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A Historical Reassessment of Congress's "Power to Dispose of" the Public Lands

Jeffrey M. Schmitt

University of Dayton, jschmitt1@udayton.edu

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A HISTORICAL REASSESSMENT OF CONGRESS'S “POWER TO DISPOSE OF” THE PUBLIC LANDS

Jeffrey Schmitt*

The Property Clause of the Constitution grants Congress the “Power to Dispose” of federal land. Congress uses this Clause to justify permanent federal land ownership of approximately one-third of the land within the United States. Legal scholars, however, are divided as to whether the original understanding of the Clause supports this practice. While many scholars argue that the text and intent of the framers show that Congress has the power to permanently own land within the states, others contend that these sources demonstrate that Congress has a duty to dispose of all federal land not held pursuant to another enumerated power. This scholarly debate has become increasingly important in recent years as a popular movement for state ownership of federal land has reemerged in the West.

This Article argues that the debate over the history of the Property Clause should move beyond the Founding. The original meaning of the text, the intent of the framers, and the precedent of the early Supreme Court simply do not resolve the issue of whether Congress’s Duty to Dispose includes the power to permanently retain land within the states. This Article therefore provides the first detailed examination of how Congress’s Power to Dispose has been understood since the Founding. It concludes that, although Westerners have repeatedly challenged Congress’s power when federal land policy has restricted western development, dominant opinion has always supported a broad construction of Congress’s power. In fact, those who favor federal land ownership have long argued that giving land to individual states would violate a constitutional obligation for Congress to use the land for the common benefit. When constitutional history is properly applied to Congress’s Power to Dispose, it strongly supports federal land ownership.

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INTRODUCTION

The Property Clause of Article IV provides: "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."¹ Pursuant to this authority, the federal government owns nearly one-third of the land within the United States.² A growing popular movement in the West, however, demands that the federal government transfer ownership to the states.³ In 2012, for example, Utah passed legislation purporting to require Congress to transfer title to more than thirty million acres to the state.⁴ Since that time, politicians have pushed for similar legislation in other states and in Congress.⁵ Radicals like Ammon and Cliven Bundy, moreover, have galvanized Western support for the movement and drawn national attention to the issue of federal land ownership.⁶ Although economic and political factors are also at play, the movement's supporters argue that federal land ownership within the states violates the original meaning of the Constitution, the intent of the framers, and the equal sovereignty of the states.⁷

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1. U.S. CONST. art. IV, § 3, cl. 2.
 2. See, e.g., Donald J. Kochan, *Public Lands and the Federal Government's Compact-Based "Duty to Dispose": A Case Study of Utah's H.B. 148—The Transfer of Public Lands Act*, 2013 BYU L. REV. 1133, 1137 (2013).
 3. See Kirk Johnson, *Siege Has Ended, but Battle Over Public Lands Rages On*, N.Y. TIMES (Apr. 14, 2017), <https://perma.cc/9YJZ-MLL5>. See generally Uma Outka, *State Lands in Modern Public Land Law*, 36 STAN. ENVTL. L.J. 147, 152–62 (2017).
 4. Transfer of Public Lands Act, H.B. 148, 59th Leg., Gen. Sess. (Utah 2012), codified at UTAH CODE ANN. §§ 63L-6-101 to 63L-6-104 (2017).
 5. See Outka, *supra* note 3, at 152–60.
 6. See, e.g., Leah Sottile, *Jury Acquits Ammon Bundy, Six Others for Standoff at Oregon Wildlife Refuge*, WASH. POST (Oct. 27, 2016), <https://perma.cc/HEL2-FPH5>.
 7. See *id.*; George R. Wentz Jr. & John W. Howard, *Americans in the Western States are Denied Equal Rights*, NAT'L REV., (Aug. 2, 2016), <https://perma.cc/HSN5-LR4W>; JOHN W. HOWARD ET AL., LEGAL ANALYSIS OF THE LEGAL CONSULTING SERVICES TEAM PRE-

There is a long-standing scholarly debate over whether these arguments are correct.⁸ Many legal scholars argue that the founding generation believed that Congress had a constitutional duty to divest all federal land held under the Property Clause.⁹ Under this reading of history, indefinite federal landownership was not seen as legitimate until attitudes towards federal power and the environment changed during the twentieth century.¹⁰ Other scholars, however, dispute this reading of history and argue that the founding generation and early Supreme Court believed that Congress had the power to permanently own land within the states.¹¹ All of these scholars rely almost exclusively on the text, evidence of framers' intent, and early court precedent.

This Article argues that both sides of the debate are wrong to assume that the Founding provides an answer. Like so many other concrete issues of modern constitutional law, the framing generation had no reason to discuss the issue of whether Congress has the power to permanently own land within the states. Although the federal government owned vast tracts of western land, it owned no land within the existing states. Moreover, sources that address only Congress's power over the territories are inconclusive, because permanent federal ownership within the states arguably raises very different concerns about state sovereignty and federalism. The original public meaning of the text, intent of the founding generation, and precedent of the early Supreme Court are therefore inconclusive.

When the original meaning of the Constitution does not resolve a concrete issue of law, the Court and most theories of constitutional interpretation give significant weight to longstanding historical practices. This Article there-

PARED FOR THE UTAH COMMISSION FOR THE STEWARDSHIP OF PUBLIC LANDS (2015), <https://perma.cc/E6MM-4CGN>.

8. Although scholars vigorously debate the history, modern legal doctrine strongly supports federal land ownership. See ROBERT B. KEITER & JOHN C. RUPLE, WALLACE STEGNER CTR. FOR LAND, RES., & ENV'T, A LEGAL ANALYSIS OF THE TRANSFER OF PUBLIC LANDS MOVEMENT, WHITE PAPER NO. 2014-2, at 2 (2014), <https://perma.cc/Q23Q-BA3C>; cf. Nick Lawton, *Utah's Transfer of Public Lands Act: Demanding a Gift of Federal Lands*, 16 VT. J. ENVTL. L. 1, 17-34 (2014).
9. See Albert W. Brodie, *A Question of Enumerated Powers: Constitutional Issues Surrounding Federal Ownership of the Public Lands*, 12 PAC. L.J. 693, 694 (1981); Robert E. Hardwicke, Carl Illig & C. Perry Patterson, *The Constitution and the Continental Shelf*, 26 TEX. L. REV. 398, 419-23 (1948); Kochan, *supra* note 2, at 1145-49, 1159-65; Carolyn M. Landever, *Whose Home on the Range? Equal Footing, the New Federalism and State Jurisdiction on Public Lands*, 47 FLA. L. REV. 557, 578-79 (1995); Robert G. Natelson, *Federal Land Retention and the Constitution's Property Clause: The Original Understanding*, 76 U. COLO. L. REV. 327, 377 (2005); C. Perry Patterson, *The Relation of the Federal Government to the Territories and the States in Landholding*, 28 TEX. L. REV. 43, 72-73 (1949).
10. See Landever, *supra* note 9, at 578-79, 588-89.
11. See Eugene R. Gaetke, *Refuting the 'Classic' Property Clause Theory*, 63 N.C. L. REV. 617 (1985); Dale Goble, *The Myth of the Classic Property Clause Doctrine*, 63 DENV. U. L. REV. 495 (1985).

fore relies on previously overlooked congressional debates and historical scholarship to provide the first detailed account of how Congress's Power to Dispose has been understood throughout constitutional history.¹² Unlike many other modern issues, the question of whether Congress can permanently own land within the states has been asked and answered several times throughout history. Since the issue first arose in the early nineteenth century, the dominant view has always been that Congress's power to own land is limited only by a duty to act for the common benefit. Although prominent Westerners have challenged this view whenever Congress has limited disposal or resource use—particularly in the 1830s, 1930s, 1970s, and today—the argument that Congress has a duty to dispose of federal land within the states has never been widely accepted. Post-Founding constitutional history therefore strongly supports a broad construction of Congress's Power to Dispose that includes the power to permanently own land within a state.

Ironically, although the constitutional argument against federal land ownership relies heavily on history, there is strong historical support for the idea that Congress should not transfer land to the states. Ever since lands were first ceded to the national government by the original states, Congress's power has been understood to be limited by an obligation to act for the common benefit. Whenever Westerners have claimed that the states are entitled to the land within their borders, defenders of federal land policy have argued that the land

12. During the final editing stages of this Article several new articles were posted on SSRN or published that discuss the history of constitutional arguments over public lands. See Gregory Ablavsky, *The Rise of Federal Title*, 106 CAL. L. REV. (forthcoming 2018) (analyzing how title to property became federalized in the early republic); John D. Leshy, *Are U.S. Public Lands Unconstitutional?*, 69 HASTINGS L.J. 499 (2018) (responding to the legal analysis prepared in support of Utah's legislation); Ian Bartrum, *Searching for Cliven Bundy: The Constitution and Public Lands*, 2 NEV. L.J.F. 67 (2018) (focusing on and refuting the argument that the federal government has a contractual obligation to divest federal lands after statehood).

Moreover, several other law review articles discuss the history of post-Founding federal land policy. See, e.g., Michael C. Blumm & Olivier Jamin, *The Property Clause and Its Discontents: Lessons from the Malheur Occupation*, 43 ECOLOGY L.Q. 781, 794–809 (2016); Lawton, *supra* note 8, at 5–9. There is also a rich body of historical work on public land policy. See generally JOHN R. VAN ATTA, *SECURING THE WEST: POLITICS, PUBLIC LANDS, AND THE FATE OF THE OLD REPUBLIC, 1785–1850* (2014); DANIEL FELLER, *THE PUBLIC LANDS IN JACKSONIAN POLITICS* (1984); PAUL W. GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* (1968); RAYNOR G. WELLINGTON, *THE POLITICAL AND SECTIONAL INFLUENCE OF THE PUBLIC LANDS, 1828–1842* (1914).

This Article differs in many important respects. In particular, this Article focuses on the narrow issue of whether the Property Clause has historically been understood to justify indefinite federal landownership within the states. This Article also provides the most detailed account of constitutional arguments around public lands outside the courts. Finally, although each of the 2018 articles agrees that federal landownership is constitutional, this Article uniquely develops the arguments that: (1) the common benefit principle has historically been understood to be a significant limitation on Congress's power; and (2) the equal sovereignty principle is historically sound but fully consistent with federal land ownership.

must be used for the benefit of all rather than any individual state or interest. Today, environmental and outdoor recreation groups make the same argument when they assert that federal land is an "American birthright" that "belongs to all of us."¹³

History also refutes the idea that federal land ownership violates the principle of equal state sovereignty because it is concentrated in the western states. Westerners advanced this same argument in the early nineteenth and twentieth centuries. Defenders of the federal land policy responded by distinguishing land ownership from sovereignty over the land. Federal ownership, they asserted, no more infringed on state sovereignty than private land ownership. Although federal and private ownership limit state control of the land, the state retains some regulatory power in both instances. The concentration of federal land within the western states, they further asserted, no more violated the principle of equal state sovereignty than the fact that Congress's power to lay tariffs had greater implications in the East.

Court precedent supports these conclusions. Early cases broadly interpret Congress's power over the territories and adopt the common benefit principle.¹⁴ When the Court finally reached the issue of Congress's power over land within the states in the early 1900s, it adopted the same broad interpretation that Congress and the executive had operated under for the past century.¹⁵ By mid-century, it explicitly rejected the equal sovereignty argument.¹⁶ In 1974, the Court in *Kleppe v. New Mexico*¹⁷ broadly asserted that Congress's power over federal land in New Mexico is "without limitation[]."¹⁸

The remainder of this Article is divided into five parts. Part I examines the text of the Property Clause, the framers' intent, and the proper role of history in the Clause's interpretation. Part II recounts the history of the public lands through the Founding. Part III provides the first in-depth account of the meaning of Congress's Power to Dispose prior to the Civil War, focusing on several key congressional debates. Part IV analyzes subsequent history and precedent on Congress's power to own land. Part V summarizes the history discussed in Parts I through IV and applies it to the modern debate over transferring federal land to the states.

13. *Congress Puts Public Lands in the Crosshairs*, ACCESS FUND (Jan. 10, 2017), <https://perma.cc/JBM3-4L6N>; Annika Kristiansen, *This Land Was Made for You and Me*, SIERRA CLUB (Feb. 6, 2017), <https://perma.cc/9HFH-NH94>.

14. See *infra* Section III.E.

15. See *infra* Section IV.B.

16. See *infra* notes 410–13 and accompanying text.

17. 426 U.S. 529 (1976).

18. *Id.* at 539; see *infra* notes 406–13 and accompanying text.

I. INTERPRETING THE PROPERTY CLAUSE: TEXT, INTENT, AND THE NEED FOR A MORE COMPLETE HISTORY

At a minimum, conventional constitutional interpretation includes an analysis of text, structure, original intent, history, and precedent.¹⁹ The text and structure of the Constitution, however, do not resolve the issue of whether the Property Clause grants the federal government the power to permanently own land within the states. Although scholarship on the history of the Property Clause has focused almost exclusively on its original meaning in 1787, the framers' intent is similarly unhelpful. Because these traditional sources of constitutional meaning are inconclusive, an analysis of Post-Founding history is needed.

A. *The Text of the Property Clause*

The Property Clause of Article IV provides: "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."²⁰ Samuel Johnson's *A Dictionary of the English Language*, which is commonly seen as the most authoritative Founding Era dictionary,²¹ defines "To dispose of" as: "7. To apply to any purpose; to transfer to any person; 8. To put in the hands of another; 9. To give away; 10. To employ to any end; 11. To place in any condition; 12. To put away by any means."²² "Territory" is defined as "[l]and; country; dominion; district," and "Property" is defined, in relevant part, as a "[p]ossession held in one's own right."²³ Giving the text its dictionary meaning, a reader in the late eighteenth century therefore could have understood it to grant Congress the authority to use, sell, give away, and regulate federal land and other possessions. Because land that is retained and regulated is "disposed of," the text does not clearly resolve the issue of whether the federal government can permanently retain land within a state.

Although when viewed in isolation the Property Clause does not require Congress to sell or transfer federal land, Natelson argues that such a requirement can be inferred from the structure of the Constitution.²⁴ Under this view,

19. For more on the standard forms of constitutional argument, see PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12–13 (1991).

20. U.S. CONST. art. IV, § 3, cl. 2.

21. See Gregory Maggs, *A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution*, 82 GEO. WASH. L. REV. 358, 359 (2014).

22. SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* (10th ed., London, Oxford Univ. Press 1792). Definitions 1–6 apply to the phrase "to dispose" rather than "to dispose of." *Id.* Although "Power" has twelve definitions, the first is "[c]ommand; authority; dominion; influence." *Id.*

23. *Id.*

24. See Natelson, *supra* note 9, at 364.

because the Property Clause does not explicitly grant the federal government the power to own or acquire land, such a power can only be derived from the powers enumerated in Article I. Without the power to own, Natelson argues, the "power" to dispose becomes a mandatory duty to sell or transfer.²⁵ Under this narrow reading of Congress's power, for example, the federal government could permanently own a military base or post office because Article I grants Congress the power to provide for the common defense and to establish post offices.²⁶ Because nothing in Article I would similarly support the establishment of national parks, however, this narrow interpretation would imply a duty to sell or transfer all park and forest land to the states or private parties.

The text, however, need not be read so narrowly. Just as the power to indefinitely own land to form a post office can be implied from Article I, Section 8, the power to acquire and permanently own national parks could be implied from the Property Clause itself. If Congress has the power to "dispose" and "make needful Rules and Regulations," then it must also have the power to own land. The Property Clause therefore only makes sense against a background of federal land ownership.²⁷ In fact, at the time of the Founding, the federal government owned vast tracts of western land, and the Confederation Congress extensively regulated its sale and use.²⁸ Regardless of whether the power derives from the Property Clause, is implied from the structure of the Constitution, or is an inherent incident of national sovereignty, it is reasonable to conclude that the federal government has the power to own land.²⁹

25. *Id.*

26. U.S. CONST. art. I, § 8.

27. The narrow interpretation, moreover, would render the Property Clause superfluous. For example, if Article I grants Congress the power to acquire and own land to build a post office, then it would likewise implicitly grant Congress the power to regulate the use of the post office land and sell or transfer the land when no longer needed.

28. *See infra* Section II.

29. The federal government's power to acquire new land, however, is arguably distinguishable. It could be argued that, although the Property Clause presupposes the existence of federal land, the text does not similarly imply that the federal government has the power to acquire new land. In fact, Thomas Jefferson struggled with the constitutionality of the Louisiana Purchase because he was sympathetic to this reading of the text, and Justice Taney infamously held that the Property Clause did not apply to newly acquired land in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 399 (1857). *See, e.g.*, Robert Knowles, *The Balance of Forces and the Empire of Liberty: States' Rights and the Louisiana Purchase*, 88 IOWA L. REV. 343 (2002); Letter from Thomas Jefferson to John Dickinson (Aug. 9, 1803), in 10 THE WORKS OF THOMAS JEFFERSON IN TWELVE VOLUMES, FEDERAL EDITION 28 (Paul Leicester Ford ed., 1905). As a textual matter, however, the power to acquire land could be implied from various sources, including the Property Clause, the treaty power, the power to declare war, and inherent national sovereignty. A full discussion of the federal government's power to acquire land is beyond the scope of this Article, which focuses on the federal government's power to own and retain land within a state. Even if the acquisition of new

Some scholars, however, contend that the Property Clause cannot justify permanent land ownership within a state when read in light of the Enclave Clause.³⁰ The Enclave Clause grants Congress “exclusive Legislation” over the District of Columbia and “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.”³¹ These scholars contend that, because the Enclave Clause clearly authorizes federal land ownership within the states, it necessarily implies that the federal government cannot own land within the states if its requirements are not met.³²

The Enclave Clause, however, does not require such a narrow interpretation of the Property Clause. First, each clause refers to a different geographical area: the Property Clause refers to the land of the United States, which, as discussed below, was primarily located outside of the states at the time of Ratification, whereas the Enclave Clause refers to land within the states, including the states that existed at the time of Ratification. Second, the clauses arguably grant Congress different levels of regulatory authority.³³ Given these differences, the Enclave Clause’s relatively clear grant of authority to permanently own land within the states implies nothing about whether Congress can do the same under the Property Clause.

In sum, the original meaning of the text of the Property Clause does not foreclose the possibility that Congress could permanently own land within the states. Moreover, notwithstanding scholarly arguments to the contrary, the text implies that Congress has the power to own land under the Property Clause. The text, however, says nothing—explicitly or implicitly—about whether Congress has the power to either (1) own land within a state under the Property Clause or (2) do so on a permanent basis.

B. *Original Intent and the Property Clause*

Original intent also provides few answers. Because the United States did not own significant amounts of land within a state until Ohio was admitted to the Union in 1803, it should be no surprise that this issue was ignored during the Founding Era. What little evidence exists, however, indicates that the

land was unconstitutional, this would not necessarily dictate that federal landholding within an existing state is unconstitutional today.

30. See Landever, *supra* note 9, at 578; Patterson, *supra* note 9, at 60–61.

31. U.S. CONST. art. I, § 8, cl. 17.

32. See Landever, *supra* note 9, at 578; Patterson, *supra* note 9, at 60–61.

33. The Property Clause grants Congress the power to make “all needful Rules and Regulations,” U.S. CONST. art. IV, § 3, cl. 2, while the Enclave Clause grants Congress a power of “exclusive legislation,” *id.* art. I, § 8, cl. 17. A full discussion of Congress’s regulatory power under these Clauses, however, is beyond the scope of this Article.

founding generation expected Congress to own land after statehood. This evidence is explored below in Part II.

Before analyzing the historical record, however, it is important to first distinguish between original intent and original expected uses of the powers that were intended. When scholars search for original intent, they ask what the framers understood the text to mean. In the words of Keith Whittington: "The point of originalist inquiry is not to ask Madison what he would do if he were a justice on the Supreme Court hearing the case at issue. The point is to determine what principle Madison and his contemporaries adopted, and then to figure out whether and how that principle applies to the current case."³⁴

Proponents of the narrow view of the Property Clause often misuse original intent. They frequently argue that, because the framing generation expected Congress to eventually sell the federal lands, Congress's powers under the Property Clause should be construed narrowly to require divestiture.³⁵ In making this argument, however, they do not cite to a single authority stating that the founding generation thought Congress was constitutionally required to dispose of federal lands. Instead, they rely on the common expectation that Congress would exercise its Power to Dispose by selling and transferring the land for private development.³⁶

This argument, however, conflates original intent with how the Founders expected Congress to use its powers. Even for those who care about intent, it is only the former that is important. We care about original intent because the Founders' understanding of constitutional meaning—not their predictions about future policy—are important. The argument for the narrow view, for

34. Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 611 (2004).

35. See sources cited *supra* note 9. This is also a popular argument in the land transfer movement. See sources cited *infra* note 426.

