Report of the Public Lands Subcommittee
Western Attorneys General Litigation Action Committee
Conference of Western Attorneys General

The Honorable Peter Michael
Attorney General
State of Wyoming
Chair
Public Lands Subcommittee
Western Attorneys General Litigation Action Committee

The Honorable Ellen F. Rosenblum
Attorney General
State of Oregon
Chair
Conference of Western Attorneys General

Christopher D. Coppin
Legal Director
Conference of Western Attorneys General
1300 I Street
Sacramento, California 95814
Ccoppin@cwagweb.org
916-322-6431

INTRODUCTION

In August 2014, a Public Lands Subcommittee of the Western Attorneys General Litigation Action Committee of the Conference of Western Attorneys General (CWAG) was formed by CWAG Chair, Idaho Attorney General Lawrence Wasden, to examine the legal issues regarding federal land ownership in the western states. The Subcommittee was chaired by Wyoming Attorney General Peter Michael and included attorneys from the Attorney General Offices of Alaska, Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah and Washington. CWAG Legal Director, Chris Coppin, served as the CWAG staff person assigned to assist the Subcommittee in its work.

The Subcommittee held ten conference calls to discuss the work of the Subcommittee and individual Subcommittee members held several conference calls with other Subcommittee members while working on sections of this Paper.

The Subcommittee did not address whether a particular state's enabling act would legally require the federal government to transfer public lands to a state, as each state's enabling act and the circumstances surrounding the admission of individual states into the Union are unique. The Subcommittee left that task of analysis to each member state.

On July 19, 2016, the membership of CWAG approved the adoption of this Paper by resolution at its annual business meeting in Sun Valley, Idaho, by vote of 11 – 1.

TABLE OF CONTENTS

EXECUTIVE SUMMARY

In August 2014, a Subcommittee of the Conference of Western Attorneys General was formed to examine the issues regarding federal land ownership in, and transfer to, the western states. Under the chairmanship of Wyoming Attorney General Peter Michael, the Subcommittee on Public Lands included attorneys from Attorney General Offices of Idaho, Montana, Nevada, Utah, New Mexico, Washington, Colorado, Oregon, Arizona and Alaska.

The express mission of the Subcommittee on Public Lands was to produce, through directed and concerted objective legal research and analysis, a document containing detailed, organized, and comprehensive commentary on legal theories for and against the continuation of substantial proprietary ownership by the United States Government of land in the western United States of America. Each member of the subcommittee reserved the right to review and comment on any and all issues identified and also to write any minority or supplemental report which such member might wish to produce.

The broad question addressed by the Subcommittee was whether the federal government was legally obligated to sell or transfer the public lands within a given state to that state. The Subcommittee jointly examined and analyzed a number of legal arguments derived from: (1) the Property Clause - Article IV, Section 3, Clause 2 of the United States Constitution; (2) the Enclave Clause - Article I, Section 8, Clause 17 of the United States Constitution and (3) the equal footing doctrine announced by the Court in *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845). In particular, the Subcommittee examined the following legal arguments, identified below with separate bullets, that litigants or other advocates have advanced to support the theory that the United States lacks authority to retain ownership of certain public lands:

Proposed Theories for Transfer Based on the Property Clause

• Lands that the United States received by treaty or other acquisition may only be held in trust for the creation of future states and cannot be retained for federal purposes. *Contra United States v. Gardner*, 107 F.3d 1314, 1317 (9th Cir. 1997) (theory presented by litigant in *Gardner* based on language in *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845)).

• The Property Clause is a temporary ownership provision only, and Congress has power to regulate only those lands that were within the United States at

the time the Constitution was ratified. *Contra United States v. Vogler*, 859 F.2d 638, 640-41 (9th Cir. 1988) (theory argued in *Vogler* based on language from *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 436-38 (1856)).

As a result of its research, the Subcommittee observes that to date, the United States Supreme Court consistently has held that: (1) public lands fall within the purview of the Property Clause; (2) the authority of the United States under the Property Clause has no limitations; (3) the Property Clause vests the United States with exclusive authority to decide whether "to dispose of" or sell public lands; and (4) under the Property Clause, the United States may withhold public lands from sale. No Supreme Court case has directly addressed the question of whether the Property Clause empowers the federal government to retain ownership of public lands indefinitely. In *Stearns v. Minnesota,* 179 U.S. 223 (1900) and *Light v. United States,* 220 U.S. 523 (1911), the Supreme Court explicitly stated that the United States may withhold public lands from sale indefinitely, but in both cases the statement about indefinite retention arguably was *dicta*. The readers of this Paper must draw their own conclusions as to whether the Supreme Court likely would follow *Stearns* and *Light* if squarely presented with the indefinite ownership question.

Proposed Theory for Transfer Based on the Enclave Clause

• The United States may hold and regulate land only to further one of the enumerated powers granted to Congress in Article I, Section 8 of the United States Constitution. *Contra United States v. Vogler*, 859 F.2d 638, 641 (9th Cir. 1988).

As a result of its research, the Subcommittee observes that the weight of relevant decisions by the United States Supreme Court is that ownership of the public lands by the federal government is not limited to those purposes set forth in the Enclave Clause.

Proposed Theories for Transfer Based on the Equal Footing Doctrine

• The high percentage of federal land ownership in the western states violates the equal footing doctrine because the percentage of federal land ownership in the western states far exceeds the percentage of land ownership in the original thirteen states. *Contra United States v. Gardner*, 107 F.3d 1314, 1318 (9th Cir. 1997).

• Under the equal footing doctrine, title to the public lands passed to each of the western states when they were admitted to the Union. *Contra United States v. Gardner*, 903 F. Supp. 1394, 1400 (D. Nev. 1994).

• Title to all unappropriated lands was automatically transferred from the federal government to state governments when the western states were admitted to the Union because the original thirteen states obtained ownership of unappropriated dry land as an attribute of sovereignty at the time of the Revolution. *Contra United States v. Nye Cnty., Nev.*, 920 F. Supp. 1108, 1114 (D. Nev. 1996).

• Under the equal sovereignty principle, the United States cannot indefinitely retain ownership of the public lands. John Howard et. al, *Legal Analysis of the Legal Consulting Services Team for the Utah Commission for the Stewardship of Public Lands*, 54-72 (2015) (*White Paper*).[1]

As a result of its research, the Subcommittee observes that, contrary to arguments that were made against the United States in the *Nye County* and *Gardner* cases, the United States Supreme Court did not suggest in its 1845 *Pollard's Lessee* decision establishing the equal footing doctrine that retention of public lands after statehood would violate a state's entitlement to admission upon equal footing with the original states. Also, the federal courts that have addressed the equal footing argument against continued federal ownership have specifically held that the equal footing doctrine established in *Pollard's Lessee* and applied in some other cases does not apply to public domain lands. The Supreme Court has had ample opportunity to apply equal sovereignty principles in addressing public lands ownership issues, but has repeatedly distinguished property issues as independent from the "limiting or qualifying of political rights and obligations" that may trigger additional scrutiny under such principles.

With the presentation of this Paper, the Subcommittee submits that it has, to the best of its ability, discharged its assignment to produce, through directed and concerted objective legal research and analysis, a document containing detailed, organized, and comprehensive commentary on legal theories for and against the continuation of substantial proprietary ownership by the United States Government of land in the western United States of America.

---

[1] Available online at: http://le.utah.gov/interim/2015/pdf/00005590.pdf (last visited June 30, 2016).

DISCUSSION

Question 1: Does the Property Clause in the United States Constitution, Article IV, Section 3, Clause 2, empower Congress to retain public lands in federal ownership indefinitely?

The United States Constitution created a federal government of enumerated powers. *Gibbons v. Ogden,* 22 U.S. (9 Wheat) 1, 33-36 (1824). Stated differently, if the Constitution does not grant a power to the federal government, either expressly or by necessary implication, then it lacks that power. *House v. Mayes,* 219 U.S. 270, 282 (1911). Powers not granted to the federal government are reserved to the states. *United States v. Cruikshank,* 92 U.S. (2 Otto) 542, 551 (1875). Some who have advocated for mandatory federal divestiture of public lands to western states have argued that, in particular instances, Congress and a prospective state have agreed in enabling legislation that the United States would at some point cede to the state ownership of federal lands. *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*, 2013 BYU L. Rev. 1133 (2013). Such commentators have also contended that no provision in the United States Constitution enumerates a power under which the federal government can continue to own and manage large tracts of land in the American West. *See, e.g.*, Robert G. Natelson*, Federal Land Retention and the Constitution's Property Clause: The Original Understanding,* 76 U. Colo. L. Rev. 327 (2005).

The Property Clause of the United States Constitution is relevant to both arguments because some claim that it creates the enumerated power within the Constitution that supports the continued ownership of such land by the United States. The Property Clause also is suggested to be the supreme federal law that implies that Congress and specific states intended the United States to continue to indefinitely own federal lands within state boundaries, despite what may be stated in statehood enabling legislation. Thus, for purposes of the discussion below, the Property Clause should be seen as a potential defense that the United States would raise in litigation brought by a state to force divestiture of federal lands.

I. Supreme Court Construction of Property Clause

The Property Clause provides in part that "[t]he Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States …." U.S. Const., art. IV, § 3, cl. 2. This language in the Property Clause vests Congress with two related but distinct powers — the power to manage property owned by the federal government and the power to dispose of such property.

Because this Paper focuses on whether the United States may retain certain public lands in federal ownership, questions regarding the authority of the federal government to manage or regulate public lands are not within the direct scope of this Paper. That said, there appears to be no dispute that Congress has unlimited authority to manage and regulate, in the interim, federal public lands. The United States Supreme Court addressed the breadth of the federal government's regulatory authority under the Property Clause in *Kleppe v. New Mexico*, 426 U.S. 529 (1976). In *Kleppe*, the Supreme Court addressed the constitutionality of the federal Wild Free-Roaming Horses and Burros Act. *Id.* at 531. That Act protects wild horses and burros on public lands owned by the United States from "capture, branding, harassment, or death." 16 U.S.C. § 1331. The State of New Mexico, through its livestock board and director and under state law, had rounded-up and auctioned wild horses found on federal land. *Kleppe*, 426 U.S. at 533-34. The State filed an anticipatory suit seeking a declaratory determination that the federal act was unconstitutional as an encroachment upon state sovereignty. *Id.* at 534.

The Supreme Court rejected the State's argument and, based on the Property Clause, affirmed the power of Congress over public lands, including animal life on those lands. *Id.* at 546. In so doing, the Supreme Court stated:

> [A]ppellees have presented no support for their position that the Clause grants Congress only the power to dispose of, to make incidental rules regarding the use of, and to protect federal property. This failure is hardly surprising, for the Clause, in broad terms, gives Congress the power to determine what are "needful" rules "respecting" the public lands. **And while the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved, we have repeatedly observed that "[t]he power over the public land thus entrusted to Congress is without limitations."**

> The decided cases have supported this expansive reading. It is the Property Clause for instance, that provides the basis for governing the Territories of the United States. And even over public land within the States, "[t]he general Government doubtless has a power over its own property analogous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case. We have noted, for example, that **the Property Clause gives Congress the power over the public lands** "to control their occupancy and use, to protect them from trespass and injury, and **to prescribe the conditions upon which others may obtain rights in them...."** And we have approved legislation respecting the public lands "[i]f it be found to be necessary, for the protection of the public or of intending settlers [on the public lands]." **In short, Congress exercises the powers both of a proprietor and of a legislature over the public domain.** Although, **the Property Clause** does not authorize "an exercise of a general control over public policy in a State," it **does permit "an exercise of the complete power which Congress has over particular public property entrusted to it."** In our view, the "complete power" that Congress has over public lands necessarily includes the power to regulate and protect the wildlife living there.

