriction and as a sovereign equal in every way to its sister States, could not be forced to bend to rules not equally applied to them.

In 1950, the Supreme Court decided *United States v. Texas*,¹⁶⁸ which demonstrated, by contrast the power and reach of the Doctrine. Texas was admitted to the Union as an independent republic and, as such, enjoyed certain expansive sovereign rights in excess of the

¹⁶⁴ *Ibid.* at 567.

¹⁶⁵ *Id.*

¹⁶⁶ *Ibid.* at 580.

¹⁶⁷ 44 U.S. 589 (1845).

¹⁶⁸ 339 U.S. 707 (1950).

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existing States. Texas claimed, for example, the right and ownership of the marginal sea beyond the three-mile limit to which other States were subject.

The Court found that when Texas agreed to enter the Union on an equal footing to the original thirteen States, it surrendered certain sovereign rights, including the right to conduct international relations and jurisdiction over the marginal sea beyond the three-mile limit. The Court wrote:

The “equal footing” clause, we hold, works the same way in the converse situation presented by this case. It negatives any implied, special limitation of any of the paramount powers of the United States in favor of a State. Texas prior to her admission was a Republic. We assume that as a Republic she had not only full sovereignty over the marginal sea but ownership of it, of the land underlying it, and of all the riches which it held. In other words, we assume that it then had the *dominium* and *imperium* in and over this belt which the United States now claims. When Texas came into the Union, she ceased to be an independent nation. She then became a sister State on an “equal footing” with all the other States. That act concededly entailed a relinquishment of some of her sovereignty. The United States then took her place as respects foreign commerce, the waging of war, the making of treaties, defense of the shores, and the like. In external affairs the United States became the sole and exclusive spokesman for the Nation. We hold that as an incident to the transfer of that sovereignty any claim that Texas may have had to the marginal sea was relinquished to the United States.¹⁶⁹

The decisions are very clear. The Equal Footing Doctrine requires that each State be admitted on an equal footing with the original thirteen in every way.

c) *Equal Footing is a Matter of Equal Sovereignty of the States*

In order to understand the reach of the Equal Footing Doctrine, it is important to understand the attributes of sovereignty to which the Doctrine applies. The overarching theme of the later equal footing cases is the assumption of equality among the States relative to one another in the inherent aspects and incidents of sovereignty. The idea is based, first, on the

¹⁶⁹ *Id.* at 717—18. Interestingly, while the dissent in *Shelby*, written by Justice Ginsburg, disputes the reach of the Equal Sovereignty Principle, it concedes that each state is *admitted* equal in dignity, status and sovereignty as a matter of Constitutional constraint. *Ibid.* at 717--718.

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fundamental notion that members of a league of sovereigns necessarily requires that each member be equal under the law to every other member, as we have pointed out. That idea then proceeds with the observation that the original thirteen States inherited particular powers, incidents, and prerogatives of sovereign nations from the Crown and surrendered only so many of those prerogatives as are enumerated in the Constitution itself.¹⁷⁰

The Court has recognized that no State is equal to any other in terms of territory, wealth, population, economy or, for that matter, prospects.¹⁷¹ Some have greater natural resources. Some have greater access to trade. Some have the pull of climate, others, the pull of tradition and culture. But each enjoys sovereign rights equal to those inherited by the original States from the Crown on independence. The Court has repeatedly held that Congress cannot impose conditions on new States that were not also imposed on the original States. So to define the attributes of sovereignty to which all States are entitled, we must understand what powers and prerogatives the original States inherited on independence.

As we have seen, the decisions conclusively demonstrate that the States inherited the rights of government and the sovereign right to enact laws; enforce laws; establish and maintain legislatures, courts and an executive; to impose taxes and regulations on their citizens; the right to control and ownership of land under navigable waters. In light of these decisions, we suggest that among the incidents of sovereignty the original States inherited from the Crown was title to the unappropriated lands within their borders.

¹⁷⁰ *Coyle*, 221 U.S. at 567.

¹⁷¹ *United States v. Texas* 339 U.S. 707, 716 (1950) (“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.” (citation omitted)).

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d) Among The Incidents of Sovereignty Inherited by The Original States Was Ownership of Unappropriated Land

It is beyond debate that the original States inherited all sovereign rights formerly belonging to the Crown.¹⁷² Among the incidents of sovereignty inherent in the Crown at the time of independence, as a matter of history, was ownership of all vacant and unappropriated land in North America, as the Court stated in *Martin v. Waddell*.¹⁷³

In the case of *Johnson v. McIntosh*, 8 Wheat. 595, this Court said that according to the theory of the British constitution, all vacant lands are vested in the Crown, as representing the nation, and the exclusive power to grant them is admitted to reside in the Crown as a branch of the royal prerogative. And this principle is as fully recognized in America as in Great Britain; all the lands we hold were originally granted by the Crown; our whole country has been granted, and the grants purport to convey the soil as well as the right of dominion to the grantee. Here the absolute ownership is recognized as being in the Crown, and to be granted by the Crown, as the source of all title, and this extends as well to land covered by water as to the dry land; otherwise no title could be acquired to land under water.¹⁷⁴

Martin was preceded by *Clark v. Smith*, 38 U.S. (13 Pet.) 195, 201 (1839), in which the Court wrote: “the ultimate fee...was in the Crown previous to the Revolution, and in the States of the Union afterwards.”

In *Shively v. Bowlby* 152 U.S. 1, 14-15 (1892), the Court wrote:

The English possessions in America were claimed by right of discovery. Having been discovered by subjects of the King of England, and taken possession of in his name, by his authority or with his assent, they were held by the King as the representative of and in trust for the nation; and all vacant lands, and the exclusive power to grant them, were vested in him. The various charters granted by different monarchs of the Stuart dynasty for large tracts of territory on the Atlantic coast conveyed to the grantees both the territory described and the

¹⁷² *Ware v. Hylton* 3 U.S. (Dall.) 199, 223-224; *Johnson v. M’Intosh* 21 U.S. 543, 558 (1823) ; *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 at 367 (1842) (“When the Revolution took place, the people of each state became themselves sovereign...”) *see also id.* at 426; *Shively v. Bowlby* 152 U.S. 1, 15 (1894) (“And, upon the American Revolution, all the rights of the Crown and the Parliament vested in the several States, subject to the rights [later] surrendered to the national government by the Constitution of the United States.”).

¹⁷³ *Martin v. Waddell* 41 U.S. (16 Pet.) 367 (1842).

¹⁷⁴ *Ibid.* at 426.

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powers of government, including the property and the dominion of lands under tide waters. And upon the American Revolution, all the rights of the Crown and of Parliament vested in the several States, subject to the rights surrendered to the national government by the Constitution of the United States. *Johnson v. McIntosh*, 8 Wheat. 543, 595; *Martin v. Waddell*, 16 Pet. 367, 408-410.

In *Pollard v. Hagan*,¹⁷⁵ the Court wrote:

The right which belongs to the society, or to the sovereign, of disposing, in case of necessity, and for the public safety, of all the wealth contained in the state, is called the eminent domain. It is evident that this right is, in certain cases, necessary to him who governs, and is, consequently, a part of the empire, or sovereign power. Vat. Law of Nations, section 244. This definition shows, that the eminent domain, although a sovereign power, does not include all sovereign power, and this explains the sense in which it is used in this opinion.

There are two interesting aspects to *Pollard* that merit note. Some have claimed that Equal Footing applies only to submerged lands. In fact, the Court has on three occasions given support to this point of view, and lower courts have stated it as a fact.¹⁷⁶ But in *Pollard* the land involved was land that was no longer submerged, though it had been when Alabama was admitted to the Union.¹⁷⁷ The second interesting feature in the *Pollard* opinion is in the observation of Justice Catron in dissent and left unrefuted – indeed unaddressed – in the main opinion of the Court:

I have expressed these views in addition to those formerly given, because this is deemed the most important controversy ever brought before this court, either as it respects the amount of property involved, or the principles on which the present

¹⁷⁵ 44 U.S. 212, 223 (1845).

¹⁷⁶ *Idaho v. United States*, 533 U.S. 262 (2001), where the Court stated: “Therefore, in contrast to the law governing surface land held by the United States, see *Scott v. Lattig*, 227 U. S. 229, 244 (1913), the default rule is that title to land under navigable waters passes from the United States to a newly admitted State.” *Scott v. Lattig* involved a navigable river with an island in it. The Court ruled that the land under the navigable river passed to the State upon admission, but that the island did not because it was fast, dry land. 227 U.S. at 244. See also, *Texas v. Louisiana*, 410 U.S. 702, 713, 35 L. Ed. 2d 646, 93 S. Ct. 1215 (1973) (stating that the rule in *Pollard's Lessee* “does not reach islands or fast lands located within such waters. Title to islands remains in the United States, unless expressly granted along with the stream bed or otherwise.”); *United States v. Gardner*, 107 F. 3rd. 1314, 1319 (9th Cir. 1997) (stating that “[t]he Equal Footing Doctrine, then, does not operate to reserve title to fast dry lands to individual states.”)

¹⁷⁷ “[T]he act of Congress, and the patent in pursuance thereof, could give the plaintiffs no title, whether the waters had receded by the labour of man only, or by alluvion..” *Pollard*, 44 U.S. at 220.

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judgment proceeds -- principles, in my judgment, as applicable to the high lands of the United States as to the low lands and shores.

The language in *Utah Division of State Lands* is also instructive. The Court began its opinion by exploring the origins of the Equal Footing Doctrine, instructing that at the time of the American Revolution, certain lands belonged to the sovereign under English common law as a matter of sovereign right and were retained and managed for certain sovereign purposes. When the original States declared their independence, they became sovereign successors to the English Crown and legitimately laid claim to those lands. Because those lands were inherited by the original States by sovereign succession, all new States must, correspondingly, succeed to ownership of similar lands within their borders on statehood, under the Equal Footing Doctrine.

The Court stated:

The equal footing doctrine is deeply rooted in history, and the proper application of the doctrine requires an understanding of its origins. 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. See *Shively v. Bowlby*, 152 U.S. 1, 11-14 (1894). 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 *Id.*, at 15. 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. *Pollard's Lessee v. Hagan*, 3 How. 212 (1845).¹⁷⁸

It is worth observing that, despite the contrary cases noted above, no court has articulated a principled difference between sovereign rights in submerged land and sovereign rights in unappropriated dry land. Both are rites and unique attributes of sovereignty and both are undergirded by important public purposes necessary and appropriate for support of the sovereign

¹⁷⁸ 428 U.S. 193, 195 (1987).

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alone. Indeed, the Court has specifically ruled that highways over dry land are essential incidents of sovereignty the same as highways of commerce over navigable waters are, and has applied the Equal Footing Doctrine to both.¹⁷⁹

Thus far, we are not aware of the federal government voluntarily surrendering a foot of tidelands to a State. Usually, each State has been forced to seek judicial redress to establish what has been law for nearly 200 years in the United States. We can assume the federal government will likewise deny that States are entitled to the unappropriated land in their borders despite the fact that no one has ever denied that ownership of unappropriated land is an incident of sovereignty; one inherited on independence by the original thirteen States. As stated by the Court in *Shively v. Bowlby*:

Therefore the title, *jus privatum*, in such lands, as of waste and unoccupied lands, belongs to the King as the sovereign; and the dominion thereof, *jus publicum*, is vested in him as the representative of the nation for the public benefit.¹⁸⁰

The original thirteen States retained the unappropriated land within their borders as a matter of history, and disposed of same under *State* law even after they approved the Constitution of the United States. In addition, the three States that immediately followed, Vermont, Kentucky and Tennessee also received the unappropriated land within their borders, as did Maine, which was not admitted until 1820. Texas, too, and Hawaii, received all their unappropriated land upon statehood. All these States disposed of their land in accordance with State law and ceded none to the United States. Accordingly, nineteen States received and disposed of the public lands within their borders, including six after the union of the original thirteen. Eighteen States admitted prior to Utah received all public lands within their borders.

¹⁷⁹ See discussion of *Withers v Buckley*, *supra*, at 68. See also notes 125--128, *supra*.

¹⁸⁰ 152 U.S. 1, 11 (1894).

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The Court has never addressed whether, under the Equal Footing Doctrine, new States are entitled to ownership of the unappropriated lands within their borders because the original thirteen received all such lands. The issue has not reached the Court because the United States, from before we adopted the Constitution until modern times, engaged in the regular and orderly disposition of public lands. It was not until after 1976 that Congress stopped all disposition of unappropriated lands pursuant to FLPMA.

The logical progression of the argument, however, is clear: (1) ownership of the unappropriated public lands rests with the sovereign as an inherent incident of sovereignty; (2) the original thirteen States succeeded to ownership of the unappropriated public lands within their borders on independence; (3) new States are admitted on an equal footing with the original thirteen States; (4) Utah – purportedly admitted by legislative text and Constitutional imperative on an equal footing with the original thirteen States – has been denied control and ownership of the same category of lands received by the original States as an inherent incident of sovereignty; and (5) this unequal treatment impinges upon a variety of Utah’s rights that the Court has, in the past, recognized as sovereign rights.¹⁸¹

e) Disclaimer Clauses.

Among the arguments posited against a right in the States to the unappropriated lands within their borders is that all of the States admitted after the first sixteen, with a few exceptions, were required, as a condition of statehood, to agree to certain disclaimer clauses. These fall into two general categories: (1) that the State shall not interfere with the primary disposal of the soil by the United States; and (2) that the citizens of the proposed State disclaim all right, title and interest in the unappropriated lands. Utah’s Enabling Act falls into the second category, stating:

¹⁸¹ See discussion, The Relationship Between State Dominion Over Land and State Sovereignty, at pages 62 – 72, *supra*.

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That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof¹⁸²

Disclaimer language appears in the enabling acts for all States admitted after Tennessee, with the exception of those for Ohio, Maine, Texas and Hawaii. While the Court has rarely addressed these clauses, in *Van Brocklin v. Tennessee*,¹⁸³ where the Court conducted a survey of these clauses in the context of a State's power to tax federal property, the Court indicated that they were interchangeable.¹⁸⁴ We conclude that these disclaimer clauses do not bar transfer of public lands as some assert.

i. States Cannot Surrender Sovereign Rights by Enabling Act

This disclaimer language has been asserted as a bar to any claim for ownership of public lands by western States. However, under the Equal Footing Doctrine, enabling acts cannot require that newly admitted States surrender their sovereign rights. *Coyle v. Smith* 221 U.S. 559, 573 (1911):

The plain deduction from this case is that when a new State is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original States, and that such powers may not be constitutionally diminished, impaired or shorn away by any conditions, compacts or stipulations embraced in the act under which the new State came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission.