36. The report on the constitutionality of Utah's land transfer legislation, for example, discusses early federal land policy at length and contends that, because its goal was the private development of the land for productive uses, Congress should be restrained to this same goal today. HOWARD ET AL., *supra* note 7, at 114–18. Nowhere in the 150-page report, however, is there any quotation from a Founding Father explicitly stating that the federal government lacks the power to permanently own land within a state. See *id.* Others similarly conflate early federal policy with the early understanding of Congress's constitutional powers. See, e.g., William Perry Pendley, *The Federal Government Should Follow the Constitution and Sell Its Western Lands*, NAT'L REV. (Jan. 19, 2016), <https://perma.cc/VMZ3-94Z4> ("The Founding Fathers intended all lands owned by the federal government to be sold."); Landever, *supra* note 9, at 567, 576 ("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."); Natelson, *supra* note 9, at 368 ("There is another piece of evidence that disposal of property not held for enumerated purposes was to be mandatory: the universal expectation that the lands would, in fact, be disposed of."); cf. Kochan, *supra* note 2, at 1158–60 (arguing that Utah's enabling act requires Congress to sell or transfer all federal land within the state because Utah agreed to the conditions of the act with the expectation that Congress would do so).

example, is akin to arguing that, because the framers did not expect that we would ever declare war on Sweden, Congress lacks the power to do so. To take another example, even if it could be demonstrated that the framers never thought that Congress would impose a tariff as high as sixty percent, this would have no implications for Congress's power to do so. What matters is the framers' understanding of Congress's powers, not the legislation that the framers expected Congress to enact. The Founders' expectation that Congress would decide to sell the federal lands to private parties thus tells us nothing about whether they thought Congress had a constitutional obligation to do so.

C. *Post-Ratification History and Constitutional Interpretation*

When the text and original intent do not resolve a concrete issue of constitutional law, constitutional interpretation often turns to post-ratification history.³⁷ As the Court recently explained in *NLRB v. Noel Canning*,³⁸ the "Court has treated [historical] practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era."³⁹ Descriptive accounts of how courts actually decide constitutional cases report that post-ratification history is nearly as important as the history of the Founding.⁴⁰

Post-ratification history is also important to most academic theories of interpretation, including originalist theories.⁴¹ Broadly defined, an originalist theory is one that holds that the original understanding of the Constitution

37. See *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2106–09 (2015) (using post-ratification history to "confirm" that the President has the exclusive power to recognize a foreign state); *Mistretta v. United States*, 488 U.S. 361, 401 (1989) ("[T]raditional ways of conducting government . . . give meaning' to the Constitution." (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) ("Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them."))); *The Pocket Veto Case*, 279 U.S. 655, 689 (1929) ("Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character."); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819) ("An exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.").

38. 134 S. Ct. 2550 (2014).

39. *Id.* at 2560.

40. See, e.g., Jack M. Balkin, *The New Originalism and the Uses of History*, 82 *FORDHAM L. REV.* 641, 651–53 (2013); Sara Aronchick Solow & Barry Friedman, *How to Talk About the Constitution*, 25 *YALE J.L. & HUMAN.* 69, 78, 81–83, 86–88 (2013).

41. Scholarship on the history of the Property Clause has been heavily influenced by originalism. See generally Natelson, *supra* note 9.

carries the force of binding law.⁴² Today, most originalists search for the original public meaning of the text, i.e., the meaning that an ordinary reader at the time of the Founding would attach to the document.⁴³ Because the text of the Constitution is often vague and ambiguous, however, many originalists concede that original public meaning cannot answer every concrete issue of constitutional law.⁴⁴

Although originalists focus primarily on the Founding, post-ratification history is also relevant. According to Justice Scalia, post-ratification history is "a critical tool of constitutional interpretation" because it provides strong evidence of original public meaning.⁴⁵ Historical practices can also be important to originalist theories of construction when the original public meaning of the text does not provide a concrete answer.⁴⁶

Many scholars who advance non-originalist or "living constitutionist" theories of interpretation also place great weight on post-ratification history. According to David Strauss's theory of common law constitutional interpretation, for example, "the Constitution should be followed [in part] because its provisions reflect judgments that have been accepted by many generations in a variety of circumstances."⁴⁷ Barry Friedman, moreover, "argues for grounding constitutional interpretation in all of our constitutional history, rather than in the history of the Founding alone."⁴⁸ Larry Kramer similarly argues that "to

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42. Lawrence B. Solum, *We Are All Originalists Now*, in CONSTITUTIONAL ORIGINALISM: A DEBATE 1, 20 (2011).
 43. Whittington, *supra* note 34, at 609–10. When originalism first emerged as a theory of constitutional interpretation, scholars searched the original intent of the framers and ratifiers. So-called "new originalists" shifted their analysis to original meaning in part because of the problems associated with finding and applying original intent. *See, e.g., id.* at 610–11; Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620–21 (1999).
 44. *See* Barnett, *supra* note 43, at 645; Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 547 (2003); Whittington, *supra* note 34, at 611–12; Solum, *supra* note 42, at 25–26.
 45. *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008) (relying on nineteenth-century history to determine the original public meaning of the Second Amendment).
 46. Originalist Lawrence Solum even goes so far as to say that "an originalist might accept that a long-standing historical practice that has generated substantial reliance might be lawful, even though it turns out to be contrary to original meaning." Solum, *supra* note 42, at 35. John McGinnis and Michael Rappaport, moreover, argue that the text should be interpreted using original methods of interpretation. *See generally* John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009). According to Caleb Nelson, the Founders thought that, when the text was unclear, deliberate actions from Congress or the judiciary would "settle" or "liquidate" constitutional meaning and thus provide a "permanent exposition of the constitution." Nelson, *supra* note 44, at 527–29 (quoting James Madison).
 47. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 891 (1996).
 48. Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 7 (1998).

conceive the Constitution as a dynamic framework of evolving institutions and restraints makes history central to the interpretive enterprise. But the history that matters is not confined to the Founding, or to specific Founding moments.⁴⁹ Bruce Ackerman goes so far as to argue that widely accepted constitutional norms can change constitutional meaning even without formal amendments.⁵⁰

In sum, post-Founding history is important. Parts III and IV therefore examine post-ratification history and argue that it overwhelmingly supports a broad view of Congress's power under the Property Clause that includes the power to permanently own land within the states. History further demonstrates that permanent federal land ownership is fully consistent with the equal sovereignty principle and that transferring federal land to the states would violate Congress's constitutional duty to use the land for the common benefit.

II. ARTICLES OF CONFEDERATION TO THE FOUNDING

By the time of the Founding, the federal government owned vast tracts of land and a national consensus had emerged around strict federal control of western settlement. The decision of how and when to dispose of the lands was thus understood to reside exclusively with Congress. Because federal lands were located outside the borders of the original states, however, the specific issue of whether the federal government has the power to indefinitely own and control land within the states under the Property Clause was neither raised nor resolved.

A. *The Confederation Period*

Many of the original colonies had claims to vast tracts of land in the West. Through charters and land grants, the British Crown granted Massachusetts, Connecticut, New York, Virginia, North and South Carolina, and Georgia territory extending to the Pacific Ocean.⁵¹ During the Revolution, states that lacked such territorial claims demanded that the western lands be ceded to the federal government for the common benefit.⁵² In 1776, Maryland's legislature resolved that, because the public lands were obtained with "the blood and treasure of the United States, such lands ought to be considered as a common

49. Larry Kramer, *Fidelity to History—And Through It*, 65 *FORDHAM L. REV.* 1627, 1638 (1997).

50. See generally BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998).

51. JAMES RASBAND, JAMES SALZMAN & MARK SQUILLACE, *NATURAL RESOURCES: LAW AND POLICY* 82 (2d ed. 2009).

52. *Id.* at 83.

stock."⁵³ Maryland later threatened to not ratify the Articles of Confederation unless the western lands were ceded and sold to retire the national war debt.⁵⁴ New York thus relinquished its western land claims in 1780.⁵⁵

To encourage further cessions from the states, Congress passed a resolution in October of 1780 that embodied an emerging national consensus on territorial policy.⁵⁶ The resolution provided that any territory ceded to the federal government would be "settled and formed into distinct republican states" that would "become members of the federal union" with the same "rights of sovereignty, freedom and independence, as the [original] states."⁵⁷ Congress thus promised that the United States would have no colonies or dependent provinces. The resolution further guaranteed that the ceded lands would be "disposed of for the common benefit of the United States."⁵⁸

Soon after Congress passed the resolution, Virginia, which had the most significant western land claims, passed an act of cession in 1781.⁵⁹ Like Congress's 1780 resolution, Virginia's act of cession stated that Congress could take the land only on the condition that it be held as a "common fund for the use and benefit" of all states and disposed of only "for that purpose, and for no other use or purpose whatsoever."⁶⁰ Virginia's act of cession further provided that the new states formed from the territory must have the same "rights of sovereignty, freedom, and independence, as the other States."⁶¹ By accepting Virginia's cession in 1784, Congress thus again committed to use the territories for the common benefit and admit new states on a condition of equality.

When the Continental Congress began to legislate for the territories, its policy was designed to encourage development. For early Americans, areas of undeveloped wilderness were "barren wilds."⁶² Through cultivation, they thought, the territories would be transformed "from a savage wilderness, to a

53. BLAKE A. WATSON, *BUYING AMERICA FROM THE INDIANS: JOHNSON v. MCINTOSH AND THE HISTORY OF NATIVE LAND RIGHTS* 110–16 (2012).

54. *Id.*

55. See Arthur Bestor, *Constitutionalism and the Settlement of the West: The Attainment of Consensus, 1754–1784*, in *THE AMERICAN TERRITORIAL SYSTEM* 13, 20 (John Porter Bloom ed., 1973).

56. See *id.* at 21.

57. See *id.* (quoting 18 *JOURNALS OF THE CONTINENTAL CONGRESS* 915–16 (1910)).

58. *Id.*

59. Peter A. Appel, *The Power of Congress "Without Limitation": The Property Clause and Federal Regulation of Private Property*, 86 *MINN. L. REV.* 1, 21–22 (2001). By 1802, each of the landholding states had ceded its territory to the federal government. See RASBAND ET AL., *supra* note 51, at 84.

60. GATES, *supra* note 12, at 52.

61. *Id.*

62. PETER S. ONUF, *STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE* 8 (1987) (quoting JONATHAN LORING AUSTIN, *AN ORATION, DELIVERED JULY 4, 1786* (Boston, Peter Edes 1786)).

civilized field that shall blossom like the rose.”⁶³ Under eighteenth century thinking, natural resources were useful only when developed, and such cultivation was “interesting, noble and august.”⁶⁴ Development by white settlers was even used as a justification for taking lands from Native Americans so that those lands could be used to their full commercial potential.⁶⁵ Americans thus universally expected that, when territory was disposed for the common good, it would be sold to private parties for cultivation.⁶⁶

Unorganized settlement of the western territories, however, was perceived to be a danger to the Union. Without an active federal plan, settlers would haphazardly claim prime lands across the territories. Policymakers worried that diffuse settlements would become politically and economically isolated from the Union, provoke conflict with Native Americans, and even look to European powers for protection.⁶⁷ In 1784, George Washington expressed a common fear when he stated that Westerners could “become a distinct people from us, have different views, different interests,” and “be a formidable and dangerous neighbour.”⁶⁸

Revenue from land sales was also needed to relieve the country of the onerous debt incurred during the Revolutionary War.⁶⁹ People generally expected that Congress would systematically sell the public lands to retire the nation’s debts.⁷⁰ As Congress stated in a 1784 resolution, it considered “vacant territory as a capital resource.”⁷¹

To address these issues, historian John R. Van Atta asserts that “[t]he land system that emerged in the 1780s reflected nation building by *design*.”⁷² Policymakers agreed that effective government was needed to bring order to the territories.⁷³ Disposal of the public land, they further believed, needed to be strictly

63. *Id.* at 157, n.30 (quoting an anonymous correspondent to *CONN. COURANT*, Nov. 7, 1785, at 3).

64. *Id.* at 37 (quoting *New-York, July 20*, *FREEMAN'S J.*, July 26, 1786, at 3). Territorial Governor Arthur St. Clair told a crowd that “the ‘pleasure’ of seeing ‘vast forests converted into arable fields, and cities rising in places which were lately the habitations of wild beasts’ was ‘something like that’ of witnessing ‘creation’ itself.” *Id.* at 113 (quoting Governor Arthur St. Clair, Address at Marietta (July 15, 1788), in 2 *WILLIAM HENRY SMITH, THE ST. CLAIR PAPERS* 53–56 (Cincinnati, Robert Clarke & Co. 1882)).

65. *Id.* at 37.

66. See Natelson, *supra* note 9, at 368–74.

67. *ONUF*, *supra* note 62, at 4–5.

68. See Andrew R.L. Clayton, *Radicals in the “Western World”: The Federalist Conquest of Trans-Appalachian North America*, in *FEDERALISTS RECONSIDERED* 81–82 (Doron Ben-Atar & Barbara B. Oberg eds., 1998).

69. See, e.g., VAN ATTA, *supra* note 12, at 17–18.

70. See FELLER, *supra* note 12, at 6.

71. *Id.*

72. VAN ATTA, *supra* note 12, at 6.

73. See *id.* at 43, 242.

limited to ensure that settlements were compact, interconnected, and strategically located.⁷⁴ Extensive federal control over western settlement was seen as essential.⁷⁵

The Confederation Congress therefore passed several ordinances regulating the territories, even though it lacked any authority to do so in the Articles of Confederation. The Ordinance of 1784, as designed by Thomas Jefferson, specified boundaries for new states and authorized settlers to establish territorial governments by "adopting the constitution and laws of any of the original States."⁷⁶ The Ordinance also promised statehood to any new division that obtained a population equal to that of the smallest existing state.⁷⁷ To encourage settlement, the new western states were guaranteed an equal place in the Union.⁷⁸

In the Land Act of 1785, the Confederation Congress developed a system to strategically sell the public lands. Rather than opening all land for settlement, the Land Act required all land to be surveyed before sale, with property lines following a grid system.⁷⁹ The gradual nature of the survey system not only stabilized the market by limiting supply, but it also forced settlers to purchase land near each other.⁸⁰ By clustering land sales near transportation routes, federally managed settlement could simultaneously promote commercial connections with the East, discourage encroachments on lands held by Native Americans, and make defense more practical in the event of conflict.⁸¹ Under this national vision for the West, gradual federal sales to a growing population would drive the settlement of a politically and economically interconnected region.

To determine price, the Land Act utilized an auction system with a minimum price per acre. This system allowed Congress to receive fair market value for land sales, thus benefiting the nation rather than land speculators or squatters. By keeping land prices high, Congress not only hoped to maximize federal revenue, but also to attract settlers of economic means who would be more likely to invest in the land and participate in republican government.⁸²

The Ordinance of 1784, however, did not prove to be an effective system for the political organization of the territories. While Jefferson had assumed there would be rapid emigration to the territories by a population desiring self-

74. See *id.* at 43, 51; ONUF, *supra* note 62, at 5–6.

75. See VAN ATTA, *supra* note 12, at 51.

76. ONUF, *supra* note 62, at 46.

77. *Id.*

78. *Id.* at xix.

79. *Id.* at 40–41.

80. *Id.* at 35, 45. Squatters and speculators were thus problematic because they often took only the prime lands in a region, leaving the rest undeveloped and unconnected. *Id.* at 40–42.

81. *Id.* at 5–7.

82. See VAN ATTA, *supra* note 12, at 36.

government, settlers were deterred by the lack of an effective government and means of self-defense from war with Native Americans.⁸³ On July 13, 1786, Congress thus adopted a report calling for a “colonial” system of temporary government in the territories.⁸⁴

When the Confederation Congress passed the Northwest Ordinance in 1787, it took a much more active role in governing the federal territories. In the early stages of development, a congressionally appointed governor controlled the territory.⁸⁵ When 60,000 free inhabitants lived within a district, it could submit a constitution to Congress and apply for statehood.⁸⁶ Up to five states could be created from the territory, and the Ordinance guarantees that such states would be admitted “on an equal footing” with the existing states.⁸⁷

The Northwest Ordinance also states that Congress would retain ownership over the public lands after statehood. It provides:

The Legislatures of those districts, or new States, shall never interfere with the primary disposal of the Soil by the United States in Congress Assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the bona fide purchasers. No tax shall be imposed on lands the property of the United States.⁸⁸

The drafters of the Ordinance apparently saw no conflict between this provision and the guarantee that the new states would be admitted on an equal footing.

The Northwest Ordinance, moreover, was no ordinary statute. It was widely considered to be a charter for the territories analogous to the British charters for the original colonies.⁸⁹ The Ordinance also provided a blueprint for all future territories. The First Congress quickly reenacted it after Ratification to ensure that it remained good law.

In sum, by the time of the Founding, a national consensus had emerged around public land policy. The federal government, rather than the individual states, would own the public domain and exercise strict control over the settlement of all western lands. Moreover, because the land belonged to the entire

83. ONUF, *supra* note 62, at 52–54.

84. *Id.* at 50.

85. The Northwest Ordinance is available in full at *Transcript of Northwest Ordinance (1787)*, OURDOCUMENTS.GOV, <https://perma.cc/XZ76-C2QN>. A popularly-elected assembly was added when a district had 5000 free male inhabitants. *Id.* § 9. The Ordinance, however, directly prohibited slavery, *id.* art. 6, and guaranteed certain civil liberties, *see, e.g., id.* arts. 1–3.

86. *Id.* art. 5.

87. *Id.*

88. *Id.* art. 4.

89. *See* ONUF, *supra* note 62, at xx, 72. Onuf explains: “This usage permitted the identification of new states with old: the American colonies in the West would recapitulate the colonial experience of the original states and then be recognized as equals.” *Id.* at xx, 49–50.

country, the federal government had an obligation to use the public domain for the common benefit rather than for the benefit of any one state or special interest. Finally, any new state formed from the public lands would be admitted to the Union on an equal footing with the original states.

B. *The Founding*

The records of the Constitutional Convention contain little debate over the Property Clause. On August 18, 1787, a proposal was referred to the committee of detail to grant Congress the powers "to dispose of unappropriated lands of the United States."⁹⁰ Gouverneur Morris later proposed language that would become the modern Property Clause, which was adopted with no debate.⁹¹ In full, the Clause provides: "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."⁹²

Perhaps the most that can be said of the Founders' intent is that they thought the Property Clause authorized Congress to reenact the Northwest Ordinance and pass similar legislation. In Federalist 38, Madison pointed out that the Confederation Congress had created territorial governments and disposed of the federal lands "without the least color of constitutional authority."⁹³ Madison, however did not mean this as a criticism of Congress, because it "could not have done otherwise."⁹⁴ Instead, the Confederation Congress's lack of authority to pass the Northwest Ordinance was "an alarming proof of the danger resulting from a government which does not possess regular powers commensurate to its objects."⁹⁵ In Federalist 7, Alexander Hamilton likewise stressed the danger posed by territorial disputes between the states without federal control over the public lands and pointed out that revenue from land sales could be used to retire the war debt.⁹⁶ There is no record of any founding father or anti-federalist criticizing the Northwest Ordinance's claim to continued federal land ownership after statehood.⁹⁷ Nor is there any hint that such federal ownership was inconsistent with the promise of equal statehood.

90. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 321 (Max Farrand ed., 1911).

91. *Id.* at 466.

92. U.S. CONST. art. IV, § 3, cl. 2.

93. THE FEDERALIST NO. 38, at 193 (James Madison) (George Carey & James McCellan ed., 2001).

94. *Id.*

95. *Id.*

96. THE FEDERALIST NO. 7 (Alexander Hamilton).

97. According to Appel, "the antifederalists generally ignored the Property Clause and the power of the federal government over the West." Appel, *supra* note 59, at 28.

Aside from the provisions of the Northwest Ordinance, however, there is little mention of Congress's power to own land within a state during the Founding Period. This is likely because, at that time, the federal government owned no such land.⁹⁸ Founding Era sources therefore cannot resolve the issue of whether the federal government has the power to *permanently* own land within a state pursuant to the Property Clause.

III. THE FORGOTTEN HISTORY: RATIFICATION TO CIVIL WAR

In the 1820s and 1830s, however, Western politicians argued for the first time that Congress lacked the power to permanently own land within the states. In doing so, they advanced arguments that are strikingly similar to those advanced today in favor of the narrow view of Congress's power to own land within a state. In a series of previously overlooked debates, leading statesmen from each section and political party advanced three basic principles. First, because the land belonged to the entire country, the federal government had an obligation to use the public domain for the common benefit rather than for the benefit of any one state or special interest. Second, Congress's power to own land was otherwise unlimited and included the power to retain land within a state and restrict it from sale indefinitely. Third, federal land ownership within the states was fully consistent with equal state sovereignty.

