Equal Footing, County Supremacy, and the Western Public Lands

by

Paul Conable

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PAUL CONABLE*

The debate over federal land management in the west has taken a new turn in recent years. "County supremacists" have sponsored numerous county ordinances declaring that the federal government has only limited authority to own land within the borders of a state and that the vast majority of what is now considered federal property belongs in fact to the states. These claims are based on county supremacists' misunderstandings of the Property Clause of the United States Constitution and the equal footing doctrine. Federal courts should dismiss pending litigation on these issues, as they have already been adequately resolved.

I. INTRODUCTION

In recent years, a movement to wrest control of public lands from the federal government has arisen in the rural west.[1] A loose confederation, which has been labeled the "county supremacy movement,"[2] is attempting to dislodge a federal land management bureaucracy it believes has become intolerably intrusive and unresponsive.[3] County supremacists have argued their positions in federal court[4] and in the press.[5] Although land management disputes have been a fact of life in the rural west for years, this latest wave of activists has succeeded in focusing an unusual amount of public attention on its claims. Whether these claims are likely to prevail or warrant review in the United States Supreme Court is another question.

Federal land management issues are of particular concern in the rural west because of the massive size of the United States land holdings in the region. Over 350 million acres of land in the 11 continental western states[6]

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* Student, Northwestern School of Law of Lewis & Clark College, J.D. expected 1997; M.S. 1994, Ohio State University; B.A. 1987, Tufts University. I wish to thank Professor Steve Kanter, Jerry Lidz, and Linda Holmes for their helpful suggestions, and my wife Victoria Conable for her patience and support.

1 *See* Erik Larson, *Unrest in the West*, TIME, Oct. 23, 1995, at 52; Mark Dowie, *The Wayward West*, OUTSIDE, Nov. 1995, at 59.

2 Larson, *supra* note 1, at 54.

3 *See id.*; Jon Christensen, *Nevada's Most Rebellious*, HIGH COUNTRY NEWS, Oct. 30, 1995, at 12; Dowie, *supra* note 1, at 62.

4 United States v. Nye County, Nevada, 920 F. Supp. 1108 (D. Nev. 1996), 903 F. Supp. 1394 (D. Nev. 1995), *appeal docketed* No. 95-17042 (9th Cir. 1996).

5 *See, e.g.*, Larson, *supra* note 1, at 52.

6 Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

are federally owned.[7] On a state-by-state basis, the federal government owns between twenty-eight percent (Washington) and eighty-two percent (Nevada) of the land in the western states.[8] Generally, these federal lands are managed for multiple uses by one of the federal land agencies (usually the United States Forest Service or Bureau of Land Management) with a percentage of revenues generated from the land going to the county and state in which it is located.[9] With the advent of the environmental movement in the 1960s, pressure on the federal land agencies to manage for purposes other than traditional resource extraction (such as mining, grazing, and timber) became stronger.[10] As a result, some rural westerners who depended on the federal lands for their livelihoods became increasingly vocal about federal land policies.[11]

Debate over the disposition of federal property is as old as the United States itself.[12] American history has been marked by a series of efforts by western states and citizens to influence federal land management or, more directly, to wrest control of these lands from the government in Washington.[13] The most recent and probably best known of these efforts was the "Sagebrush Rebellion" of the late 1970s and early 1980s.[14] Like these earlier movements, the present-day county supremacy movement has the general aim of reducing federal presence on western lands.

Though similar in general philosophy to these earlier movements, the new movement bears some striking differences in its legal arguments, tactics, and the virulence and passion of its proponents. The Sagebrush Rebellion of fifteen years ago was forcefully argued, but generally peaceful in

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[7] SALLY K. FAIRFAX & CAROLYN E. YALE, FEDERAL LANDS: A GUIDE TO PLANNING, MANAGEMENT, AND STATE REVENUES 199 (1987).

[8] Approximate percentages of federal land in the other western states are as follows: Arizona-40%; California-47%; Colorado-36%; Idaho-65%; Montana-29%; New Mexico-33%; Oregon-49%; Utah-61%; Wyoming-49%. *Id.* By contrast, federal land holdings in eastern and midwestern states are far less extensive, comprising only about three percent of the land area of the continental United States, exclusive of the eleven western states (compared to approximately 47% in the continental western states). *Id.*

[9] *Id.* at 3.

[10] Scott W. Hardt, *Federal Land Management in the Twenty-First Century: From Wise Use to Wise Stewardship*, 18 HARV. ENVTL. L. REV. 345, 370 (1994).

[11] R. MCGREGGOR CAWLEY, FEDERAL LAND, WESTERN ANGER: THE SAGEBRUSH REBELLION AND ENVIRONMENTAL POLITICS 90 (1993).

[12] *See, e.g.*, PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT (1968) (tracing the evolution of public land law and the disposal of the vast public domain of the United States). Early battles included the Confederation Congress fight over the western reserves, discussed in Part II, *infra*, and a continuing series of internecine squabbles over the settlement and disposal of the public domain. *See id., passim.*

[13] *See id.*; CAWLEY, *supra* note 11, at 72-74 (describing at least three western land battles of national significance prior to the county supremacy movement); WILLIAM L. GRAF, WILDERNESS PRESERVATION AND THE SAGEBRUSH REBELLIONS (1990) (discussing four "sagebrush rebellions" over western land disposition).

[14] For more thorough discussions of this earlier movement, see generally CAWLEY, *supra* note 11; GRAF, *supra* note 13; and John D. Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics and Federal Lands*, 14 U.C. DAVIS L. REV. 317 (1980).

nature.[15] The county supremacy movement, on the other hand, has been accompanied by a wave of violent attacks on federal land officers,[16] and the rhetoric of movement members is often dissonant with overtones of impending violence and conflict.[17] The greatest victory for the Sagebrush Rebellion was probably the passage by the State of Nevada of a bill denying Bureau of Land Management (BLM) authority over the land that the federal agency managed in Nevada.[18] By contrast, the high point of the county supremacy movement to date has been July 4, 1994, when Richard Carver, County Commissioner of Nye County, Nevada, bulldozed open a closed United States Forest Service road in the Toiyabe National Forest.[19] Carver's action, which supporters have likened to Rosa Parks's bus ride and the minutemen's stand at Lexington and Concord,[20] illustrates a major difference between current land rebels and their predecessors. The Sagebrush Rebellion states passed legislation, but did not take direct action to control the subject lands.[21] At least some of the county supremacists, however, seem determined to force confrontation.

Carver's bulldozer escapade triggered a federal government lawsuit against Nye County, which resulted in a district court opinion affirming federal ownership of the disputed lands.[22] Nye County has apparently decided not to appeal this decision.[23] As a result, there is still no federal appellate opinion directly addressing the county supremacists' claims. However, another case presenting these issues has been appealed to the

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[15] *See* MARION CLAWSON, THE FEDERAL LANDS REVISITED 7-8 (1983) ("[T]he 'Sagebrush Rebellion' . . . has been, and I think will continue to be, a mild and gentlemanly conflict.").

[16] Among an estimated 30-40 attacks were two widely reported bombings, both directed at Forest Service District Ranger Guy Pence. Pence's office in Carson City, Nevada was damaged by a pipe bomb in March 1995, and in August, dynamite destroyed a van parked in the driveway of his home. Christensen, *supra* note 3, at 1. In general, violent attacks on federal land officers have become more common. *See* Larson, *supra* note 1, at 54. These officers report feeling an unprecedented level of fear when they go to work. *See* Christensen, *supra* note 3, at 10-11. County supremacists disclaim all knowledge of, or responsibility for, these attacks. Gary Andrew Poole, *Hold It! This Land Is My Land!*, L.A. TIMES, Dec. 3, 1995, at 28.

[17] *See* Larson, *supra* note 1, at 54, 66; Dowie, *supra* note 1, at 59-63; Christensen, *supra* note 3.

[18] A.B. 413, 60th Leg., Reg. Sess. (Nev. 1979), codified at NEV. REV. STAT. § 321.596-.599 (1995). This bill was sponsored by State Assemblyman Dean Rhoads, one of the Sagebrush Rebellion's leaders. The bill asserted state control over certain BLM lands in the state. For a more detailed history of this legislation, see CAWLEY, *supra* note 11, at 95.

[19] Larson, *supra* note 1, at 52.

[20] *Id.* at 55.