Other cases are in accord. In *Withers v. Buckley*,¹⁸⁵ the Court wrote:

Clearly, Congress could exact of the new State the surrender of no attribute inherent in her character as a sovereign independent State, or indispensable to her equality with her sister States, necessarily implied and guaranteed by the very nature of the Federal compact.

¹⁸² 28 Stat. 107 (1894).

¹⁸³ 117 U.S. 151 (1886).

¹⁸⁴ *Ibid.* at 167.

¹⁸⁵ 61 U.S. 84, 93 (1858).

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In *Permoli, supra*, the Court wrote:

It is not the mere assertion of her equality, in this clause, which establishes her equality – it only pronounces that equality which the Constitution establishes. If she be equal, however, she must be equally exempt from the legislation of Congress, past or future, as her elder sisters.¹⁸⁶

Therefore, assuming our conclusion that dominion over land relates to State sovereignty is correct, Congress could not constitutionally have forced Utah to surrender that dominion through Utah's enabling act.

ii. *The Disclaimer Clauses Have Not Acted to Bar Transfer in the Past*

As noted above, all States admitted after Tennessee other than Ohio, Maine, Texas and Hawaii have agreed to disclaimer clauses. Accordingly, sixteen States that agreed to disclaimer clauses during the course of their admission now have dominion over the land within their borders, although most consisted of primarily public lands upon their admission. Therefore, the disclaimer clauses cannot accurately be construed as a bar, as they have not operated in this fashion in the past.

iii. *The Disclaimer Clauses Were Intended to Clear Title to Facilitate Disposal*

The disclaimer clauses have rarely been construed by the Court. The first category of disclaimer clause, requiring that the State shall never interfere with the primary disposal of the soil, first appears in Congress' first attempt to sell off western lands, the Ordinance of 1784, article 3, which reads:

That they, in no case shall interfere with the primary disposal of the soil by the United States in Congress assembled, nor with the ordinances and regulations which Congress may find necessary for securing the title in such soil to the bona-fide purchasers.¹⁸⁷

¹⁸⁶ 44 U.S. 589, 608 (1845).

¹⁸⁷ Donaldson, *supra*, 149.

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The Ordinance of 1784 was passed with the express intent of selling off ceded western lands as quickly as possible to pay down the debt from the Revolutionary War.¹⁸⁸ As noted above, at this time, multiple conflicting claims to the ceded land existed.¹⁸⁹ The above language can most accurately be interpreted as aimed at securing clear title in the United States so that it could transfer clear title to bona-fide purchasers.

The disclaimer language next appears in the Northwest Ordinance of 1787, article 4, which states in relevant part:

The legislatures of those districts, or new States, shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary, for securing title in such soil, to the bona-fide purchasers.¹⁹⁰

This language also appears aimed at securing clear title in the United States so that it could transfer clear title to bona-fide purchasers. The Court appears to interpret the clause in this manner in *Gibson v. Cheoteau*.¹⁹¹ In addressing Congress' power to dispose of public lands, it stated:

No state legislation can interfere with this right or embarrass its exercise, and to prevent the possibility of any attempted interference with it, a provision has been usually inserted in the compacts by which new states have been admitted into the Union that such interference with the primary disposal of the soil of the United States shall never be made. Such provision was inserted in the act admitting Missouri, and it is embodied in the present constitution, with the further clause that the legislature shall also not interfere “with any regulation that Congress may find necessary for securing the title in such soil to the *bona fide* purchasers.”

The enabling acts of the States admitted under the Northwest Ordinance usually contained a recitation of the disclaimer that the legislature would “never interfere with the primary disposal of the soil.”

¹⁸⁸ Statehood and Union, Chapter 3.

¹⁸⁹ See discussion of conflicting claims at pages 20 – 22, *supra*.

¹⁹⁰ Donaldson, *supra*, 155.

¹⁹¹ 80 U.S. (13 Wal.) 92 (1871) at 99.

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The second category of disclaimer clause, the type in the Utah enabling act, first appears in the Louisiana enabling act, passed in 1811, which stated:

And provided also, that the convention shall provide by an ordinance, irrevocable without the consent of the United States, that the people inhabiting the said territory do agree and declare, that they forever disclaim all right or title to the waste or unappropriated lands, lying within the said territory; and that the same shall be and remain at the sole and entire disposition of the United States;¹⁹²

This language also appears aimed at securing clear title in the United States so that it could transfer clear title to bona-fide purchasers. The change in the language from that used in the prior land ordinances passed by the Confederation Congress was required because instead of title being ceded by a State that had clear title under a prior Colonial Charter, Louisiana was purchased from France. Titles had been granted to citizens of the Louisiana Territory by the kings of France and Spain prior to the Louisiana Purchase, presenting a new situation for the United States. These titles were not subject to control by the State legislature, to which the prior form of disclaimer clause used for State ceded land was directed, but instead rested with the citizens of the territory themselves. On March 2, 1805, Thomas Jefferson signed legislation entitled “An act for ascertaining and adjusting the title and claims to land, within the territory of Orleans, and the District of Louisiana,” published in French and English, which created a lengthy process by which title holders under French and Spanish land grants could register those land grants with the United States.¹⁹³ From 1805 until 1811, those foreign land grants were registered and recognized. The purpose of the disclaimer clause by the citizens of the territory prior to the admission of Louisiana to the Union was to terminate any claims to the land that had not been registered under this process prior to statehood, so that the United States would have clear title to

¹⁹² Eleventh Congress, Sess. III. Ch. 21, 1811, page 642.

¹⁹³ 1 Francois-Xavier Martin, *A General Digest of the Acts the Legislatures of the Late Territory of Orleans and the State of Louisiana and the Ordinances under the Territorial Government* 238, 1816.

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transfer to bona-fide purchasers. Therefore, the clause was directed at the citizens, not the legislature.

Our review of the use of the two categories of clauses leads us to the conclusion reached by the *Van Brocklin* court – the two are interchangeable.¹⁹⁴ Both were designed to secure clear title in the United States so that it could dispose of the land. We conclude that these clauses, far from acting as a bar to the United States disposing of public lands, were designed to facilitate the sale of public lands, as they did in nineteen States to Utah’s east. This interpretation is consistent with the history surrounding the formation of the clauses, the language of the clauses, and the use of the clauses in nineteen States. It is also the most reasonable interpretation of the disclaimer clauses, as it avoids constitutional issues by harmonizing the language with the Equal Sovereignty Principle and the Equal Footing Doctrine.

iv. The Disclaimer Clauses Confer no Power on the United States

In *Van Brocklin v. Tennessee*,¹⁹⁵ decided three years before Utah was admitted, the Court examined the enabling and admissions acts of most of the States admitted to that date, virtually all of which contained either the “never interference with disposal of the soils” or “forever disclaim” clauses, and determined that these clauses “are but declaratory, and confer no new right or power upon the United States.”¹⁹⁶

It is evident that the disclaimer clauses of the various enabling acts do not actually convey title, since they did not operate upon statehood to convey title to streambeds and lakebeds

¹⁹⁴ As correctly noted by Chief Justice Rehnquist, albeit in dissent, in *Idaho v United States*, 533 U.S. 262, 285 n. 2 (2001): “Clauses indicating that the entering State “forever disclaims all right and title to . . . all lands . . . owned or held by any Indians or Indian tribes” were boilerplate formulations at the time . . .”

¹⁹⁵ 117 U.S. 151 (1886).

¹⁹⁶ *Id.* The fact that the disclaimer language conveys no title, but merely confirms whatever may have been the state of title at the time of admission, is critical to understanding why the Equal Footing Doctrine is not violated by the fact that several states (Vermont, Maine, Kentucky, Texas, California and West Virginia) had no such provisions in their Enabling or Admission Acts, and yet stand on an equal footing with other States.

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to the United States, even though these lands most certainly constitute unappropriated public lands.¹⁹⁷ This is consistent with our conclusion that they merely operate to clear any clouds upon title to the land so that the United States can convey it to bona-fide purchasers.

f) *Contrary Authority*

The effort to transfer the public lands has been the topic of legal debate for some years. We can anticipate arguments against the application of the Equal Footing Doctrine, and cases that may be cited in support of that opposition. We engage in a non-exhaustive review of those authorities.

We start by acknowledging that no court has ever held that the Equal Footing Doctrine applies to the unappropriated dry public lands within the borders of admitted States. On the other hand, the Supreme Court has also never held that it does *not*, despite the cases noted above involving islands in navigable waters. The issue has never been squarely presented to the Court, so it has never been decided. The Court has held that Texas wielded too much sovereign power through ownership of offshore lands no other State owned, so we know that land ownership and sovereign power are in some manner connected.¹⁹⁸ But no State has ever argued that the percentage of federal land within its borders impinges upon its sovereign powers in violation of the Equal Footing Doctrine.

The Supreme Court has repeatedly held that unappropriated submerged lands passed to the States automatically on statehood and, as we have observed, no court, let alone the Supreme Court, has ever offered a principled reason why the Doctrine should not apply with equal force to *unsubmerged* unappropriated land. But a number of opinions contain language that appears to

¹⁹⁷ *Pollard v. Hagan* 44 U.S. (3 How) 212 (1845); *Utah Division of State Lands v. United States* 482 U.S. 193 (1987).

¹⁹⁸ *United States v. Texas*, *supra*.

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suggest that federal ownership of *unsubmerged* unappropriated lands is legitimate, even within the borders of a State admitted to the Union.

The earliest such indication is found in *Pollard v. Hagan, supra*. Before we present our analysis of these cases, however, we pause to indicate the difference between comments supporting a decision based on an argument presented to a court and incidental comments made by a court in issuing a decision. When a question is posed to a court, as in *Pollard v. Hagan* (the specific question posed being: who was entitled to ownership and possession of land that had been submerged at the time Alabama was admitted as a State), the Court performs its analysis and issues its opinion with respect to the question posed and arguments presented. In doing so, it states the findings and conclusions necessary to support its opinion. The Court may also, however, offer observations that are not necessary to support the opinion or to make assumptions that were not presented for decision. The latter are referred to as “dictum” (plural, “dicta”) or “obiter dictum”. *Black’s Law Dictionary* defines “obiter dictum” as “[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential” (i.e., offering no support in precedent for the proposition it addresses). This distinction is important to keep in mind in analyzing the cases that appear to authorize federal retention of unappropriated public lands within States after admission to the Union.

In *Pollard v. Hagan*,¹⁹⁹ the Court wrote:

When Alabama was admitted into the union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the

¹⁹⁹ *Supra*, at 223.

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deed of cession and the legislative acts connected with it. Nothing remained to the United States, according to the terms of the agreement, but the public lands.

This appears to suggest that the United States had the power to retain the public lands after Alabama's admission to the Union. But the paragraph goes on:

And, if an express stipulation had been inserted in the agreement, granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative; because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere except in cases in which it is expressly granted.

To understand the Court's meaning, one must understand an ancient concept little used in modern days and that is the notion of "municipal sovereignty". The Court defined that concept eight years before it decided *Pollard in New York v. Miln*.²⁰⁰ In that case the court wrote of "municipal sovereignty."

We choose rather to plant ourselves on what we consider impregnable positions. They are these:

That a state has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right but the bounden and solemn duty of a state to advance the safety, happiness, and prosperity of its people and to provide for its general welfare by any and every act of legislation which it may deem to be conducive to these ends where the power over the particular subject or the manner of its exercise is not surrendered or restrained in the manner just stated. That all those powers which relate to merely municipal legislation, or what may perhaps more properly be called internal police, are not thus surrendered or restrained, and that consequently, in relation to these, the authority of a state is complete, unqualified, and exclusive."

An early treatise on the topic explains the significance of the distinction:

The distinction between national sovereignty and municipal sovereignty is not an arbitrary one but naturally arises out of the nature of government and has often

²⁰⁰ 36 U.S. (11 Pet.) 102, 139 (1837).

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been recognized by the United States supreme court as a distinction which marks the boundary line between federal and state power.²⁰¹

The *Pollard* Court went on to observe that:

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

In other words, the Court's view was that the federal government never obtains municipal sovereignty over the unappropriated land within a State's borders, but only temporary possession of it. It was, further, the Court's view that until the federal government carried out its duty to dispose of all of the unappropriated land within the borders of an admitted State, that State will not be on an equal footing with its sisters. This opinion not only underscores the meaning of the Equal Footing Doctrine, it also supports the Compact Theory that follows this analysis.

Far from supporting a right in the federal government to own and retain the land, it was the Court's opinion that the United States never gained municipal sovereignty over any of the land, dry or submerged, except for purposes of its disposal, and that power grew out of the deeds of cession from Virginia and Georgia which, presumably, had the power of disposal by right of the inherent municipal sovereignty of those States. This much of the opinion is not dictum inasmuch as it was required reasoning to support the Court's decision. In addition, the Court specifically held that a State's agreement to allow the federal government to own this land and

²⁰¹ *Federal Procedure at Law: A Treatise on the Procedure on Suits at Common Law*; Vol. 1 by C.L. Bates, T.H. Flood & Co., 1908, page 148; § 181.

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exercise municipal sovereignty over it would “be void and inoperative; because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a State”²⁰²

Pollard provides no support for the notion, therefore, that the United States could legitimately permanently retain land within the borders of a State after statehood, in the face of the Equal Footing Doctrine. We hasten to recall, as well, Justice Catron’s unrefuted observation in dissent that the principle the Court articulated in *Pollard* was as applicable to the uplands (dry land), as to submerged lands.

In *Gratiot v. United States*,²⁰³ the Court was called upon to resolve the question of whether or not the federal government had the power to lease rather than “dispose of” unappropriated land by grant or sale. The Court decided that while the land was in territorial condition, the United States had the power to do so and not just the obligation to sell. The opinion said:

The term "territory," as here used, 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, and has been considered the foundation upon which the territorial governments rest. In the case of *McCulloch v. State of Maryland*, 4 Wheat. 422, the Chief Justice, in giving the opinion of the Court, speaking of this article and the powers of Congress growing out of it, applies it to territorial governments, and says all admit their constitutionality.

