

# The Property Clause and Its Discontents: Lessons from the Malheur Occupation

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*The occupation of the Malheur National Wildlife Refuge in Oregon by a group of armed militants led by Ammon Bundy during January 2016 spotlighted public land management for a largely oblivious American public. The militants' month-long occupation was only the latest of several armed confrontations in recent years, one of them at Bundy's father's ranch in Nevada. What made the Malheur incident unusual was not only the length of the occupation but also the claims of the militants that their occupation was based on constitutional principles. We examine those claims in this Article and find them meritless, wholly inconsistent with a long line of Supreme Court interpretations of the plenary federal power to manage federal public lands under the Property Clause.*

*Although there is no credible legal case against federal ownership and management of public lands, the militants and their sympathizers may succeed in their efforts to divest federal-land management in the political arena, epitomized by the 2016 Republican Party platform endorsing federal divestiture. Conveying federal lands to the states, as urged particularly by the state of Utah, however, would be a recipe for privatizing a common birthright of all Americans, inconsistent with moral, if not legal obligations to future generations.*

Introduction.....	782
I. Background .....	787
A. The Arizona Standoff.....	787
B. The Bundy Nevada Standoff.....	788

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C.	The Utah Transfer of Public Lands Act .....	789
D.	The Galice Mining Standoff–Rogue River .....	792
E.	The Malheur Refuge Occupation .....	793
II.	The Property Clause and Its Interpretation .....	794
A.	The Northwest Ordinance .....	794
1.	Managing Western Settlements .....	796
2.	Prohibiting Slavery in the Northwest .....	797
3.	Reducing Inequalities Among States .....	798
B.	Judicial Interpretation of the Property Clause .....	798
1.	Disposing of Federal Lands .....	799
2.	Managing Federal Lands .....	801
3.	Protecting Federal Lands .....	803
C.	Congressional Interpretation of the Property Clause .....	805
III.	The Discontents’ Legal Claims .....	810
A.	State Water Rights as a Limit on Federal Land Use Discretion .....	811
B.	Public Grass as a Private Property Right .....	812
C.	The Enclave Clause as a Limit on Federal Lands .....	814
D.	The Supreme Court’s Alleged Misinterpretation of the Property Clause .....	814
E.	Utah’s “Equal Sovereignty” and “Equal Footing” Claims .....	816
IV.	The Discontents’ Political Prospects .....	817
A.	Congressman Bishop’s “Grand Settlement” in Utah .....	818
B.	Local Land Planning Ordinances .....	819
	Conclusion .....	820
	Postscript .....	824

*This land is your land, this land is my land  
From California to the New York Island  
From the Redwood Forest to the Gulf Stream waters  
This land was made for you and me.*

*This Land is Your Land*, Woodie Guthrie, 1940

#### INTRODUCTION

In early 2016, a group of armed militants seized control of the Malheur National Wildlife Refuge in southeastern Oregon and occupied the refuge for some forty-one days.<sup>1</sup> Originally a protest against a sentence imposed on

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1. The occupiers took over the refuge on January 2, 2016, after a rally for ranchers Dwight and Stephen Hammond, who were imprisoned for setting fire to federal Bureau of Land Management lands. The occupation lasted forty-one days, ending on February 11, after the death of one of the protesters, Robert “LaVoy” Finicum, in a confrontation with the police on January 26. See Conrad Wilson & John Rosman, *Malheur National Wildlife Occupation Ends*, OPB NEWS (Feb. 11, 2016, 5:58 PM), <http://www.opb.org/news/series/burns-oregon-standoff-bundy-militia-news-updates/malheur-occupation-ends/>.

federal public-lands grazers,<sup>2</sup> the incident quickly devolved into an effort led by Ammon Bundy to challenge federal ownership of western lands.<sup>3</sup> The occupation made national news and eventually led the occupiers to jail.<sup>4</sup> Bundy and his fellow occupiers loudly challenged—without warrant—federal ownership of land as unconstitutional.<sup>5</sup>

The Malheur Refuge occupation was not unlike other recent armed protests over federal land ownership and management. Two years before, Bundy's father, Cliven, led armed resistance against attempts to enforce federal grazing regulations and fees.<sup>6</sup> And just a year before the Malheur Refuge occupation, in southern Oregon's Rogue River Basin, dredge miners with federal claims ignored a cease-and-desist order issued by the federal Bureau of Land Management (BLM) and proceeded with armed resistance.<sup>7</sup> A decade earlier, a confrontation similar to the one at Malheur threatened BLM employees in southern Arizona, although no violence occurred.<sup>8</sup> The recent rise of social media, and its ability to marshal numerous anti-government protestors in short order, may account for the significant increase in the level of resistance

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2. Dwight and Steven Hammond set fire to federal lands in 2001 and 2006, allegedly to ward off invasive plant species and protect their property from wildfire (although perhaps also to cover for an illegal deer hunt), a crime punishable by a minimum five-year sentence in jail under federal law. *See* Alexandra Zavis et al., *How Oregon Ranchers Unwittingly Sparked an Armed Standoff*, L.A. TIMES (Jan. 5, 2016, 3:00 AM), <http://www.latimes.com/nation/la-na-ff-hammond-oregon-20160105-story.html>. After the Hammonds refused to plea-bargain with the U.S. Attorney, the case went to trial—at which the Hammonds were convicted. At sentencing however, U.S. District Judge Michael Hogan decided that a five-year sentence would constitute unconstitutional cruel and unusual punishment. Consequently, he sentenced Dwight to just three months in jail and Steven to a year. *See id.* The government appealed the sentences, and the Ninth Circuit reversed on the grounds the sentences did not violate the Eighth Amendment, and the district court lacked discretion to alter mandatory minimum sentences imposed by Congress. *See id.* This decision effectively sent the Hammonds to federal prison for five years each. *See id.*

3. *See* Les Zaitz, *Militia takes over Malheur National Wildlife Refuge headquarters*, THE OREGONIAN (Jan. 2, 2016, 6:15 PM, updated Feb. 22, 2016, 1:29 PM), [http://www.oregonlive.com/pacific-northwest-news/index.ssf/2016/01/drama\\_in\\_burns\\_ends\\_with\\_quiet.html](http://www.oregonlive.com/pacific-northwest-news/index.ssf/2016/01/drama_in_burns_ends_with_quiet.html).