[21] Cawley argues that passing legislation asserting state control without attempting to exercise such control was a sophisticated political maneuver, because it "formulated a confrontational situation based on threat rather than action." CAWLEY, *supra* note 11, at 95. According to this theory, the purpose of the bill was to sway other states to pass similar bills (which five western states did), and to get an original jurisdiction case before the United States Supreme Court, which might be swayed by mounting public pressure. *Id.*

[22] United States v. Nye County, Nevada, 920 F. Supp. 1108 (D. Nev. 1996).

[23] *Sagebrush Rebellion Dealt Setback*, NAT'L L.J., Apr. 1, 1996, at A10.

Ninth Circuit,[24] and it appears that there could be a relevant appellate ruling in the near future. In addition to pursuing their objectives in federal courts, county supremacists have promoted local ballot initiatives aimed at transferring federal land to state ownership.[25] Initiatives attacking federal land ownership have become commonplace in rural western county elections. When he bulldozed open the Toiyabe National Forest logging road, Richard Carver was acting under color of a Nye County ordinance rejecting federal authority to own land in the state, except for the very limited purposes listed in the Enclave Clause of the U.S. Constitution.[26] Over seventy western counties have passed similar ordinances.[27]

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[24] United States v. Gardner, 903 F. Supp. 1394 (D. Nev. 1995), *appeal docketed* No. 95-17042 (9th Cir. 1996). *Gardner* was a trespass action brought by the United States against holders of a permit to graze cattle on federal land in Nevada. A forest fire damaged the subject grazing allotment, and the Forest Service directed the permittees to remove their cattle from damaged and reseeded lands for two years. The permittees defied this order, and the Forest Service subsequently cancelled their grazing permit. When grazing continued notwithstanding permit cancellation, the United States sued in trespass to eject the permittees from the burned area.

The permittees raised essentially the same arguments at the District Court level that were raised in the Nye County litigation. *Id.* at 1399-1401. Those arguments are addressed in detail in the body of this Comment. The District Court rejected those claims and granted summary judgment to the United States, holding that the United States did in fact own the subject lands. *Id.* at 1400. Permittees appealed the grant of summary judgment to the Ninth Circuit, and filed their opening brief on February 9, 1996. Telephone Interview with Ninth Circuit Clerk (Aug. 15, 1996). The United States' response brief was filed on May 30. *Id.* No date for oral argument has been set in this case. *Id.*

[25] This is another distinction between the current movement and the Sagebrush Rebellion. The earlier movement concentrated on passing state and federal legislation. *See supra* notes 18-21 and accompanying text. The county initiative process, favored by the county supremacists, results in ordinances passed by majority vote of county residents. County supremacists claim that counties are the highest authority in American government, because they are "closest to the people." Ed Vogel, *Nye's Carver Leads Fight for Land Use*, LAS VEGAS REV. J., May 7, 1995, at 1-A. Nye County Commissioner Richard Carver has stated that he is "at the highest level of government," and that he has "more power than the state government and the federal government." *Id.* This belief in the primacy of county government helps to explain why the county supremacists have relied so heavily on the county initiative process and have expended comparatively little effort lobbying the federal government.

[26] U.S. CONST. art. I, § 8, cl. 17. The Enclave Clause gives Congress power "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . . ."

[27] Christopher A. Wood, *The War for Western Lands*, WASH. POST, May 7, 1995, at C2. One example is the following ballot measure, passed by voters in Union County, Oregon in 1995.

> Whereas article 1, Section 8, Clause 17 of the United States Constitution specifically states what type of property the Federal Government may hold, and how it is to be acquired,
>
> Whereas (including but not limited to) lands held by the Bureau of Land Management and the U.S. Forest Service meet none of these specified uses,
>
> Whereas none of this property was purchased with either the consent of the Oregon State Legislature, or the representative government of the people of Union County,
>
> Whereas the Federal Government holds no deed or titles to any of this land,

The legal reasoning behind these ordinances is similar to that advanced in *United States v. Gardner*[28] and *United States v. Nye County, Nevada*.[29] County supremacists claim that the federal government has no power to own land within the borders of a state, except for the limited purposes enumerated in the Enclave Clause.[30] Less than one percent of federal land is held under Enclave Clause powers;[31] the rest is held pursuant to the Property Clause.[32] County supremacists argue that Property Clause lands should have passed to the states upon their admission to the Union under the "equal footing doctrine."[33] The equal footing doctrine mandates that new states be admitted to the Union as equals of the existing states, in terms of power, sovereignty, and freedom.[34] Although all of the continental western states were admitted with clauses in their admissions acts disclaiming any right to unappropriated public lands within their borders, county supremacists argue that these clauses are unconstitutional under the equal footing doctrine, and therefore invalid.[35] Much of the debate during previous Sagebrush Rebellions centered around how the federal government should manage western lands.[36] County supremacists, using the equal footing doctrine, are advancing a more radical agenda: the immediate transfer of roughly 350,000,000 acres[37] of public lands in the west from federal to state control.[38]

This Comment assesses the legal validity of the county supremacists' arguments and discusses whether their ordinances will, or should, survive

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We, the people of Union County, Oregon, hereby refuse to recognize the United States Government's authority to hold or exercise any management jurisdiction over any unconstitutionally held property within the borders of our county.

This ordinance is typical in that it contains no provision for enforcement. Outside Nye County, the initiatives seem to have resulted in little or no actual county action. This may indicate that the purpose of the initiatives is largely to draw attention to county concerns, *see* Dowie, *supra* note 1, at 65, or that county officials are loath to take any action that might involve them in expensive litigation, *see infra* note 39.

28 903 F. Supp. 1394 (D. Nev. 1995).

29 920 F. Supp. 1108 (D. Nev. 1996).

30 William E. Schaeffer, District Attorney, Eureka County, Nevada, Nevada's Public Lands Reviewed in Light of the Equal Footing Doctrine of the United States Constitution 8, Eureka County Draft District Attorney Opinion 1994-2-C (March 1995) (unpublished manuscript, on file with author).

31 PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND 327 (1970) [hereinafter ONE THIRD OF THE NATION'S LAND].

32 U.S. CONST. art. IV, § 3, cl. 2. In pertinent part, this clause reads, "The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

33 *See* Schaeffer, *supra* note 30, *passim*.

34 United States v. Texas, 339 U.S. 707, 716 (1949) (holding that the equal footing doctrine was not designed to extinguish economic disparity between states, but to create equality of political standing and sovereignty).

35 *See* Schaeffer, *supra* note 30, at 3.

36 CAWLEY, *supra* note 11, at 9.

37 FAIRFAX & YALE, *supra* note 7, at 199.

38 In the words of Nye County Commissioner Richard Carver, "We get called Sagebrush Rebels but we're as far from the Sagebrush Rebellion as you can get. They assumed the federal government owned the land. (We say) the federal government has to prove they own the land. And they can't do it." Christensen, *supra* note 3, at 12.

federal court review. Part II provides background on the public lands question in the formation of the United States and the admission of new states to the Union. Part III explores the constitutional basis for the county supremacy arguments, focusing on the Enclave Clause, the Property Clause, and the equal footing doctrine. Part IV concludes that while the wisdom of current federal land management policies is debatable, the legal foundation of federal land ownership is well established and western counties are wasting money[39] and time in their attempts to gain control of federal lands through county initiatives and the courts.

II. HISTORICAL DEVELOPMENT OF THE PUBLIC LANDS

The legal arguments of the county supremacists are based largely on events that occurred during the formation of the United States and the admission of the western states into the Union. Some history is necessary to evaluate these arguments. This Part will focus on the admission of states formed from the public lands, since these states are the particular focus of the equal footing debate.

The original thirteen colonies declared their independence from Great Britain in 1776. In declaring themselves sovereign states and disclaiming all political connection with their former ruler, the states became owners of the unappropriated lands within their boundaries.[40] Since the original thirteen states declared themselves independent and sovereign over their lands prior to the formation of the federal government, these states could contain no federal public lands at the time of their formation.[41]

Seven of these original states also claimed colonial holdings outside their boundaries.[42] These "unappropriated or crown lands"[43] were claimed under colonial land grants from the English monarch.[44] The other six

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[39] One recent county supremacy ordinance has been invalidated in federal courts, with disastrous financial results for the county. In *Boundary Backpackers v. Boundary County Commissioners*, No. CV 93-9955, 1994 WL 189642 (D. Id. Jan. 27, 1994), county residents in Boundary County, Idaho challenged a county ordinance that purported to severely limit the purposes for which federal land in the county could be managed, and to require management focused primarily on resource extraction. The district court ruled that the statute was unconstitutional under the Supremacy Clause of the U.S. Constitution, since it attempted to curtail federal management authority through a county ordinance. *Id.* at *18. In addition to invalidating the ordinance, the court also awarded the challengers $25,000 in legal fees from the county. Dowie, *supra* note 1, at 66. The cost of fighting a prolonged lawsuit in federal court is enough by itself to stretch the legal budgets of many unpopulous western counties. The possibility of substantial attorneys' fees awards for victorious challengers only makes this possibility more worrisome for county attorneys. *See id.*

[40] THOMAS DONALDSON, THE PUBLIC DOMAIN 56 (1970).