And again, in the case of *American Insurance Company v. Canter*, 1 Pet. 542, in speaking of the cession of Florida under the treaty with Spain, he says that Florida, until she shall become a state, continues to be a territory of the United States government by that clause in the Constitution which empowers Congress to make all needful rules and regulations respecting the territory or other property of the United States. If such are the powers of Congress over the lands belonging to the United States, the words "dispose of" cannot receive the construction

²⁰² *Pollard*, 44 U.S. at 223.

²⁰³ 39 U.S. (14 Pet.) 526, 537, 538 (1839).

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contended for at the bar -- that they vest in Congress the power only to sell and not to lease such lands. The disposal must be left to the discretion of Congress. And there can be no apprehensions of any encroachments upon state rights by the creation of a numerous tenantry within their borders, as has been so strenuously urged in the argument. The law of 1807, authorizing the leasing of the lead mines, was passed before Illinois was organized as a state, and she cannot now complain of any disposition or regulation of the lead mines previously made by Congress. She surely cannot claim a right to the public lands within her limits.”

The opinion simply states that while land – in this case land within the Indiana Territory – is in territorial condition (and, hence, owned by the United States) the federal government has the power to manage it as it sees fit, just as any other landowner might. The *Gratiot* Court was not asked to decide whether or not the Equal Footing Doctrine demanded that States succeed to ownership of the public lands on statehood, nor did it decide they did not. It assumed, for purposes of the dispute before it (which did not involve lands in a State but lands in a territory during territorial condition) that the public lands belonged to the federal government. Its dictum that Illinois could not claim the public land within its limits was not the result of briefing, argument and deliberation. It has, therefore, no precedential value.

In *Gibson v. Cheoteau*,²⁰⁴ the Court was called upon to review the question of ownership of land that transferred by legal fiction in 1818, but which transfer was not completely consummated until 1862. The original patent to the land was made by the United States when the land was in territorial condition in the Missouri Territory. Missouri was not admitted to the Union until 1821. The dispute turned on the statute of limitations which the Missouri court held began to run in 1818 under Missouri law and had, therefore, expired by the time suit was initiated. In reversing the Missouri decision, the Supreme Court wrote:

With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times,

²⁰⁴ 80 U.S. (13 Wall.) 92 (1871).

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the conditions, and the mode of transferring this property or any part of it, and to designate the persons to whom the transfer shall be made. No state legislation can interfere with this right or embarrass its exercise, and to prevent the possibility of any attempted interference with it, a provision has been usually inserted in the compacts by which new states have been admitted into the Union that such interference with the primary disposal of the soil of the United States shall never be made. Such provision was inserted in the act admitting Missouri, and it is embodied in the present constitution, with the further clause that the legislature shall also not interfere "with any regulation that Congress may find necessary for securing the title in such soil to the *bona fide* purchasers."

The same principle which forbids any state legislation interfering with the power of Congress to dispose of the public property of the United States also forbids any legislation depriving the grantees of the United States of the possession and enjoyment of the property granted by reason of any delay in the transfer of the title after the initiation of proceedings for its acquisition.²⁰⁵

This broad language appears to indicate that the United States government has the right and power to manage and dispose of public lands within the borders of an admitted State, "without limitation", even after statehood. However, when the language is put in context, it simply means that land sold or granted by the United States while the region is in territorial condition carries with it the right and power of the United States government, and title to land conveyed under these circumstances cannot be impacted or the conveyance undone by subsequent State law. This means that nothing a State does after statehood can interfere with a federal transfer of land undertaken during territorial condition, even if the transfer does not become complete, consummated and effective until after statehood. *Gibson* furnishes no authority for the proposition that the federal government may permanently retain unappropriated land within the borders of a State after the State is admitted on an equal footing with its sister States.

²⁰⁵ *Id.* at 99--100.

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In *Light v. United States*,²⁰⁶ the Court held that the United States has the right to manage and dispose of “its” land in whatever manner it pleases, as would any private landowner. The issue in *Light* was the government’s charge of trespass against a cattle rancher who turned his cattle out onto public land and then allowed them to wander into unfenced federal lands where grazing was prohibited. Colorado State law provided that damages were not answerable with respect to unfenced land and Light, therefore, believed he could allow his cattle to graze on federally claimed land without consequence.

The Court disagreed, finding that Colorado State law did not apply to land claimed by the federal government and that the government was entitled to seek damages for trespass and equitable relief to exclude Light’s cattle. In making its decision, the Court reasoned:

‘Congress is the body to which is given the power to determine the conditions upon which the public lands shall be disposed of.’ *Butte City Water Co. v. Baker*, 196 U.S. 126. ‘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.’ *Camfield v. United States*, 167 U.S. 524. And if it may withhold from sale and settlement it may also as an owner object to its property being used for grazing purposes, for ‘the Government is charged with the duty and clothed with the power to protect the public domain from trespass and unlawful appropriation.’ *United States v. Beebee*, 127 U.S. 342.

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 (citation omitted)

‘All the public lands of the nation are held in trust for the people of the whole country.’ *United States v. Trinidad Coal Co.*, 137 U.S. 160. And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.²⁰⁷

As in the other cases cited for the proposition that the federal government has the right and power to retain unappropriated public land within the borders of States after admission, the

²⁰⁶ 220 U.S. 523 (1911).

²⁰⁷ *Ibid.*, at 536.

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issue of the fundamental legitimacy of federal ownership was neither joined nor decided in *Light*. The *Light* Court assumed, without deciding, that federal ownership was proper and that, as such, the federal government had the unreserved right to manage its land in accordance with its discretion. It is an unsurprising opinion and does not address whether the Equal Footing Doctrine, in the first instance, required State succession to federal ownership upon statehood.

Finally, and more recently, in 1976, the Supreme Court decided *Kleppe v. New Mexico*,²⁰⁸ in which it was asked to decide whether the federal government has the power to promulgate rules that protect wild horses and burros on unappropriated public lands assumed to belong to the federal government. Justice Thurgood Marshall, writing for the Court, wrote:

[T]he Clause, in broad terms, gives Congress the power to determine what are “needful” rules “respecting” the public lands. *United States v. San Francisco*, 310 U.S., at 29-30; *Light v. United States*, 220 U.S., at 537; *United States v. Gratiot*, 14 Pet., at 537-538. And while the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved, we have repeatedly observed that “[the] power over the public land thus entrusted to Congress is without limitations.”²⁰⁹

The opinion assumes, without deciding, that the federal government does, in fact, own the land it claims within the borders of New Mexico. The question of State claims to succession to the ownership of unappropriated lands within their borders was neither argued, considered nor decided by the *Kleppe* Court. *Kleppe* stands for one proposition: that the federal government has plenary power to manage its own land as it wishes, without interference.

The Court further explained its position:²¹⁰

And even over public land within the States, “[t]he general Government doubtless has a power over its own property analogous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case.” *Camfield v. United States*,

²⁰⁸ 426 U.S. 529 (1976).

²⁰⁹ *Id.* at 539.

²¹⁰ *Ibid.*, at 540-541.

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supra, at 525. We have noted, for example, that the Property Clause gives Congress the power over the public lands "to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them..." *Utah Power & Light Co. v. United States*, 243 U.S. 389, 405 (1917). And we have approved legislation respecting the public lands "[i]f it be found to be necessary for the protection of the public, or of intending settlers [on the public lands]." *Camfield v. United States*, supra, at 525. In short, Congress exercises the powers both of a proprietor and of a legislature over the public domain. *Alabama v. Texas*, supra, at 273; *Sinclair v. United States*, 279 U.S. 263, 297 (1929); *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915). Although the Property Clause does not authorize "an exercise of a general control over public policy in a State," it does permit "an exercise of the complete power which Congress has over particular public property entrusted to it." *United States v. San Francisco*, supra, at 30 (footnote omitted). In our view, the "complete power" that Congress has over public lands necessarily includes the power to regulate and protect the wildlife living there.

The question *Kleppe* does *not* answer is whether the public lands belong to the United States or should properly have transferred to State ownership on admission to the Union. *Kleppe* furnishes no guidance on that question because the question was not joined. It holds only that the federal government has the power to manage land it properly owns, an accurate statement of the law.

Other cases make the same assumption without analysis or decision. The Court more recently decided *Idaho v. United States*,²¹¹ in which it was called upon to decide the ownership of certain submerged lands. In writing the opinion, Justice Souter affirmed that the States presumptively succeeded to ownership of the submerged lands on admission to the union and observed, without argument or decision, that this is "in contrast to the law governing surface land held by the United States". The question of federal ownership of such lands was not at issue in the case and was neither joined nor decided by it.

²¹¹ 533 U.S. 262 (2001).

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4. *The Compact Theory*

a) *Introduction*

Our Constitution, like the Articles of Confederation before it, is a compact. The Compact Theory begins from the premise that the Constitution creates a central government of limited and enumerated powers along with powers necessary and proper to effectuate its enumerated powers. The central government holds no power not specifically delegated by the States and makes no provision for the federal government's owning any more land than that necessary to provide for the Capitol city and for certain needed instruments of government, such as arsenals, forts and dockyards.²¹² Nothing in the Constitution specifically allows the federal government to own vast tracts of vacant land, especially after that land has been surveyed, described and admitted as a State. Indeed, as we have indicated, Thomas Jefferson expressed grave doubts that the Louisiana Purchase could constitutionally be accomplished for just this reason; doubts he clearly overcame in the face of enormous opportunity.²¹³

When the States joined the Union, they transferred land to the central government to be held in trust and then sold to pay off the debts of the federal government and to allow the States to develop the land within their borders. Congress cannot constitutionally change its mind and decide to prevent development in the subsequently admitted States. Congress must keep the promise it made to each State when it joined the Union. In this context, a later Congress cannot break the promise of an earlier one.²¹⁴

²¹² Enclave Clause, Constitution, Article I, §8, cl.17.

²¹³ *Donaldson, supra*, at 100.

²¹⁴ *See, Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 129 S. Ct. 1436, 173 L.Ed.2d 333 (2009). The Office of Hawaiian Affairs claimed that the State of Hawaii could not alienate some land that the federal government had ceded to the State of Hawaii because of a post-statehood resolution. Justice Alito, for a unanimous Court, rejected that argument and held that a subsequent Congress cannot constitutionally renege on its earlier federal commitment.

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The Compact Theory then proceeds to the deeds of cession themselves, which established the first federally owned land but also provided for and required, by their very terms, its prompt disposal by the central authority.²¹⁵ The Theory then looks to the language of the Northwest Ordinance which codified the reception, management and disposal of the lands ceded by the original States and that required disposal, as that term was defined in the late 18th Century. The Theory then refers to the language of the various enabling acts through which the new States were admitted and which also contain clear language requiring disposition.

Finally, proponents of the Compact Theory review the history of public lands from and after their first creation on New York's cession to see what actually occurred. Referring to an ancient precept of contract law, they view the conduct of the parties after the contract was drawn as indicative of the intent of contracting parties. It has ever been true in Anglo-American jurisprudence that the intention of the parties to a contract can be determined by the conduct of the parties in carrying it out. From and after the central authority first obtained unappropriated land as an owner, a succession of authorities, from the Continental Congress to the Confederation Congress to the United States government after the adoption of the Constitution, have promptly and regularly disposed of hundreds of millions of acres of unappropriated land

“[T]he *consequences of admission* are instantaneous, and it ignores the uniquely sovereign character of that event ... *to suggest that subsequent events somehow can diminish what has already been bestowed*’ And that proposition applies a *fortiori* where virtually all of the State's public lands—*not just its submerged ones*—are at stake. In light of those concerns, we must not read the Apology Resolution's nonsubstantive “whereas” clauses to create a retroactive “cloud” on the title that Congress granted to the State of Hawaii in 1959.

Id. at 176 (emphasis added) (quoting Rehnquist, C.J., dissenting in another case).

²¹⁵ We use the term “central authority” in this instance because when New York first ceded its western lands, there was no formal national government in place, not even the proto-government represented by the Articles of Confederation that followed the cession. There was certainly no “federal government”, as we have come to think of it, until after the adoption of the Constitution.

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starting with the first State admitted that did not immediately succeed to ownership of the unappropriated land in its borders, Ohio, in 1803.

b) Compacts

“Compact” is defined as: “An agreement or contract. Usually applied to conventions between nations or sovereign states. A compact is a mutual consent of parties concerned respecting some property or right that is the object of the stipulation, or something that is to be done or forborne.²¹⁶ The terms “compact” and “contract” are synonymous.²¹⁷ The term is most often applied to contracts between sovereigns.²¹⁸

A compact between the States and the federal government is a “solemn agreement” between the parties analogous to a contract between private parties and enforceable as such.²¹⁹ The first real compact between the States was the Articles of Confederation that bound the States together for the first time “in perpetual union.”²²⁰ Other compacts followed and each is considered an enforceable contract between the parties.

c) Historical Roots of Compact Theory

As set forth in the Historical Background above, the sovereign of England laid claim to all land in North America by right of discovery.²²¹ The original States succeeded to all of England’s sovereign rights, including its ownership of all unappropriated land within their borders.²²² To raise money to carry out activities for the central authority, to pay the Revolutionary war debt, to settle an ongoing controversy between large States and small and to

²¹⁶ *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.*, 4 Gill & J. (Md.).

²¹⁷ *Green v. Biddle*, 8 Wheat. 1, 92, 5 L. Ed 547; *Black’s Law Dictionary*.

²¹⁸ *Black’s*, *supra*.

²¹⁹ *Andrus v. Utah* 446 U.S. 500, 507 (1980).

²²⁰ *Articles of Confederation*, Article XIII.

²²¹ *M’Intosh*, *supra*, 573; *Martin v. Waddell*, 41 U.S. 367, 409 (1842); , *Shively*, *supra*, at 15; *Donaldson* at 30.

²²² See discussion of Equal Footing Doctrine, above.