Id. at 539-41 (citations omitted) (emphasis added).

While *Kleppe* appears to resolve any question regarding the scope of Congress's management authority over public lands, no Supreme Court case definitively addresses whether the federal government may retain public lands in federal ownership indefinitely. However, in other contexts relevant to this discussion, the Supreme Court has addressed the scope of Congress's authority to dispose of lands under the Property Clause.

Historically, the Supreme Court has construed the Property Clause broadly with respect to the authority of the United States to dispose of public lands. *See* Robert B. Keiter & John C. Ruple, *A Legal Analysis of the Transfer of Public Lands Movement* 1-2 (Wallace Stegner Center for Land Resources and the Environment at the University of Utah S.J. Quinney College of Law, October 27, 2014) [Stegner Center White Paper No. 2014-2]. Three Supreme Court decisions from the late nineteenth century illustrate this point.

In 1871, the Supreme Court explained that, under the Property Clause, the power of the United States to dispose of public lands has no limitations. *Gibson v. Chouteau*, 80 U.S. (13 Wall.) 92 (1871). *Gibson* involved the question of whether a state statute of limitations could defeat the title of a grantee of the United States. Regarding the scope of Congress's authority under the Property Clause, the Court explained:

> 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; and to prevent the possibility of any attempted interference with it, a provision has been usually inserted in the compacts by which new States have been admitted into the Union, that such interference with the primary disposal of the soil of the United States shall never be made.

Gibson, 80 U.S. (13 Wall.) at 99.

Fifteen years later, the Supreme Court recognized that the federal government's power to dispose of public lands under the Property Clause is exclusive. *Van Brocklin v. Anderson*, 117 U.S. 151 (1886). In *Van Brocklin*, the Court addressed whether lands acquired by the United States by means of a tax sale and later sold by the United States were subject to taxation by the State of Tennessee while they were owned by the federal government. Regarding the State's taxing authority under such circumstances, the Court explained:

> Upon the admission of a state into the Union, the state doubtless acquires general jurisdiction, civil and criminal, for the preservation of public order, and the protection of persons and property, throughout its limits, except where it has ceded exclusive jurisdiction to the United States. The rights of local sovereignty, including the title in lands held in trust for municipal uses, and in the shores of navigable waters below high-water mark, vest in the state, and not in the United States. **But public and unoccupied lands, to which the United States have acquired title, either by deeds of cession from other states, or by treaty with a**

> **foreign country, congress, under the power conferred upon it by the constitution, "to dispose of and make all needful rules and regulations respecting the territory or other property of the United States," has the exclusive right to control and dispose of, as it has with regard to other property of the United States; and no state can interfere with this right, or embarrass its exercise.**

Van Brocklin, 117 U.S. at 167-68 (emphasis added) (citations omitted).

Eleven years after *Van Brocklin* was decided, the Supreme Court confirmed that the power to dispose of public lands gives the United States discretion to withhold public lands from sale. *Camfield v. United States*, 167 U.S. 518 (1897). The issue in *Camfield* involved the constitutionality of a federal statute that prohibited a person with no right or title to the public lands of the United States from erecting a fence around such lands. Although the Court did not explicitly cite the Property Clause, it explained the authority of the United States regarding the public lands as follows:

> While the lands in question are all within the state of Colorado, **the government has, with respect to its own lands, the rights of an ordinary proprietor, to maintain its possession** and to prosecute trespassers. **It may deal with such lands precisely as a private individual may deal with his farming property. It may sell or withhold them from sale.** It may grant them in aid of railways or other public enterprises. It may open them to pre-emption or homestead settlement, but it would be recreant to its duties as trustee for the people of the United States to permit any individual or private corporation to monopolize them for private gain, and thereby practically drive intending settlers from the market.

Camfield, 167 U.S. at 524 (emphasis added).

Viewed together, *Gibson*, *Van Brocklin*, and *Camfield* establish four principles: (1) public lands fall within the purview of the Property Clause; (2) the authority of the United States under the Property Clause has no limitations; (3) the Property Clause vests the United States with exclusive authority to decide whether "to dispose of" or sell public lands; and (4) under the Property Clause, the United States may withhold public lands from sale. Since 1900, the Court has reiterated these principles when explaining the

nature and extent of the authority granted to the United States under the Property Clause. *See, e.g., Kleppe*, 426 U.S. at 539; *Alabama v. Texas*, 347 U.S. 272, 273 (1954) (per curiam); *United States v. City & Cnty. of San Francisco*, 310 U.S. 16, 29 (1940); *United States v. Midwest Oil Co.*, 236 U.S. 459, 474-75 (1915).

In *Gibson*, *Van Brocklin*, and *Camfield*, the Supreme Court did not explicitly address whether the Property Clause empowers the United States to indefinitely withhold public lands from disposal or sale. But in *Gibson*, the Court explained that the authority of the United States under the Property Clause has "no limitations," and that the United States 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." *Gibson*, 80 U.S. (13 Wall.) at 99. Presumably, the phrase "no limitations" includes limitations on how long the United States may retain public lands, and the right to prescribe the time of transfer includes the authority to retain public lands indefinitely. It thus appears as though the Court has implicitly recognized that the Property Clause authorizes the United States to retain public lands indefinitely.

In two cases decided in the early twentieth century, the Supreme Court explicitly recognized that the United States may withhold public lands from sale indefinitely. *See Stearns v. Minnesota*, 179 U.S. 223 (1900); *Light v. United States*, 220 U.S. 523 (1911). In both cases, however, the Court's statement about retaining ownership of public lands indefinitely appears in *dicta*.

In *Stearns*, a number of railroad companies and at least one Minnesota county official appealed from a decision by the Supreme Court of Minnesota. The issue before the United States Supreme Court was whether, under state law, a certain classification of real estate belonging to railroad companies should be taxed according to the value provided by the state constitution or subject to payment in lieu of taxes as provided by state statute. *Stearns*, 179 U.S. at 223. The lands at issue had been transferred from the United States to the State of Minnesota as trustee, and then from the State to railroad companies to construct railroad lines. *Stearns*, 179 U.S. at 224-29.

In addressing a concern expressed by the lower court about taxation of lands that have been transferred from public to private ownership, the Court explained:

> It is true that Congress might act so as in effect to keep withdrawn a large area of the state from taxation. **Under the reservation in the act of admission and the acceptance thereof by the state of Minnesota the right of Congress to determine the disposition of public lands within that state was reserved**, and, according to the decision in *Van Brocklin* v. *Tennessee*, 117 U. S. 151 … lands belonging to the United States are exempt from taxation by the state. So that **if Congress should determine that the great body of public lands within the state of Minnesota should be reserved from sale for an indefinite period it might do so**, …. It had the power to withdraw all the public lands in Minnesota from private entry or public grant, and, exercising that power, it might prevent the state of Minnesota from taxing a large area of its lands, but no such possibility of wrong conduct on the part of Congress can enter into the consideration of this question.

Stearns, 179 U.S. at 242-43 (emphasis added) (part of citation omitted).

In *Stearns*, the Supreme Court noted that, during the process of admitting Minnesota to the Union, the United States reserved the right to dispose of public lands located in Minnesota, and the people of Minnesota had agreed to that reservation of right. *Id.* To reach this conclusion, the Court relied on the enabling act for the Territory of Minnesota and article II, section 3 of the Minnesota Constitution. *Id.*, at 243-44. In the enabling act, Congress required the people of Minnesota to agree that the State "shall never interfere with the primary disposal of the soil within [the State of Minnesota] by the United States, or with any regulations Congress may find necessary for securing the title in said soil to bona fide purchasers thereof …." *Id.* (citation omitted). The people of Minnesota undertook this agreement in article II, section 3 of the Minnesota Constitution.[2] That section adopted *verbatim* the preceding language from the enabling act. *Stearns*, 179 U.S. at 244 (citation omitted).

The Supreme Court characterized the enabling act and the Minnesota constitutional provision as "simply an agreement as to property between a

[2] The original Minnesota Constitution was adopted on October 13, 1857. It was generally revised effective November 5, 1974. The revised Minnesota Constitution does not include the "never interfere" language set forth in the article II, section 3 of the original Constitution.

state and the nation." *Stearns*, 179 U.S. at 245. The Court then explained the consequences of that agreement for the State of Minnesota with respect to the public lands within the state:

> [**T]he state expressly agreed** that no tax should be imposed on lands belonging to the United States**, that it should never interfere with the primary disposal of the soil within the state by the United States,** or with any regulations Congress might find necessary for securing the soil to bona fide purchasers thereof. **These provisions are not to be construed narrowly or technically, but as expressing a consent on the part of the state to the terms proposed by Congress; and among these terms were that the full control of the disposition of the lands of the United States should be free from state action.** Whether Congress should sell or donate; what terms it should impose upon the sale or donation; what arrangements it should make for securing title to the beneficiaries-were all matters withdrawn from state interference by the terms of the enabling act and the Constitution.

Stearns, 179 U.S. at 250 (emphasis added). Finally, the Court reiterated that "the provisions of the enabling act and the state Constitution … secure to the United States full control of the disposition of the public lands within the limits of the state." *Stearns*, 179 U.S. at 250.

For some western states, *Stearns* may render moot any argument that the Property Clause does not empower the United States to retain public lands indefinitely. The opinion in *Stearns* provides that: (1) during the process of being admitted to the Union, a state may consent to the United States having full control over the disposition of public lands with the state; and (2) if a state agreed that the United States would have full control over the disposition of public lands within the state, the United States may withhold those lands from sale indefinitely. The question of whether a particular state consented to such an arrangement with the United States will depend upon the specific facts and circumstances surrounding that state's admission into the Union.

That said, in addressing whether the United States may retain public lands within a state indefinitely, *Stearns* may lack precedential value for two reasons.

First, the statement about the United States having the authority to withhold public lands from sale indefinitely appears in a hypothetical in a part of the analysis that appears to be *dicta*. Generally speaking, the Supreme Court is not bound by *dicta* on an issue that was not fully debated in the prior case. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006). It is not clear whether the parties fully debated the indefinite land retention issue in *Stearns*.

Second, *Stearns* arguably is a plurality opinion.[3] Generally speaking, a plurality opinion has "questionable precedential value" when a majority of the Justices disagreed with the rationale of the plurality. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 66 (1996).

