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## Whose Home on the Range? Equal Footing, the New Federalism and State Jurisdiction on Public Lands

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WHOSE HOME ON THE RANGE? EQUAL FOOTING, THE NEW  
FEDERALISM AND STATE JURISDICTION ON PUBLIC LANDS

Carolyn M. Landever\*

I. THE EQUAL FOOTING DOCTRINE . . . . .	563
II. EQUAL FOOTING IN THE FIRST CENTURY . . . . .	566
A. <i>The Fundamental Importance of Lands</i> . . . . .	566
B. <i>State Authority to Disclaim Equal Footing</i> . . . . .	570
C. <i>Land as an Element of State Sovereignty</i> . . . . .	572
D. <i>Federal Power and the Property Clause</i> . . . . .	576
III. FEDERALISM IN THE SECOND CENTURY . . . . .	584
A. <i>Land as an Object of Federal Power</i> . . . . .	584
B. <i>State Sovereignty Without Land</i> . . . . .	590
C. <i>Federal Lands, Federal Power</i> . . . . .	597
IV. DUAL SOVEREIGNTY AND COOPERATIVE FEDERALISM IN THE THIRD CENTURY . . . . .	604
A. <i>A Less Than Manifest Destiny</i> . . . . .	604
B. <i>Shared Authority Over Public Lands</i> . . . . .	611
C. <i>New Federalism: Limiting Federal Power</i> . . . . .	612
1. <i>New Federalism and the Court</i> . . . . .	613
2. <i>New Federalism and the Government</i> . . . . .	622
D. <i>Moving Towards Cooperative Authority</i> . . . . .	625
V. CONCLUSION . . . . .	636

On July 4, 1994, Nye County Commissioner Richard Carver drove a bulldozer through the Toiyabe National Forest in Nevada and cleared a road.<sup>1</sup> Carver ignored the federal agent ordering him to halt; as the bulldozer moved forward, the agent jumped out of its way.<sup>2</sup> The agent,

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1. Ed Vogel, *Nye's Carver Leads Fight for Land Use*, LAS VEGAS REV.-J., May 7, 1995, at 1A; Vincent J. Schodolski, *Range Wars: Nevada Struggle Emblematic of Battle to Put Public Land Strictly in Counties' Hands*, S.F. EXAMINER, May 21, 1995, at A6.

2. Vogel, *supra* note 1, at 1A.

a Forest Service worker, was arrested by Nye County officials for his protest.<sup>3</sup> The basis for the authority asserted by Carver and the County was Resolution 93-48, adopted by the Nye County Board of Commissioners, which declares that the "State of Nevada owns all public lands within the borders of the State of Nevada [*see* Nev. Rev. Stat. § 321.5973] and the Counties of Nevada have a duty to manage these lands, to protect all private rights held on these lands, and to preserve local customs, culture, economy, and environment."<sup>4</sup>

On March 6, 1995 the United States Department of Justice filed suit against Nye County, Nevada.<sup>5</sup> Citing the Toiyabe road clearing, a similar unauthorized opening of the San Juan Canyon Road, Nye County Resolutions 93-48 and 93-49,<sup>6</sup> and Nye County warnings that federal employees attempting to enforce federal regulations in Nye County are subject to criminal sanctions for acting outside the scope of their authority, the United States sought a declaratory judgment confirming federal rights to the "lands within Nye County presently owned by the United States."<sup>7</sup>

The Nye County action is one example of numerous county actions in the West.<sup>8</sup> This "county movement" is part of a general trend toward state legislative growth, and against a federal government that is seen to

3. *Forest Service Gives Workers "Arrest" Cards—Federal Employees Could Be Caught in Front Lines of "Sagebrush Rebellion,"* SEATTLE TIMES, Apr. 16, 1995, at B1.

4. NEV. REV. STAT. § 321.5973, enacted by the Nevada state legislature in 1979 during the "Sagebrush Rebellion," declares that "[s]ubject to existing rights, all public lands in Nevada and all minerals not previously appropriated are the property of the State of Nevada and subject to its jurisdiction and control." *See also* NEV. REV. STAT. §§ 321.596-.599 (describing the nature and extent of Nevada state control over public lands).

5. *United States v. Nye County, Nev.*, No. CV-S-95-00232-LDG (RJJ) (D. Nev. filed Mar. 6, 1995) [hereinafter *Nye County Complaint*]; *see United States v. Nye County, Nev.*, 920 F. Supp. 1108 (D. Nev. 1996) (granting United States' motion for summary judgment).

6. Nye County Resolution 93-49, also relying upon NEV. REV. STAT. §§ 321.596-.599, declares that all roads and other public travel corridors (with limited exception) on public lands within Nye County are Nye County public roads.

7. Nye County Complaint, *supra* note 5. As a corollary, the United States sought a declaratory judgment that §§ 321.596-.599 and Resolutions 93-48 and 93-49 are preempted by federal law, as well as an injunction against County interference with federal management of federal lands within Nye County. *Id.*

8. According to the Department of Justice, 35 counties have passed (and 35 other counties are thinking of passing) "anti-federal ordinances or resolutions" since the late 1980s. *See Maria L. LaGanga, Nevada Range War Pits U.S., Nye County: Sovereignty: Tensions Rise in Ongoing Challenge to Federal Authority Over Land*, L.A. TIMES, Apr. 5, 1995, at A1. Richard Carver, a Nye County commissioner and a leader of the "county movement," believes the number to be significantly higher; he estimates that almost 300 counties have passed or are considering such county-rights measures. *Id.*

be intruding upon the reserved powers of the states and ultimately upon individual liberty.

Claims such as those made by Nye County, of state ownership and/or control of the public lands within a state's borders, often are considered by scholars and critics to be frivolous, even absurd.<sup>9</sup> State governments often have agreed that the claims are baseless. Nevada Attorney General Frankie Sue Del Papa, for example, has replied to "county rights advocates" that "[t]here has been little or no mention of the vast body of law which contradicts your position. I think you owe it to the people whom you address to explain its existence."<sup>10</sup> But are the claims so unfounded? Reexamination of the issue suggests a plausible, even substantial, argument in favor of state jurisdiction over, and private party ownership of, the unappropriated "public" lands in the West. Together, the "equal footing" doctrine and the Article IV Property Clause provide a solid basis for this position.<sup>11</sup>

9. For example, Greg Hicks, a Professor of Public Land Law at the University of Washington, calls the argument "spurious." Rob Taylor, *Meet a Man Who Would Get U.S. Out of the West—He Preaches Takeover of Federal Land*, SEATTLE POST-INTELLIGENCER, Mar. 31, 1995, at A1. David Schuman, an Associate Professor of Law at the University of Oregon, has said that "[t]hese initiatives are utterly frivolous, and they have absolutely no constitutional basis whatsoever." Dana Tims, *4 Counties Voting on Sagebrush Rebellion*, PORTLAND OREGONIAN, Mar. 26, 1995, at D1. Peter Coppelman, deputy assistant attorney general, Environment and Natural Resources Division, U.S. Department of Justice, says "[t]his is an entirely erroneous interpretation of the equal footing doctrine." Jill Conley, *County Supremacy Ordinances Are Unconstitutional—Coppelman*, NACO COUNTY NEWS, June 5, 1995, at 16; see also George C. Coggins, *Some Disjointed Observations on Federal Public Land and Resources Law*, 11 ENVTL. L. 471, 495 (1981) (commenting on the "exotic variations on the 'equal footing' doctrine said to be expressed in *Pollard's Lessee*, a long-forgotten 1845 opinion"); Letter from Frankie Sue Del Papa, Attorney General, State of Nevada, to Edward L. Presley, Executive Director, County Alliance to Restore the Economy and Environment (Sept. 17, 1993) ("your legal theory [of equal footing] is unconventional and it was rejected by the court").

10. Christopher A. Wood, *The War for Western Lands—It Was Never Theirs, But Militant Counties Aim to "Retake" Federal Domain*, WASH. POST, May 7, 1995, at C2.

11. Noteworthy articles concerning power over the public lands, in the last 15 years, include: Bruce Babbitt, *Federalism and the Environment: An Intergovernmental Perspective of the Sagebrush Rebellion*, 12 ENVTL. L. 847 (1982); Albert W. Brodie, *Question of Enumerated Powers: Constitutional Issues Surrounding Federal Ownership of the Public Lands*, 12 PAC. L.J. 693 (1981); George C. Coggins et al., *The Law of Public Rangeland Management I: The Extent and Distribution of Federal Power*, 12 ENVTL. L. 535 (1982); Coggins, *supra* note 9, at 471; Richard H. Cowart & Sally K. Fairfax, *Public Lands Federalism: Judicial Theory and Administrative Reality*, 15 ECOLOGY L.Q. 375 (1988); David Engdahl, *State and Federal Power Over Federal Property*, 18 ARIZ. L. REV. 283 (1976); Eugene R. Gaetke, *Refuting the "Classic" Property Clause Theory*, 63 N.C. L. REV. 617 (1985); Dale D. Goble, *The Myth of the Classic Property Clause Doctrine*, 63 DENV. U. L. REV. 495 (1986); John Leshy, *Unravelling the Sagebrush Rebellion: Who Should Control the Public Lands?*, 14 U.C. DAVIS L. REV. 317 (1980); Note, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 COLUM. L.

The Property Clause—Article IV, section 3, clause 2 of the United States Constitution—is the more familiar constitutional provision. The Property Clause provides the federal government with the power to dispose of and regulate property: “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.”<sup>12</sup> The implications of the Property Clause are not clear, however. In particular, the meaning of the terms “dispose of” and “belonging to the United States” are disputed by those on opposite sides of the lands debate.

The equal footing doctrine is a less familiar constitutional doctrine, and its implications are even more disputed. According to the equal footing doctrine, all states, from the original thirteen to the latest, Alaska, are admitted to the United States as equal states, on an equal footing with all other states.<sup>13</sup> To maintain that constitutional position, the Supreme Court has held that all of the states must have the same sovereignty, jurisdiction, and political rights as did the original states.<sup>14</sup> The implications of this “equality”—for example, whether all states therefore are equally entitled to jurisdiction over all lands within their state borders—are disputed.<sup>15</sup>

Challenges about the equality of the states have been fueled by the disproportional federal ownership of lands in the fifty states. In the twelve states in the West, the federal government owns from 28% (Washington) to 88% (Alaska) of all lands within the states’ respective borders.<sup>16</sup> Alaska alone accounts for 45% of all public lands owned by

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REV. 817 (1980) [hereinafter Note, *The Property Power*]; Note, *The Sagebrush Rebellion: Who Should Control the Public Lands?*, 1980 UTAH L. REV. 505 [hereinafter Note, *The Sagebrush Rebellion*].

12. U.S. CONST. art. IV, § 3, cl. 2.

13. For a detailed history and description of the equal footing doctrine, see *infra* pts. I & II.

14. See, e.g., *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195-97 (1987); *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 223-24, 229 (1845).

15. See, e.g., *United States v. Nye County*, Memorandum in Opposition to Plaintiff’s Amended Motion for Partial Summary Judgment (“Defendant’s Opposition Memorandum”), and Reply Memorandum in Support of Plaintiff’s Amended Motion for Partial Summary Judgment (“Plaintiff’s Reply Memorandum”).

16. The federal government owns a substantial percentage of lands in each of the 12 western states: 88% in Alaska; 85% in Nevada; 65% in Idaho; 63% in Utah; 52% in Oregon; 49% in Wyoming; 46% in California; 44% in Arizona; 36% in Colorado; 33% in New Mexico; 29% in Montana; and 28% in Washington. See GEORGE C. COGGINS & CHARLES F. WILKINSON, *FEDERAL PUBLIC LAND AND RESOURCES LAW* 13 (2d ed. 1989); see also Cowart & Fairfax, *supra* note 11, at 447 n.394 (citing COGGINS & WILKINSON, *supra*, for the proposition that a

the federal government.<sup>17</sup> All told, the federal government owns about 700 million acres of public land in just these twelve western states.<sup>18</sup> In the other 38 states combined, the federal government owns only 4.4% of the public land, though it owns 32.6% of all land in the country.<sup>19</sup> In Nye County, Nevada, for example, the federal government owns 93%—or 18,000 square miles—of the land within the county borders.<sup>20</sup>

Equal footing—in meaning and in fact—is a concept that has been argued about for over two centuries.<sup>21</sup> As Justice Brennan wrote, the questions regarding application of the doctrine are “substantial and difficult ones.”<sup>22</sup> Part I of this Article briefly examines the existence of this constitutional doctrine, including its historical origins and its continued recognition by both the courts and society. Part II analyzes the intended force of the equal footing doctrine in relation to lands, state sovereignty, and the Property Clause, as defined in the first century of the United States.

Part III discusses the evolution in interpretation and application of the equal footing doctrine in the country’s second century. These changes largely can be traced to flawed judicial analysis of the Property Clause, restrictive notions of state sovereignty, and changing societal expectations about lands and the role of the federal government.

Part IV addresses the new focus, at the start of the United States’ third century, on the issues of federalism, equal footing, and jurisdiction over public lands. First, the obvious question: Given the fact of long-standing federal retention of vast amounts of land within the boundaries of the “new” western states, does the equal footing doctrine today demand that title to these public lands be passed to the states or to private parties within the states? Ambiguity within the doctrine—exacerbated by the facts of State rejection of earlier federal offers to sell the lands and State acquiescence to federal retention of the lands—suggests that such a drastic remedy is not mandated.

significant percentage of land in 12 western states is held by the federal government).

17. ELIZABETH D. JUNKIN, *LANDS OF BRIGHTER DESTINY* 7 (1986).

18. See BERNARD SHANKS, *THIS LAND IS YOUR LAND—THE STRUGGLE TO SAVE AMERICA’S PUBLIC LANDS* 7 (1984); Note, *The Property Power*, *supra* note 11, at 820-21 n.27.

19. See Note, *The Property Power*, *supra* note 11, at 817 n.1. Federal ownership of public lands in the older States is far less substantial than in the western states: 9.9% in Michigan; 6.7% in Minnesota; 4.9% in Missouri; 3.6% in Oklahoma; 1.4% in Ohio; and 0.6% in Iowa. See COGGINS & WILKINSON, *supra* note 16, at 13.

20. Vincent J. Schodolski, *Range Wars*, S.F. EXAMINER, May 21, 1995, at A6.

21. Secretary of the Interior Bruce Babbitt has described the equal footing controversy as “‘a kind of Kabuki drama we Westerners go through from time to time.’” Jeff Arnold, *Counties Take Lead as Sagebrush Rebellion Rides Again*, COUNTY NEWS, Apr. 4, 1994, at 5.

22. *Organized Village of Kake v. Egan*, 80 S. Ct. 33, 38 (1959) (Brennan, J.).

The real issue, then, is less a question of ownership of land and resources and more a question of control over them. What kind of sharing of power, or federalism, does the United States Constitution require in the public lands in the West? And what kind of federalism does our constitutional system permit; what sound and practical approaches on the ground would be consistent with the Constitution?

As the focus of the Supreme Court and the country shifts back to the role of the States as dual sovereigns in our federal system, it is time to recognize anew the meaning and usefulness of the equal footing doctrine in the context of land resources. The 1994-95 term of the Supreme Court witnessed a resurgence of federalism and state sovereignty concerns.<sup>23</sup> A notion of reinvigorating federalism has taken center stage in Congress, and in state capitals as well. Certainly there is a clear, originalist basis for the Court's inclination to limit the reach of federal power in areas of traditional state sovereignty, and for Congress' propulsion toward returning large areas of governance to the states: namely, the framers of our Constitution expected that broad powers were reserved by and would be exercised by the states. In particular, there is a basis both in original intent and in tradition for a unique and important role of the states in governance of the public lands and resources.

Absent explicit cession of exclusive jurisdiction to the federal government, both the equal footing doctrine and sensible public policy demand that the states, in the West as elsewhere, have at least shared governmental authority over the lands within their borders. There is a formalistic, or plain meaning, basis in both original intent and tradition for cooperative federalism in the public lands in the West. There is also a functional basis; working solutions can be devised by giving a broad or flexible reading of provisions so as to take account of present values in federalism and in the long-term protection of the environment and

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23. The *New York Times* declared that in its 1994-95 term, "the Court, for the first time in half a century, is engaging in a debate over power: where power resides in the Federal system and how the Constitution's grant of powers to the national Government is to be interpreted." Linda Greenhouse, *Blowing the Dust Off the Constitution That Was*, N.Y. TIMES, May 28, 1995, at 4-1. The case of *United States v. Lopez*, the *Times* reported, "was the first time in 60 years that the Court had invalidated a Federal law on the ground that Congress had exceeded its constitutional authority to regulate interstate commerce." Linda Greenhouse, *Gavel Rousers: Farewell to the Old Order in the Court*, N.Y. TIMES, July 2, 1995, at 4-4 (citing *United States v. Lopez*, 115 S. Ct. 1624 (1995)). In *United States Term Limits, Inc. v. Thornton*, the *New York Times* noted, four dissenters "argued for a vision of federalism in which the Federal Government operates essentially at the sufferance of the sovereign states." *Id.* (referring to *United States Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842 (1995)). The *New York Times* article concluded that "[a] deep skepticism about Federal power was a theme that ran through the term." *Id.*

public resources. Congress and the States have always realized such a shared role in the context of public lands, albeit informally.

Today, given the wide expanse of the land and the paucity of federal resources and agents on site, it is all the more necessary for the states to share jurisdiction. New acknowledgment by the Supreme Court of the dual sovereignty exercised over the public lands can impose an effective framework for more formal federal and state cooperative federalism in the management and protection of our lands.

### I. THE EQUAL FOOTING DOCTRINE

Equal footing is considered a "constitutional" doctrine, though the term is not expressly mentioned in the Constitution. In fact, the doctrine was established even before the time of the Constitution.<sup>24</sup> The Northwest Ordinance, enacted by the Continental Congress in July of 1787, formally decreed the equality of all states.<sup>25</sup> Out of lands relinquished by seven of the original thirteen states, the Ordinance authorized the Congress to create between three and five new states, to be admitted "on an equal footing with the original States in all respects whatever."<sup>26</sup> When the Northwest Ordinance was incorporated into an act by the First Congress in 1789, the equal footing doctrine was accepted under the Constitution.<sup>27</sup> All newly created states have been admitted to the United States as equals to every other state, including the original thirteen.<sup>28</sup> The admitting acts for the first two new states, Vermont and Kentucky, declared each "a new and entire member of the

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24. The equal footing doctrine first appeared in a Continental Congress resolution in 1780. See JAY A. BARRETT, *EVOLUTION OF THE ORDINANCE OF 1787 WITH AN ACCOUNT OF THE EARLIER PLANS FOR THE GOVERNMENT OF THE NORTHWEST TERRITORY* 20-21 (1891), cited in Cowart & Fairfax, *supra* note 11, at 443 n.366.

25. Northwest Ordinance of 1787, art. V, reprinted in 1 PHILIP B. KURLAND & RALPH LERNER, *THE FOUNDERS' CONSTITUTION* 27-29 (1987).

26. *Id.*; see also Pollard, 44 U.S. at 222 (quoting Northwest Ordinance of 1787). The Ordinance reflected the intent of the donor states that all states, original and future, be equal. Virginia, for example, ceded to the United States the lands outside her boundaries on the condition that the states formed from the territory "shall be republican states and admitted members of the federal union, having the same rights of sovereignty, freedom, and independence, as the other states." *Id.* (quoting Virginia authorization statute); see also MERRILL JANSEN, *THE ARTICLES OF CONFEDERATION* 235 (1940).

27. Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 289 & n.232 (1992); see also Cowart & Fairfax, *supra* note 11, at 443 n.366 (stating that the equal footing doctrine was initially passed by a resolution of the Confederated Congress in 1780, thus predating the Constitution).

28. See Laycock, *supra* note 27, at 289 & n.233; see also Coyle v. Smith, 221 U.S. 559, 566-67 (1911), discussed *infra* notes 39-41 and accompanying text.

United States of America.”<sup>29</sup> Admitting acts for all new states since the third, Tennessee, have provided that the states are admitted “[as] one of the United States of America,” “on an equal footing with the original states in all respects whatsoever.”<sup>30</sup>

The equal footing doctrine is also implied by Article IV, Section 3, Clause 1 of the Constitution:

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.<sup>31</sup>

Every new “State” is a state, in the same sense as any original state.<sup>32</sup>

Because the equal footing doctrine is not expressly written in the Constitution, however, some commentators do not recognize the doctrine as “constitutional.”<sup>33</sup> The distinction generally is employed to strengthen arguments against application—or at least for limitation—of the doctrine.<sup>34</sup> The fact that an express equal footing provision was not incorporated in the Constitution, but rather was rejected by the Constitutional Convention, can lead to a negative inference that the framers did not intend to guarantee such equality to all states.<sup>35</sup> However, this inference is reasonably refuted by the framers’ awareness of the express requirement for equal footing in the 1787 Northwest Ordinance,<sup>36</sup> by the express inclusion in *every* state admitting act of a promise of equal footing,<sup>37</sup> and by the understanding of the courts (and

29. See *supra* note 28.

30. See *Coyle*, 221 U.S. at 567.

31. U.S. CONST. art. IV, § 3, cl. 1.

32. See *id.*

33. See, e.g., Gaetke, *supra* note 11, at 633-35 & n.127.

34. See *id.*

35. The Constitutional Convention voted against including express “equal footing” language in the Constitution. See *id.* at 634 n.127. A few participants worried that there might arise an occasion where it would make sense not to ensure equal footing. *Id.* The fact that the Convention voted against the language, however, does not preclude a court from upholding the authority. For example, in the early Supreme Court case *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), the Court upheld the power of the federal government to establish a corporation (a national bank), despite the fact that the framers had voted against creating federal power to establish a corporation.

36. See *supra* notes 24-26 and accompanying text.

37. See *supra* notes 27-29 and accompanying text.

society) through the 19th and 20th centuries that equal footing was and is a guarantee to each and every state.<sup>38</sup>

The Supreme Court has always recognized such a guarantee.<sup>39</sup> As the Supreme Court held in *Coyle v. Smith*<sup>40</sup> in 1911, “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.”<sup>41</sup> The Court concluded that “the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized.”<sup>42</sup>

Most scholars who point to the rejection of an equal footing doctrine in the Constitution nonetheless will admit that “the Constitution includes an equal footing concept.”<sup>43</sup> They argue that the meaning of equal footing, however, should be restricted “only to political equality, not proprietary equality,” on the basis that the doctrine was not expressly included in the Constitution.<sup>44</sup> This argument fails, too. Once the critics have agreed that the early Americans intended to provide for—and understood that they had provided for—“equal footing” of the states, then there is no reason to impose arbitrary limitations on the intended meaning of the doctrine. Rather, we are returned to the original point of inquiry: What does equal footing of the states mean?

38. *See id.*

39. *See, e.g., Utah Div. of State Lands*, 482 U.S. at 195-96; *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 707 (1987); *California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 281 n.9 (1982); *Montana v. United States*, 450 U.S. 544, 551 (1981); *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 370 (1977); *Alabama v. Texas*, 347 U.S. 272, 274-75 (1954) (Reed, J., concurring); *United States v. Texas*, 339 U.S. 707, 715-21 (1950); *United States v. California*, 332 U.S. 19, 29-31 (1947); *Coyle*, 221 U.S. at 567, 572-73; *Shively v. Bowlby*, 152 U.S. 1, 26, 30 (1894); *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 434 (1892); *Knight v. United Land Ass'n*, 142 U.S. 161, 183 (1891); *Weber v. Board of State Harbor Comm'rs*, 85 U.S. (18 Wall.) 57, 65 (1873); *Mumford v. Wardwell*, 73 U.S. (6 Wall.) 423, 436 (1867); *Permoli v. First Municipality*, 44 U.S. (3 How.) 589, 609 (1845); *Pollard*, 44 U.S. at 223-24, 229. The definition of “equal footing” has varied, however.

40. 221 U.S. 559 (1911).

41. *Id.* at 567. In *Coyle*, the Supreme Court held that the State of Oklahoma had a right to move its capital immediately, despite a provision in its Enabling Act that required the State to wait to move its capital until 1913. *Id.* at 562-64, 580.

42. *Id.* at 580.

43. *See, e.g., Gaetke, supra note 11*, at 634 n.127; *see also Tom C. Clark, National Sovereignty and Dominion Over Lands Underlying the Ocean*, 27 TEX. L. REV. 140, 150 (1948) (stating that powers reserved to the states under the Constitution have been granted to subsequently admitted states under the “equal footing” clause); Robert E. Hardwicke et al., *The Constitution and the Continental Shelf*, 26 TEX. L. REV. 398, 424 n.83, 427 n.88 (1948) (discussing equal footing in connection with federal restrictions on the use of state lands).

44. *See Clark, supra note 43*, at 150; Gaetke, *supra note 11*, at 634 n.127; Hardwicke et al., *supra note 43*, at 424 n.83.

Though the nature of the states as equal entities has been a bedrock principle in American society,<sup>45</sup> the meaning of this “equality” has been the subject of much debate.<sup>46</sup> The interpretation chosen has serious implications for the very structure of government. Perhaps it is not surprising that desire for a certain structure of government in turn has affected the interpretation of the equal footing doctrine.

## II. EQUAL FOOTING IN THE FIRST CENTURY

### A. *The Fundamental Importance of Lands*

Justice O'Connor wrote in *New York v. United States*<sup>47</sup> that “[s]ome truths are so basic that, like the air around us, they are easily overlooked.”<sup>48</sup> Today, the importance of land is such a truth. In the first century of America’s history, however, land was recognized as the cornerstone of development and governance, and this recognition shaped the meaning of property law in the early years under the Constitution.

The United States almost did not come into being because of bitter conflicts over land.<sup>49</sup> Seven of the original thirteen colonies held claim to public lands that lay to the west, outside their borders.<sup>50</sup> Maryland, a state holding no such land, refused to consent to the Articles of Confederation until Virginia agreed to cede its western public lands to the federal government for the purpose of creating new and equal states.<sup>51</sup> The states without excess land feared that the large, land-rich states would control the new Union, imposing their will on the smaller states.<sup>52</sup> To solve the stalemate and facilitate creation of the federal government, the states holding public lands voluntarily ceded these

45. See *supra* notes 31-32 and accompanying text.

46. See *supra* notes 33-35 and accompanying text.

47. 112 S. Ct. 2408 (1992).