4. *See* Press Release, FED. BUREAU OF INVESTIGATION, FBI Arrests All Remaining Occupiers at the Malheur National Wildlife Refuge (Feb. 11, 2016), <https://www.fbi.gov/portland/press-releases/2016/fbi-arrests-all-remaining-occupiers-at-the-malheur-national-wildlife-refuge>.

5. *See* Janell Ross, *The Bundys Want Federal Land 'Returned' to Them. But it was Never 'Theirs' in the First Place*, WASH. POST: THE FIX (Jan. 6, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/01/06/the-bundys-want-federal-land-returned-to-them-but-it-was-never-theirs-in-the-first-place/>.

6. Les Zaitz, *Nevada Rancher Cliven Bundy Arrested by FBI in Portland*, THE OREGONIAN (Feb. 23, 2016, 1:07 PM), [http://www.oregonlive.com/oregon-standoff/2016/02/nevada\\_rancher\\_cliven\\_bundy\\_de.html](http://www.oregonlive.com/oregon-standoff/2016/02/nevada_rancher_cliven_bundy_de.html). Cliven Bundy was finally arrested in Portland earlier this year when planning to join his sons at the Malheur refuge. *Id.* He faces weapons charges and a charge of conspiracy to interfere with a federal officer. *Id.*

7. *See* Rob Davis, *Months before Malheur Occupation, another Oregon Land Dispute Galvanized Militants*, THE OREGONIAN (Feb. 22, 2016, 2:35 PM), [http://www.oregonlive.com/oregon-standoff/2016/01/months\\_before\\_malheur\\_occupati.html](http://www.oregonlive.com/oregon-standoff/2016/01/months_before_malheur_occupati.html).

8. *See* Tim Steller, *Nevada Rancher Case has Links to, Parallels in Southern Arizona*, ARIZ. DAILY STAR (Apr. 18, 2014), [http://tucson.com/news/local/column/steller-nevada-rancher-case-has-links-to-parallels-in-southern/article\\_57029e8f-0bec-5a81-b638-82988fb1e8ea.html](http://tucson.com/news/local/column/steller-nevada-rancher-case-has-links-to-parallels-in-southern/article_57029e8f-0bec-5a81-b638-82988fb1e8ea.html).

a decade later.<sup>9</sup> All of these confrontations involved public-land users claiming that the federal government lacked authority to own and manage federal lands.<sup>10</sup>

Some westerners have used state legislation to resist federal land ownership. For example, in 2012 the state of Utah enacted the Transfer of Public Lands Act (TPLA), which demanded that the federal government transfer ownership of most federal land in the state to Utah.<sup>11</sup> The state also threatened to file suit, claiming that the federal government violated its promises in the Utah Statehood Act to dispose of federal land.<sup>12</sup> In 2015 Wyoming passed a statute amending its trespass law to forbid collecting environmental data on private property, aimed at preventing the collection of data relevant to water quality problems caused by public-lands cattle grazing.<sup>13</sup> And several members of Congress from western states like Utah, Colorado, Idaho, and Wyoming introduced bills in 2016 that would require divestiture of federal lands by one means or another.<sup>14</sup> The Republican Party platform in 2016 even contained a promise to convey federal lands to the states.<sup>15</sup>

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9. See Lindsey Bever, *How the Bundys' Social Media Machine Fed their Political Movement*, WASH. POST: MORNING MIX (Jan. 27, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/01/27/how-the-bundys-social-media-machine-fed-their-political-movement/>.

10. See Ross, *supra* note 5 (regarding Bundy's claim in Oregon); Jaime Fuller, *The Long Fight Between the Bundys and the Federal Government, from 1989 to Today*, WASH. POST: THE FIX (Jan. 4, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2014/04/15/everything-you-need-to-know-about-the-long-fight-between-cliven-bundy-and-the-federal-government/> (addressing Bundy's claim in Nevada); Davis, *supra* note 7 (discussing the Galice standoff); Steller, *supra* note 8 (concerning the southern Arizona controversy).

11. H.B. 148, 2012 Gen. Sess. (Utah) (codified at UTAH CODE ANN. §§ 63L-6-101104 (West 2014)). Professors Robert Keiter and John Ruple have analyzed the constitutionality of the statute. Robert B. Keiter & John C. Ruple, Wallace Stegner Ctr. for Land, Resources & the Env't, *A Legal Analysis of the Transfer of Public Lands Movement* 1 (Stegner Center White Paper No. 2014-2, 2014), [http://www.law.indiana.edu/publicland/files/legal\\_analysis\\_utah\\_land\\_transfer.pdf](http://www.law.indiana.edu/publicland/files/legal_analysis_utah_land_transfer.pdf) (concluding that Utah's claims will fail because the federal government has plenary control over federal public lands).

12. Utah lawmakers passed legislation establishing a dedicated funding stream for an expected \$14 million lawsuit. See Phil Taylor, *Utah Prepares War Chest for Takeover Lawsuit*, GREENWIRE (Mar. 11, 2016), <http://www.eenews.net/stories/1060033874>. Utah may base its decision to sue on the political leanings of the appointee who fills the Supreme Court vacancy left by the late Justice Scalia. See Michelle L. Price, *Lawmaker: Utah Might Not Sue for Federal Lands until 2017*, WASH. TIMES (June 15, 2016), <http://www.washingtontimes.com/news/2016/jun/15/lawmaker-utah-may-not-sue-for-federal-lands-until-/>. Transferring management of public lands to states would increase management costs dramatically. See ROBERT B. KEITER & JOHN C. RUPLE, WALLACE STEGNER CTR. FOR LAND, RESOURCES & THE ENV'T, *THE TRANSFER OF PUBLIC LANDS MOVEMENT: TAKING THE 'PUBLIC' OUT OF PUBLIC LANDS* 1 (Jan. 28, 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2555922](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2555922).