Eleven years after *Stearns* was decided, the Court cited *Stearns* for the proposition that the United States may withhold public lands from sale indefinitely. *Light*, 220 U.S. at 536 (citing *Stearns*, 179 U.S. 243). The Court affirmed *Stearns's* analysis in the context of explaining the extent of the federal government's authority under the Property Clause. *Id.*

In *Light,* a rancher from Colorado challenged a federal court injunction enjoining him from running cattle on public lands. Addressing the authority Congress to "withdraw large bodies of land from settlement without the consent of the state where it is located," the Court explained:

> [T]he nation is an owner, and has made Congress the principal agent to dispose of its property …. Congress is the body to which is given the power to determine the conditions upon which the public lands shall be disposed of. The government has, with respect to its own 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.** And if it may withhold from sale and settlement, it may also, as an owner, object to its property being used for grazing purposes, for the government is charged with the duty and clothed with the power to protect the public domain from trespass and unlawful appropriation.

---

[3] In *Stearns*, one justice concurred in the judgment on a different basis from the opinion, and four justices joined in a separate opinion "assenting to the judgment of reversal." *Stearns,* 179 U.S. at 253-54. The Subcommittee has found no reported opinion in which the Supreme Court or any other federal court treated *Stearns* as a plurality opinion.

> The United States can prohibit absolutely or fix the terms on which its property may be used. **As it can withhold or reserve the land, it can do so indefinitely.** *Stearns v. Minnesota*, 179 U. S. 243, 45 L. ed. 173, 21 Sup. Ct. Rep. 73. It is true that the United States do not and cannot hold property as a monarch may, for private or personal purposes. But that does not lead to the conclusion that it is without the rights incident to ownership, for the Constitution declares, § 3, art. 4 that 'Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or the property belonging to the United States.' The full scope of this paragraph has never been definitely settled. Primarily, at least, it is a grant of power to the United States of control over its property.

Id. at 536-537 (citations and quotation marks omitted) (emphasis added).

Although the above-quoted language appears to definitively answer the question at hand, the specific issue before the Supreme Court in *Light* was whether the court of appeals properly granted an injunction to prohibit a cattle owner from grazing his cattle on a forest reservation. *Light*, 220 U.S. at 524. The Court held that the injunction was properly granted and, in so holding, stated that it was "unnecessary to consider … the other constitutional questions involved." *Light*, 220 U.S. at 538. Thus, the Court's explanation of the contours of the Property Clause in *Light* appears to be *dicta*.

A recently-issued white paper prepared for a Utah state commission that analyzed legal theories for the State to attempt to gain ownership or control of public lands discussed the Supreme Court's Property Clause jurisprudence. *White Paper*, at 79-85.

Citing *Kleppe, Gibson, Van Brocklin*, and *United States v. Gratiot*, 39 U.S. 526 (1840), the *White Paper* acknowledged that, "[t]here is no question that, within the constraints of the Constitution, Congress has plenary power to manage and regulate the property it owns, and to decide to sell it or withhold it from sale. *Id.* at 124, n.265. The *White Paper* noted that these cases did not address the specific question whether the Property Clause grants Congress the authority to "forever retain the majority of the land within a State." *Id.* at 125.

The *White Paper* analyzed *Light v. United States* as the "closest Supreme Court case on record" regarding "whether Congress can forever retain the

majority of the land within a State." *Id.* at 125-28. After analyzing *Light*, the *White Paper* concluded that the question of "[w]hether the Property Clause grants the United States the power to permanently own over sixty-six percent of the State of Utah is an open one under existing jurisprudence. There is an indication, however, that this Court might be open to the structural Constitutional arguments noted above [in the *White Paper*]." *Id.* at 128.

At least two lower federal courts have addressed the specific issue of whether the Property Clause empowers Congress to indefinitely retain ownership of public lands within a state. *See Nevada ex rel. State Bd. of Agric. v. United States,* 512 F. Supp. 166 (D. Nev. 1981); *United States v. Gardner*, 107 F.3d 1314 (9th Cir. 1997). In *Nevada ex rel. State Board of Agriculture,* the State of Nevada alleged that the Federal Land Policy and Management Act of 1976 unconstitutionally infringed upon its Tenth Amendment and equal footing rights and sought declaratory judgment to determine whether the United States could constitutionally place a moratorium on the disposal of public lands. *Nevada ex rel. State Bd. of Agric.*, 512 F. Supp. at 168.

The district court held that "the plaintiff can prove no set of facts which would entitle it to judicial relief" and dismissed the case. *Id.* at 172. In its analysis of the claims, the court addressed the scope of the federal government's authority under the Property Clause:

> The public domain passes to the United States upon the admission of a state to the Union; this is implicit in the acts of admission. Regulations dealing with the care and disposition of public lands within the boundaries of a new state may properly be embraced in its act of admission, as within the sphere of the plain power of Congress. No state legislation may interfere with Congress' power over the public domain; to prevent any attempt at interference, the act of admission usually contains an agreement by the state not to interfere. Nevada was admitted to the Union subject to such an agreement.
>
> **Art. 4, s 3, Cl. 2 of the Constitution** ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory and other property belonging to the United States....") entrusts Congress with **power over the public land without limitations**; it is not for the courts to say how that trust shall be administered, but for Congress to determine. **Necessarily, then, the U.S. Government may sell public land**

> **or withhold it from sale. Thus, the consent of the state is not required for Congress to withdraw large bodies of land from settlement.** That a power may be injuriously exercised is no reason for a misconstruction of the scope and extent of that power.

Id. at 171-72 (citations omitted) (emphasis added).[4]

In *United States v. Gardner*, the Ninth Circuit addressed a number of arguments related to the core question of whether the United States has legal title to the public lands in Nevada. *United States v. Gardner*, 107 F.3d 1314 (9th Cir. 1997). Relying on language from *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845), the appellants argued that the United States has legal authority to hold land in trust for the creation of future states but is not authorized to retain land for its own purposes. *Gardner*, 107 F.3d at 1317.

The court in *Gardner* rejected this argument. *Id.* at 1317-18. It first distinguished *Pollard's Lessee*, explaining that (1) the United States held the land at issue in *Pollard's Lessee* in trust for the establishment of future states because the States of Georgia and Virginia ceded that land to the federal government and the terms of the cessions dictated that the authority of the United States over the land would cease after the land was used to create new states, but (2) as a result of the Treaty of Guadalupe Hidalgo in 1848, the United States was the initial owner of the lands that were used to create the State of Nevada. *Id.* (citation omitted). Based on the difference in the nature of the federal government's property interests in each case, the panel determined that the reasoning from *Pollard's Lessee* did not apply to the situation in *Gardner*. *Id.*

The court then addressed the extent of the federal government's authority over the public lands in Nevada, explaining that the public lands had been the property of the federal government since Mexico ceded the land to the United States in 1848 and, as such, were subject to the Property Clause. *Id.* at 1318. The court observed that the United States Supreme Court has recognized that Congress's power over the public lands is without limitations and includes

[4] On appeal, the Ninth Circuit upheld the dismissal, not on the merits, but on the ground that the case had become moot with the lifting of the moratorium. *Nevada ex rel. State Bd. of Agric. v. United States*, 699 F.2d 486, 487 (9th Cir. 1983).

the power to sell public lands or withhold them from sale. *Id.* (citations omitted).[5]

In *Nevada ex rel. State Board of Agriculture* and *Gardner*, the courts concluded that (1) the federal government's power over the public lands is without limitations, and (2) this power includes the discretion to withhold public lands from sale. In reaching these conclusions, the courts did not find there were any temporal limitations on the power to withhold public lands from sale. Therefore, *Nevada ex rel. State Board of Agriculture* and *Gardner* reasonably can be interpreted as supporting an argument that the Property Clause vests the United States with the power to retain public lands indefinitely.

II. Conclusions

In the final analysis, the Subcommittee has found no nationally binding precedent that directly answers the question of whether the Property Clause empowers the federal government to retain ownership of public lands indefinitely. No United States Supreme Court case is directly on point. Although the decisions in *Nevada ex rel. State Board of Agriculture* and *Gardner* arguably answer the question directly and in the affirmative, *Nevada ex rel. State Board of Agriculture* is not binding precedent on any court and *Gardner* is not binding precedent outside of the Ninth Circuit.

Although no Supreme Court case has directly answered the question, in *Stearns* and in *Light* the Court stated that Congress may retain ownership of public lands indefinitely under the Property Clause. If these statements are viewed as *dicta*, they are not controlling, but may be followed by the Court. *See Humphrey's Ex'r v. United States*, 295 U.S. 602, 627 (1935). For almost two centuries the Supreme Court has followed the rule that "'general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.'" *Ark. Game & Fish Comm'n v. United States*, — U.S. —,

[5] The Supreme Court denied a petition for writ of certiorari and a request for rehearing on the petition filed in the *Gardner* case. *Gardner v. United States*, 522 U.S. 907 (1997); 522 U.S. 1008 (1997). Generally, denial of a petition "carries with it no support of the decision in that case, nor of any of the views in the opinion supporting it." *Agoston v. Pennsylvania,* 340 U.S. 844, 845 (1950).

133 S. Ct. 511, 520 (2012) (quoting *Cohens v. Virginia,* 6 Wheat. 264, 399 (1821)). It thus appears that the Court would have discretion to follow the statements in *Stearns* and in *Light*, but would not be bound by those statements, in addressing whether the United States may retain ownership of public lands indefinitely. The readers of this Paper must draw their own conclusions as to whether the Supreme Court likely would follow the *dicta* from *Stearns* and *Light* if squarely presented with the indefinite ownership question.

QUESTION 2: Is the ownership of the public lands by the federal government limited to those purposes set forth in the Enclave Clause, United States Constitution Article I, Section 8? Or, to ask the question another way, is there a reasonable legal basis for a claim that the Enclave Clause precludes federal purchase, ownership, and control for other purposes?

Article I, Section 8, Clause 17 of the United States Constitution provides:

> The Congress shall have power to . . . exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings ….

During the time following the end of the Revolutionary War and before ratification of the Constitution, the newly-minted federal government had two problems with ownership of lands not owned by the various states. The first was that it needed a legal means to own and control lands required for important governmental functions such as forts, prisons, and seats of government. The second was that, as the result of negotiations among the various states leading up to ratification of the Constitution, tracts of land, generally to the west of the original thirteen states, were ceded to the federal government by several of the states, and the federal government needed a legal basis to own and deal with those lands.

The first need was addressed in the Constitution by the Article I Enclave Clause. The second was addressed by the Article IV Property Clause.

I. Development of the Meaning and Effect of the Enclave Clause by the Courts

As to properties which actually come within the conditions of the Enclave Clause (properties purchased by consent of the state legislature and utilized for one of the necessary governmental purposes), the federal government has exclusive legislation, and the state has no governmental jurisdiction. *See, e.g., Osburn v. Morrison Knudsen Corp.,* 962 F. Supp. 1206, 1208-09 (E.D. Mo. 1997).