48. *Id.* at 2434.

49. Ironically, the United States also came to exist in part because of a public lands crisis. The Declaration of Independence lists as one of the colonies’ grievances the fact that the English Crown “has endeavored to prevent the population of these states; for that purpose, obstructing the laws for naturalization of foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new appropriations of lands.” Brodie, *supra* note 11, at 695 n.4. A cause for the great concern was the Proclamation of 1763, by which the monarch had confiscated public lands for the Crown’s benefit. *Id.* at 695.

50. The colonies of Massachusetts, Connecticut, New York, Virginia, North Carolina, South Carolina, and Georgia held title to territory to the west of the Appalachian Mountains, which they had received by grant from the English Crown or by treaty with Indian tribes. See THOMAS DONALDSON, *THE PUBLIC DOMAIN* 59-60 (1884). The colonies of Maryland, Delaware, Pennsylvania, New Jersey, and New Hampshire held no such lands. *Id.*

51. See PAUL W. GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* 50 (1968).

52. See 3 *JOURNALS OF THE AMERICAN CONGRESS, 1744-1788*, at 281-83 (1823).

western lands to the Confederation, for the express purpose of formation into new, independent, and equal states.<sup>53</sup>

Such was the direction of thinking about lands at the time of the Constitution: lands were not to be retained by the federal government, but were to be formed into states.<sup>54</sup> Other than the lands ceded by the original states to the United States for this express purpose, the federal government owned no significant amount of land within the first thirteen states.<sup>55</sup> Nor did the United States withhold any lands from the three states next admitted. While the unappropriated public lands in the newly-formed state of Tennessee were initially owned both by the State and the United States, in 1846 Congress formally granted the lands to the State.<sup>56</sup> Until the time of admission of the western states, the federal government “disposed” of lands in new states by passing title to the State or to individuals.<sup>57</sup>

That the unappropriated lands in each new state, as in each existing state, would ultimately be placed in private hands was generally understood throughout most of the country’s first century.<sup>58</sup> “Disposal”—meaning organization and transfer—of the unappropriated lands

53. New York began the process when it ceded its western lands to the Confederation. Brodie, *supra* note 11, at 695. Virginia ceded its western lands in 1784. *Id.* By 1787, five of the seven states had ceded part of their territory. *Id.* at 696. Just after the ratification of the Constitution, the cessions of the final two states (North Carolina and Georgia) were accepted by the federal government. *Id.*

54. *See id.* at 695.

55. MARION CLAWSON, *THE FEDERAL LANDS REVISITED* 185 (1983). Even the lands ceded by the original colonies were outside their real boundaries; they were only the unsettled, unappropriated lands of the new West. *See GATES, supra* note 51, at 50-51.

The federal government has since acquired certain lands within the original thirteen states, for such purposes as national parks and wildlife preserves. *See, e.g.*, 16 U.S.C. § 459e (1994) (Fire Island National Seashore, in New York); 16 U.S.C. § 459f (1994) (Assateague Island National Seashore, in Maryland and Virginia); and 16 U.S.C. § 459g (1994) (Cape Lookout National Seashore, in North Carolina); *see also* Gaetke, *supra* note 11, at 637 n.134, 644 n.178. Although these lands have been described as “article IV lands,” *see id.* at 644 n.178, there is no such delineation in the acquisition statutes. In fact, the statutory requirements that the lands “be acquired only with the concurrence of [the owner state],” or only by state donation, are more reminiscent of the Enclave Clause restrictions on acquisition. *See* 16 U.S.C. §§ 459e-1(a), 459f-1(a), and 459g-1(a).

56. *See GATES, supra* note 51, at 286-88. The three states were Vermont, Kentucky, and Tennessee. *See id.*

57. *See Brodie, supra* note 11, at 703 (stating that Congress “subsequently surrendered the overwhelming majority of the public lands in all the states east of the 100th meridian, reserving control over vast tracts only in the western states”). Because they had been independent countries, Texas retained its public lands upon admission as a state, and Hawaii had no “unalienated public domain.” *See CLAWSON, supra* note 55, at 186.

58. *See* James L. Huffman, *The Inevitability of Private Rights in Public Lands*, 65 U. COLO. L. REV. 241, 247-49 (1994).

into new states was the intended goal of the federal government, for it was thought necessary to satisfy two important objectives: to raise federal revenue, and to provide for orderly settlement of the lands in each state.<sup>59</sup> In fact, pursuant to a 1785 ordinance, the Board of Treasury, later the Treasury Department, was in charge of administering the public lands, for “the public domain was regarded at this time wholly from the point of view of revenue.”<sup>60</sup> From the Land Ordinance of 1785 to the Homestead Act of 1862, through to the Stock-Raising Homestead Act of 1916, the United States set about disposing of lands, passing title to private parties.<sup>61</sup> As the Supreme Court noted in 1947, the interest of the settlers was in “lands upon which to live, and waters upon which to fish and sail.”<sup>62</sup>

Retention of lands by the federal government was not an issue in the country’s first century because for most of that period the United States simply did not seek to retain the lands.<sup>63</sup> Even when the federal

59. See THE PUBLIC LANDS—STUDIES IN THE HISTORY OF THE PUBLIC DOMAIN at xvii-xviii (Vernon R. Carstensen ed., 1968); GATES, *supra* note 51, at 61-63. Federal retention of lands also was implausible, however, both because it was exactly the policy that the colonies had fought against with the English Crown, and because the early Congress simply did not envision the federal government as proprietor of such enormous tracts of land. See Huffman, *supra* note 58, at 247-48.

60. AMELIA C. FORD, COLONIAL PRECEDENTS OF NATIONAL LAND SYSTEM 91-92 (Porcupine Press, 1976) (1910) (citing JOURNALS OF CONGRESS, X, at 118-23). The lands became the responsibility of the Department of the Interior after its establishment in 1849. An audit in 1880, however, revealed that land sales from the public domain had actually cost the United States government \$121 million more than the revenue the disposal of lands had generated. See THE PUBLIC LANDS, *supra* note 59, at xviii.

61. Pursuant to the Land Ordinance of 1785, the United States was responsible for extinguishing any Indian title to the land, surveying the land, offering the land at auction, and granting title to the land by deed. See THE PUBLIC LANDS, *supra* note 59, at xvii-xviii; Huffman, *supra* note 59, at 241, 248-49 & n.37. Later federal disposal acts which transferred land to private parties included the Preemption Act of 1841, which pardoned squatters for their illegal settlement of public lands and granted them title, see SHANKS, *supra* note 18, at 39; the Homestead Act of 1862, which granted a party title to 160 acres for the cost of a filing fee and five years of residence on the land, THE PUBLIC LANDS, *supra* note 59, at xviii; Huffman, *supra* note 59, at 248 & n.39; the Timber and Stone Act of 1878, under which the United States sold private parties up to 160 acres of valuable timber and stone lands surveyed in California, Oregon, and Washington for \$2.50 an acre, THE PUBLIC LANDS, *supra* note 59, at xxv; Huffman, *supra* note 59, at 249 & n.43; the Enlarged Homestead Act of 1909, which allowed parties to homestead 320 acres, THE PUBLIC LANDS, *supra* note 59, at 481; Huffman, *supra* note 59, at 249 & n.46; the Stock-Raising Homestead Act of 1916, which allowed claims for 640 acres of livestock grazing land, THE PUBLIC LANDS, *supra* note 59, at 481; SHANKS, *supra* note 18, at 47; Huffman, *supra* note 59, at 249 & n.48.

62. United States v. California, 332 U.S. 19, 32 (1947).

63. In addition to public lands within the states, the United States also acquired and held “territories” outside of and non-contiguous to the states that were not incorporated into the

government began retaining some lands in the late 1800s and early 1900s, the United States “reserved” or “withdrew” these lands from the general “disposal” of the public domain.<sup>64</sup> Thus, the United States made clear that such retention was an exception to the general policy of disposal. Such reservations and withdrawals marked the dawn of a new federal policy toward land conservation and management of retained land holdings.

This change in policy was backed by a fortuitous lack of interest. The first such major reservation was Yellowstone National Park in 1872.<sup>65</sup> Despite the established understanding that—with limited, enumerated exceptions—the federal government was not a land-holding entity, the United States was able to “reserve” this land because it faced no challenge no private owner was interested in the particular land at the time.<sup>66</sup> Moreover, this first federal tract of land was carved out of what were, at that time, territories, not states.<sup>67</sup> Thus, issues of equal footing and sovereignty due states were not raised.<sup>68</sup> When the states of Wyoming and Montana, whose territories bounded the Park, were admitted to the United States, the Yellowstone land had already been formed into a special federal entity.<sup>69</sup> The new states ceded “exclusive control and jurisdiction” to the United States over what was already Yellowstone National Park.<sup>70</sup>

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United States, such as Puerto Rico. See JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 6.3 (3d ed. 1986). These territories raise unique and interesting questions, both about federal governmental authority and applicability of the Constitution. See *id.* These lands are not included, however, in the general term “federal lands,” as discussed in this Article.

64. The Forest Reserve Act of 1891, for example, authorized the President to “set apart and reserve” lands covered with timber “as public reservations.” *Light v. United States*, 220 U.S. 523, 536 (1911).

65. See 16 U.S.C. §§ 21-40 (1994); see also Huffman, *supra* note 59, at 250 & n.61. Congress set aside Yellowstone as a “pleasuringground for the benefit and enjoyment of the people.” Goble, *supra* note 11, at 510 n.63.

66. See CLAWSON, *supra* note 55, at 134; see also MARION CLAWSON & BURNELL HELD, THE FEDERAL LANDS: THEIR USE AND MANAGEMENT 22-35 (1957).

67. Yellowstone National Park is located in Wyoming and Montana, which did not become states until 1890 and 1891, respectively. See Engdahl, *supra* note 11, at 318 n.158.

68. *Id.*

69. See *id.*

70. See *id.* By federal act, the United States proclaimed the Park under the “sole and exclusive jurisdiction of the United States.” *Id.* (quoting Act of May 7, 1894, ch. 72, § 1, 28 Stat. 73). State cessions in admitting acts are not valid, however, if coerced by the United States in contravention of the equal footing clause and the Constitution. See *infra* notes 71-85 and accompanying text.

### B. *State Authority to Disclaim Equal Footing*

In the country's second century, the fact of state "agreement" upon admission to disclaim all rights to public lands was invoked as support for the proposition that federal retention of such lands is valid, and not contrary to the equal footing doctrine.<sup>71</sup> Such an argument is ill-founded, however. As the Supreme Court held in *Pollard v. Hagan*<sup>72</sup> in 1845, any agreement between a state and the United States "cannot operate as a contract between the parties."<sup>73</sup> The agreement is "binding as a law," but only as it reflects the powers already delineated in the Constitution; it is only enforceable in so far as "all constitutional laws are binding on the people, in the new states and the old ones."<sup>74</sup>

Thus, either (1) the states were not entitled to the unappropriated lands and Congress was authorized to hold title in perpetuity without violating the equal footing doctrine, with or without disclaimer, or (2) such a disclaimer was not valid.<sup>75</sup> This is the "plain deduction," the Supreme Court held in *Coyle*

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.<sup>76</sup>

As a result, even conditions deemed "irrevocable" in an admitting act have no power and can be revoked if they are not otherwise required by the Constitution.<sup>77</sup> For "[w]hatever the limitation upon [a state's]

71. By their enabling acts, new states agreed to disclaim any ownership rights in the unappropriated lands lying within the state, which were "reserved" to the United States. *See, e.g., Pollard*, 44 U.S. (3 How.) at 220-21.

72. 44 U.S. (3 How.) 212 (1845).

73. For a discussion of this seminal equal footing case, see *infra* notes 91-109 and accompanying text.

74. *Pollard*, 44 U.S. (3 How.) at 224-25.

75. *See Coyle*, 221 U.S. at 573.

76. *Id.*

77. *See New York v. United States*, 505 U.S. 144 (1992) (holding that the State of New York could not be estopped from challenging the propriety of the federal government's attempt to commandeer state action, even though New York purportedly accepted the commandeering principle and originally had agreed to participate in disposal of low-level radioactive waste). The State of Nevada will soon test this proposition in the public lands context; Senate Joint Resolution 27 will allow state residents to vote in the November 1996 election on whether to

powers as a government whilst in a territorial condition, whether from the ordinance of 1787 or the legislation of Congress, it ceased to have any operative force, except as voluntarily adopted by her after she became a State of the Union.”<sup>78</sup> The Court noted in the 1882 case *Escanaba & Lake Michigan Transportation Co. v. City of Chicago* that “[t]he language of the act of admission is ‘on an equal footing with the original states in all respects whatever.’ Equality of constitutional right and power is the condition of all the states of the Union, old and new.”<sup>79</sup>

The mere existence of a disclaimer, therefore, is of no consequence unless the parties possessed the authority to enter into such an agreement.<sup>80</sup> A state’s disclaimer in an admitting document of the state’s rights to public lands within its borders is only enforceable if that disclaimer does not impact on the equal footing of the state.<sup>81</sup> And Congress can only act upon such a disclaimer legitimately if Congress has the right, according to the Constitution, to exercise that disclaimed power.<sup>82</sup>

In America’s first century, land was essential for creation of a state, and was integrally tied to the equal footing of the states. Hence, a state would not and could not be forced to disclaim its ultimate power over land. But the State could disclaim any interference with disposal of the lands within the state, for the Property Clause gave Congress the right to manage the disposal of unappropriated lands.<sup>83</sup>

However, this right was limited. The United States was understood to have the right only to temporarily manage the lands in the territories and new states, looking toward the disposal of the lands to private

“revoke” its surrender of control over unappropriated lands by removing the disclaimer clause from the Nevada Constitution. See Ed Vogel, *Sagebrush Pioneer Thinks New Rebellion Too Radical*, LAS VEGAS REV.-J., May 7, 1995, at 15A.

78. *Escanaba & Lake Mich. Transp. Co. v. City of Chicago*, 107 U.S. 678, 688 (1882).

79. *Id.* at 689 (citation omitted).

80. See *supra* notes 76-77 and accompanying text.

81. See *id.*

82. See *id.*

83. Thus, for example, the Supreme Court in 1900 found valid the Minnesota constitutional provision that “this State shall never interfere with the primary disposal of the soil within the [Territory of Minnesota], by the United States, or with any regulations Congress may find necessary for securing the title to said soil to bona fide purchasers thereof.” *Stearns v. Minnesota*, 179 U.S. 223, 244 (1900). Similarly, the State of Wisconsin was admitted into the United States upon the condition “that the State would never interfere with the primary disposal of the soil within it by the United States, nor with any regulations Congress might find necessary for securing the title in such soil to bona fide purchasers.” *Beecher v. Wetherby*, 95 U.S. 517, 523 (1877).

parties.<sup>84</sup> Once the lands were so disposed, they would then be subject to the sovereignty of the state.<sup>85</sup> The next two sections explore the dual powers—state and federal—over land.

### C. *Land as an Element of State Sovereignty*

The recognized importance of land to a state, and the early Congress' complete certainty that, as with the original states, all lands in new states would be disposed of to private parties, inevitably framed the interpretation of equal footing. As early as 1818, the Court held that a state's right to control the property within its own borders was an essential part of its sovereignty as a state.<sup>86</sup> Without its sovereignty, a new state would not be an equal state.

In 1819, in the preeminent case on federalism, *M'Culloch v. Maryland*,<sup>87</sup> the Court delineated the doctrine of enumerated powers: the federal government exercised only the powers delegated to it in the Constitution, and the states and the people reserved all powers not enumerated or reasonably implied.<sup>88</sup> There followed a notion of dual sovereignty. In 1858, the Court explained that "the powers of the general government, and of the state, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres."<sup>89</sup> Thus, any time a congressional act infringed

84. See *infra* notes 91-109 and accompanying text.

85. See *infra* notes 91-109 and accompanying text.

86. *United States v. Bevens*, 16 U.S. (3 Wheat.) 336, 386-87 (1818). In fact, this notion that lands within a state's borders are integrally tied to the state's sovereignty is still recognized. See *California ex rel. State Lands Comm'n*, 457 U.S. at 273. The Supreme Court held in 1982 that part of a state's sovereignty over lands within its boundaries included the right to determine property disputes by state law unless an issue in the case depended on a principle of federal law requiring the displacement of state law. See *id.* at 281 (determining that title to oceanfront land created through accretion was held by the United States, because the land had not originally qualified as land under navigable waters); see also *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 332-33 (1973) (Stewart, J., dissenting) (stating that federal law governs the question of ownership of once-submerged lands), *overruled by Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977) (holding that an ownership dispute concerning lands underlying navigable river was governed by Oregon law, not by federal common law).

87. 17 U.S. (4 Wheat.) 316 (1819).

88. *Id.* at 384-88; see U.S. CONST. amend. X. Interestingly, the Court in *M'Culloch* also reinforced the power of the federal government, giving a flexible and broad reading to the federal economic power and its protection from the states. See *M'Culloch*, 17 U.S. (4 Wheat.) at 385-99.

89. *Ableman v. Booth*, 62 U.S. (21 How.) 506, 516 (1858), *quoted in* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-20, at 381 n.16 (2d ed. 1988).

upon a state's sovereignty, then Congress exceeded its power granted by the Constitution.<sup>90</sup>

In the seminal case of *Pollard v. Hagan*,<sup>91</sup> the Supreme Court was “[for] the first time . . . called upon to draw the line that separates the sovereignty and jurisdiction of the government of the union, and the state governments,” over the ownership of and jurisdiction over land.<sup>92</sup> The doctrine of equal footing provided the basis for the Court's decision.<sup>93</sup>

In *Pollard*, two parties claimed valid title to a tract of land.<sup>94</sup> The plaintiffs claimed title based on a federal patent; the defendants claimed contrary title based on a deed from the State.<sup>95</sup> The Court held that the land was the property of the state, not the federal government, so that only the State had the authority to grant the land.<sup>96</sup> Thus, the Court validated the title of the defendants.<sup>97</sup>

Moreover, the Court held that a state's control over lands within its borders directly implicated the equal footing doctrine, for “[w]hen 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.”<sup>98</sup> To the Court in 1845, this meant power over land. The Court noted that “the only cases, within the United States, in which all the powers of government are united in a single government” over lands are: (1) in the case of lands expressly covered by the Enclave Clause, Article I, Section 8, Clause 16 (*i.e.*, in the seat of government and in lands purchased by the federal government for the erection of “needful buildings”), and (2) in the case of lands where there is only a “temporary territorial government” (*i.e.*, Article IV lands).<sup>99</sup> Thus, held the Court,

90. TRIBE, *supra* note 89, § 5-20.

91. 44 U.S. (3 How.) 212 (1845).

92. *Id.* at 220. Those who advocate a very narrow reading of the equal footing doctrine argue that *Pollard* more specifically dealt with the issue of sovereignty over lands covered by water. *See, e.g.*, Gaetke, *supra* note 11, at 641; Goble, *supra* note 11, at 502-04, 507. *See infra* notes 104-11 and accompanying text.

93. *Pollard*, 44 U.S. (3 How.) at 230.

94. *Id.* at 219.

95. *Id.* at 219-20.

96. *Id.* at 230.

97. *Id.*

98. *Id.* at 223. The power of eminent domain was “[t]he right which belongs to . . . the sovereign, of disposing . . . of all the wealth contained in the state.” *Id.* This power, explained the Court in *Pollard*, was “necessary to him who governs, and is, consequently, a part of the empire, or sovereign power.” *Id.*

99. *Id.* at 223-24.

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 [Enclave Clause] shows that no such power can be exercised by the United States within a state.<sup>100</sup>

The *Pollard* Court held that the federal government's exercise of a power of municipal sovereignty over lands within a state would be "repugnant to the Constitution."<sup>101</sup>

For the right of Alabama and every other 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.

And whenever the United States shall have *fully executed these [public lands] 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.<sup>102</sup>

The Court focused on land and on the powers of government enjoyed by control over the land.<sup>103</sup>

Some critics of the equal footing doctrine point out that *Pollard* specifically addressed the issue of sovereignty over lands covered by water, and not lands generally.<sup>104</sup> Thus, they argue that the language in the Court's opinion regarding all lands can be dismissed as dicta.<sup>105</sup> However, to argue that the language is dicta is to assume one's

100. *Id.* at 224 (emphasis added).

101. *Id.*

102. *Id.* (emphasis added). New states, wrote the Court, succeeded to all rights of the original states, "except so far as this right was diminished by the public lands remaining in the possession . . . of the United States . . . for the temporary purposes provided for" in order for the federal government to create the state. *Id.* at 223.

103. *Id.* at 221-24.

104. *See supra* note 91.

105. *See, e.g.,* Gaetke, *supra* note 11, at 641 (stating that "[h]aving concluded that the submerged lands were not federal property, the Court's further assertion that article IV provides no grant of exclusive federal jurisdiction over federal property within a state is relegated to mere dictum"); Goble, *supra* note 11, at 502-04 (stating that "[t]he Court had previously decided that the original thirteen states held title to lands beneath navigable waters within their boundaries as an incident of sovereignty and therefore concluded" that Alabama succeeded to the same rights).

conclusion: that the Court distinguished between jurisdiction over navigable lands and all other lands. But it is the very generality of the Court's chosen language and analysis that indicates that the Court did not view the power over submerged lands as different from the power over other lands held temporarily by the federal government.<sup>106</sup> None of these lands were "federal property," property subject to the United States' exclusive jurisdiction.<sup>107</sup> The Court stated quite clearly that "[w]e 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. . . ."<sup>108</sup> In no way did the Court indicate that its decision about state jurisdiction over property was one to be limited to a certain type of land, under navigable waters or elsewhere.<sup>109</sup>

Nor did any other Supreme Court decision, until the mid-1900s, suggest that there existed such a distinction between the equal footing right of a state to power over all lands within its borders, as opposed to only over lands under navigable waters.<sup>110</sup> Practically speaking, at a time of mass settlement and development of the country, an argument that the federal government could retain title and sovereignty over all lands other than those under navigable waters would have been derided.<sup>111</sup> Given this reality, and the prevailing views of the broad powers of the State and the limited power of the federal government, no such distinction made sense.

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106. The Court did view the derivation of the "right over rivers" as distinguishable from that of the right over lands, for "[r]ivers must be kept open; they are not land, which may be sold." *Pollard*, 44 U.S. (3 How.) at 216. Thus, the Court explained, it did not matter if the rights over a river were not passed at the time the territory was acquired, for "[s]overeignty transferred itself, and when this passes, the right over rivers passes too." *Id.* The Court did not view this distinction as relevant to the question of jurisdiction over property generally, however. *See id.* The Court concluded thereafter that "as it is, the United States have nothing in Alabama but proprietary rights. They cannot put their foot in a state to claim jurisdiction without its consent." *Id.*

107. *See id.* at 221.

108. *Id.*

109. In fact, Justice Catron, in a spirited dissent, argued against the majority's decision because he believed it involved "principles, in my judgment, as applicable to the high lands of the United States as to the low lands and shores." *Id.* at 235 (Catron, J., dissenting).

110. For a discussion of the limited application of the equal footing doctrine in the mid-1900s, *see infra* pt. III.

111. *See Brodie, supra* note 11, at 714 (stating that "[t]his conjures up the historical possibility of the Congress instituting and creating riverine or canal states, with the overwhelming majority of the states' land being reserved in the federal government").

### D. *Federal Power and the Property Clause*

As discussed earlier, the United States was not intended by the framers to be a landed power, nor was it treated as such for most of the 1800s.<sup>112</sup> Initial cession of the original states' lands to the federal government, and later acquisition of lands by the United States through purchase and treaty, raised questions about federal power over lands. Notions of federal power evolved over time, and on sometimes dubious grounds.

The United States did not explicitly have the power to own lands under the Constitution, except by consent of a particular state's legislature for certain express purposes, as provided not in Article IV, but in an entirely separate provision, Article I.<sup>113</sup> Under Article IV the United States had the authority to form and admit new states, and to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."<sup>114</sup> However, as president, Thomas Jefferson struggled with the limits of federal authority provided by these Article IV clauses because he found no authority for the United States to purchase lands.<sup>115</sup> In a functionalist

112. See *supra* notes 43-70 and accompanying text.

113. The Enclave Clause, U.S. CONST. art. I, § 8, cl. 17, provides the federal government with the authority:

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

U.S. CONST. art. I, § 8, cl. 17.

114. U.S. CONST. art. IV, § 3, cl. 2. The power to admit new states is expressed in U.S. CONST. art. IV, § 3, cl. 1. The power to dispose of and regulate property is encompassed by the Property Clause, U.S. CONST. art. IV, § 3, cl. 2.

115. See Merrill D. Peterson, *Constitutional History 1801-29*, in 1 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 394 (L. Levy ed., 1986). As early as 1788, *The Federalist* reported that, appreciating the potential value of the western territory, Congress " 'assumed the administration of this [national] stock,' " " 'beg[a]n to make it productive,' " and " 'proceeded to form new states; to erect temporary governments . . . ; and to prescribe the conditions, on which such states shall be admitted into the confederacy.' " 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1311 (1833). *The Federalist* noted that " '[a]ll this has been done, and done without the least colour of constitutional authority. Yet no blame has been whispered, and no alarm has been sounded.' " *Id.* (quoting THE FEDERALIST Nos. 38, 42, 43). Some 100 years later, the Supreme Court held that certain rights of authority were inherent to a sovereign nation. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936). In *Curtiss-Wright*, the Court expounded upon a theory of a dual source of federal

decision, Jefferson ultimately permitted the federal government to do so anyway.<sup>116</sup> Nonetheless, he acknowledged that the United States' purchase of the Louisiana Territory without passage of a constitutional amendment made the Constitution "a blank paper by construction."<sup>117</sup>

The federal government's growing assertions of power to hold and manage lands largely paralleled Supreme Court interpretations of the Article IV Property Clause at the given time. To the extent that the United States acted pursuant to the Property Clause, this assertion of power to hold and manage the lands became acceptable to the Court. As Chief Justice Marshall wrote in *United States v. Fisher*,<sup>118</sup> "Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution."<sup>119</sup>

But the power granted by the Constitution is unclear. The Property Clause, remember, was defined in the Constitution as providing Congress with the "[p]ower to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."<sup>120</sup> It is significant that the clause appears in Article IV of the Constitution. All the provisions of Article IV relate to the creation, respective powers, and protection of the states and their citizens.<sup>121</sup> Section 1 guarantees "Full Faith and Credit" to each state's acts, records, and judicial proceedings; section 2 guarantees each state's citizens "all Privileges and Immunities of Citizens" and provides for criminal reciprocity; section 3, clause 1 provides that "New States may be admitted by the Congress into this Union," and protects the jurisdiction and geographic bounds of every state; and section 4 "guarantee[s] to every State . . . a Republican Form of Government," protection

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authority: (1) grants of power in the Constitution; and (2) external sovereignty power that is inherent and inherited. *See id.* at 318-20 (stating that "the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.").