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induce Maryland and others to agree to a compact – the Articles of Confederation – that bound the States together that they might act jointly in matters of common concern, certain landed States were induced to define their western borders and to cede all land belonging to them to the west of those borders to the central authority.²²³

The Continental Congress adopted a resolution on September 6, 1780 in which it urged the States that had made no cession of lands to it to do so. The resolution set forth the reasons for cession:

“..It appears more advisable to press upon those States which can removed the embarrassments respecting the western country, a liberal surrender of a portion of their territorial claims since they cannot be preserved entire without endangering the stability of the general confederacy; to remind them how indispensably necessary it is to establish the Federal Union on a fixed and permanent basis, and on principles acceptable to all of its respective members; how essential to public credit and confidence to the support of our army, to the vigor of our councils, and success of our measures; to our tranquility at home, our reputation abroad, to our very existence as a free, sovereign, and independent people; that they are fully persuaded the wisdom of the respective legislatures will lead them to a full and impartial consideration of a subject to interesting to the United States and so necessary to the happy establishment of the Federal Union; that they are confirmed in these expectations by a review of the before-mentioned act of the legislature of New York, submitted to their consideration; as far as depends on that State, the impediment arising from the western country and for that purpose to yield up a portion of territorial claims for the general benefit; whereupon,

Resolved, That copies of the several papers referred to the committee be transmitted, with a copy of the report, to the legislatures of the several States and that it be *earnestly recommended to those States, who have claims to the western country, to pass such laws and give their delegates to Congress such powers as may effectually remove the only obstacle to a final ratification of the Articles of Confederation* (emphasis in original).

The resolution is redolent with urgency and yearning and clearly lays out the reason the Continental Congress wanted a cession of those lands from the landed States.

²²³ See historical review above.

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To ensure that its meaning was clear, and to assure the ceding States that the land ceded would be used for the purposes represented, the Congress adopted another resolution the following month. On October 10, 1780, Congress:

“*Resolved*, That the unappropriated lands that may be ceded or relinquished to the United States by any particular State, pursuant to the recommendation of Congress of the 6th day of September last, shall be disposed of for the common benefit of the United States and be settled and formed into distinct republican States, which shall become members of the Federal Union, and have the same rights of sovereignty, freedom and independence as the other States.”

To accomplish those cessions, the landed States issued “deeds of cession” relying on congressional promises with respect to the use and disposition of that land in what can properly be characterized as conditional gifts.

The Act through which New York agreed to cede its western lands states that the lands are to be used “as a common fund the expenses of war” and that they “shall be disposed of and appropriated” to provide that “common fund” to support the Revolution, and “for no other use or purpose whatsoever.”²²⁴

In its Deed of Cession, New York made clear that the cession was made on the condition that the land “shall be and inure for the use and benefit of such of the United States as shall become member of the federal alliance of the States, and for no other use or purpose whatsoever”²²⁵ and that it be “granted, disposed of and appropriated.” It is important to underscore that in 1780 the word “appropriated,” when used as a reference to land, meant sold or granted to private individuals or companies and “disposed of” meant sold or granted.²²⁶

²²⁴ *AN ACT to facilitate the completion of the Article of Confederation and perpetual Union among the United States of America* – New York, March 7, 1780; 3 Way & Gideon, *Journals of the American Congress, 1774-1778* at 582-586 (1823) (hereinafter, “*Journals*”) Donaldson, at 63.

²²⁵ *Id.*

²²⁶ *Webster’s Dictionary*, 1828.

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Virginia’s Deed of Cession, crafted by Thomas Jefferson, was even more pointed. It provided that the land ceded

shall be a considered as a common fund for the use and benefit of such of the United States as have become or shall become members of the Confederation or federal alliance of the said States, Virginia inclusive ... and shall be faithfully and bona fide disposed of for that purpose and for no other use or purposed whatsoever.²²⁷

Deeds ceding land by other States contained similar language requiring that the land be “disposed of”²²⁸ by the central government and that new States be described and admitted on an “equal footing with the original States” when a sufficient number of inhabitants had settled there.²²⁹ Note the presence of the mandatory word “*shall*” that requires the disposal of ceded land under the deeds of cession and the presence of the word “*conditioned*” when describing the circumstances of cession.²³⁰ The cession was clearly conditioned on the government’s disposal of the land to create a common fund for the benefit of all.

As we have seen, after the States entered into the Articles of Confederation, the Confederation Congress adopted the Ordinance of 1787 (the “Northwest Ordinance”) for the governing and disposition of the western lands. In 1789, the Northwest Ordinance was readopted and reaffirmed by the first Congress after the adoption of the Constitution and its provisions were later applied to southwestern ceded lands and lands acquired under the Louisiana Purchase.²³¹

The Northwest Ordinance provides at Section 12: “It is hereby ordained and declared by the authority aforesaid, That the following articles shall be considered as *articles of compact*

²²⁷ *Journals* at 342-344; *Donaldson, supra*, at 63-67.

²²⁸ The term “disposed of” meant “sold”, “granted” or “transferred” in the 18th Century. *Webster’s Dictionary*, 1828.

²²⁹ *Journals*, at pages 501-504.

²³⁰ *Id.* (“... that is to say, upon *condition* that the territory so ceded *shall* be laid out and formed into States”)

²³¹ 1 Stat. 50 (August 7, 1789).

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between the original States and the people and States in the said territory and forever remain unalterable, unless by common consent.” (emphasis added). The Northwest Ordinance requires the establishment of new States which, it states “shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original States in all respects whatever” (Article V). The Northwest Ordinance also confirms what the deeds of cession provided: “The legislatures of those districts or new States, shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the *bona fide* purchasers.” (Article IV).

This demonstrates that the original intention was for the federal government to hold the unappropriated land only long enough to sell it for the purposes for which it was first conditionally ceded.²³² This is supported by the report filed with Congress in 1828, entitled *Report 125, 20th Congress, 1st Session, House of Reps., Rep. No. 125, Graduate Price of Public Lands, February 5, 1828*. The Committee reported as follows:

When these States stipulated not to tax the lands of the United States until they were sold, they rested upon the implied engagement of Congress to cause them to be sold, within a reasonable time. No just equivalent has been given those States for a surrender of an attribute of sovereignty so important to their welfare, and to an equal standing with the original States.

This intent is underscored by the earlier report of the *Committee on Ordinance Disposing of Western Territory in the Confederation Congress*, April, 1787. The Committee reported that the pace of disposition was “too slow in its operation to effect the faithful execution of the duties incumbent on Congress under the present public circumstances and terms upon which these lands were ceded to and accepted by the United States.” This report goes on to say:

²³² *Pollard, supra*, at 224-225.

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From a view of the present public circumstances, the state of these lands and terms cession by which the United States have become ~~vested with~~ [possessed of] them your committee are induced to think that it is the duty of Congress to adopt measures for disposing of them, which may be not only practicable but Speedy in their operation. The debts of the Union are already so great that all efforts of the people toward their extinguishment fall far short of paying the interest and of consequence the daily burthens must be daily increasing.” [strike through in original]²³³

It is noteworthy that the words “vested with” were struck through and the words “possessed of” substituted. The clear intention was to make clear that the federal government was not to become “vested with”, i.e., “own” the lands but that it was to be temporarily “possessed of” them only, that it might promptly dispose of them in accordance with everyone’s understanding.²³⁴ The Report indicates a sense of urgency driven not only by circumstance but also by a duty perceived as an imperative to dispose of the lands expeditiously.

As previously observed, following the adoption of the Constitution, the original States continued to dispose of the unappropriated lands within their borders in accordance with State law.²³⁵ By 1796, Vermont, Kentucky and Tennessee had also been admitted to the Union and had received the unappropriated land within their borders. No land was withheld from them by the federal government.²³⁶

The States admitted after Tennessee, with the exception of Ohio, Maine, Texas and Hawaii, were admitted pursuant to enabling acts subject to disclaimer clauses, as discussed above. As we have also indicated, however, the disclaimer clauses cannot be read in isolation and are void to the extent that they are in conflict with the Constitutional imperative of admission

²³³ National Archives Website: <http://memory.loc.gov/cgi-bin/ampage?collId=lljc&fileName=032/lljc032.db&recNum=247>.

²³⁴ This sentiment was echoed 589 years later in *Pollard v. Hagen*, as we have seen, at page 223, appearing herein above at page 75.

²³⁵ *Donaldson, supra*. See also, Paul W. Gates, *History of Public Land Law Development* 55 (1968) (written for the Public Land Law Review Commission) (hereinafter referred to as “Public Land Law Report”).

²³⁶ *Id.* at 287.

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on an equal footing. The disclaimer clauses are followed by further provisions like those included in Utah's enabling act, that hold that the lands were only to be temporarily retained by the United States "and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States."

In Section 9, the Enabling Act reads:

SEC. 9. That five per centum of the proceeds of the sales of public lands lying within said State, which shall be sold by the United States subsequent to the admission of said State into the Union, after deducting all the expenses incident to the same, shall be paid to the said State, to be used as a permanent fund, the interest of which only shall be expended for the support of the common schools within said State.

Note the use of the mandatory word "*shall*," which requires the disposition of the unappropriated land in accordance with the history of disposition that adhered at the time Utah was admitted to the Union. It is also logical that the people of Utah would not have agreed to receive five percent (5%) of the proceeds of sales of unappropriated land in exchange for relinquishing their right to tax federal land within Utah's borders if they had not been assured – and fully believed – that the sales would, in fact, occur.

This analysis is not intended to confine its conclusions to the law applicable to the State of Utah, but Utah's experience is illuminating. Utah is not alone in having been admitted through an enabling act that, first, secured in the United States the power to dispose of the unappropriated land, but, second, required it to do so promptly.

In 1848, at the conclusion of the Mexican-American War, the United States obtained a vast expanse of land in the southwest quadrant of the present day continental United States by cession from Mexico through the Treaty of Guadalupe Hidalgo. Two years later, Congress

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designated this land the “Utah Territory” and established a territorial government.²³⁷ From its inception, like the other territories that preceded it, Congress intended the unappropriated land within the Utah territory to be marketed to the public. Accordingly, Congress provided that the land “shall be surveyed . . . preparatory to bringing the same into market.”²³⁸ The Utah Territory Act explicitly instructed the territorial legislature that “no law shall be passed interfering with the primary disposal of the soil.”²³⁹ That is because the understanding was that the federal government was going to promptly dispose of the soil and no one wanted anyone to interfere with that process.

All these explicit expressions of intention and all of this explicit direction – combined with mandatory language – established a compact through which the federal government was obliged to dispose of all of the land in the States, even after statehood, to ensure the new States’ equality with the old. The new States quite clearly intended to surrender only certain rights of taxation and management in exchange for the federal government’s explicit promise to promptly dispose of the unappropriated land.

d) Decisional Confirmation

The decisional record is sparse on this point for reasons that will become clear shortly. Suffice it to observe at this point that there was no reason for States to challenge the pace (and reality) of the federal government’s disposal of the land until relatively recently. For the first forty years after the adoption of the Constitution the federal government promptly and regularly disposed of land by selling or granting it. Thus, States found that shortly after statehood the land in their borders was wholly privatized and, in the words of the *Pollard* Court, “[the] sovereignty

²³⁷ 9 Stat. 435 (Sept. 9, 1850) (“*Territorial Act*”).

²³⁸ *Ibid.* § 15.

²³⁹ *Id.* §6.

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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.”²⁴⁰ This historical reality explains the paucity of court challenge to the federal government’s failure to dispose, as it was obliged to under its compacts. Indeed, as we have seen from the Congressional Report of 1823, Congress, itself, was clearly concerned with the pace of disposal and clearly committed to continuing disposition and was urging the process to be carried out more expeditiously.

But the Supreme Court, in *Pollard v. Hagen*, made the obligation to dispose very clear.

We think a proper examination of this subject will show, that the United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory, of which Alabama or any of the new states were formed; except for temporary purposes, and to execute the trusts created by the acts of the Virginia and Georgia legislatures, and the deeds of cession executed by them to the United States, and the trust created by the treaty with the French republic, of the 30th of April, 1803, ceding Louisiana.

Both of these deeds of cession stipulated, that all the lands within the territory ceded, and not reserved or appropriated to other purposes, should be considered as a common fund for the use and benefit of all the United States, to be faithfully and bona fide disposed of for that purpose, and for no other use or purpose whatever.

Taking the legislative acts of the United States, and the states of Virginia and Georgia, and their deeds of cession to the United States, and giving to each, separately, and to all jointly, a fair interpretation, we must come to the conclusion that it was the intention of the parties to invest the United States with the eminent domain of the country ceded, both national and municipal, for the purposes of temporary government, and to hold it in trust for the performance of the stipulations and conditions expressed in the deeds of cession and the legislative acts connected with them.

When Alabama was admitted into the union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the

²⁴⁰ *Pollard v. Hagen, supra.*

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deed of cession and the legislative acts connected with it. [i.e., prompt disposition]²⁴¹

Further, the Compact language, like any other contract provision, must be read in light of the meaning that the parties ascribed to it at the time. In a case decided by the Supreme Court fourteen years before Utah was admitted to the Union, the Court stated matter-of-factly the commonly accepted meaning of the phrase: “the words “public lands” are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws.”²⁴² Accordingly, the compacts are clear in meaning that the public land was to be sold or granted and the United States was obligated to do so promptly by contractual obligation.

e) History of Disposition

Following the adoption of the Constitution, the federal government privatized hundreds of millions of acres of previously unappropriated land and fueled the westward expansion of the United States and the admission of new States. Thus, the federal government owned at one time the territory that became the States of Ohio, Illinois, Indiana, Michigan, Kentucky, Wisconsin and the eastern part of Minnesota. In each of these States, Congress systematically privatized the land, divesting the United States of the unappropriated land. This process was repeated in the land acquired through the Louisiana Purchase, the land ceded from Mexico after the Mexican-American War, the land acquired through treaty with Spain and other lands acquired in the great westward expansion. In this way, virtually the entire continental United States was settled and the States were admitted to the Union.²⁴³

This history demonstrates that what was originally intended; what was originally contracted; what was originally and repeatedly acknowledged as an obligation of the United

²⁴¹ *Id.* at 221--224.

²⁴² *Newhall v. Sanger* 92 U.S. 761, 763 (1875); see, also, *Barker v. Harvey* 181 U.S. 481 (1901).

²⁴³ *Public Land Law Report*, *supra*, at 75-120.

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States, was faithfully carried out across the nation...carried out, that is, until it stopped just inside the borders of New Mexico and Wyoming in a virtual straight vertical line from Canada to Mexico at the 104°W Meridian.