13. WYO. STAT. § 40-27-101 (2015) (the statute prohibits people from using private lands adjacent to public lands to sample water quality, a technique used to draw conclusions as to the negative impact of public land grazing on water quality). See Justin Pidot, *Forbidden Data: Wyoming Just Criminalized Citizen Science*, SLATE (May 11, 2015, 10:04 AM), [http://www.slate.com/articles/health\\_and\\_science/science/2015/05/wyoming\\_law\\_against\\_data\\_collection\\_protecting\\_ranchers\\_by\\_ignoring\\_the.html](http://www.slate.com/articles/health_and_science/science/2015/05/wyoming_law_against_data_collection_protecting_ranchers_by_ignoring_the.html).

14. *E.g.*, State National Forest Management Act of 2015, H.R. 3650, 114th Cong. (2015); Self-Sufficient Community Lands Act, H.R. 2316, 114th Cong. (2015); Mount Hood Cooper Spur Land Exchange Clarification Act, H.R. 3826, 114th Cong. (2016). See Abby Kessler, *Land Management Bills*

Efforts to seize control over federal lands have existed at least since the so-called “Sagebrush Rebellion” of the 1970s<sup>16</sup>—a response to federal efforts to reform federal-land management to be more sensitive to wildlife and watershed protection.<sup>17</sup> But when a self-proclaimed sagebrush rebel, Ronald Reagan, became president, the rebellion subsided.<sup>18</sup> A decade-and-a-half later, the Clinton Administration, under the leadership of Interior Secretary Bruce Babbitt (a rancher), proposed to reform rangeland regulations, prompting a so-called “County Supremacy Movement.”<sup>19</sup> Although that movement bore no legal fruit,<sup>20</sup> it produced numerous unenforceable county ordinances that to this day proclaim that federal-land ownership within their borders is illegal.<sup>21</sup>

Attempts to divest federal ownership of public lands have failed because for the last 175 years the Supreme Court has consistently affirmed Congress’s broad authority<sup>22</sup> under the Constitution’s Property Clause to establish federal-

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*Spark Heated Debate*, ENV’T & ENERGY DAILY (Feb. 26, 2016), <http://www.eenews.net/eedaily/stories/1060033039/search?keyword=Public+lands+bill>.

15. See Jodi Peterson, *This Year’s GOP Platform Pushes Federal Land Transfers*, HIGH COUNTRY NEWS (July 14, 2016), <https://www.hcn.org/articles/2016-gop-platform-pushes-federal-land-transfers>; Scott Streater, *Salazar, Hickenlooper Rip ‘Reckless’ GOP Transfer Platform*, E&E NEWS PM (July 19, 2016), <http://www.eenews.net/eenewspm/2016/07/19/stories/1060040509>; see also *infra* text accompanying note 313.

16. See GEORGE C. COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW 72–77* (7th ed. 2014).

17. See *Forty Years of Sagebrush Rebellion*, HIGH COUNTRY NEWS (Jan. 4, 2016), <http://www.hcn.org/articles/sagebrush-rebellion>. The Hoover Administration offered to convey to western states the unreserved public lands but withhold the mineral estate, which the states refused. See George C. Coggins & Doris K. Nagel, “*Nothing Beside Remains: The Legal Legacy of James G. Watt’s Tenure as a Secretary of the Interior on Federal Land and Law Policy*,” 17 B.C. ENV’T L. REV. 473, 492–93 (1990).

18. See COGGINS ET AL., *supra* note 16, at 73.

19. See Gary Andrew Poole, *Hold It! This Land Is My Land!: Led by Commissioner Dick Carver, Nevada’s Nye County Is Now Ground Zero in the West’s War Against the U.S. Government*, L. A. TIMES (Dec. 3, 1995), [http://articles.latimes.com/1995-12-03/magazine/tm-9835\\_1\\_nye-county/6](http://articles.latimes.com/1995-12-03/magazine/tm-9835_1_nye-county/6).

20. See, e.g., *Gardner v. Stager*, 103 F.3d 886 (9th Cir. 1996) (barring an action to quiet title to federal lands and water rights under a Nevada state statute on grounds of federal sovereign immunity); *Colvin Cattle Co. v. United States*, 468 F.3d 803 (Fed. Cir. 2006) (rejecting an argument that a state water right included an attendant right to graze on public land; thus, cancellation of a federal grazing lease was not taking of water rights); *United States v. Estate of Hage*, 810 F.3d 712 (9th Cir. 2016) (rejecting the argument that a rancher had an easement by necessity to cross federal lands due to his water rights for his cattle to access water sources on federal land).

21. See, e.g., NEV. REV. STAT. § 321.596–321.599 (2015) (declaring that the state owned and had control over all “public lands” within it); Baker County, Or., Natural Resources Plan (July 20, 2016); Grant County, Or., Public Lands Natural Resources Plan (Sept. 30, 2015); Elizabeth M. Osenbaugh & Nancy K. Stoner, *The County Supremacy Movement*, 28 URB. LAW. 497, 500–01 (1996); Tay Wiles, *Land Transfer Battles Rage On, County by County*, HIGH COUNTRY NEWS (July 15, 2016), <https://www.hcn.org/issues/48.12/battles-over-whether-to-support-the-american-lands-council-rage-on-county-by-county>. The American Legislative Exchange Council (ALEC) helps draft such ordinances and circulates them online. KARLA JONES, AM. LEGIS. EXCHANGE COUNCIL, *FEDERALLY MANAGED LANDS IN THE WEST: THE ECONOMIC AND ENVIRONMENTAL IMPLICATIONS FOR THE STATES 15–16* (Sept. 2, 2015), <https://www.alec.org/publication/2015federallands/>.