However, much of the land owned by the United States did not come into its possession through the express conditions of the Enclave Clause; the land was not purchased by the federal government with consent of the legislature of any state. The United States became the owner of large tracts of land before the states encompassing those tracts were created, with those lands coming by treaty with Great Britain, by cession from foreign powers, and by cession from various of the original thirteen states. *Fort Leavenworth R.R. Co. v. Lowe,* 114 U.S. 525, 532 (1885). In cases where the United States did purchase lands, states sometimes attached conditions to cessions of jurisdiction which precluded exclusive jurisdiction. *Id.* at 533-39; *James v. Dravo Contracting Co.*, 302 U.S. 134, 149 (1937) (determining that the Enclave Clause "contains no express stipulation that the consent of the state must be without reservations"); *Collins v. Yosemite Park Co.,* 304 U.S. 518, 528 (1937) ("Jurisdiction obtained by consent or cession may be qualified by agreement or through offer and acceptance or ratification. It is a matter of arrangement. These arrangements the courts will recognize and respect.").

The result was recognition by the courts that the United States Constitution accommodates ownership and management by the United States of lands outside the prescriptions of the Enclave Clause. As summarized by George C. Coggins and Robert L. Glicksman in their treatise *Public Natural Resources Law*:

> Courts consequently rewrote the Enclave Clause to allow ratification of virtually any division of jurisdiction and authority over the tract agreed to by the respective governments.

1 George C. Coggins and Robert L. Glicksman, *Public Natural Resources Law* § 3.7 (2nd ed. 2015).

As to Congress's authority to deal with lands not within the strict confines of the Enclave Clause, the United States Supreme Court has consistently dealt with the problem by reference to the Property Clause, Article IV, Section 3, of the United States Constitution.

In *United States v. Gratiot*, the Court said of the Property Clause:

> The term territory, as here used, is merely descriptive of one kind of property, and is equivalent to the word lands. And congress has the same power over it as over any other property belonging to the United States, and this power is vested in congress without limitation[.]

United States v. Gratiot, 39 U.S. 526, 537-39 (1840).

Later, in *Camfield v. United States*, the Court said,

> [W]e do not think the admission of a Territory as a State deprives it [the United States] of the power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power …. [A] different rule would place the public domain of the United States completely at the mercy of state legislation.

Camfield v. United States, 167 U.S. 518, 525-26 (1896).

Additionally, in *Butte City Water Co. v. Baker*, the Court said:

> The authority of Congress over the public lands is granted by section 3, article IV, of the Constitution, which provides that "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." In other words, Congress is the body to which is given the power to determine the conditions upon which the public lands shall be disposed of. The Nation is an owner, and has made Congress the principal agent to dispose of its property.

Butte City Water Co. v. Baker, 196 U.S. 19, 125-26 (1904).

In 1910, in *Light v. United States*, the Court said, "[T]he full scope of this paragraph (referring to the Property clause) has never been definitely settled." *Light v. United States*, 220 U.S. 523 at 536-37(citing *Kansas v. Colorado*, 206 U.S. 46, 89 (1907)).

And most recently, in *Kleppe v. New Mexico*, the Court said:

> And while the furthest reaches of the power granted by the Property Clause have not yet been definitely resolved, we have repeatedly observed that "[t]he power over the public land thus entrusted to Congress is without limitations." [United States v. Cnty. of San Francisco, 310 U.S. 16, 29 (1940)].

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

Some commentators have disagreed with the Supreme Court's reliance on, and application of, the Property Clause contending that, properly construed, the Enclave Clause should have the effect of limiting the United States's ownership and control of federal lands contained within states.

In his 1976 article, David Engdahl explains his "classical public property power doctrine." David E. Engdahl, *State and Federal Power Over Federal Property*, 18 Ariz. L. Rev. 283 (1976). Under his theory, as to federal property not meeting the conditions of the Enclave Clause, the states had general governmental jurisdiction and the United States had only limited power akin to that of a proprietor. Engdahl, at 296. He argues that, under cases such as *Fort Leavenworth R.R. Co. v. Lowe*, where the United States held property within a state without the consent of the legislature, the state maintained general governmental jurisdiction over that property except that, to the extent the United States was using the property for one of the enumerated governmental powers, it would be free from any such interference and jurisdiction of the state as would destroy or impair the lands' effective use for the purposes designed. Engdahl, at 296 (citing to *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 531, 539 (1885)).

Engdahl contends that this exemption from state control, or, looked at from the United States's perspective, this constitutional grant of authority to the United States, did not flow from the Article IV Property Clause, but instead, from the doctrine of intergovernmental immunities and the doctrine of the Necessary and Proper Clause [U.S. Const. Article I, Section 8, Clause 18]. Engdahl, at 299. The Necessary and Proper Clause "supports measures

affirmatively enacted by Congress, combining with the supremacy clause to enable such measures to override conflicting state laws, while the intergovernmental immunities doctrine can limit state power with respect to federal instrumentalities regardless of congressional action on the matter." *Id.*

Engdahl notes one additional limit or qualification to states' general governmental jurisdiction over federal non-enclave property. Even after federal lands within a territory were brought within a state, acquisition of title and other private rights remained under federal, not state law. Engdahl says this was "clearly understood as an exception to the general principle that governmental jurisdiction over article IV property was vested in the state within which the lands lay." Engdahl, at 297.

The classic property power doctrine has not been favorably received by the courts. In *Ventura County v. Gulf Oil Corp.,* the court dismissed a litigant's attempts to limit the scope of the Property Clause, saying, "[I]n light of *Kleppe*, the renewed attempt to restrict the scope of congressional power under the Property Clause in the present case is legally frivolous." *Ventura County v. Gulf Oil Corp.*, 601 F. 2d 1080, 1083 (9th Cir. 1979), *aff'd without opinion*, 445 U.S. 947 (1980)).[6]

II. Conclusions

There is room in the history and the express wording of the Enclave and Property Clauses to support a different view of the authority of the United States to own and manage public lands than that recognized in *Kleppe v. New Mexico*, but the clear weight of relevant decisions by the United States Supreme Court is to the effect that ownership of the public lands by the federal government is not limited to those purposes set forth in the Enclave Clause.

[6] Engdahl had his own strongly-felt views. Acknowledging that, as the law has developed, the classic theory has gotten lost, he attributes this to "A Generation of Confusion and Neglect" (Engdahl, at 310); inadequate advocacy (*Id.* at 360); and, at least insofar as federalism issues are concerned, a sore need for "much more sophisticated scholarship" by the Supreme Court (*Id.* at 357-58).

Question 3: Is there a reasonable legal basis for a claim that the equal footing doctrine precludes federal purchase, ownership, and control of public lands?

The original thirteen states, and each after-admitted state, are sovereigns. "[I]n every sovereign political community there inheres necessarily the right and the duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large." *W. River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 531 (1848). In forming a union, the original thirteen states necessarily delegated certain powers to the central government, but "it would imply an incredible fatuity in the States, to ascribe to them the intention to relinquish the power of self-government and self-preservation." *Id*. This principle is embodied in the Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." In joining the union, after-admitted states necessarily succeed to the same "rights of dominion and sovereignty which belonged to the original states." *Escanaba & Lake Mich. Transp. Co. v. Chicago*, 107 U.S. 678, 689 (1883).

One "essential attribute of sovereignty" shared by the original thirteen states and all after-admitted states is title and control of submerged lands. *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195-98 (1987). In order to place after-admitted states on an "equal footing" with the original states, title to submerged lands vests in each state upon its admission. *Id*. at 196. It has been suggested that similar reasoning should apply to vacant uplands because the original thirteen states succeeded to ownership of all vacant crown lands upon gaining independence—thus, such lands were an attribute of the sovereignty possessed by the original states. *White Paper*, at 79-85. Alternatively, it has been suggested that even if ownership of vacant public lands is not an inherent attribute of sovereignty, permanent federal ownership and sovereign control over massive land holdings in the western states is such an intrusion upon state sovereignty that such lands must be either disposed of or turned over to the states in order to ensure all states in the union enjoy equal sovereignty. The following analysis examines both the "equal footing" and "equal sovereignty" theories for state assertions of title to federal public lands in the western states.

I. Historical Background

In England and the American colonies, the Crown owned all vacant lands, whether dry or submerged. Vacant uplands were an economic asset and were sold or granted to private owners. Edward T. Price, *Dividing the Land: Early American Beginnings of our Private Property Mosaic,* 7-18 (1995). Submerged lands, on the other hand, had a unique status because, by nature, they were "incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the King's subjects." *Shively v. Bowlby*, 152 U.S. 1, 11 (1894). English law recognized two aspects of submerged land ownership: the *jus privatum*, or legal title, and the *jus publicum*, described as "the dominion thereof … vested [in the king] as the representative of the nation and for the public benefit." *Id*. The *jus publicum* was so closely tied to sovereignty that it could not be conveyed to non-sovereigns: there "can be no irrepealable …conveyance … in disregard of a public trust, under which [the sovereign] was bound to hold and manage it." *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 460 (1892).

When the 13 colonies gained independence from Britain, they succeeded to all Crown lands, both upland and submerged. *Town of Pawlet v. Clark*, 13 U.S. (9 Cranch) 292 (1815); *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 416 (1842). In the newly sovereign states, title to submerged lands continued to be "different in character from that which the state holds in lands intended for sale." *Ill. Cent. R.R. Co.*, 146 U.S. at 452. Title to submerged lands was "held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties." *Id.* Uplands, on the other hand, were not held in trust for public use. State-owned uplands were treated primarily as assets, and held only until such time as they could be sold into private ownership. Price, *supra*, at 185.

After independence, disputes arose among the thirteen states regarding claims to vacant western lands. In some cases more than one state claimed the same territory, but the primary dispute arose from the fact that only seven of the thirteen states had western land claims, leaving the "landless" states to fear that any future union would be dominated, politically and economically, by the states that controlled large portions of the western frontier. J. Jackson Owensby, *The United States Constitution (Revisited)*, 46 (2011).

To resolve the crisis, the Continental Congress adopted a resolution in 1780 calling for the states to cede their western lands to the United States. 17 Journals of Continental Congress 808 (resolution of Sept. 6, 1780). The ceded lands were "considered a common fund for the use and benefit of such of the United States as have become or shall become members of the confederation according to their usual proportions or quotas of general charge and expenditure, and shall be applied and disposed of for that purpose and no other whatsoever …." *Id.*

The Land Ordinance of 1784 called for the division of the ceded lands into districts that would be eventually admitted as states "on an equal footing with the said original states." 26 Journals of Continental Congress 274, 277-78 (April 23, 1784). The drafters understood "equal footing" to mean that upon admission a state is "entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original states … Equality of constitutional right and power is the condition of all the states of the Union, old and new." *Escanaba & Lake Mich. Transp. Co.*, 107 U.S. at 688-89. The requirement that new states be admitted on an equal footing with old states was carried forward into the Northwest Ordinance of 1787, which also provided as follows:

> 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 …. The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor.

Northwest Ordinance, art. 5, 32 Journals of the Continental Congress 334, 341 (July 13, 1787)(emphasis added).

Together, the Continental Congress's actions established that after a state's admission on equal footing, "soil" would continue to be held by the United States for disposal and income generation. On the other hand, Congress, while providing that navigable waters would be forever held for public use, did not explicitly address whether dominion over such waters would continue to be held by the United States after statehood or would pass to the

newly-admitted states. It was left to the courts to determine whether the public interest, or *jus publicum*, in navigable waters passed to the newly-admitted states as an incident of the sovereignty guaranteed to the new states by the equal footing clause in the Northwest Ordinance. The question examined herein is whether the Court's holdings regarding the states' equal footing entitlement to submerged lands may be applied to uplands retained by the United States for purposes other than disposal.