A. Early Public Land Policy

Early federal land policy reflected a bipartisan consensus on these three principles. Because land sales generated revenue, the Secretary of the Treasury had a large role in setting land policy. Treasury Secretary Alexander Hamilton valued the western lands as a source of revenue and collateral to help establish the country's credit; however, he feared that swift western migration would threaten "the vigor of the Nation by scattering too widely and too sparsely the elements of resource and strength."⁹⁹ Jefferson and his Secretary of Treasury, Albert Gallatin, similarly worried that large-scale sale would undermine interconnectedness with the East, cause conflict with Native Americans, and result in a nation too large for republican government.¹⁰⁰ Federalists and Jeffersonians thus used federal land policy as a tool to extract revenue for the good of the nation and control the flow of western settlement in the territories.

98. The federal government controlled military installations, post offices, and the capital under its other enumerated powers.

99. VAN ATTA, *supra* note 12, at 53 (quoting ALEXANDER HAMILTON, DEFENSE OF THE FUNDING SYSTEM (1796), *reprinted in* 19 THE PAPERS OF ALEXANDER HAMILTON 39-40 (Harold C. Syrett & Jacob E. Cooke eds., 1973)).

100. *Id.* at 69-73.

After Congress passed legislation enabling the admission of seven states from 1802 to 1821, it continued to sell land within the new states on the same terms that applied to land within the territories.¹⁰¹ Each of Congress's enabling acts contained three essential features. First, as the Northwest Ordinance had promised, they specified that the new states would be admitted on "the same footing with the original States in all respects whatever."¹⁰² Second, as a condition of admission, the new states disclaimed any right to the public domain within their borders.¹⁰³ Third, the new states were granted a limited amount of land and revenue for internal improvements in exchange for an exemption for all federal lands from state taxation for five years following sale.¹⁰⁴ Throughout the administrations of Washington, Adams, Jefferson, and Madison, the federal government not only assumed the power to own land within the states, but also purposely limited land sales to control the rate and location of settlements. In this early period, few argued that the federal government lacked the power to limit land sales or that federal land retention violated state sovereignty.¹⁰⁵

B. *Distribution, Graduation, and Cession*

The economic collapse caused by the Panic of 1819, however, triggered calls for major change. Many blamed the financial meltdown on a federal land policy that encouraged excessive speculation in western lands.¹⁰⁶ Because they blamed Congress for the economic crisis, many Westerners resented federal interference and demanded more local control combined with reduced land prices. Easterners, however, sought to extract more money from land sales or a distribution of land to the state governments to compensate for declining revenues.¹⁰⁷

The early debates over the distribution of land illustrate the principle that Congress had a duty to use the lands for the common benefit. Maryland ad-

101. GATES, *supra* note 12, at 288–95 (discussing the admission of Ohio, Louisiana, Indiana, Illinois, Mississippi, Alabama, and Missouri).

102. *Id.*

103. *Id.* For example, Ohio's enabling act provides that the state's government and constitution could not violate the Northwest Ordinance, which, as explained above, specifies that the new states have no right to interfere with Congress's ownership or disposal of the public lands. *Id.*

104. More specifically, the new states were given a portion of all federal lands sold within their borders for the creation of schools; varying amounts of land near springs; and five percent of the net profits from land sales for internal improvements. *Id.*

105. Although they did not become a major national issue, constitutional arguments against federal land ownership within Tennessee date back to the state's 1796 constitutional convention. See Ablavsky, *supra* note 12, at 138–41.

106. See VAN ATTA, *supra* note 12, at 86. This speculation was blamed on Congress's sale of land on credit. Congress thus ended sales on credit in April 1820 and reduced the minimum price to \$1.25 per acre. *Id.* at 87, 93.

107. See GATES, *supra* note 12, at 7–9.

vanced the earliest proposal for the distribution of land to the states in a report submitted to Congress in 1821. Maryland began by arguing that the nearly two-decade-old policy of giving public lands to the new states for education violated the common benefit principle.¹⁰⁸ The public lands, Maryland asserted, had been obtained “by the common sword, purse, and blood of all the States, united in a common effort.”¹⁰⁹ Any use of the land for the “benefit of any *particular* State or States, to the exclusion of the others,” therefore, would be “a violation of the spirit of our national compact.”¹¹⁰ To remedy the violation, Maryland requested a share of the federal lands in the western states and territories that was similar to that given to the new states.¹¹¹ Maryland’s request no doubt arose from the Panic of 1819, which had undermined the state’s plans to allocate funds for education.¹¹² Connecticut, New Hampshire, Rhode Island, New Jersey, Kentucky, Delaware, and Vermont quickly issued similar demands.¹¹³

Maryland’s report was referred to the Senate Committee on Public Lands, and Chairman Jesse Thomas of Illinois issued a report rejecting distribution and defending the constitutionality of the nation’s public land policy. Educational land grants to the new states, Thomas argued, were constitutional because they inured to the common benefit through the “increased value which the population and improvement of the State gave to the unsold public lands.”¹¹⁴

Ninian Edwards, Illinois’ other senator, further argued that giving public land to the states under the Maryland plan would be unconstitutional. Edwards agreed with Maryland that, under the Property Clause, “the property of the

108. See 37 ANNALS OF CONG. 1772–84 (1821). Andrew Gregg, Representative from Pennsylvania, also made a similar argument during debate over the admission of Ohio. See 12 ANNALS OF CONG. 584–86 (1803).

109. 37 ANNALS OF CONG., *supra* note 108, at 1774.

110. *Id.* at 1776. Maryland also rejected the idea that the new states were entitled to lands within their borders. The report states:

The public lands are not the less the common property of all the States because they are situated within the jurisdictional limits of the States and Territories which have been formed out of them The interest which a citizen of an Atlantic State has in them, as part of the property of the Union, is the same as the interest of a citizen residing in a State formed out of them.

Id. at 1781.

111. *Id.* at 1781.

112. See FELLER, *supra* note 12, at 40, 47.

113. GATES, *supra* note 12, at 7.

114. 3 AMERICAN STATE PAPERS: DOCUMENTS OF THE CONGRESS OF THE UNITED STATES IN RELATION TO THE PUBLIC LANDS 439–40 (Walter Lowrie & Walter S. Franklin eds., Washington, Gales & Seaton 1834). Treasury Albert Gallatin made the same argument when proposing the policy nearly twenty years earlier. GATES, *supra* note 12, at 289.

Union should be disposed of for the use and benefit of the Union."¹¹⁵ Maryland's proposal to give public land to the states, however, would violate this principle because "no State can rightfully claim . . . the separate and distinct use, and enjoyment of, the property, or funds of the nation."¹¹⁶ Giving land to the old states, he further argued, "would be transferring to those States a power exclusively delegated to Congress."¹¹⁷ Edwards explained: "It cannot be contended that we are competent to delegate powers for such purposes to the States, for, if that be the case, there are no powers with which we are invested, that might not, with equal propriety, be transferred."¹¹⁸ Congress was given responsibility over the public domain, he asserted, because a uniform national policy was needed to ensure orderly settlement.¹¹⁹ After Edwards' speech, Congress abandoned the Maryland proposal.¹²⁰

Although Westerners opposed giving lands to the old states to promote education, many supported distributing a portion of the revenue from land sales to the states, so long as all states benefited.¹²¹ In the debate over Maryland's proposal, for example, Thomas's senate report and a report from the Ohio legislature favored a distribution of revenue.¹²² Three years later, Senator Johnson of Louisiana introduced a resolution stating that the public lands should be "pledged as a permanent and perpetual fund" for state education and internal improvements through the distribution of land sale revenue.¹²³ House and Senate committee reports favoring distribution were again introduced in 1826 and 1829.¹²⁴ While some sought to distribute land-sale revenue to the states, Thomas Hart Benton of Missouri introduced several bills to gradually reduce the price of unsold land the longer it remained on the market.¹²⁵ Millions of acres of federal land had already been surveyed and put on the market, but there was not sufficient demand to buy at the minimum federal price of \$1.25 per acre. Benton argued that "graduation," as his plan became known, would facili-

115. 38 ANNALS OF CONG. 251 (1822).

116. *Id.* at 249. Like Thomas, Edwards argued that giving new states land for educational purposes did serve a national object, because it increased land prices and promoted republican government in the West. *See id.* at 259–60.

117. *Id.* at 253.

118. *Id.* at 250.

119. *Id.* at 253–54. Giving the old states extensive territory within the new states, Edwards asserted, would lead to competition in land prices between the states and federal government. Moreover, he worried it would effectively subject the new states to the interests of the old. *Id.*

120. FELLER, *supra* note 12, at 47. Although most of the northeast supported it, New York, Massachusetts, and Virginia opposed it. *Id.* at 42–43.

121. *Id.* at 47.

122. *Id.*; 3 AMERICAN STATE PAPERS, *supra* note 114, at 439–40.

123. 1 REG. DEB. 42 (1824).

124. GATES, *supra* note 12, at 8.

125. *See* 41 ANNALS OF CONG. 582 (1824); 3 REG. DEB. 39 (1827).

tate the sale of less productive land, encourage compact settlement, and promote egalitarian republicanism by allowing those of lesser means to become freeholders.¹²⁶ For similar reasons, Benton also supported preemption legislation to give squatters valid legal claims to their lands.¹²⁷ Benton's proposals gained support from many who felt that the traditional system slowed western development and let the public land go to waste.¹²⁸

When originally proposed in 1824, however, Benton's plan gained little support outside of the western public land states.¹²⁹ The Atlantic states had no desire to add further enticements for westward migration. If settlement occurred too quickly, Easterners feared, land prices would plummet and labor shortages would harm Eastern manufacturing.¹³⁰ Slow, steady, and deliberate settlement in the West was more consistent with Eastern interests. Even Westerners were divided. Senator David Barton, Benton's political rival in Missouri and the Chairman of the Committee on Public Lands, called graduation "fictitious and delusive" because, rather than facilitate sales to poor farmers, it would merely enable rich land speculators to buy up the public domain.¹³¹

The debate over graduation further demonstrates that Congress was understood to have had complete power over federal land policy. Benton recognized that federal land policy effectively prevented private ownership and development. Instead of arguing that Congress had a constitutional duty to adopt a less restrictive land policy—whether based on a duty to sell or the sovereignty of the new states—Benton's arguments sounded in policy. A majority in Congress thought it wiser that the lands be retained indefinitely in federal control.

Frustrated by high land prices and Congress's rejection of preemption and graduation, prominent Westerners demanded that Congress cede title to all federal land within the new states. Although the ensuing debates covered far more ground, they focused on the issue of whether federal landownership was consistent with the equal sovereignty of the new states.

Ninian Edwards, the Governor of Illinois and a former U.S. senator, delivered the most comprehensive equal sovereignty argument in two addresses to

126. VAN ATTA, *supra* note 12, at 106–07. In support of his second graduation bill, Benton dramatically declared: "I speak to . . . an assembly of legislators, and not to a keeper of the King's forests. I speak to Senators who know this to be a Republic, not a Monarchy; who know that the public lands belong to the People, and not to the Federal Government." 2 REG. DEB. 727 (1826).

127. VAN ATTA, *supra* note 12, at 107–08.

128. *Id.* at 109–10.

129. *See* FELLER, *supra* note 12, at 81.

130. *Id.*

131. 3 REG. DEB. 40–42 (1827). The 1824 graduation bill was thus tabled. Benton introduced a graduation bill again in 1828, but it was defeated by a narrow margin in the Senate. *See* FELLER, *supra* note 12, at 94–96.

the Illinois legislature in 1828 and 1830.¹³² Congress's policy of slow and deliberate land sales within existing states, Edwards argued, was unjust and unconstitutional. Prior to statehood, he asserted, "there was no other State to object whose welfare could be checked, or whose sovereignty, freedom, independence or jurisdiction could be violated."¹³³ The new states, however, were admitted to the Union on "an equal footing with the original States in all respects whatever."¹³⁴ A new state, he asserted, would not "be on an equal footing with the original States in a very important respect, if the United States could hold more lands, or hold them for different purposes, within its limits" with respect to the other states.¹³⁵ Because the original states had no public lands, Congress could assert jurisdiction over land within them only pursuant to the Enclave Clause, which requires state consent and authorizes federal landholding only for limited purposes.¹³⁶ Allowing Congress to control most of the territory within a new state under the Property Clause, he asserted, would therefore place the public land states on "vastly different and unequal . . . footing."¹³⁷ "It would . . . be a singular anomaly," he explained, if the Enclave Clause would prohibit Congress from buying a small plot of land for the common defense within an original state, when the Property Clause would allow Congress to "hold millions and millions of acres within the [new] State, for almost every other conceivable purpose."¹³⁸

The equal sovereignty of the new states, Edwards continued, required Congress to cede title of all federal lands within a state. "The sovereignty of a State," he asserted, "includes the right to exercise supreme and exclusive control over all lands within it. . . . The right of any State or Nation to the public lands that lie within it, is not only a right of independence, but is inseparable from it."¹³⁹ Because "every sovereignty, properly so called, is in its nature one and indivisible," state sovereignty over the public lands dictated a lack of federal

132. See NINIAN W. EDWARDS, HISTORY OF ILLINOIS, FROM 1778 TO 1833; AND LIFE AND TIMES OF NINIAN EDWARDS 112–13 (Ill. St. J. Co. 1870) [hereinafter HISTORY OF ILLINOIS]; NINIAN EDWARDS, AN ADDRESS, DELIVERED BY NINIAN EDWARDS, GOVERNOR OF THE STATE OF ILLINOIS, TO BOTH HOUSES OF THE LEGISLATURE, DECEMBER 7, 1830, at 12 (Illinois, Vandalia 1830) [hereinafter AN ADDRESS]. Edwards, however, was not the first to make this argument. In response to the 1821 Maryland proposal discussed above, for example, the Ohio legislature declared in a report that "the new states have an indisputable claim, to all the unappropriated lands, within their respective limits" because land ownership was an "appendage of their sovereign characters." FELLER, *supra* note 12, at 43 (quoting S. JOURNAL, 20th Gen. Assemb., 1st Sess. 180–81 (Ohio 1821)).

133. HISTORY OF ILLINOIS, *supra* note 132, at 110–11.

134. *Id.* at 114.

135. *Id.*

136. *Id.* at 115.

137. *Id.* at 114–15.

138. *Id.* at 116.

139. *Id.* at 118–19.

sovereignty.¹⁴⁰ In other words, “as the right of the one necessarily excludes that of the other, it cannot belong to both at the same time.”¹⁴¹ Congress’s power under the Property Clause, he therefore argued, applied only to land outside the borders of a state.¹⁴²

The public benefit principle, he further argued, was no obstacle to his proposal to transfer the public lands to the states. Such a transfer, he asserted, would inure to the common benefit of the nation by encouraging the development of national commerce and power.¹⁴³ Moreover, the common benefit principle was a “mere question of dollars and cents,” whereas the equality of the states “involves the most important natural and political rights of millions of freemen, and the peace and harmony of the whole Union.”¹⁴⁴

Edwards finally contended that the provisions of the Northwest Ordinance and state enabling acts that purported to reserve the public domain for Congress even after statehood were null and void. The federal government is limited to its enumerated powers and “can make no bargain with a State in the Union for a part of its sovereign rights.”¹⁴⁵ If a state could give its sovereignty to the federal government, he explained, the Constitution’s carefully balanced federal system could easily be destroyed. “All bargains, therefore, with the people of a Territory . . . restrictive of the equal rights of a sovereign and independent member of the Union, are, after admission, not only voidable, like civil contracts made during infancy, but absolutely null and void as being incompatible with and repugnant to the fundamental law.”¹⁴⁶ Edwards ended his address by calling on the Illinois legislature to ask Congress to transfer the public lands to state control.¹⁴⁷

On January 28, 1828, Senator William Hendricks of Indiana introduced an amendment to a federal land bill to cede all public lands within existing states.¹⁴⁸ Like Edwards, he asserted that “the equality and sovereignty of the new States require that these States should have the control of the public lands within their limits.”¹⁴⁹ After reviewing the history of the cession of the public lands to Congress, Hendricks stated that the condition that the lands be used

140. *Id.* at 119 (quoting Emer de Vattel).

141. *Id.* at 120; see also AN ADDRESS, *supra* note 132, at 9 (“[W]e are threatened with the establishment of a complete *imperium in imperio* within the limits of our own state . . .”).

142. HISTORY OF ILLINOIS, *supra* note 132, at 120; AN ADDRESS, *supra* note 132, at 11.

143. HISTORY OF ILLINOIS, *supra* note 132, at 118.

144. *Id.* at 117.

145. *Id.* at 113.

146. *Id.*; see also AN ADDRESS, *supra* note 132, at 27.

147. HISTORY OF ILLINOIS, *supra* note 132, at 123.

148. 4 REG. DEB. 151 (1828).

149. *Id.* at 152. Hendricks further stated that, under the prevailing system, “the equality, sovereignty, and independence, of the new States, are lost in their abject and humiliating dependence on the Federal Government.” *Id.* at 151. He made a similar argument in debate over the Missouri Crisis of 1820. See FELLER, *supra* note 12, at 37.

for the common benefit "was not intended by either party to be a permanent one," because "it is stipulated that new States shall be formed out of this territory."¹⁵⁰ He further asserted: "We shall search in vain for any clause in the Constitution, which authorizes a control over the principle object of sovereignty in the States—their public lands."¹⁵¹ The Property Clause provided no basis, he asserted, because the word "Territory, in our Constitution, our laws, and our history, signifies a region of country without the limits of a State."¹⁵² Senator John McKinley of Alabama made similar points in a speech in favor of Hendricks's amendment.¹⁵³ When cession received no Atlantic support, however, Hendricks's amendment was tabled.¹⁵⁴

Nevertheless, within the next year, the legislatures of Illinois, Indiana, and Louisiana all petitioned Congress to cede the federally owned lands within their borders to state control.¹⁵⁵ The Indiana petition, for example, asserted that the state "has the exclusive right to the soil and eminent domain of all the unappropriated lands within her acknowledged boundaries."¹⁵⁶ It called on Indiana's federal representatives "to use every exertion in their power, by reason and argument, to induce the United States to acknowledge this vested right of the States, and place her upon an equal footing with the original States."¹⁵⁷

The East, however, was united in rejecting cession. Historian Daniel Feller concludes that "the Eastern press . . . ridiculed the Western pretensions. . . . Northerners and Southerners, Adams and Jackson men, all spurned the Western claims."¹⁵⁸ In addition to the obvious economic incentives to oppose cession,¹⁵⁹ Easterners rejected the Western argument based on equal sovereignty and developed their own constitutional arguments against cession.

150. 4 REG. DEB. 155 (1828). Following Edwards, Hendricks also argued that any condition on the admission of a new state that it must give up its claims to its territory was null and void upon statehood, because a state could not surrender its sovereignty to Congress. *Id.* at 159–62.

151. *Id.* at 161.

152. *Id.*

153. *See id.* at 507–21 (1828) ("I shall endeavor to show that the United States have no constitutional right or claim to the lands in the new States.").

154. FELLER, *supra* note 12, at 94–95.

155. 5 AMERICAN STATE PAPERS: DOCUMENTS OF THE CONGRESS OF THE UNITED STATES IN RELATION TO THE PUBLIC LANDS 622, 624, 630 (Asbury Dickins & John W. Forney eds., Washington, Gales & Seaton 1860) [hereinafter 5 AMERICAN STATE PAPERS].

156. *Id.* at 630.

157. *Id.*

158. FELLER, *supra* note 12, at 109.

159. Although many worried that rapid emigration could create labor shortages in northeastern manufacturing, most Northeasterners understood that slow and deliberate western development would create a home market for Eastern goods. A carefully planned land policy, Northeasterners further believed, was needed to help ensure that Western settlers would have the education, order, and virtue needed for republican society. Strict federal control over western development, they thus believed, was more consistent with eastern interests

In sum, leading statesmen from each region and party responded to Western demands for cession with the three principles listed above. Since the time of the Founding, it had always been understood that Congress had complete discretion over federal land policy. Ceding federal land to the states, they further argued, would favor the new states and thus violate the common benefit principle. Continued federal ownership, they finally contended, was fully consistent with equal state sovereignty.

On February 25, 1829, for example, Representative James Stevenson of Pennsylvania authored a scathing report on the state cession petitions for a special committee of the House. Stevenson noted that "several of the new States have now boldly *demand*ed of Congress the surrender of the lands within their limits, although the sovereignty and right of soil were obtained by the treasure, or won from the Indians by the blood of the citizens of the old States."¹⁶⁰ He continued:

These demands, the committee are disposed to believe, have been rather the acts of certain individuals than the deliberate expression of the people at large. The patriotism of the citizens of the old States, who voluntary conceded these lands to the *Union*, might here be placed by the committee in strong contrast with the want of that feeling in the citizens of the new States who could seriously demand from the Union the surrender of all this invaluable property *to them alone*. But if any States have, in reality, an unhallowed desire *to get*, it may be useful to them to reflect that the other States have the power *to keep*, and that it is the *duty* of the representatives of these to know that if the national property is parted with, it is parted with only for the *general* advantage.¹⁶¹

Stevenson and the special committee therefore not only rejected a state's right to the public lands within its borders, but also asserted that ceding the land to the states would violate Congress's duty to dispose of the land for the common benefit.