22. See *infra* Part II.C.

land policy and to manage public lands.<sup>23</sup> This long precedent suggests that no legal basis exists upon which courts may order such a divestiture,<sup>24</sup> despite the misleading legal advice influencing some of the militants.<sup>25</sup>

Political efforts for divestiture, however, present other issues, given the broad power Congress possesses under the Property Clause. Congress may have the authority to convey public lands to the states or privatize them.<sup>26</sup> In short, the divestiture of public lands from the federal government is mostly a political issue, not a legal one.

This Article examines contemporary controversies over federal public lands, which have now entered a new era—perhaps due to social networking that encourages armed confrontations—producing considerable threats to both public employees<sup>27</sup> and local communities.<sup>28</sup> Part I of the Article discusses the current controversies and their antecedents. Part II explains the Property Clause

23. See *infra* Part II.B.

24. One law firm in New Orleans, commissioned by the state of Utah, seems to think otherwise. See George R. Wentz et. al., DAVILLIER LAW GROUP, LLC, LEGAL ANALYSIS OF THE LEGAL CONSULTING SERVICES TEAM PREPARED FOR THE UTAH COMMISSION FOR THE STEWARDSHIP OF PUBLIC LANDS 1–5, 145 (Dec. 9, 2015), <http://le.utah.gov/interim/2015/pdf/00005590.pdf> (suggesting that under the so-called “equal sovereignty” and “equal footing” doctrines the state may have a case if it were to expend some \$14 million in legal fees). See *supra* notes 2–9 and accompanying text.

25. The Malheur militants were apparently inspired by KrisAnne Hall, a self-proclaimed constitutional lawyer and Tea Party activist. See KrisAnne Hall, *What’s Really Going on in Oregon! Taking Back the Narrative!*, YOUTUBE (Jan. 5, 2016), <https://www.youtube.com/watch?v=T424sWq1SkE>; see also *infra* note 248 and accompanying text. Hall has maintained that the federal government’s only authority to own land is ten square-miles from Washington D.C. *Id.* She has rejected the authority of the Supreme Court to judge the constitutionality of laws, maintaining that the seminal case on which the Supreme Court’s judicial power is based, *Marbury v. Madison*, 5 U.S. 137 (1803), is just an example of the Supreme Court usurping this power. *Id.* Her argument that the government’s authority is limited to 10 square-miles in the District of Columbia is inaccurate even under the Enclave Clause, the scope of which is much broader. See Peter A. Appel, *The Power of Congress “Without Limitation”: The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1, 10–15 (2001); Marla E. Mansfield, *A Primer of Public Land Law*, 68 WASH. L. REV. 801, 804 (1993).

26. The public trust doctrine may provide some limits on the congressional authority to alienate federal public lands. See, e.g., Michael C. Blumm & Lynn S. Schaffer, *The Federal Public Trust Doctrine: Misinterpreting Justice Kennedy and Illinois Central Railroad*, 45 ENVTL. L. 399 (2015).

27. Public Employees for Environmental Responsibility (PEER) tries to protect such employees by asking agencies to “confront the message, rather than the messenger.” PUB. EMPS. FOR ENVTL. RESP., <http://www.peer.org/> (last visited Nov. 15, 2016).

28. In Malheur County, in the wake of the occupation, the local judge (the equivalent of a county commissioner) who opposed the Bundy militants survived a recall election with over 70 percent of the vote. See Andrew Selsky, *Oregon County Keeps Judge Who Blocked Refuge Occupiers*, WASH. TIMES (June 28, 2016), <http://www.washingtontimes.com/news/2016/jun/28/oregon-recall-election-linked-to-armed-takeover/>. During the occupation, Oregonians started a petition to collect monetary pledges in order to fund the “most appropriate groups to combat the ignorance and hate of the Malheur NWR occupiers.” By the end of the occupation, the movement, “Go Home Malheur” or #gohomemalheur had raised more than \$135,000. GOHOMEMALHEUR, <http://www.gohomemalheur.org/mission/> (last visited Nov. 15, 2016). The local Burns Paiute Tribe also voiced strong concerns against the occupation, arguing that “[c]ondoning the illegal occupation of a federal facility by armed lawbreakers only encourages others to believe they can behave in the same way, with impunity.” Luke Hammill, *Burns Paiute Tribe to Feds: Stop Allowing Bundy Free Passage*, THE OREGONIAN (Feb. 22, 2016, 2:51 PM), [http://www.oregonlive.com/oregon-standoff/2016/01/burns\\_paiute\\_tribe\\_to\\_the\\_feds.html](http://www.oregonlive.com/oregon-standoff/2016/01/burns_paiute_tribe_to_the_feds.html).

of the Constitution and its consistent judicial interpretation over the centuries, retracing well-trod legal ground. Part III examines the protestors' legal claims against federal ownership of public lands. The claims of these "discontents" have no plausible credence in light of the long judicial history of consistent Property Clause interpretation. Part IV explores the political prospects of the federal-land divestiture movement in Congress, which, given the law explained in Part II, is where any resolution must occur. The Article concludes that divestiture threatens to radically alter public-land law and its long history of preventing land and resource monopolies.<sup>29</sup> Given that federal lands have always been central to American identity, and that divestiture threatens to engender great opposition and contentious litigation,<sup>30</sup> Congress and the President should proceed with caution.

## I. BACKGROUND

The incident involving Ammon Bundy and his colleagues at Malheur Refuge in southeastern Oregon was hardly the first armed protest against public-land ownership. Just in the twenty-first century, such conflicts occurred at least five times, in Arizona, Nevada, Utah, and twice in Oregon. In this Part, we examine some of the most notable confrontations.