116. *See supra* note 115.

117. *See id.*

118. 6 U.S. (2 Cranch.) 358 (1805).

119. *Id.* at 396. Federal acts that were reasonably related to powers enumerated in the Constitution were therefore valid: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *M'Culloch*, 17 U.S. (4 Wheat.) at 421.

120. U.S. CONST. art. IV, § 3, cl. 2.

121. *See* U.S. CONST. art. IV.

“against Invasion,” and protection when requested “against domestic Violence.”<sup>122</sup> Contained as it is within this Article, it is reasonable to view the Property Clause also as related to the states.

It also is important to note that the first power of the Property Clause is the power “to dispose.”<sup>123</sup> Such a specific and narrow directive would be most unusual if one were talking about a delegation of a sovereign, or legislative, power.<sup>124</sup> Rather, this chosen beginning is evidence of the limited authority of the United States over these lands. Further evidence is the notion of “needful [r]ules,” whereby the federal government seems to be granted a capacity to make only practical, useful provisions, not a sovereign capacity to govern.<sup>125</sup> The language of Article I provides another interesting contrast; unlike the limited grant of power specified in the Property Clause, in the Enclave Clause, the United States is specifically given authority to “exercise exclusive [l]egislation” in Washington, D.C., and in certain defined federal properties.<sup>126</sup>

The limited purposes of the Property Clause were undisputed until the 1900s.<sup>127</sup> In the country’s first century, the courts held that the Property Clause provided the federal government with the power to temporarily manage lands in territories pending creation of a state, and the power to dispose of lands in those new states.<sup>128</sup> Recall that in *Pollard* the Supreme Court held that “the United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory, of which . . . any of the new states were formed; except for temporary purposes.”<sup>129</sup> Rather, the United States was “invest[ed] . . . 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 creation of a state and for disposal of the lands therein.<sup>130</sup> The Court held that “as soon as these purposes [to convert the land into money for the payment of the debt, and to erect new states over the

122. *Id.*

123. *See* U.S. CONST. art. IV, § 3, cl. 2.

124. Compare this power with, for example, the Enclave Clause in Article I. *See supra* note 113.

125. *See* U.S. CONST. art. IV, § 3, cl. 2.

126. *See* U.S. CONST. art. I, § 8, cl. 17.

127. In the 1900s, the United States sought legitimacy for its assertion of a power to keep public lands and resources. *See infra* pt. III.

128. *See Pollard*, 44 U.S. (3 How.) at 221.

129. *Id.*

130. *Id.* at 222. The Court noted that the lands ceded “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.” *Id.* at 221.

territory thus ceded'<sup>131]</sup> could be accomplished, the power of the United States over these lands, as property, was to cease."<sup>132</sup>

Contemporary cases in the 1800s were consistent with the *Pollard* limited view of federal power. The 1840 Supreme Court decision in *United States v. Gratiot*<sup>133</sup> affirmed the power of the federal government to dispose of territorial lands.<sup>134</sup> But the Court in *Gratiot* focused on the issue of land disposal within a territory—not within a state—when it declared that “this [property] power is vested in Congress without limitation; and has been considered the foundation upon which the territorial governments rest.”<sup>135</sup> No mention was made by the Court of stripping the sovereign powers of a state over land within its borders. Rather, the Court noted that the law disputed in *Gratiot*, which indefinitely authorized the President to lease 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.”<sup>136</sup>

Not addressing the nature of the federal government’s reservation in *Gratiot*, the Court only distinguished the property at issue from public lands generally: “It has been the policy of the government, at all times in disposing of the public lands, to reserve the mines for the use of the United States.”<sup>137</sup> After *Gratiot*, in the 1853 case *Hicks v. Bell*,<sup>138</sup> the California Supreme Court considered the specific issue of the federal government’s reservation of mineral resources, and held that the United States’ power over such resources is temporary, and merely that of a proprietor.<sup>139</sup> The most telling limitation on the meaning of *Gratiot* came from the Supreme Court itself five years later, when the Court in *Pollard* did not even mention *Gratiot*, holding that federal holdings of property within a state under Article IV are only temporary.<sup>140</sup>

Ten years after *Pollard*, the Supreme Court revisited the meaning of the Property Clause, this time in a most controversial context: slavery.<sup>141</sup> Once again, to the moral outrage of many at the time, and

131. *Id.* at 224.

132. *Id.*

133. 39 U.S. (14 Pet.) 526 (1840).

134. *Id.* at 537-38.

135. *Id.* at 537.

136. *Id.* at 538.

137. *Id.*

138. 3 Cal. 219 (1853).

139. *Id.* at 227; Cowart & Fairfax, *supra* note 11, at 442-43.

140. *See Pollard*, 44 U.S. (3 How.) at 212.

141. *See Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856). The Supreme Court case is well-known, and justifiably reviled, as the decision that relegated African-Americans to a

certainly today, the Court held that the power of the federal government over property was a paltry one.<sup>142</sup> In a 7-2 decision in *Dred Scott v. Sandford*,<sup>143</sup> each Justice separately authored his own opinion, and the Court held that the United States had no power to enact the Missouri Compromise and strip an “owner” of his right to his “property”—in this case, to an individual who had the status of slave in a southern state.<sup>144</sup> Interpretation of federal power, pursuant to the Property Clause and the Constitution generally, was the focus of the Court’s analysis.<sup>145</sup>

For our purposes, what is important about the *Dred Scott* decision is that, whatever intense disagreements the Justices had about the celebrated issues, all of the Justices—those in the majority and minority—agreed on one proposition: the Constitution allowed the federal government to manage the territories only on a *temporary* basis.<sup>146</sup> That view reflected the first century position of the Supreme Court.<sup>147</sup>

The Justices disagreed about whether the Property Clause was applicable to territories that were not held, or anticipated to be held, by the United States at the time of the Constitution.<sup>148</sup> The majority, who

permanent position of inferiority outside the political community of the United States. Although one may be repulsed by the decision, one should not simply dismiss the opinions of the Court, particularly where they shed useful light on important issues that were entangled with the slavery question.

142. *See id.*

143. 60 U.S. (19 How.) 393 (1856).

144. *See id.* at 452.

145. *See id.* at 432-54.

146. *See id.* at 446, 544-46 & 606-10.

147. *See supra* pt. II.

148. In the Opinion of the Court, written by Chief Justice Taney, the Court held that the entire Property Clause

has no bearing on the present controversy, and the power there given, whatever it may be, is confined, and was intended to be confined, to the territory which at that time belonged to, or was claimed by, the United States, . . . and can have no influence upon a territory afterwards acquired from a foreign Government. It was a special provision for a known and particular territory, and to meet a present emergency, and nothing more.

*Dred Scott*, 60 U.S. (19 How.) at 432 (Taney, C.J.). The limited power, wrote the Chief Justice, was necessary to allow the federal government to pay the war debt by sale of property and to maintain the unappropriated lands and to protect the people in ceded territories. *Id.* at 435-36, 441-42.

The two dissenters disagreed with this limitation of the Property Clause to the property held (or anticipated) by the United States at the time of the Constitution. *Id.* at 546 (McLean, J., dissenting); *id.* at 613-14 (Curtis, J., dissenting). Justice McLean argued for expediency, for “[w]ithout temporary Governments, our public lands could not have been sold, nor our

believed that the application of the Property Clause was limited to the original territories, nonetheless agreed that the United States had the power to govern a new territory, “ [p]erhaps . . . result[ing], necessarily, from the facts that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States.’ ”<sup>149</sup> However, the Justices disagreed about the extent of the federal government’s power over the territory. The majority argued that as to these new lands, the federal government did not have the specific grant of temporary governing power found in the Property Clause.<sup>150</sup> Thus, protection of “all” private property rights was required within a new territory, because the federal government did not have the power to arbitrarily favor one state’s citizen over another’s by choosing a definition of “property.”<sup>151</sup> Instead, the dissenters argued that by failing

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wildernesses reduced to cultivation, and the population protected; nor could our flourishing States, West and South, have been formed.” *Id.* at 546 (McLean, J., dissenting). Therefore, he favored “acquiescence under a settled construction of the Constitution for sixty years, though it may be erroneous; which has secured to the country an advancement and prosperity beyond the power of computation.” *Id.* Based on the power of the federal government to make war and make treaties, and an implied power to acquire foreign territory, Justice Curtis argued in his dissent that the United States should be assumed to have “contemplated” any property that it obtained. *Id.* at 613 (Curtis, J., dissenting). He

construe[d] this clause, therefore, as if it had read, Congress shall have power to make all needful rules and regulations respecting those tracts of country, out of the limits of the several States, which the United States have acquired, or may hereafter acquire, by cessions, as well of the jurisdiction as of the soil.

*Id.* at 613-14.

149. *Dred Scott*, 60 U.S. (19 How.) at 442-43 (quoting *American & Ocean Ins. Cos. v. Canter*, 26 U.S. (1 Pet.) 511, 542 (1828)). Because the majority believed that this power to govern was not derived from an express provision in the Constitution, however, these Justices looked to “the provisions and principles of the Constitution, and its distribution of powers.” *Id.* at 447. Focusing on the ultimate role of a territory, to be a “sovereign and independent” state, the Court reasoned that the federal government, acting as a temporary surrogate, should only impose “some form of civil authority [that] would be absolutely necessary to organize and preserve civilized society, and prepare it to become a State.” *Id.* at 447, 449.

150. *See id.* at 450-51.

151. *See id.* at 450 (stating that “the rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and [sic] property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.”).

Unlike a state, the Court held that Congress had no authority to prohibit a citizen from holding a slave (“property”) in certain territory; thus, the Act “is not warranted by the Constitution, and is therefore void.” *Id.* at 452. Six of the Justices agreed that the Missouri

to respect one state's determination that a slave had been freed, the Court favored the other state.<sup>152</sup>

Whatever their disagreement about the source and the substantive limits of the power of the United States over acquired lands, the Justices in *Dred Scott* agreed that this power was limited to the lands and property in a "territory," and did not extend to those in an admitted state; the United States had power only regarding temporary governance and sale of the lands.<sup>153</sup> As Chief Justice Taney wrote, "no power is given [to the federal government] to acquire a Territory to be held and governed permanently in that character. . . . [The Territory] is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority."<sup>154</sup> In his dissent, Justice Curtis declared that the power of the federal government to temporarily govern the "settlers on the public lands" was "manifestly conferred to enable the United States to dispose of its public lands to settlers, and to admit them into the Union as States."<sup>155</sup> This power, wrote Justice Curtis, is

Compromise (section eight of the Act of 1820) was unconstitutional. *See id.* at 455 (Wayne, J., concurring). The seventh member of the majority, Justice Nelson, expressed no opinion on the issue. *Id.*

In the 1981 case *Nevada ex rel. Nev. State Bd. of Agric. v. United States*, 512 F. Supp. 166 (D.C. Nev. 1981), it appears that the Nevada district court misunderstood the significance of the *Dred Scott* majority's limited view of the Property Clause. The Nevada court recognized that *Pollard* established that there existed within the Property Clause a "trust (to sell the public lands)." *Id.* at 171. But based on the *Dred Scott* holding that the Property Clause only applied to the territories at the time of the Constitution, the Nevada court concluded that the federal government's exercise of power in all later territories was not limited by any such requirement that the lands be sold. *See id.* To the contrary, if the Property Clause does not apply to the Nevada public lands, then, it would seem, the power of the federal government over Nevada's territory is even *more* limited.

152. *See Dred Scott*, 60 U.S. (19 How.) at 559 (McLean, J., dissenting). Justice McLean stated:

I am not able to reconcile this result with the respect due to the State of Illinois. Having the same rights of sovereignty as the State of Missouri in adopting a Constitution, I can perceive no reason why the institutions of Illinois should not receive the same consideration as those of Missouri.

*Id.*

153. *See id.* at 446, 544-46 & 606-10.

154. *Id.* at 446-47.

155. *Id.* at 615 (Curtis, J., dissenting). Justice Curtis explained that at the time of the Constitution,

the unsettled territory was viewed as justly applicable to the common benefit, so far as it then had or might attain thereafter a pecuniary value; and so far as it might become the seat of new States, to be admitted into the Union upon an equal footing

“to govern the inhabitants of the territory, by such laws as Congress deems needful, until they obtain admission as States.”<sup>156</sup>

Through the late 1800s, the Supreme Court continued to view the power of the United States in the public lands as limited to temporary governance pending distribution.<sup>157</sup> In 1871, the Supreme Court held in *Gibson v. Chouteau*,<sup>158</sup> that “[w]ith 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.”<sup>159</sup> Though the language sounds very broad, the power described as limitless is, in fact, very specific: “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.”<sup>160</sup> It is this power to transfer land that the Court held was protected from state legislation.<sup>161</sup> The Court explained that it was “to prevent the possibility of any attempted interference with [this power to transfer property, that] 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.”<sup>162</sup>

In the 1877 case of *Beecher v. Wetherby*,<sup>163</sup> as well, the Supreme Court noted that “the words ‘public lands’ ‘are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws.’ ”<sup>164</sup> Thus, as in *Gibson*, the Court focused on the federal government’s right to sell or distribute the public lands.<sup>165</sup> In *Beecher*,

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with the original States.

*Id.* at 606.

Again, the Nevada district court in *Nev. State Bd. of Agric.* apparently misread the *Dred Scott* decision. The Nevada court held that, under *Dred Scott*, the United States is not required to sell the public lands in Nevada, because it was not an original territory. *Nev. State Bd. of Agric.*, 512 F. Supp. at 171. However, even the *Dred Scott* majority, who believed the Property Clause to be inapplicable to all but original territories, agreed that the public lands in all territories were to be sold. *See supra* notes 146-49 and accompanying text.

156. *Dred Scott*, 60 U.S. (19 How.) at 615 (Curtis, J., dissenting).

157. *See infra* notes 158-70 and accompanying text.

158. 80 U.S. (13 Wall.) 92 (1871).

159. *Id.* at 99.

160. *Id.* (emphasis added).

161. *Id.*

162. *Id.*

163. 95 U.S. 517 (1877).

164. *Id.* at 520 (quoting *Newhall v. Sanger*, 92 U.S. 761 (1875) (Davis, J.)).

165. *See id.* at 523. The Court looked to the state’s promise that it “would never interfere with the primary disposal of the soil within it by the United States, nor with any regulations Congress might find necessary for securing the title in such soil to bona fide purchasers.” *Id.*

however, because the Court deemed the setting apart of lands as a reservation to be a “specific appropriation” of those lands, the Court held that the lands had been disposed of, such that “they have never since become ‘public lands.’”<sup>166</sup>

Yet in another of the often cited equal footing decisions, the 1894 case of *Shively v. Bowlby*,<sup>167</sup> the Court again focused on settlement of the public lands.<sup>168</sup> “[I]n disposing of the public lands,” the Court wrote, Congress “has constantly acted upon the theory that those lands . . . above high-water mark, may be taken up by actual occupants, in order to encourage the settlement of the country. . . .”<sup>169</sup> Settlement was apparently the “disposal” thought of as the norm, as it had been through the 1800s.

The Supreme Court’s reluctance to validate an expansive view of federal powers over public lands indicated a continued recognition that the Constitution required protection of a state’s sovereignty. Such protection was required, under the equal footing doctrine and the states’ Tenth Amendment reservation of powers.<sup>170</sup>

### III. FEDERALISM IN THE SECOND CENTURY

#### A. *Land as an Object of Federal Power*

The early 1900s saw an increase in the reservation of lands for public use,<sup>171</sup> and correspondingly, the Supreme Court’s declarations of the potential power of the federal government over lands became far more broad.<sup>172</sup> By the turn of the century, the Supreme Court’s view of the powers of the federal government over land, under the Property Clause, had subtly changed to permit the Congress to have on-going control over all unappropriated lands within a new state’s borders.<sup>173</sup>

166. *See id.* at 520.

167. 152 U.S. 1 (1894).

168. *See id.* at 49.

169. *Id.* Unlike the lands “above high-water mark,” however, the Court held that the “navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways.” *Id.*

170. The Tenth Amendment to the Constitution, the last in the “Bill of Rights” adopted in 1791, provides that “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. amend. X.

171. In addition to withdrawal of national parks, the act of March 3, 1891, for example, authorized the President “to set apart and reserve, in any State or Territory, public lands, wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public forest reservations.” *United States v. Grimaud*, 220 U.S. 506, 507 (1910).

172. *See infra* notes 188-201 and accompanying text.

173. *See infra* notes 188-96 and accompanying text.

Even so, Supreme Court cases continued to reflect an assumption that actual use of the power of the federal government regarding the public lands would be restrained, if not temporary.<sup>174</sup>

The Court addressed the power of Congress over “federal” lands within a new state in the 1897 case *Camfield v. United States*.<sup>175</sup> In *Camfield*, the challenge to federal authority was not by the State of Colorado, but by defendants who had erected a fence enclosing 20,000 acres of public lands for their exclusive use.<sup>176</sup> Their actions were contrary to a federal act that declared unlawful “ ‘all enclosures of any public lands’ ” and “ ‘the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States in any State or any of the Territories of the United States.’ ”<sup>177</sup> The question was whether the congressional act, itself, was constitutional.<sup>178</sup>

The Court first noted that, “[w]hile the lands in question are all within the State of Colorado, the [federal] Government has, with respect to its own lands, the rights of an ordinary proprietor, to maintain its possession and to prosecute trespassers.”<sup>179</sup> Thus, as would a private landowner, the federal government had recourse against fence enclosure by the laws against trespass and nuisance.<sup>180</sup> Congress’ act was passed, said the Court, because “the evil of permitting persons, who owned or

174. See *infra* notes 193-96 and accompanying text.

175. 167 U.S. 518 (1897).

176. *Id.* at 521-22. The defendants claimed that they had placed swinging gates at the section lines in the two townships enclosed “to afford access to so much of the public domain as was inclosed by the aforesaid fence.” *Id.* at 520. Furthermore, the defendants applied “an ingenious [device]” to accomplish their purpose of enclosing the public lands: they erected fences “immediately outside the even-numbered [public] sections, [such that] they are manifestly intended to inclose the Government’s lands, though, in fact, erected a few inches inside the defendants’ line.” *Id.* at 525.

177. *Id.* at 521-22 (quoting “An Act to Prevent the Unlawful Occupancy of the Public Lands” ch. 149, 23 Stat. 321 (1885)).

178. *Id.* at 522. The Court rejected the defendants’ justification for their actions. *Id.* at 528. The defendants had argued that the fences were necessary in order to build large reservoirs to irrigate the lands in the vicinity; their work, they vowed, “was of great importance and utility, and would redound to the great advantage of the United States and its citizens.” *Id.* at 521. The Court found this to be “immaterial.” *Id.* at 528.

179. *Camfield*, 167 U.S. at 524. The Court’s acceptance of the federal government as a proprietor in no way contradicts the established view that Congress held the lands only temporarily, pending “disposal,” because the Court did not address the longevity of Congress’ “ownership” of the lands.

180. *Id.* at 524. The Court noted, for example, that some states also recognized a problem with the common notion that “a man may build a fence upon his own land as high as he pleases”; the legislature of Massachusetts, for one, had passed a statute in 1887 “declaring that any fence ‘unnecessarily exceeding six feet in height, maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property,’ should be deemed a private nuisance. . . .” *Id.* at 523 (quoting an unspecified Massachusetts statute).

controlled the alternate sections, to inclose the entire tract, and thus to exclude or frighten off intending settlers, finally became so great. . . .<sup>181</sup> The act outlawing this conduct largely proclaimed (unnecessarily) the government's rights as a proprietor to protect the lands.<sup>182</sup>

The Court held that, in addition to its rights as a proprietor, Congress also had the constitutional authority to pass this act to protect its property.<sup>183</sup> This federal "power over its own property" decreed the Court, was "analogous to the police power of the several States. . . ."<sup>184</sup> The "power of legislating for the protection of the public lands" was said to be necessary, because "[a] different rule would place the public domain of the United States completely at the mercy of state legislation."<sup>185</sup> Even so, the Court hastened to limit its affirmation of power: "we do not undertake to say that Congress has the unlimited power to legislate against nuisances within a State, which it would have within a Territory. . . ."<sup>186</sup> Nor did the Court deny the temporary status of the federal government's powers over the lands, or the fact that the lands ultimately were to be disposed of by the federal government.<sup>187</sup>

In *Stearns v. Minnesota*<sup>188</sup> in 1900, the Supreme Court maintained its focus on distribution of the "federal" lands, noting that "the question

181. *Id.* at 524-25.

182. *See id.*

183. *Id.* at 528. The Court noted that the act provided Congress an extension to the recourse normally due a proprietor, for it empowered the federal government to prohibit both fence enclosures actually on its public lands and those that had the effect of enclosing the property. *Id.* at 525. Thus, the fences erected by defendants on their property were covered by the act. *Id.*

184. *Id.*

185. *Id.* at 526.

186. *Id.* at 525.

187. *See id.* at 525-26.

188. 179 U.S. 223 (1900) (holding that State agreement to accept percent of railroad gross earnings, in lieu of normal property tax on lands granted to State of Minnesota as trustee or to railroads for railroad construction, is valid, despite the State constitution's requirement that all non-exempt lands be taxed on the basis of the cash value of the property). In this tax case, the Court noted the fact that

[t]he system of providing for the payment of a percentage of the gross earnings of the road in lieu of all other taxes on "railroad property" . . . was inaugurated by the territorial legislatures, and was universally in vogue at the date of the adoption of the constitution. And after that date the state legislatures invariably assumed that they continued to possess the power to adopt this system of commuted taxation when granting lands to aid in the construction of a railroad, whether such lands were the absolute property of the State, or were held by it in trust for that purpose under an act of Congress.

*Id.* at 235 (quoting *State ex rel. Marr v. Luther*, 56 Minn. 156, 162-64 (1894)).

here is . . . as to full [federal] control over the matter of sale and disposal” of land in a new state.<sup>189</sup> For authority, the Court looked to the “reservation in the act of admission and the acceptance thereof by the State of Minnesota”; by this state disclaimer, the “right of Congress to determine the disposition of public lands within that State was reserved. . . .”<sup>190</sup> As it had been through the 1800s, the issue still, according to the Court, was “[w]hether Congress should sell or donate [the lands within the state]; what terms it should impose upon the sale or donation; what arrangements it should make for securing title to the beneficiaries. . . .”<sup>191</sup>

Federal retention of the vast lands was considered by the Court in *Stearns*, but only as an abstract, temporary possibility.<sup>192</sup> Addressing the state court’s fears that “Congress might act so as in effect to keep withdrawn a large area of the State from taxation,” the Court noted that “if Congress should determine that the great body of public lands within the State of Minnesota should be reserved from sale for an indefinite period it might do so, and thus the lands be exempted from taxation. . . .”<sup>193</sup> However, the Court did not support use of the broader powers that it now attributed to the federal government.<sup>194</sup> Rather, in a precursor to later decisions, the Court relied upon Congress’ discretion to exercise appropriate limits on its power.<sup>195</sup> By withdrawing such public lands from sale, Congress might “prevent the State of Minnesota from taxing a large area of its lands,” but, the Court stated,

no such *possibility of wrong conduct* on the part of Congress can enter into the consideration of this question. It is to be expected that [Congress] will deal with Minnesota as with other States, and in such a way as to subserve the *best interests of the people of that State*. That a power may be

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189. *Id.* at 250. The Court noted that the State of Minnesota had agreed that “the full control of the disposition of the lands of the United States should be free from state action.” *Id.*

190. *Id.* at 242-43.

191. *Id.* at 250. These “were all matters withdrawn from state interference by the terms of the enabling act and the Constitution.” *Id.*

192. *See id.* at 250-52.

193. *Id.* at 242-43.

194. *See id.* at 243.

195. *See id.* After President Franklin D. Roosevelt’s (failed) 1937 plan to pack the Supreme Court with justices more sympathetic to the exercise of federal power and less concerned about infringement on state sovereignty, decisions of the Court showed much greater deference to Congress. *See Note, The Property Power, supra* note 11, at 826-27 & n.71. Congress, it was now said, should enforce limits on its own power. *See id.* In theory, the states could protect themselves through their role in selecting the President and members of Congress. *See id.*

injuriously exercised is no reason for a misconstruction of the scope and extent of that power.<sup>196</sup>

The same practical restraint, in conjunction with increasingly broad suggestions of power, was in evidence in the 1911 case *Light v. United States*.<sup>197</sup> In *Light*, the Supreme Court held that a Colorado state statute which provided that a landowner cannot recover for damages by animal trespass unless the property is enclosed by a fence did not protect the defendant from an injunction against driving cattle on unenclosed federal reserve land.<sup>198</sup> The Court based its decision on the United States' "rights incident to proprietorship," finding that "[e]ven a private owner would be entitled to protection against willful trespasses. . . ."<sup>199</sup> It is true that, in dicta, the Court declared that the courts "cannot compel [the Congress] to set aside the [public] 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."<sup>200</sup> However, the Court considered these to be "rights incident to *proprietorship*," and nothing more.<sup>201</sup>

Although the early part of the century saw modest restraint, by the mid-1900s the Court's interpretation of federal power under the Property Clause had clearly shifted to encompass a broader, more permanent ownership of public lands with accompanying sovereign powers.<sup>202</sup> A natural forum for this change was in the context of national parks.<sup>203</sup> Individual states had ceded to the federal government "exclusive jurisdiction" over national parks, beginning in 1890 with Yellowstone National Park.<sup>204</sup> In 1928, in accord with previous decisions, a district

196. *Stearns*, 179 U.S. at 243 (emphasis added).