[41] CAWLEY, *supra* note 11, at 97.

[42] GATES, *supra* note 12, at 49. The seven states were Connecticut, Georgia, Massachusetts, New York, North Carolina, South Carolina, and Virginia. DONALDSON, *supra* note 40, at 11.

[43] DONALDSON, *supra* note 40, at 56.

[44] *Id.* at 60. Since these grants were made by different monarchs, at a time when European knowledge of North American geography was less than perfect and political disputes over European holdings in the new world were common, the boundaries described in the

states, which did not own lands outside their borders,[45] were concerned that their lack of western lands placed them in an inferior position to their landed sister states.[46] Maryland was particularly alarmed at this disparity and refused to ratify the Articles of Confederation until its concerns were addressed.[47] Finally, in 1780, the Congress of the Confederation issued a proclamation recommending that states with western lands pass legislation ceding that land to the federal government.[48] Shortly thereafter, the Congress issued another proclamation, resolving that lands so ceded to the federal government would be disposed of for the benefit of the United States and formed into states with "the same rights of sovereignty, freedom, and independence, as the other States."[49] This mandate is the root of the equal footing doctrine; indeed, the term "equal footing" is simply shorthand for "the same rights of sovereignty, freedom, and independence."[50]

Mollified, Maryland ratified the Articles of Confederation on February 2, 1781.[51] The states with western land eventually ceded most of this land to the United States between 1781 and 1802.[52] Thus the federal government acquired the first of the federal public domain, by cession from the states, with the proviso that it be disposed of for the benefit of all the states.[53] These lands were subsequently governed under the Northwest Ordinance of 1787[54] (concerning lands north of the Ohio River) and the Southwest Ordinance of 1790.[55] These two ordinances are substantially

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grants were often conflicting, overlapping, or ill-defined. *Id.* As a result, conflicts among the new states over the actual extent of their western lands were common. *Id.*; GATES, *supra* note 12, at 49-51.

45 Maryland, Rhode Island, Delaware, Pennsylvania, New Hampshire and New Jersey.

46 *See* GATES, *supra* note 12, at 51-56; DONALDSON, *supra* note 40, at 60.

47 DONALDSON, *supra* note 40, at 60.

48 RESOLUTION OF THE CONGRESS OF THE CONFEDERATION (September 6, 1780), *reprinted in* DONALDSON, *supra* note 40, at 64. The Confederation Congress had no power to require this cession, and so this proclamation was more in the nature of an agreed-upon "recommendation" to the states than a law compelling them to cede their lands. *Id.*

49 RESOLUTION OF THE CONGRESS OF THE CONFEDERATION (October 10, 1780), *reprinted in* DONALDSON, *supra* note 40, at 64.

50 *See* David E. Engdahl, Comments on Equal Footing, Address at the Meeting of the National Association of County Officers 1 (July 31, 1994) (transcript on file with author) [hereinafter Engdahl Speech].

51 DONALDSON, *supra* note 40, at 60.

52 *Id.* at 56.

53 This condition of the cessions meant that the lands were to be sold for cash to retire the debts acquired by the federal government during the Revolutionary War. *Id.* at 51. The sale was intended to be to settlers, who would populate the new territory so that it could be formed into new states. *Id.*

54 Act to provide for the Government of the Territory Northwest of the river Ohio, ch. 8, 1 Stat. 50 (1789).

55 Act for the Government of the Territory of the United States, South of the River Ohio, ch. 14, 1 Stat. 123 (1790).

identical.[56] Nine new states were formed from this first federal public domain.[57]

Two provisions of the Northwest and Southwest Ordinances are particularly important in evaluating the county supremacists' arguments. First, the ordinances repeated the earlier Congress of the Confederation mandate that new states created from the territories would be admitted on an equal footing with existing states.[58] Second, they declared that new states would "never interfere with the primary disposal of the soil by the United States."[59] The Confederation Congress apparently contemplated that states formed from the federal public domain would contain lands controlled by the federal government. The Congress also clearly intended that these states would be on an equal footing with the original thirteen states, which did not contain federal lands. Based on that, it appears that the Confederation Congress (many members of which were also involved in drafting the Constitution) believed that a state could contain federal land and still be on equal footing with a state that did not.[60] The juxtaposition of these two clauses in the Northwestern and Southwestern Ordinances is strong evidence that the legislators responsible for first introducing equal footing into American law believed that states admitted with federal land within their boundaries could be equal to states without federal lands.

In the first eighty years after the formation of the United States, the public domain expanded very quickly. The United States added the Louisiana Territory by purchase in 1803,[61] Florida by treaty in 1819,[62] Texas by annexation in 1845,[63] the Oregon Territory by treaty in 1846,[64] roughly 330 million acres of the west in the Mexican War of 1848,[65] the Gadsden Purchase lands in 1853,[66] and Alaska in 1867.[67] All told, the federal govern-

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[56] The primary difference between the two Ordinances is a provision of the Southwestern Ordinance stating that Congress would not abolish slavery in the new southern states.

[57] *See* DONALDSON, *supra* note 40, at 159-163. The nine states were Kentucky, Tennessee, Ohio, Indiana, Mississippi, Alabama, Illinois, Michigan and Wisconsin. In addition, the northeastern edge of Minnesota was originally part of the Northwest territory.

[58] Act of July 13, 1787, art. V (declaring new states shall be admitted "on an equal footing with the original States, in all respects whatever"). This language is reflected in the admission acts of virtually all states subsequently admitted to the Union. Thus, equal footing applies both to states formed from the Northwestern and Southwestern Territories, and those formed from lands acquired after the ratification of the Constitution. CAWLEY, *supra* note 11, at 97.

[59] Act of July 13, 1787, art. IV.

[60] *See* Engdahl Speech, *supra* note 50, at 4-5.

[61] Act of October 31, 1803, 2 Stat. 245.

[62] Treaty of Amity, Settlement, and Limits, February 22, 1819, U.S.-Spain, 8 Stat. 252.

[63] Joint Resolution for Annexing Texas to the United States, March 1, 1845, 5 Stat. 797.

[64] Treaty With Great Britain, in Regard to Limits Westward of the Rocky Mountains, June 15, 1846, 9 Stat. 869.

[65] Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, February 2, 1848, 9 Stat. 922. This area comprises what is now California, Utah, Nevada, New Mexico, most of Arizona, western Colorado, and southwest Wyoming. *See* DONALDSON, *supra* note 40, at 134.

[66] Treaty with Mexico, December 30, 1853, 10 Stat. 1031.

[67] Treaty with Russia, March 30, 1867, 15 Stat. 539.

ment acquired approximately 1.84 billion acres of public domain land in North America.[68]

From these lands were created the midwestern and western states (exclusive of Hawaii). Each of these states, at the time of its entrance into the Union, contained lands belonging to the federal government.[69] As previously stated, the admissions acts of these new states all repeated the two clauses noted above from the Northwest Ordinance: the new states would 1) be on an equal footing with existing states and 2) disclaim ownership of public domain lands within state boundaries.[70]

It is on these two clauses that the legal arguments of the county supremacists must succeed or fail. It is the county supremacists' position that a state admitted to the Union with federal land within its borders must become the owner of that land at the moment it becomes a state, or it is not on equal footing with the original thirteen states, which contained no federal land when they became states.[71] A state in which the federal government owns land, they argue, cannot be the political equal of a state without federal land, so equal footing requires that a state own all of its unappropriated public lands. Therefore, they contend that the two admissions act clauses discussed above are contradictory, because they purport to admit new states on equal footing with existing states, while at the same time reinforcing federal land ownership within new states' boundaries. As a result, the admissions act clauses guaranteeing equal footing to new states invalidate the admissions act clauses disclaiming states' interest in public domain lands within their boundaries, because the two concepts are mutually exclusive. An analysis of the equal footing argument follows, preceded by a brief discussion of the justification for federal ownership of land under the Enclave and Property Clauses of the United States Constitution.