II. Early Case Law

In a series of early decisions, the Supreme Court established that submerged lands are an essential attribute of sovereignty that, to assure equal footing, must vest in the state upon its admission, while concurrently recognizing, in a separate series of cases, that the Property Clause authorized federal retention of uplands after statehood. The first case to discuss the equal footing doctrine as it applies to lands was *Mayor of New Orleans v. United States*, 35 U.S. (10 Pet.) 662 (1836). The Court began by discussing the unique nature of lands adjacent to the Mississippi River that had been dedicated to public use while under French jurisdiction. Quoting Domat, a French jurist, the Court recognized:

> Domat, liv. 1, title 8, sec. 1, art. 1, says, there are two kinds of things destined to the common use of men, and of which every one has the enjoyment. The first are those which are so by nature; as rivers, the sea and its shores. The second, which derive their character from the destination given them by man; such as streets, highways, churches, markethouses, courthouses, and other public places ….

Id. at 720. Once land was "dedicated to public use [it] was withdrawn from commerce; and so long as it continued to be thus used, could not become the property of any individual." *Id*. at 731 (citing laws of Spain). When the United States obtained the Louisiana Territory, it held it subject to such public dedications. *Id*. at 732. After the admission of Louisiana as a state on an equal footing with the original states, lands dedicated to public use passed to Louisiana:

> The state of Louisiana was admitted into the union, on the same footing as the original states. Her rights of sovereignty are the same, and by consequence no jurisdiction of the federal government, either for purposes of police or otherwise, can be

> exercised over this public ground, which is not common to the United States. It belongs to the local authority to enforce the trust, and prevent what they shall deem a violation of it by the city authorities.

Id. at 737. Because "neither the fee of the land in controversy, nor the right to regulate the use, [was] vested in the federal government," the disposition of the land was a question subject to the general sovereignty of the state, since "[a]ll powers which properly appertain to sovereignty, which have not been delegated to the federal government, belong to the states and the people." *Id*. In short, the *Mayor of New Orleans* decision established the principle that submerged lands by their nature are dedicated to public use and are held by the sovereign in trust for the populace. Upon admission, title to submerged lands passes to the state.

A few years later, the Court again examined the nature of submerged lands and their ties to state sovereignty in *Martin v. Waddell's Lessee,* 41 U.S. (16 Pet.) 367 (1842). The Court was asked to determine title to 100 acres of tideland in New Jersey. The plaintiff claimed title under a purported conveyance from King Charles while New Jersey was still a colony. *Id.* at 407. The Court held that any conveyance of tidelands by the king had to be strictly construed because under English law tidelands were "held by the king in his public and regal character, as the representative of the nation, and in trust for them." *Id*. at 409. Any conveyance of tideland was not a simple alienation but required the king "to sever the bottoms of the navigable waters from the prerogative powers of government … and to convert them into mere franchises in the hands of a subject, to be held and used as his private property." *Id*. at 410. To accomplish this, the deed would have to include language "for the purpose of separating [the submerged lands] from the *jura regalia* [rights which belong to the crown] and converting them into private property." *Id*. at 413.

The Court then emphasized that:

> [W]hen the revolution took place, the people or each state became themselves sovereign; and in that character hold 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 to the general government.

Id. at 410. *Martin* demonstrates that by 1842, it was well-established that submerged lands were an incident of state sovereignty. Unlike public lands

held for sale, submerged lands were "dedicated to public use … and … could not become the property of any individual" unless steps were first taken to sever the lands from sovereignty. *Mayor of New Orleans,* 35 U.S. (10. Pet.) at 731. Newly admitted states, having the same rights as original states, assumed sovereign ownership of submerged lands upon admission. In general, federal title to submerged lands ceased upon state admission because retention of title was not a matter confided to the federal government under the Constitution. The United States retained only its delegated powers over navigable waters, such as the authority to regulate commerce. *Shively v. Bowlby*, 152 U.S. 1, 22, 57-58 (1894).

III. *Pollard's Lessee v. Hagan*

The primary case cited for the principle that equal footing requires the United States to either dispose of public lands or cede them to the state is *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845). There, the plaintiff, who possessed a post-statehood federal patent to certain lands below the high water mark of the Mobile River, sought to affirm his title to such lands. As such, the decision hinged on the validity of the federal patent.

The issue was framed by the defendant as resting on the question of whether the United States had "any title to lands covered by navigable water, [a] question. . . important to the new states, as involving an attribute of sovereignty, the want of which makes an invidious distinction between the old and new states." *Id*. at 215. The defendant, citing *Martin v. Waddells' Lessee*, asserted that the "right to the shore between high and low water mark is a sovereign right, not a proprietary one . . . they are not land, which may be sold, and the right to them passes with a transfer of sovereignty." *Id*. at 215-16. The defendant went on to state: "when [sovereignty] passes, the right over rivers passes too. Not so with public lands." *Id.* at 216.

The Court explained at the beginning of its opinion that it was only addressing the question of title to lands under navigable waters: "this is the first time we have been called upon to draw the line that separates the sovereignty and jurisdiction of the government of the union, and the state governments, **over the subject in controversy**." *Id*. at 220 (emphasis added).

The Court rejected the plaintiff's argument that the state's disclaimer to "unappropriated lands" includes "waste … lands" (a term then commonly used to refer to submerged lands), so that "the land under the navigable waters, and

the public domain above high water, were alike reserved to the United States." *Id*. at 221. The Court stated:

> Taking the legislative acts of the United States, and the states of Virginia and Georgia, and their deeds of cession to the United States, and giving to each, separately, and to all jointly, a fair interpretation, we must come to the conclusion that it was the intention of the parties to invest the United States with the eminent domain of the country ceded, both national and municipal, for the purposes of temporary government, and to hold it in trust for the performance of the stipulations and conditions expressed in the deeds of cession and the legislative acts connected with them. To a correct understanding of the rights, powers, and duties of the parties to these contracts, it is necessary to enter into a more minute examination of the rights of eminent domain, and the right to the public lands. When the United States accepted the cession of the territory, they took upon themselves the trust to hold the municipal eminent domain for the new states, and to invest them with it, to the same extent, in all respects, that it was held by the states ceding the territories.

Id. at 222-23. From the above statement, the Court was obviously distinguishing the "municipal eminent domain" (which includes ownership of submerged lands) from the "public lands."

The Court then identified the "eminent domain" as the "right which belongs to the society, or to the sovereign, of disposing, in case of necessity, and for the public safety, of all the wealth contained in the state." *Id*. at 223. "[T]he eminent domain, although a sovereign power, does not include all sovereign power, and this explains the sense in which it is used in this opinion." *Id*. The Court then stated:

> When Alabama was admitted into the union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the deed of cession and the legislative acts connected with it. Nothing remained to the United States, according to the terms of the agreement, but the public lands.

Id. In the Court's view, while the Constitution requires that rights of sovereignty and eminent domain pass to the state upon admission, it also provides that "public lands" may remain "under the control of the United States." *Id*. Thus, the "right of Alabama and every other new state to exercise all the powers of government, which belong to and may be exercised by the original states of the union, must be admitted, and remain unquestioned, except so far as they are, temporarily, deprived of control over the public lands." *Id*. at 224. The Court then described the nature of the federal government's right to public lands as follows:

> This right originated in voluntary surrenders, made by several of the old states, of their waste and unappropriated lands, to the United States, under a resolution of the old Congress, of the 6th of September, 1780, recommending such surrender and cession, to aid in paying the public debt, incurred by the war of the Revolution. The object of all the parties to these contracts of cession, was to convert the land into money for the payment of the debt, and to erect new states over the territory thus ceded; and as soon as these purposes could be accomplished, the power of the United States over these lands, as property, was to cease.
>
> Whenever the United States shall have fully executed these trusts, the municipal sovereignty of the new states will be complete, throughout their respective borders, and they, and the original states, will be upon an equal footing, in all respects whatever. We, therefore, think the United States hold the public lands within the new states by force of the deeds of cession, and the statutes connected with them, and not by any municipal sovereignty which it may be supposed they possess, or have reserved by compact with the new states, for that particular purpose.

Id. at 224. To be sure, the above-quoted *dicta*, which was not necessary to the fundamental question of title to submerged lands, establishes that temporary federal retention of public lands for the purposes of selling them was not an exercise of "municipal sovereignty" and, thus, not a violation of the sovereignty guaranteed to the state by the equal footing doctrine. But the Court did not take the next step of holding that federal retention of public lands for purposes other than sale would be an act of "municipal sovereignty" that would violate the equal footing of the subject state. Thus, the decision in *Pollard's Lessee* left room for the Court to later determine, as will be seen herein, that federal

retention of public lands does not pose an impermissible intrusion upon state sovereignty.

A further reason to doubt that *Pollard's Lessee* provides support for state claims to public lands under the equal footing doctrine is found in the Court's acknowledgment that the United States's post-statehood retention of public domain lands for sale was empowered by the Property Clause and was not a function of any agreement in a state's admission compact. *Pollard's Lessee*, 44 U.S. (3 How.) at 224. The Court noted that the required disclaimer of state title to the "waste and unappropriated" lands "cannot operate as a contract between the parties, but is binding as a law," because the Property Clause "authorized the passage of all laws necessary to secure the rights of the United States to the public lands, and to provide for their sale, and to protect them from taxation." *Id*. Thus, the Court squarely rejected the proposition that federal retention of public lands "required the express consent of the people of the new state." *Id*. at 225. As the Court explained:

> The propositions submitted to the people of the Alabama territory, for their acceptance or rejection, by the act of Congress authorizing them to form a constitution and state government for themselves, so far as they related to the public lands within that territory, amounted to nothing more nor less than rules and regulations respecting the sales and disposition of the public lands. The supposed compact relied on by the counsel for the plaintiffs, conferred no authority, therefore, on Congress to pass the act granting to the plaintiffs the land in controversy.

Id. at 225. If in fact there was an equal footing entitlement to ownership of public domain lands, then a disclaimer from the state would be required to ensure that federal patents provided clear title to such lands. The Court's conclusion that the disclaimer was declaratory, rather than contractual, is difficult to square with the notion that states are entitled to public domain lands as a matter of sovereignty. The Court's recognition that the Property Clause alone is sufficient to "secure the rights of the United States to the public lands" suggests that the modern Court would not interpret *Pollard's Lessee* as recognizing state sovereignty-based entitlement to public lands.[7]

---

[7] Since *Pollard's Lessee*, the Court has repeatedly affirmed that state disclaimers to public lands "being within the sphere of congressional power, can derive no force from the consent of the state." *Coyle v. Smith*, 221 U.S. 559, 570 (1911); *Van Brocklin v.*

IV. Equal Sovereignty

Closely related to the equal footing doctrine is the equal sovereignty principle. While the equal footing doctrine restricts the limitations that may be placed upon a state as a condition of admission, the equal sovereignty principle restricts the ability of Congress to enact legislation that discriminates among the States after their admission. One of the earlier expressions of the equal sovereignty principle is found in *Permoli v. Municipality No. 1 of City of New Orleans*.