Contract litigators often win breach of contract cases on significantly less evidence than this. There are compacts that refer to the federal government's obligation to dispose of the unappropriated land prior to the admission of States. There are compacts that require the federal government to continue disposing of the land within a State's borders even after statehood. There are compacts that require the disposition of public lands in the various enabling acts. There is a 150-year history of the disposition of lands within State borders after admission for 200 years. Ambiguities in contracts can be resolved by expressions of intention and by course of conduct. The course of conduct over nearly two centuries suggests that all parties – both the States and the federal government – understood the meaning, effect and obligations under the written compacts, and that was that the federal government had an obligation to dispose of the land under its control – promptly and completely – as soon after statehood as was reasonably possible.

We need look no further for an expression of intention than a report issued by the United States Senate. That body periodically published a volume entitled "*The Constitution of the United States (Annotated)*". In the second session of the 74th Congress in 1938, when the New Deal and its massive expansion of federal authority was in full swing, it did so as "United States Senate Document No. 232." At page 539 of that volume the United States Senate writes:

The right of every new State to exercise all the powers of government which belong to and may be exercised by the original States of the Union must be admitted and remain unquestioned except so far as they are temporarily deprived of control over the public lands.

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This clear expression of intention indicates federal understanding – as recently as 1938 – that its possession was to be temporary and its disposal prompt.

We note that the volume of evidence of compacts between the federal government and the States might go some distance in explaining why the States did not enforce their rights as sovereigns to the unappropriated lands on statehood. In the first instance, of course, they could not do so because when the first cession was made, there was no formal government, New York's having originally agreed to cede its land in 1780 even before the adoption of the Articles of Confederation.

In the next instance – when Virginia ceded its land – there was a central authority under the Articles of Confederation, but there was no Constitution that would have made the act unconstitutional. In the third instance, no one knew that there was a means of redress for constitutional violations until 1803 when *Marbury v. Madison*²⁴⁴ was decided. And by that time, disposition was proceeding apace and efforts were being made in Congress to accelerate the process. In addition, there was little reason for States to pursue the matter since the federal government repeatedly promised to dispose of the land and, in fact, did so as a matter of stated policy until 1976, when it abruptly decided to stop.

The federal government was largely successful in its disposition of public land until approximately 1919 when the aggressive sale of unappropriated land ceased. But the obligation clearly persisted and was being carried out under such efforts as the Homestead Act and Pre-Emption Acts. The Compact ceased being honored by the federal government following the adoption of a new form of revenue development: the income tax, authorized for the first time by Constitutional amendment in 1913.

²⁴⁴ 5 U.S. 137 (1803).

Historical and documentary evidence supports the position that the federal government had an obligation by compact to dispose of the unappropriated public lands it retained after States were admitted to the Union. The understanding at the time that the federal government was obligated to dispose of the public land, the continuous and repeated expressions of intention by the federal government that it would do so, and the continuous history of disposal all demonstrate why the States took no steps to vindicate their rights under the Equal Footing Doctrine. It also shows how the legal theories we have presented work together as a cohesive historical, constitutional and legal narrative.

5. The Property Clause

The government will undoubtedly rely upon the Property Clause to argue that Congress has plenary power to do as it pleases with the unappropriated lands within the borders of admitted States. This will, in fact, likely be their most powerful argument.

However, the Supreme Court has never addressed whether Congress may forever retain the majority of a State as federally owned public land. The Property Clause itself speaks to the disposal and needful regulation of property, but does not speak to the permanent retention of property, and does not address the permanent retention of the majority of the land within an admitted State. The Court has never addressed the Property Clause in this context, and has never analyzed the scope of the Property Clause as balanced against the structural Constitutional principles presented in this case.²⁴⁵ The Court has recognized that “the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved . . .”²⁴⁶

²⁴⁵ The closest case on record appears to be *Light v. United States*, 220 U.S. 523 (1911), discussed below, where the Court specifically sidestepped the structural Constitutional issues raised.

²⁴⁶ *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976).

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Under these circumstances -- with no constitutional text directly on point -- the Court has advised how to proceed. “Because there is no constitutional text speaking to this precise question, the answer . . . must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court.”²⁴⁷ Accordingly, we first analyze the historical understanding and practice. We then address the structure of the Constitution, and finally we review the jurisprudence of the Court.

a) Historical Understanding and Practice as it Relates to Article IV, Section 3

As has been noted by the Court, early congressional enactments provide “contemporaneous and weighty evidence” of the Constitution’s meaning.²⁴⁸ “Indeed, such “contemporaneous legislative exposition of the Constitution . . ., acquiesced in for a long term of years, fixes the construction to be given its provisions.”²⁴⁹ As the preceding historical analysis shows, Article IV, Section 3, was included in the Constitution to remove doubt as to whether Congress was empowered to implement the provisions of the compromise resolving the Western Lands Impasse. The Articles omitted any mention of federal ownership of property, the administration of property, and the admission of new States to the Union. As noted by James Madison in Federalist XLIII, Article IV, Section 3 was required to cure this defect.²⁵⁰

In spite of having no power to do so, however, on October 10, 1780, Congress resolved:

That the unappropriated lands that may be ceded or relinquished to the United States, by any particular State, pursuant to the recommendation of Congress of the 6th day of September last, shall be disposed of for the common benefit of the United States, and be settled and formed into distinct republican States, and have the same rights of sovereignty, freedom and independence as the other States.

²⁴⁷ *Printz v United States*, 521 U.S. 898, 905 (1997).

²⁴⁸ *Id.*, citing *Bowsher v. Synar*, 478 U.S. 714, 723-724 (1986) (quoting *Marsh v. Chambers*, 463 U.S. 783, 790 (1983)).

²⁴⁹ *Id.*, quoting *Myers v. United States*, 272 U.S. 52 (1926).

²⁵⁰ 2 The Debate on the Constitution at 73 (B. Bailyn, 1969). See also, Federalist XXXVII, *Ibid.* at 781.

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The terms of the October 10, 1780 Resolution were faithfully carried out in the cessions of the States, the Ordinance of 1784, the Land Ordinance of 1785, and the Northwest Ordinance of 1787. Together they formed a comprehensive plan to sell the western lands as quickly as possible. At the time, it was seen as an urgent matter, required for the new republic's very survival.

Only by rapidly developing the frontier economy and integrating it into the national economy could the West be preserved for the union, and the union itself preserved . . . In many ways, the debate over how to begin disposing of the national domain, culminating in the land ordinance of May 20, 1785, anticipated the reconception of the American union later embodied in the federal Constitution. American policy makers faced a 'critical period' in the West: frontier lawlessness threatened Congress's tenuous hold over the domain recently created by state land cessions. The federal lands were potentially an 'amazing resource' for paying off Revolutionary War debts . . . But if the settlers refused to pay Congress for their lands and looked beyond the United States for markets for their produce, disunion would inevitably follow. . . Most commentators agreed that the alternative to expansion was disintegration; even the most superficial knowledge of western conditions confirmed that such fears were well grounded.²⁵¹

Competing with the necessity to rapidly develop the western lands was the fear that the eastern States would suffer as a result through depopulation as their citizens moved west, depreciation of land values, loss of tax base, and inability to service their public debt. There was also always the fear of loss of political power by the eastern States to the newly admitted States to the west as their population base grew.²⁵² Jefferson's Western Lands Ordinance of 1785 balanced these competing concerns by adopting an approach George Washington called "progressive seating." The land would only be sold after the completion of surveys designed to create clean title to lots arranged in compact townships. They would be put on the market in a controlled manner, township by township. This would create a controlled roll-out of the western

²⁵¹ Statehood and Union at 4.

²⁵² *Ibid.* at 16.

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lands, ameliorating the fears of the eastern States. It would also create a better market price by controlling the supply of raw land available for sale. Without such controls in place, the supply would seemingly be endless, driving down the price. As soon as seven ranges of townships, each six square miles, had been surveyed, commissioners of the continental loan office would offer federal lands for competitive bidding at public auctions to be held in each of the original thirteen States, and no land would be sold for less than one dollar per acre. This range/township approach was also seen as creating ties between the old States and the new, and leading to larger, denser and therefore more productive settlements.²⁵³ This approach was also hoped to maximize revenue at a time when the United States badly needed it.

The emphasis on commercial agriculture and economic development reflected Congress's overriding concern with revenue. Its goal was to create a national domain that would produce revenue through land sales. The idea that the sale of the West would help pay for the Revolution became fixed in congressional thinking, particularly as prospects for developing other revenue sources dimmed.²⁵⁴

The conclusion, on the basis of the historical record, is, therefore, that what the Framers had in mind in adopting Article IV, Section 3, was to merely cure the defect in the Articles of Confederation so that Congress could validly implement the Ordinances it had put in place for the survey and sale of the western lands, followed by the admission of new western States. James Madison stated as much on two occasions in the Federalist Papers. There is no historical evidence that the Framers intended to grant Congress the power to forever hold vast public lands within the borders of future western States, as it does today. Instead, the entire focus at the time was to comply with the tripart terms under which Congress resolved the Western Lands Impasse:

²⁵³ *Ibid.* at 30.

²⁵⁴ *Id.*

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use the lands as a common fund to pay for the war; parcel the land out into new States; and admit those States on an equal footing with the original States.

The fact that one of the first acts of the new Congress under the Constitution was to reenact the Northwest Ordinance is a significant indication that Congressional interpretation was disposal, not retention. Also significant are the two deeds of cession from original States accepted by Congress under the Constitution, the first from North Carolina, on April 2, 1790, and the second from Georgia, on April 24, 1802.

The North Carolina cession refers back to the October 10, 1780, Congressional resolution urging the States to cede their land, and specifically incorporates its terms, stating that the ceded land shall

be considered as a common fund, for the use and benefit of the United States of America, North Carolina inclusive, according to their respective and usual proportion in the general charge and expenditure, and shall be faithfully disposed of for that purpose, and no other purpose whatsoever . . . that the territory so ceded shall be laid out and formed into a State or States . . . the inhabitants of which shall enjoy all the privileges, benefits and advantages set forth in the ordinance of the late Congress for the western territory of the United States

Note also the specific incorporation of the provisions of the Northwest Ordinance. It envisions only the sale of the land, and allows no other purpose whatsoever.

The Georgia cession clearly envisions only the sale of the ceded land, stating in pertinent part:

That all lands ceded by this agreement to the United States shall . . . be considered as a common fund for the use and benefit of the United States, Georgia included, and shall be faithfully disposed of for that purpose, and for no other use or purpose whatever

The Georgia cession accepted by Congress in 1802 also specifically incorporates the Northwest Ordinance, save for its prohibition of slavery, stating:

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That the territory thus ceded shall form a State, and be admitted as such into the Union . . . on the same conditions and restrictions, with the same privileges, and in the same manner, as provided in the ordinance of Congress of the thirteenth day of July, one thousand seven hundred and eighty seven, for the government of the western territory of the United States, which ordinance shall, in all its parts, extend to the territory contained in the present act of cession, that article only excepted which forbids slavery.²⁵⁵

As noted above in the comprehensive review of the historical record, the United States followed a consistent and orderly program of surveying and selling the western lands, establishing temporary territorial governments, and then admitting new States from those settled territories on an equal footing with the original States. The enabling acts for all States admitted after Tennessee followed the same general pattern, speaking to the disposal of the unappropriated territory, and including a provision to ensure the United States had clear title to dispose of that territory.

Thus, the “contemporaneous legislative exposition of the Constitution . . ., acquiesced in for a long term of years, fixes the construction to be given”²⁵⁶ to Article IV, Section 3, as the disposal and settlement of the unappropriated lands, followed by admission of the territory as new States, on an equal footing with the original States.

b) Structure of the Constitution

The structure of the Constitution supports the conclusion that the Property Clause of Article IV, Section 3, does not grant Congress the power to forever own over sixty-six percent of Utah. The overall structure of the Constitution is based on the diffusion of power to protect individual liberty, not the concentration of unlimited power. The Framers incorporated this diffusion of power into multiple aspects of the document’s architecture.

²⁵⁵ This understanding was underscored by the *Pollard* Court as noted above.

²⁵⁶ *Meyers, supra*.

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i. Dual Sovereignty

The dual sovereignty of the federal system is one such limitation.

This separation of the two spheres is one of the Constitution's structural protections of liberty.

Just as the separation and independence of the coordinate branches of the Federal government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal government will reduce the risk of tyranny and abuse from either front.²⁵⁷

As recently stated by Chief Justice Roberts:²⁵⁸

State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.” *New York v. United States*, 505 U.S. 144, 181, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992) (internal quotation marks omitted). Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed. The Framers thus ensured that powers which “in the ordinary course of affairs, concern the lives, liberties, and properties of the people” were held by governments more local and more accountable than a distant federal bureaucracy. *The Federalist No. 45*, at 293 (J. Madison). The independent power of the States also serves as a check on the power of the Federal government: “By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.” *Bond v. United States*, 564 U.S. ___, ___, 131 S. Ct. 2355, 2364, 180 L. Ed. 2d 269, 280 (2011).

The exercise of police powers by the federal government in over sixty-six percent of the State of Utah concentrates power in the Federal government in a manner inconsistent with the dual sovereignty principle of the Constitution. This concentration of power skews the “healthy balance of power” between the States and the Federal government, and thereby increases the risk

²⁵⁷ *Printz, supra*, at 921, quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

²⁵⁸ *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578 (2012).

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of tyranny and abuse dual sovereignty was designed to prevent.²⁵⁹ It also places power over the ordinary affairs of Utahns in the hands of a “distant federal bureaucracy.” Federal bureaucrats exercise day to day control over more of the State of Utah than does the Governor.

ii. Limited, Enumerated Powers of Federal Government

The fact that the Constitution grants the federal government only limited powers, as opposed to the general powers retained by the States, is another structural aspect of the Constitution contrary to the assertion that the Property Clause grants the federal government plenary power over such a large percentage of the State of Utah. Once again, it is difficult to improve on Justice Roberts’ recent explanation:

In our federal system, the National government possesses only limited powers; the States and the people retain the remainder. Nearly two centuries ago, Chief Justice Marshall observed that “the question respecting the extent of the powers actually granted” to the Federal government “is perpetually arising, and will probably continue to arise, as long as our system shall exist.” *McCulloch v. Maryland*, 17 U.S. 316, 4 Wheat. 316, 405, 4 L. Ed. 579 (1819). In this case we must again determine whether the Constitution grants Congress powers it now asserts, but which many States and individuals believe it does not possess. Resolving this controversy requires us to examine both the limits of the Government’s power, and our own limited role in policing those boundaries.