### A. *The Arizona Standoff*

In 2002 in southeastern Arizona, the Klump family caused a conflict with BLM quite similar to the Bundy standoffs. The Klumps claimed ownership of public lands southeast of the Dos Cabezas Mountains.<sup>31</sup> After ten years of conflict, the federal district court in Tucson ordered Wally Klump to remove his cattle from the Badger Den and Simmons Peak Allotments.<sup>32</sup> When Klump refused to recognize BLM's jurisdiction over his cattle on public lands, federal officials jailed him until he removed his cows a year later, marking the end of the dispute.<sup>33</sup>

The Klump incident resulted from the militants' misunderstanding of the Constitution and, like the Bundy affairs, intimidated public servants. Klump threatened a lethal response to efforts by BLM to remove the cattle, claiming Second Amendment protection.<sup>34</sup> On the other hand, the Klump situation

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29. See generally Michael C. Blumm & Kara Tebeau, *Antimonopoly in American Public Land Law*, 28 GEO. ENVTL. L. REV. 155 (2016).

30. See Blumm & Schaffer, *supra* note 26, at 421–30 (discussing possible limits to wholesale congressional divestiture).

31. See Phil Taylor, *Meet the Klumps – BLM's pre-Bundy Roundup Nightmare*, GREENWIRE (Mar. 4, 2016), <http://www.eenews.net/stories/1060033470>.

32. *Id.*

33. See Steller, *supra* note 8.

34. See Taylor, *supra* note 31. Klump warned BLM, "You take those cows, I'll kill you as mandated by the Second Amendment." *Id.*

differed from the Bundy conflicts because after being jailed, Klump stopped trespassing.<sup>35</sup>

### B. *The Bundy Nevada Standoff*

Although the Bundy standoff in Nevada captured widespread media attention in 2014, its origins date from two decades earlier. Cliven Bundy had stopped paying his grazing fees in the early 1990s, claiming that the federal government lacked authority over lands that his ancestors settled in the 1880s.<sup>36</sup> BLM filed suit against Bundy, and a federal district court ruled in favor of BLM in 1998.<sup>37</sup> Over the years, BLM tried to settle Bundy's unpaid grazing fees, which eventually amounted to over \$1.2 million, but its efforts were unsuccessful.<sup>38</sup>

The conflict intensified in 2014 when footage of a BLM agent using a stun gun on Bundy's son went viral on the Internet, and hundreds of armed militants came to Bundy's ranch to help defend him from the court order.<sup>39</sup> The standoff culminated in April 2014, when Bundy led his followers to retake the cattle that BLM had confiscated, resulting in more than four hundred armed followers confronting about fifty government agents.<sup>40</sup> Faced with a threat of armed conflict, BLM backed down and returned some of the cattle, while proceeding with administrative and judicial actions against Bundy.<sup>41</sup>

Later, Bundy offered two defenses in court. First, he alleged that the land in question belonged to either Nevada or the local county.<sup>42</sup> Second, he argued that his ancestral use right preempted BLM's jurisdiction over federal land, denying the sovereignty of the federal government.<sup>43</sup> He even claimed that the Supreme Court had no authority to interpret law, and that the decisions of the

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35. Compare Taylor, *supra* note 31, with Matt Ford, *The Irony of Cliven Bundy's Unconstitutional Stand*, THE ATLANTIC (Apr. 14, 2014), <http://www.theatlantic.com/politics/archive/2014/04/the-irony-of-cliven-bundys-unconstitutional-stand/360587/> (Klump did not acknowledge Arizona state laws, whereas Bundy claimed to act consistent with Nevada law).

36. Matt Ford, *The Irony of Cliven Bundy's Unconstitutional Stand*, THE ATLANTIC (Apr. 14, 2014), <http://www.theatlantic.com/politics/archive/2014/04/the-irony-of-cliven-bundys-unconstitutional-stand/360587/>.

37. United States v. Bundy, No. CV-S-98-531-JBR (RJJ), 1998 U.S. Dist. LEXIS 23835, at \*19 (D. Nev. Nov. 4, 1998).

38. See Ford, *supra* note 36.

39. See *id.*

40. See Julie Turkewitz, *Cliven Bundy and Sons Charged in Case That Gave Rise to Oregon Standoff*, N.Y. TIMES (Feb. 18, 2016), <http://www.nytimes.com/2016/02/19/us/charges-for-5-in-nevada-are-linked-to-oregon-case.html>; see Ford, *supra* note 36 (one of the anti-government militants told Reuters "I'm ready to pull the trigger if fired upon . . .").

41. Jim Urquhart, *U.S. Officials End Stand-Off with Nevada Rancher Cliven Bundy*, NEWSWEEK (Apr. 12, 2014, 10:50 PM), <http://www.newsweek.com/us-officials-end-stand-nevada-rancher-cliven-bundy-246038>.

42. United States v. Bundy, No. CV-S-98-531-JBR (RJJ), 1998 U.S. Dist. LEXIS 23835, at \*4, 12–13 (D. Nev. Nov. 4, 1998).

43. *Id.*; Bundy did pledge allegiance to state laws. See Ford, *supra* note 36 ("I abide by all of Nevada state laws. But I don't recognize the United States government as even existing.").



Court could not bind any state.<sup>44</sup> Consequently, he flatly rejected all of the Property Clause’s jurisprudence concerning federal authority over public lands.<sup>45</sup>

Although Cliven Bundy’s argument failed in court, many ranchers celebrated his “[teaching] the federal government a lesson” and getting BLM to back down.<sup>46</sup> That “victory,” however, came at a price, as more militants involved in the armed standoff have since faced indictment and jail time.<sup>47</sup> Bundy’s legal prospects are dim<sup>48</sup>—even the Nevada Constitution, which expressly recognizes the supremacy of the federal government and of the Supreme Court,<sup>49</sup> conflicts with his argument. But Bundy has enjoyed some political momentum, including the backing of several Republican politicians.<sup>50</sup> While Cliven Bundy remained in Nevada, his son, Ammon, became the leading figure in the Malheur Refuge occupation.

### C. The Utah Transfer of Public Lands Act

In 2012 state representative Ken Ivory of Utah sponsored a bill to transfer public lands to the state.<sup>51</sup> The TPLA demanded that the United States government gift the state over 30 million acres of public lands by December 31, 2014.<sup>52</sup> The TPLA resulted from growing state frustration over federal land ownership and management in Utah, where the federal government owns

44. Bundy claimed that the Constitution did not authorize the Supreme Court to exercise judicial review, echoing the argument of Hall, *supra* note 25, against the legitimacy of the foundational case *Marbury v. Madison*, 5 U.S. 137 (1805), and asserting that the Court exceeded its constitutional authority in that decision.