> [T]here is, and must be, from a constitutional necessity, a perfect and unchangeable equality among the states, not indeed in reference to the powers which they may separately exercise, (for that depends upon their own municipal constitutions,) but in reference to those which they separately retain. What Massachusetts may do, Louisiana may do. What Congress may not forbid Massachusetts to do, it may not forbid Louisiana to do.

Permoli v. Municipality No. 1 of City of New Orleans, 44 U.S. (3 How.) 589, 606 (1845):

The equal sovereignty principle finds some textual support in constitutional provisions mandating that certain congressional powers be exercised uniformly throughout the United States. Article I, § 8 provides that "all duties, imposts and excises shall be uniform through the United States." The provision was enacted to prevent "discrimination as between the states, by the levying of duties, imposts, or excises upon a particular subject in one state and a different duty, impost, or excise on the same subject in another." *Knowlton v. Moore*, 178 U.S. 41, 89 (1900). Related provisions in Article I, § 8 require Congress to "establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States." Article I, § 9 (the Port Preference Clause) provides that "[n]o preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another."

Anderson, 117 U.S. 151, 167 (1886) (disclaimers to public lands "are but declaratory, and confer no new right or power upon the United States").

On the other hand, the Constitution, by mandating equal treatment among the states in some areas but not others, could also be interpreted to imply the absence of a general principle of state equality. Zachary S. Price, *NAMUDNO's Non-Existent Principle of State Equality*, 88 N.Y.U. L. Rev. Online 24, 27 (2013).[8] The Court has held that because an explicit requirement of uniformity appears in only some constitutional provisions, other provisions, like the Commerce Clause, do not "impose requirements of geographic uniformity." *Sec'y of Agric. v. Cent. Roig Ref. Co.*, 338 U.S. 604, 616 (1950). And, even for those constitutional provisions explicitly prohibiting discrimination between the states, such as the Port Preference Clause, there are many circumstances in which Congress can lawfully take actions that treat different States differently, so long as such effects are incidental to an action otherwise within Congress' power and not the result of intentional discrimination among the States.

In *Pennsylvania v. Wheeling & Belmont Bridge Co.*, Pennsylvania challenged the constitutionality of a federal statute declaring a bridge over the Ohio River to be a legal structure, despite the fact that it obstructed larger-class steamboats from reaching ports in Pennsylvania, thus effectively diverting river traffic to ports in Virginia. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855). The Court rejected the proposition that the Port Preference Clause prohibited congressional actions directed to specific projects that gave advantage to one state at the expense of another, because "the principal object of the framers … in conferring the [commerce] power would be sacrificed to the subordinate consequences resulting from its exercise." *Id.* at 433-34. The Court held that "what is forbidden is, not discrimination between individual ports within the same or different States, but discrimination between States." *Id.* at 435. Thus, when Congress engages in local projects such as river or harbor improvements or erection of light-houses it does not discriminate between States, even if one state is advantaged and one state is disadvantaged by the action.

The Court has reached similar results in applying constitutional provisions requiring uniformity in bankruptcy laws and taxation. In *Blanchette v. Conn. Gen. Ins. Corps.*, creditors of bankrupt railroads challenged a statute that was passed to reorganize eight major railroads in the northeast and midwest regions of the country. *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102 (1974). The creditors argued that the statute violated the uniformity provision of the Bankruptcy Clause because it operated only in a single

[8] Available online at: http://perma.cc/JU72-Y6TA.

statutorily defined region. The Court found that "[t]he uniformity provision does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems." *Id.* at 159. Likewise, the Court has held that the Tax Uniformity Clause gives Congress "wide latitude in deciding what to tax and does not prohibit it from considering geographically isolated problems." *United States v. Ptasynski*, 462 U.S. 74, 84 (1983). Thus, Congress could exempt from windfall profit taxation all oil production north of the Arctic Circle even if the exemption only applied to oil wells in Alaska. *Id*. at 85.

The principles applied in the port preference, bankruptcy, and tax uniformity cases are instructive because they have also been applied in cases addressing disparate impacts on the equal sovereignty of the states. In such cases, the Court has not been concerned with congressional actions that preempt state sovereignty where necessary to address geographically isolated problems within a state, even if such impacts on sovereignty are not shared by other states. Instead, the equal sovereignty principle comes into play only when Congress attempts to preclude one or more states from exercising certain sovereign rights statewide while allowing other states to do so. Thomas Colby, *In Defense of the Equal Sovereignty Principle*, 65 Duke L. J. 1087 (2016). In other words, congressional actions that use state boundaries as the dividing line to determine where an action applies and where it does not are at risk of being struck down under the equal sovereignty principle. Congressional actions that curtail state sovereignty within defined geographic locations within a state are likely to survive equal sovereignty review.

One early case often cited as invoking the equal sovereignty principle is *Withers v. Buckley*, which addressed state legislation authorizing the construction of a canal that would divert the course of a river used by the plaintiff for transportation of his crops. *Withers v. Buckley*, 61 U.S. (20 How.) 84 (1857). The plaintiff asserted that the state legislation violated a provision in the Mississippi enabling act providing "that the Mississippi river, and the navigable rivers and waters leading into the same, shall be common highways, and forever free as well to the inhabitants of the State of Mississippi as to other citizens of the United States." *Id*. at 92. The Court held the enabling act provision

> could have no effect to restrict the new State in any of its necessary attributes as an independent sovereign Government, nor to inhibit or diminish its perfect equality with the other members of the Confederacy with which it was to be associated. These conclusions

> follow from the very nature and objects of the Confederacy, from the language of the Constitution adopted by the States, and from the rule of interpretation pronounced by this court in the case of *Pollard's Lessee v. Hogan*, 3 How., p. 223
> . . . .
> Clearly, Congress could exact of the new State the surrender of no attribute inherent in her character as a sovereign independent State, or indispensable to her equality with her sister States, necessarily implied and guarantied [sic] by the very nature of the Federal compact.

Id. at 92-93.

Later cases, while applying *Withers*, provided an important qualification to the doctrine of state equality. In *Escanaba & Lake Michigan Transport Co. v. Chicago*, the City of Chicago prohibited the opening of draw-bridges over the Chicago River for one hour in the morning and one hour in the evening to facilitate the flow of traffic to and from workplaces. *Escanaba & Lake Mich.*, 107 U.S. (17 Otto.) at 679. A steam-ship company challenged the city ordinance, asserting that the Northwest Ordinance of 1787, as adopted in the act admitting Illinois into the union, had declared that all rivers leading into the Mississippi and St. Lawrence Rivers "shall be common highways and forever free." *Id*. at 688. The Court held that the federal provision "ceased to have any operative force, except as voluntarily adopted by [Illinois] after she became a state of the Union" because the original states had plenary power to erect bridges over navigable waters, and "[e]quality of constitutional right and power is the condition of all states of the Union, old and new." *Id*. at 688-89. Thus, Illinois was entitled "to exercise the same power over rivers within her limits" that Delaware and Pennsylvania exercise over their rivers. *Id*.

Concurrently, however, the Court acknowledged the power of Congress to preempt a State's sovereign authority over navigable waterways by taking action directed to a specific river or obstruction:

> When [the State's] power is exercised so as to unnecessarily obstruct the navigation of the river or its branches, congress may interfere and remove the obstruction. If the power of the state and that of the federal government come in conflict, the latter must control and the former yield. This necessarily follows from the position given by the constitution to legislation in pursuance of it, as the supreme law of the land. But until congress acts on the

> subject, the power of the state over bridges across its navigable streams is plenary.

Id. at 683. Thus, while Congress could not take action to obstruct Illinois's plenary authority over all rivers in the state, it could obstruct the state's authority over specific rivers or geographic areas within the state without violating the principle of state equality. *See also Sands v. Manistee River Imp. Co.*, 123 U.S. 288, 296 (1887) (recognizing that while admission term guaranteeing free navigation of rivers became inoperative upon state's admission, Michigan's "rights of sovereignty and dominion" over rivers were "restrained by the constitution of the United States and laws of congress passed in pursuance thereof"); *Cardwell v. Am. River Bridge Co.,* 113 U.S. 205, 211-12 (1885) (while California could not be shorn "as to the navigable waters within her limits of any of the powers which the original states possessed over such waters within their limits," the "right of congress is recognized to interfere and control the matter whenever deemed necessary").

One of the most direct applications of the equal sovereignty principle is *Coyle v. Smith,* which addressed a provision in the 1906 Oklahoma Enabling Act which purported to prevent Oklahoma from relocating its capital until 1913. *Coyle v. Smith,* 221 U.S. 559, 563 (1911). The issue was whether Congress could limit "the power of the state after its admission" to determine the location of its capital. *Id.* at 565. Relying on equal footing principles, the Court concluded that Congress could not exact, as the price of admission, any portion of the "residuum of sovereignty not delegated to the United States by the Constitution itself." *Id.* at 567. In short, Congress could not "restrict the new state in any of its necessary attributes as an independent sovereign government, nor to inhibit or diminish its perfect equality with the other members of the Confederacy with which it was to be associated." *Id.* at 575. The Court was careful to note, however, that such restriction on the power of Congress did not apply to "matters that were within the sphere of congressional power" under the terms of the Constitution, including its powers under the Property Clause. *Id*. at 570. Thus, Congress could lawfully require the state to disclaim title to public lands and could retain sole authority to dispose of such lands "solely because the power of Congress extended to the subject, and therefore would not operate to restrict the state's legislative power in respect to any matter which was not plainly within the regulating power of Congress." *Id*. at 574.

While the above-discussed decisions all addressed provisions in state admission acts, thus implicating the equal footing doctrine, the holdings also

appear to be grounded on the more fundamental principle of "perfect equality" among the States. Yet, at the same time, the Court clearly concluded that such equality was only implicated by actions that purported to entirely deny a state's power over certain subject matters. A consistent theme in the decisions is that a state's equality is not threatened when Congress acts under an enumerated constitutional power to preempt state authority over a specific geographical location. In short, the principle of equal sovereignty is violated when Congress prohibits state A from regulating a particular subject matter while not enacting similar prohibitions on state B. Equal sovereignty is not implicated if Congress preempts state A's authority over specific properties within the State but does not preempt state B's authority over comparable properties. The latter point is particularly true as applied to public lands, since congressional actions addressing such lands do "not operate to restrict the state's legislative power." *Coyle*, 221 U.S. at 574.

Modern decisions have provided conflicting guidance regarding the circumstances under which the Court may invoke the equal sovereignty principle. The decisions most directly applying the equal sovereignty principle address section 5 of the Voting Rights Act, which requires those states which used tests and devices for voter registration, and had a voting rate in the 1964 presidential election at least 12 points below the national average, to obtain approval from either a three-judge panel in the Federal District Court in Washington, D.C., or the Attorney General, before implementing changes in state voting procedures.

In 1966, South Carolina asserted that the doctrine of state equality barred Congress from confining such remedies to a small number of states. The Court rejected the assertion, holding that the doctrine of equality "applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared." *South Carolina v. Katzenbach*, 383 U.S. 301, 328-29 (1966). Thus, "[i]n acceptable legislative fashion, Congress chose to limit its attention to the geographic areas where immediate action seemed necessary." *Id*. at 328.