III. Equal Footing and the Constitutionality of Federal Land Ownership

One fact poses a major obstacle to the county supremacists. All of the continental western states specifically disclaimed ownership of the federal public lands within their boundaries in their admission acts. The United States Supreme Court has likened conditions in admission acts to terms of a contract, and has clearly stated that such conditions are not to be treated lightly, but rather as indicia of a state's intent to be bound.[72] The county supremacists counter that these clauses are unconstitutional, and therefore invalid, because an admission act cannot confer upon Congress

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[68] Clawson, *supra* note 15, at 189. Approximately 63% of this land has passed into private or state ownership. *Id.*

[69] *See* Gates, *supra* note 12. New states were typically given grants of land by the federal government, upon admission, to finance construction of schools and other public works. *Id.*

[70] *See id.* at 287-307.

[71] *See* Schaeffer, *supra* note 30, *passim*.

[72] Stearns v. Minnesota, 179 U.S. 223, 244, 249-50 (1900).

any extra-constitutional powers.[73] They argue that the land disclaimer clauses in state admissions acts are simply invalid attempts by Congress to assert power that it does not possess,[74] because the federal government has no authority to own land in a state except under the Enclave Clause.[75]

In accordance with this belief that the only authority for federal ownership of land within a state comes from the Enclave Clause, the county supremacists conclude that the Property Clause,[76] under which over ninety-nine percent of federal lands are owned and managed,[77] provides no authority for federal land ownership within a state. County supremacists argue that although the Property Clause allows the federal government to own and manage territorial lands prior to statehood, the equal footing doctrine transfers these lands from federal to state ownership when a state is admitted to the Union.[78] In addressing this argument, then, two questions must be answered. First, are the county supremacists correct in their assessments of the Enclave and Property Clauses? Second, does equal footing operate to transfer federal land to state ownership as an incident of statehood?[79]

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[73] Coyle v. Smith (also known as Coyle v. Oklahoma), 221 U.S. 559, 570 (1911).

[74] *See* Schaeffer, *supra* note 30, at 11.

[75] U.S. CONST. art. I, § 8, cl. 17.

[76] U.S. CONST. art. IV, § 3, cl. 2.

[77] *See supra* note 31 and accompanying text.

[78] *See* Schaeffer, *supra* note 30, at 3.

[79] It is interesting to speculate what the result of such a transfer would be. If the Supreme Court were to rule that all federal land not held under the Enclave Clause actually became state property upon admission to the Union, the effect would not be limited to lands currently held by the federal government. The federal government has disposed of literally hundreds of millions of acres of land within already-admitted states under the assumption that this land was federal. *See* GATES, *supra* note 12. If this land was in fact state land at the time of conveyance, these federal grants and sales would presumably be void, since the United States conveyed land it did not possess. Nor would current owners have gained prescriptive rights to the land, since the actual owners would be the states, and citizens cannot adversely possess against states. *See* Carl C. Risch, *Encouraging the Responsible Use of Land By Municipalities: the Erosion of Nullum Tempus Occurrit Regi and the Use of Adverse Possession Against Municipal Land Owners*, 99 DICK. L. REV. 197 (1994) (discussing the proper application of the principle that public lands are not subject to adverse possession claims by citizens).

This difficulty could be avoided by a prospective ruling, transferring only those lands currently held by the federal government under the Property Clause. But a transfer of this limited type might raise other Constitutional problems. To so rule, the Court would have to determine that the title to public lands within a state passes upon statehood as an incident of state sovereignty. *See infra* Part III.C.1. But in many earlier-incorporated states in the south and midwest, the federal government has already disposed of virtually all of the formerly federal public lands. *See* GATES, *supra* note 12, at 287-307. Because of this, a prospective transfer of public lands would have virtually no effect on these states, despite the fact that, upon statehood, they contained considerable sections of federal land. The practical effect of a prospective transfer would be to give western states a sovereign right that their southern and midwestern counterparts did not possess. Although those states would share the right on paper, it would have no meaning in most states outside the west. Therefore, a prospective land transfer would arguably violate the very principles of equality between states on which the county supremacists rely.

Further, what effect would invalidating the land disclaimer clauses in state admissions acts have on the acts as a whole? As previously stated, admission act conditions are analo-

A. *The Enclave Clause*

County supremacists do not dispute federal authority to own property under the Enclave Clause.[80] This clause gives Congress enumerated power to purchase land from a state, with consent of that state's legislature, in order to build forts, arsenals, and other such "needful Buildings."[81] Land acquired in this manner is subject to the exclusive jurisdiction of the United States.

The county supremacists assert that the federal government may own land within a state *only* under this clause.[82] The vast majority of lands currently designated as federal are not Enclave Clause lands,[83] and these other federal lands, according to county supremacists, are therefore state property.[84] It is true that the great majority of federal lands are not held under the Enclave Clause, but rather under the Property Clause.[85] The Enclave Clause was clearly not intended for the governance of large areas of federal territory. Rather, it is a mechanism for purchasing land from already-incorporated states, for purposes mostly related to national defense. The Enclave Clause "simply establishes the exclusive jurisdiction of the United States over property which is acquired in the manner provided therein."[86] So it is beyond debate that most western public lands were not purchased under the Enclave Clause.[87] However, the counties' accompanying claim, that the Enclave Clause represents the *only* authority for the United States to own property within a state, is less convincing.

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gous to terms in a contract. *See supra* text accompanying note 72. It is not clear whether in a hypothetical case the disputed clauses would be severable from the rest of the acts, or whether they would be held to invalidate the whole of the agreement. It could certainly be argued that the transfer of millions of acres of land (which under the act as written would remain under federal ownership) would represent a material change in the bargain. The most extreme possibility is that the removal of the clauses would invalidate the whole of the compact, and return the subject state to territorial status (though the Supreme Court has invalidated minor clauses in admissions acts without mandating this result, *see* Coyle v. Smith, 221 U.S. 559 (1911)). Such a return to territorial status would result, ironically, in the disputed land remaining in federal hands (since the state would never have become a state, and thus never succeeded to any sovereign rights). Although it seems unlikely that any court would take the drastic step of disincorporating a state, it remains unclear what the exact effect of the invalidation of these admission act clauses would be. For a more complete discussion of the possible effects of invalidation, see Leshy, *supra* note 14, at 327.

[80] *See, e.g.*, Union County Ballot Measure, *supra* note 27; Schaeffer, *supra* note 30, at 3.

[81] For the text of the Enclave Clause, see *supra* note 26.

[82] *See* Union County Ballot Measure, *supra* note 27 ("Whereas Article 1, Section 8, Clause 17 of the United States Constitution specifically states what type of property the federal government may hold, and how it is to be acquired . . . .").

[83] *See id.* ("Whereas . . . lands held by the Bureau of Land Management and the U.S. Forest Service meet none of these specified uses . . . .").

[84] *See id.* ("We, the people of Union County, Oregon, hereby refuse to recognize the United States Government's authority to hold or exercise any management jurisdiction over any unconstitutionally held property within the borders of our county.").

[85] ONE THIRD OF THE NATION'S LAND, *supra* note 31, at 19-20.

[86] Letter from Lorne J. Malkiewich, Legislative Counsel, State of Nevada, to Assemblyman Roy Neighbors (Nov. 5, 1993) (on file with author).

[87] *See supra* text accompanying note 31.

B. The Property Clause

The Property Clause[88] has been widely accepted by courts and scholars as a sufficient basis for federal governance of the great majority of the public domain.[89] The Supreme Court has supported a broad view of federal powers under the clause, declaring that these powers are virtually without limit.[90] County supremacists, however, argue that the Property

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[88] U.S. CONST. art. IV, § 3, cl. 2. This clause provides that "[t]he 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."

[89] *See, e.g.*, Hooven & Allison Co. v. Evatt, 324 U.S. 652, 673 (1945) ("It is no longer doubted that the United States may acquire territory by conquest or by treaty, and may govern it through the exercise of the power of Congress conferred by [the Property Clause]."), *overruled on other grounds sub nom.* Limbach v. Hooven & Allison Co., 466 U.S. 353 (1984); Louis Touton, Comment, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 COLUM. L. REV. 817, 821 ("It has long been established that, at a minimum, the property clause gives the federal government the same powers over federally owned land as a private landowner has over his private land." (citing Alabama v. Texas, 347 U.S. 272, 293 (1954), United States v. Midwest Oil Co., 236 U.S. 459, 474-75 (1915))).