President Adams also spoke against cession during his annual message in 1827. Adams asserted that federal land policy had been "eminently successful" and stressed that the public lands were "the common property of the Union, the appropriation and disposal of which are sacred trusts in the hands of Congress."¹⁶² According to historian Daniel Feller, "[a] few years before, Adams's remarks would have been considered innocuous truisms, the like of which ap-

than indiscriminately turning the land over to the states or private parties. See VAN ATTA, *supra* note 12, at 146-50.

160. 5 AMERICAN STATE PAPERS, *supra* note 155, at 796.

161. *Id.*

162. FELLER, *supra* note 12, at 92 (quoting 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1902, at 391 (James D. Richardson ed., 1907)).

peared regularly in the messages of Presidents Madison and Monroe.¹⁶³ Following on the heels of Western demands for cession, however, they carried a deeper meaning.

An article edited by Representative Edward Everett of Massachusetts and published in the *North American Review* asserted that Ninian Edwards's argument for cession "has found no great favor as yet in Congress."¹⁶⁴ Everett also quoted Representative William Archer of Virginia as asserting that demands for cession created "a relation of war, between the States."¹⁶⁵ Any attack on public land policy, Everett further claimed, would impugn the "leading statesmen" of the republic, with "General Washington and Mr. Jefferson [being] the most distinguished."¹⁶⁶

Many Westerners even rejected cession as too radical.¹⁶⁷ Senator James Noble of Indiana, for example, argued that federal ownership of land within a state did not undermine the equality of the new states because "the soil and taxation are separable from the sovereignty" of a state.¹⁶⁸ He further cited Virginia's act of cession, the Northwest Ordinance, the Property Clause, and Indiana's enabling act as evidence that, while the federal government owned the public lands and had an obligation to use them for the common benefit, the new states were sovereign and equal to the old.¹⁶⁹

Senator Barton of Missouri, moreover, called cession a "suicidal act" that would "destroy the Union."¹⁷⁰ He derided the equal sovereignty argument as follows:

Their argument stands thus: Until the Federal lands are disposed of in the new countries, State sovereignty cannot exist there, according to the Constitution. The Federal lands were not disposed of in the new States when they were admitted, and, therefore, they are not sovereign States of the Union. And thus, Sir, by a discovery made at

163. *Id.*

164. *Speeches made in the Senate of the United States, on Occasion of the Resolution offered by Mr. Foot, on the Subject of the Public Lands, during the First Session of the Twenty-first Congress*, 31 N. AMER. REV. 467 (Edward Everett ed., 1830) [hereinafter *Speeches*].

165. *Id.* at 467–68.

166. *Id.* at 470.

167. FELLER, *supra* note 12, at 108. Illinois Representative Joseph Duncan, for example, warned that unrealistic demands for cession undermined more realistic Western requests for internal improvements and limited grants of lands for specific purposes. *See id.* at 134–35. Davy Crockett, the "King of the Western Frontier," also distanced himself from cession during a debate over federal land in Tennessee. *See* 6 REG. DEB. 480, 873 (1829–1830).

168. *See* 4 REG. DEB. 580 (1828).

169. *Id.* at 580–81.

170. *See* 3 REG. DEB. 43 (1827).

this late day, after a quiet practice of thirty years, are we to be sylogized out of the Union!¹⁷¹

Barton also rejected the equal sovereignty argument on its merits. “[T]he answer to these new notions is,” he explained, “there is no such thing as absolute State sovereignty over all subjects.”¹⁷² While Ninian Edwards had argued that sovereignty was indivisible, Barton contended that the Constitution divided power over the public lands between the state and national governments. Under the Constitution, Congress had the power to own and sell the public lands, whereas the state retained the power to otherwise regulate them. He thus asserted that “[t]he new States do possess all the potential sovereignty of the old States, though they may not yet possess all the subjects upon which to exercise their powers.”¹⁷³ According to Barton, Congress’s power over the public lands was therefore fully consistent with state equality.

Southerners rejected cession of the public lands as well. House Representative William Martin of South Carolina called cession “preposterous.”¹⁷⁴ Leading newspapers such as the *The Richmond Enquirer* and *The Southern Recorder* also opposed cession despite their strong commitments to states’ rights.¹⁷⁵ John C. Calhoun warned that cession “would at once unsettle the whole landed property of the U.S.,” as states competed with each other for settlers by reducing land prices.¹⁷⁶

James Madison also rejected the constitutional argument for cession in private correspondence in 1831.¹⁷⁷ He asserted that “the title in the people of the United States rests on a foundation too just and solid to be shaken by any technical or metaphysical arguments whatever.”¹⁷⁸ He continued:

The known and acknowledged intentions of the parties at the time, with a prescriptive sanction of so many years consecrated by the intrinsic principles of equity, would overrule even the most explicit declarations and terms, as has been done without the aid of that principle

171. *Id.*

172. *Id.*

173. *Id.* He further explained: “If infractions of State laws happen upon public lands within her limits, they are cognizable by State authority; and Missouri possesses all the kinds of power or sovereignty that New York does, although she has no grand canal upon which to exercise her powers.” *Id.*

174. FELLER, *supra* note 12, at 126 (quoting Rep. William Martin, Address at a Public Dinner in Barnwell, S.C. (June 30, 1830), in 38 NILES’ WKLY. REG. 445, 453 (1830)).

175. *Id.*

176. *Id.* at 149 (quoting Memorandum from Col. James H. Hammond (Mar. 18, 1831), in 6 AM. HIST. REV. 741, 743 (1901)).

177. JAMES MADISON, 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON, FOURTH PRESIDENT OF THE UNITED STATES 187 (Philadelphia, J.B. Lippincott & Co. 1865).

178. *Id.* at 188.

in the slaves, who remain such in spite of the declarations that all men are born equally free.¹⁷⁹

In other words, Madison asserted that the framers' intent for Congress to retain title to the public domain was so clear that no legalistic argument could defeat it, much as slavery existed notwithstanding the principle of equality. Madison thus predicted that, when cession was taken up in Congress, it "can and will be demolished."¹⁸⁰

Writing for the Committee on Manufactures in 1832, Henry Clay, the influential senator from Kentucky, condemned both graduation and cession.¹⁸¹ Clay argued that Congress was "solemnly bound to hold and administer the lands ceded, as a common fund for the *use* and *benefit* of all the States, and for no *other* use or purpose whatever."¹⁸² He thus asserted that "[t]he general government has no . . . power, rightfully, to cede the lands thus acquired to one of the new States, without a fair equivalent."¹⁸³ Because the Louisiana Purchase has been paid from the common treasury, "to squander or improvidently cast [the public lands] away, would be alike subversive to the interests of the people of the United States and contrary to the plain dictates of the duty by which the general government stands bound to the States and the whole people."¹⁸⁴

Not only did Congress have an obligation to use the public lands for the common benefit, Clay asserted, but transferring them to the states would produce disastrous results. He explained: "Competition would probably arise between the new States in the terms which they would offer to purchasers."¹⁸⁵ As a result, "[c]ollisions between the States would probably arise," and a "spirit of hazardous speculation would be engendered."¹⁸⁶ Any sale of the lands to the new states, moreover, would undermine the Union by creating "between the debtor States a common feeling and a common interest, distinct from the rest of the Union."¹⁸⁷ Collecting the debt from the states, moreover, would raise a host of difficulties.¹⁸⁸

179. *Id.*

180. *Id.* at 187.

181. 6 AMERICAN STATE PAPERS: DOCUMENTS OF THE CONGRESS OF THE UNITED STATES IN RELATION TO THE PUBLIC LANDS 441–47 (Asbury Dickins & John W. Forney eds., Washington, Gales & Seaton 1860) [hereinafter 6 AMERICAN STATE PAPERS]. The committee had been tasked with inquiring into "the expediency of reducing the price of public lands, and of ceding them to the several States within which they are situated." *Id.*

182. *Id.* at 442.

183. *Id.*

184. *Id.*

185. *Id.* at 446.

186. *Id.*

187. *Id.*

188. *Id.* at 447 ("Delinquency on the part of the debtor States would be inevitable, and there would be no effectual remedy for delinquency.").

Clay also opposed cession because it was inconsistent with the American System, which was a plan to integrate the Union through a system of economic policies.¹⁸⁹ In the West, Clay sought to generate federal revenue through land sales and develop reciprocal commercial relationships between the agriculture of the West and the manufacturing of the East through internal improvements. Clay feared, however, that a drastic reduction in the price of public land would not only decrease federal revenue from land sales, but would also attract unproductive poor settlers to the West and undermine eastern land values.¹⁹⁰ National control over land policy, moreover, could best facilitate the development of internal improvements such as roads and canals that would facilitate commerce between the sections.¹⁹¹ The Whig Party's American System therefore depended on federal control of the land and strict limitations on its sale.¹⁹²

C. Cession and Nullification

Many Southerners, however, believed that Clay's American System "was a monstrous Northern plot to plunder Southern wealth."¹⁹³ The tariff, they contended, not only subsidized Northern manufacturing, but it also taxed the Southern economy due to its reliance on cash crops and international trade. Tariff revenue, in turn, was funneled into internal improvements that primarily benefitted the North and the Northwest and thus further consolidated national power. A strong national government unmoored from constitutional restraints posed an existential threat to the South and its slave-based society.¹⁹⁴

Southern opposition to the tariff culminated in South Carolina's nullification crisis of 1828–1832. John C. Calhoun's *Exposition and Protest*, which was adopted by the state legislature, argued that the tariff was unconstitutional because it did not treat the states equally.¹⁹⁵ Calhoun asserted that the powers of

189. See VAN ATTA, *supra* note 12, at 113–14. The most important components of the American System were a protective tariff, national bank, and internal improvements. *Id.*

190. See *id.* at 127–29. Clay asserted that federal land policy "lays the foundation of useful civil institutions" by establishing clear property rights and promoting compact settlement by settlers of moderate means. 6 AMERICAN STATE PAPERS, *supra* note 181, at 443.

191. See VAN ATTA, *supra* note 12, at 130.

192. Clay thus personally scorned the idea of ceding the land to the states. In private correspondence, Clay stated: "In Illinois there are about forty millions of acres of public land, and about one hundred and fifty or one hundred and sixty thousand people. What think you of giving that large amount of land to that comparatively small number of people?" Letter from Henry Clay to Francis Brooke (Mar. 28, 1832), in 4 CALVIN COLTON, THE LIFE, CORRESPONDENCE, AND SPEECHES OF HENRY CLAY 331 (New York, A.S. Barnes & Co. 1857).

193. FELLER, *supra* note 12, at 89.

194. See, e.g., *id.* at 74, 89; 41 ANNALS OF CONG. 696–97 (1825) (statement of Sen. Robert Hayne of South Carolina).

195. See WILLIAM W. FREEHLING, THE ROAD TO DISUNION: SECESSIONISTS AT BAY 257 (1990).

the "general government are intended to act uniformly on all the parts."¹⁹⁶ The tariff, however, created "inequality and oppression" because it imposed severe economic burdens on the South that were then used to subsidize manufacturing in the North.¹⁹⁷ South Carolina's constitutional argument against the tariff therefore relied on a state equality argument not unlike that used by advocates of cession.¹⁹⁸

South Carolina's chosen remedy of nullification was also equally applicable to constitutional demands for cession.¹⁹⁹ Edwards and Hendricks both invoked nullification during their arguments for cession.²⁰⁰ In a conversation with President Adams, Clay "spoke of a long message from Ninian Edwards," and expressed concern over "the threats of disunion from the South, and the graspings after all the public lands, which are disclosing themselves in the Western States."²⁰¹ The *Niles Weekly Register* warned that "the stand taken by South Carolina against the tariff, may be taken by Illinois concerning the public lands."²⁰²

In this explosive political context—where Southerners demanded reductions in the tariff, Westerners demanded federal lands, and both sections threatened nullification—Senator Samuel A. Foot of Connecticut provoked one of the most famous debates in the history of the Senate.²⁰³ The "Great

196. *Exposition and Protest: Reported by the Special Committee of the House of Representatives of South Carolina on the Tariff* (Dec. 19, 1828), in 1 THE STATUTES AT LARGE OF SOUTH CAROLINA 263 (Thomas Cooper ed., Columbia, A.S. Johnston 1836).

197. *Id.* at 249.

198. In fact, after Edwards' address to the Illinois legislature, Edward "Duff" Green, one of Calhoun's men, wrote to Edwards: "Your views on the rights of the States are considered able and conclusive. . . . Your position in relation to the public lands brings you into company with the South and West and in direct conflict with the East." Letter from Edward "Duff" Green to Ninian Edwards (Jan. 6, 1829), in 3 THE EDWARDS PAPERS: BEING A PORTION OF THE COLLECTION OF THE LETTERS, PAPERS, AND MANUSCRIPTS OF NINIAN EDWARDS 380 (E.B. Washburne ed., Chicago, Fergus Printing Co. 1884) (emphasis in original).

199. See FELLER, *supra* note 12, at 118 ("Nullification was a practical remedy as well as a theoretical doctrine, and one that in 1830 appeared as likely to be tried in the West as in the South.").

200. Edwards argued that "it should not be forgotten that a State has an equal right with the United States to judge of all such matters." HISTORY OF ILLINOIS, *supra* note 132, at 112. Hendricks also warned that federal ownership of the public lands "offer[s] to the new States the strongest inducement to a severance of the Union." 4 REG. DEB. 165 (1828). He asked: "Suppose the Union to be dissolved, and where would be the public lands?" *Id.*

201. 8 MEMOIRS OF JOHN QUINCY ADAMS 87–88 (Charles Francis Adams ed., Philadelphia, J.B. Lippincott & Co. 1876). Adams expressed similar concerns. See FELLER, *supra* note 12, at 116–17.

202. *South Carolina and Nullification*, NILES' WKLY. REG., NOV. 10, 1832, at 167.

203. For more on the "Great Debate" generally, see HERMAN BELZ, THE WEBSTER-HAYNE DEBATE ON THE NATURE OF THE UNION (2012); STEFAN M. BROOKS, THE WEBSTER-HAYNE DEBATE: AN INQUIRY INTO THE NATURE OF UNION (2009).

Debate" would last more than three months and give voice to the great sectional issues of the day. Thomas Hart Benton would speak for the West, Robert Y. Hayne of South Carolina for the South, and Daniel Webster of Massachusetts for the Northeast. Although the debate has been immortalized because of the famous exchange between Hayne and Webster over the nature of the Union, Congress's power over the public domain was also a leading subject.

Foot triggered the debate with a proposal to temporarily halt the surveying of new land.²⁰⁴ He justified his proposal by arguing that the market for federal land had excess supply. Seventy-two million acres of public land had been surveyed and offered for sale, he explained, but only about one million acres were sold each year.²⁰⁵ Because the public "lands are the common property of the United States," he asserted, sales should be in the "public interest" rather than in the interests of only purchasers in the new states.²⁰⁶

Benton immediately rose in opposition. He argued that the resolution would "inflict unmixed, unmitigated evil upon the new States and Territories."²⁰⁷ The seventy-two million unsold acres, he asserted, were "scraps" or "refuse" land unsuitable to productive settlers.²⁰⁸ If no new lands were put on the market, he continued, emigration to the western states would end, as would their economic, cultural, and political development.²⁰⁹ A federal land policy that restrained settlement and left productive land undeveloped, he further argued, violated the "Divine command" and was an "injury to the whole human race."²¹⁰ He ominously warned: "it is time for the new States to wake up to their danger, and to prepare for a struggle which carries ruin and disgrace to them, if the issue is against them."²¹¹ Given the larger context of the looming nullification crisis in the South and demands for cession of the public lands coming from several western states, Benton's words carried threatening implications.²¹²

Benton further charged that Foot's resolution was a sectional measure designed by the East to aid manufacturing at the expense of the West and the South. Ending western emigration, he asserted, would "confine the poor people of the Northeast to work as journeymen in the manufactories," thus keeping labor prices low.²¹³ Low revenue from the sale of federal lands, he further asserted, would justify a high protective tariff.²¹⁴ As South Carolina forcefully

204. 6 REG. DEB. 3-4 (1829).

205. *Id.* at 4.

206. *Id.*

207. 6 REG. DEB. 23 (1830).

208. 6 REG. DEB. 4 (1829).

209. *Id.* at 4-5.

210. 6 REG. DEB. 22, 24 (1830).

211. *Id.* at 23.

212. VAN ATTA, *supra* note 12, at 156.

213. 6 REG. DEB. 24 (1830).

214. *Id.*

argued in the *Exposition and Protest*, tariffs not only benefitted Northern manufacturers, but they also disproportionately affected the South, because plantations typically produced cash crops for export.²¹⁵ The Northeast's plan, Benton asserted, was "[a] most complex scheme of injustice, which taxes the South to injure the West, to pauperize the poor of the North!"²¹⁶ Benton seemed to implicitly call for Southern assistance on public land policy in exchange for Western opposition to the tariff.²¹⁷

Hayne took Benton's invitation to attack Foot's resolution on behalf of the South. "The people of America are," he asserted, "and ought to be for a century to come, essentially an agricultural people."²¹⁸ Public land policy, he stated, thus should "convert into great and flourishing communities, that entire class of persons, who would otherwise be paupers in your streets, and outcasts in society."²¹⁹ Hayne further stated: "From the bottom of my soul do I abhor and detest the idea, that the powers of the Federal Government should ever be prostituted" to slow western migration for the benefit of Eastern manufacturing.²²⁰ Following Benton's lead, Hayne thus argued that the federal government should pursue a policy designed to sell land at low prices to anyone willing to farm it.

Hayne, however, rejected the constitutional argument for cession.²²¹ "This claim," he asserted, "was set up for the first time only a few years ago."²²² He called the argument "untenable" because the federal government had "absolute property" in the public lands.²²³ Federal land ownership, Hayne acknowledged, could be "inconvenient" to the new states and hinder their development. "But though this state of things may present strong claims on the Federal Government for the adoption of a liberal policy towards the new States, *it cannot affect the question of legal or constitutional right.*"²²⁴ In fact, Hayne thought the constitutional argument for cession was so extreme that it would "never be recognized by the Federal Government" and thus had "no other effect than to create a prejudice against the claims of the new states."²²⁵

215. See *Exposition and Protest*, *supra* note 196, at 249–50.

216. 6 REG. DEB. 24 (1830).

217. VAN ATTA, *supra* note 12, at 154. Former President John Quincy Adams worried that "Benton . . . proposed to break down the union of the Eastern and Western sections, . . . restoring the old joint operation of the West and the South against New England." 8 MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 201, at 190.

218. 6 REG. DEB. 34 (1830).

219. *Id.*

220. *Id.*

221. *Id.* (rejecting the argument that the new states "have a full and perfect legal and constitutional right to all the lands within their respective limits").

222. *Id.*

223. *Id.*

224. *Id.* (emphasis added).

225. *Id.*

Hayne also famously defended state sovereignty and South Carolina's right to nullify federal law. "The true nature of the Federal constitution," Hayne asserted, is a "compact by which each State, acting in its sovereign capacity, has entered into an agreement with the other States, by which they have consented that certain designated powers shall be exercised by the United States."²²⁶ Because the states "have not surrendered their sovereignty," Hayne asserted, the states retained the power to judge when the federal government exceeded the scope of its delegated powers.²²⁷ This right was shared equally by the states, he asserted, because "all sovereigns are of necessity equal."²²⁸ Hayne thus saw no inconsistency with a broad interpretation of Congress's Power to Dispose and equal state sovereignty.

In his first reply to Hayne, Daniel Webster argued that federal land policy was designed to benefit the West rather than to restrain it.²²⁹ The object of federal policy, he contended, had always been to "hasten its settlement and cultivation, as far and as fast as practicable; and to rear the new communities into equal and independent States."²³⁰ He warned, however, that introducing too much land to the market at once would attract few additional settlers, result in "speculation by individuals, on a large scale," undermine the price of lands that had already been sold, and discourage investments in improvements.²³¹ Rather than seeking to check western development, Webster argued, the Northeast worked to ensure its steady and deliberate settlement.

As a matter of constitutional law, Webster argued that the only restriction on Congress's power to dispose of the public lands was the requirement that they be used for the common benefit. He explained that, "at the moment of the cession of the lands [from the states to the federal government], and by the very terms of that cession, every State in the Union obtained an interest in them, as a common fund. Congress has uniformly adhered to this condition."²³² He continued: "The Government has always felt itself bound, in regard to sale and settlement, to exercise its own best judgment, and not to transfer the discretion to others."²³³ Because the public lands were "a public fund," he argued that Congress was "no more authorized to give them away gratuitously than to give

226. *Id.* at 86.