197. 220 U.S. 523, 537-38 (1911).

198. *Id.* at 535-38.

199. *Id.* at 537.

200. *Id.* *Light*'s affirmation of the United States' right to hold lands pursuant to the Forest Reserve Act of 1891 has been cited in support of a broad view of federal powers over lands. See, e.g., Goble, *supra* note 11, at 510 n.63 (citing *Light*, 220 U.S. at 523).

201. *Light*, 220 U.S. at 537 (emphasis added). The Court noted that these powers were those of a proprietor, "to say nothing of the power of the United States as a sovereign over the property belonging to it." *Id.* And indeed, the Court went on to say exactly "nothing" about any federal sovereign powers, for it considered that the proprietary resolution "makes it unnecessary to consider . . . the other constitutional questions involved." *Id.* at 538. Thus, the Court skirted the matter of sovereignty.

202. See Engdahl, *supra* note 11, at 324-25.

203. See *id.*

204. See *Yellowstone Park Transp. Co. v. Gallatin County*, 27 F.2d 410, 412 (D. Mont. 1928). By the Act of May 7, 1894, Congress declared that Yellowstone National Park "shall

court in Montana held that such a cession of “ ‘exclusive control’ imports only administrative authority to care for the proprietary interests of the United States in the lands, and not legislative and judicial jurisdiction or political dominion. . . .”<sup>205</sup> Citing Supreme Court precedent, the court held that “Montana, admitted upon equal footing with all other states, thereby was vested with sovereignty and jurisdiction over all its area, and including the aforesaid strip of the Park, which without the state’s valid consent cannot be diminished. . . .”<sup>206</sup> Thus, while the Montana court noted that “the [State] Legislature has power to in effect cede such jurisdiction, and the United States to accept in respect to limited areas” outlined in Article I, Section 8 of the United States Constitution, the court concluded that the notion “that by construction, implication, or otherwise the power extends to large areas of the state and the inhabitants thereof, for a federal ‘public park or pleasuring ground’ like Yellowstone Park, is at least doubtful.”<sup>207</sup>

The Supreme Court finally addressed the constitutionality of such non-Article I land cessions in 1938 in *Collins v. Yosemite Park & Curry*

be under the sole and exclusive jurisdiction of the United States.’ ” *Id.* (quoting 16 U.S.C.A. § 24 (West 1894)).

205. *Id.* at 412.

206. *Id.*

207. *Id.* The following year, the Supreme Court affirmed the power of the State of Arkansas to cede exclusive jurisdiction to the United States, and the power of the United States to accept such exclusive control, pursuant to the Enclave Clause, over part of the Hot Springs Reservation to contain springs and an Army and Navy Hospital for federal purposes. *Arlington Hotel Co. v. Fant*, 278 U.S. 439, 447-48 (1929).

The Court noted plaintiffs’ counsel’s argument that:

[T]he United States has the constitutional authority to maintain exclusive jurisdiction over the tract . . . as a national park, and that as the government undoubtedly may use its control over all land within its exclusive jurisdiction to provide national parks, it may, where land is ceded by a State to the exclusive jurisdiction of the National Government, [treat this ceded land as] land which had never come within the jurisdiction of the State.

*Id.* at 453-54. According to counsel,

by virtue of Article 4 of the Constitution, Section 3, Congress has power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, it may treat land ceded to it by a State for the purposes of making a national park exactly as it would treat land which had always been within its exclusive jurisdiction and subject to its disposition for park purposes.

*Id.* at 454. However, the Court “[did] not find it necessary . . . now to examine this question” of “constitutional controversy.” *Id.*

*Co.*<sup>208</sup> For the first time, the Court held that a state could choose to surrender its sovereign powers over property, and thus provide the federal government with exclusive jurisdiction over lands within the state.<sup>209</sup> No longer was the federal government constrained to being a mere “proprietor” of lands that fell outside of Article I’s Enclave Clause confines. And now, based on this case where authority was granted to the federal government by the states themselves, the Supreme Court stood at the top of the slippery slope of federal power over non-Enclave lands.

### B. *State Sovereignty Without Land*

It is not clear whether the Supreme Court recognized that it—and indeed, the country—had embarked upon a new path towards expanded federal authority over public lands. At no point did the Court signify such awareness. Regardless of its design, the Court’s decisions comported with the expanded notion of federal power over lands within states by limiting the notion of land as an object of state sovereignty and a basis for equal footing. Increasingly, the Court quoted the language it had used in equal footing cases in the 1800s, but misplaced the sense of the holdings. For as the accepted meaning of federal land “ownership” had changed in the 1900s, so too did the meaning of the Court’s words that affirmed the federal power.

The early 1900s saw the Supreme Court reiterate its support for the concept of equal footing of the states at the same time as it validated some unstated measure of federal power over public lands. In *Coyle v. Smith*,<sup>210</sup> the Court held invalid a provision in the Oklahoma enabling act that mandated the location of the capital city of the state.<sup>211</sup> The Court based its decision on the requirement, encompassed within the power to “admit ‘new states into this Union,’ ” that the Union be “a union of States, equal in power, dignity and authority.”<sup>212</sup> In dicta, the Court seemed comfortable with the enabling act provision that the state “disclaimed title to the public lands, and stipulated that such lands should remain subject to the sole disposition of the United States”;

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208. 304 U.S. 518 (1938).

209. *Id.* at 529-30; see Engdahl, *supra* note 11, at 324-25. *Collins* was consistent with the revolution in federalism that had occurred one year earlier. In *NLRB v. Jones & Laughlin Steel Corp.*, a new 5-4 majority broadly interpreted the federal government’s power to regulate commerce among states; the Court held that the power encompassed even local matters that were within the states’ reserved powers, if the matters substantially affected commerce. 301 U.S. 1, 37 (1937). In *NLRB*, as in *Collins*, the Court was showing deference to Congress. See *id.*

210. 221 U.S. 559 (1911).

211. *Id.* at 563-64, 578.

212. *Id.* at 567 (emphasis in original).

“such stipulations,” deemed the Court, were “within the sphere of congressional power.”<sup>213</sup> The precise power embodied in the public lands disclaimer was not discussed, however. The Court simply stated that “[w]hatever force such provisions have after the admission of the State may be attributed to the power of Congress over the subjects, derived from other provisions of the Constitution.”<sup>214</sup>

The Court did address the power issue as it subtly revised its 1848 *Pollard* equal footing holdings in the 1913 case of *Donnelly v. United States*.<sup>215</sup> In *Donnelly*, the Court noted that it had held in *Pollard* that the state “could exercise all the powers of government which belong to and may be exercised by [the original States], excepting with respect to control over public lands owned by the United States.”<sup>216</sup> A careful reading of *Pollard* in context cautions against interpreting this so-called “exception” as anything but temporary.<sup>217</sup> Sixty-five years after *Pollard*, however, the Court’s distinction between the temporary control of the federal government and the anticipated permanent control of the states over the lands was largely ignored. Rather, a new meaning of permanent ownership became attached to the *Pollard* phrase “owned by the United States,” allowing the Court in the 1900s to claim precedent for limiting the new states’ sovereign powers over lands within their borders.<sup>218</sup>

Thus, with the power of the federal government to retain lands regarded as settled, the issue ceased to be the power of the federal government to own and control lands, and became, instead, the degree to which a state had any authority over these “federal” lands. The States did have some power. Even in lands deemed permanently federal by withdrawal or reservation, the Court in *Donnelly* noted that authority to punish crimes generally passed to the State upon admission.<sup>219</sup> The

213. *Id.* at 570.

214. *Id.*

215. 228 U.S. 243 (1913).

216. *Id.* at 260 (citing *Pollard*, 44 U.S. (3 How.) at 212).

217. *See supra* text accompanying note 102.

218. The subtle change in meaning seems to have occurred in concert with the society’s acceptance of the United States retaining and withdrawing lands. In *Pollard*’s time, when the federal government was not expected to hold lands permanently, the phrase “owned by the United States” would have been understood as referring to the temporary state of ownership—the time when the government would hold the lands, pending settlement or other such disposal. *Pollard*, itself, held that the United States was required by the Property Clause to distribute the lands, such that the state would gain sovereign authority over the lands within its bounds. *See Pollard*, 44 U.S. (3 How.) at 223-24. By the 1900s, however, when certain lands were considered owned by the federal government, in the true and permanent sense, the *Pollard* meaning would no longer be as clear.

219. *Donnelly*, 228 U.S. at 271.

Court affirmed its prior holding that “the organization and admission of States qualified the former Federal jurisdiction over Indian country included therein by withdrawing from the United States and conferring upon the States the control of offenses committed by white people against whites, in the absence of some law or treaty to the contrary.”<sup>220</sup>

By the mid-1900s, the Supreme Court began to read some new criteria and limiting conditions into the *Pollard* equal footing standard. In the first equal footing case of that era, *United States v. California*,<sup>221</sup> the Court chose not to “transplant the *Pollard* rule of ownership as an incident of state sovereignty in relation to inland waters out into the soil beneath the ocean, [because the ocean area was] so much more a matter of national concern.”<sup>222</sup> The basis for the Court’s limitation of the *Pollard* rule of state sovereignty over lands within state borders was that “protection and control of [the three-mile belt off the ocean’s shore] has been and is a function of national external sovereignty.”<sup>223</sup> The Court could functionally ignore the equal footing argument because, it found, there was no evidence that even the thirteen original colonies had acquired ownership to lands under the three-mile belt.<sup>224</sup>

At the same time, however, the Court in *United States v. California* espoused an additional basis for its support for federal authority over the lands under the ocean belt: the fact that Congress claimed such authority.<sup>225</sup> The Court noted, “[t]hat the political agencies of this nation both claim and exercise broad dominion and control over our three-mile marginal belt is now a settled fact. And this assertion of national dominion over the three-mile belt is binding upon this Court.”<sup>226</sup>

Thus evolved the notion that the assertion of federal power, and judicial recognition of such power, could in and of themselves legitimize the exercise of power. A contemporary scholar, Professor John Hanna, acknowledged as convincing the arguments that “the makers of the Constitution did not intend to give the new nation any such power [to

220. *Id.* (citing *United States v. McBratney*, 104 U.S. 621 (1881); *Draper v. United States*, 164 U.S. 240 (1896)).

221. 332 U.S. 19 (1947).

222. *Id.* at 36.

223. *Id.* at 34. The government had argued more generally against the validity of the *Pollard* rationale, asking why “ownership of [lands under inland navigable water areas], any more than ownership of uplands, is a necessary incident of the state sovereignty contemplated by the ‘equal footing’ clause.” *Id.* at 30-31. This argument was not addressed by the Court, however.

224. *Id.* at 31-32.

225. *Id.* at 33-34.

226. *Id.* (citations omitted).

own land within a state] without the express consent of the states,” and that “[t]he Constitution made no provision for Federal ownership of new territory,” such that “[t]he most that should be allowed the Federal government is a temporary trusteeship of public lands which are ultimately to be transferred on to state or private ownership.”<sup>227</sup> The necessary conclusion of these arguments, also recognized by Hanna, would be that “the vast holdings of the Federal government within the states for all sorts of purposes and without state consent are unwarranted by the Constitution and are in effect an invalid Federal imperialism.”<sup>228</sup> But Hanna, like the Court, refused to accept such a conclusion.

Rather, Hanna insisted that “[i]f there were doubts as to the power of the United States to acquire [lands], these have been resolved decisively in favor of the Federal government, not only by the Supreme Court but by the people through their elected representatives in the Congress and the presidency.”<sup>229</sup> Hanna concluded, “[o]ne may question the wisdom of some or all of these developments, but one can scarcely raise at this time the question of national power in respect of them.”<sup>230</sup> In fact, the “power of the nation to retain such ownership and control of public lands is so well settled that any citation of authority is superfluous.”<sup>231</sup> Ignored by this analysis is the fact that the assertion and exercise of this new federal power occurred most unequally in the various states, undercutting the established doctrine of equal footing.<sup>232</sup> Also disregarded was the fact that a minority of

227. John Hanna, *Equal Footing in the Admission of States*, 3 BAYLOR L. REV. 519, 527 (1951) (citing, with approval, C.P. Patterson, *The Relations of the Federal Government to the Territories and the States in Landholding*, 28 TEX. L. REV. 43 (1949)).

228. Hanna, *supra* note 227, at 527-28.

229. *Id.* at 528. This analysis was supported by the Supreme Court’s statement a few years earlier that political processes protect state sovereignty. *See Helvering v. Gerhardt*, 304 U.S. 405 (1938).

230. Hanna, *supra* note 227, at 529. Hanna even raised what he viewed as “troubling” implications of the Supreme Court’s interpretation of expansive federal powers. Hanna worried that

[i]f the government should subsequently urge that its paramount powers required sovereignty over New York harbor, San Francisco bay or the Great Lakes, the existing nature of equal footing might require that to the Federal government would flow the ownership of all the navigable inland waters of all the states and the resources under these waters could be taken by the government without compensation.

*Id.* at 535.

231. *Id.* at 529.

232. The government in *United States v. California* apparently recognized the potential

states, those adversely affected by the new exercise of federal power over their lands, could not likely protect themselves through their representatives in Congress or their votes for President.<sup>233</sup>

The next Supreme Court case, *United States v. Texas* in 1950,<sup>234</sup> carved out a new limiting criterion for the application of the equal footing doctrine: political, versus economic, equality.<sup>235</sup> The equality of the states had always been viewed in terms of the impact on state sovereignty; the Court quoted its statement in *Stearns v. Minnesota*,<sup>236</sup> that “[t]he ‘equal footing’ clause has long been held to refer to political rights and to sovereignty.”<sup>237</sup> But for the first time, the Court specified an aspect that was *not* to be considered: “[Equal footing] does not, of course, include economic stature or standing.”<sup>238</sup> This new category of “economic” was integrally tied to the concept of land and property. In support of this limitation, the Court noted that:

Some States when they entered the Union had within their boundaries tracts of land belonging to the Federal Government; others were sovereigns of their soil. Some had special agreements with the Federal Government governing property within their borders. Area, location, geology, and latitude have created great diversity in the economic aspects of the several States.<sup>239</sup>

Three problems with the Court’s analysis are troublesome. First, even in its own explanation, the Court was unable to disentangle the “economic” from the “political.” If only some states were “sovereigns of their soil,” as the Court described, then those whose states contained

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conflict between the newly asserted federal rights over land and the general doctrine of equal footing, and consequently argued against the *Pollard* rule entirely, even when applied to ownership of water lands. See *United States v. California*, 332 U.S. at 30-31; see also Hanna, *supra* note 227, at 528.

233. See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (“[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”); JOHN H. ELY, *DEMOCRACY AND DISTRUST* (1980) (writing that the Court should defer to the people’s elected representatives except where a particular person or group is unfairly disadvantaged in the political system).

234. 339 U.S. 707 (1950) (holding that per the equal footing doctrine, the Republic of Texas lost sovereignty over and all claim to the marginal sea when she became a state).

235. *Id.* at 716.

236. 179 U.S. 223 (1900).

237. *Id.* (quoting *Stearns*, 179 U.S. at 245).

238. *Id.*

239. *Id.* (citations omitted).

federal land were necessarily not equal in sovereignty to all other states.<sup>240</sup> Second, the Court treated the fact that the federal government had imposed burdens on the equality of some states as the basis of legality for those very acts. If the Court had looked to the original states—the states intended to be the standard for equality of all other states—the Court’s analysis would have failed.<sup>241</sup> For all of the original states were “sovereigns of their soil,” and not a one had any “special agreement” with the federal government that it did not enter into as a full and voluntary participant.<sup>242</sup> Third, while the “diversity in the economic aspects” was a fluke of nature and state boundary lines, once lines were drawn, all states were intended to be equal. As such, all states were entitled to sovereignty over all of the land, no matter what kind of land, within their borders.

Ignoring these analytical flaws, the Supreme Court proceeded to base its new approach to equal footing on the facts of the day,<sup>243</sup> on new meanings imposed on old decisions, and on the questionable declarations in the 1950 *United States v. Texas*<sup>244</sup> case. In *Alabama v. Texas*,<sup>245</sup> for example, the Court quoted its 1840 holding in *Gratiot*: “The power of Congress to dispose of any kind of property belonging to the United States ‘is vested in Congress without limitation.’”<sup>246</sup> The Court did not note, however, that *Gratiot* dealt with the powers of Congress to dispose of property in territories, before statehood.<sup>247</sup> Nor did the Court acknowledge that *Pollard*, decided after *Gratiot*, clearly expressed

240. Given that the Court apparently did recognize that sovereignty was an issue, it is possible that the Court accepted the differences in sovereignty of the states because it assumed that individual states had surrendered their sovereignty over certain lands in their admitting acts. The requirement that those states surrender their sovereignty over lands in order to become states, however, would not be constitutional; the United States has no power in the Constitution to deprive a state of its sovereignty as a state equal to the original states. See *Coyle*, 221 U.S. at 573; *supra* text accompanying notes 210-14. At best, the United States had the power to accept *voluntary* cessions of exclusive jurisdiction from the states. See *Collins*, 304 U.S. at 528-30; *supra* text accompanying notes 208-09. Thus, the forced agreement of the states is not a valid disclaimer, and cannot form a proper basis for the Court’s analysis.

241. See *Mumford v. Wardwell*, 73 U.S. (6 Wall.) 423, 436 (1867) (“[T]he new States since admitted have the same rights, sovereignty and jurisdiction . . . as the original States possess within their respective borders.”).

242. See *supra* text accompanying notes 53-56.

243. Such a functionalist approach can be seen in other seminal Court decisions, as well. See *infra* notes 332-33 and accompanying text.

244. 339 U.S. 707, *reh’g denied*, 340 U.S. 907 (1950).

245. 347 U.S. 272 (1954) (finding the Submerged Lands Act of 1953, 67 Stat. 29, 43 U.S.C.A. §§ 1301-1356, which conveyed title to the soil under the Gulf of Mexico, the Atlantic and the Pacific Oceans to certain states, constitutional).

246. 347 U.S. at 273 (quoting *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537 (1840)).

247. See *Gratiot*, 39 U.S. at 537-38; see also *supra* text accompanying notes 132-37.

the expectation that the federal government ultimately would relinquish sovereignty over the lands to the State.<sup>248</sup> Instead, in his concurrence, Justice Reed announced in *Alabama v. Texas* that equal footing “does not affect Congress’ power to dispose of [or not dispose of] federal property.”<sup>249</sup> Further, quoting *United States v. Texas*, he noted that “[t]he requirement of equal footing does not demand that courts wipe out diversities ‘in the economic aspects of the several States.’ ”<sup>250</sup>

So now, it appeared, the government had turned the disposal provision in the Constitution on its head. No longer was the federal government expected to dispose of the lands within newly admitted states, such that all states were sovereign over territory in their borders.<sup>251</sup> Rather, the recognized *status quo* was that the United States retained the land, and the Court agreed that the federal government did not owe the states the favor of disposing of the land to better the “economic” straits of a given state.<sup>252</sup> State sovereignty was not considered to be an issue.

The broadened power of the federal government over so-called Article IV lands, with its concomitant lessening of the guaranteed sovereignty of the states, was further supported by the Supreme Court in 1955, in the case of *Federal Power Commission v. Oregon*.<sup>253</sup> In *Federal Power Commission*, the State claimed jurisdiction over federal “reserved” lands;<sup>254</sup> thus, the State argued that its consent, not just that of the Federal Power Commission, was required for the building of a dam on those lands.<sup>255</sup> The Court rejected this position,<sup>256</sup> holding that “[a]uthorization of this [dam] project . . . is within the exclusive jurisdiction of the Federal Power Commission. . . .”<sup>257</sup> Even where “the project will have [consequences] beyond the limits of the reserved

248. See *supra* text accompanying notes 129-32.

249. 347 U.S. at 275 (Reed, J., concurring).

250. *Id.* (quoting *United States v. Texas*, 339 U.S. at 716).

251. Compare *Pollard*, 44 U.S. (3 How.) at 221 (finding that the United States’ right to hold land was temporary, lapsing with a formation of a new state) with *Alabama v. Texas*, 347 U.S. at 273 (declaring Congress has the power to retain lands in the same manner as a private land owner).

252. See *Alabama v. Texas*, 347 U.S. at 273 (finding congressional power over public land has no limit).

253. 349 U.S. 435 (1955); see also Engdahl, *supra* note 11, at 344-48.

254. 349 U.S. at 440, 442. The State “argue[d] that the Acts of July 26, 1866, July 9, 1870, and the Desert Land Act of 1877 constitute[d] an express congressional delegation or conveyance to the State of the power to regulate the use of these waters.” *Id.* at 446-47.

255. *Id.* at 447.

256. *Id.* at 448.

257. *Id.* at 446.

lands on which it will be located . . . ,”<sup>258</sup> the Court held that the State had no power to interfere with the federal government’s management or use of lands owned pursuant to Article IV of the Constitution.<sup>259</sup>

### C. Federal Lands, Federal Power

The end of the second century of the United States’ history was marked by two bold pronouncements of federal powers over lands within the states. First, in 1976, through enactment of the Federal Land Policy and Management Act of 1976 (FPLMA),<sup>260</sup> Congress formally repealed the land “disposal” statutes, including the Homestead Act of 1862.<sup>261</sup> Although the United States had withdrawn and reserved vast lands in the western states,<sup>262</sup> for the first time the federal government formally declared that its “ownership” of public domain lands was permanent.<sup>263</sup>

Second, in 1977, in *Kleppe v. New Mexico*,<sup>264</sup> the Supreme Court upheld the existence of dual government powers<sup>265</sup> over these federal lands. The joint exercise of power was not that contemplated by *Pollard*, however, for the federal government’s potential power was greater than that over lands held by private interests or the State.<sup>266</sup> The Court considered Congress’ power to own and regulate the lands to be weighted against the state’s jurisdiction over land within its borders.<sup>267</sup>

258. *Id.* at 449.

259. *Id.* at 437, 443, 448-49. The Court noted that “the [federal] Commission acts on behalf of the people of Oregon, as well as all others, in seeing to it that the interests of all concerned are adequately protected.” *Id.* at 449.

260. 43 U.S.C. §§ 1701-1784 (1994).

261. See FLPMA, Pub. L. No. 94-579, § 702, 90 Stat. 2743, 2787-79 (1976). The movement in the west to demand state title to the public domain, called the “Sagebrush Rebellion,” is considered to be in large part a reaction to the FLPMA. See, e.g., Babbitt, *supra* note 11, at 853.

262. Recall that the first major land reservation was that of land creating Yellowstone National Park, in 1872. See *supra* note 65 and accompanying text.

263. The Public Land Law Review Commission, a group of elected officials, land use managers, and public representatives assigned the task of studying and creating federal lands policy, reported that the public lands “would not serve the maximum public interest in private ownership.” PUBLIC LAND LAW REVIEW COMMISSION, FINAL REPORT, ONE THIRD OF THE NATION’S LAND 6 (1970).

264. 426 U.S. 529 (1976).

265. *Id.* at 546. The federal government had sovereign authority, while the state could exercise the police power as well as some powers of management over the lands. *Id.* at 545.

266. See *Pollard*, 44 U.S. (3 How.) at 223-24; see also *supra* text accompanying notes 91-109.

267. See *Kleppe*, 426 U.S. at 542-43 (recognizing that the state retains jurisdiction over lands within the state to the extent Congress does not enact laws governing those same lands under the Property Clause).

Where there was no clear congressional assertion of authority, the Court indicated that it would find no preemption of state authority.<sup>268</sup>

In *Kleppe*, the State of New Mexico called into question the power of the United States, absent state consent and contrary to state law, to regulate lands held by the federal government under Article IV of the Constitution.<sup>269</sup> The Wild Free-roaming Horses and Burros Act<sup>270</sup> enacted by Congress “to protect ‘all unbranded and unclaimed horses and burros on public lands of the United States’ . . . from ‘capture, branding, harassment, or death’ ”<sup>271</sup> directly conflicted with the New Mexico Estray Law, which provided “ ‘the right to go upon Federal or State lands to take possession of [all estray] horses or burros, should the [New Mexico] Livestock Board so desire.’ ”<sup>272</sup>

On the basis of its interpretation of past decisions, the Court affirmed the power of the federal government to legislate conduct on public lands held by the United States pursuant to Article IV of the Constitution.<sup>273</sup> The Court rejected the State’s argument that “Congress’ rights in its land are ‘only the rights of an ordinary proprietor . . . ,’ ”<sup>274</sup> though this was the description applied by the Court in the late 1800s.<sup>275</sup> In support of Congress’ broader powers, the Court cited cases such as *Light* and *Gratiot*, which, the Court said, affirmed the power of Congress “to determine what are ‘needful’ rules ‘respecting’ the public lands.”<sup>276</sup> The Court ignored the basic holdings of those decisions, however: that Congress had the rights of a *proprietor* to protect lands it held, and that Congress had the right to dispose of lands in a *territory*.<sup>277</sup> Once again, the Court blended interchangeably its prior

268. *Id.* at 543.

269. *See id.* at 533-35 (finding that the New Mexico Livestock Board’s removal of burros was in contradiction to 16 U.S.C. § 1331 (1970 ed., Supp. IV), the Wild Free-roaming Horses and Burros Act).

270. 16 U.S.C. §§ 1331-1340 (1994).

271. *Kleppe*, 426 U.S. at 531 (quoting 16 U.S.C. § 1332(b) (1970 ed., Supp. IV 1970)).

272. *Id.* at 533 (quoting the letter of intent from New Mexico Livestock Board to the United States Secretaries of the Interior and Agriculture). The letter cites N.M. STAT. ANN. § 47-14-1 (1966). *Id.* at 532 n.2.

273. *See Kleppe*, 426 U.S. at 544 (distinguishing cases cited by New Mexico as either inapplicable or supporting Congress’ power to regulate federal lands).