[90] *See, e.g.*, United States v. San Francisco, 310 U.S. 16 (1940) (upholding congressionally-imposed restrictions on a federal grant of Property Clause land to the city of San Francisco); Light v. United States, 220 U.S. 523, 537 (1911) (holding that the federal government has authority to set aside portions of Property Clause lands in perpetuity as Forest Reserves because it holds the Property Clause lands in trust for the benefit of the entire country, "[a]nd . . . how that trust shall be administered . . . is for Congress to determine"); Gibson v. Choteau, 80 U.S. (13 Wall.) 92, 99 (1871) (holding that a state statute of limitations does not apply to the federal government in its capacity as owner of the Property Clause lands, because congressional power under the Property Clause "is subject to no limitations"). There has been considerable academic discussion of the extent and nature of federal regulatory powers under the Property Clause. *See, e.g.*, David Abelson, *Water Rights and Grazing Permits: Transforming Public Lands Into Private Lands*, 65 U. COLO. L. REV. 407 (1994); Roger M. Sullivan, Jr., *The Power of Congress Under the Property Clause: A Potential Check on the Effect of the* Chadha *Decision on Public Land Legislation*, 6 PUB. LAND L. REV. 65 (1985). In the wake of the Supreme Court's decision in *Kleppe v. New Mexico*, 426 U.S. 529 (1976), there was an active debate in the pages of law reviews concerning the intent of the framers of the Constitution regarding the Property Clause. One group embraced the "classic" Property Clause doctrine. This group argued that the framers of the Constitution intended the federal government to have only proprietary powers over Property Clause lands. *See, e.g.*, David E. Engdahl, *State and Federal Power Over Federal Property*, 18 ARIZ. L. REV. 283, 296 (1976). The federal police powers upheld by the Supreme Court in *Kleppe* were, according to this argument, beyond the scope of Property Clause authority as conceived by the framers. *Id.* Some adherents of the classic theory argued further that the Property Clause gives the federal government power to dispose of public lands, but not the power to hold them in perpetuity. *See* Albert W. Brodie, *A Question of Enumerated Powers: Constitutional Issues Surrounding Federal Ownership of the Public Lands*, 12 PAC. L.J. 693, 721 (1981). Their opponents have adopted a position more in line with the Court's reasoning in *Light*, *Kleppe*, and the other expansive Property Clause cases. They argue that the classic theory misconstrues the framers' intent, and that federal police powers over the Property Clause lands are consistent with the original purpose of the Clause. *See, e.g.*, Eugene R. Gaetke, *Refuting the "Classic" Property Clause Theory*, 63 N.C. L. REV. 617 (1985). For the time being at least, the Court seems to favor the latter interpretation.

Neither of the positions in this debate resembles the county supremacists' views, however. The county supremacists, instead of arguing about the *extent* of federal management authority, dispute the federal government's right to exercise *any* control under the Property Clause after a state has been admitted to the Union, on the grounds that the federal govern-

Clause speaks only to federal authority to *manage* land belonging to the United States, and does not confer power to *acquire* or *own* that land. Therefore, they contend, broad federal management power under the Property Clause is irrelevant to the question of whether the federal government owns Property Clause land in the first place.[91]

This argument takes a narrow and misguided view of Property Clause jurisprudence. Recent Property Clause cases (including *Kleppe v. New Mexico*,[92] discussed below) have interpreted the Clause as conferring broad management authority over federal public lands within the border of an already-incorporated state.[93] Implicit in these decisions is the Supreme Court's recognition that the United States may *own* land within a state, pursuant to its Property Clause powers. The United States has undoubted authority to acquire territory in various ways (treaty, conquest, cession), and to manage this territory under the Property Clause.[94] If the federal government may acquire and dispose of land, it must necessarily have the power to own land. So the United States may acquire land, may own land, and may manage that land virtually without limit; the Supreme Court, especially in this century,[95] has consistently advanced

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ment cannot own public lands within a state except under the Enclave Clause. *See supra* notes 80-82 and accompanying text.

[91] *See, e.g.*, Schaeffer, *supra* note 30, at 6.

[92] 426 U.S. 529 (1976).

[93] *See, e.g.*, California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 580 (1987); United States v. Vogler, 859 F.2d 638 (9th Cir. 1988); United States v. Brown, 552 F.2d 817 (8th Cir. 1977) (holding that federal regulations prohibiting hunting in state park were permissible exercise of Congress's power under the Property Clause).

[94] *See, e.g.*, *Hooven & Allison*, 324 U.S. at 673-74; California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987) (holding that federal land management statutes do not preempt state permit requirement for operators of mining claims in national forest).

[95] One interesting 19th century exception to this general rule appears in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 436-42 (1856). In *Dred Scott*, Chief Justice Taney refused to find that Dred Scott had become a free man when he was brought into the Territory of Missouri, even though Congress had declared slavery illegal in that territory. In reaching this result, Taney concluded, among other things, that the Property Clause did not give Congress authority to legislate in the Missouri Territory. *Id.* at 436-37. According to the Chief Justice, the Property Clause only applied to the property and territory which was in the possession of the United States at the time of the ratification of the Constitution. *Id.* This property consisted only of the territories ceded to the federal government as a result of the Compromise of 1780, less the cessions of Georgia and North Carolina (which were not finalized until after ratification of the Constitution). *Id.* at 434. Therefore, Taney contended, the Property Clause should only be read to apply to those portions of the Northwest and Southwest territories that were United States property in 1789, and confers on Congress no authority in regard to later-acquired territory, including Missouri. *Id.* at 432.

Justice McLean's dissent in *Dred Scott* points out that the Property Clause had been relied upon prior to 1857 to give the United States authority to govern its growing territory, including lands that were not property of the United States when the Constitution was ratified. *Id.* at 540. Further, the Supreme Court had apparently ratified the constitutionality of this practice. In *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828), Chief Justice Marshall, writing for the majority, stated that "Florida continues to be a territory of the United States [ ] governed by virtue of [the Property Clause]." *Id.* at 542. Since the Florida Territory was acquired by the United States after the ratification of the Constitution, it could not,

a broad view of federal management power under the Property Clause.[96]

Nor has the Court ever held that these federal powers of ownership and management of territorial lands terminate upon admission of a territory as a state. To the contrary, *Kleppe*[97] and other Property Clause decisions[98] implicitly support federal ownership of Property Clause lands within state boundaries.

In *Kleppe*, New Mexico challenged federal authority to act under the Wild Free-Roaming Horses and Burros Act,[99] which asserts federal control over wild horses and burros on federal lands.[100] Under the Act, a private landowner must arrange for a federal agent to remove any wild horses or burros that stray on to the landowner's property.[101] In 1974, a New Mexico rancher asked the Bureau of Land Management (BLM) to remove several wild burros from federal land near his grazing claim.[102] Although the ani-

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under Chief Justice Taney's formulation in *Dred Scott*, have been governed under the Property Clause. Yet the Marshall Court, in *Canter*, stated that it was.

Like much of the *Dred Scott* opinion, Chief Justice Taney's analysis of the Property Clause is strained and hard to follow. Clearly it is not common practice to limit the scope of federal powers under the Constitution to subjects and items that were in existence in 1789 (for example, courts do not limit congressional power to regulate "[c]ommerce between the several States" to those states in existence at the ratification of the Constitution). Furthermore, Chief Justice Taney does not articulate a compelling reason why the Property Clause should be construed differently from the rest of the Constitution in this regard. The portion of *Dred Scott* interpreting the Property Clause has been characterized as "difficult to take . . . seriously" and is marred by the fact that Taney "cite[s] no court decisions in support of his bizarre explication." DON E. FEHRENBACHER, THE DRED SCOTT CASE 367 (1978). Nevertheless, Taney's discussion of the Property Clause has never been specifically overruled, which is odd considering that it is part of what has been called "the most frequently overturned decision in history." *Id.* at 580.

Although never specifically overruled, Taney's discussion of the Property Clause has routinely been ignored in the numerous Supreme Court cases applying the clause to lands acquired after the ratification of the Constitution. *See, e.g., Hooven & Allison*, 324 U.S. at 652; Kleppe v. New Mexico, 426 U.S. 529 (1976) (affirming federal power to govern conquest and treaty lands under the Property Clause). The continued validity of the Taney view of the Clause was recently tested at the federal appellate level, however. In *United States v. Vogler*, 859 F.2d 638 (9th Cir. 1988), an Alaskan public lands miner challenged the authority of Congress to declare part of Alaska a National Preserve. *Id.* at 640-41. Vogler relied on Taney's view that the Property Clause was only meant to apply to the pre-Constitution territory of the United States. *Id.* In summarily rejecting this claim, the Ninth Circuit cited *Kleppe* for the proposition that Property Clause powers are to be broadly construed. *Id.* at 641. *Kleppe* does not directly address *Dred Scott* or confront the argument that the Property Clause is applicable only in limited areas (although, by implication, the Court clearly does not endorse this view, since *Kleppe* concerns later-acquired territory in New Mexico). However, given that Taney's dubious reading of the Clause has never been used as the basis for a subsequent Court decision and appears contrary to case law and scholarly opinion, it seems highly unlikely that any future court will find it compelling.