227. *Id.* For Hayne, because the Supreme Court "is created by, and is indeed merely one of the departments of, the Federal Government," it had no more right to rule on the allocation of power between states and federal government than the supreme courts of each state. *Id.* at 88.

228. *Id.* at 86.

229. *See id.* at 36 ("No, Sir, I deny altogether, that there has been anything harsh or severe in the policy of the Government towards the new States of the West."); *id.* at 64 ("So, then, sir, New England is guiltless of the policy of retarding Western population.").

230. *Id.* at 36.

231. *Id.* at 35.

232. *Id.* at 37.

233. *Id.*

away gratuitously the money in the treasury."²³⁴ Any transfer to the states would thus be unconstitutional.

In Webster's second reply to Hayne, he famously articulated the nationalist view of the Union already endorsed by the Supreme Court in cases such as *McCulloch v. Maryland*²³⁵ and *Martin v. Hunter's Lessee*.²³⁶ Rather than a compact among the states, Webster argued that the Constitution was "made for the people; made by the people; and answerable to the people."²³⁷ Thus, he explained, "[t]he General Government and the State Governments derive their authority from the same source. Neither can, in relation to the other, be called primary, though one is definite and restricted, and the other general and residuary."²³⁸ The people had therefore divided sovereignty between the two levels of government and made the Supreme Court the arbiter of that division.²³⁹

Webster's theory of divided sovereignty was inconsistent with both nullification and Ninian Edwards's constitutional argument for cession. Edwards's argument assumed that sovereignty was indivisible. Federal sovereignty over the public lands, Edwards argued, necessarily excluded state power and thus made the new states unequal.²⁴⁰ Webster's theory of divided sovereignty, however, implied that, while the federal government might own and sell public lands within a state, the state could otherwise retain power over its territory.²⁴¹ The fact that Congress's power under the Property Clause had greater implications within the new states than within the old thus no more violated equal sovereignty than the fact that Congress's Commerce Clause power had greater implications in the more commercialized Northeast.

Although Hayne and Webster fought to a draw in their debate over the nature of the Union, they agreed that the constitutional argument for cession lacked merit. Hayne, the famous protégé of John C. Calhoun and defender of states' rights, ridiculed the argument and asserted that state interests could not affect Congress's "absolute property" in federal land. Webster, the "Expounder of the Constitution" and champion of the Union, comprehensively explained why federal ownership was both necessary and constitutional.²⁴² Benton's call

234. *Id.*

235. 17 U.S. 316, 403 (1819). For a more detailed account of Justice Marshall's views, see generally JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 78–105, 155–214 (Gerald Gunther ed., 1969).

236. 14 U.S. 304 (1816).

237. 6 REG. DEB. 74 (1830).

238. *Id.*

239. *Id.* at 74–80.

240. See *supra* note 132.

241. Barton made this same point on the Senate floor when arguing against cession. See 3 REG. DEB. 43 (1827) ("[T]he answer to these new notions is, there is no such thing as absolute State sovereignty over all subjects.").

242. See ROBERT V. REMINI, DANIEL WEBSTER: THE MAN AND HIS TIME 28–29, 162 (1997).

for an alliance between the South and the West on the issue of public lands and the tariff therefore failed.²⁴³

D. Calhoun's Cession Bill

Throughout the 1830s, Congress debated proposals for distribution, graduation, and preemption.²⁴⁴ The General Pre-emption Act of 1830 gave preferential rights to purchase land at the minimum federal price to squatters.²⁴⁵ Benton succeeded in pushing a graduation bill through the Senate in 1830, only to have it die in the House.²⁴⁶ Clay emerged as the champion of distribution,²⁴⁷ which passed Congress in 1833 before being vetoed by President Jackson.²⁴⁸ By this time, the public lands had become a partisan issue, with Jacksonians favoring graduation and National Republicans supporting distribution. Although some Westerners still sought cession, it had fallen from serious national discussion by the early 1830s.²⁴⁹

In 1837, however, Calhoun shocked Congress by introducing a bill for the cession of the public lands during a debate over graduation and preemption.²⁵⁰ Rather than giving the lands to the states outright, Calhoun's bill included several conditions, including the requirement that the states give the federal government one-third of any revenue derived from the sale of the land.²⁵¹ Although Calhoun claimed that he introduced the bill to end sectional conflict over the public lands, he also hoped that Southern support for cession would induce the West to aid the South on sectional issues like the tariff.²⁵² Calhoun further declared that he had "always felt the force of the argument that the new States

243. See FELLER, *supra* note 12, at 119–24. As Hayne made clear, the South was not willing to embrace cession of the public lands, as radicals in the West demanded. Southern opposition to federal power also led them to oppose the federally-funded internal improvements sought by the Northwest. The Northwest, moreover, favored the tariff to develop budding manufacturing.

244. See *id.* at 125.

245. *Id.* at 129. The Act technically applied only to persons squatting on federal land at the time of its enactment. It effectively applied prospectively as well, however, as everyone expected that Congress would grant preferential treatment to new squatters in future legislation. *Id.*

246. *Id.* at 153.

247. See 6 AMERICAN STATE PAPERS, *supra* note 181, at 447.

248. GATES, *supra* note 12, at 13. Clay's distribution bill gained Western support by giving an extra share of the revenue from land sales to the state in which in the land was sold. See FELLER, *supra* note 12, at 148. It gained Southern support in exchange for Clay's support for a compromise tariff. *Id.* at 162–71. Critics, however, argued that distribution was unconstitutional because it violated the common benefit principle by favoring the public lands states. See 6 AMERICAN STATE PAPERS, *supra* note 181, at 451–56.

249. FELLER, *supra* note 12, at 134, 178–79.

250. *Id.* at 186.

251. 13 REG. DEB. 705, 730 (1837).

252. See *id.* at 735; WELLINGTON, *supra* note 12, at 58–60.

are not now placed upon an equal footing with the other members of the confederacy."²⁵³ Moreover, he "sought to counteract the centralism, which was the great danger of this Government, and thereby to preserve the liberties of the people."²⁵⁴

Several Western senators spoke in favor of cession. Senator Robert J. Walker of Mississippi, for example, said he would vote for Calhoun's bill because it would put the new states "on an equal footing with the other States of the Union."²⁵⁵ Senator Ambrose Hundley Sevier of Arkansas stated that the bill "was the only measure which would give full and final satisfaction to the people of the West."²⁵⁶ Twenty senators, all of whom were from the West and the South, ultimately voted for Calhoun's cession bill.²⁵⁷

The bill, however, was tabled after harsh criticism from several of the Senate's leading figures.²⁵⁸ James Buchanan of Pennsylvania called Calhoun's proposal "the most splendid bribe that had ever yet been offered."²⁵⁹ It would, he asserted, "give the entire public domain to the people of the new States, without fee or reward, and on the single condition that they should not bring all the land into the market at once."²⁶⁰ Buchanan "solemnly protested against the principle that Congress had any right, in equity or justice, to give what belonged to the entire people of the Union to the inhabitants of any State or States whatever."²⁶¹

253. 13 REG. DEB. 705 (1837). Calhoun further asked: "And now I put it in the bosom of every Senator, whether the mere moneyed income derived from the public domain is to be compared for one moment to the great advantage of putting these Senators on the same independent footing with ourselves?" *Id.* at 743.

254. *Id.* at 736. Calhoun argued that federal ownership of the public lands made the new states "vassals" or "tenants" to the federal government and especially susceptible to the executive's patronage power. *Id.* at 742.

255. *Id.* at 731. Senator Gabriel Moore of Alabama similarly said that "the constitution certainly looked to the time when those States would be free indeed, and no longer vassals under the control of this Government, through the public lands." *Id.* at 734.

256. *Id.* at 732.

257. WELLINGTON, *supra* note 12, at 63. Technically, they voted against tabling it.

258. Twenty-six senators voted to table the bill, including the senators from Virginia, North Carolina, and the Northeast, as well as one senator from each of Ohio and Kentucky. *Id.* at 63–64.

259. 13 REG. DEB. 731 (1837).

260. *Id.*

261. *Id.* Senator John Davis of Massachusetts likewise asserted that, because "the public lands are public and common property, belonging to the whole people, and the whole people have a right to the benefit of them," Congress had no power to dispose of them for the "exclusive benefit of the States in which the public lands lie." *Id.* at 761, 766. Moreover, Senator Henry Hubbard of New Hampshire declared that, although the argument that a new state had a right to all the land within its borders had some support a decade ago, "it was now set up by no one." *Id.* at 792.

Clay similarly declared that the public domain was “one of the most sacred of all the sacred trusts confided to the General Government, and that they were bound to take the utmost care of it, and to administer it fairly for the benefit of all the States.”²⁶² He thus opposed cession as a project “aimed to wrest the lands from the common benefit of the Union, and appropriate them to the use either of a small portion of the States or of speculators.”²⁶³

Webster gave the most comprehensive argument against Calhoun’s cession bill. He began by arguing that the bill “transcended the power of Congress.”²⁶⁴ Congress had a duty, Webster asserted, “to make the public lands a common fund for the benefit of the whole people of the Union.”²⁶⁵ The cession bill, however, was a “gratuitous grant,” and Congress lacked the power to “give away the public domain.”²⁶⁶ Even if Calhoun’s plan was not viewed as a gift to the new states, Webster contended, the land could not be ceded to the states because, “by the constitution of the country, the trust, the management, the disposition of the public lands, was conferred on Congress.”²⁶⁷ He thus asked whether “it was possible that any man could maintain the proposition that, as they were placed in their hands, as belonging to the whole people of the United States, they could transfer the general disposition of them?”²⁶⁸ Congress could no more give away the power to dispose of the public lands, Webster contended, than “assign to others the power of collecting the revenue of the custom-house in Boston.”²⁶⁹

Webster further argued that, “so far as respects the equality of footing upon which the new States stood to the old, he saw no reason to impute inferiority.”²⁷⁰ Merely owning the public domain, he explained, had not “encroached on the sovereign power of the new States. The General Government exercised no legislation over the land lying in a State, except so far as that State had agreed to it.”²⁷¹ Webster therefore used the same theory of divided sovereignty that he had relied upon during his debate with Hayne over the nullification crisis. While Congress had the power to own and sell the public lands, the states otherwise had the power of legislation over all lands within their borders.

Because Easterners were solidly opposed to Calhoun’s cession bill, it was quickly defeated.²⁷² Calhoun’s plans to use the public land issue to forge an

262. *Id.* at 741.

263. *Id.*

264. *Id.* at 784–85.

265. *Id.* at 785. Senator Samuel Southard of New Jersey made the same argument. *Id.* at 790.

266. *Id.* at 784.

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.* at 785.

271. *Id.*

272. FELLER, *supra* note 12, at 186.

alliance between the West and the South died with the bill, and the land issue became a creature of national party politics that transcended sectional lines. While Whigs favored steady land prices and the distribution of revenue to the states, Democrats advocated for low prices, graduation, and preemption for settlers.²⁷³ As electoral fortunes changed over the 1840s and 1850s, Congress passed distribution, graduation, and preemption acts.²⁷⁴ Neither national party, however, favored the doctrine of cession. By the time party politics disintegrated with the coming Civil War, Westerners pushed for federal homesteading laws rather than cession.²⁷⁵

E. Supreme Court Precedent

Court precedent on Congress's power over the public lands is fully consistent with the dominant opinion expressed in the antebellum Congress. Although the Marshall Court never ruled on the constitutionality of federal land ownership within an existing state, it held that Congress had unlimited power over the territories. In *American Insurance Co. v. 356 Bales of Cotton*,²⁷⁶ the Court rejected a challenge to the legitimacy of congressionally established territorial courts in Florida.²⁷⁷ In his opinion for the Court, Chief Justice Marshall stated that Congress had "the combined powers of the general, and of a state government" over the territories.²⁷⁸ This power, Marshall explained, derived from a "general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States."²⁷⁹

The Taney Court reached the issue of Congress's power to own land within an existing state in a pair of cases in the 1840s. The first, *United States v. Gratiot*,²⁸⁰ arose from a federal license to smelt lead ore on federal land in pre-

273. *Id.* The issue still had sectional influences, as some Western Whigs favored graduation and many Eastern Democrats opposed it and supported distribution. *Id.*

274. When Whigs gained control of the national government, they passed the Distribution Act of 1841, ch. 16, 5 Stat. 453 (1841). To gain Southern votes, however, the Act specified that distribution would end if the tariff was raised above twenty percent. Because Congress raised the tariff in 1842, distribution lasted for less than one year. See FELLER, *supra* note 12, at 187–88.

275. See FELLER, *supra* note 12, at 188; VAN ATTA, *supra* note 12, at 238–40.

276. 26 U.S. 511 (1828).

277. *Id.* at 546. The plaintiff challenged an auction sale of 356 bales of cotton that had been made pursuant to an order from a territorial court under the law of the territory of Florida. *Id.* at 513.

278. *Id.* at 546.

279. *Id.* The Court made similar statements in *Sere v. Pitot*, 10 U.S. (6 Cranch) 332, 336–37 (1810).

280. 39 U.S. (14 Pet.) 526 (1840).

sent-day Illinois.²⁸¹ When the defendants failed to pay as required under the lease, the United States brought an action for debt.²⁸² In a demurrer, the defendants argued that the lease was invalid because, under the Property Clause, “the lands are ‘to be disposed of’ by Congress; not ‘held by the United States.’”²⁸³ Congress’s power to regulate, the defendant asserted, may have authorized such a lease prior to statehood, but, after Illinois became a state, a federal leasehold violated the state’s rights.²⁸⁴

The *Gratiot* Court broadly held that Congress has the power to lease federal land within a state and thus reserve it from sale.²⁸⁵ The Court explained that the word “territory” in the Property Clause “is equivalent to the word lands. And Congress has the same power over it as over any other property belonging to the United States; and this power is vested in Congress without limitation.”²⁸⁶ The Court further held that disposal was not limited to a power to sell because “disposal must be left to the discretion of Congress.”²⁸⁷ “And there can be no apprehensions of any encroachments upon state rights,” the Court added, because Illinois “cannot claim a right to the public lands within her limits.”²⁸⁸

The Court’s next significant Property Clause case, *Pollard v. Hagan*,²⁸⁹ arose from a dispute over land in Alabama that was situated within the tidal zone of the Mobile River.²⁹⁰ The plaintiff in *Pollard* sought to eject the defendant based on an 1836 grant of title from Congress, whereas the defendant claimed the land under state law.²⁹¹ The Court held that, although Congress had plenary authority over the land while Alabama was a territory, Congress had lost this power when Alabama became a state in 1819.²⁹² The Court reasoned that, at the time of the Revolution, the sovereign power of the states included “the absolute right to all their navigable waters, and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution.”²⁹³ Because Alabama inherited equal sovereign power when it became a state, Congress’s attempt to convey the land after Alabama’s statehood was void.²⁹⁴

281. *Id.* at 527, 533.

282. *See id.* at 534.

283. *Id.* at 533.

284. *Id.*

285. *See id.* at 538.

286. *Id.* at 537.

287. *Id.* at 538.

288. *Id.*

289. 44 U.S. (3 How.) 212 (1845).

290. *Id.* at 219–20.

291. *See id.*

292. *See id.* at 222–23.

293. *Id.* at 229 (quoting *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842)).

294. *See id.*

The *Pollard* Court, however, was careful to distinguish navigable waters from other public lands. The Court stated that, even after a territory achieves statehood, "the United States hold[s] the public lands within the new states by force of the deeds of cession, and the statutes connected with them."²⁹⁵ Federal ownership, the Court further stated, did not completely displace state sovereignty over the land because the states possessed a "municipal right of sovereignty" over federally owned land.²⁹⁶ Although the Court did not directly address the equal sovereignty argument against federal ownership, this division of sovereignty helps to explain how the new states were sovereign equals despite federal land ownership.²⁹⁷ In any event, the Court clearly approved of federal land holding under the Property Clause after statehood. The issue of whether Congress had a duty to dispose of this land, however, was not addressed.²⁹⁸

The Taney Court returned to the Property Clause in the infamous case of *Dred Scott v. Sandford*.²⁹⁹ Scott claimed his freedom in part from being held in a federal territory that prohibited slavery under the Missouri Compromise.³⁰⁰ After finding that the federal courts lacked diversity jurisdiction because African-Americans could not be U.S. citizens, Chief Justice Taney held that travel to Missouri could not make Scott free because the Missouri Compromise's ban on slavery was unconstitutional.³⁰¹ Taney began his analysis with the legally con-

295. *Id.* at 224.

296. *Id.* at 223. Justice Joseph Story took the same position in his highly influential treatise. See 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 189, § 1328 (2d ed., Boston, Charles C. Little & James Brown 1851) (asserting that, on federal land within a state, "the general jurisdiction of the state is not excluded in regard to the site, but, subject to the rightful exercise of the [enumerated] powers of the national government, it remains in full force."). Justice Story also implicitly rejected the equal sovereignty argument by stating that "no less than eleven states have, in the space of little more than forty years, been admitted into the union upon an equality with the original states." *Id.* at 184, § 1319.

297. See *supra* notes 235–41, 270–71 and accompanying text (explaining how Webster used the same distinction between land ownership and sovereignty over the land that the Court identified in *Pollard* to refute the argument that federal land ownership violated the equal sovereignty principle).

298. Proponents of the duty to dispose read the cases differently. See Landever, *supra* note 9, at 578–83. Their arguments, however, conflate regulatory power with the power to own property. As stated above, the Court held that equal sovereignty dictated that the states had some regulatory power over federal land after statehood. The issue of regulatory power, however, has no bearing on whether Congress has a duty to dispose.

299. 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

300. *Id.* at 519. Scott also claimed that he was free because he was held in the free state of Illinois. *Id.* at 394.

301. Taney first held that Congress lacked the power to ban slavery as a "Rule or Regulation" under the Property Clause because the Clause applied only to the territory held at the time of Ratification. *Id.* at 436. He continued, however, to state that Congress had an inherent authority to regulate newly acquired territories. *Id.* at 448. This power, Taney found, was

troversial position that the protections contained in the Bill of Rights apply to U.S. citizens in the territories.³⁰² The Due Process Clause, he further reasoned, protected private property rights, including property in slaves, from governmental interference.³⁰³ Property in slaves was protected, he stated, because “no word can be found in the Constitution which . . . entitles property of that kind to less protection than property of any other description.”³⁰⁴ If any doubt remained, he boldly claimed that the Constitution “distinctly and expressly affirmed” property in slaves by citing the Slave Trade and Fugitive Slave Clauses. The Missouri Compromise’s prohibition on slavery thus violated the constitutionally protected property rights of slave owners.³⁰⁵

Taney supported his Due Process argument by stating that a federal ban on slavery would violate the fundamental principle that the territories must be used for the “common and equal benefit” of the states.³⁰⁶ He explained: “Whatever [Congress] acquires, it acquires for the benefit of the people of the several States who created it. It is their trustee acting for them, and charged with the duty of promoting the interests of the whole people of the Union in the exercise of the powers specifically granted.”³⁰⁷ Taney argued that “because the federal government was the mere trustee of the territories and each state had an equal claim to them, the federal government could not discriminate against the property of the citizens of” the slaveholding states.³⁰⁸

Although *Dred Scott* was a divisive decision that has been thoroughly repudiated with respect to slavery, the Justices’ opinions reveal the degree to which the common benefit principle was accepted. Justices Curtis and McLean, who vehemently dissented from Taney’s opinion for the Court, both endorsed the common benefit principle.³⁰⁹ It was Taney’s recognition of a constitutionally

implied from Congress’s power to acquire new territory, which in turn was implied from the power to admit new states. *Id.* at 447.

302. See MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 58–60 (2006).

303. *Id.* at 60–61.

304. *Dred Scott*, 60 U.S. at 452.

305. *Id.* at 450–52 (“[A]n 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. . . .”).

306. *Id.* at 448; cf. GRABER, *supra* note 302, at 68 (“Laws banning slavery in the territories, justices in the *Dred Scott* majority further insisted, violated the original understanding of constitutional equality by unconstitutionally giving one class of citizens the right to the exclusive use of jointly owned American possessions.”).

307. *Dred Scott*, 60 U.S. at 448.

308. See Jeffrey M. Schmitt, *Constitutional Limitations on Extraterritorial State Power: State Regulation, Choice of Law, and Slavery*, 83 *Miss. L.J.* 59, 98–99 (2014).