45. See *infra* Part II.

46. See Adam Nagourney, *A Defiant Rancher Savors the Audience That Rallied to His Side*, N.Y. TIMES (Apr. 23, 2014), [http://www.nytimes.com/2014/04/24/us/politics/rancher-proudly-breaks-the-law-becoming-a-hero-in-the-west.html?\\_r=1](http://www.nytimes.com/2014/04/24/us/politics/rancher-proudly-breaks-the-law-becoming-a-hero-in-the-west.html?_r=1).

47. See Phil Taylor, *Trump Ally Arrested; 14 More Indicted for Bundy’s Nev. Siege*, E&ENews (Mar. 3, 2016, 6:00 PM), <http://www.eenews.net/stories/1060033433>.

48. See *infra* Part II.B.; see also Conrad Wilson, *Judge Denies Release for Bundy Brothers Again*, OPB NEWS (July 19, 2016, 5:04 PM), <http://www.opb.org/news/series/burns-oregon-standoff-bundy-militia-news-updates/ammon-ryan-bundy-denied-release-again/>.

49. See NEV. CONST. art. I, § 2 (“[T]he Paramount Allegiance of every citizen is due to the Federal Government in the exercise of all its Constitutional powers as the same have been or may be defined by the Supreme Court of the United States”).

50. Sen. Rand Paul (R-Ky.) voiced support for the Bundys, as did Sen. Dean Heller (R-Nev.), who called Cliven Bundy’s supporters “patriots.” See Nagourney, *supra* note 46. Former presidential candidate Sen. Ted Cruz (R-Tex.) made clear his intention to give away or sell public lands to the states. See Ralph Maughan, *Cruz Tries to Win the West by Taking our Public Lands*, WILDLIFE NEWS (Apr. 9, 2015), <http://www.thewildlifeneeds.com/2015/04/09/cruz-tries-to-win-the-west-by-taking-our-public-lands/>. There are groups in many western states, including New Mexico, Colorado, Idaho, and Utah, calling for the transfer of public lands to the states. See Paul Tolmé, *Keeping Public Lands Public*, NAT’L WILDLIFE FED’N (Jan. 29, 2016), <https://www.nwf.org/News-and-Magazines/National-Wildlife/Animals/Archives/2016/Keeping-Public-Lands-Public.aspx>.

51. Transfer of Public Lands Act and Related Study, H.B. 148, 2012 Gen. Sess. (Utah) (codified at UTAH CODE ANN. §§ 63L-6-101–104 (West 2014)). The 2016 Republican Platform endorsed conveying federal lands to the states. See *supra* note 15 and accompanying text.

52. See UTAH CODE ANN. § 63L-6-103(1) (West 2014); Keiter & Ruple, *supra* note 11, at 1.

roughly 65 percent of the land surface.<sup>53</sup> Utah became the first state to pass a law demanding the federal government hand over lands to the state.<sup>54</sup> The Act's deadline for the transfer expired at the end of 2014 without inducing federal action, so state Republicans are now pressing to sue the federal government to claim the federal acres. The state seeks to secure the lands for mineral development and timber production.<sup>55</sup>

Although the TPLA conflicts with congressional authority under the Property Clause to manage public lands,<sup>56</sup> supporters of the Act make three arguments in support of its constitutionality.<sup>57</sup> First, they allege that the text of the Utah Enabling Act demonstrates that both the federal government and the state intended the Act to commit Congress to dispose of public lands in Utah.<sup>58</sup> Second, they argue that the history of management of western lands shows federal intent to eventually cede all lands to the states.<sup>59</sup> Third, they claim that

53. See Keiter & Ruple, *supra* note 11, at 1.

54. Jack Healy & Kirk Johnson, *The Larger, but Quieter than Bundy, Push to Take Over Federal Land*, N.Y. TIMES (Jan. 10, 2016), <http://www.nytimes.com/2016/01/11/us/the-larger-but-quieter-than-bundy-push-to-take-over-federal-land.html>. ALEC, *supra* note 21, helped transfer advocates in drafting similar bills in Alaska, Arizona, Colorado, Montana, New Mexico, Washington, and Wyoming, but no bill has been enacted. See Rachael Bale, *The Problems with the State Movement to Take Federal Land*, CTR. FOR INVESTIGATIVE REPORTING: REVEAL (Mar. 11, 2015), <https://www.revealnews.org/article/the-problems-with-the-state-movement-to-take-federal-land/>.

55. See Healy & Johnson, *supra* note 54.

56. See Nick Lawton, *Utah's Transfer of Public Lands Act: Demanding a Gift of Federal Lands*, 16 VT. J. ENVTL. L. 1, 17 (2014). In cases of conflict between state and federal law, the federal law prevails under the Supremacy Clause. U.S. Const. art. VI, § 2.

57. See Lawton, *supra* note 56, at 18–21.

58. See *id.* at 19. Section III of the Utah Enabling Act provides that the people of Utah

[A]gree that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof; and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States.

Utah Enabling Act, §3, 28 Stat. 107 (1894). Proponents of transfer argue that the so called “disclaimer” requires the United States to extinguish title to public lands, which the United States has failed to do. See Lawton, *supra* note 56, at 18. Professors Keiter and Ruple explain why the argument is flawed, however. See Keiter & Ruple, *supra* note 11, at 5 (“[S]hall’ in an enabling act indicates that at some future date, the federal government may sell public lands. If [it] does sell more land, five-percent of the proceeds would go to the state, but the Utah Enabling Act does not obligate the federal government to dispose of federal lands. Moreover, even if shall is interpreted as a term of obligation, at the turn of the 19<sup>th</sup> century, ‘shall’ meant ‘[m]ay, when used against a government.’”).