The Federal government “is acknowledged by all to be one of enumerated powers.” *Ibid.* That is, rather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal government’s powers. Congress may, for example, “coin Money,” “establish Post Offices,” and “raise and support Armies.” Art. I, § 8, cls. 5, 7, 12. The enumeration of powers is also a limitation of powers, because “[t]he enumeration presupposes something not enumerated.” *Gibbons v. Ogden*, 22 U.S. 1, 9 Wheat. 1, 195, 6 L. Ed. 23 (1824). The Constitution’s express conferral of some powers makes clear that it does not grant others. And the Federal government “can exercise only the powers granted to it.” *McCulloch, supra*, at

²⁵⁹ *Gregory, supra*, 501 U.S. at 458.

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405, 4 Wheat. 316, 4 L. Ed. 579.²⁶⁰

The architecture of the Constitution once again argues against the conclusion that -- when the Framers went to such lengths to limit, through specific enumeration, the powers granted to the national government, and to reserve those not specifically so granted to the States -- they would by contrast grant an unlimited plenary power to the national government to control over sixty-six percent of the property within the boundaries of a sovereign State.

iii. General Police Power of States

Not only does the idea that the Property Clause grants the national government plenary power over more than sixty-six percent of the State of Utah distort the structure of the Constitution with regard to protections to individual liberty provided by the federal system's dual sovereignty and the limited and enumerated powers granted to the national government, it also distorts the traditional role of the State as envisioned by the Framers. Once again, as stated by Chief Justice Roberts:

Indeed, the Constitution did not initially include a Bill of Rights at least partly because the Framers felt the enumeration of powers sufficed to restrain the Government. As Alexander Hamilton put it, "the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS." The Federalist No. 84, p. 515 (C. Rossiter ed. 1961). And when the Bill of Rights was ratified, it made express what the enumeration of powers necessarily implied: "The powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people." U.S. Const., Amdt. 10. The Federal government has expanded dramatically over the past two centuries, but it still must show that a constitutional grant of power authorizes each of its actions. See, e.g., *United States v. Comstock*, 560 U.S. 126, 130 S. Ct. 1949, 176 L. Ed. 2d 878 (2010).

The same does not apply to the States, because the Constitution is not the source of their power. The Constitution may restrict state governments--as it does, for example, by

²⁶⁰ *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578 (2012).

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forbidding them to deny any person the equal protection of the laws. But where such prohibitions do not apply, state governments do not need constitutional authorization to act. The States thus can and do perform many of the vital functions of modern government--punishing street crime, running public schools, and zoning property for development, to name but a few--even though the Constitution's text does not authorize any government to do so. Our cases refer to this general power of governing, possessed by the States but not by the Federal government, as the "police power." See, *e.g.*, *United States v. Morrison*, 529 U.S. 598, 618-619, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000).²⁶¹

Contrary to the role of States envisioned by the Constitution, Utah is unable to perform vital functions of modern government through the exercise of its police power in the majority of the State. Instead, the general police power is exercised over the majority of the State of Utah by various federal agencies, contrary to the constitutional framework.

iv. Equal Sovereignty Principle

A further structural requirement of the Constitution weighing against the government's position is the Equal Sovereignty Principle, most recently enunciated by the Court in *Shelby County v. Holder*.²⁶² The Equal Sovereignty Principle, the roots of which are traced in the historical analysis above, states that for the proper functioning of our federal republic as envisioned by the Framers, the individual States must all enjoy equal sovereign power. Therefore, actions by the National government that treat certain states differently from other states in a manner which impinges upon their sovereign power – i.e. treats some States as "less sovereign" than others – will receive a heightened level of constitutional scrutiny. As discussed in Part Three, Section 2 of this analysis, there is a basis for Utah to argue that the federal ownership of the majority of the land within its borders violates the Equal Sovereignty Principle.

²⁶¹ *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578 (2012).

²⁶² 133 S. Ct. 2612 (2013).

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v. *Organizational Structure of the Constitution*

The organizational structure of the Constitution also indicates that the Framers did not intend to grant the national government a general power through the Property Clause. The Framers positioned the enumerated powers granted to Congress, logically, in the first Article of the document, which dealt with the legislative branch. Article 1, Section 8 carefully lists the powers granted to Congress. The Property Clause is not among them. Instead, it is positioned as part of Article IV, which deals with the relationship between the States and the federal government, the so-called States' Relations Article.²⁶³ Specifically, it is placed in Article IV, Section 3, which addresses the formation and admission of new States. It is eminently logical that the Framers would position the powers envisioned by Congress in the Ordinances discussed above in this section of the document, as it involves the creation of new States from territory ceded to it by certain of the original States. It is not logical that the Framers would position a plenary power to forever hold vast public lands in that section of the document.

Moreover, it is instructive that the Framers did indeed place a power to own and administer property within the enumerated powers listed in Article 1, Section 8, just where one would expect such a power to appear. This enumerated power does allow Congress to own and exercise plenary power over land within a State, but only with the State's consent. This is consistent with all of the structural aspects of the Constitution discussed above, as well as with the usual cautionary practice by the Framers of placing a check on granted powers.

In summary, the structure of the Constitution does not support the position that the Framers intended the Property Clause of Article IV, Section 3, to grant Congress unlimited

²⁶³ *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 379 (1978).

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plenary power to forever own vast public lands within the borders of the State of Utah. As the Court stated in *New York v. United States*:

Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear ‘formalistic’ in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.²⁶⁴

c) The Jurisprudence of the Court

The Supreme Court has never considered the precise issue presented by Utah’s Transfer of Public Lands Act. Therefore, the issue must be defined with precision: Whether the Property Clause of Article IV, Section 3, grants Congress the power to permanently retain ownership of over sixty-six percent of the land within the borders of the State of Utah. The issue is not whether Congress has plenary power to manage and regulate public lands, or decide to sell some and withhold others from sale. There is no question that, within the constraints of the Constitution, Congress has plenary power to manage and regulate the property it owns, and to decide to sell it or withhold it from sale.²⁶⁵ This is consistent with the approach Congress took in the Ordinances for the disposal of western lands discussed above. For example, George

²⁶⁴ 505 U.S. 144, 187 (1992).

²⁶⁵ While the cases on this point are too numerous to cite, perhaps the leading case establishing this power is *Kleppe v. New Mexico*, 426 U.S. 529 (1976). However, *see also*, *United States v. Gratiot*, 39 U.S. 526, 537-8 (1840) (The power to dispose includes the power to lease prior to disposal); *Gibson v. Chouteau*, 80 U.S. (13 Wall.) 92, 99 (1871) (“With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made.”); *Van Brocklin v. Anderson*, 117 U.S. 151, 167-68 (1886) (“But public and unoccupied lands, to which the United States have acquired title, either by deeds of cession from other states, or by treaty with a foreign country, congress, under the power conferred upon it by the constitution, ‘to dispose of and make all needful rules and regulations respecting the territory or other property of the United States,’ has the exclusive right to control and dispose of, as it has with regard to other property of the United States; and no state can interfere with this right, or embarrass its exercise.”)

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Washington’s “progressive seating” approach, adopted by Congress in the Land Ordinance of 1785, called for selling land only after seven ranges of townships, each six square miles, had been surveyed. This held a tremendous amount of raw land owned by the United States off market, and gradually phased in surveyed land, thereby increasing the sales price of the smaller quantity of land the government had prepared for sale.²⁶⁶ Accordingly, it is not surprising that numerous opinions of the Court speak to Congress’s ability to decide when and how to sell its land.²⁶⁷ This power was established early on. What the Supreme Court has never addressed, however, is whether Congress can forever retain the majority of the land within a State.

The closest Supreme Court case on record appears to be the 1911 case of *Light v. United States*.²⁶⁸ As described above, *Light* involved grazing on the recently established Holy Cross Forest Reserve in California in violation of regulations issued by the Secretary of Agriculture for the use of the forest reserve land. There, *Light*, a rancher with the right to graze his cattle on certain open public lands, “with the expectation and intention that they would do so, turned his cattle out at a time and place which made it certain that they would leave the open public lands

²⁶⁶ Onuf, *Statehood & Union, supra*, at 40. “It thus becomes clear that the formulation of congressional land policy in 1784-1785 represented an effort to create a national market in western lands. The success of the effort depended on mobilizing national and even international demand for new, potentially productive lands. Congress would have to take an active role, at considerable expense, in guaranteeing that market conditions favorable to its and the nation’s interests would prevail. . . . The most important feature of Congress’s new land policy was the requirement of survey before settlement, with property lines following a grid system that made clear title possible. The grid system thus helped make the land more marketable.”

²⁶⁷ See, e.g., *Camfield v. United States*, 167 U.S. 518, 524 (1897), where, in ruling that the Federal government could prevent a property owner adjacent to Federal land from building a fence on his adjacent land that would impact the Federal land, the Court said: “While the lands in question are all within the state of Colorado, the government has, with respect to its own lands, the rights of an ordinary proprietor, to maintain its possession and to prosecute trespassers. It may deal with such lands precisely as a private individual may deal with his farming property. It may sell or withhold them from sale. It may grant them in aid of railways or other public enterprises. It may open them to pre-emption or homestead settlement, but it would be recreant to its duties as trustee for the people of the United States to permit any individual or private corporation to monopolize them for private gain, and thereby practically drive intending settlers from the market.”

²⁶⁸ 220 U.S. 523 (1911).

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and go at once to the Reserve, where there was good water and fine pasturage.”²⁶⁹ The Court noted that although an implied license had developed to allow ranchers to graze cattle on open land, this did not prohibit the United States from withdrawing that implied license at any time. Light asserted that in order to withdraw the implied license under Colorado law, the government would be required to fence the land. Light additionally asserted Constitutional arguments, based on the equal footing doctrine, as well as the equal sovereignty principle, that Congress could not reserve lands equal to one fifth of the State of Colorado. The Court specifically avoided addressing those arguments, instead framing Light’s argument as follows:

It is contended, however, that Congress cannot constitutionally withdraw large bodies of land from settlement without the consent of the State where it is located; and it is then argued that the act of 1891 providing for the establishment of reservations was void, so that what is nominally a Reserve is, in law, to be treated as open and unenclosed land, as to which there still exists the implied license that it may be used for grazing purposes.²⁷⁰

In response to the issue so framed, the Court relied on Congress’s broad rights to regulate its property, concluding that the implied license could always be withdrawn, thereby sidestepping the structural Constitutional arguments asserted by Light. The Court’s language, however, is instructive in its expansive interpretation of Congressional power granted by the Property Clause:

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.” *Butte City Water Co. v. Baker*, 196 U.S. 126. “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.” *Camfield v. United States*, 167 U.S. 524. And if it may withhold from sale and settlement it may also as an owner object to its property being used for grazing purposes, for “the Government is charged with the duty and clothed with

²⁶⁹ *Id.* at 535.

²⁷⁰ *Id.* at 535-6.

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the power to protect the public domain from trespass and unlawful appropriation.” *United States v. Beebee*, 127 U.S. 342.

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, *Stearns v. Minnesota*, 179 U.S. 243. It is true that the “United States do not and cannot hold property as a monarch may for private or personal purposes.” *Van Brocklin v. Tennessee*, 117 U.S. 158. But that does not lead to the conclusion that it is without the rights incident to ownership, for the Constitution declares, § 3, Art. IV, that “Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or the property belonging to the United States.” “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.” *Kansas v. Colorado*, 206 U.S. 89.

“All the public lands of the nation are held in trust for the people of the whole country.” *United States v. Trinidad Coal Co.*, 137 U.S. 160. And it is not for the courts to say how that trust shall be administered. That is for Congress to determine. The courts cannot compel it to set aside the lands for settlement; or to suffer them to be used for agricultural or grazing purposes; nor interfere when, in the exercise of its discretion, Congress establishes a forest reserve for what it decides to be national and public purposes. In the same way and in the exercise of the same trust it may disestablish a reserve, and devote the property to some other national and public purpose. These are rights incident to proprietorship, to say nothing of the power of the United States as a sovereign over the property belonging to it. Even a private owner would be entitled to protection against willful trespasses, and statutes providing that damage done by animals cannot be recovered, unless the land had been enclosed with a fence of the size and material required, do not give permission to the owner of cattle to use his neighbor's land as a pasture. They are intended to condone trespasses by straying cattle; they have no application to cases where they are driven upon unfenced land in order that they may feed there. *Lazarus v. Phelps*, 152 U.S. 81; *Monroe v. Cannon*, 24 Montana, 316; *St. Louis Cattle Co. v. Vaught*, 1 Tex. App. 388; *The Union Pacific v. Rollins*, 5 Kansas, 165, 176.

After this expansive language regarding Congressional power granted by the Property Clause, however, the Court pulled back, specifically avoiding all constitutional issues, and based its ruling on the government’s right to defend its property from intentional trespass.

Fence laws do not authorize wanton and willful trespass, nor do they afford immunity to those who, in disregard of property rights, turn loose their cattle under circumstances showing that they were intended to graze upon the lands of another.

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This the defendant did, under circumstances equivalent to driving his cattle upon the forest reserve. He could have obtained a permit for reasonable pasturage. He not only declined to apply for such license, but there is evidence that he threatened to resist efforts to have his cattle removed from the Reserve, and in his answer he declares that he will continue to turn out his cattle, and contends that if they go upon the Reserve the Government has no remedy at law or in equity. This claim answers itself.

It appears that the defendant turned out his cattle under circumstances which showed that he expected and intended that they would go upon the Reserve to graze thereon. Under the facts the court properly granted an injunction. The judgment was right on the merits, wholly regardless of the question as to whether the Government had enclosed its property.

This makes it unnecessary to consider how far the United States is required to fence its property, or the other constitutional questions involved. For, as said in *Siler v. Louisville & Nashville R.R.*, 213 U.S. 175 “where cases in this court can be decided without reference to questions arising under the Federal Constitution that course is usually pursued, and is not departed from without important reasons.”²⁷¹

Light therefore does not address the instant issue. The case assumes that, as part of its disposal and needful regulation of public lands, Congress can create forest reserves. However, the case does not discuss whether these reserves are, or can be, permanent, or discuss the impact on the structure of government envisioned by the Framers if one fifth of Colorado was to be permanently withheld. Instead, the case discusses only the recognized power of Congress to manage the property entrusted to it, and to protect it from intentional trespass. Thus, in the end, it falls into the category of cases like *Kleppe* cited in footnote 265 above.