309. See 60 U.S. at 549 (McLean, J., dissenting) (“It is said the Territories are common property of the States, and that every man has a right to go there with his property. This is not controverted.”); *id.* at 606 (Curtis, J., dissenting) (“[T]he unsettled territory was viewed as

protected property right in owning slaves in the territories that drew criticism, not the common benefit principle.³¹⁰

Like the congressional debates of the same era, early Supreme Court precedent thus supports three propositions: Congress could dispose of the federal lands only for the common benefit of the states; Congress had a broad power to own land within the states; and federal land ownership did not undermine equal state sovereignty. Unlike the congressional debates, however, the Court did not speak directly to the issue of whether Congress has the power to permanently own significant portions of the land within a state. When the constitutional argument for a duty to dispose arose in a concrete way in the early nineteenth century, it was resolved in Congress rather than the Supreme Court.

IV. RECONSTRUCTION TO TODAY

Although federal land policy changed dramatically in the nineteenth and twentieth centuries, the meaning of the Property Clause did not. When Western interests pushed for federal land in the 1910s, 1930s, and 1940s, Congress's power to permanently own land within the states was repeatedly challenged and vindicated. The Supreme Court also directly confronted the issue during the early twentieth century and held that permanent land ownership within the states is constitutional and does not infringe on the sovereignty of the states. More recent arguments against the constitutionality of federal land ownership are therefore wholly at odds with the meaning consistently given to the Property Clause throughout more than 200 years of constitutional history.

A. Federal Land Policy

Congress aggressively sold and transferred land to private parties throughout the remainder of the nineteenth century. The most important disposal legislation was the Homestead Act of 1862.³¹¹ Under the Act, a homesteader who claimed, cultivated, and lived on federal land for five years could acquire title to

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 with the original States."); GRABER, *supra* note 302, at 62, 68–69.

310. See, e.g., DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS*, 437–40 (1978). Taney's opinion is also rightly criticized for restricting the scope of Congress's regulatory power under the Property Clause to the territories originally held at the time of Ratification and thus ignoring the precedent of the Northwest Ordinance's ban on slavery.

311. An Act to secure Homesteads to actual Settlers on the Public Domain (Homestead Act of 1862), ch. 75, 12 Stat. 392 (1862) (codified at 43 U.S.C. §§ 161–164, repealed 1976).

160 acres after paying land-office fees.³¹² Homesteaders used the Act to acquire title to approximately 100 million acres by the turn of the century.³¹³ Congress granted a similar amount of land to railroad companies to encourage development and therefore increase the value of nearby federal lands.³¹⁴ In the words of one commentator, “the public domain during this period is best characterized as that of a real estate agent rather than a landlord.”³¹⁵ As explained above, land was seen as having value only because of its potential for development, and the West was thought to be an area of unlimited resources.³¹⁶

The Progressive Movement of the late nineteenth century, however, changed attitudes towards federal land.³¹⁷ Progressives valued efficiency highly, and an efficient land policy required scientific management by professional federal officials.³¹⁸ Because sale to private parties created waste and overuse, land policy increasingly favored planned development under continuing federal management by a professional bureaucracy.³¹⁹

As a result, by the late nineteenth century, Congress began to reserve large amounts of federal land from private disposal.³²⁰ Congress created the first national park in 1872 when it reserved land from the Montana and Wyoming Territories for the creation of Yellowstone.³²¹ The Forest Reserve Act of 1891 then authorized the President to withdraw public lands from settlement and private sale.³²² Congress gave the President further authority to reserve federal

312. *Id.* §§ 161–162. Alternatively, homesteaders could purchase the land after just six months. *The Homestead Act of 1862*, NAT'L ARCHIVES, <https://perma.cc/7H73-CHWX>; FRED A. SHANNON, *THE FARMER'S LAST FRONTIER: AGRICULTURE, 1860–1897*, at 53 (1945).

313. See RANDALL K. WILSON, *AMERICA'S PUBLIC LANDS: FROM YELLOWSTONE TO SMOKEY BEAR AND BEYOND* 28 (2014). In 1908, Congress expanded the amount of land available in more arid lands where 160 acres could not support a family. Homesteaders ultimately took approximately 288 million acres of land. *Id.*

314. *Id.* at 29.

315. *Id.* at 24.

316. R. MCGREGGOR CAWLEY, *FEDERAL LAND, WESTERN ANGER: THE SAGEBRUSH REBELLION AND ENVIRONMENTAL POLITICS* 16–17, 32 (1993).

317. *Id.* at 16.

318. *Id.*

319. *Id.* at 16–18; see also E. LOUISE PEFFER, *THE CLOSING OF THE PUBLIC DOMAIN: DISPOSAL AND RESERVATION POLICIES 1900–50*, at 4 (1951) (“[A]n awakened public conscience was beginning to decry the ‘squandering’ of the public domain in the past and was scrutinizing with greater care the uses to which it was being put in the present, with an idea of preventing its waste in the future.”).

320. See, e.g., Blumm & Jamin, *supra* note 12, at 805. Congress gave the President the power to withdraw lands from disposal as early as 1817. Early Presidents, however, did not make much use of this power. See PEFFER, *supra* note 319, at 14–15.

321. Yellowstone National Park Protection Act of 1872, ch. 24, 17 Stat. 32 (codified as amended at 16 U.S.C. §§ 21–40c (2012)).

322. Forest Reserve Act of 1891, ch. 561, § 24, 26 Stat. 1095 (codified as amended at 16 U.S.C. §§ 471–546 (2012)).

land in the Antiquities Act of 1906, which authorizes the designation of national monuments.³²³ Relying on this authority, President Theodore Roosevelt, the "conservationist president," reserved approximately 150 million acres of forest land from 1901 to 1909.³²⁴ Roosevelt helped to place an additional seventy million acres under federal protection through the creation of national parks, bird reserves, and monuments.³²⁵

Many Westerners, however, opposed Roosevelt's actions. While they generally recognized the need for forest reserves, they opposed what Senator Carter of Montana called the "extravagant and unreasonable" expansion of the national forests in the early 1900s.³²⁶ Much like the advocates of cession in the 1830s, they argued that permanent federal ownership was unconstitutional because it infringed on state sovereignty and made the western states unequal to those in the East.³²⁷

Henry A. Buchtel, the Governor of Colorado, called on the governors of each state containing public lands to attend a 1907 convention "for the purpose of discussing the relations of the states to the public lands."³²⁸ Among the questions raised for discussion was the following: "Has the United States government the constitutional right to hold the public lands within the borders of a new state in perpetual ownership and under municipal sovereignty without the consent of the state?"³²⁹ Some of the Western politicians in attendance answered that question in the negative.³³⁰ The legal opinion prepared for the Convention, however, concluded that, if the Supreme Court were to hear the issue, it would "continue its decisions favorable to congressional power to do

323. American Antiquities Act of 1906, ch. 3060, 34 Stat. 225 (codified as amended at 16 U.S.C. §§ 431–433 (2012)). Significant amounts of federal land have been reserved under the Antiquities Act. President Obama, for example, reserved millions of acres by establishing or expanding thirty-four national monuments. See Blumm & Jamin, *supra* note 12, at 806–07 n.191.

324. *Theodore Roosevelt and Conservation*, NAT'L PARK SERV., <https://perma.cc/KB5V-RPD3>.

325. *Id.*

326. 41 CONG. REC. 3200 (1907).

327. See PEFFER, *supra* note 319, at 39.

328. PROCEEDINGS OF THE PUBLIC LAND CONVENTION 4 (1907), <https://perma.cc/G76N-Q3SB> [hereinafter PROCEEDINGS]. With the help of newspapers and dispatches, the convention had convinced many that the West was opposed to permanent federal land retention. See PEFFER, *supra* note 319, at 101. In reality, however, many Westerners believed that federal management was necessary to develop and manage the land, at least for a time. Owners of arid land needed federal assistance to develop irrigation, for example, and, by the turn of the century, most cattlemen preferred federal regulation to the inefficient and often chaotic open range. See *id.* at 21, 39, 74–75, 83–88.

329. PROCEEDINGS, *supra* note 328, at 8. The Program Committee also raised other questions, including whether federal policy was in the best interests of the public land states. See *id.*

330. See, e.g., *id.* at 78 (Address of Robert W. Bonyng).

what it sees fit with the public lands.”³³¹ Most speakers at the convention therefore argued that withdrawing federal land from sale was wrong because the people of the West had a right to develop it rather than because of any constitutional doctrine.³³² It is telling that, although many Westerners opposed federal land ownership and personally believed it unconstitutional, they understood that raising the constitutional argument would be futile.³³³

Roosevelt responded to Western criticism by embarking on a campaign to raise public support for the Conservation Movement.³³⁴ At a conference of governors in 1908, for example, Roosevelt declared:

We are coming to recognize as never before the right of the Nation to guard its own future in the essential matter of natural resources. In the past we have admitted the right of the individual to injure the future of the Republic for his own present profit. . . . The time has come for a change. As a people we have the right and the duty, second to none other but the right and duty of obeying the moral law, of requiring and doing justice, to protect ourselves and our children against the wasteful development of our natural resources³³⁵

The Conservation Movement gained widespread public support, and both major party platforms officially supported it.³³⁶ At its core, the movement opposed misuse of public land for personal gain and supported federal stewardship to ensure sustainable use and preservation for future generations.³³⁷ The success of the movement demonstrates that the public domain was not seen as the exclusive property of the West or those who would develop it; instead, the public increasingly came to view it as a shared resource for all.³³⁸

In 1910, President Taft called on Congress to enact legislation to empower the President to withdraw land whenever he determined that disposal would not be in the public interest.³³⁹ Taft sought such legislation largely be-

331. *Id.* at 176. Ethelbert Ward, the author of the opinion and attorney of the Colorado Cattle & Horse Growers' Association, was careful to stress that his report reflected settled precedent, even though his personal view was that Congress lacked such power. *See id.* at 170.

332. *See, e.g., id.* at 50 (“I do not contend that we have a right to seize the lands, but I do contend that we have a right to put them to the use that God Almighty intended they should be put to, and that the power of the government is a tyrannical power whenever it attempts to interfere with the rights of the citizens to that extent.”).

333. *Id.*

334. *See* PEFFER, *supra* note 319, at 102.

335. Theodore Roosevelt, Opening Address by the President (May 13, 1908), in PROCEEDINGS OF A CONFERENCE OF GOVERNORS 3, 10 (1909).

336. *See* PEFFER, *supra* note 319, at 103.

337. *See, e.g.,* SAMUEL TRASK DANA & SALLY K. FAIRFAX, FOREST AND RANGE POLICY: ITS DEVELOPMENT IN THE UNITED STATES 71–72 (2d ed. 1980).

338. *See* PEFFER, *supra* note 319, at 103.

339. H.R. DOC. NO. 61-533 (1910).

cause he believed that some of Roosevelt's actions were questionable under existing statutes. He thus essentially asked Congress to ratify Roosevelt's actions and delegate the power to make permanent reservations to the executive.³⁴⁰

Although many congressmen, particularly from the West, opposed Taft's proposed legislation, there is no indication in the records of the debates that anyone thought Congress lacked the power to pass it.³⁴¹ For example, Senator Clark of Wyoming, the principle opponent of the bill, warned that it "placed in the hands of the Executive the absolute, undisputed control of the public lands of the United States to act and do with as his judgment may dictate at any time."³⁴² His argument, of course, assumes that Congress had such a power to delegate.³⁴³ Senator Heyburn of Idaho, moreover, proposed an amendment that would limit executive power to making recommendations regarding withdrawal, "to the end that Congress may, in the performance of its constitutional duty, enact such legislation."³⁴⁴ His amendment was defeated, however, and the bill authorizing the President to withdraw federal land from the disposal laws easily passed on June 10, 1910, despite much Western opposition.³⁴⁵

By 1920, most of the 180 million acres still available for disposal were arid and therefore suitable only for grazing livestock.³⁴⁶ Because this land remained in the public domain, it was available for all to use as common grazing land. Without regulations, however, it increasingly became clear that overgrazing was destroying the commons and even threatened nearby lands due to serious soil erosion.³⁴⁷ The cattlemen of the West therefore strongly supported federal leasing to more efficiently manage the rangelands.³⁴⁸

This was a critical juncture in federal land policy. Although the federal government had already withdrawn more than 200 million acres, the default policy had always been that any land not so withdrawn would be sold. If Con-

340. See PEFFER, *supra* note 319, at 115–16.

341. Senator Bailey of Texas suggested that the lands be given to the states, but he did so because he thought "a State can manage public lands better than the General Government has done" rather than because of any constitutional duty. 45 CONG. REC. 7542 (1910). The Senator was speaking from his state's practical experience, as the federal government owns very little land within Texas due to the unique circumstances of its admission.

342. 45 CONG. REC. 7538 (1910).

343. Clark further said: "Do we want to establish a crown-land system in this Nation, whose public domain, the Constitution says, it is within the power of Congress to legislate and prescribe rules and regulations for?" *Id.* at 7542.

344. *Id.* at 7552. The other Senator from Idaho, Borah, "with a great deal of reluctance" supported the original bill because he wished to establish the precedent that "the Executive must yield to the rule established by the acts of Congress" on matters of public lands. *Id.* at 7543, 7549.

345. Act of June 25, 1910, ch. 420, 36 Stat. 847 (codified at 43 U.S.C. §§ 141–143).

346. PEFFER, *supra* note 319, at 169.

347. *Id.* at 69.

348. *Id.* at 184.

gress were to regulate the open range by leasing grazing land, however, virtually all federal land would be withdrawn from sale, effectively making retention the default. Many Westerners therefore argued that the federal lands should be transferred to the states so that they could enact grazing regulations.³⁴⁹ Arizona Governor George W.P. Hunt, for example, argued for transfer to the states because permanent federal land ownership in the West “is repugnant to every vital and fundamental principle underlying the Constitution.”³⁵⁰ In the words of Charles E. Winter, Representative from Wyoming, because of the dire state of the open range, the situation “has come to a culmination, and I believe that those who hold the view of leaving things as they are will be compelled finally to come to a choice between regulation by the State or regulation by the Federal Government.”³⁵¹

In 1929, President Hoover proposed that Congress transfer the remaining federal land to the states. He declared that “our Western States have long since passed from their swaddling clothes and are to-day more competent to manage much of these affairs 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.”³⁵² At Hoover’s behest, Congress formed the Committee on the Conservation and Administration of the Public Domain,³⁵³ and, pursuant to its recommendation, a bill was introduced in Congress to give the states the option to take title to all remaining unreserved lands, exclusive of mineral rights.³⁵⁴ Under the bill, if a state declined the land, federal districts would be created to regulate grazing.³⁵⁵

Public reaction to Hoover’s proposal was generally not supportive. Although some Easterners supported the bill because they felt the states should have to bear the burden of maintaining the lands within their borders, others opposed giving the land away for nothing.³⁵⁶ Conservationists strongly opposed the bill because, in the words of Gifford Pinchot, “the national forests belong to all the people of all the States.”³⁵⁷ Moreover, the American Forestry Association declared that it “stands for inviolate retention of the lands and natural resources

349. Support for state ownership increased throughout the 1920s as Congress failed to pass a leasing law. *See id.* at 199–200.

350. 67 CONG. REC. 7911 (1926). Hunt argued that permanent federal ownership undermined state sovereignty and independence in the West. *Id.*

351. *Granting Remaining Unreserved Public Lands to the States: Hearings on H.R. 5840 Before the H. Comm. on the Public Lands, 72nd Cong.* 118–19 (1932) [hereinafter *Hearings*] (statement of Hon. Charles E. Winter).

352. 71 CONG. REC. 3571 (1929).

353. CAWLEY, *supra* note 316, at 72.

354. *Hearings, supra* note 351, at 1–4.

355. *Id.* at 5.

356. PEFFER, *supra* note 319, at 206.

357. *Hearings, supra* note 351, at 219 (statement by Hon. Gifford Pinchot).

which now belong to our people as a perpetual and inalienable trust to be used for the common benefit"³⁵⁸

Westerners also generally opposed the bill.³⁵⁹ Utah Governor George H. Dern, for example, stated: "The States already own, in their school-land grants, millions of acres of this same kind of land, which they can neither sell nor lease, and which is yielding no income. Why should they want more of this precious heritage of desert?"³⁶⁰ Although much Western opposition stemmed from the fact that the proposal excluded mineral rights and national forests, as Winter stated, "some States in the West appear, at this time at least, to favor a national range or Federal regulation over the balance of the domain."³⁶¹ In the words of John M. Macfarlane, President of the Utah Cattle and Horse Growers' Association, "none of the States in the West [are] in a position to take hold of that range and build it up as it ought to be done."³⁶²

During hearings on the bill, however, several Westerners raised the constitutional argument for state ownership of the land. In a memorial presented at the hearings, for example, the Wyoming legislature declared that "the control asserted by the Federal Government is a growth of a system nowhere even contemplated by the founders of our Government and in violation of the sovereignty of states which came in to the Federal Union on an equal footing with the original States in all respects"³⁶³ Governor Dern, moreover, asserted that "the States of the West have always felt that every State that is admitted

358. *Id.* at 231. These statements were echoed in many letters to Congress opposing the bill. *See id.* at 225–37.

359. PEFFER, *supra* note 319, at 207.

360. *Hearings, supra* note 351, at 14. Arizona Governor W.P. Hunt similarly said that "at present this land is unsalable at nearly any figure." *Id.* at 237.

361. *Id.* at 118. Some Westerners worried that, among other things, the states did not have sufficient resources to manage the land, uniformity of regulations would be lost, and the states would lose access to federal funding that was tied to the land. *See id.*; PEFFER, *supra* note 319, at 208. Others opposed the bill, moreover, because they considered the "public domain a heritage for all our people of the entire United States." *Hearings, supra* note 351, at 168 (statement of David L. Geyer, a United States Land Officer from New Mexico).

362. *Hearings, supra* note 351, at 204.

363. *Id.* at 193. Interestingly, the legislature cited a speech made in 1828 by Senator Hendricks of Indiana. A number of men from Wyoming made similar arguments at the hearings on the bill. *See id.* at 143 (Charles E. Winter, Representative from Wyoming) ("The Government is a trustee, not an absolute, permanent owner Let us complete the jurisdiction and equality of the States."); *id.* at 171 (Thomas Cooper, President of the Wyoming Wool Growers' Association) ("We do not want any Federal Control. We feel that the people of Wyoming are equal in their rights and in their citizenship with the people of any of the other States."); *id.* at 188 (Perry Jenkins, member of the Committee on the Conservation and Administration of the Public Domain) ("We feel . . . that we have not had what the Constitution offered us or said that we should have, or that the treaties said we should have, and that is complete sovereignty within our State."). Arthur H. King, register of the State Board of Land Commissioners of Colorado, similarly argued that the bill should not reserve mineral rights to the federal government in part because "in equity and justice, all of the

into the Union on an equal footing with the original thirteen States is the rightful sovereignty over all the lands within its borders”³⁶⁴

Like during the 1830s, however, the constitutional argument for transfer to the states was not within mainstream opinion. Representative Claude Fuller of Arkansas declared that the constitutional argument was “not correct,” and even Governor Dern admitted that it was not “legally true.”³⁶⁵ Most Westerners also did not take the equal sovereignty argument to its logical conclusion. Dern, for example, declared that the states were “pretty well satisfied with the national forests” and “it is entirely futile to think of getting the national forests turned over to the States.”³⁶⁶

In fact, although the bill would have granted approximately 180 million acres of federal land to the states, it was inconsistent with the constitutional argument for state ownership. When viewed in combination with other pending legislation, the bill would have allowed the states to take title to the unreserved lands, but, if they failed to do so, the executive would have organized them into federal grazing districts.³⁶⁷ Moreover, the bill did not apply to some 200 million acres of federal land that had already been reserved. The legislation thus contemplated extensive and permanent federal land ownership within the states.

After the push for state ownership failed, Congress finally closed the open range by regulating grazing on some 142 million acres of public land in the 1936 Amendments to the Taylor Grazing Act of 1934.³⁶⁸ Although the Act technically authorized sales to homesteaders, it also allowed the executive to classify land and withhold it from disposal.³⁶⁹ After the Dust Bowl laid waste to the country during the Great Depression, President Franklin D. Roosevelt subjected virtually all remaining public land to classification in a pair of executive orders signed in 1934 and 1935.³⁷⁰ From that time forward, only land classified

unappropriated public lands belong to the State and that the Federal Government is simply holding title as trustee.” *Id.* at 46.

364. *Id.* at 14.

365. *Id.* at 14–15. Dern said the argument was “equitably true.” *Id.*

366. *Id.* at 15. Winter, another representative who raised constitutional arguments, similarly did not challenge federal reserves. *Id.* at 130. Instead, he argued that “the Western States that are now asking for these cessions to them are simply attempting to preserve that balanced government between the Federal power and the States which is provided in the Constitution.” *Id.* Jenkins, however, did argue that all federal land should be ceded to the states. *Id.* at 189–91.

367. *Id.* at 5 (Memorandum from Northcutt Ely for Ray Lyman Wilbur, Secretary of the Interior).