59. See, e.g., Donald J. Kochan, *A Legal Overview of Utah's H.B. 148—The Transfer of Public Lands Act* 14–18, THE FEDERALIST SOC'Y (Jan. 2013), <http://www.fed-soc.org/publications/detail/a-legal-overviewof-utahs-hb-148> (“It can not [sic] be supposed the compacts intended that the United States should retain forever a title to lands within the States which are of no value, and no doubt is entertained that the general interest would be best promoted by surrendering such lands to the States.” (quoting President Andrew Jackson, Veto Message of December 4, 1833, reprinted in 3 Messages and Papers of the Presidents, 1789-1897, at 56-69, <http://www.presidency.ucsb.edu/ws/index.php?pid=67041>)). Professor Kochan's report claimed that there were “serious legal questions” raised by Utah's demand that the federal government gift it some 20 million acres of federal public land, Kochan, *supra*, at 5. However, there are serious flaws in several of his arguments: (1) he claimed that it would be “impracticable” to believe that the state would disclaim any interference with federal land management without a corresponding obligation to dispose of federal lands, *id.* at 13, but the federal government did

the Supreme Court's 1845 decision in *Pollard v. Hagan*<sup>60</sup> means that the federal government may own land only for the benefit of new states, rejecting the Supreme Court's contrary interpretations of the Property Clause.<sup>61</sup> However, the Utah Enabling Act's express requirement that the state "forever disclaim all right and title to the unappropriated public lands"<sup>62</sup> within its territory, represents the most persuasive evidence of the appropriate federal and state roles in future land management. Moreover, the Supreme Court clearly confined its holding in *Pollard* to submerged lands beneath navigable waters.<sup>63</sup> Utah's claims are consequently unlikely to succeed.<sup>64</sup>

Utah's efforts to obtain title to public lands constitute just one example of multiple bills introduced in western states for similar claims. Most of the other efforts rely on political, not legal arguments,<sup>65</sup> as these efforts represent a broader attempt to gather support to lobby Congress to gift federal lands to the states. This approach has a better chance of success than any legal claim.<sup>66</sup>

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in fact dispose of over seven million acres of land to the state in its Statehood Act and many more to private parties over the years, and the chief consideration for the state to join the Union was political equal footing, not proprietary benefits; (2) he mistakenly referred to the federal government as acquiring land through statehood, *id.* at 14, when it actually obtained the lands through the Treaty of Guadalupe Hidalgo of 1848 with Mexico, Treaty of Guadalupe Hidalgo, Mex.-U.S., Feb. 2 1848, 9 Stat. 922; (3) he alleged that if the federal government failed to sell its land, the state would not receive its "anticipated percentage" of 5 percent, Kochan, *supra*, at 15, but a failure to sell would not affect the disposition of revenues from the lands that were not sold; and (4) he maintained that failure to dispose conflicted with an "ethic" or "expectation" of disposal, *id.* at 16, but there's no language in the Statehood Act that could be interpreted as creating any vested rights in a particular number of acres the federal government must dispose.

60. 44 U.S. 212 (1845) (holding that statehood implicitly transferred tidelands in navigable Mobile Bay to the state).

61. See Lawton, *supra* note 56, at 20–21.

62. Utah Enabling Act §3, 28 Stat. 107 (1894).

63. *Pollard*, 44 U.S. at 230; *United States v. California*, 332 U.S. 19, 36 (1947) (refusing to apply the *Pollard* reasoning to lands submerged beneath ocean waters); *Arizona v. California*, 373 U.S. 546, 597–98 (1963) (rejecting state arguments to apply *Pollard* to federal public lands not submerged beneath navigable waters at statehood). See *infra* notes 275–277 and accompanying text.

64. See Keiter & Ruple, *supra* note 11, at 6 ("The federal government has absolute control over federal public lands, including the constitutional authority to retain lands in federal ownership."). Rep. Bishop will not let his big bargain go down easily, however, as an updated bill he introduced in July 2016 demonstrated. See Thomas Burr & Matt Canham, *Bishop, Chaffetz Unveil Long-Awaited Lands Bill in Bid to Block a Bears Ears National Monument*, SALT LAKE TRIB. (July 16, 2016, 5:47 PM), <http://www.sltrib.com/home/4116187-155/bishop-chaffetz-unveil-long-awaited-lands-bill>.

65. See the congressional and political support mentioned *supra* notes 50–51.

66. See Part IV. After this Article was in press, the Associated Press obtained through the Freedom of Information Act a report of the Western Attorneys General, which agreed that (1) the Property Clause gives the federal government plenary authority to dispose of or reserve public lands at its discretion; (2) the Enclave Clause does not limit the scope of the Property Clause; and (3) neither the equal footing nor equal sovereignty arguments, proffered by the New Orleans law firm for the state of Utah, *supra* note 24, required federal disposition of public lands. W. ATT'YS GEN. LITIG. ACTION COMMITTEE, CONFERENCE OF WESTERN ATTORNEYS GENERAL, REPORT OF THE PUBLIC LANDS SUBCOMMITTEE (2016), <https://wilderness.org/sites/default/files/CWAG%20Public%20Lands%20Subcommittee%20Report.pdf> [hereinafter ATTORNEY GENERAL'S REPORT]. The report was approved on an 11-1 vote on July 19, 2016. *Id.* at i. See Scott Streater, *States Lack Standing to Seize Federal*

*D. The Galice Mining Standoff—Rogue River*

The Malheur Refuge occupation was not the first armed resistance to federal land management in Oregon. A similar standoff began in April 2015 when two gold miners in the Galice mining district received a non-compliance letter from BLM disputing their mining rights to the Sugar Pine Mine in southwestern Oregon.<sup>67</sup> To defend his alleged mining right, Rick Barclay asked the Oath Keepers of Josephine County for help, prompting numerous armed protesters to arrive and watch over the claim for six weeks.<sup>68</sup>

Although BLM closed its office for a day because of threatening phone calls, the Galice standoff appeared more peaceable than the Malheur Refuge occupation.<sup>69</sup> The armed conflict ended when the Interior Board of Land Appeals agreed to hear the miners' administrative appeal, which remains ongoing as of this writing.<sup>70</sup> The miners challenged BLM's authority to manage surface rights, contending that the claims dated back to the 1870s, long before the 1955 Surface Resources Act directed federal land managers to protect surface resources affected by mining.<sup>71</sup> BLM maintained that it possessed surface rights authorizing the agency to regulate the mining claims.<sup>72</sup> Unlike Bundy's meritless ownership claim at the Malheur Refuge occupation, the Galice miners may have a credible legal argument concerning BLM's jurisdiction over their mining claims.