96 *Hooven & Allison*, 324 U.S. at 673-74.

97 426 U.S. 529 (1976).

98 *See supra* note 93.

99 16 U.S.C. §§ 1331-1340 (1994).

100 *Id.* § 1333(a).

101 *Id.* § 1334.

102 *Kleppe*, 426 U.S. at 553.

mals were not on the rancher's property, he was concerned that they would interfere with his grazing animals.[103] After BLM refused, the New Mexico Livestock Board removed the animals and sold them at auction under the provisions of the New Mexico Estray Law.[104] BLM then demanded that the Board recover the animals and restore them to the public land.[105]

In response, New Mexico filed suit in federal court, seeking to have the Wild Free-Roaming Horses and Burros Act declared unconstitutional.[106] The district court so ruled, on the grounds that the Act exceeded federal power under the Property Clause.[107] The Supreme Court reversed this determination in *Kleppe v. New Mexico*,[108] rejecting the limitations that the district court had suggested curtailed federal power under the Property Clause. The Court ruled that the Clause gave Congress more than sufficient authority to legislate to protect wild animals on federal lands.[109] Implicit in this ruling is that the lands in question, federal Property Clause lands within the borders of an incorporated state, are the property of the federal government.

The *Kleppe* Court distinguished Property Clause authority from Enclave Clause authority.[110] New Mexico argued that the Enclave Clause provided the only means for the federal government to gain *exclusive* jurisdiction over territory within a state and that a state therefore retains jurisdiction over non-Enclave Clause federal lands within its borders.[111] In response, the Supreme Court first noted that the federal government does not have exclusive jurisdiction over Property Clause lands, because "[a]bsent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory . . . ."[112] However, the federal government, which acts as both proprietor and legislature over these lands, may also pass laws respecting their management. "[W]hen Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause."[113] Thus, *Kleppe* makes clear that the mechanism for federal land acquisition in the Enclave Clause is intended primarily for situations where the federal government needs to acquire state property and to exercise exclusive jurisdiction over that property. This mechanism

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103 *Id.*

104 N.M. STAT. ANN. § 47-14-1 (1966) (current version at § 77-13-1 (1978)).

105 *Kleppe*, 426 U.S. at 534.

106 New Mexico v. Morton, 406 F. Supp. 1237 (D. Nev. 1975).

107 *Id.* at 1239.

108 *Kleppe*, 426 U.S. at 546.

109 *Id.* at 539-41 ("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.'") (quoting United States v. San Francisco, 310 U.S. 16, 29 (1940)).

110 *Id.* at 542-46.

111 *Id.* at 543.

112 *Id. See also* Wilson v. Cook, 327 U.S. 474 (1945) (upholding Arkansas' right to tax activities on federal Forest Reserves in the state, since the state retained concurrent jurisdiction over Property Clause lands).

113 *Id.* at 543.

is therefore not relevant to the question of Property Clause management powers. The fact that the Property Clause does not confer exclusive jurisdiction upon the federal government does not mean that the United States lacks authority to own and manage these lands.

By implication, *Kleppe* arguably ratifies federal ownership of Property Clause lands within a state. True, the *Kleppe* Court never directly addressed the question of whether the federal government owns Property Clause lands. But it is improbable that the Supreme Court would have bothered to define the parameters of Property Clause power if the Justices believed that Property Clause lands were not the property of the United States, as county supremacists contend. The fact that *Kleppe* does not address federal ownership of Property Clause lands does not suggest that the question is a novel one, or has not come to the attention of the Supreme Court. It seems likely that the Court simply considered the issue settled.

County supremacists also contend that *Kleppe* is not dispositive of their claim,[114] because *Kleppe* does not speak to federal authority under the Property Clause "to acquire the lands in the first place."[115] This attempted distinction reveals the county supremacists' basic confusion about federal land ownership. The federal government did not "acquire" or "grab" western federal lands under the authority of the Property Clause. The county supremacists are correct that the Enclave Clause, and not the Property Clause, provides the mechanism for the United States to acquire lands within an already-admitted state. This is irrelevant, however, because the public lands over which the county supremacists are asserting state ownership *were not acquired from a state*. Rather, as described above, these lands were acquired by treaty or conquest from other nations or native inhabitants.[116] The federal government does not need the Property Clause to provide authority for federal land acquisition; that authority derives from other sources.[117]

Federal authority to acquire territory through treaty, conquest, or discovery is well established, and under *Kleppe*, federal power to hold and manage this land is broad and perpetual. Thus, the county supremacists'

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114 *See, e.g.*, Schaeffer, *supra* note 30, at 6 ("*Kleppe* and this entire line of cases are inapposite because this dispute is not about power, it's about *title*.").

115 Anita P. Miller, *The Western Front Revisited*, 26 URB. LAW 845 (1994) (citing Letter from Richard Carver, Nye County Commissioner, to Bruce Babbitt, Mike Espy, etc.); *see also* Schaeffer, *supra* note 30, at 11 ("Where is the Constitutional basis of the asserted power for the Federal Government to grab unoccupied land in the Original Thirteen? It's just not there! And if it's not there for the Original Thirteen, then it's also not there for the rest of the states.").

116 *See supra* notes 61-67 and accompanying text.

117 *See, e.g.*, American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 542 (1828) ("The Constitution confers absolutely on the government of the Union, the powers of making war, and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty."); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 595 (1823) ("[T]he discovery is made for [the benefit of] the whole nation, . . . and that the vacant soil is to be disposed of by that organ of the government which has the constitutional power to dispose of the national domains . . . .").

contention that the federal government may acquire and hold property only under the Enclave Clause[118] is invalid. The only remaining question in addressing the county arguments, then, is whether the equal footing doctrine requires that federal property within a territory pass to state ownership when that territory achieves statehood.

C. The Equal Footing Doctrine

The term "equal footing" originally appears in the Northwest Ordinance of 1787.[119] It embodies the concept that Congress has no power to create a state "which shall be any less of a state than those which compose the Union,"[120] in terms of sovereignty, freedom, or power. The county supremacists contend that this equality of sovereignty invalidates the provisions of western state admissions acts that disclaim any state right to federal land within state borders.[121] This follows, they argue, from the fact that the federal government owned no land within the original thirteen states.[122] Later-admitted states should therefore have been given title to all federal land within their borders upon admission so that they would be on equal footing with the first states.[123] This argument is unpersuasive because it attempts to apply equal footing outside the area of sovereign rights, and erroneously extends the doctrine beyond the sphere in which the Supreme Court has applied it.

1. Pollard v. Hagen

County supremacists rely heavily on two Supreme Court cases in support of their position. The first, *Pollard v. Hagen*,[124] is the classic explication of the equal footing doctrine. In *Pollard*, the Supreme Court invalidated a grant of land by the United States to Pollard. The land in question was a lot that lay below the mean high tide line of the Mobile River in Mobile, Alabama. At the time of the grant, the United States owned the land surrounding the lot as part of a deed of cession from Georgia under the Compromise of 1780. The Supreme Court ruled, however, that the federal government did not own the beds and banks of the Mobile River, which had passed to Alabama when it became a state, under the equal footing doctrine.[125] Therefore, the federal grant to Pollard, lying

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118 *See* Union County Ballot Measure, *supra* note 27.

119 Act to provide for the Government of the Territory Northwest of the river Ohio, ch. 8, 1 Stat. 50, 53 n.(a) (1789) ("[A] State shall be admitted . . . on an equal footing with the original States . . . .").

120 Coyle v. Smith, 221 U.S. 559, 568 (1911).

121 *See* Schaeffer, *supra* note 30, at 8 ("[T]he title to that land passed to the State upon statehood as an incident of the sovereignty of the State pursuant to the Equal Footing Doctrine.").

122 *Id.*

123 *Id.*

124 44 U.S. (3 How.) 212 (1845).