368. An Act to Amend the Taylor Grazing Act, ch. 842, tit. I, 49 Stat. 1976 (1936) (codified as amended in scattered subsections of 43 U.S.C. § 315 (2012)).

369. *Id.*

370. PEFFER, *supra* note 319, at 224; *see* Exec. Order No. 6910, 54 Interior Dec. 539 (1934); Exec. Order No. 6964, 55 Interior Dec. 188 (1935).

as suitable for agriculture was available for homesteaders. Because the Department of the Interior intentionally made the classification system slow and onerous, little federal land was disposed after FDR's orders.³⁷¹ Federal lands were instead leased to grazers, and the executive withdrew an additional 15 million acres for national defense during the war.³⁷² By closing the open range, Congress asserted its right to indefinite ownership.

While federal land policy in the early twentieth century was largely based on the desire to end waste and make productive use of the land, attitudes towards federal land again began to shift during the middle of the twentieth century.³⁷³ Not only did public concern about the environment rise, but increasing numbers of Americans began to use their disposable income on outdoor recreation activities on federal lands.³⁷⁴ Environmentalists who advocated for preservation of nature rather than sustainable resource use therefore gained considerable influence.³⁷⁵ As a result, federal officials often limited resource use to allow for recreation and the preservation of nature rather than pursuing the old policies of maximum sustained yield.³⁷⁶ National opinion and policy therefore became even more committed to federal ownership and regulation.

Increasing withdrawals and regulations, however, predictably fueled another revolt by certain elements within the West. During the early part of the 1940s, Senator Patrick McCarran of Utah, a vocal critic of federal land management, succeeded in gutting appropriations for the Grazing Service and thus effectively put the lands under the control of local grazing interests.³⁷⁷ With McCarran's support, Western livestock associations then called for the sale of federal grazing land, including land within national forests, in 1946 and 1947.³⁷⁸ Conservationists, hunters, fishermen, and dude-ranchers alike, however, accused the stockmen of trying to steal the people's land for their own gain.³⁷⁹ Westerners also worried that sale to private stockmen would undermine federal assistance with irrigation and the development of recreation as both a pastime and a business.³⁸⁰ Even within the West, therefore, the proposal to sell grazing lands was extremely unpopular,³⁸¹ and it generated little interest in

371. See PEFFER, *supra* note 319, at 257–58; ANNUAL REPORT OF THE SECRETARY OF THE INTERIOR 136 (1940) (“During recent years there has been a marked change The former system of land disposals . . . has been superseded to a large extent by the present systems of leasing.”).

372. See PEFFER, *supra* note 319, at 259.

373. See CAWLEY, *supra* note 316, at 18.

374. *Id.* at 18–19.

375. *Id.* at 11.

376. *Id.* at 31–33.

377. See PEFFER, *supra* note 319, at 272–78; CAWLEY, *supra* note 316, at 73–74.

378. See PEFFER, *supra* note 319, at 280.

379. *Id.* at 282.

380. *Id.* at 289.

381. *Id.* at 279–93.

Congress.³⁸² By mid-century, the country not only opposed giving the federal lands to the states, but also overwhelming rejected large-scale sale to local land users.

Congress formally adopted retention of federal land as the government's default policy in the Federal Land Policy Management Act of 1976 ("FLPMA").³⁸³ FLPMA also gives the Bureau of Land Management ("BLM") broad authority to manage public lands, and, in doing so, directs the BLM to balance environmental interests and resource use. It not only directs the BLM to manage "in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands," but it also commands the BLM to "protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resources, and archeological values."³⁸⁴ Whereas Congress acted as a real estate agent throughout the eighteenth century, FLPMA demonstrates that the federal government now acts as a permanent landlord of the public domain.

In sum, the federal government began claiming permanent ownership of federal land in the late nineteenth century, and, as a practical matter, Congress expanded that claim to all federal land over time. Although certain elements within the West have repeatedly challenged the constitutionality of such policy, the constitutional argument against federal ownership has never been widely accepted. Instead, the federal government has taken the side of conservationists who saw the federal lands as resource to be preserved for all the people of the United States.

B. Court Precedent

Although the Court did not directly rule on the issue of permanent federal ownership during the late nineteenth century, dicta in several cases shows that the Court had a broad understanding of Congress's power to own land.³⁸⁵ In

382. *Id.*

383. Federal Land Policy Management Act of 1976, 90 Stat. 2743 (codified as amended at 43 U.S.C. § 1701(a) (2012)) (stating that federal lands would "be retained in Federal ownership, unless . . . it is determined that disposal of a particular parcel will serve the national interest.").

384. *Id.*

385. *See, e.g.,* *Camfield v. United States*, 167 U.S. 518, 524 (1897) ("While the lands in question are all within the state of Colorado, the government has, with respect to its own lands, the rights of an ordinary proprietor, to maintain its possession and to prosecute trespassers. It may deal with such lands precisely as a private individual may deal with his farming property. *It may sell or withhold them from sale.*") (emphasis added); *Ward v. Race Horse*, 163 U.S. 504, 514 (1896) (noting that Congress may hold land "in private ownership within a state"); *Fort Leavenworth R. Co. v. Lowe*, 114 U.S. 525, 531 (1885) (recognizing Congress's right to own land even when not "used as a means to carry out the purposes of government"); *Grisar v. McDowell*, 73 U.S. 363, 381 (1868) ("[F]rom an early period in the history of the govern-

Gibson v. Chouteau, for example, the Court held that federal land could not be taken through a state law of equitable title based on possession.³⁸⁶ In doing so, the *Gibson* Court stated:

With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No State legislation can interfere with this right or embarrass its exercise.³⁸⁷

Because a constitutional obligation to dispose of federal land would be inconsistent with a power that is "subject to no limitations," the *Gibson* Court's dicta supports a broad reading of congressional power. Indeed, no language in any of the Court's late nineteenth-century or early twentieth-century cases suggests that Congress has a duty to dispose under the Property Clause.

The issue of whether Congress has the power to indefinitely own land within the states was finally presented to the Court in the 1911 case of *Light v. United States*.³⁸⁸ Much like the Cliven Bundy incident of 2014,³⁸⁹ *Light* arose from a dispute over grazing cattle on federal land. The defendant in *Light* regularly grazed his cattle on the federal Holy Cross Forest Reserve in violation of federal regulations.³⁹⁰ According to the Court, "When notified to remove the cattle, he declined to do so, and threatened to resist if they should be driven off by a forest officer."³⁹¹ After he was enjoined from grazing on the reserve, the defendant challenged the regulations, in part, by arguing "that Congress cannot constitutionally withdraw large bodies of land from settlement without the consent of the state where it is located."³⁹² If Congress lacked the power to reserve federal land, the defendant maintained, the federal regulation preventing his grazing would be void.

ment it has been the practice of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses.").

386. 80 U.S. 92 (1871).

387. *Id.* at 99.

388. 220 U.S. 523 (1911).

389. Cliven Bundy led an armed standoff against federal officials who sought to seize his cattle for illegally grazing on federal land. See, e.g., Adam Nagourney, *A Defiant Rancher Savors the Audience That Rallied to His Side*, N.Y. TIMES (Apr. 23, 2014), <https://perma.cc/HPY2-S6NU>.

390. 220 U.S. at 534.

391. *Id.* at 535.

392. *Id.* at 535–36.

The Court in *Light* held that Congress had the power to permanently own land within the states under the Property Clause.³⁹³ The Court stated: “The United States can prohibit absolutely or fix the terms on which its property may be used. As it can withhold or reserve the land, it can do so indefinitely.”³⁹⁴ The only limitation on Congress’s power to own land, the Court stated, was that “the public lands of the nation are held in trust for the people of the whole country.”³⁹⁵ The Court emphasized, however:

[I]t is not for the courts to say how that trust shall be administered. That is for Congress to determine. The courts cannot compel it to set aside the lands for settlement, or to suffer them to be used for agricultural or grazing purposes, nor interfere when, in the exercise of its discretion, Congress establishes a forest reserve for what it decides to be national and public purposes.³⁹⁶

When the Court finally decided the issue in the early twentieth century, therefore, it reached the same conclusion that Congress had reached nearly one hundred years earlier.

In other opinions, the Court also rejected the argument for state ownership based on the principle of equal sovereignty.³⁹⁷ In *Stearns v. Minnesota*,³⁹⁸ for example, the Court discussed language in Minnesota’s enabling act and Constitution that exempted federal land from taxation after statehood.³⁹⁹ In justifying federal landownership and tax exemption, the Court stated:

393. Kochan, however, argues that this holding is dicta. See Kochan, *supra* note 2, at 1177–78. According to Kochan, “The *Light* opinion used that broad rhetorical language only as dicta in reaching a far narrower and unexceptional holding that the federal government had the power—like any owner—to expel trespassers.” *Id.* at 1178. Kochan, however, fails to acknowledge that the Court considered the defendant’s argument that the regulations reserving the federal land and preventing his grazing were unconstitutional because Congress lacked the power to “withdraw large bodies of land from settlement without the consent of the State where it is located.” *Light*, 220 U.S. at 535–36. The Court’s rejection of this argument was necessary to the resolution of the case, and therefore its conclusion regarding Congress’s power to own land indefinitely was a holding rather than dicta. Regardless, *Light* shows that the Court believed Congress has such a power.

394. *Light*, 220 U.S. at 536.

395. *Id.* at 537.

396. *Id.*

397. Of course, the Court in *Light* implicitly rejected this argument by holding that Congress could indefinitely own land within the states. See *id.* at 536.

398. 179 U.S. 223 (1900).

399. *Id.* at 240. The case involved a railroad’s Contracts Clause challenge to a state law that revoked tax benefits the state had given to the railroad at the time the land was sold. The Court held that the legislation violated the Contracts Clause because the state had formed a contract with the railroad when it sold the land. Although the state legislature ordinarily would lack the power to grant such tax benefits, the Court held, Congress’s conveyance of the land to Minnesota for the purpose of railroad construction empowered the state to ex-

It has often been said that a state admitted into the Union enters therein in full equality with all the others, and such equality may forbid any agreement or compact limiting or qualifying political rights and obligations; whereas, on the other hand, a mere agreement in reference to property involves no question of equality of status.⁴⁰⁰

The Court, like Webster and others in Congress, thus rejected the equal sovereignty argument by distinguishing between state sovereignty and property ownership.⁴⁰¹

The Court consistently followed this precedent throughout the first half of the twentieth century.⁴⁰² In *United States v. City and County of San Francisco*,⁴⁰³ for example, the Court broadly stated that "the power over the public land thus entrusted to Congress is without limitations. 'And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.'"⁴⁰⁴ The Court further declared that Congress's power over federal lands was "complete," "without limitations," and could be used to achieve Congress's "views of public policy."⁴⁰⁵

With the country increasingly in favor of permanent federal land ownership, the Court announced its most expansive reading of the Property Clause in

empt the land from the normal rules for taxation because federal land is exempt from state taxation. *Id.*

400. *Id.* at 245.

401. In a concurring opinion in *Alabama v. Texas*, 347 U.S. 272 (1954), Justice Reed similarly stated:

The fact that Alabama and the defendant states were admitted into the Union upon the same footing with the original states, in all respects whatever, does not affect Congress' power to dispose of federal property. The requirement of equal footing does not demand that courts wipe out diversities in the economic aspects of the several States, but calls for parity as respects political standing and sovereignty. The power of Congress to cede property to one state without corresponding cession to all states has been consistently recognized.

Id. at 275 (internal citations omitted). *Alabama v. Texas* upheld the constitutionality of the Submerged Lands Act of 1953, which granted title to certain submerged lands to bordering states. *Id.* Alabama and Rhode Island had argued that granting title to some coastal states violated equal sovereignty because those states would possess power over the ocean that other states lacked. *Id.*

402. See *Ashwander v. TVA*, 297 U.S. 288, 336 (1936) ("The United States owns the coal, or the silver, or the lead, or the oil, it obtains from its lands, and it lies in the discretion of the Congress, acting in the public interest, to determine of how much of the property it shall dispose."); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 404 (1917) (finding state jurisdiction in federal land "does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use, and to prescribe in what manner others may require rights in them").

403. 310 U.S. 16 (1940).

404. *Id.* at 29–30 (quoting *Light v. United States*, 220 U.S. 523, 537 (1911)).

405. *Id.*

the seminal case of *Kleppe v. New Mexico* in 1974.⁴⁰⁶ *Kleppe* arose from a constitutional challenge to the federal Wild Free-roaming Horses and Burros Act, which protected wild horses and burros on federal land.⁴⁰⁷ A rancher complained to state authorities that wild burros were eating his feed and harassing his livestock that were legally grazing on federal land. The state authorities rounded up the burros on federal land and sold them at public auction pursuant to the New Mexico Estray Law.⁴⁰⁸ The BLM then commanded the state to return the animals.⁴⁰⁹ Instead of complying, New Mexico filed suit seeking a declaratory judgement that the Wild Free-roaming Horses and Burros Act was unconstitutional.

The *Kleppe* Court held that “the Property Clause gives Congress the power to protect wildlife on the public lands, state law notwithstanding.”⁴¹⁰ In doing so, the Court rejected the state’s argument that the Property Clause granted Congress only: “(1) the power to dispose of and make incidental rules regarding the use of federal property; and (2) the power to protect federal property.”⁴¹¹ Instead, the Court asserted, Congress “exercises the powers both of a proprietor and of a legislature over the public domain,” and its power over federal property is “without limitations.”⁴¹² Congress had found that wild burros were “an integral part of the natural system of the public lands,” and the Court did not question this conclusion because “determinations under the Property Clause are entrusted primarily to the judgment of Congress.”⁴¹³ It would be very difficult to square this expansive language with any constitutional duty to divest the public lands.⁴¹⁴

In sum, federal policy and precedent have increasingly supported permanent federal ownership and control of the public lands. The Court squarely rejected the constitutional argument in the early twentieth century, and the cases have only been more deferential to Congress over time. As in so many

406. 426 U.S. 529, 546–47 (1974).

407. *Id.* at 531–34.

408. *Id.* at 533.

409. *Id.* at 534.

410. *Id.* at 546.

411. *Id.* at 536.

412. *Id.* at 539–40.

413. *Id.* at 535–36.

414. *See* United States v. Gardner, 107 F.3d 1314 (9th Cir. 1997) (relying on *Kleppe* and *Light* to hold that Congress has the power to permanently own and regulate land within the states). Nevertheless, Kochan argues that *Kleppe* “has limited value” because the Court’s expansive language is dictum. Kochan, *supra* note 2, at 1173–74. Technically, Kochan may be correct. Nevertheless, the Court’s language in *Kleppe* conveys a broad understanding of Congress’s power under the Property Clause. While this language may not be technically binding on lower courts today, it is a strong and persuasive marker of historical understanding. Moreover, as argued above, the Court’s earlier decision in *Light* squarely held that Congress has the power to hold land indefinitely. *See* *Light v. United States*, 220 U.S. 523 (1911).

other areas of constitutional law, Congress, the President, the Supreme Court, and the People have announced progressively expansive views of Congress's Power to Dispose.

*C. Modern Developments: The Sagebrush Rebellion
and Land Transfer Movement*

Western radicals again challenged Congress's power to own land within the states during the so-called Sagebrush Rebellion of the 1970s. During the 1960s and 1970s, the federal government expanded wilderness lands,⁴¹⁵ reduced grazing allotments,⁴¹⁶ regulated mining, and restricted the use of off-road vehicles.⁴¹⁷ Many Westerners became convinced that, although FLPMA represented a compromise between use and protection, federal officials favored environmental interests when implementing the law.⁴¹⁸ The Sagebrush Rebels therefore demanded that the federal government transfer ownership of federal land to the states, which they thought would be more responsive to resource development.⁴¹⁹

The Sagebrush Rebellion achieved significant success at the state level. In 1979, Nevada passed legislation claiming ownership to all federal land within the state managed by the BLM.⁴²⁰ Nevada thus claimed approximately forty-eight million acres, which represents seventy-nine percent of the land within its borders. Alaska, Arizona, New Mexico, Utah, and Wyoming all passed similar legislation, and several other western states passed resolutions or began studying the issue.⁴²¹ The Rebels galvanized local support in part by arguing that federal ownership violated state sovereignty, just as Ninian Edwards and other advocates of cession had done 150 years earlier.⁴²² Recognizing that legal precedent was not in their favor, however, the Sagebrush Rebels pushed for a political solution in the 1980 election rather than a court ruling.⁴²³

Because the Sagebrush Rebellion was a protest against restrictive federal land policies, it faded with the election of Ronald Reagan. Reagan appointed

415. The wilderness system expanded from 9.1 million acres in 1964 to 80 million acres in 1980. CAWLEY, *supra* note 316, at 43.

416. Authorized animal unit months decreased by thirty-six percent from 1959 to 1978. *Id.* at 51.

417. *Id.* at 62–64.

418. *Id.* at 42.

419. *Id.* at 70.

420. *Id.* at 1.

421. *Id.* at 2. California, Colorado, and Montana also funded studies related to the Sagebrush Rebellion, and Hawaii and North Dakota passed resolutions in support of the movement. *Id.*

422. *Id.* at 96–101.

423. *Id.* In 1996, however, the United States District Court for the District of Nevada held that the Nevada law was unconstitutional after Nye County relied on the law when opening a local road into a national forest in violation of an order from the U.S. Forest Service. *See United States v. Nye County*, 920 F. Supp. 1108, 1109–10, 1114 (D. Nev. 1996).

James G. Watt, a self-identified Sagebrush Rebel, as Secretary of the Interior. With Watt promoting resource use over preservation, it became clear that the environmentalists would no longer dominate federal policy.⁴²⁴ The Sagebrush Rebellion and its demands for state ownership of federal land thus subsided in the early 1980s.⁴²⁵

In recent years, however, the Sagebrush Rebellion has reemerged in what I will call the “land transfer movement.”⁴²⁶ Utah led the way in 2012 by passing legislation demanding that the federal government extinguish title to over thirty million acres of land in the state.⁴²⁷ Within the last several years, state legislators have considered similar legislation in most of the western states.⁴²⁸ Although legally meaningless without federal cooperation, state land transfer legislation has been successful in raising the salience of the issue and galvanizing local support.

In 2016, for example, Ammon Bundy and a group of armed militants occupied the Malheur National Wildlife Refuge for forty-one days to protest the “oppression” of federal landownership in the West.⁴²⁹ Although the occupation was clearly illegal, a jury acquitted Bundy and six co-defendants of most federal charges in October 2016 after a six-week trial that focused on constitutional arguments as much as the facts of the case.⁴³⁰ The occupation and Bundy’s dramatic acquittal demonstrate the level of popular support for the movement in much of the West.⁴³¹

424. See CAWLEY, *supra* note 316, at 12. Watt resigned in 1983 in part due to opposition to Reagan’s proposal to convert federal lands to private property. *Id.* at 3.

425. *Id.* at 12–13. As the County Supremacy Movement of the 1990s demonstrates, however, the Sagebrush Rebellion never completely died out in the West. See Lawton, *supra* note 8, at 12–13.

426. See, e.g., Jim Carlton, *Interior Secretary Cites Risk of “Extreme Movement to Seize Public Lands”*, WALL STREET J. (Apr. 19, 2016), <https://perma.cc/NG3C-FH6Q>; Jack Healy & Kirk Johnson, *The Larger, but Quieter Than Bundy, Push to Take Over Federal Land*, N.Y. TIMES (Jan. 10, 2016), <https://perma.cc/C44J-24R2>.

427. See Transfer of Public Lands Act, UTAH CODE ANN. §§ 63L-6-101 to 104 (West 2017); Tim Gaynor & David Schwartz, *Arizona Governor Vetoes Law Demanding Return of Federal Lands*, REUTERS (May 14, 2012), <https://perma.cc/A33M-QUHH>.

428. Although it was ultimately vetoed, the Arizona legislature passed a similar legislation, and analogous bills were debated in Colorado, Nevada, and Washington. See Gaynor & Schwartz, *supra* note 427; KEITER & RUPLE, *supra* note 8, at 2. Moreover, Idaho, Montana, Nevada, and Wyoming have all commissioned studies on the issue. See KEITER & RUPLE, *supra* note 8, at 2. Wyoming is now considering a constitutional amendment that would enable it to manage the public lands. See Kirk Siegler, *Push To Transfer Federal Lands To States Has Sportsmen On Edge*, NPR (Jan. 5, 2017), <https://perma.cc/U662-PQAU>.

429. See Sottile, *supra* note 6.

430. *Id.* Only two years earlier, Ammon’s father, Cliven Bundy, had led an armed standoff against federal officials who sought to seize his cattle for illegally grazing on federal land. See Nagourney, *supra* note 389.