274. *Id.* at 538 (quoting *Ft. Leavenworth R.R. v. Lowe*, 114 U.S. 525, 527 (1885)).

275. The Court founded its holding that Kansas maintained taxing jurisdiction over the lands of Fort Leavenworth on the doctrine of equal footing. *Lowe*, 114 U.S. at 526, 542. Further, the Court found that the federal government’s position as an “ordinary proprietor” was based on the doctrine of equal footing and dispositive of the rights Kansas held over the land. *Id.* at 527. The Court dismissed this language as dicta. *Kleppe*, 426 U.S. at 539.

276. *Kleppe*, 426 U.S. at 539 (citing *United States v. San Francisco*, 310 U.S. 16, 29-30 (1940); *Light*, 220 U.S. at 537; *Gratiot*, 39 U.S. (14 Pet.) at 537-38).

277. *See supra* text accompanying notes 133-39, 197-201.

holdings regarding (1) the federal government's rights over territorial lands or lands temporarily held pending distribution within a state, and (2) the federal government's right to hold lands permanently. Citing cases from *Gratiot* to *Alabama v. Texas*, the Court endorsed an "expansive reading" of the Property Clause,<sup>278</sup> noting that "[t]he power over the public land thus entrusted to Congress is without limitations."<sup>279</sup>

True, the Court acknowledged that "[a]bsent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory. . . ."<sup>280</sup> In particular, the Court held that the Wild Horses "Act does not establish exclusive federal jurisdiction over the public lands in New Mexico. . . ."<sup>281</sup> But, in language reminiscent of the "exclusive Legislation" power expressed in the Article I Enclave Clause, the Court also held that Congress, under the Article IV Property Clause, "exercises the powers both of a proprietor and of a legislature over the public domain."<sup>282</sup> Thus, while the State had the right to enforce its laws over these public lands, "when Congress [acts pursuant to the Property Clause respecting its lands], the federal legislation necessarily

278. *Kleppe*, 426 U.S. at 539.

279. *Id.* (quoting *United States v. San Francisco*, 310 U.S. at 29). The Court also offered six additional cases, *Ivanhoe Irr. Dist. v. McCracken*, 357 U.S. 275, 294-95 (1958); *Alabama v. Texas*, 347 U.S. at 273; *FPC v. Idaho Power Co.*, 344 U.S. 17, 21 (1952); *United States v. California*, 332 U.S. at 27; *Gibson v. Chouteau*, 80 U.S. (13 Wall.) 92, 99 (1872); and *Gratiot*, 39 U.S. (14 Pet.) at 537, in support of Congress' broad power.

280. *Kleppe*, 426 U.S. at 542-43. In dicta, however, the Court suggested that Congress might be able to withdraw federal public lands from the jurisdiction of the state. *See id.* at 544. The Court did not indicate how, or on what legal basis, this might be done. The Court disregarded the contrary holding in *Wilson v. Cook* that the United States "did not acquire exclusive jurisdiction over certain federal forest reserve lands in Arkansas and the State retained legislative jurisdiction over those lands . . .," noting that "[n]o question was raised regarding Congress' power to regulate the forest reserves under the Property Clause." *Id.* (discussing *Wilson v. Cook*, 327 U.S. 474, 487-88 (1946)). The Court said only that " 'without more,' federal ownership of lands within a State does not withdraw those lands from the jurisdiction of the State." *Id.* (citing *Surplus Trading Co. v. Cook*, 281 U.S. 647, 650 (1930)). The "more" the Court would require was not defined. The Court emphasized that it had, in the past, "found that Congress had not purported to assume jurisdiction over highways within [federal lands], not that it lacked the power to do so under the Property Clause." *Id.* (citing *Colorado v. Toll*, 268 U.S. 228, 230-31 (1925)). The Court did not elaborate on the basis for such exclusive power, particularly absent state consent or cession. *See id.*

281. *Id.* at 545.

282. *Id.* at 540 (emphasis added). In support of this holding, the Court cited *Camfield*, the 1897 case wherein the Court found that the federal government had "a power over its own property analogous to the police power of the several States. . . ." *Id.* (citing *Camfield*, 167 U.S. at 525). The *Kleppe* Court did not address the limitations expressed in *Camfield* on federal powers over property within states. *See supra* text accompanying notes 175-86.

overrides conflicting state laws under the Supremacy Clause.<sup>283</sup> The question considered by the Court, therefore, became one of statutory interpretation and preemption doctrine—*i.e.*, does the congressional act override state law—rather than one of a state's constitutional right to power over lands.<sup>284</sup>

In *National League of Cities v. Usery*,<sup>285</sup> decided just one week after the Court rejected federalism arguments in *Kleppe*,<sup>286</sup> the Supreme Court appeared to retreat from its willingness to permit federal exercise of power in contravention of traditional state control.<sup>287</sup> In *National League of Cities*, the Court held invalid the extension of the Fair Labor Standards Act minimum wage and maximum hours provisions to state employees.<sup>288</sup> The Court recognized that “the Commerce Clause of Art. I of the Constitution is a grant of plenary authority to Congress . . .,” or, in Chief Justice Marshall's words, “the power to regulate. . . .”<sup>289</sup> However, as the Court noted, “Congressional enactments which may be fully within the grant of legislative authority contained in the Commerce Clause may nonetheless be invalid because found to offend against” another constitutional right, such as the Sixth Amendment right to a jury trial.<sup>290</sup>

The Court recognized in *National League of Cities* “that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce which are conferred by Art. I of the Constitution.”<sup>291</sup> Specifically, “Congress may not exercise [its Commerce] power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made.”<sup>292</sup> The Court held “that such assertions of power, if unchecked, would indeed . . . allow ‘the National Government [to] devour the essentials of state sovereignty,’ and would therefore transgress the bounds of the authority granted Congress under the Commerce Clause.”<sup>293</sup>

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283. *Kleppe*, 426 U.S. at 543 (citing U.S. CONST. art. VI, cl. 2). The ability of the federal government to displace state law makes this power over Article IV lands tantamount to the absolute power of the federal government over Article I Enclave Clause lands. See Note, *The Property Power*, *supra* note 11, at 824-25 & n.56.

284. See Cowart & Fairfax, *supra* note 11, at 448-49.

285. 426 U.S. 833 (1976).

286. See *supra* text accompanying notes 264-79.

287. See *National League of Cities*, 426 U.S. at 851-52.

288. *Id.* at 852.

289. *Id.* at 840 (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)).

290. *Id.* at 841.

291. *Id.* at 842.

292. *Id.* at 855.

293. *Id.* at 855 (alteration in original) (citations omitted) (quoting *Maryland v. Wirtz*, 39

However, the Supreme Court's emphasis on state sovereignty in *National League of Cities* was both limited and short-lived. In his concurrence in *National League of Cities*, Justice Blackmun noted that "it seems to me that [the Court's Opinion] adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential."<sup>294</sup> Furthermore, over the next several years, the Court never invalidated any other federal act on the basis that the United States was usurping a state's sovereign powers.<sup>295</sup> In 1985, the Court overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>296</sup> holding that federal minimum wage and hours provisions in the Fair Labor Standards Act could be applied to a municipal mass transit system.<sup>297</sup> The basis for the decision was the Court's belief, once again, that states were protected against infringement of their sovereignty by the political system, or the "structure of the Federal Government itself."<sup>298</sup>

Despite the Court's renewed disavowal of protecting state sovereignty,<sup>299</sup> the strong dissents in *Garcia* made clear that the Supreme Court at the close of America's second century might reconsider its absolute support for federal intrusion.<sup>300</sup> For one thing, the Court did recognize

U.S. 183, 205 (1968) (Douglas, J., dissenting)). The Court overruled *Wirtz*. *Id.*

294. *Id.* at 856 (Blackmun, J., concurring). Justices Brennan, White, and Marshall dissented, arguing the inconsistency with previous Court holdings that "nothing in the Tenth Amendment constitutes a limitation on congressional exercise of powers delegated by the Constitution to Congress . . .," and " [t]he [Tenth] amendment states but a truism that all is retained which has not been surrendered." *Id.* at 862-63 (Brennan, J., dissenting). The Court additionally cited *M'ulloch*, 17 U.S. (4 Wheat.) at 404-07 and *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 324-25 (1816). *Id.* at 863. Justice Stevens also dissented "from [the Court's] constitutional holding . . .," though he "agree[d] that it is unwise for the Federal Government to exercise its power in the ways described in the Court's opinion." *Id.* at 881 (Stevens, J., dissenting).

295. See *TRIBE*, *supra* note 89, § 4.10, at 164.

296. 469 U.S. 528, 557, *reh'g denied*, 471 U.S. 1049 (1985), *cert. denied*, 488 U.S. 889 (1988). In the 5-4 decision, Justice Blackmun wrote the opinion of the Court. *Id.* at 530.

297. *Id.* at 555-56.

298. See *id.* at 550 (finding the structure of government was the "principle means chosen by the Framers to ensure the role of the States. . ."). The Court discussed the "influence" vested in the states through the selection processes of the federal government, and concluded that "the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority." *Id.* at 551-52.

299. See *id.* at 555-57 (finding participation in the federal government by the several states, rather than judicial intervention, as the primary limit on federal power).

300. See *id.* at 578-80 (Rehnquist, J., dissenting) (forecasting that the Court would return again to a balanced approach to federalism); see also *id.* at 588-89 (O'Connor, J., dissenting)

exceptions where the Constitution demands that a state's sovereignty be protected.<sup>301</sup> Indeed, even Justice Blackmun, for the majority, noted that one of the "rare exceptions," where the Constitution does "carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace . . .," is in the "guarantee, in Article IV, Section 3, of state territorial integrity. . . ."<sup>302</sup> Also interesting was the fact that four Justices dissented on the basis of the historic and intended role of states as "sovereigns" in the federal system of the United States.<sup>303</sup> Justice O'Connor argued in her dissent that "[t]he true 'essence' of federalism is that the States *as States* have legitimate interests which the National Government is bound to respect even though its laws are supreme."<sup>304</sup> And Justice Rehnquist declared that the principle of balanced federal powers over the states "in time [will] again command the support of a majority of this Court."<sup>305</sup>

Ten years after *Kleppe*, though the Supreme Court continued to speak of the "plenary power" of the federal government "to regulate and dispose of land within the Territories,"<sup>306</sup> the focus of the Court appeared to shift again slightly toward recognition of the effects of federal action on state sovereignty, and against a presumption of federal preemption. In *Utah Division of State Lands v. United States*, in a 5-4 decision written by Justice O'Connor,<sup>307</sup> the Court looked back to 1894 and *Shively v. Bowlby* for the principle that "congressional policy to dispose of sovereign lands [is to be acknowledged] only in the most unusual circumstances."<sup>308</sup> The "sovereign" lands at issue were the lands under navigable waters; in 1889, lands under Utah Lake were selected as a reservoir site, "'in accordance with the [Sundry Appropriations] Act of October 2, 1888.'"<sup>309</sup> The State of Utah argued that its

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(finding that defining the balance between state and federal concerns "is and will remain the duty of this Court. . .").

301. *See id.* at 550 (finding that although generally the Constitution does not provide specific protection of state sovereignty, there are exceptions when it does).

302. *Id.* at 550.

303. *See id.* at 557 (Powell, J., dissenting); *id.* at 579 (Rehnquist, J., dissenting); *id.* at 580 (O'Connor, J., dissenting). Justice Powell filed a dissenting opinion, joined by Justices O'Connor, Rehnquist and Chief Justice Burger; Justice O'Connor's separate dissent was joined by Justices Powell and Rehnquist; and Justice Rehnquist authored a separate dissent, as well.

304. *Id.* at 581 (O'Connor, J., dissenting).

305. *Id.* at 580 (Rehnquist, J., dissenting).

306. *See Utah Div. of State Lands v. United States*, 482 U.S. 193, 201 (1987).

307. *Id.* at 195. Chief Justice Rehnquist and Justices Blackmun, Powell, and Scalia joined Justice O'Connor's opinion. *Id.* at 194. Justice White filed a dissenting opinion, joined by Justices Brennan, Marshall, and Stevens. *Id.* at 209.

308. *Id.* at 197 (citing *Shively v. Bowlby*, 152 U.S. 1 (1894)).

309. *Id.* at 199 (alteration in original) (quoting letter from the Commissioner of the General

claim to the lands under the equal footing doctrine could not summarily be defeated by this federal reservation of land.<sup>310</sup>

The Court held that “we simply cannot infer that Congress intended to defeat a future State’s title to land under navigable waters ‘unless the intention was definitely declared or otherwise made very plain.’”<sup>311</sup> Despite the Lake’s inclusion in the federal government’s 1888 list of reservoir sites, well before the state’s admission into the Union on January 4, 1896,<sup>312</sup> the Court held that “Congress did not definitely declare or otherwise make very plain either its intention to reserve the bed of Utah Lake or to defeat Utah’s title to the bed under the equal footing doctrine.”<sup>313</sup> As attested to by the dissenting opinion, such a conclusion obviously was subject to dispute.<sup>314</sup> Thus, the inclination of the majority to find no federal reservation was, itself, an indication that the Court might lean more favorably on the side of the State in considerations of sovereignty and federalism.

Land Office to the Land Office at Salt Lake City, Apr. 11, 1889, app. 21).

310. *Id.* at 200. The State argued that “only a conveyance to a third party, and not merely a federal reservation of land, can defeat a State’s title to land under navigable waters upon entry into the Union.” *Id.* The State’s concession that the United States could convey lands under navigable waters even to a third party could have been based on *Shively v. Bowlby*, the 1894 case where, as the Court in *Utah Division* explained, the Supreme Court “disavowed the dicta in *Pollard’s Lessee*, and held that the Federal Government had the power, under the Property Clause, to convey such land to third parties. . . .” *Id.* at 196-97 (citing *Shively*, 152 U.S. at 48, 50).

311. *Id.* at 201-02 (quoting *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926)).

312. *See id.* at 199. The Court noted that the 1888 Act only reserved the land that “may” be designated. *Id.* The Sundry Appropriations Act of 1890, ch. 837, 26 Stat. 371 (1890) repealed the 1888 Act, but “provided ‘that reservoir sites heretofore located or selected shall remain segregated and reserved from entry or settlement as provided by [the 1888 Act].’” *Id.* at 199 (alteration in original) (quoting the 1890 Act).

313. *Id.* at 209. Thus, the Court found it unnecessary to decide the issue of whether or not Congress could reserve the submerged lands. *Id.* at 201.

314. *Id.* at 209 (White, J., dissenting). The dissent strongly disagreed with the majority’s conclusion. Justice White wrote that “Congress plainly and specifically expressed its intent to exercise that power [to reserve submerged lands] with respect to Utah Lake” in the 1890 Act. *Id.* The dissent therefore did not hesitate to address the issue of Congress’ power to reserve the lands. Justice White wrote that “[c]ontrary to the Court’s opinion and judgment today, I am confident that Congress has the power to prevent ownership of land underlying a navigable water from passing to a new State by reserving the land to itself for an appropriate public purpose. . . .” *Id.* The “source of the congressional power . . .” wrote the dissent, was the Property Clause, art. IV, § 3, cl. 2. *Id.*

#### IV. DUAL SOVEREIGNTY AND COOPERATIVE FEDERALISM IN THE THIRD CENTURY

##### A. *A Less Than Manifest Destiny*

In the first decade of the third century in United States history, once again the cries from the west for state ownership or increased State management of public lands have grown loud.<sup>315</sup> State title to the public lands has been asserted by numerous counties in western states.<sup>316</sup> Two court cases filed in 1995—*United States v. Nye County, Nevada*,<sup>317</sup> brought by the federal government in Nevada, and *Hat Ranch, Inc. v. Babbitt*,<sup>318</sup> brought by Hat Ranch, Inc. and Otero County,

315. See *id.* (holding that Congress did not expressly reserve Utah Lake's bed). Since the late 1980s, at least 70, and perhaps as many as 300, counties have passed or are thinking of passing "anti-federal ordinances or resolutions." See LaGanga, *supra* note 8, at A19. After the 1980 election of President Ronald Reagan, the "Sagebrush Rebels" of the late-1970s quieted, their anger evidently appeased by the Reagan Administration's promise to address their concerns by easing regulation and expanding business use of the lands. See C. BRANT SHORT, RONALD REAGAN AND THE PUBLIC LANDS 9, 40-54 (1989); see also LaGanga, *supra* note 8, at A19. President Reagan, himself, promised " 'to work toward a 'sagebrush solution,' " and pledged that " '[his] administration will work to insure that the states have an equitable share of public lands and their natural resources.' " SHORT, *supra*, at 9 (quoting Reagan telegram to rebellion leader Dean Rhodes). The ultimate dissatisfaction with these pro-business efforts, coupled with the 1992 election of President Bill Clinton, whose environmental agenda was perceived as a threat to the business users of the lands, has contributed to the resurgence in angry demands to wrest control and ownership of the lands from the federal government. See LaGanga, *supra* note 8, at A19 ("movement . . . was reborn with Clinton Administration efforts to raise grazing fees and reform mining laws"); Jeff Arnold, *Counties Take Lead as Sagebrush Rebellion Rides Again*, COUNTY NEWS, Apr. 4, 1994, at 5 ("Clinton Administration's agenda is to reestablish the progressive environmental ethic though changes in management practices, fee structures and policies affecting public land. . . . Secretary of the Interior Bruce Babbitt's policies have reignited the embers of the original rebellion.").

316. See, e.g., *The Endangered West*, N.Y. TIMES, June 18, 1995, at E14 ("More than 70 rural Western counties have passed or proposed laws to 'take back' the public lands."). The role of the counties in this debate is not clear, however. The "county supremacy movement," led by Richard Carver, a Nye County Commissioner, claims that the Constitution provides counties with the authority to regulate the public lands. See *CBS Evening News: Forest Rangers in Nevada Fear Violence as Local Residents Fight for Control of Public Lands*, 1995 WL 3026959 (CBS television broadcast, May 3, 1995). But even if the federal government ceased holding the lands—if the states owned the lands or had jurisdiction over private properties—there is no guarantee that the county land management or taxing opportunities would expand. Some state lawmakers, including original Sagebrush Rebel Nevada State Senator Dean Rhoads, believe that "[w]hile the second generation of sagebrush rebels gives lip service to the state ownership of public lands, . . . in reality they are making 'an end run' around the state's political leaders to get the lands managed by the various county commissions." See Vogel, *supra* note 77, at 15A.

317. See 920 F. Supp. 1108 (D. Nev. 1996).

318. See 932 F. Supp. 1 (D.D.C. 1995).

New Mexico in the District of Columbia—directly raise the issues of equal footing and federal ownership of public lands within the States of Nevada and New Mexico.

The annals of the past suggest that arguments against federal retention of public lands based on the equal footing doctrine and the Property Clause should not be too quickly rejected. As discussed above, in the country's first century, settlement of land was the desired goal, and long-standing interpretation by the Supreme Court spoke to society's understanding of the role of land in the Constitution's guarantee of "equal" states.<sup>319</sup> Language in state enabling acts disclaiming the public lands cannot be used to resolve the issue. If interpreted one way, the "disclaimer" simply might have been a reaffirmation of the federal government's right under the Property Clause to distribute the lands, which when sufficiently populated would become new states.<sup>320</sup> Alternatively, the requirement that a state "disclaim" its sovereign powers over land might have been an unconstitutional—and therefore, void—exercise of federal power.<sup>321</sup> Nor do the Supreme Court opinions from the last half century irrefutably decide the matter, for the limitation of the equal footing doctrine and the expanded interpretation of the Property Clause were based largely on new definitions and facts inconsistently imposed upon old decisions and different analytical frameworks.<sup>322</sup>

Discussion cannot end, however, even if one concludes that the equal footing doctrine demands that every state have sovereign control over lands within its borders, that enabling act disclaimers are invalid, and that second-century Supreme Court precedent is flawed. For the fact remains that the United States has held vast amounts of land for over a century, and the federal government's authority to do so has been supported, ill-advisedly or not, by the Supreme Court for much of that time.<sup>323</sup>

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319. See *supra* text accompanying notes 83-111.

320. See *supra* text accompanying notes 80-85.

321. See *New York v. United States*, 505 U.S. 144 (1992) (holding a federal law unconstitutional as it requires the State of New York, in the context of a voluntary compact clause, to take title to low-level radioactive waste). *New York v. United States* is discussed *infra* text accompanying notes 368-85; see also *supra* text accompanying notes 80-85.

322. See *supra* pt. III.

323. See, e.g., *United States v. Texas*, 339 U.S. at 716 (finding that the equal footing doctrine did not include economic stature or standing) (discussed *supra* text accompanying notes 234-50); *United States v. California*, 332 U.S. at 34 (finding that the three-mile belt off the ocean's shore is a function of national sovereignty) (discussed *supra* text accompanying notes 221-33); *Donnelly*, 228 U.S. at 260 (interpreting *Pollard*'s "owned by the United States" to have a permanent, rather than the intended temporary, attachment to the land) (discussed *supra* text accompanying notes 215-20); *Collins*, 304 U.S. at 529-30 (holding that a state could surrender

That federal disgorgement of public lands has not been considered in the past decades, or that a Supreme Court ruling requiring such an act could create bureaucratic havoc in land titles and resource control, is not necessarily a basis for rejecting that course.<sup>324</sup> Under a formalistic approach, the Supreme Court's responsibility is to determine whether particular government action is consistent with the plain mandate—express or implied—of the Constitution, even if the result is serious and there are adverse consequences to the political system.<sup>325</sup> The Supreme Court in *Pollard*, for example, made its equal footing ruling despite the strong dissenting argument that

for thirty years neither Congress, or any state legislature, has called in question the power of the United States to grant the flowed lands, more than others. . . . A right so obscure, and which has lain dormant, and even unsuspected, for so many years, and the assertion of which will strip so much city property, and so many estates of all title, should as I think be concluded by long acquiescence, and especially in courts of justice.<sup>326</sup>

Similarly, where the Court itself has made a prior ruling, the rule of *stare decisis* highlights the importance of consistency in the law,<sup>327</sup> but

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sovereign power over lands within the state to the federal government) (discussed *supra* text accompanying notes 208-09).

324. In his 1980 article *Unraveling the Sagebrush Rebellion: Law, Politics and Federal Lands*, John Leshy argued that “[i]t is nearly inconceivable that even the most activist, states’-rights-oriented court would dare embark on such a course [of giving the public lands to the States] now in the third century of our country’s history. . . .” Leshy, *supra* note 11, at 339. Leshy, however, considered only the most extreme position of federal disgorgement; for his analysis, he accepted the 1979 sagebrush rebel view that ownership of the public lands vested in the States at the time of statehood. *Id.* at 327-28. By this rationale, then, all land titles—private and public—would now be subject to dispute. *See id.* at 327-29. Such a proposition would, as Leshy wrote, “raise[] some fearsome possibilities.” *Id.* at 328.

325. *See, e.g.,* *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) (holding, under Article I, Congress has no role in execution of laws and lacks power to control the executive, so Congress cannot have removal power over a Comptroller General exercising executive functions); *INS v. Chadha*, 462 U.S. 919, 955-58 (1983) (finding that given the restrictions of Article I, Congress can only act through bicameralism and presentment, not by a one-house legislative veto); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585-89 (1952) (holding that even in an emergency, the President lacks power of legislation and thus cannot seize steel mills); *United States v. E.C. Knight*, 156 U.S. 1, 16-17 (1895) (finding that if Congress could regulate a matter, such as sugar refining, under its commerce power, local in nature as commerce and manufacturing are distinct, there would be “comparatively little of business operations and affairs . . . left for state control”).

326. *Pollard*, 44 U.S. (3 How.) at 232 (Catron, J., dissenting).

327. *See, e.g.,* *Planned Parenthood v. Casey*, 505 U.S. 833, 855, 869 (1992) (finding that

consistency with the Constitution ultimately may have a higher value.<sup>328</sup>

Of course, functionally, there is little likelihood that such transfers of title, with a recognition of state sovereign power, will occur. The fact that a doctrine has come to be interpreted in a certain way often indicates that there is a positive, even necessary, purpose that is being accomplished. In his dissent in *Dred Scott*, for example, Justice McLean argued the importance of finding a federal power of governance over new territories; for “[w]ithout temporary Governments, our public lands could not have been sold, nor our wildernesses reduced to cultivation, and the population protected; nor could our flourishing States, West and South, have been formed.”<sup>329</sup> Therefore, he favored “acquiescence under a settled construction of the Constitution for sixty years, though it may be erroneous; which has secured to the country an advancement and prosperity beyond the power of computation.”<sup>330</sup>

Early in the nation’s history, James Madison applied such a functionalist approach to considering constitutionality when he showed a willingness to bend to subsequent and “necessary” new assertions of constitutional power. In the 1790s, Madison expressed his belief that establishment of a National Bank was not authorized by the Constitution. In 1815, however, when a bill to establish a bank was offered in Congress, Madison

“[w]aiv[ed] the question of the constitutional authority of the Legislature to establish an incorporated bank, as being precluded . . . by the repeated recognitions under varied circumstances of the validity of such an institution, in acts of the Legislative, Executive, and Judicial branches of the Government, accompanied by indications, in different

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because the abortion rule of *Roe v. Wade*, 410 U.S. 113 (1973) was not unworkable, had engendered reliance in society, and was based on law and facts that had not changed, “[a] decision to overrule *Roe*’s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court’s legitimacy, and to the Nation’s commitment to the rule of law”).

328. See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483 (1954), and supplemented by *Brown v. Board of Educ.*, 349 U.S. 294, 298 (1955) (holding that contrary to *Plessy v. Ferguson*, 163 U.S. 537 (1896), the “separate but equal” doctrine violated the Fourteenth Amendment in an education context); see also *Casey*, 505 U.S. at 955 (Rehnquist, C.J., dissenting) (“[W]hen it becomes clear that a prior constitutional interpretation is unsound we are obliged to reexamine the question.”).

329. *Dred Scott*, 60 U.S. (19 How.) at 546 (McLean, J., dissenting). Even Justice McLean did not go further than advocating temporary federal authority over the lands, however. See *id.* at 542 (discussing the power of the federal government to establish a temporary government for a territory).