The subsequent decision of *Northwest Austin Municipal Utilility District Number One v. Holder*, cited, with approval, *Katzenbach*'s conclusion that the equal sovereignty tradition "does not bar remedies for local evils which have subsequently appeared" after statehood. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009). At the same time, the Court acknowledged the "historic tradition that all the States enjoy 'equal sovereignty.'" *Id*. at 203. It tempered such acknowledgment by noting that "a departure from the

fundamental principle of equal sovereignty" may be justified by a "showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." *Id*. The Court ultimately held it need not decide such constitutional issues and based its decision on an interpretation of the Voting Rights Act. *Id*. at 205-06.

Then, in *Shelby County v. Holder*, the Court, while acknowledging that "*Katzenbach* rejected the notion that the [equal sovereignty] principle operated as a bar on differential treatment outside [the] context" of the admission of new states, concluded that the decision in *Northwest Austin* had recognized that "the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States." *Shelby Cnty. v. Holder*, --- U.S. ---, 133 S. Ct. 2612, 2623-24 (2013). Citing the fact that the states kept "for themselves, as provided in the Tenth Amendment, the power to regulate elections," the Court expressed concern that the basic principle of equal sovereignty was at issue when some, but not all, "States must beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own." *Id*. at 2623-24. While the Court's decision was clearly informed by the principle of equal sovereignty, its holding ultimately rested on Congress's reliance on outdated information to determine which states and counties were subject to preclearance requirements: the "tests and devices for voter registration" which were the original criteria for identifying states subject to section 5, had not been used in 40 years. In short, "Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. It cannot rely simply on the past." *Id*. at 2629.

The decision in *Shelby County* has come under criticism because the effect of the decision was to reject *Katzenbach's* conclusion that the doctrine of equal sovereignty applied only to the terms of state admission acts "with nary an explanation of why it finds *Katzenbach* wrong" other than a citation to the *dicta* in *Northwest Austin*. *Id*. at 2649 (Ginsburg, J., dissenting). But *Shelby County*'s revival of the equal sovereignty doctrine cannot be dismissed as a mere aberration, because, as discussed above, its roots run far deeper than the decisions in *Katzenbach* and *Northwest Austin*. Indeed, the Court has long held forth that "the whole Federal system is based upon the fundamental principle of the equality of the states under the Constitution." *Bolln v. Nebraska*, 176 U.S. 83, 89 (1900).

Importantly, however, the *Shelby County* Court's concern about unequal treatment of states was triggered, as were earlier concerns in cases such as

Escanaba & Lake Michigan Transport Co., by congressional legislation that imposed state-wide restrictions on state sovereignty, as opposed to preemptions of state authority applicable to certain geographic locations that result in disparate impacts on the sovereignty of one or more states.

The Court has repeatedly confirmed Congress's authority to curtail aspects of state sovereignty in defined geographic areas when necessary to carry out the federal government's enumerated powers. Thus, Congress may immunize not only Indian lands from state taxation but also income earned by Indians living on such lands. *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 181 (1973). Congress can abrogate state sovereignty over specific navigable waterways by selling or reserving the beds and banks of such waterways prior to statehood. *E.g., Idaho v. United States*, 533 U.S. 262, 280-81 (2001). Congress can direct the listing of an animal species as endangered, even if the impacts of such listing are limited to a single state. *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1045 (D.C. Cir. 1997).

All of the above actions directly impede state taxation, state regulation, or state sovereign autonomy when compared to states that are not subject to such localized restrictions, but the Court has never held that such impediments violate the equal sovereignty principle. Rather, the equal sovereignty principle has been applied only in instances where a state is entirely "shorn of a legislative power vested in all the other states of the Union, a power resulting from the fact of statehood and incident to its plenary existence." *Ward v. Race Horse*, 163 U.S. 504, 514 (1896).

Tellingly, despite numerous opportunities, the Court, has never expressed concern that permanent retention of public lands may violate the principle of equal sovereignty. One case that addresses this issue squarely is *Stearns v. Minnesota*, 179 U.S. 223, 243 (1900). In *Stearns*, the Court distinguished admission compacts addressing "political rights and obligations" from "those solely in reference to property belonging to one or the other":

> 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, but only of the power of a state to deal with the nation or with any other state in reference to such property.

Id. at 244-45. In short, the Court viewed disposition of public lands as an issue that did not impair the state's equal footing, so that such matters could be lawfully "withdrawn from state interference by the terms of the enabling act and the Constitution." *Id*. at 250. The Court went so far as to state that "if Congress should determine that the great body of public lands within the state of Minnesota should be reserved from sale for an indefinite period it might do so," and went on to acknowledge Congress's "power to withdraw all the public lands in Minnesota from private entry or public grant." *Id*. at 243. The Court did not view the principle of state equality as a barrier to congressional retention of federal lands because "[t]hat a power may be injuriously exercised is no reason for a misconstruction of the scope and event of that power." *Id*.

In *Stearns*, the Court simply reiterated what were, by then, long-standing precedents recognizing the federal government's authority, under the Property Clause, to retain public domain lands after a state's admission, both for disposal and for other purposes. In *United States v. Fitzgerald*, the Court recognized Congress's authority under the Property Clause to reserve public domain lands from sale and appropriate them to public purposes, such as the erection of a lighthouse. *United States v. Fitzgerald*, 40 U.S. (15 Pet.) 407, 421 (1841). In *Wilcox v. Jackson*, the Court likewise recognized Congress's authority to appropriate public domain lands under its Property Clause power for forts and other purposes, holding that "whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands." *Wilcox v. Jackson*, 38 U.S. (13 Pet.) 498, 499 (1839). Federal title to reserved or appropriated lands remained valid after statehood because retention of federal title was "a subject confided by the Constitution to Congress only." *Id*. at 517.

In *United States v. Gratiot*, the Court affirmed that federal retention of public domain lands after state admission for purposes other than sale was not a violation of state sovereignty. *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 538 (1840). *Gratiot* addressed the authority of Congress to reserve lead mines on public land in the State of Illinois. The United States leased the mines for a payment of six percent of all lead mined. *Id*. at 530. The defendants asserted that federal retention of the lead mines violated the Property Clause because "no authority in the cession of the public lands to the United States is given, but to dispose of them, and to make rules and regulations respecting the preparation of them for sale …. The lands 'are to be disposed of' by Congress; not 'held by the United States'" *Id*. at 533.

The Court rejected the defendant's argument, and upheld the authority of Congress to reserve public domain lands after statehood for purposes other than sale:

> [T]he Constitution … empowers Congress to make all needful rules and regulations respecting the territory or other property of the United States. If such are the powers of Congress over the lands belonging to the United States, the words 'dispose of,' cannot receive the construction contended for at the bar; that they vest in Congress the power only to sell, and not to lease such lands. The disposal must be left to the discretion of Congress. And there can be no apprehensions of any encroachments upon state rights, by the creation of a numerous tenantry within their borders; as has been so strenuously urged in the argument. The law of 1807, authorizing the leasing of the lead mines, was passed before Illinois was organized as a state; and she cannot now complain of any disposition or regulation of the lead mines previously made by Congress. She surely cannot claim a right to the public lands within her limits.

Id. at 537-38.

The decisions in the above-discussed cases confirm that the nineteenth-century Court, while repeatedly applying the principles of equal footing and equal sovereignty to cases involving submerged lands, did not perceive reservations of public land to impact the subject state's status as a sovereign equal to its peers. This trend continued in the twentieth century. In *Light v. United States*, a rancher, accused of letting his cattle trespass on a forest reservation, argued that the public lands were held in trust for the people of the state, so that "Congress cannot constitutionally withdraw large bodies of land from settlement without the consent of the state where it is located." *Light v. United States*, 220 U.S. 523, 535-36 (1911). The Court held:

> But "the nation is an owner, and has made Congress the principal agent to dispose of its property …. Congress is the body to which is given the power to determine the conditions upon which the public lands shall be disposed of." *Butte City Water Co. v. Baker*, 196 U. S. 126. "The government has, with respect to its own 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." *Canfield v. United States*, 167 U. S. 524. And if it may withhold from sale and settlement, it may also, as an owner, object to its property being used for grazing purposes, for "the government is charged with the duty and clothed with the power to protect the public domain from trespass and unlawful appropriation." *United States v. Beebe*, 127 U. S. 342. The United States can prohibit absolutely or fix the terms on which its property may be used. As it can withhold or reserve the land, it can do so indefinitely. *Stearns v. Minnesota*, 179 U. S. 243.

Id. at 536-37. The Court then emphasized the limited role of the courts in matters involving withdrawal of public lands:

> "All the public lands of the nation are held in trust for the people of the whole country." *United States v. Trinidad Coal & Coking Co.* 137 U. S. 160. And it is not for the courts to say how that trust shall be administered. That is for Congress to determine. The courts cannot compel it to set aside the lands for settlement, or to suffer them to be used for agricultural or grazing purposes, nor interfere when, in the exercise of its discretion, Congress establishes a forest reserve for what it decides to be national and public purposes. In the same way and in the exercise of the same trust it may disestablish a reserve, and devote the property to some other national and public purpose. These are rights incident to proprietorship, to say nothing of the power of the United States as a sovereign over the property belonging to it.

Id. at 537. Since *Light*, the Court has stressed that "[t]he power over the public land thus entrusted to Congress is without limitations." *United States v. City & Cnty. of San Francisco*, 310 U.S. 16, 29 (1940).

When given the opportunity to extend the equal footing doctrine beyond submerged lands, the Court has declined to do so. In *Scott v. Lattig*, the Court was asked to determine title to an island within a navigable river in the State of Idaho. *Scott v. Lattig*, 227 U.S. 229 (1913). The Court concluded that while "lands underlying navigable waters within the several states belong to the respective states in virtue of their sovereignty," the island was "fast dry land, and therefore remained the property of the United States and subject to disposal under its laws." *Id.* at 242-44.

Sixty years later, the Supreme Court, citing *Scott,* again held that the rule in *Pollard's Lessee* "does not reach islands or fast lands located within such waters. Title to islands remains in the United States, unless expressly granted along with the stream bed or otherwise." *Texas v. Louisiana*, 410 U.S. 702, 713 (1973). It is to be expected that the Court will continue limiting the equal footing doctrine to submerged lands that have specific and traditional ties to sovereignty, as explained in *United States v. Oregon*: "Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either grants by the sovereign of the lands to be held in private ownership or transfer of sovereignty itself." *United States v. Oregon*, 295 U.S. 1, 14 (1935).

Lower courts have likewise rejected application of the equal footing doctrine to uplands. The Ninth Circuit holds that differences in public land holdings among the states do not implicate equal footing because there is no corresponding inequality of "political rights and sovereignty." *United States v. Gardner*, 107 F.3d 1314, 1319 (9th Cit. 1997); *see also United States. v. Luppi*, No. 98-1475, 1999 WL 535295, at *5 n.5 (10th Cir. July 26, 1999) ("[t]he equal footing doctrine does not apply even to lands underlying non-navigable waters, let alone to dry lands within a national forest") (citation omitted).