125 *Id.* at 230.

within the bed of the Mobile River, was not the federal government's to give, but instead belonged to the state.[126]

Thus, the classic statement of *Pollard* is that a state becomes the owner of the beds and banks of its navigable waterways when it enters the Union.[127] An inquiry into the basis for this transfer of ownership is helpful to understanding the flaws in the county supremacists' position. Before the admission of Alabama to the Union, the federal government owned considerable land in the Alabama territory as a result of a cession from Georgia.[128] Included in this land was the parcel adjoining the Mobile River, which the United States owned under the cession; and the land under the Mobile River, which the United States owned in its role as sovereign over the Alabama territory.[129] Beds and banks of rivers are held by the sovereign in "public trust for the benefit of the whole community, to be freely used by all for navigation and fishery . . . ."[130] These lands are analogous to public highways: they are owned by the sovereign regardless of who owns the neighboring estate,[131] because to allow private ownership would endanger the public interest by risking privately constructed obstructions of the public thoroughfare.[132] Thus, during the time that the United States was sole sovereign over the unincorporated Alabama territory, it held the beds and banks of rivers as an incident of that sovereignty.

Upon statehood, Alabama succeeded to all incidents of sovereignty common to the original thirteen states because, under equal footing, new states must be admitted as equals in terms of sovereignty, freedom, and independence.[133] Among these sovereign powers is control over the beds and banks of rivers, because the original thirteen states were sovereign over their beds and banks.[134] Although the federal government owned the land beside and under the river prior to Alabama statehood, upon Alabama's admission to the Union, "the rights over rivers became severed from the rights over property."[135] The United States retained only its title to dry lands within the state.[136]

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126 *Id.*

127 This ownership is still subject to "the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce." United States v. Oregon, 295 U.S. 1, 14 (1934).

128 *Pollard*, 44 U.S. at 221.

129 *See infra* note 134.

130 Martin v. Waddell, 41 U.S. (16 Pet.) 367, 413 (1842).

131 Shively v. Bowlby, 152 U.S. 1, 11 (1894) ("Such [navigable] waters, and the lands which they cover . . . are 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 . . . . Therefore the title, *jus privatum*, in such lands . . . belongs to the King as the sovereign; and the dominion thereof, *jus publicum*, is vested in him as the representative of the nation and for the public benefit.").

132 *Id.* at 11-12.

133 Pollard v. Hagen, 44 U.S. 212, 223 (1845).

134 *Martin*, 41 U.S. at 410.

135 *Pollard*, 44 U.S. at 216.

136 *Id.* The Court agreed with the defendant that in Pennsylvania, for example, when the state was created, "[s]overeignty transferred itself, and when this passes, the right over rivers passes too. Not so with public lands." *Id.*

The *Pollard* court explicitly limited its holding to the beds and banks of navigable waterways.[137] The Supreme Court has consistently followed this limitation when applying equal footing to property questions, applying the doctrine "only [to] the shores of and lands beneath navigable waters."[138] However, the Court has never ruled on a case where the specific issue raised was the applicability of equal footing to public dry lands within a state. Therefore, county supremacists argue that it is an open question, and that the doctrine should be applied to all public lands.[139]

To apply the doctrine in this manner would distort its purpose. Equal footing operates only to guarantee that new states get the same sovereignty as their predecessors, which merely requires the federal government to transfer those lands that it holds as an incident of sovereignty.[140] The doctrine does not guarantee state ownership of lands held under other authority. The federal government does not own the public domain lands as an incident of general sovereignty, but rather by conquest, cession, or treaty.[141] Thus, the United States stands in a fundamentally different relation to these lands than it does to beds and banks of rivers. The federal government is the owner of these lands, and the Supreme Court has never identified any sovereign right requiring that a state take ownership of federal territory upon admission.

Further, the county supremacists' statement that the Supreme Court has never directly ruled on this issue[142] is misleading. While it is true that the court has never decided a case where a state tried to gain title to federally held uplands under equal footing, there are cases in which the court has addressed issues very closely related to this one.[143] It seems likely

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137 *Id.* at 230.

138 Arizona v. California, 373 U.S. 546, 597 (1963) (concerning apportionment of the waters of the Colorado River).

139 *See, e.g.*, Schaeffer, *supra* note 30, *passim*; Robert List, Nevada Attorney General, Brief, The Equal Footing Doctrine and its Application by Congress and the Courts 2 (1977) *quoted in* CAWLEY, *supra* note 11, at 99 ("[T]he issue has never been addressed by the United States Supreme Court. These circumstances are perhaps fortunate, however, because never having directly ruled on the issue the Court is not bound by prior precedent.").

140 *See, e.g.*, Coyle v. Smith, 221 U.S. 559, 567-68 (1911).

141 *See supra* notes 61-67, 116 and accompanying text. Thus, the federal government did not acquire title to these lands because it was sovereign over the territory in which they were located, but rather because it signed treaties, etc. for their ownership. Beds and banks, on the other hand, always belong to the sovereign entity, simply as a result of its sovereignty.

142 *See supra* text accompanying note 133.

143 *See, e.g.*, Scott v. Lattig, 227 U.S. 229 (1913) (concerning ownership of an island in the Snake River); Shively v. Bowlby, 152 U.S. 1 (1894) (applying equal footing to tidally affected lands in Oregon); Pollard v. Hagen, 44 U.S. 212 (1845) (concerning ownership of riverbeds and banks). In each of these cases, the Court addressed the question of federal land ownership under an equal footing analysis. In *Pollard*, the Court distinguished ownership of beds and banks from ownership of uplands. *Pollard*, 44 U.S. at 229. In *Shively*, the issue was whether beds and banks included strips of tidally affected land beside a navigable river. *Shively*, 152 U.S. at 9. In *Scott*, the Court held that title to an island which lay within the streambed of a navigable river did not pass from federal to state ownership upon the state's admission, even though the beds and banks of the river did change hands. *Scott*, 227 U.S. at 244. In each case, the Court drew a distinction between beds and banks of navigable rivers,

that if the Court had ever harbored a conviction that all federal lands in a state transfer upon admission, it would have said so, rather than going to such pains to analyze the differences between ownership of beds and banks, dry lands, tidal lands, etc.

2. Coyle v. Smith

The second equal footing case relied on by the county supremacists is *Coyle v. Smith.*[144] In *Coyle*, the Supreme Court declared a clause in the Oklahoma Admission Act[145] invalid.[146] This clause mandated that the Oklahoma state capitol be maintained at Guthrie until at least 1913.[147] When the Oklahoma legislature voted in 1910 to move the capitol to Oklahoma City, the federal government sued to have the action enjoined as a violation of the state's Admission Act.[148] The Oklahoma Supreme Court ruled in favor of the state,[149] and the United States Supreme Court upheld this ruling on an equal footing analysis.[150]

The Court first stated that an admission act could confer no power on Congress not conferred by the Constitution.[151] Since there is no provision of the Constitution that confers upon Congress the power to dictate to a state the location of its capitol, Congress could only so dictate under a general power of sovereignty akin to the power over beds and banks in *Pollard*. This general sovereignty, however, passed to Oklahoma on its admission to the Union, because earlier states had exercised the sovereign power to select the place of their capitols.[152] Thus, when the United States admitted Oklahoma without this power, it denied the state a right of sovereignty common to earlier states.[153] The Supreme Court found this clause of the Oklahoma Admission Act violated the equal footing doctrine and was therefore invalid.[154]

While *Coyle* does involve the invalidation of a state admission act clause under an equal footing analysis, it does not advance the county supremacists' cause. As previously stated, the Supreme Court has never held ownership of public uplands within state boundaries to be an incident of general state sovereignty.[155] The power to choose the seat of state government at issue in *Coyle* is such a general right; thus it transfers to the state upon admission. But unless the Supreme Court rejects its previous

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which became state property upon admission, and public uplands, which apparently did not. Thus, the Court, when it determined that beds and banks must pass to new states, was at the same time determining that equal footing did not mandate a similar transfer of uplands.

144 221 U.S. 559 (1911).

145 34 Stat. 267 (1906).

146 *Coyle*, 221 U.S. at 579-80.

147 34 Stat. 269, sec. 2 (1906).

148 Coyle v. Smith, 113 P. 944 (Okla. 1911).

149 *Id.*

150 *Coyle*, 221 U.S. at 579.

151 *Id.* at 570.

152 *Id.*

153 *Id.* at 579.

154 *Id.*

155 *See supra* text accompanying note 136.

stand from *Pollard*,[156] the transfer of general sovereign powers to a new state does not include the transfer of public uplands. While *Coyle* holds that a particular admission act clause may be void under equal footing, it does not follow that the clauses concerning federal ownership of land are also invalid under this opinion.