330. *Id.* at 546.

modes, of a concurrence of the general will of the nation.<sup>331</sup>

Madison recognized that, where there arose differences of opinion regarding the meaning of the Constitution, “ ‘it might require a regular course of practice to liquidate and settle the meaning of some of them.’ ”<sup>332</sup>

There are at least two compelling arguments raised by those who favor federal retention of power over public lands. One is environmental: protection of the natural resources of the nation, wherever they may lie, is best accomplished by federal enforcement of national, comprehensive environmental regulations.<sup>333</sup> The other is based on economics: the

331. *See id.* at 546 (McLean, J., dissenting) (quoting James Madison’s veto message to the 1815 congressional Act establishing a National Bank).

332. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 941 (1985) (quoting a letter from James Madison to Judge Spencer Roane (Sept. 2, 1819), reprinted in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 143, 145 (1865)). A similar functionalist approach to determining constitutionality of actions can be seen in many important Supreme Court cases. *See, e.g.*, *Mistretta v. United States*, 488 U.S. 361 (1989) (holding that the judicial branch commission engaged in making mandatory federal sentencing guidelines does not unduly intrude upon Congress’ legislative role, though it does “to some degree commingle the functions of the Branches”); *Morrison v. Olson*, 487 U.S. 654 (1988) (holding that independent counsel, though clearly exercising executive functions, does not unduly interfere with Presidential powers under Article II); *Humphrey’s Executor v. United States*, 295 U.S. 602, 629 (1935) (upholding the substantial independence of alphabet agencies from the President and recognizing their quasi-legislative, quasi-judicial character); *M’Culloch*, 17 U.S. (4 Wheat.) at 316 (establishing total immunity of the national bank from state tax); *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137 (1803) (establishment of judicial review). One could also argue that the mere fact that the founders *expected* that the original lands would be sold off to form new states would not necessarily mean that the Constitution *required* such disposal. *See, e.g.*, *Apodaca v. Oregon*, 406 U.S. 404, 407-09 (1972) (finding in each that, though the framers’ experience was with a jury of 12 members, whose decision had to be unanimous, the Sixth Amendment did not mandate either requirement; thus, the Court affirmed the constitutionality of a six member, or non-unanimous, jury); *Williams v. Florida*, 399 U.S. 78, 98-100 (1970).

333. *See, e.g.*, Babbitt, *supra* note 11, at 849. According to Babbitt, “[t]he historical record does not support the view that the states are responsible trustees of the public domain. Throughout the West huge grants of public lands . . . ,” conveyed to states, “were sold for a pittance to ranchers, timbermen, and other special users.” *Id.* Babbitt noted that “[m]any states are incapable of managing the large land holdings they already have.” *Id.* at 849-50; *see also* Mark E. Rosen, *Nevada v. Watkins: Who Gets the Shaft?*, 10 VA. ENVTL. L.J. 239 (1991). Rosen suggests that

rejection of the equal footing doctrine as it relates to state enforcement of environmental safety concerns was warranted because state enforcement of nuclear matters would totally upset the statutory authority of the Nuclear Regulatory Commission to make uniform national rules regarding nuclear safety and would emasculate the safety provisions of the NWPA. . . . Also, the panoply of NWPA

federal government provides an immense financial infrastructure for the protection and management of natural resources.<sup>334</sup> Whether the state or local governments could match (or would be willing to match) these federal abilities is a matter of much debate today.<sup>335</sup>

The case for validating the “regular course” of accepting federal retention and control of public lands within states is made somewhat

environmental protections are supplemented by plenary environmental protections afforded by NEPA, the Clean Air, and Water Acts.

*Id.* at 290-91.

334. *See, e.g.*, Babbitt, *supra* note 11, at 850. Babbitt reported in 1982 that

[a]dministration of the public domain is a large and expensive undertaking. The BLM [Bureau of Land Management] currently invests over \$500 million each year for soil stabilization and erosion control, reforestation, range-land rehabilitation, and protection of archaeological, cultural, and recreational resources. The BLM spent \$24 million more in Arizona than it collected in the state during 1980. Forest Service expenditures also far exceed revenues. Additional funds are dedicated to the maintenance and preservation of national parks. The states would be unwilling to match this effort if the lands were transferred to state ownership.

*Id.* at 850-51. The costs, themselves, continue to grow. In 1994, alone, the federal government spent approximately \$900 million on fire management in the states in the West, and annually, the government spends \$95 million to manage and improve public rangelands and more than \$300 million for facilities on public lands. Christopher A. Wood, *The War for Western Lands—It Was Never Theirs, but Militant Counties Aim to “Retake” Federal Domain*, WASH. POST, May 7, 1995, at C2. As George C. Coggins wrote,

transfer of ownership under present conditions seems to make little financial sense for states. The federal presence means payrolls, in lieu tax payments, highway subsidies, water subsidies, tourism, revenue sharing, subsidized grazing, and a spectrum of other direct and indirect dollar benefits to western states. Even acknowledging the imprecision of economic cost benefit balancing, one must still surmise that the West, if it won divestiture, could end up holding a pig in a poke.

Coggins, *supra* note 11, at 496.

335. *See* Robert H. Nelson, *Transferring Federal Lands in the West to the States: How Would it Work?*, POINTS WEST CHRONICLE 6-7 (1994-95). Professor Nelson reports that “[b]ased on 1992 figures, if the Western states took over all lands and minerals now managed by the BLM, a representative Western state would receive about \$20 to \$30 million a year less in new revenues than its new management costs.” *Id.* at 7. Nelson argued, however, that “overall, given that a typical Western state would be taking possession of something like a quarter of its land, the added fiscal burdens do not seem unmanageable.” *Id.* Rather, he opined that “[t]he more important consideration would be the confidence that Westerners have in their own state governments and other political institutions to manage the land.” *Id.* Nelson argued that possession of the lands would enable the States to fulfill their function as “‘laboratories’ of the federal system,” and would allow the States to grow beyond their current condition of “political and economic adolescence.” *Id.*

stronger by both the ambiguity of the equal footing doctrine and the actions of the States themselves. Contrary to the arguments of some counties, the equal footing doctrine does not “vest” title to all lands in the State upon admission.<sup>336</sup> To read the Constitution consistently, the equal footing doctrine must allow the United States to dispose of the unappropriated lands, pursuant to the Property Clause; thus, even *Pollard* recognized that the federal government held lands within a state temporarily, and could sell or grant the lands to private parties.<sup>337</sup>

Nor is there any provision in the equal footing doctrine for the exceptional case where the federal government attempts to dispose of property, and finds no willing takers. Such was the case for much of the land now held by the United States.<sup>338</sup> Before the federal government formally reserved or retained the lands, and despite the federal proffer of available land, these lands were neither claimed nor deemed desirable by private individuals.<sup>339</sup> The States, themselves, similarly expressed no interest in the lands. In 1929, President Herbert Hoover told Congress that the western states “ ‘are today more competent to manage’ the public lands ‘than is the Federal Government. Moreover we must seek every opportunity to retard the expansion of Federal bureaucracy and to place our communities in control of their own destinies.’ ”<sup>340</sup> President Hoover therefore recommended that the unappropriated lands be ceded to the states, believing that “ ‘[f]or the best interest of the people as a whole, and people of the western states and the small farmers and stockmen by whom they are primarily used, [the lands] should be managed and the policies for their use determined by state governments.’ ”<sup>341</sup> Ultimately, however, the states in the West

336. See, e.g., Plaintiff’s Summary Judgment Brief at 4, 22, *United States v. Nye County*, 920 F. Supp. 1108 (No. 90-15128).

337. See *Pollard*, 44 U.S. (3 How.) at 221, 224; *supra* text accompanying notes 95-109.

338. For several decades, until at least the end of the 1800s, reservation of lands (such as Yellowstone National Park) was the anomaly; most lands were available for disposal. See CLAWSON & HELD, *supra* note 66, at 27-28.

339. Individuals could have claimed the lands in accordance with a number of federal land distribution acts. See *supra* notes 59-64 and accompanying text.

340. See GATES, *supra* note 51, at 524 (quoting President Hoover’s 1929 address to Congress, reprinted in RAY L. WILBUR & ARTHUR M. HYDE, *THE HOOVER POLICIES* 230 (1937)).

341. See *id.* at 524-25 (quoting President Hoover’s 1929 address to Congress, reprinted in RAY L. WILBUR & ARTHUR M. HYDE, *THE HOOVER POLICIES* 232-33 (1937)). According to Gates, the Public Land Committee, authorized by Congress to study the public domain issues, recommended that “[a]reas important for national defense, reclamation, national forests, national parks and bird refuges should be reserved. . . . The balance of the public domain useful for grazing should be given the states if and when they were prepared to accept it and provide administrative control of use.” *Id.* at 525-26.

rejected the government proposals to transfer the lands to the states.<sup>342</sup> Therefore, it is possible to view the States' refusal to take the lands as a constructive cession of the lands. Yet, the exact powers arguably ceded by the states were not defined.

### B. Shared Authority Over Public Lands

Whatever the basis of federal or state authority, legitimate or not, the actual exercise of power over the public lands has always been shared. Certainly Congress has always recognized state jurisdiction and involvement with the public lands within state borders; most striking about the federal government's declared "unlimited" power has been the government's *non-use* of such power.<sup>343</sup> State police power, for example, typically is in force "over the federal public domain, at least when there is no legislation by Congress on the subject."<sup>344</sup>

In fact, the United States government itself points to this sharing of sovereign authority over the public lands in *Nye County* as proof that federal retention of the lands "does not improperly impact the sovereignty of the State of Nevada or Nye County."<sup>345</sup> To refute the County's argument that "its land-use and economic planning has been hampered" and that "the federal government has taken over 'core' state functions such as its police powers and its other sovereign rights as a land manager, a lawmaker, and a condemner of private property,"<sup>346</sup> the

342. *See id.* at 527-28; *see also* Coggins, *supra* note 11, at 495-96 (finding that the lands "were rejected as worthless by waves of settlers for nearly a century. . . . They were offered to the western states . . . several times before, but the states refused to accept them because they wanted no part of the burden of managing unclaimed, arid wastelands."). The states did not want the lands unless they could have all of the lands and resources; they were not willing to accept the lands if the United States reserved any land or withheld mineral rights to the lands. *See* GATES, *supra* note 51, at 527-28. The states also benefitted from federal land holdings, because the share of federal highway aid was proportional to the amount of land in a state that was federally owned. *See* Cowart & Fairfax, *supra* note 11, at 387. Cowart and Fairfax argue that important State interests were also mollified by the 1934 Taylor Grazing Act, which "was an almost complete victory for the range cattle industry . . .," providing ranchers with open access to the rangeland, while restricting use by homesteaders and sheep operators. *Id.* at 389. State attempts to gain title to the public lands can be traced, historically, to grazers' concerns about grazing fees and rangeland restrictions. *Id.* at 390-93. Calls for land distribution were heard, for example, following the imposition of environmental requirements in the mid-1970s, such as the mandate that grazing management plans include an Environmental Impact Statement. *See id.* at 393.

343. *See, e.g.,* *Kleppe*, 426 U.S. at 532.

344. *See* *Omaechevarria v. Idaho*, 246 U.S. 343, 346 (1918) (permissible to prohibit sheep from grazing on cattle lands).

345. *See* Plaintiff's Reply Memorandum at 17, *United States v. Nye County*, 920 F. Supp. at 1108 (No. 90-15128).

346. *Id.* (citations omitted).

United States declares that the argument “is premised on attacking a position never taken by the United States—that the United States has exclusive jurisdiction over the public lands.”<sup>347</sup> The government, says the United States in its *Nye County* reply brief, “has never claimed exclusive jurisdiction over these lands. To the contrary, the United States fully acknowledges that the State has the authority to regulate certain activities on the public lands,” as well as “law enforcement authority over persons within certain public lands.”<sup>348</sup> Interestingly, the United States in its *Nye County* briefs is absolutely silent about the Supreme Court’s implication in *Kleppe* that the federal government *could* claim exactly the exclusive jurisdiction that the United States takes such pains here to disavow.<sup>349</sup>

### C. *New Federalism: Limiting Federal Power*

The United States’ position in *Nye County* is consistent with a growing emphasis, both by the Supreme Court and by federal and state legislatures, on a new form of Madisonian federalism. At issue is just how the federal and state powers should be divided over the public lands, where, beyond its traditional capacity as national authority, the federal government has assumed an additional, ill-defined role as both proprietor and “plenary” authority.<sup>350</sup> Particularly where a right of questionable federal authority is recognized, it is important for that right to be exercised with utmost restraint by Congress and interpreted with utmost restraint by the reviewing courts.<sup>351</sup>

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347. *Id.* at 17-18.

348. *Id.* at 18. The government cites to the Organic Act of 1987, 16 U.S.C.A. § 480 (state law enforcement power within national forests is unaffected “by reason of their existence”), and to the Cooperative Law Enforcement Act, 16 U.S.C.A. § 551a (“ [t]his section shall not deprive any State or political subdivision thereof of its right to exercise civil and criminal jurisdiction, within or on lands which are a part of the national forest system’ ”).

349. *See Kleppe*, 426 U.S. at 544.

350. The term “plenary” means “[f]ull, entire, complete, absolute, perfect, unqualified.” BLACK’S LAW DICTIONARY 1154 (6th ed. 1990). The Supreme Court described the federal government’s power over the public lands as “plenary” in *California Coastal Comm’n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987), discussed *infra* text accompanying notes 353-56.

351. For example, Learned Hand urged restraint in the exercise of judicial review. *See LEARNED HAND, THE BILL OF RIGHTS 14-15* (1958). Judge Hand did not believe that the power of judicial review could be clearly deduced from the intent of the framers or from the Constitution, itself, but he recognized that some measure of judicial review was necessary. *Id.* Thus, he wrote, as such, review is “but only a practical condition . . . it need not [always] be exercised. . . .” *Id.*

## 1. New Federalism and the Court

Recent Supreme Court decisions, where the Court has shown restraint in its findings of federal preemption, indicate that the Court is moving toward recognition of a new type of federalism.<sup>352</sup> In *California Coastal Commission v. Granite Rock Co.*, for example, the Supreme Court held that federal law—including forest service regulations, land use statutes, and the Coastal Zone Management Act—did not preempt imposition of a California Coastal Commission permit requirement on an unpatented mining claim in a national forest.<sup>353</sup> Dual regulation was to be accommodated, if possible; the Court held that a State can enforce its criminal and civil laws on federal lands “so long as those laws do not conflict with federal law.”<sup>354</sup> Quoting *Kleppe*, the Court noted that “ [a]bsent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory. . . . ”<sup>355</sup> Preemption occurs only if it is Congress’ intention “ ‘to occupy a given field,’ ” or if state law “ ‘actually conflicts with federal law,’ ” so that it is “ ‘impossible to comply with both’ ” and the state law “ ‘stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.’ ”<sup>356</sup>

Exercising caution in finding federal preemption is particularly important in the United States’ “system of dual sovereignty . . . ,” the Supreme Court instructed in *Gregory v. Ashcroft*.<sup>357</sup> In *Gregory*, the Court held that the Federal Age Discrimination in Employment Act did not apply to state judges.<sup>358</sup> The Court reminded the states and the federal government that the United States is a government of limited

352. The application of the Supremacy Clause can dictate the measure of federal restraint. See U.S. CONST. art. VI, cl. 2 (Congress can preempt state law).

353. *California Coastal Comm’n v. Granite Rock Co.*, 480 U.S. 572, 589, 594 (1987). Justice O’Connor authored the majority opinion, joined by Chief Justice Rehnquist, and Justices Brennan, Marshall, and Blackmun; Justice Powell, joined by Justice Stevens, concurred in part and dissented in part; Justice Scalia filed a dissenting opinion, joined by Justice White. *Id.* at 574.

354. *Id.* at 580 (citing *Kleppe*, 426 U.S. at 543).

355. *Id.* (quoting *Kleppe*, 426 U.S. at 543).

356. *Id.* at 581 (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984)). The Court further declared that “it is appropriate to expect an administrative regulation to declare any intention to pre-empt state law with some specificity. . . .” *Id.* at 583.

357. 501 U.S. 452, 457 (1991). Once again, Justice O’Connor authored the Opinion, joined this time by Chief Justice Rehnquist, and Justices Scalia, Kennedy, and Souter, and in two parts by Justices White and Stevens. *Id.* at 454.

358. See *id.* at 473 (holding that the ADEA did not prohibit Missouri’s mandatory retirement provision). While *Gregory* specifically addressed the police power of the states within land historically subject to state jurisdiction, the same principle should apply in the public lands arena.

powers only.<sup>359</sup> Quoting James Madison in the *Federalist Papers*, the Court noted that:

The powers . . . which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.<sup>360</sup>

Joint sovereignty was intended to create a more responsive government, to encourage innovation and experimentation, and to provide a check on abuses of government power.<sup>361</sup>

In particular, the Court in *Gregory* limited the reach of the Supremacy Clause in order to protect state sovereignty.<sup>362</sup> The Supremacy Clause is a power that “Congress does not exercise lightly.”<sup>363</sup> If it “intends to preempt the historic powers of the States,” declared the Court, then “Congress should make its intention ‘clear and manifest.’”<sup>364</sup> The States “retain substantial sovereign powers,” and even “[a]s against Congress’ powers,” “principles of federalism” serve to “constrain Congress’ exercise of . . . powers.”<sup>365</sup> Thus, the Court rejected the use of “mere congressional ambiguity” to preempt state law; rather, it must be plain to anyone reading the Act that it covers the state law.<sup>366</sup> The Court concluded that “[i]n the face of such ambiguity, we will not attribute to Congress an intent to intrude on state governmental functions. . . .”<sup>367</sup>

359. *Id.* at 457.

360. *Id.* at 458 (quoting THE FEDERALIST No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961)).

361. *Id.* at 458-59.

362. *See id.* at 460 (citing U.S. CONST. art. VI, cl. 2).

363. *Id.*

364. *Id.* at 461 (quoting *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 65 (1989)).

365. *Id.* at 461, 464, 468. The Court refused to assume congressional intent to subvert state powers, even if Congress acted pursuant to such broad delegated powers as the Commerce Clause and the Fourteenth Amendment. *Id.* at 470. Justice White protested that the Fourteenth Amendment provided a “sweeping constitutional delegation of authority to Congress. . . .” *Id.* at 479 (White, J., concurring in part and dissenting in part). The Court found the authority limited, nonetheless, and declared, for example, that “[a]s against Congress’ powers ‘[t]o regulate Commerce’ . . . , the authority of the people [to determine their state officials’ qualifications] may be inviolate.” *Id.* at 464 (quoting U.S. CONST. art. I, cl. 3).

366. *Id.* at 464 (citing *TRIBE*, *supra* note 89, § 6-25, at 480).

367. *Id.* at 470.

In the 1991 case *New York v. United States*,<sup>368</sup> the Supreme Court continued to follow a new path of federalism, as it explicitly joined the limitation of federal authority to the required protection of state sovereignty.<sup>369</sup> The State of New York challenged a provision in the Low-Level Radioactive Waste Policy Act that required states to take title to and possession of waste-generating property, and to assume liability for all damages incurred in relation to that property when the state was unable to arrange for disposal of the radioactive water.<sup>370</sup> The Court held the provision unconstitutional, because it forced states to implement federal regulation.<sup>371</sup>

As it had in *Garcia*,<sup>372</sup> the Court based the decision of whether a power properly was a federal or state power by determining whether (1) the Act was authorized by powers delegated to the Congress in Article I of the Constitution,<sup>373</sup> and (2) whether the Act “invades the province of state sovereignty reserved by the Tenth Amendment.”<sup>374</sup> The Tenth Amendment provides that “[t]he 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.”<sup>375</sup> Yet, although the Court cited *Garcia* in support, the Court’s consideration of the powers of the States and the Tenth Amendment in *New York v. United States* provided an important signal of a change in its approach to questions of state sovereignty. In *Garcia*, the Court had held that state representation in the political process, not really the Tenth Amendment, protected state sovereignty; “the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself.”<sup>376</sup> Thus, in *Garcia*, the Court declared that it was wrong for “an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes.”<sup>377</sup> In *New*

368. 505 U.S. 144 (1992).

369. *See id.* at 156 (finding “if a power is an attribute of state sovereignty reversed by the Tenth Amendment, it is necessarily a power that the Constitution has not conferred on Congress”).

370. *Id.* at 153.

371. *See id.* at 161.

372. *See supra* text accompanying notes 296-305.

373. *See M’Culloch*, 17 U.S. (4 Wheat.) at 316.

374. *New York v. United States*, 505 U.S. at 155-56 (citing *Garcia*, 469 U.S. at 528).

375. U.S. CONST. amend. X.

376. *Garcia*, 469 U.S. at 550.

377. *Id.* at 546.

*York v. United States*, the Court, with a new majority,<sup>378</sup> showed that it was no longer so reluctant to enter the fray.

The Court paid short shrift to the United States' arguments of federal necessity: "The question is not what power the Federal Government ought to have but what powers in fact have been given by the people."<sup>379</sup> Necessity was considered too convenient and dangerous a reason to alter the balance of powers. As the Court noted, "the Constitution protects us from our own best intentions: It divides power among sovereigns . . . precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day."<sup>380</sup> Similarly, the Court in *New York v. United States* dismissed the notion that the States could acquiesce to improper expansion of federal power and diminution of state power, or that a State, by its acquiescence, could be estopped from challenging the constitutionality of such an arrangement.<sup>381</sup> The Court held that the "Constitution divides authority between federal and state governments for the protection of individuals," such that "[w]here Congress exceeds its authority relative to the States, . . . the departure from the constitutional plan cannot be ratified by the 'consent' of state officials."<sup>382</sup>

Instead, the Court pointed to ways Congress could "urge a State to adopt a legislative program consistent with federal interests."<sup>383</sup> The government could use the spending power to influence the States, "attach[ing] conditions on the receipt of federal funds."<sup>384</sup> Alternatively, the Court recognized that the government could give the States a choice between regulating activity in accordance with federal standards, or facing preemption by federal regulation.<sup>385</sup>

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378. Justices Brennan and Marshall from the majority opinion in *Garcia* had retired from the Court prior to the *New York* decision. GEOFFREY R. STONE, CONSTITUTIONAL LAW lxxxii-lxxxiii (2d ed. 1991). Justices Thomas and Souter replaced them and joined the *Garcia* minority, along with Chief Justice Burger and Justice Powell's replacements (Justices Scalia and Kennedy) to form the new majority. *Id.*

379. *New York v. United States*, 505 U.S. at 157 (quoting *United States v. Butler*, 297 U.S. 1, 63 (1936)).

380. *Id.* at 187.

381. *See id.* at 181.

382. *Id.* at 181-82. The Court reiterated its position that "[t]he constitutional authority of Congress cannot be expanded by the 'consent' of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States." *Id.* at 182.

383. *Id.* at 166.

384. *Id.* at 167.

385. *Id.* An example is the Clean Water Act, which "anticipates a partnership between the States and the Federal Government, animated by a shared objective. . . ." *Id.* (quoting *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992)).

Perhaps the clearest reflection of the strengthening of a new thread of federalism was the Supreme Court's 1994-95 term. Two cases, in particular, prompted intense discussion in and around the Court about the nature of federal power and the limits to the exercise of that power vis-à-vis the states. In *United States v. Lopez*,<sup>386</sup> a split Court held that a federal law that made possession of a firearm in a known school zone a federal offense exceeded the authority of Congress to regulate interstate commerce.<sup>387</sup> In *United States Term Limits, Inc. v. Thornton*,<sup>388</sup> four members of the Court, in dissent, opined that an Arkansas constitutional amendment, which prohibited the appearance of a candidate's name on a ballot for Congress after the candidate had served three terms in the United States House of Representatives or two terms in the United States Senate,<sup>389</sup> was a constitutional exercise of the state's "reserved" powers.<sup>390</sup>

Contrary to its general position in the second century, the Supreme Court in *Lopez* emphasized the need for the Court to actively participate in the debate over federal and state power, rather than simply assume its usual deferential posture toward Congress.<sup>391</sup> In his concurrence, Justice Kennedy wrote that, though political officials have a duty "to preserve and protect the Constitution in maintaining the federal balance . . . , the absence of structural mechanisms to require those officials to undertake this principled task, and the momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role."<sup>392</sup> Thus, he concluded that "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability

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386. 115 S. Ct. 1624 (1995).

387. *Id.* at 1626 (deciding that the Gun-Free School Zones Act of 1990, 18 U.S.C. § 992(q)(1)(A) (Supp. V 1993) exceeded the Commerce Clause power of Congress). The *Lopez* majority included Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas; Justice Kennedy also filed a concurrence, joined by Justice O'Connor, and Justice Thomas filed a powerful separate concurrence. *Id.* at 1625 (reporter of opinion's summary of the Justices' positions). Justice Breyer dissented, joined by Justices Stevens, Souter, and Ginsburg, and Justices Stevens and Souter wrote separate dissents, as well. *Id.*

388. 115 S. Ct. 1842 (1995).

389. *Id.* at 1845.

390. *Id.* at 1875 (Thomas, J., dissenting). Justice Thomas wrote for the dissenters, Chief Justice Rehnquist, Justice O'Connor, and Justice Scalia. The majority, consisting of Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer (with Kennedy also authoring a separate concurrence), held that the amendment violated the Qualifications Clause, U.S. CONST. art. I, § 2, cl. 2 and art. I, § 3, cl. 3. *Id.* at 1845.

391. *Lopez*, 115 S. Ct. at 1633-34.