V. Economic Equality

Beyond question, the United States's retention of extensive land holdings in the western states results in economic inequality in comparison to eastern states. In the eastern states, the majority of lands are in private ownership. Private ownership typically results in greater resource use and economic development and provides a broad base for state and local property taxation. Western states, on the other hand, have a much smaller tax base and economic development and resource use of federal lands is limited. Local governments typically provide law enforcement and other services on federal lands with no ability to recover such costs aside from voluntary federal contributions, such as federal Payments in Lieu of Taxes and the Secure Rural Schools Program.

The economic impact of retained federal ownership, however, is not likely to prove a viable cause of action for claims of state ownership of public lands under equal footing and equal sovereignty principles. Almost any action by Congress, whether to establish military bases, improve transportation infrastructure, subsidize certain farm products, reserve federal lands, or

regulate commerce, may spur taxable economic activity in some states and restrict it in other states. If courts were to require congressional actions to have identical impacts on state taxation across the states, Congress would quickly be rendered unable to exercise its delegated powers and "the principal object of the framers of the instrument in conferring the power would be sacrificed to the subordinate consequences resulting from its exercise. *Wheeling & Belmont Bridge Co.*, 59 U.S. at 434.

While the Court in *Wheeling* was addressing congressional actions under the Commerce Clause, courts have applied similar reasoning to actions taken under the Property Clause. In *Nuclear Energy Institute, Inc. v. E.P.A.*, the court of appeals, in reviewing Nevada's challenge to establishment of a nuclear waste depository, rejected Nevada's argument that Congress's decision "to use federal property in a manner that imposes a unique burden on a particular State" violated Nevada's right to "equal treatment":

> Under Nevada's proposed requirement, each time Congress decides to use federal property in a manner that incidentally burdens a State – for example by designating such property for use as a military installation, a prison, a dam, a storage or disposal site, or a conservation area – it must formulate neutral selection criteria and apply those criteria to every piece of federal property in the Nation before selecting a site. Courts presumably would be required to scrutinize the substantive basis of the legislation in question to ensure that the criteria were genuinely neutral and generally applied. This is far more intrusive than any requirement that there be a rational basis for Congress's judgment that a particular regulation respecting a particular property is "needful." The substantive constraint on legislation and the judicial role implicit in Nevada's "equal treatment" requirement are, in our view, totally at odds with the broad interpretation given to Congress's Property Clause powers.

Nuclear Energy Inst., Inc. v. E.P.A, 373 F.3d 1251, 1308 (D.C. Cir. 2004).

The United States Supreme Court has also rejected state arguments that federal retention of lands violates equal sovereignty principles if they work to the state's economic disadvantage. *United States v. Texas* involved a federal challenge to state statutes claiming ownership of the lands under the Gulf of Mexico for a distance of 24 miles past the three mile limit. *United States v. Texas*, 339 U.S. 707, 720 (1950). The case turned on what the Court called the

"converse" application of the equal footing doctrine: the Court concluded that the doctrine "prevents extension of the sovereignty of a State into a domain of political and sovereign power of the United States from which the other States have been excluded, just as it prevents a contraction of sovereignty (*Pollard's Lessee v. Hagan, supra*) which would produce inequality among the States." *Id*. at 719-20. In extending its boundaries seaward, Texas's primary objective was to obtain title to the oil-rich seabed of the Gulf Coast. Thus, in reaching its conclusion, the Court focused on the nature of the equal footing doctrine and the relation of state sovereignty to lands and economic resources.

The Court first emphasized that principles of state equality have "long been held to refer to political rights and to sovereignty" and do not, "of course, include economic stature or standing. There has never been equality among the States in that sense." *Id*. at 716. The Court acknowledged that the differing amounts of federal lands within the various states, along with factors such as "[a]rea, location, geology, and latitude have created great diversity in the economic aspects of the several States. The requirement of equal footing was designed not to wipe out those diversities but to create parity as respects political standing and sovereignty." *Id*.

As in *Stearns*, *Light*, and other cases, the Court distinguished federal retention of public lands from federal actions that affect a state's political standing or sovereignty. With reference to land, the Court again found that the only lands that directly impact state sovereignty are the "shores of navigable waters and the soils under them" because "[d]ominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either grants by the sovereign of the lands to be held in private ownership or transfer of sovereignty itself." *Id*. (quoting *United States v. Oregon*, 295 U.S. 1, 14 1935). Because the marginal seabed was not associated with state sovereignty but rather was associated with the United States's regulation of foreign commerce, the waging of war, the making of treaties, and defense of the shores, the lands, which had been owned by the Republic of Texas, passed to federal ownership upon Texas's admission, even if such ownership worked an economic hardship upon the state. *Id*. at 718.

Subsequent cases expanded upon the notion that equal footing does not guarantee states economic equality. In *United States v. Gardner*, the court concluded that the differing amounts of federal lands "may cause economic differences between the states [but] the purpose of the [e]qual [f]ooting [d]octrine is not to eradicate all diversity among states but rather to establish

equality among the states with regards to political standing and sovereignty." *United States v. Gardner*, 107 F.3d 1314, 1319 (9th Cir. 1997). The court thus concluded the equal footing doctrine does not apply "to economic or physical characteristics of the states [and] applies primarily to the shores of and lands beneath navigable waters, not to fast dry lands." *Id.*; *see also United States v. Medenbach*, No. 96–30168, 1997 WL 306437, at *3 (9th Cir. June 6, 1997) ("the equal footing doctrine is not implicated by the fact that the State of Washington may have within its boundaries more land subject to federal control than do the original thirteen states"); *United States v. Risner,* No. 00-10081, 2000 WL 1545491, at * 1 (9th Cir. Oct. 17, 2000) ("Neither the Supreme Court nor this court has ever held that the equal footing doctrine insures equality between the States with respect to property beyond those lands under navigable waters."); *Nevada ex rel. Nev. State Bd. of Agric. v. United States*, 512 F. Supp. 166, 171 (D. Nev. 1981) (stating that while passage of Federal Land Policy and Management Act had disproportionate impact on Nevada due to its large federal land holdings, "[f]ederal regulation which is otherwise valid is not a violation of the 'equal footing' doctrine merely because its impact may differ between various states because of geographic or economic reasons").

VI. Political Equality

The equal footing and equal sovereignty doctrines embrace the precept that each state is "equal in power, dignity, and authority" and that a state's sovereign power may not be constitutionally diminished by any conditions in the acts under which the state was admitted to the union. Conditions imposed by Congress at a state's admission cannot "operate to restrict the State's legislative power in respect of any matter which was not plainly within the regulating power of Congress." *Coyle*, 221 U.S. at 574.

Principles of state equality forbid Congress from placing a state "upon a plane of inequality with its sister states." *Id.* at 566. States must be admitted "with all of the powers of sovereignty and jurisdiction which pertain to the original states, and … such powers may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts, or stipulations embraced in the act under which the new state came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission." *Id.* at 573.

States with significant federal land holdings are not shorn of any powers possessed by states with fewer federal holdings because the balance of state and federal authorities over federal lands is ensconced in the Constitution

itself and is not dependent upon the terms of admission and enabling acts. Because the Property Clause empowers Congress to retain and manage federal lands, the exercise of such authorities does not affect the "dignity or power" of the state. With regard to federal lands, each state's "dignity and power" are equally fixed by the Constitution, and each state is guaranteed equal authority over such lands. In short, while there is great diversity in the amount of federal land holdings in the individual states, with significant disparities in practical and economic impacts, there is no diversity with regard to state authorities and powers over federal lands.

Nor do federal land holdings in the western states violate the principle of equal apportionment. A person's right "to participate on an equal footing in the election process" is violated only when that "person's vote is given less weight through unequal apportionment." *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 54-55 (1970). Western states are each represented by two senators, the same as eastern states with few federal land holdings. Likewise, the representation of the western states in the House of Representatives is based on population, so that the weight given to the vote of a person living in a western state congressional district is roughly proportional to the weight given the vote of the resident of an eastern state congressional district. *See U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 459-60 (1992) (constitutional standard is "equal representation for equal numbers of people") (quoting *Wesberry v. Sanders*, 371 U.S. 1, 18 (1964).

Some writers have suggested that extensive federal land ownership impedes equal sovereignty because the western States are denied the right to populate the public lands, thus placing them at a disadvantage in "the Constitutional competition for national political power." *White Paper*, at 64. But demonstrating this to the satisfaction of a federal court may prove difficult. Despite extensive federal land holdings, many western states have greater amounts of private land within their borders than many eastern states. For example, while 61% of Idaho is federal land, Idaho still has three times more private land than Massachusetts. Yet, Massachusetts's population is more than four times greater than Idaho's: as a result, it has nine congressional representatives compared to Idaho's two. While 48% of Wyoming is federal lands, the remaining privately-owned acreage is over nine times greater than in Connecticut. Nonetheless, Wyoming's population is one-sixth the size of Connecticut's, and it has one congressional representative compared to Connecticut's five. Despite federal land ownership of 29%, Montana has over thirteen times the amount of private acreage than in New Jersey, but only one-

eighth its population.[9] In short, the differences in population between western and eastern states, and their resulting differences in congressional representation, are not the result of retained federal land holdings but are the result of geographic and climatic factors that affect population density. Given such facts, it is unlikely that a claim for state ownership of public lands could be successfully based on allegations of political inequality.

VII. Conclusions

Equality of sovereignty is an important constitutional principle that can help prevent federal intrusions upon the sovereignty and independence of the states. Court precedents, however, provide little support for the proposition that the principles of equal footing or equal sovereignty may compel transfer of public lands to the western states. The Court has been given ample opportunity to apply such principles to public lands but, when given the opportunity to do so, it has repeatedly distinguished property issues as independent from the "limiting or qualifying of political rights and obligations" that may trigger additional scrutiny under equal sovereignty principles. *Stearns*, 179 U.S. at 244-45. Equal sovereignty principles are intended to "create parity as respects political standing and sovereignty" and are not implicated by the fact that "[s]ome States when they entered the Union had within their boundaries tracts of land belonging to the Federal Government" while others did not. *United States. v. Texas*, 339 U.S. at 716.

Even if a court could be convinced to apply the equal sovereignty principle to the great diversity among the states in federal lands holdings, the principle is not an absolute bar to such diversity. Rather, the decisions in *Northwest Austin* and *Shelby County* hold that discrimination among the states can be justified if "a statute's disparate geographic coverage is sufficiently related to the problem that it targets." *Northwest Austin*, 557 U.S. at 203.

---

[9] Statistical information compiled from Congressional Research Service, *Federal Land Ownership: Overview and Data* (2012); World Atlas, http://www.worldatlas.com/aatlas/populations/usapoptable.htm (last visited June 17, 2015); and http://statetrustlands.org/ (last visited June 17, 2015).

Question #4: Do the respective state Enabling Acts (or Acts of Admission) require the United States to divest itself of ownership of the federal lands?

Potential arguments arising from state Enabling Acts or Acts of Admission were not jointly analyzed by the Subcommittee but were instead left to the province of each individual state in its discretion. An analysis of potential arguments arising from an individual state's Enabling Act or Act of Admission necessarily hinges upon facts specific to that state's admission into the Union.