Indeed, the Supreme Court has addressed the validity of these federal lands clauses in another context, and it has stated that they do not violate equal footing. In *Stearns v. Minnesota*,[157] the Court analyzed such a clause in the Minnesota Admission Act.[158] The Court held that the clause did not violate equal footing and issued what is perhaps its strongest rebuttal of the argument that federal ownership of land in a state impermissibly intrudes on state sovereignty:

> 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.[159]

Thus, while *Coyle* holds that there are limits on the ways Congress may restrict a state in its admission act, *Stearns* holds that clauses disclaiming state interest in federal property do not violate these limits.[160]

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156 *See supra* notes 133-37 and accompanying text.

157 179 U.S. 223 (1900) (upholding a federal statute concerning taxation of federally-owned railroad lands).

158 11 Stat. 166 (1857).

159 *Stearns*, 179 U.S. at 245.

160 The *Stearns* court stated that

> [Congress] has 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 . . . 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. It is to be expected that it will deal with Minnesota as with the other states, and in such a way as to subserve the best interests of the people of that State.

Id. at 243.

CAWLEY, *supra* note 11, at 98, suggests that this dictum might support legal action by the state of Nevada concerning federal land management. Since approximately 82% of Nevada is made up of federal land, Cawley argues that the state has been subjected to the very shrinkage of tax base that concerned the *Stearns* Court. *Id.* Further, Cawley argues that new federal land management policies aimed at management in the national interest violate the *Stearns* Court's expectation that federal management will be conducted so as to serve the best interests of residents of the state. *Id.* While this is interesting speculation, it is not clear how a court would determine a permissible level of federal ownership in a state, especially given that the Supreme Court has stated that Congress has discretion under the Property Clause to determine the course of federal land management. *See, e.g.*, Kleppe v. New Mexico, 426 U.S. 529 (1976).

There are also other credible interpretations of the *Stearns* Court's statement that "no such possibility of wrong conduct on the part of Congress can enter into our consideration of this question." It could be argued that what the Court was in fact saying was that it was not empowered to inquire into the possibility, raised in *Stearns*, that Congress would manage public lands to the detriment of the surrounding state. In other words, the *details* of federal management of Property Clause lands may be essentially a nonjusticiable political

While county supremacists may argue that *Stearns* does not answer their arguments because it did not address a direct challenge to federal ownership of public lands,[161] this distinction is artificial. In *Stearns*, the Supreme Court considered the constitutionality of a clause identical to those that the county supremacists claim are invalid and upheld it under an equal footing analysis. This weakens the county supremacists' claim that they are raising novel legal issues and that there is no Supreme Court precedent relevant to their arguments.[162]

3. Unequal Effect of Federal Laws

Another possible equal footing argument relating to western public lands concerns the recent passage of federal legislation concerning federal land management. These statutes especially affect western states because of the large amounts of federal land within western borders. Federal land management laws often preempt state statutes under the Supremacy Clause,[163] even if the state statutes were proper expressions of concurrent state sovereignty over Property Clause lands. In states without federal lands, this preemption never takes place, and the federal legislation does not displace any state action. Thus, it could be argued that federal land management statutes limit sovereignty in the western states, but not in the original thirteen, and therefore violate equal footing.

This argument, while superficially interesting, is ultimately unconvincing. The purpose of equal footing is to guarantee *political* equality among the states.[164] The Supreme Court has stated that political equality between states does not mean equality of land holding.[165] In other words, equal footing means only that the political relationship between the fed-

question. *See* Baker v. Carr, 369 U.S. 186 (1962) (holding that reapportionment case does not present nonjusticiable political question). This formulation finds some support in earlier Supreme Court cases. *See* Light v. United States, 220 U.S. 523, 537 (1911) ("it is not for the courts to say how that trust [the Property clause lands] shall be administered. That is for Congress to determine."). Property Clause land management might be nonjusticiable either because it is committed to the discretion of Congress under the Property Clause, or because there is no logical means for a court to determine how much federal ownership is too much. *See Baker*, 369 U.S. at 217. These arguments, however, go more to the details of federal management than to the question of whether the United States owns Property Clause lands in the first place. Therefore, they do not directly speak to the county supremacists' claims.

161 Schaeffer, *supra* note 30, at 22.

162 *See supra* text accompanying note 143.

163 *See Kleppe*, 426 U.S. at 543.

164 Coyle v. Smith, 221 U.S. 559, 579 (1911).

165 *See* United States v. Texas, 339 U.S. 707, 716 (1950), ("[Equal footing] does not, of course, include economic stature or standing. There has never been equality among the states in that sense. Some States when they entered the Union had within their boundaries tracts of land belonging to the Federal Government; others were sovereigns of their soil. Some had special agreements with the federal Government governing property within their borders . . . . [E]qual footing was designed not to wipe out those diversities but to create parity as respects political standing and sovereignty."). *See also* Engdahl Speech, *supra* note 50, at 5 ("Equal footing is no more disturbed by federal ownership, per se, of vast tracts of land, than by the fact that some states and not others have seaports, or great industrial centers, or oil.").

eral and state governments must be the same in every state. The Constitution may not be read to give Congress powers over one state that it would not have over another similarly situated. Since public land laws are not applied differently on a state-by-state basis, but are applied evenhandedly on all public lands, they do not affect similarly situated states differently.

It could be argued that even though the public land laws are facially evenhanded, in practice they affect western states disproportionately and thus result in de facto inequality between the states. The Supreme Court has held, however, that state sovereignty is not compromised when a law affects one group of states more than another. This can be clearly shown by reference to Supreme Court cases involving federal regulation of Native Americans and "Indian Land." Because not all states contain reservations, federal regulation of tribal activities and taxation of tribal lands affects some states and not others. The Supreme Court has held that this inequality does not unfairly intrude on the sovereignty of affected states.[166] Congress may exercise its legislative power in such a way as to bind all states, although in fact the practical effect of this legislation is mainly focused on a few states.

IV. Conclusion and Recommendations

The county supremacists' legal arguments are unpersuasive and run counter to Supreme Court precedent. The Property Clause provides sufficient authority for the federal government to hold land it has previously acquired, even when that land is within the boundaries of a state. There is little or no support for the proposition that the Enclave Clause provides the sole power for such ownership. Further, the argument that the equal footing doctrine requires the federal government to transfer its lands to a state upon admission to the Union reveals a fundamental misunderstanding of the doctrine and the nature of state sovereign rights.

It may be that rural westerners have legitimate disputes with the federal government concerning federal land management. If so, these complaints are essentially political, not legal. The United States Constitution, as interpreted by the Supreme Court, places primary responsibility for management of public lands in Congress, not the courts. County supremacists must take their arguments to Congress if they hope to affect western land management substantially.

It has been suggested that the issues currently being appealed in the Ninth Circuit may be ripe for Supreme Court analysis.[167] But equal footing and the extent of congressional power under the Property Clause have

[166] *See, e.g.*, In re Kansas Indians, 72 U.S. (5 Wall.) 737, 757 (1866); United States v. 43 Gallons of Whiskey, 93 U.S. 188, 197 (1876) (concerning clause in Minnesota admissions act relating to commerce on Indian land; "The principle that Federal jurisdiction must be everywhere the same, under the same circumstances, has not been departed from. The prohibition rests on grounds which, so far from making a distinction between the states, apply to them all alike."); Dick v. United States, 208 U.S. 340 (1908) (addressing liquor sales on Indian land in Idaho); United States v. Sandoval, 231 U.S. 28 (1913) (upholding clause in New Mexico admission act prohibiting liquor and state taxation on lands of the Pueblo Indians).

[167] *See* Christensen, *supra* note 3.

both been addressed by the Supreme Court. Without some significant new legal claim, the public interest in these issues should not dictate Supreme Court review.

It could be argued that the Court should hear the county supremacists' arguments if the opportunity arises, in order to decide once and for all the issue of federal land ownership under the Property Clause. But a Supreme Court decision revisiting these issues would not end the debate, or even the legal struggle, over federal land ownership in the west.[168] These arguments would simply resurface in another form, and find their way into court on the strength of another legal theory. This long-standing debate is essentially political, and should be carried out in the political arena. Federal courts called upon to decide the validity of federal land management in the west should not waste valuable court time or county money on legal questions that have already been answered.

[168] This is not to say that the Supreme Court would not take review of these issues. Four members of the current Court might be drawn by the political tension around this issue, or by the chance to revisit earlier Court decisions. But this speculation is premature, given that the only pending county supremacy case has yet to be argued at the appellate level. *See supra* note 24.