392. *Id.* at 1639 (Kennedy, J., concurring).

to intervene when one or the other level of Government has tipped the scales too far.”<sup>393</sup>

As to the federal powers, the Chief Justice, in his Opinion for the Court in *Lopez*, described those powers delegated to the federal government as “few and defined,” especially compared with those of the states; “[t]hose which are to remain in the State governments are numerous and indefinite.”<sup>394</sup> The United States Constitution “creates a Federal Government of enumerated powers . . .,” the Court held, citing to Article I, Section 8.<sup>395</sup> Quoting language from *Gregory*, the Court in *Lopez* held that “ ‘a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.’ ”<sup>396</sup>

To maintain such a balance of power, the Court in *Lopez* invalidated expansive application of the Commerce Clause, holding that it would usurp power “in areas such as criminal law enforcement or education where States historically have been sovereign.”<sup>397</sup> The Court refused “to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.”<sup>398</sup> In his concurrence, Justice Thomas noted that the Court has “*always* . . . rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power.”<sup>399</sup> But the problem with the “ ‘substantial effect’ ” on commerce test was that “[t]his test, if taken to its logical extreme, would give Congress a ‘police power’ over all aspects of American life.”<sup>400</sup> Thus, Justice Thomas argued that, even though the Court might always reject such a result, it would make more sense to change the standard.<sup>401</sup>

A similar situation is created where Congress is deemed to have the authority to usurp any and all state powers on vast lands that are within state borders but claimed by the United States under Article IV. It is true that the United States has such authority over some lands, such as those acquired under Article I. In his *Lopez* concurrence, Justice Thomas

393. *Id.*

394. *Id.* at 1626 (quoting THE FEDERALIST No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961)).

395. *Id.*

396. *Id.* (quoting *Gregory*, 501 U.S. at 458).

397. *Id.* at 1632. The Court noted that “depending on the level of generality, any activity can be looked upon as commercial.” *Id.* at 1633.

398. *Id.* at 1634.

399. *Id.* at 1642 (Thomas, J., concurring) (emphasis in original).

400. *Id.*

401. *Id.* at 1642-43 (Thomas, J., concurring).

noted that an exception to the rule that Congress cannot exercise a police power is that “Congress could enact such [murder or felony] laws for places where it enjoyed plenary powers—for instance, over the District of Columbia.”<sup>402</sup> But Justice Thomas found that “[t]he grant of comprehensive legislative power over certain areas of the Nation, when read in conjunction with the rest of the Constitution, further confirms that Congress was not ceded plenary authority over the *whole* Nation.”<sup>403</sup> By the reasoning of *Lopez*, even though the United States has never purported to exercise such exclusive powers over the larger areas of public land within the states, and even if the Court would reject an actual assertion of such extreme powers, a less expansive application of the Property Clause could best achieve the desired result: protecting the federal and state balance of powers in the public lands.

*Lopez* provides a practical rationale for splitting federal and state powers in the context of the public lands. Justice Kennedy explained in his concurrence that, especially where “considerable disagreement exists about how best to accomplish” objectives, then “the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.”<sup>404</sup>

In the second important federalism decision, *United States Term Limits, Inc.*, a majority of the Court recognized that the “States unquestionably do retain a significant measure of sovereign authority.”<sup>405</sup> The Court quoted Alexander Hamilton’s declaration

that the plan of the Constitutional Convention did not contemplate “[a]n entire consolidation of the States into one complete national sovereign,” but only a partial consolidation in which “the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States.”<sup>406</sup>

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402. *Id.* at 1648 (Thomas, J., concurring) (citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 426, 428 (1821)).

403. *Id.* at 1644 n.3 (Thomas, J., concurring) (emphasis in original). A 1790 Act, in fact, specifically limited the right of the federal government to outlaw such crimes as murder and maiming, to instances “when those acts were either committed on United States territory *not part of a State* or on the high seas.” *Id.* at 1648 n.6 (Thomas, J., concurring) (citing Act of April 30, 1790, ch. 9, 1 Stat. 112) (emphasis added).

404. *Id.* at 1641 (Kennedy, J., concurring).

405. *United States Term Limits*, 115 S. Ct. at 1854 (quoting *Garcia*, 469 U.S. at 549, and citing *New York v. United States*, 505 U.S. at 15).

406. *Id.* (quoting THE FEDERALIST No. 32, at 198) (emphasis in original).

Thus, as Justice Kennedy noted in his concurrence, the corollary to the rule that “the State may not invade the sphere of federal sovereignty” is the “proposition that the Federal Government must be held within the boundaries of its own power when it intrudes upon matters reserved to the States.”<sup>407</sup>

Nonetheless, the five-member majority in *United States Term Limits*<sup>408</sup> held that the “power to add qualifications [for Congressional service] is not within the ‘original powers’ of the States, and thus is not reserved to the States by the Tenth Amendment.”<sup>409</sup> Quoting Justice Story, the Court held that “[n]o state can say, that it has reserved, what it never possessed.”<sup>410</sup> Such a standard—that if “no such right existed before the Constitution was ratified”<sup>411</sup> then no such right is reserved—might defeat the argument that federal lands ought to be governed in part by the states; since there were no Article IV lands in the states at the time of the Constitution,<sup>412</sup> arguably there was no state power over such federal lands at that time and therefore there is no state power now. But the fact that the original states had sovereign powers over all land within their borders is persuasive evidence that the States did reserve their jurisdiction over all land.<sup>413</sup> It adds nothing to the debate to say that the original states did not have jurisdiction over “federal” public lands, for the government held no Article IV lands at the time of the Constitution,<sup>414</sup> and indeed, through most of the country’s first century.<sup>415</sup> Moreover, this position would beg the question, for it assumes the validity of federal ownership of lands under the Property Clause, an issue that is at the heart of the equal footing debate.

It is the dissenting opinion of four members of the Court, authored by Justice Thomas,<sup>416</sup> that is particularly notable for its continuation of the *Lopez* restrictive view of federal power and broad view of state hegemony. The dissent argued that the powers reserved to the states in the Tenth Amendment were not tied to those powers previously held, for “[i]f someone says that the power to use a particular facility is reserved

407. *Id.* at 1873 (Kennedy, J., concurring).

408. Justice Kennedy joined the four-member minority from *Lopez* to create this majority in *United States Term Limits*.

409. *United States Term Limits*, 115 S. Ct. at 1854.

410. *Id.* (quoting 1 STORY, *supra* note 115, § 627).

411. *Id.* at 1855.

412. See Gaetke, *supra* note 11, at 643 n.175.

413. *But see id.*

414. *Id.*

415. See *supra* notes 63-64 and accompanying text.

416. *United States Term Limits*, 115 S. Ct. at 1875.

to some group, he is not saying anything about whether that group has previously used the facility.”<sup>417</sup> Rather, the dissent believed that one should look only at the “ ‘traditional aspects of state sovereignty’ ”<sup>418</sup> or the “ ‘original powers of [state] sovereignty’ ”<sup>419</sup> to determine if “a congressional statute that appears to have been authorized by Article I is nonetheless unconstitutional because it invades a protected sphere of state sovereignty.”<sup>420</sup> Where there is no statute, and where the Constitution does not bar state action, then, according to the dissent, the State has the power to act.<sup>421</sup>

Thus, the *United States Term Limits* dissenters expressed their objection to the majority’s “enormous and untenable limitation on the principle expressed by the Tenth Amendment.”<sup>422</sup> According to the dissent, the only cases where power is *not* reserved by the Tenth Amendment are where power is expressly delegated to the United States, expressly prohibited to the states, or delegated or prohibited “by necessary implication.”<sup>423</sup> In all other cases, the power is the states’; the “people had ‘conferred on the general government the power contained in the constitution, and on the States the whole residuum of power.’ ”<sup>424</sup>

The dissent took particular exception to the majority’s reliance on Story for a limited view of state power and an expansive view of federal power, noting that “[Story’s Commentaries] represent only his own understanding. . . . [T]his Court has deemed positions taken in Story’s commentaries to be more nationalist than the Constitution warrants.”<sup>425</sup> Instead, Justice Thomas urged application of the Court’s second century dictate that “ ‘where there is ambiguity or doubt, or where two views may well be entertained, contemporaneous and subsequent practical construction[s] are entitled to the greatest weight.’ ”<sup>426</sup> Back in the late

417. *Id.* at 1878 (Thomas, J., dissenting). This position is consistent with the definition of “reserved” found in *Black’s Law Dictionary*: “[r]etained, kept or set apart, for a purpose or a person.” BLACK’S LAW DICTIONARY 1307 (6th ed. 1990). It is also consistent with the definition of “reservation”: “[a] clause in a deed or other instrument of conveyance by which the grantor created, and reserves to himself, some right, interest or profit in the estate granted, which had no previous existence as such, but is first called into being by the instrument reserving it.” *Id.*

418. *United States Term Limits*, 115 S. Ct. at 1878 (Thomas, J., dissenting) (citing *New York v. United States*, 505 U.S. at 155-56; *National League of Cities*, 426 U.S. at 841, 849).

419. *Id.* (alteration in original) (quoting *Garcia*, 469 U.S. at 549).

420. *Id.*

421. *Id.* at 1879 (Thomas, J., dissenting).

422. *Id.* at 1877.

423. *Id.* at 1879 (Thomas, J., dissenting) (citing *M’Culloch*, 17 U.S. (4 Wheat.) at 406).

424. *Id.*

425. *Id.* at 1880 (Thomas, J., dissenting) (regarding 2 STORY, *supra* note 115, §§ 623-628).

426. *Id.* at 1903 (Thomas, J., dissenting) (quoting *McPherson v. Blacker*, 146 U.S. 1, 27

1700s and 1800s, the understanding would likely have been one of broader state power and more limited federal power; thus, there would likely have been an expectation that states have power over all lands within their borders.<sup>427</sup>

The concern in the Supreme Court for the role of the states, and particularly the willingness of a majority of the Court in *Lopez* to limit the federal government's exercise of its delegated powers where necessary to protect the states' powers, highlights a new judicial sense of the importance of the State in our federalist society.

## 2. New Federalism and the Government

This new emphasis of federalism is also the focus of legislators, both in Congress and in the states. The fate of the public lands, in particular, has become a source of concern both to the "states rights" advocates in Congress and to environmentalists.<sup>428</sup> A bill entitled The Public Rangeland Management Act, for example, which was approved by the Senate Energy and Natural Resources Committee in July 1995, would increase the control of local ranchers over 270 million acres of federal rangeland and would "free ranchers who use public lands from heavy [federal] regulation."<sup>429</sup>

More dramatic changes have also been proposed. In the 103d Congress in 1994, Representative Craig Thomas (Wyo.) introduced, on behalf of himself and twenty-four fellow western representatives, a bill that proposed to "transfer the lands administered by the Bureau of Land Management to the State in which the lands are located."<sup>430</sup> Exempted from transfer were lands that were "(1) wilderness; (2) wilderness study areas; (3) areas of critical environmental concern; or (4) determined by the Secretary [of Interior] to be too costly for the United States to decontaminate."<sup>431</sup> In the first legislative session in 1995, Representa-

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(1892)). In *McPherson*, the Court held that district-based selection of Presidential electors was constitutional, based on the fact that such a process was used in some states in the first three Presidential elections, and despite the fact that in subsequent years, most states used a general ticket system. *McPherson*, 146 U.S. at 29-37.

427. See *supra* pt. II.

428. See Timothy Egan, *In Battle Over Public Lands, Ranchers Push Public Aside*, N.Y. TIMES, July 21, 1995, at A1; Tom Kenworthy, *Ranchers Drive Land Bill Through Friendlier Hill*, WASH. POST, July 20, 1995, at A25.

429. Egan, *supra* note 428, at A12; see also Kenworthy, *supra* note 428, at A1. The Act is sponsored by Sen. Pete V. Domenici (R-N.M.) and Rep. Wes S. Cooley (R-Ore.). Kenworthy, *supra* note 428, at A25.

430. H.R. 4157, 103d Cong., 2d Sess. (1994). Representative Charles Taylor of North Carolina was also a co-sponsor. *Id.*

431. *Id.* § 1(d).

tive James Hansen (Utah) circulated a draft of a similar bill requiring the Secretary of Interior to "offer to transfer all right, title, and interest of the United States in and to all lands and interests in lands administered by the Bureau of Land Management to the State in which such lands and interests are located."<sup>432</sup> This newest bill would not exempt from transfer any lands and interests in lands for environmental reasons. Rather, the bill provides that designated "wilderness" areas "shall be managed by the State as wilderness in accordance with the requirements specified in the Wilderness Act . . . and any other Act of Congress which specifically provides for the management of such lands. . . ."<sup>433</sup>

Controversy over the actual impact of such measures grows as opponents cite the harmful effects of decreased federal and increased state control over the public lands. The proposed Public Rangeland Management Act, said Mike Dombek, acting director of the Bureau of Land Management, "takes the public out of public lands," and "returns land management to an era of single use at taxpayers' expense."<sup>434</sup> Another critic, Karl Hess, Jr., an environmental studies fellow at the Cato Institute, derided the benefits provided ranchers at the public's expense, calling them a form of "Cowboy socialism."<sup>435</sup>

But the very nature of the federal debate has changed. Gone is the idea that the federal government can do what it wants with public lands without considering the states' interests and involving the State in the decisionmaking process. While the Clinton administration opposes the Public Rangeland Management Act (or the Livestock Grazing Act), an alternate administrative plan created by Secretary of the Interior Bruce Babbitt would, among other things, establish resource advisory councils representing various local land interests.<sup>436</sup> Senator Domenici and Representative Cooley argued that their Act would allow not only the ranchers but also the general public and the executive branch to participate in grazing decisions; Senator Domenici insisted that "[i]t doesn't shut out any other uses' of the land. . . ."<sup>437</sup> Some congressional opponents of the Act, who also opposed Babbitt's proposal as being too restrictive on ranchers, objected that the Domenici-Cooley legislation "still locks out the public from decision-making. . . ."<sup>438</sup> The focus has shifted to shared management as well as shared use of the lands.

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432. H.R. 2032, 104th Cong., 1st Sess., § 1(a)(1) (1995).

433. *Id.* § 3(a).

434. Egan, *supra* note 428, at A18.

435. Kenworthy, *supra* note 428, at A25.

436. *Id.*

437. *Id.*

438. *Id.* (quoting Sen. Jeff Bingaman (D-N.M.)).

The States have been particularly vocal in support of expanding their power and limiting the power of the federal government. The *New York Times* reported in July 1995 that “[i]n the past year, at least 15 states have passed resolutions asserting their sovereignty and rejecting all but the most narrow role for the Federal Government.”<sup>439</sup> Colorado’s resolution, for example, quotes the Tenth Amendment and declares:

(1) That the State of Colorado hereby claims sovereignty under the 10th Amendment to the Constitution of the United States over all powers not otherwise enumerated and granted to the federal government by the United States Constitution.

(2) That this [Joint Resolution] serve as a Notice and Demand to the federal government, as our agent, to cease and desist, effective immediately, mandates that are beyond the scope of its constitutionally delegated powers.<sup>440</sup>

While the *New York Times* described such measures as the work of paranoid, “right-wing extremists,”<sup>441</sup> their success across the broad state and federal map is another sign of the growing interest, even in mainstream America, in state power and sovereignty.<sup>442</sup>

439. Dirk Johnson, *Conspiracy Theories’ Impact Reverberates in Legislatures—Extreme Right’s Outcry Scuttles Conference*, N.Y. TIMES, July 6, 1995, at A1.

440. *Id.* at B9 (quoting H.R.J. Res. 1035, 59th Gen. Assembly (1994)).

441. *Id.* at A1. The *Times* noted that Colorado State Senator Charles Duke, a “prime force in the so-called 10th Amendment movement,” as well as others on the far right, such as California State Senator Don Rogers, have also claimed that the federal government was involved in bombing the Oklahoma City Federal Building and is consequently now engaged in an elaborate cover-up. *Id.* at B9. Duke evidently believes that “[t]he Government’s motive for the brutality . . . was to create a sentiment in the country for stronger powers for the Federal Bureau of Investigation and the Bureau of Alcohol, Tobacco and Firearms.” *Id.* A Republican, himself, Duke rejects House Speaker Newt Gingrich for being a “ ‘counterfeit Republican.’ ” *Id.* According to the *Times*, Duke “has been criticized for his extreme views by state party leaders.” Dirk Johnson, *Mild-Mannered Engineer Fans Fires of a Movement*, N.Y. TIMES, July 6, 1995, at B9.

442. See Johnson, *supra* note 439, at A1. In fact, the strength of this anti-federal, state’s rights movement is evidenced by the proponents’ ability to force the cancellation of a nationally touted Conference of the States. *Id.* Though the Conference was intended to provide a forum for “finding ways of gaining more power for the states,” opponents of the Conference, reported the *New York Times*, feared that it would be “a clandestine Constitutional convention that could nullify basic American rights, perhaps as part of a sinister plot to impose a totalitarian ‘One World Government.’ ” *Id.* Utah Governor Mike Leavitt, a Republican himself and chairman of the Conference, decried the claims of the “extremists,” noting that “ ‘[w]e’ve been hearing some of these theories about global conspiracies and international bankers for over 20 years.’ ” *Id.* (quoting Gov. Leavitt). Ultimately, the detractors succeeded in convincing all but 14 states not to participate in the Conference, and the organizers canceled the Conference because of

### D. Moving Towards Cooperative Authority

In his *United States Term Limits* concurrence, Justice Kennedy wrote that “[t]he Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.”<sup>443</sup> Protection of this unique shared status is particularly called for in the public lands arena, given the history of presumed state jurisdiction over all lands—including federal lands, the fact of more than two hundred years of cooperative power, and a practical recognition that the power of the federal government over “its” lands is not an unlimited power. The recent development of stronger federalism notions by the Supreme Court suggests that the judiciary may provide a more formal basis for federal and state cooperation in the management of public lands.<sup>444</sup>

Such cooperation is inherently encouraged in a system such as ours, where there is a division of authority between the federal government and the states: the federal government, pursuant to the Supremacy Clause,<sup>445</sup> is supreme within its own sphere; the states, under their Reserve power,<sup>446</sup> have traditional police power within their domain. Moreover, Congress may, by design, grant additional authority to the states,<sup>447</sup> join with the states in exercising power,<sup>448</sup> or forego exercising its own power.<sup>449</sup> Furthermore, the Supreme Court can act to further federal and state cooperation in the context of public lands. While the Court will not likely overrule the *Kleppe* holding that the

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insufficient interest. *Id.* Ironically, Nevada State Senator Dean Rhoads, the lawmaker who started the Sagebrush Rebellion in 1979 when he sponsored the original law that asserted State ownership of federal public lands, had hoped to use the Conference of the States “as a forum to secure more federal lands for states in the West.” Vogel, *supra* note 77, at 14A.

443. *United States Term Limits*, 115 S. Ct. at 1872 (Kennedy, J., concurring).

444. The notion of “cooperative federalism” has been raised before. *See, e.g.*, Coggins, *supra* note 11, at 496 (“A more likely solution is increased deference by federal managers to state desires and further development of cooperative federalism.”); Cowart & Fairfax, *supra* note 11, at 408 (“The system of cooperative regulation, which both fed and grew out of the Sagebrush Rebellion, is vital to the environmentally sound management and use of public lands and resources.”). Recent changes in philosophy, in the Supreme Court, society, and government, make a cooperative approach even more attractive and feasible today.

445. U.S. CONST. art. VI, cl. 2.

446. U.S. CONST. amend. X.

447. *See, e.g.*, *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 422-25 (1946) (stating that Congress can expand state power to regulate commerce among the states).

448. *See, e.g.*, *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm’n*, 461 U.S. 190, 205-16 (1983) (holding Congress’ Atomic Energy Act did not preempt California’s moratorium on nuclear plants).

449. *See Kleppe*, 426 U.S. at 543 (noting that Congress can choose to forego criminal enforcement).

federal government has sovereign power in the public lands, the Court nonetheless should employ a functionalist approach to its review of both state and federal assertions of power over the lands; despite this federal sovereignty—which under a formalist approach would require a presumption in favor of federal control—the Court should apply a heavy presumption against federal preemption of state power. Congress can expand federal and state cooperation, as well, by developing express, non-preemption designs of shared authority, pursuant to which states are specifically authorized to participate, under conditions specified by Congress, in the lands management and decisionmaking process.<sup>450</sup>

Contrary to the fears of some environmentalists and the hopes of some ranchers, an increase in state authority or decrease in federal authority in the public lands does not equate with any particular result. At the moment, it is largely the Republicans who have sounded the call for state power, so it is largely the Republican message—pro-business and anti-environment according to its detractors—that has become associated with the state efforts.<sup>451</sup> Such an alliance is not necessary or inevitable, however. In fact, preservation of a federal and state balance of powers protects and strengthens the individual citizens' right to decide societal norms and desirable government actions. A real balance of powers should ultimately promote the libertarian notion of free will, not specifically a Republican, conservative, Democratic or

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450. Congress might also legislate federal economic design trade-offs, lending assistance to those geographic areas on which Congress determines that federal environmental concerns must have priority. Such assistance could assure the creation of diversified commercial development, replacing environmentally harmful traditional industry. *See, e.g.,* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 111-15 (1978) (discussing New York City's Landmarks Preservation Law which restricted developer's capacity to make exterior alterations to Grand Central Station and buildings in its vicinity but transferred lost development rights to other land parcels instead).

451. *See The Endangered West*, N.Y. TIMES, June 18, 1995, at E14. The *Times* editorial decried the

war in the West and the war in Congress on basic environmental protections [which] have much in common. First, both are being driven and in some cases underwritten by big business. Second, both are being waged to save the "little guy" from Federal tyranny. Third, this alleged little guy is nowhere to be found when the time comes to draft crippling legislation. Indeed, his wishes [to protect the environment] have been largely ignored.

*Id.* The *Times* noted that the current Sagebrush Rebellion is being "egged on by commercial interests, "including ranchers, mining companies, timber barons, developers, big commercial farmers and virtually anyone else who stands to profit from relaxation of environmental controls" and "by small but noisy groups of property-rights advocates." *Id.*

liberal agenda.<sup>452</sup> And the free choices of individuals could well cover a broad ideological spectrum, perhaps favoring restricted government authority on some fronts but continued or even expanded federal or state government authority on others.

Bob Dole, former Senate Majority Leader and a 1996 Republican candidate for President, may have recognized this fact (belatedly) in the context of a "regulatory reform" bill. Dole, who co-sponsored a bill that effectively would have overturned many environmental laws,<sup>453</sup> showed a new willingness to moderate his position that coincided with a *Times Mirror* public opinion poll finding that "78 percent [said] that government should 'do whatever it takes to protect the environment.'" <sup>454</sup> It is true that public sentiment has not prevented some states from diminishing state environmental protections.<sup>455</sup> But the citizenry has not yet been required to face a world where the federal government does not provide or ensure provision of desirable protections. A realization that there is an altered balance of federal and state powers should promote heightened awareness and action on the part of wide-ranging interests in the states. Given the strong public support for preservation of the public lands, both nationally and in

452. Roger Pilon, of the Center for Constitutional Studies at the libertarian Cato Institute, explained that "[w]hen you ask the question 'by what authority?' you are asking the most fundamental question in law and in politics." Linda Greenhouse, *Justices Court Federal Decline*, SAN DIEGO UNION-TRIB., May 24, 1995, at A1 (quoting Roger Pilon).

453. See John H. Cushman Jr., *Crucial Democrat Joins Dole in Bid to Overhaul Environmental Regulations*, N.Y. TIMES, June 23, 1995, at A17. Critics argued that the bill would "sharply limit the Federal Government's authority to enforce regulations under laws that protect health, safety and the environment." *Id.*

454. Gregg Easterbrook, *A Green Comeback? Bob Dole Rethinks the Politics of Pollution*, WASH. POST, July 9, 1995, at C1, C2. According to the *New York Times*, "[p]oll after poll suggests that what ordinary citizens want is more environmental protection if it means a cleaner environment and a healthier society." *The Endangered West*, *supra* note 451, at E14.

455. See *The Endangered West*, *supra* note 451, at E14. The article discusses a "sample of recent bulletins from the Old West," noting that "[d]espite citizen complaints, and nearly unanimous editorial opposition," the State of Montana

rewrites some of the country's strongest water pollution laws as a favor to the mining industry. Idaho lawmakers award potential polluters a major voice in setting clean water standards. Utah's Governor rebuffs the stated wishes of Utah's citizens to set aside 5.7 million acres of state land as protected wilderness. Washington State's Legislature passes the nation's most far-reaching "takings" law, weakening essential land-use controls. Wyoming's Legislature authorizes a bounty on wolves—recently re-introduced into Yellowstone National Park and protected under the Federal Endangered Species Act.

*Id.*

western states,<sup>456</sup> protection need not wane as a result of increased State involvement in overseeing and managing these resources.

Bringing the State and its citizens' interests into the political fold also may have the collateral beneficial effect of diminishing the violence that has dangerously clouded the public lands debate in recent years. Even during the Bush administration, there were reports of ranchers in the West threatening Forest Service rangers who attempted to enforce grazing and environmental regulations.<sup>457</sup> Tensions rose further with the election of President Clinton,<sup>458</sup> and there have been at least a few instances of actual violence. In March 1995, a bomb exploded in the Forest Service's office in Carson City, Nevada, and another exploded in a National Forest campground in Lamoille Canyon in Nevada.<sup>459</sup> A few days later, the Toiyabe National Forest headquarters in Sparks, Nevada had to be closed and searched after the agency received a bomb threat.<sup>460</sup> In August, the threats became more personal, as a bomb exploded a van parked at the home of a Forest Service ranger in Carson City, Nevada. The house was damaged, but the ranger's wife and three children, who were home at the time of the explosion, were not harmed.<sup>461</sup> Those in the so-called county movement have disclaimed

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456. Many citizens in the West, particularly those who live in urban areas, favor protection of the public lands for the enjoyment of multiple users. *See, e.g.*, Christopher A. Wood, *All Uneasy on the Western Front—Militant Counties Threatening to Take Back Federal Land Don't Have a Leg to Stand On*, WASH. POST, Nat'l Weekly Ed., May 15-22, 1995, at 24. In Catron County, New Mexico, for example, "[n]ewly arrived 'green' groups have filed numerous lawsuits and endangered species actions, leading to federal protection for the Mexican spotted owl and the willow flycatcher, among other creatures." Charles McCoy, *Catron County, N.M., Leads a Nasty Revolt Over Eco-Protection—U.S. Agency's Plan to Trim Grazing Rights Sparks Laws—and Lawlessness*, WALL ST. J., Jan. 3, 1995, at A1, A4. With the departure in the 1970s of many ranchers in the West, and the emigration to the West of people from the North and the Midwest, the population in the West became far more diverse; unlike their rural counterparts, the urban dwellers have "an agenda stressing environmental, aesthetic, and amenity values over resource consumption." *See* ROBERT F. DURANT, *THE ADMINISTRATIVE PRESIDENCY REVISITED—PUBLIC LANDS, THE BLM, AND THE REAGAN REVOLUTION* 12-13 (1992).