Whether the Property Clause grants the United States the power to permanently own over sixty-six percent of the State of Utah is an open one under existing jurisprudence. There is an indication, however, that this Court might be open to the structural Constitutional arguments noted above. In Chief Justice Roberts’ analysis of the structure of government as envisioned by the Framers, we note this admonition:

²⁷¹ *Id.* 536-8.

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The States are separate and independent sovereigns. Sometimes they have to act like it.²⁷²

Perhaps this is an invitation by the Roberts Court to States like Utah, willing to reassert their sovereignty in an effort to restore balance to the federal State relationship.

6. FLPMA Analysis

Section 102(a)(1) of FLPMA states:

The Congress declares that it is the policy of the United States that—

(1) the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest;

For reasons discussed in the section of this analysis addressing the Equal Sovereignty Principle, the Equal Footing Doctrine, and the Compact Theory, we believe sound Constitutional objections to the disparate treatment of Utah exist when compared to the thirty-eight States that control twelve percent or more of the land within their borders. If those conclusions are correct, then the Congressional policy of retention announced in Section 102(a)(1) of FLPMA should be struck down as unconstitutional.

If the Court were to rule that the near permanent retention policy of Section 102(a)(1) is unconstitutional, the issue would then be thrown to elected representatives at the State and federal level to resolve legislatively, something some members of the Court might prefer. A legislative solution, in which the State and Congress can resolve the issue in the manner they feel works best, may be preferable to Utah as well. It could also allow for a gradual plan of transition that may be more acceptable to the State from a budgetary standpoint. A successful declaratory judgment action on FLPMA's retention policy would allow such a plan to be developed.

²⁷² *Sebelius, supra*, at 2603.

PART FOUR: PROCEDURAL OPTIONS

1. Overview

All Utah’s legal theories boil down to this: The United States is wrongfully holding title to the public lands in Utah and should either dispose of them or transfer title to Utah. The obvious parties to a lawsuit about this dispute are Utah and the United States. This section discusses where and how Utah could sue the United States. As discussed below, the two possible venues are the United States Supreme Court and a federal district court. In either venue, we would want to consider asserting two causes of action: (1) a cause of action based directly on the Constitution, seeking to enforce the constitutional provisions discussed above; and (2) a cause of action under the federal Administrative Procedure Act.

2. Action in the United States Supreme Court

One possible venue is the United States Supreme Court. We will discuss: (1) the provisions that give the Court original jurisdiction over a suit by Utah against the United States; (2) the factors influencing the exercise of this jurisdiction; and (3) the causes of action supporting Utah’s legal claims.

The Court has original jurisdiction over a suit by a State against the United States under Article III of the Constitution. Specifically, Article III, § 2, clause 1 of the Constitution extends federal judicial power to cases arising under federal law and to “controversies to which the United States shall be a party.” In addition, Article III, § 2, clause 2 gives the U.S. Supreme Court original jurisdiction “[i]n all Cases ... in which a State shall be a Party.” These provisions in Article III give the Court original jurisdiction over actions between a State and the United States.²⁷³

²⁷³ See *United States v. Texas*, 143 U.S. 621 (1892).

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Article III’s grant of original jurisdiction to the Court is self-executing, and so does not depend on any statute to be effective.²⁷⁴ Congress nonetheless enacted legislation implementing this constitutional grant of jurisdiction in the Judiciary Act of 1789, the current version of which is at 28 U.S.C. § 1251(b)(3). Section 1253(b)(3) says that the Court “shall have original *but not exclusive* jurisdiction of ... [a]ll controversies between the United States and a State.” The Court has upheld Congress’s power to make the Court’s original jurisdiction non-exclusive.²⁷⁵

The non-exclusivity of the Court’s jurisdiction over suits between a State and the United States has two implications for the present matter. First, it means that Utah does not have to file its lawsuit in the United States Supreme Court; Utah may, and in fact does (as discussed below), have other another option: the federal district courts. Second, if other venues do indeed exist, their existence cuts against the Court’s exercising original jurisdiction over Utah’s lawsuit.

As the second point implies, the Court’s original jurisdiction is discretionary, not mandatory. The Court does not have to take cases that fall within its original jurisdiction under the Constitution and the relevant statute (28 U.S.C. § 1251). The Court admitted in 1971 that “it may initially have been contemplated that this Court would always exercise its original jurisdiction when properly called upon to do so.”²⁷⁶ In that 1971 decision, however (*Ohio v. Wyandotte Chemicals Corp.*), the Court held that it has discretion to decline to exercise original jurisdiction under 28 U.S.C. § 1251.

Since its 1971 decision in *Wyandotte Chemicals*, the Court has regularly declined original jurisdiction even in actions between States, as to which its jurisdiction is exclusive.²⁷⁷

²⁷⁴ *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 74 (1860).

²⁷⁵ See *Case v. Bowles*, 327 U.S. 92, 97 (1946); *Ames v. Kansas*, 111 U.S. 449 (1884); *Bors v. Preston*, 111 U.S. 252 (1884).

²⁷⁶ *Ohio v. Wyandotte Chem. Corp.*, 401 U.S. 493, 497 (1971).

²⁷⁷ *California v. West Virginia*, 454 U.S. 1027 (1981) (Stevens, J. dissenting).

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Considering the Court’s regular refusal to exercise jurisdiction even over suits that cannot be brought in any other court, it should come as no surprise that the Court is “particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle his claim.”²⁷⁸ As Justice Thomas observed accurately, albeit in dissent, “This particular reluctance applies squarely to ‘controversies between the United States and a State,’ of which we have ‘original *but not exclusive* jurisdiction.’”²⁷⁹ Thus, if Utah can sue the United States in another court, that option cuts against the Court’s exercising original jurisdiction over Utah’s suit.

In deciding whether to exercise original jurisdiction, the Court would consider factors besides the existence of other adequate forums. Chief Justice Roberts discussed the two main such factors in a recent case: *South Carolina v. North Carolina*.²⁸⁰ The Chief Justice explained, “Two basic principles have guided the exercise of our constitutionally conferred original jurisdiction.” First, “our original jurisdiction, ‘delicate and grave,’ was granted to provide a forum for the peaceful resolution of weighty controversies involving the States.”²⁸¹ “The second guiding principle,” Chief Justice Roberts said, “is a practical one: We are not well suited to assume the role of a trial judge.”²⁸² Reflecting that limitation, even though the Court can call on special masters to marshal the facts and propose findings of fact, it declined original jurisdiction in *Wyandotte Chemicals* partly because the case presented novel and complex issues of environmental law.²⁸³

²⁷⁸ *United States v. Nevada*, 412 U.S. 534, 538 (1973) (per curiam).

²⁷⁹ *Nebraska v. Wyoming*, 515 U.S. 1, 26 (1995) (emphasis in original).

²⁸⁰ 558 U.S. 256, 277 (2010) (Roberts, C.J., concurring in the judgment and dissenting in part).

²⁸¹ *Id.* (citation omitted); see also Charles Warren, *The Supreme Court and Sovereign States* 31-33 (Princeton ed. 1924) (tracing Supreme Court’s original jurisdiction over actions involving States to the Virginia Plan’s provision establishing a Supreme Court to determine questions “which may involve the national peace and harmony”).

²⁸² *South Carolina*, 558 U.S. at 278.

²⁸³ See *Wyandotte Chemical*, 401 U.S. at 503–504 (citing scientific complexity of interstate water pollution claim as reason to decline jurisdiction).

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As to the first factor cited by Chief Justice Roberts, Utah does have a weighty matter to present. In particular, its suit “implicate[s] the unique concerns of federalism forming the basis of [the Court’s] original jurisdiction.”²⁸⁴ Utah claims federal interference with its sovereignty of a magnitude comparable to that claimed in South Carolina’s original-jurisdiction action challenging the constitutionality of the Voting Rights Act of 1965.²⁸⁵ Utah’s claim is also comparable in its nature and importance to that claimed in *South Carolina v. Regan*,²⁸⁶ which challenged a federal statute that gave tax-exempt status to State-issued bonds only when they were registered bonds, and not when they were bearer bonds. Just as the federal statute challenged there interfered with the State’s ability to finance its government, so does the United States’ retention of title to public lands in Utah.

Furthermore, Utah’s suit resembles many prior original-jurisdiction cases involving land disputes between a State and the United States. In what appears to be the most recent such case, Alaska has sued the United States to quiet title to certain marine submerged lands.²⁸⁷ In one such case, the Court expressly recognized that “[d]isputes between a State and the United States over ownership of property are fully within our original jurisdiction over cases ‘in which a State shall be a party.’”²⁸⁸

As discussed above, the Court declined to exercise original jurisdiction in *Wyandotte Chemicals* partly because of that case’s factual complexity.²⁸⁹ The case involved interstate water

²⁸⁴ *Maryland v. Louisiana*, 451 U.S. 725, 743 (1981).

²⁸⁵ See *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

²⁸⁶ 465 U.S. 367 (1984)

²⁸⁷ *Alaska v. United States*, 530 U.S. 1228 (2000) (granting Alaska’s motion for leave to fill complaint against United States); see also *California ex rel. State Lands Comm’n v. United States*, 457 U.S. 273, 276-277 (1982) (California sues to quiet title to oceanfront land created through accretion to land owned by United States); *Minnesota v. Hitchcock*, 185 U.S. 373 (1902) (Minnesota sues U.S. Secretary of Interior to enjoin sale of land in former Indian reservation).

²⁸⁸ *California ex rel. State Lands Commission*, 457 U.S. at 277 n.6.

²⁸⁹ 401 U.S. at 501-502.

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pollution, and arose at the dawn of the modern era of environmental law. *Wyandotte Chemicals* is thus distinguishable from the present matter, which involves legal and historical, rather than scientific, complexity. In *California v. Arizona*, the Court rejected the factual complexity of a land dispute as a reason for declining original jurisdiction, noting that “several cases decided by the Court under its original jurisdiction have involved complicated questions of title to land.”²⁹⁰ Utah’s matter presents no greater factual complexity than other land disputes over which the Court has exercised original jurisdiction, and it rests on historical facts that the Court is uniquely well-equipped to analyze considering its long experience adjudicating land disputes between sovereigns.

If the Court nonetheless declines original jurisdiction over Utah’s lawsuit, Utah may wish to seek federal legislation encouraging the Court to assert jurisdiction over this suit. The Court exercised original jurisdiction under such a statute in *United States v. Texas*.²⁹¹ The case arose under the Act of Congress organizing the Oklahoma Territory. One provision in the Act addressed the dispute between Texas and the United States over which sovereign owned Greer County. The provision directed the Attorney General of the United States to bring a suit against Texas in the Court’s original jurisdiction “in order that the rightful title to said land may be finally determined.”²⁹² Although the provision did not expressly require the Court to assert jurisdiction, the Court did so.

The 1892 case of *United States v. Texas* predated the Court’s 1971 *Wyandotte Chemicals* decision establishing the discretionary nature of its original jurisdiction under 28 U.S.C. § 1251. In the post-1971 legal landscape, a statute that expressly or impliedly required the Court to

²⁹⁰ 440 U.S. at 68 n.8.

²⁹¹ 143 U.S. 621 (1892).

²⁹² 26 Stat. 92, ch. 192, § 25 (1890).

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exercise its original jurisdiction could raise concerns as a restriction on the Court's discretion. Yet there is modern precedent for such restriction. The Court's appellate jurisdiction, like its original jurisdiction, today is largely discretionary. Even so, Congress from time to time enacts legislation giving the Court obligatory appellate jurisdiction over certain matters. For example, a provision in a 1992 federal statute, the Cable Television Consumer Protection and Competition Act, authorized appeals to the Court "as of right" from lower court decisions addressing the constitutionality of the Act.²⁹³

Assuming the Court exercises original jurisdiction over Utah's lawsuit, the question remains what statutory vehicle supports its claims. As mentioned above, there are two possibilities: an action directly under the Constitution and an action under the Administrative Procedure Act.

To begin with, any lawsuit by Utah initially must overcome the hurdle of federal sovereign immunity. Federal sovereign immunity bars unconsented lawsuits against the United States, whether they are brought by a private party or a sovereign State.²⁹⁴ Federal sovereign immunity bars not only suits that name the United States as a defendant but also those in which the United States is a necessary and indispensable party. As relevant here, Utah could not avoid sovereign immunity by suing a federal official, instead of the United States, because as the holder of title to public lands the United States would indeed be a necessary and indispensable party. Nor can the immunity be avoided by suing directly in the United States Supreme Court.²⁹⁵ Federal sovereign immunity restricts non-consenting suits by any plaintiff, in any federal court.

²⁹³ 47 U.S.C. § 555(c)(2); *Turner Broadcasting v. FCC*, 512 U.S. 622, 636 (1994).

²⁹⁴ *Block v. North Dakota*, 461 U.S. 273, 280 (1983).

²⁹⁵ See, e.g., *Hawai'i v. Gordon*, 373 U.S. 57 (1963); *Arizona v. California*, 298 U.S. 558 (1936); *Kansas v. United States*, 204 U.S. 331 (1907).

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The United States can consent to being sued, and has done so in the Administrative Procedure Act (“APA”). The APA contains a waiver of federal sovereign immunity that would allow a suit for declaratory and injunctive relief directly under the Constitution and under the APA itself.²⁹⁶ The APA waives immunity in a federal court suit “seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority.” As applied to the present matter, this quoted language enables Utah to argue that the federal officials who have long administered the public lands in Utah have unconstitutionally failed to dispose of the land or, alternatively, to transfer title to Utah as required by the TPLA. Since the lands are administered under the FLPMA, this APA suit could also provide a vehicle to challenge FLPMA’s constitutionality. As to a cause of action directly under the Constitution, Chief Justice Roberts, writing for the Court, affirmed the existence of an implied cause of action to enforce the Constitution in a recent decision.²⁹⁷ In addition, the APA supports a cause of action asserting that federal officials have unconstitutionally failed to dispose of the public lands in Utah, acting pursuant to FLPMA, which, we argue, is itself unconstitutional.²⁹⁸

While the APA waives the federal government’s sovereign immunity from actions to enforce the Constitution and actions under the APA, another potential hurdle is that of timeliness. A federal statute, 28 U.S.C. § 2401(a), requires civil actions against the United States to be brought within six years of when the cause of action “first accrues.” Utah can expect the federal government to argue that Utah’s suit is untimely under this statute.