431. See Sottile, *supra* note 6.

Now, for the first time in decades, federal land transfer legislation has a real chance of passage. Like the Sagebrush Rebellion, the land transfer movement is intimately associated with the Republican Party in the West.⁴³² Not only is land transfer legislation championed by state politicians, but also national party leaders such as Rand Paul, Ted Cruz, Ben Carson, and Robert Bishop, the Chairman of the House Natural Resources Committee, have publicly endorsed the transfer of federal lands to the states.⁴³³ The American Lands Council, a conservative nonprofit that pushes for land transfer, has received support from thousands of elected officials and mega-donors such as Americans for Prosperity, the group run by the Koch brothers.⁴³⁴ The 2016 Republican platform, moreover, called for the federal government to "convey certain federally controlled public lands to states."⁴³⁵

On January 3, 2017, House Republicans introduced two measures to facilitate the transfer of federal land to the states. First, Republican Don Young introduced a bill to allow the states to purchase National Forest System land.⁴³⁶ Second, the House changed the manner in which the Congressional Budget Office accounts for the transfer of federal land.⁴³⁷ The new rules make it easier for Congress to transfer land to the states by specifying that such a transfer "shall not be considered as . . . decreasing revenues," even if the land had been leased out for activities such as logging or grazing.⁴³⁸ According to Representative Raul Grijalva, the top Democrat on the Natural Resources Committee, the new rule allows "Congress to give away every single piece of property we own, for free, and pretend we have lost nothing of any value."⁴³⁹

432. See Healy & Johnson, *supra* note 426.

433. See Stephanie Mencimer, *It's Not Just Militia Members Who Want to Take Over Federal Land*, MOTHER JONES (Jan. 5, 2016), <https://perma.cc/4C97-RH79>; Michelle Ye Hee Lee, *Ben Carson's Claim that the Federal Government Should 'Return' Public Land to the States*, WASH. POST (Dec. 1, 2015), <https://perma.cc/HGY9-ZDHM>.

434. Healy & Johnson, *supra* note 426; Nigel Duara, *In Western States, Idea of Reclaiming Federal Land Still Has a Strong Allure*, L.A. TIMES (May 10, 2015), <https://perma.cc/PX5S-F3A9>; see also John O'Connell, *Federal Land Ownership Battle Heads for Court*, CAPITAL PRESS (Feb. 11, 2016), <https://perma.cc/8Z7K-AW4C>.

435. REPUBLICAN PLATFORM, AMERICA'S NATURAL RESOURCES: AGRICULTURE, ENERGY, AND THE ENVIRONMENT, <https://perma.cc/XLK2-9F2K>. The platform also states that federal ownership of the public lands "places an economic burden on counties and local communities" and that it "is absurd to think that all that acreage must remain under the absentee ownership or management of official Washington." *Id.*; see also Jeff Mapes, *GOP Platform Supports Transferring Western Public Lands to States*, OR. PUB. BROADCASTING (July 20, 2016), <https://perma.cc/SKD5-YPU4>.

436. State National Forest Management Act, H.R. 232, 115th Cong. (2017).

437. Juliet Eilperin, *House GOP Rules Will Make It Easier to Sell Off Federal Land*, WASH. POST (Jan. 3, 2017), <https://perma.cc/ZGA2-YVWG>.

438. *Id.*

439. *Id.*

Although President Trump has not pushed for land transfer to the states, he has not clearly opposed it. During the campaign, Trump opposed land transfer in an interview with *Field & Stream*, supported it during a fundraiser in Nevada, and then reportedly failed to respond to a letter from forty sporting and conservation groups asking him to clarify his position.⁴⁴⁰ Trump's Secretary of the Interior, Ryan Zinke, explicitly opposed land transfer during his confirmation hearings, but he also voted for the 2017 legislation described above as a representative from Montana.⁴⁴¹ As such, Congress appears receptive to land transfer, and the Trump Administration has given conflicting signals.

Although economic and political forces are also at play, constitutional arguments against permanent federal land ownership lend emotional and intellectual force to the movement.⁴⁴² Like earlier movements against federal land ownership, advocates of transfer argue that, because control over territory is an incident of sovereignty, federal ownership of roughly half of the land within only the western states violates the fundamental principle of equal state sovereignty.⁴⁴³ Disposal is constitutionally required under originalist constitutional principles, they further assert, because the framing generation intended to dispose of virtually all the land within the first public land states.⁴⁴⁴

440. Tay Wiles, *Trump met with a leader of the land transfer movement*, HIGH COUNTRY NEWS (Oct. 17, 2016), <https://perma.cc/L292-6K3P>.

441. See Emmarie Huetteman, *Nominee for Interior Vows to Preserve, and Develop, Public Lands*, N.Y. TIMES (Jan. 17, 2017), <https://perma.cc/N53Q-TAQ9>; Jimmy Tobias, *Opinion, Public Lands in Private Hands?*, N.Y. TIMES (Mar. 3, 2017), <https://perma.cc/8EAA-N839>. Zinke has also recently been attacked by outdoor and environmental groups for recommending that the federal government decrease the size of Bears Ears National Monument, a 1.3 million acre protected area. See Julie Turkewitz & Coral Davenport, *Interior Secretary Recommends Shrinking Borders of Bears Ears Monument*, N.Y. TIMES (June 12, 2017), <https://perma.cc/8DZD-X9GP>.

442. Ammon Bundy's militia group, some of the most fanatical devotees to the movement, for example, called themselves the "Citizens for Constitutional Freedom." Ammon also carried a pocket Constitution to his daily press conferences during his occupation and frequently invoked the Constitution to justify his actions at trial. See Sottile, *supra* note 6; see also CAWLEY, *supra* note 316, at 6–7, 96–101 (arguing that the constitutional argument helps explain Western devotion to the Sagebrush Rebellion).

443. Wentz & Howard, *supra* note 7; Rocky Barker, *Public Lands Bills Come to Head in Idaho Legislature*, IDAHO STATESMAN (Mar. 14, 2016), <https://perma.cc/AYP4-UGY6> (quoting the attorney who headed the panel that analyzed the land transfer issue for Idaho and explaining that the panel's argument in favor of land transfer rests on the principle of equal sovereignty); *Get the Facts*, AM. LANDS COUNCIL, <https://perma.cc/Y5F7-UTQM> (contending that state ownership is necessary to "#HonorThePromise of Statehood").

444. JOHN W. HOWARD ET AL., LEGAL ANALYSIS OF THE LEGAL CONSULTING SERVICES TEAM PREPARED FOR THE UTAH COMMISSION FOR THE STEWARDSHIP OF PUBLIC LANDS 4 (2015), <https://perma.cc/UZ9S-9WFD> ("[T]he Framers intended to grant the power to regulate public lands only in the context of their disposal, not to permanently retain the majority of the land within a State.").

Environmentalists and outdoor enthusiasts, however, oppose land transfer by arguing that state ownership could end public access and cause environmental degradation.⁴⁴⁵ The federal government spends billions of dollars each year protecting and maintaining public lands. Because the expense of managing the lands would be a large percentage of state budgets, any economic setback, such as a drop in the price of natural resources taken from the land, could force the states to sell to the highest bidder.⁴⁴⁶ Outdoor enthusiasts—hunters, fishermen, hikers, rock climbers, etc.—thus oppose land transfer by arguing that the federal government must ensure public access to the lands because they are an “American birthright” that “belongs to all of us.”⁴⁴⁷

V. SUMMARIZING THE HISTORY AND APPLYING IT TO CONGRESS'S “POWER TO DISPOSE”

Founding Era sources do not answer the narrow issue addressed in this article: whether the Property Clause grants Congress the power to indefinitely own land within a state. The text is fully consistent with both a broad construction that gives Congress the power to permanently own and a narrow interpretation that imposes a duty to divest. Original intent is likewise ambiguous. The Founders had no occasion to discuss the issue because the federal government owned virtually no land within the states.

A. History Supports a Broad Construction of the Power to Dispose

Post-Ratification history, however, strongly supports a broad construction of Congress's Power to Dispose. Since the admission of the first public land state, Congress has always owned vast tracts of land within the states and exercised strict control over their sale. When Washington, Adams, Jefferson, and Madison were in office, few argued that federal land policy violated the Constitution or the sovereignty of the states.

For nearly two centuries, however, prominent politicians in the public land states have unsuccessfully advanced a narrow view of Congress's power when-

445. See Johnson, *supra* note 3. Law Professors Robert Keiter and John Ruple similarly warn that, even if land transfer “is not the blatant rush towards development that many fear, economic imperatives make anything other than a massive increase in development unrealistic.” ROBERT B. KEITER & JOHN C. RUPLE, WALLACE STEGNER CTR. FOR LAND, RES., & ENV'T, *THE TRANSFER OF PUBLIC LANDS MOVEMENT: TAKING THE “PUBLIC” OUT OF PUBLIC LANDS* 8 (2015), <https://perma.cc/DH39-R2HB>.

446. See, e.g., Brian Maffly, *Economists: Transferring Federal Lands Could Generate Revenue for Utah*, SALT LAKE TRIB. (Jan. 16, 2015), <https://perma.cc/LTL9-7T9E>.

447. *Congress Puts Public Lands in the Crosshairs*, *supra* note 13; Kristiansen, *supra* note 13; see also Siegler, *supra* note 428; *House of Representatives Passes Public Lands Transfer Provision; Sportsmen Push Back*, BACKCOUNTRY HUNTERS & ANGLERS (Jan. 4, 2017), <https://perma.cc/69AB-283V>.

ever they feel that federal land policies are too restrictive on local interests. The first clash over the meaning of Congress's power took place after the economic downturn of the 1820s, which left many Westerners demanding easier access to federal land. While most Westerners simply sought reductions in land prices, some argued that federal land ownership within the states was unconstitutional because it violated the principle of equal sovereignty. National politicians in both political parties, however, overwhelmingly rejected the constitutional argument for cession of federal land. Many even equated Western demands for cession of the land to the states with the radical and dangerous doctrine of nullification, as both stressed the primacy of states' rights. The debates over cession reveal that, when the issue was first considered, Congress's Power to Dispose was widely understood to be limited only by the duty to dispose for the common benefit. A special House Committee on state cession petitions, for example, proclaimed that "if any States have, in reality, an unhallowed desire *to get*, it may be useful to them to reflect that the other States have the power *to keep*, and that it is the *duty* of the representatives of these to know that if the national property is parted with, it is parted with only for the *general* advantage."⁴⁴⁸

The constitutionality of federal landholding reemerged as a pressing national issue in the early twentieth century after President Franklin D. Roosevelt withdrew hundreds of millions of acres of federal land from divestiture.⁴⁴⁹ Like before, some Westerners argued that restrictive federal land policy violated the Constitution and the equal sovereignty of the states. These constitutional arguments, however, were not taken seriously outside of the West. Instead, most in the federal government assumed that Congress had plenary power over the land and took the side of conservationists who saw it as a resource to be preserved for the common benefit of all the people of the United States. The Sagebrush Rebellion of the 1970s, which arose from frustration with federal regulations that limited the use of federal land, repeated these same dynamics.

Supreme Court precedent also fully supports a broad construction of Congress's Power to Dispose. Although the Supreme Court did not squarely rule on the issue during the nineteenth century, it stated in *Gratiot* that power over the public lands "is vested in Congress without limitation."⁴⁵⁰ In 1911, the Court in *Light* squarely held that, as Congress "can withhold or reserve the land, it can do so indefinitely."⁴⁵¹ The *Kleppe* Court, moreover, rejected a narrow reading of Congress's power and stated that it is "without limitations."⁴⁵²

448. 5 AMERICAN STATE PAPERS, *supra* note 155, at 796.

449. See *supra* text accompanying note 370.

450. *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537 (1840).

451. *Light v. United States*, 220 U.S. 523, 536 (1911).

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

The fact that Congress sold virtually all the public land within the early public land states, moreover, has no bearing on the scope of Congress's power under the Property Clause. Originalists who care about original intent look to what the framers intended the Constitution to mean, not what policies they thought Congress would use its powers to pursue.⁴⁵³ Although early land policy was designed to facilitate land sales, Congress—not the states or the courts—was understood to have had the power to set this policy. Robert Hayne, a Southern champion of states' rights during the Nullification Crisis, argued that although Western desire for access to land "may present strong claims on the Federal Government for the adoption of a liberal policy towards the new States, it cannot affect the question of legal or constitutional right."⁴⁵⁴

The expectation that Congress would sell the public domain, moreover, was driven by prevailing social attitudes rather than the original understanding of Congress's Property Clause power. Under eighteenth-century thinking, cultivation of the land was "interesting, noble and august," whereas undeveloped lands were "barren wilds" or "immense deserts."⁴⁵⁵ Environmental conservation and preservation were unknown concepts in the eighteenth and nineteenth centuries. The people of the founding generation thus did not expect Congress to use its powers over the public lands for conservation because they did not understand the concept of conservation, not because they thought that Congress lacked the power to do so.

It is also important to recognize that, for all practical purposes, policymakers in the early republic thought Congress would always control vast tracts of land. As Foot explained when introducing his resolution in 1829, the federal government sold only about one million acres per year.⁴⁵⁶ By comparison, the Louisiana Purchase alone was approximately 530 million acres.⁴⁵⁷ The early Congress therefore expected that it would own millions of acres within the states for the foreseeable future. It is difficult to square this expectation with any meaningful duty to divest federal land.

B. *The Equal Sovereignty Argument*

For nearly two centuries, advocates of the narrow view of congressional power have argued that federal land ownership displaces state sovereignty and therefore makes the western states unequal to those in the East. Under this argument, Nevada is not equal to other states because it has sovereignty over less than half of its territory. The equal sovereignty principle, which the Su-

453. See *supra* Section I.B.

454. 6 REG. DEB. 34 (1830).

455. Bestor, *supra* note 55.

456. See 6 REG. DEB. 3–4 (1829).

457. *Louisiana Purchase, 1803*, OFF. OF THE HISTORIAN, U.S. DEP'T OF STATE, <https://perma.cc/GME4-36ZH>.

preme Court recently affirmed in *Shelby County v. Holder*,⁴⁵⁸ has deep historical support.⁴⁵⁹ In fact, state equality was a basic assumption of all parties in the historical debates over Congress's Power to Dispose.

Eighteenth century commentators, however, believed that state equality was perfectly consistent with federal land ownership within a state. The framers clearly intended for the Property Clause to authorize Congress to reenact the Northwest Ordinance. The Ordinance, like every subsequent enabling act, both guarantees that new states will be admitted on an "equal footing" and assumes that the federal government will continue to own land within the state after admission.⁴⁶⁰ James Madison, the "Father of the Constitution," also declared that "the known and acknowledged" view of the framers was that Congress would control the public lands after statehood.⁴⁶¹

In fact, giving all federal land to the state governments at statehood would be antithetical to the framers' land policy. Starting with the Land Act of 1785, Congress exercised strict control over land sales to ensure slow, orderly, and compact settlement in the territories that would be connected to the East and consistent with republican government.⁴⁶² Any loss of federal control would have undermined this system and threatened the Union. As congressmen pointed out during the debates over cession,⁴⁶³ the equal sovereignty argument was inconsistent with the land policy of Founders like Washington and Jefferson. As Madison asserted, "a prescriptive sanction of so many years" cannot be ignored.⁴⁶⁴

Throughout history, Congress and the courts have responded to the equal sovereignty argument by contending that federal land ownership does not infringe on state sovereignty. Webster, the "Expounder of the Constitution,"⁴⁶⁵ declared that federal ownership of the public domain had not "encroached on the sovereign power of the new States" because the states retained the power to legislate with respect to the land within their borders.⁴⁶⁶ In cases like *Gratiot*, *Pollard*, and *Stearns*, moreover, the Supreme Court likewise held that federal property ownership is distinct from state sovereignty. In fact, the problem of dividing sovereignty was a central issue in eighteenth- and nineteenth-century political thought. The American system of federalism was based on the idea that dividing political power between the states and federal government was not

458. 570 U.S. 529, 544 (2013).

459. See Jeffrey Schmitt, *In Defense of Shelby County's Principle of Equal State Sovereignty*, 68 OKLA. L. REV. 209, 238 (2016).

460. See *Transcript of Northwest Ordinance*, *supra* note 85.

461. See MADISON, *supra* note 177, at 187–88.

462. See *supra* text accompanying notes 79–82.

463. *Speeches*, *supra* note 164.

464. MADISON, *supra* note 177, at 188

465. See REMINI, *supra* note 242, at 28–29, 162 (1997).

466. 13 REG. DEB. 785 (1837).

only possible, but "a virtue to be celebrated."⁴⁶⁷ The federal government's ownership of a disproportionate amount of land in the West, therefore, is no more constitutionally problematic than the federal government regulating more commerce on the eastern seaboard.⁴⁶⁸

C. *The Common Benefit Principle*

Congress's broad power to dispose, however, has always been understood to be limited by a duty to act for the common benefit. As early as 1776, Maryland's legislature resolved that, because the public lands were obtained with "the blood and treasure of the United States, such lands ought to be considered as a common stock."⁴⁶⁹ Leading antebellum statesmen such as Clay, Buchanan, Webster, and John Quincy Adams agreed. Buchanan, for example, "solemnly protested against the principle that Congress had any right, in equity or justice, to give what belonged to the entire people of the Union to the inhabitants of any State or States whatever."⁴⁷⁰ In *Dred Scott*, moreover, Chief Justice Taney held that Congress acted as the "trustee" with respect to the territories and thus had a "duty of promoting the interests of the whole people of the Union."⁴⁷¹

Just as antebellum politicians used the principle to fight off demands for cession of federal land to the states, twentieth- and twenty-first century commentators have argued that permanent federal ownership is necessary to ensure that the lands are kept open for common use. The conservation movement was based on a desire to stop special interests from misusing the public lands for private gain. President Theodore Roosevelt, for example, stated: "As a people we have the right and the duty, second to none other but the right and duty of obeying the moral law, of requiring and doing justice, to protect ourselves and our children against the wasteful development of our natural resources."⁴⁷² When President Hoover proposed giving federal range lands to the states, moreover, the American Forestry Association declared that it "stands for inviolate retention of the lands and natural resources which now belong to our people as a perpetual and inalienable trust to be used for the common benefit."⁴⁷³ Today, outdoor recreation groups similarly oppose land transfer to the states on

467. See ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 6 (2010).

468. As the Court held in *Shelby County*, the equal sovereignty principle does not require the federal government to treat all states equally; instead, it merely requires that unequal treatment be "sufficiently related to" differences in fact. *Shelby Cty. v. Holder*, 570 U.S. 529, 550–51 (2013) (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 204 (2009)).

469. GATES, *supra* note 12, at 6 (quoting CONG. GLOBE, 25th Cong., 2d Sess. 542 (1838)).

470. 13 REG. DEB. 731 (1837).

471. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 448 (1857).

472. See Roosevelt, *supra* note 335.

473. *Hearings*, *supra* note 351.

the basis that the public lands are an “American birthright” that “belongs to all of us.”⁴⁷⁴

These groups, however, should not rely on the courts to enforce the common benefit principle against Congress. In *Light*, the Court stated that “it is not for the courts to say how that trust shall be administered. That is for Congress to determine.”⁴⁷⁵ In other words, disposal of federal lands is arguably a political question because of a “textually demonstrable constitutional commitment of the issue to a coordinate political department.”⁴⁷⁶ Regardless of whether the courts enforce the common benefit principle, however, history suggests that it should constrain Congress’s disposal power.

CONCLUSION

Founding Era sources do not answer the issue of whether Congress has the power to permanently own land within a state. Because the federal government owned no such land until the nineteenth century, the Confederation and Founding periods contain little discussion of Congress’s power under the Property Clause. The Supreme Court, moreover, did not rule directly on the issue until the early twentieth century. It is therefore not surprising that legal scholarship, which has primarily analyzed only Founding-Era sources, is hopelessly divided.

Moving beyond the Founding Era reveals that Congress’s Power to Dispose has been broadly construed since at least the 1830s. Whenever federal policy has restricted access to federal land, prominent Western politicians have challenged Congress’s power. An overwhelming majority in Congress, however, has always responded by arguing that its power to own land is limited only by a duty to act for the common benefit. For more than two-hundred years, commentators have argued that giving federal land to the states would violate this limitation. Supreme Court doctrine has now supported this construction for more than a century. Ironically, although many Westerners today argue that federal landholding violates an originalist understanding of the Constitution, constitutional history provides more support to the environmentalist groups that seek to preserve federal land for the common good.

Although history does not necessarily dictate constitutional meaning, such a long-standing and widely accepted construction of Congress’s Power to Dispose is highly persuasive. As Madison wrote nearly two centuries ago, “the title in the people of the United States rests on a foundation too just and solid to be shaken by any technical or metaphysical arguments whatever.”⁴⁷⁷

474. See *supra* note 13 and accompanying text.

475. *Light v. United States*, 220 U.S. 523, 537 (1911).

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

477. MADISON, *supra* note 177, at 188.