457. Jeff DeBonis, *Buffaloed by the Land-Use Bullies*, N.Y. TIMES, July 7, 1995, at A25. One rancher in southern Idaho allegedly threatened to "slit [a Forest Service ranger's] throat." *Id.* (quoting the rancher). After learning of such threats, President Bush "acted firmly to stop the angry ranchers in their tracks with a show of Government force" by sending a Justice Department team to Idaho to investigate. *Id.*

458. *See supra* note 311.

459. *2 Forest Service Sites Bombed Amid "Sagebrush Rebel" Tensions*, ARIZONA REPUBLICAN, Apr. 3, 1995, at CL14. The bombs did physical damage, but did not injure anyone. *Id.*

460. *Id.*

461. *Two Nevada Bomb Attacks on Forest Service Probed*, WASH. POST, Aug. 6, 1995, at A3.

any formal involvement in the bombings,<sup>462</sup> but the combination of anger against the federal government and a lack of mainstream political channels for this anger clearly can prove lethal.<sup>463</sup>

As for the mainstream possibilities, just as a transferal of authority need not result in a lessened effort to protect the lands, it is also not evident that the federal government can do a better job of managing the public lands on its own. In response to South Dakota Governor William J. Janklow's request that the State be permitted to manage Mount Rushmore and three other national park areas, Senator Tom Daschle (D-S.D.) noted that " 'South Dakota has demonstrated real capability to manage its state parks very well, and they'd certainly have the capability to manage the federal parks as well.' "<sup>464</sup> South Dakota has already taken over other federal enterprises with success; specifically, Governor Janklow pointed to the state's lower-cost, higher-yield operation of a former federal fish hatchery.<sup>465</sup>

Unfortunately, not all state land management and ownership efforts have been so successful.<sup>466</sup> For this reason, it is important to note that even in the most extreme proposed legislation, the states would be

462. See 2 *Forest Service Sites Bombed Amid "Sagebrush Rebel" Tensions*, *supra* note 459, at CL14; *Two Nevada Bomb Attacks on Forest Service Probed*, *supra* note 461, at A3. Nye County Commissioner Richard Carver suggested that "a Forest Service employee might have engineered the [March] bombings to win sympathy for the beleaguered agency"; Jim Nelson, superintendent of the Toiyabe National Forest, called that claim " 'ludicrous.' " 2 *Forest Service Sites Bombed Amid "Sagebrush Rebel" Tensions*, *supra* note 459, at CL14.

463. Even where groups do not themselves espouse violence, "their anti-federal government rhetoric could lead individuals to act more extremely." See Chuck Raasch, *Extremist Groups on the Rise*, GANNETT NEWS SERV., Apr. 21, 1995. Thus, for example, Senator Harry M. Reid (D-Nev.) believes that the August bombing of the ranger's home was the work of " 'extremist elements' within the states' rights movement." *Two Nevada Bomb Attacks on Forest Service Probed*, *supra* note 461, at A3. Bob Beckett, Nye County District Attorney, called the bombing an example of " 'vigilante behavior.' " *Id.*

The coalitions forming along the fringe of anti-government movements can be very diverse, with a central component of volatility. At an informal hearing before seven Democratic Congressmen, "witnesses described an escalation of intimidation and violence by members of self-styled militias, white supremacists and other fringe groups like the Freemen, Wise Users, and Constitutionalists, whose profound dislike of government and regulations shape their political agendas." Michael Janofsky, *Accounts of Violence by Paramilitary Groups*, N.Y. TIMES, July 12, 1995, at A14. A National Park Service special agent reported that " '[t]he rage and hate is beginning to well up. . . . We've always gotten threats against our employees. But now, we hear death: 'You're going to be killed' or 'You'll be shot.' In the past, it was just, 'a rancher is mad at us.' " *Id.* (quoting Robert Mariott, an agent for the National Park Service).

464. Bob Mercer, *South Dakota Wants a Piece of the Rock: State Proposes Managing National Parks, Including Mount Rushmore*, WASH. POST, July 4, 1995, at A8.

465. Mercer, *supra* note 464, at A8.

466. See, e.g., Babbitt, *supra* note 11, at 849 ("[T]he historical record does not support the view that the states are responsible trustees of the public domain.").

required to manage the lands as directed by any applicable federal legislation.<sup>467</sup> The Supremacy Clause does not fade simply because the federal government is not solely responsible for management duties.

Moreover, the advantage of the proposed system of cooperative federalism is that there is shared responsibility, mutual checks and balances, and a general course set by federal design. In 1982, then-Arizona Governor Bruce Babbitt suggested in a law review article that the solution to the Sagebrush Rebellion lies not in transferring ownership from the federal government to the states, but in the honest sharing of management control.<sup>468</sup> The states, wrote Babbitt, resented the federal government's lax interpretation of the legislative directives to act consistent with state efforts, and they were angry at the government's assertion of power "without limitations."<sup>469</sup> Babbitt proposed that federal lands be subject to all state laws and requirements, including zoning, leasing, and permitting, except in the case of overriding national interest.<sup>470</sup> Such a sharing arrangement has been used successfully in the context of coastal zone management,<sup>471</sup> albeit a traditional area of primary state jurisdiction where few laws governed.

Many federal environmental laws already require some measure of state and local participation or consideration in agency actions. The National Environmental Policy Act (NEPA) implementing regulations, for example, mandate that:

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467. See, e.g., H.R. 2032, 104th Cong., 1st Sess., § 3(a) (1995) (directing states to manage lands designated as wilderness in accordance with the Wilderness Act or any other applicable Act of Congress); see *supra* notes 432-33 and accompanying text.

468. See Babbitt, *supra* note 11, at 853-54. Babbitt serves as Secretary of the Interior in the Clinton Administration.

469. *Id.* at 856, 858 (quoting *Kleppe*, 426 U.S. at 539).

470. *Id.* at 858.

471. *Id.* at 859-60 (citing the Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. §§ 1451-1464 (1976 & Supp. IV 1980)); see also DONNA R. CHRISTIE, COASTAL AND OCEAN MANAGEMENT LAW In a Nutshell 3-5, 116-18 (1994). The CZMA is designed to "preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations." 16 U.S.C. § 1452(1). The Act provides federal funding to encourage the states to provide this resource protection and to control use. See CHRISTIE, *supra*, at 4, 117. It requires the participating states to prepare, and submit for federal approval, coastal management plans; once a plan is approved, the state is the final judge of disputes, and the federal government must act consistent with the state plan. Only in the case of national security may the federal government override the state plan. See Babbitt, *supra* note 11, at 860; CHRISTIE, *supra*, at 117. Based on the high rate of state participation (all 35 eligible coastal states have participated), the fact that the federal government has approved all but six state coastal management plans, and the fact that almost the entire United States coast is governed by such a plan, the Act can be considered a success. See CHRISTIE, *supra*, at 117-18.

Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements. . . . [S]uch cooperation shall to the fullest extent possible include:

- (1) Joint planning processes.
- (2) Joint environmental research and studies.
- (3) Joint public hearings (except where otherwise provided by statute).
- (4) Joint environmental assessments.<sup>472</sup>

Subsection C goes on to note that: “[S]uch cooperation shall to the fullest extent possible include joint environmental impact statements. In such cases, one or more Federal agencies and one or more State or local agencies shall be joint lead agencies.”<sup>473</sup> The National Forest Management Act provides for similar “‘coordinat[ion] with State and local governments in the promulgation of land management plans’ ”,<sup>474</sup> specifically, the Forest Service must review state and local land use plans concerning the National Forests, and consider possible conflicts with federal plans.<sup>475</sup> The Clean Air Act recognizes that “[f]ederal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution,”<sup>476</sup> and instructs the federal government to “encourage cooperative activities by the States and local governments.”<sup>477</sup> Likewise, the Clean Water Act requires that “[f]ederal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.”<sup>478</sup> Even one of the most controversial pieces of environmental legislation, the Endangered Species Act, “declare[s] it] to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered

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472. 40 C.F.R. § 1506.2(b) (1995) (implementing regulations for the NEPA).

473. *Id.* § 1506.2(c).

474. See Ann Desch, “*Freemarket*” *Land Use Planning or “Son of Sage Rebellion,”* MONTANA ASSOCIATION OF PLANNERS, July/Aug. 1992, at 20 (quoting Dale Robertson, Chief, U.S.D.A. Forest Service). The Forest and Rangeland Renewable Resources Planning Act of 1974 requires the Secretary of Agriculture to “develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System, coordinated with the land and resource management planning processes of State and local governments and other Federal agencies.” 16 U.S.C. § 1604(a) (1994).

475. See Desch, *supra* note 474, at 20.

476. 42 U.S.C. § 7401(a)(4) (1994).

477. *Id.* § 7402(a).

478. 33 U.S.C. § 1251(g) (1994).

species,”<sup>479</sup> and requires the federal government to “give actual notice” of an impending regulation based on a determination that a species is endangered or threatened “to each county or equivalent jurisdiction in which the species is believed to occur, and invite the comment of such agency, and each such jurisdiction thereon.”<sup>480</sup> Despite these provisions, however, ultimately the federal agencies today are empowered to make the final land management decisions, and need not address state or local concerns.

But there are already examples of actual cooperative federal and local efforts in public land initiatives. In one notable case, Catron County, New Mexico—often called the “birthplace of the county movement”<sup>481</sup>—signed a Memorandum of Understanding (MOU) in February 1994 with the U.S. Forest Service, Gila National Forest.<sup>482</sup> In this Memorandum of Understanding, the parties “recognized that the Forest Service manages the National Forest” in accordance with federal regulations, and the County did not dispute the federal government’s jurisdiction.<sup>483</sup> To satisfy joint objectives for efficient and effective action and communication on a cooperative basis, the parties agreed that the Forest Service would mail the quarterly Environmental Analysis Calendar and any scoping reports—detailing need for proposed action—to the County Commission, possibly with an invitation to the

479. 16 U.S.C. § 1531(c)(2) (1994).

480. *Id.* § 1533(b)(5)(A)(ii).

481. McCoy, *supra* note 456, at A1. Catron County contains a large amount of federally-owned land, and historically, Catron County “has often been in the vanguard” of anti-federal rebellions; back in the 1890s, residents “torched tens of thousands of acres to protest the government’s original plan to set aside national forests.” *Id.* Catron County was dramatically affected in the 1980s when federal environmental protection actions impeded two of its major industries, mining and timber. See Cheryl Probst, *Catron Officials Say Work with Feds*, CHRONICLE (Omak, WA), Apr. 14, 1993, at 10. In 1991, Catron County was the first of many counties recently to pass an ordinance asserting jurisdiction over the federal government on federal lands. See Anita P. Miller, *All Is Not Quiet on the Western Front*, 25 URB. LAW. 827 (1993), for a discussion of the Catron County Land Plan; see also John Craig, *County, Agencies Agree to Cooperate—Deal Aimed at Averting Legal Battles*, SPOKESMAN-REV., May 24, 1994, and John Craig, *Agreements Signal Peace in Land-Use Revolt—Stevens County Pacts Give Residents Power Against Agencies*, SPOKESMAN-REV., May 13, 1994, at B4. An Idaho State Court held that a Catron County-style ordinance was in violation of both the United States and Idaho Constitutions, in *Boundary Backpackers v. Boundary County*, CV 93-9955 (1st Dist. Bonner Co., Jan. 27, 1994).

482. Memorandum of Understanding (MOU) Between Catron County Commissioners, Catron County, New Mexico and the U.S. Forest Service, Gila National Forest, Feb. 15, 1994 (Catron County MOU).

483. *Id.* at 1-2. Cited were the Forest Reserve Organic Act of 1897, The Multiple Use Sustained Yield Act, and the Forest and Rangeland Renewable Resources Planning Act and the National Environmental Policy Act. *Id.*

County to join in cooperative efforts, and the County would then provide comments to the Forest Service, including a description of “applicable State and local laws and local plans and policies which may apply to the proposal or have an effect on the decision.”<sup>484</sup> The Forest Service also agreed to mail to the County a description of alternative actions considered, and the County agreed to “provide quantified information and data analyzing the impacts of the alternatives and the relationship of the alternatives to County plans and policies.”<sup>485</sup> All this would happen before the usual comment and decision notification regulations would ordinarily be triggered.<sup>486</sup>

Catron County and the Forest Service agreed to consider joint planning as well, particularly in cases where the County has some subject-matter jurisdiction or where the parties have similar environmental planning requirements to satisfy.<sup>487</sup> The Forest Service affirmed its commitment to follow planning regulations requiring coordination with local officials.<sup>488</sup> In return, the County “recognized that the Forest [Service] administers a large portion of the land base of the County, and that Forest [Service] employees are members of the community and contribute greatly to the economic stability of the County,” and therefore agreed to involve the federal agency in County planning processes.<sup>489</sup>

Local officials in Stevens County, Washington, worked out similar agreements with the Forest Service, the BLM, the National Park Service, and the Fish and Wildlife Service that dictate procedures for federal and county sharing of information and participatory decisionmaking processes.<sup>490</sup> The purpose of the MOUs, according to the Stevens County Commissioners Office, is to “allow[] local residents a constructive voice for timely comments to various federal agency actions and policies on issues which may impact county residences,” and in planning, to “focus[] additional federal attention upon the importance of

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484. *Id.* at 2-4.

485. *Id.* at 5.

486. *Id.*

487. *Id.* at 6.

488. *Id.* at 7.

489. *Id.* at 9.

490. See “Summary of the Stevens County Community Approach to Federal Agency Actions,” presented to the Washington Association of Counties Legislative Conference, Stevens County Commissioners Office, Sept. 19-30, 1994 (including Memoranda of Understanding signed on or around May 23, 1994 by Stevens County Commissioners and the U.S. Forest Service, Fish & Wildlife Service, Department of Interior/BLM, and the National Park Service) [hereinafter Stevens County Community Approach]; see also John Craig, *Agreements Signal Peace in Land-Use Revolt—Stevens County Pacts Give Residents Power Against Agencies*, SPOKESMAN-REV., May 13, 1994, at B4. The County had already signed an agreement with the BLM in 1981, “and the BLM has generally followed it.” *Id.*

balancing natural resource management with the needs of the local economy."<sup>491</sup> Generally, the counties appear most interested in receiving "early warning" of federal agency planning and policy formulation, as well as in having actual input in such efforts.<sup>492</sup> In Nevada, home to the Nye County federal lands controversy, the Nevada Association of Counties now offers a handbook entitled *Public Land Use Planning Guidelines*; the booklet disdains "too much contentiousness in rural America" and instead encourages a practical approach to federal and county "cooperation and coordination."<sup>493</sup>

On the state level, Interior Secretary Bruce Babbitt has worked to broker agreements between federal, state, ranching, and environmental interests, and seems to have succeeded, at least in the State of Colorado.<sup>494</sup> And many state officials, including the Nevada lawmaker who ignited the original "Sagebrush Rebellion" in 1979, State Senator Dean Rhoads, oppose the latest disruptive county actions.<sup>495</sup> Rhoads believes that "the state is on the verge of winning land concessions from the federal government and that the new rebels are frustrating his efforts with their moves for county control."<sup>496</sup> In 1995, he is hopeful that Congress will approve legislation authorizing the establishment of demonstration projects, whereby States can manage the public lands.<sup>497</sup>

Cooperative efforts also make sense from a practical standpoint, for the lands controlled by the federal government, by the states, and by private parties are intermingled and often can only be developed or cared for through mutual arrangement.<sup>498</sup> For similar reasons, regional or multi-state alliances, such as those created to address "cross-border"

491. See Stevens County Community Approach, *supra* note 490, at 2-3.

492. See, e.g., Cooperative Agreement Between Stevens County and Border Resource Area Bureau of Land Management at 2, in Stevens County Community Approach, *supra* note 490.

493. NEVADA ASS'N OF COUNTIES, PUBLIC LAND USE PLANNING GUIDELINES i (1st ed., July 1993).

494. See *The Endangered West*, *supra* note 451, at E14. With Secretary Babbitt's help, the respective parties in Colorado "were able to agree on less destructive grazing practices." *Id.*; see also Cowart & Fairfax, *supra* note 11, at 424. Pursuant to a 1982 Memorandum of Understanding between the State, BLM and the Forest Service, for example, the parties meet every four months and discuss resource issues, planning decisions, and cooperative means to solve problems. *Id.*

495. Vogel, *supra* note 77, at 14A. In 1979, Rhoads was the force behind the Nevada law that first asserted State ownership of federal public lands. *Id.*

496. *Id.* Rhoads predicts that Nye County will lose the legal battle over its county ordinances. *Id.*

497. *Id.*

498. See Cowart & Fairfax, *supra* note 11, at 410-11. Though the federal government owns large amounts of land in total, much of this area is composed of small plots that intersperse with private and state plots. See *id.*

resources, can also assist both individual states and the federal government.<sup>499</sup> Such an alliance was created by the Surface Mining Control and Reclamation Act,<sup>500</sup> for example, to consider energy requirements, regional production capabilities, and the likely impact on the environment and the economy, and to make leasing recommendations to the Secretary of the Interior.<sup>501</sup>

While agreement on sharing authority is important in the public lands context, federal and state cooperation will not in itself solve the more substantive dilemmas. The issues raised in the public lands context are not easy ones; both those who seek increased economic opportunity in development of resources, and those who seek increased protection in preservation of resources, have responsible goals worth pursuing. The solution rarely can be as black-and-white or bleak as either extreme seeks to portray it.

The debate over the federal lands that comprise the "Grand Staircase" of southern Utah<sup>502</sup> is illustrative:

To many of those who live in southern Utah, protecting wilderness means locking up their land and their economic future, cutting off access to energy and mineral resources and the kind of booms that took place during uranium's heyday. They fear that livestock grazing will be restricted (although it is permitted in wilderness areas), that four-wheel-drive roads will be closed, that a way of life will be destroyed so that a backpacking elite may sample the joys of solitude.

To wilderness advocates, southern Utah is an irreplaceable jewel that is worth far more as an unspoiled landscape than as a collection of exploitable resources.<sup>503</sup>

Conservationists in the past have sponsored legislation to protect 5.7 million acres of the southern Utah land, equalling ten percent of the state's entire mass.<sup>504</sup> Now, in 1995, Utah's congressional delegation

499. *See id.* at 427.

500. 30 U.S.C. §§ 1201-1328 (1982) (cited in Cowart & Fairfax, *supra* note 11, at 427).

501. *See* Cowart & Fairfax, *supra* note 11, at 427.

502. The "Grand Staircase" is a "cascade of white, pink and vermilion cliffs that foreshadow the scenic glories of the Grand Canyon 50 miles to the southeast." Tom Kenworthy, *Conservation Debate Rages Over Much of Utah's "Grand Staircase,"* WASH. POST, June 17, 1995, at A3. According to the *Post*, southern Utah "has more acreage with wilderness potential than almost any other state in the Lower 48." *Id.*

503. *Id.*

504. *Id.*

and Governor Mike Leavitt (R) have proposed legislation that would protect only about 1.9 million acres of the land, as originally proposed by the Bureau of Land Management during President Bush's tenure.<sup>505</sup> Thus, the parties stand 3.8 million acres apart.

Obviously, a dispute over what to do with so many millions of acres of federal land is a significant one. Author Wallace Stegner described the debate generally as " 'a conflict between the material and the spiritual.' "<sup>506</sup> The states, filled with individuals whose livelihoods are directly affected by the designation, can and should represent the material side. But the states also are filled with individuals whose lives are enhanced by the " 'original and unchanging beauty' "<sup>507</sup> of the public lands, and so all of the states must represent the spiritual side, as well. In the same way, the federal government is comprised of representatives of all individuals—businessmen, environmentalists, and others—and must balance and protect their diverse interests. Hopefully, new judicial and federal support for shared authority will encourage dialogue and compromise between the various constituencies, for the solution can only be one that appreciates all elements, both material and spiritual. Our system of federalism, with equal states and equal citizens, requires that we work toward nothing less.

## V. CONCLUSION

As resources appear less infinite, concern of individual states for their respective welfare grows. Western states with large land mass but little control over it, and little hope of meaningfully populating it, are worried about their relative clout and the fate of their territory.<sup>508</sup> State assumption of greater responsibility over federal public lands increasingly will be needed in order to compensate for shrinking federal appropriations for management of these lands.<sup>509</sup> A spending bill approved by the Senate in August 1995, for example, would reduce the Interior

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505. *Id.* Even this narrower protection is opposed by county officials in the affected area of the State; some would accept protection of half this amount of land, while others "proposed that no land from their counties be included." *Id.*

506. *Id.* (quoting Wallace Stegner in 1990).

507. *Id.* (quoting the words of President Lyndon B. Johnson in the original 1964 Wilderness Act).

508. Some increase in state population has had the effect of increasing the political power of these states in the West. The Western population rose from 28.1 million in 1960 to 43.2 million in 1980, resulting in an increased number of representatives in Congress, from 69 to 85. See Cowart & Fairfax, *supra* note 11, at 409-10.

509. Governor Janklow, for example, proposed that his State manage national parks within South Dakota "as a response to threats in the Republican-controlled Congress of significant budget cuts for the National Park Service." Mercer, *supra* note 464, at A8.

Department's current \$12 billion budget by \$1.5 billion, cutting programs for federal land management, national parks, Indian tribal governments, scientific research, and wildlife refuges.<sup>510</sup> As Senator Daschle warned, "[i]f there comes a time when resources become more scarce and budgets are cut, we may be left with no option but to turn [national] parks over to the state."<sup>511</sup>

States in the West are not the only ones worried about their standing in the federal system. States in the heavily populated Northeast, for example, are also worried, and some see an altogether different kind of federalism as necessary to address these state problems. Senator Daniel Patrick Moynihan (D-N.Y.)—the man "who predicted years in advance that out-of-wedlock births would nearly destroy the black family and that the Soviet Union would collapse"<sup>512</sup>—now predicts that apportionment in the Senate may have to be changed, in order to protect the Northeast States from being drained of their resources and continuously denied relief by "coalitions of sparsely populated states with only a fraction of their constituents."<sup>513</sup> Senator Moynihan objected that "New York and other northeastern states have come out on the short end, sending more tax money to Washington than they have gotten back in federal largess."<sup>514</sup> The concern, specifically, is for the stature of the State; as Senator Moynihan put it, "[t]he influence of New York in the nation, . . . in all the meanings of the term influence, is in jeopardy."<sup>515</sup>

Thus, across a broad geographic tableau, in state and federal halls of power, and in the Supreme Court of the land, there is a sense that a profound change must occur in the relationship between the states and the federal government. To preserve the federal system itself, and to protect individual components such as the public lands and resources, a new cooperative federalism is emerging. This sharing of authority is

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510. *Senate Votes to Cut Interior's Budget; Land, Indian Tribes, Energy Funding Hit*, WASH. POST, Aug. 10, 1995, at A13.

511. Mercer, *supra* note 464, at A8 (quoting Senator Daschle). Representative Joel Hefley (R-Co.) already has proposed closing some units of the National Park Service. *Id.*

512. Judith Havemann, *Moynihan Poses Questions of Balance—Senate's Proven Prognosticator Predicts the Apportionment Issue Will Divide States*, WASH. POST, Aug. 14, 1995, at A15.

513. *Id.* Senator Moynihan's immediate cause for concern is the proposal that Congress provide block grants to the states, to be used by the states to provide benefits to the poor. The problem for the states with large populations is that the Senate would determine the amounts to be distributed to each state, such that "the multitude of small states could trample the few states with large populations." *Id.*

514. *Id.* (quoting Senator DANIEL P. MOYNIHAN, *THE FEDERAL BUDGET AND THE STATES* (19th ed. 1995)).

515. *Id.*

based in history and on the Constitution; it ensures and strengthens the equal footing of each state, and hence, the United States.

But this cooperative relationship must be recognized and clearly affirmed by the Court and by the political powers of both the states and the federal government. The Court should apply its new federalism philosophy to the public lands issues, encouraging federal and state cooperation and finding federal preemption only in the most narrow and limited instances. Federal statutes should be enforced—or rewritten if necessary—to require more, true federal and state efforts. State and local governments should evaluate resource issues, determine policy goals and offer planning initiatives, so that they may be a meaningful participant in the lands management process.

Only then will all parties engage in the same debate, in two legitimate legislative forums, rather than each faction doing battle alone, triumphant perhaps, but within only one forum. Realization of this new federalism in the public lands will not destroy the foundations of our landed society. Rather, it is the balance of powers, the independence and interchange of two governments, that will allow our system of federalism to be truly representative and protective of the will of the people.

Almost two centuries ago, Chief Justice Marshall declared that “no political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass.”<sup>516</sup> In an identical sense, no one—not the Framers, not the federal government, and certainly not the States—has ever contemplated a portrait of America that has no states, but simply has one common land mass. All lands within this country fall within a state’s borders. By this fact, our system is a federal system, at all times a system of two powers, state and federal.

As constitutional scholar Laurence Tribe has noted, “[i]f states are to have any real meaning, Congress must also be prevented from acting in ways that would leave a state formally intact but functionally a gutted shell.”<sup>517</sup> Contrary to the founders’ intent, Congress has deprived the western states of vast degrees of their power over much of the land within their borders, prompting concerns about the relative authority of these states in the federal system that cannot simply be dismissed. A meaningful federalism in the public lands can begin the process of redressing this historical disparity. And as a partner in authority, the states and their citizens instead can focus their energies on finding effective measures that meet the diverse agendas of the state and the

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516. *M’Culloch*, 17 U.S. (4 Wheat.) at 403, quoted in *United States Term Limits*, 115 S. Ct. at 1872 (Thomas, J., dissenting).

517. TRIBE, *supra* note 89, § 5-20, at 388.

nation, as they and the federal government address the resource problems of the day.