²⁹⁶ 5 U.S.C. § 702; see also *Alabama-Coushatta Tribe of Texas v. United States*, 757 F.3d 484, 488–489 (5th Cir. 2014); *Rudeau v. Fed. Trade Comm’n*, 456 F.3d 178, 185–187 (D.C. Cir. 2006).

²⁹⁷ *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010).

²⁹⁸ 5 U.S.C. §§ 702 & 706(1).

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Further study is needed to confidently predict the likely outcome of a defense of untimeliness under § 2401(a). To date, we have identified at least four arguments that Utah might make in response to a defense of untimeliness. First, Utah can argue that its cause of action accrued on December 31, 2014, the TPLA's deadline for the United States to transfer title to public lands to Utah. This date is part of a statute that represents the State's judgment as to when such a significant legal action is appropriate and supported by a majority of the State's citizens. Second, the federal government's continued refusal to dispose of the public lands constitutes a continuing violation, and accordingly justifies a current legal remedy. Third, Utah is suing now because of the deteriorating conditions of the public lands in Utah, and the concomitant adverse effects on Utah's citizenry. Before now, Utah has reasonably sought non-judicial remedies. Finally, Utah can reasonably argue that the statute of limitations cannot immunize the federal government from a challenge to the continuing harm to a State's sovereignty caused by the federal government's administration of an unconstitutional statute such as FLPMA.

Whether Utah sued directly under the Constitution, under the APA, or under both, the procedure for bringing the suit in the U.S. Supreme Court would be the same. Utah would begin the suit by filing a motion for leave to file a complaint. Utah would accompany the motion with a supporting brief and a copy of the complaint it seeks to file. All these materials would be served on the United States, in addition to being filed with the Court. The United States would then have 60 days after receiving the material to file a written opposition to the motion. Utah would have a short window of time – about 10 days – in which to file a reply.

Once these initial filings are in, the Court has great discretion about how to proceed. The Court's rule says it “may grant or deny the motion, set it for oral argument, direct that additional

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documents be filed, or require that other proceedings be conducted.”²⁹⁹ The other proceedings could include a reference to a special master to evaluate the filings and make a report and recommendation. It is hard to predict how quickly the Court would rule on Utah’s motion for leave to file a complaint. It could happen within a matter of months unless the matter is initially referred to a special master, in which case the matter could take significantly longer.

If the Court grants Utah’s motion for leave to file a complaint, that does not necessarily mean that Utah will have its day in Court. To the contrary, the Court could grant the motion and, in the very same order that grants the motion, invite the United States to file a motion to dismiss the complaint. More generally, however, once the Court granted Utah’s motion for leave to file a complaint, the lawsuit would proceed more or less like a lawsuit in any other court. Indeed, the Court’s rule for original-jurisdiction cases provides that these cases are generally governed by the same rules that govern lawsuits in the federal district courts: namely, the Federal Rules of Civil Procedure and the Federal Rules of Evidence.³⁰⁰

3. Action in a Federal District Court

The two causes of action discussed above – based directly on the Constitution or based on the APA – could be used as vehicles for Utah to file a lawsuit in a federal district court. Utah could certainly file this lawsuit in the United States District Court for the District of Utah, for that is where the disputed land is located.³⁰¹ Alternatively, Utah could likely file the suit in the United States District Court for the District of Columbia, for this is where the United States would presumably be deemed to reside and, for a long time, was the only place in which one could sue the federal government.

²⁹⁹ Supreme Court Rule 17.5.

³⁰⁰ See Supreme Court Rule 17.2.

³⁰¹ See 28 U.S.C. § 1391(e).

PART FIVE: ESTIMATED COST PROJECTION

We caution that litigation estimates are difficult as so much depends on the actions of the counterparty to the suit. The government, with highly skilled staff attorneys that do not bill by the hour, is often prone to contest every issue, thereby increasing litigation costs. Moreover, when litigating against the government, advance preparation of all issues related to the case is critical. Only through proper preparation and hard work in advance of filing can the litigant taking on the federal government hope to succeed against such a well-funded and staffed opponent. This results in more up-front cost than in normal litigation. Each fact relied upon in the complaint must be established prior to filing. Arguments to overcome all anticipated dispositive motions by the government must be built into the pleading. Chances should not be taken, and mistakes must be minimized. Counsel must use extraordinary care. In short, litigating against the government is always difficult, time consuming, and expensive.

In this matter, we are also presented with a vast and complex historical record spanning centuries, from the early Colonial period to the present. A well-developed factual record is essential to victory in this matter. The Court must be informed by history, and material facts related to that record must be key to the case, in order to have a successful outcome. This presents document review, analysis, management and control issues in addition to evidentiary issues. Much of the record will need to be established through the use of expert witnesses as a result. This increases the expense significantly.

Finally, we note that this is a matter of national concern. Eleven other States are in positions similar to Utah with regard to public lands. Countless conservation and environmental groups are concerned about the future of public lands and the disposition of public lands in western States. Accordingly, we envision the possibility of numerous intervening parties that may

increase the cost of the potential litigation.

Therefore, as we review the steps that would be taken should Utah pursue an action against the United States in the Supreme Court, we caution that the estimates given herein are just that: estimates. We have attempted to make as accurate a prediction as possible at this preliminary stage, but caution that actions by the government could increase the workload, thereby increasing the cost.

1. Process for Original Jurisdiction Filing

As discussed above, the first formal step in filing under the original jurisdiction of the Court is a motion for leave to file. Because these cases are outside of the Supreme Court's normal appellate function, the Court will often appoint a Special Master to secure and review an initial evidentiary record, manage discovery and motion practice as would a trial court, and recommend a final disposition. It is not unusual for the Court to refer the ruling on the motion for leave to file the complaint to a Special Master. However, much work takes place prior to drafting the complaint and filing the motion for leave to file.

a) Case Assessment and Development

A significant portion of the legal analysis for this matter has now been conducted. However, there are additional steps that must be taken to fully assess and develop the case prior to filing the motion for leave to file a complaint. These are:

- i. Completing fact investigation and development
- ii. Determining the required fact witnesses
- iii. Determining the required expert witnesses, both testifying and consulting
- iv. Interviewing, retaining, and obtaining preliminary analysis from consulting expert witnesses
- v. Interviewing, retaining and obtaining required reports from testifying expert witnesses
- vi. Interviewing all fact witnesses

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- vii. Compiling, reviewing and analyzing all documents related to fact and expert witness testimony
- viii. Assessing legitimacy of preliminary analysis and strategy based on the foregoing
- ix. Preparing a draft complaint based on above
- x. Reviewing and revising a draft complaint
- xi. Finalizing the complaint
- xii. Preparing a motion for leave to file the complaint

We estimate that accomplishing the foregoing would require the full time attention of two senior attorneys and three associates, together with two paralegals, over the course of a six-month period. On an hourly basis, we estimate that the litigation team noted above would bill at a rate of \$1,750 per hour. If the litigation team worked on average 40 hours per week, it would bill **\$1,680,000.00** during this Case Assessment and Development period.

To this we would add a recognized specialist in Supreme Court practice. We would anticipate that such a specialist and his associates involved would bill an additional approximately **\$1,000,000.00** during this stage of the case.

However, expert witness fees for both consulting and testifying experts must be taken into consideration. We anticipate that several experts would be required to prove the basic elements of the case. Historical experts would be required to develop and admit the historical record before the Special Master should that be required to resolve the motion for leave to file the complaint. Given the various historical periods covered, four historical experts would probably be required. With regard to the infringement of sovereignty issues, both expert and fact witnesses may be required. For example, economists may be required to develop evidence of Utah's inability to self-govern when compared to eastern States due to its inability to tax such a high percentage of its land. Educational experts may be required to develop evidence of underfunding's impact on Utah's ability to educate its children. Forest management experts may

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be required to develop evidence and testify as to wildfire issues. Environmental experts may be required to develop evidence and testify as to destruction of water tables, water sheds, biodiversity, and protected wildlife as a result of mismanagement. Economic development experts may be required to develop evidence and testify as to the impact on population development as a result of Utah's inability to condemn property and establish a proper system of roads as is commonly done in eastern States. It is likely that six testifying experts would be required to develop evidence of, and opinions related to, infringement of sovereignty issues. The experts required will not be limited to this initial assessment, and will grow as the factual allegations of the complaint are fully and finally developed. We therefore anticipate requiring ten testifying experts. We anticipate that testifying experts would be paid \$300 per hour. We anticipate that each testifying expert would work about 240 hours in the Case Assessment and Development stage on a complex matter such as this, for a total of **\$720,000.00** during this period of the case.

In addition to testifying experts, we may need consulting experts in certain areas to guide the lawyers with regard to the types of issues at play. Consulting experts are part of the litigation team, and as such, they need not be disclosed to the government, and their communications and opinions are protected. In a complex case such as this, a good team of consulting experts is essential to a positive outcome. They educate the lawyers, advise the lawyers, alert the lawyers to issues with testifying experts and their opinion, and prepare the lawyers for discovery, depositions, expert witness examinations, and fact witness interviews and examinations.

We anticipate that the at least four consulting experts would be required, but caution that as the record is more closely examined, and the case is developed, further consulting experts could be required. We anticipate that consulting experts would be paid \$250 per hour. We anticipate that the consulting experts would work approximately twenty hours per week during

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this period of the case. Therefore, we anticipate a total consulting expert expenditure during the Case Assessment and Development stage of **\$480,000.00**.

Travel and miscellaneous expenses during the Case Assessment and Development stage will be incurred to find and develop appropriate witnesses, both fact and expert (testifying and consulting). We anticipate that **\$250,000.00** in travel and lodging expenses could be incurred during the stage as a result.

Accordingly, we anticipate that during the Case Assessment and Development stage, at least **\$4,130,000.00** could be spent to get to the point where the motion for leave to file the complaint is submitted to the Supreme Court. We note that whatever expense is incurred during this stage, there is no guarantee that the Supreme Court will grant leave to file the complaint. Unless Utah decided to convert the case to one in District Court, the work done above would not be used further, at least with regard to litigation.

b) Motion Practice

Following submission of the motion for leave to file the complaint, a couple of things may happen. The Court may consider the motion itself, in which case the government would be advised of the filing, and would have sixty (60) days in which to file an opposition. Utah would then have ten (10) days to reply to the opposition.

However, it is also possible, and perhaps more likely, that the Court would appoint a Special Master to develop the facts of the case and submit a report to the Court with a recommendation as to whether the Court should accept the case. Costs of the Special Master are taxed to the parties. If the case is referred to a Special Master for this purpose, much of the historical record and evidence of sovereign infringement would be relevant. Live testimony could be taken, or written reports and declarations might be filed with the Special Master. It is

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also possible that dispositive motions could be filed by the government, as original jurisdiction cases incorporate the standard Rules of Federal Procedure. The development of the factual issues during the Case Assessment and Development stage will reap benefits if such motions are filed, as genuine issues of material fact must be shown to survive such motions. It is also possible that once the Special Master makes his recommendation to the Court, the side disagreeing with the Special Master's report will file exceptions, and the other side will respond. Legal, expert, and factual matters will all be involved in these exceptions to the Report. Most of the work done during this period, however, would be based upon the work done in the Case Assessment and Development stage discussed above.

Because it is difficult to predict what may happen during this period, we can only attempt to predict the fees and costs in a general way. For preliminary budgeting purposes, we would suggest that a figure of **\$1,500,000.00** during this period could be incurred. A portion of this work would be done by the Supreme Court specialist.

c) Development of Record

Assuming the Court decides to accept the case, it would almost certainly refer it to a Special Master to develop the record, hear motions, and make a recommendation to the Court, with fees and expenses incurred taxed to the parties. Motions available under the Federal Rules are available. These could include motions to dismiss the case, motions for summary judgment, motions to challenge competency of testifying experts, motions to challenge the admissibility of evidence, etc. Once again, the foundational work for this period will have been done in the Case Assessment and Development stage, but significant lawyer, consulting expert, and testifying expert time can be anticipated with regard to all such motions. Moreover, Special Masters work at their own pace. It is difficult to predict the time involved, but many cases are with the Special

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Master for two to three years. The work required during this stage is not consistent, but is intensive when required. Once again, projections are estimates at best. However, for preliminary budgeting purposes, we suggest that this stage could result in fees and expenses of **\$3,000,000.00**. This would include the fees anticipated for the Supreme Court specialist.

d) Merits Stage

Once the Special Master develops the record, writes his report, and makes his recommendation, the case enters the merits stage. It is likely that both parties will file exceptions to the Special Master's report, with supporting briefs and appendices. Replies and sur-replies may be allowed, also with supporting appendices. The Court will rule on the exceptions, with or without argument. Once the record is established and all exceptions ruled on, final briefs on the merits will be filed. Oral argument will be set, after which the Court will issue a final ruling.

For preliminary budgeting purposes, we would suggest that this stage could result in additional fees and costs of **\$2,000,000.00**.

Given the speculative nature of such a preliminary budget projection, we encourage inclusion of a miscellaneous budget factor of thirty percent (30%) or, **\$3,189,000.00**.

Total Estimated Fees and Expenses: \$13,819,000.00.

The Commission must make the cost benefit analysis of this expense in light of the economic losses to the State on an annual basis due to federal land ownership. As noted above, it is our opinion that legitimate legal theories support the anticipated challenge by Utah, but that significant procedural and substantive hurdles must be overcome for success. Given the legitimate theories that, in our opinion, exist, it is also possible that other public land States would join in the action, possibly pooling resources and defraying a portion of these anticipated legal expenses.

PART SIX: RECOMMENDATIONS

Based upon our analysis, and our conclusion that legitimate legal bases exist for Utah to attempt to gain ownership and control over the public lands, and/or to enforce the provisions of the TPLA, and/or to attempt to have the retention of public lands provision of FLPMA held unconstitutional, the Legal Consulting Services team recommends that the Commission and Legislature urge the Governor and the Attorney General of the State of Utah to consider instituting litigation against the United States of America under the Original Jurisdiction of the United States Supreme Court. We recommend considering actions under the Constitution directly, as well as under the Administrative Procedures Act. We further recommend that the Commission authorize the Legal Consulting Services team to prepare a private memorandum for confidential consideration by the Attorney General addressing potential defenses to Utah's claims, together with counter arguments, along with a model Complaint.