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*Acres—AGs*, GREENWIRE (Oct. 3, 2016), <http://www.eenews.net/greenwire/stories/1060043768> (citing and linking to the attorneys general's report).

67. See Davis, *supra* note 7 (explaining that a federal employee surveying the land for abandoned mines found impermissible equipment on site near Galice because the miners had no surface rights; the employee told Rick Barclay and George Backes that they needed to obtain federal approval before mining).

68. See *id.*

69. The Josephine County Sheriff compared the two incidents in the following terms: “[w]hat you had in Sugar Pine was a peaceful, fairly well-organized event” . . . [w]hat you have over there [at Malheur Refuge] is truly an armed occupation where laws are being broken.” *Id.*

70. The Interior Board of Land Appeals ordered BLM not to enforce its order to stop mining, and the miners promised to stop mining during the administrative appeal process. Barclay proceeded to file suit in federal court in October 2015 to restore his rights to mine, and oral arguments were heard in February 2016. See Mark Freeman, *Miners Defiant as Dredging Moratorium Begins*, WASH. TIMES (Jan. 15, 2016), <http://www.washingtontimes.com/news/2016/jan/15/miners-defiant-as-dredging-moratorium-begins/?page=all>.

71. See Travis Gettys, *Militia Groups Flock to Oregon for Bundy-Style Standoff with ‘Government Jackboots’ over Gold Mining Claims*, RAW STORY (Apr. 14, 2015, 12:28 PM), <http://www.rawstory.com/2015/04/militia-groups-flock-to-oregon-for-bundy-style-standoff-with-government-jackboots-over-gold-mining-claim/>.

72. See Judge Bars BLM Enforcement in Oregon Gold Mine Dispute, THE OREGONIAN (May 20, 2015, 4:45 PM), [http://www.oregonlive.com/environment/index.ssf/2015/05/judge\\_bars\\_blm\\_enforcement\\_in.html](http://www.oregonlive.com/environment/index.ssf/2015/05/judge_bars_blm_enforcement_in.html).

### E. The Malheur Refuge Occupation

The Malheur Refuge occupation lasted six weeks and resulted in the arrest of at least twenty-five militants.<sup>73</sup> The leading figure of the occupation, Ammon Bundy was not an Oregon landowner, but he seized the opportunity provided by the Ninth Circuit's decision on the Hammonds' sentences<sup>74</sup> to advocate the Bundian interpretation of the Constitution and its public-land ramifications. Ironically, BLM and the local community had collaborated well over the years and had reached agreement in 2013 on a refuge management plan affecting grazing and wildlife and watershed protection.<sup>75</sup> Although the local population had expressed mixed feelings about the presence of the Bundy militants,<sup>76</sup> Bundy used the occupation to repeatedly declare federal land ownership unconstitutional, and BLM powerless to manage federal lands.<sup>77</sup>

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73. See Conrad Wilson, *Judge: Malheur Occupation Trial Could Take More Than a Month*, OPB NEWS, Mar. 9 2016, 10:19 PM), <http://www.opb.org/news/series/burns-oregon-standoff-bundy-militia-news-updates/judge-malheur-trial-could-take-more-than-a-month/>. Ammon and Ryan Bundy argued in their federal court trial in Portland, Oregon, that the federal government lost the power to regulate public lands after Oregon achieved statehood. See *Nevada Trial for Cliven Bundy, 18 Others Set for 2017*, THE OREGONIAN (Apr. 27, 2016, 2:36 PM), [http://www.oregonlive.com/pacific-northwest-news/index.ssf/2016/04/nevada\\_trial\\_for\\_cliven\\_bundy.html](http://www.oregonlive.com/pacific-northwest-news/index.ssf/2016/04/nevada_trial_for_cliven_bundy.html). The Bundys maintained that their actions at the refuge aimed to establish an adverse possession claim over the Refuge, and that free speech protected their conduct. See Maxine Bernstein, *Bundy Brothers' Motion for Pretrial Release Previews their Defense in Oregon Standoff Case*, THE OREGONIAN, (July 18, 2016, 5:06 AM), [http://www.oregonlive.com/portland/index.ssf/2016/07/ammon\\_bundys\\_motion\\_for\\_pretri.html#incart\\_river\\_home](http://www.oregonlive.com/portland/index.ssf/2016/07/ammon_bundys_motion_for_pretri.html#incart_river_home). The number of defendants who went to trial in September 2016 was just seven, as many of the original defendants pleaded guilty, and others will face later proceedings. See Maxine Bernstein, *Trial for Ammon Bundy, 6 Others in Oregon Standoff Set to Begin*, THE OREGONIAN (Sept. 8, 2016, 9:30 AM), [http://www.oregonlive.com/oregon-standoff/2016/09/oregon\\_standoff\\_trial\\_for\\_ammo.html](http://www.oregonlive.com/oregon-standoff/2016/09/oregon_standoff_trial_for_ammo.html). In a surprising decision, given the relatively undisputed facts, the jury acquitted all seven defendants. See *Postscript, infra*.

74. See Zavis et al., *supra* note 2.

75. See U.S. FISH & WILDLIFE SERV., MALHEUR NATIONAL WILDLIFE REFUGE: COMPREHENSIVE CONSERVATION PLAN (2013), <https://catalog.data.gov/dataset/malheur-national-wildlife-refuge-comprehensive-conservation-plan>.

76. Oregonians started a petition to collect pledges in order to fund the “most appropriate groups to combat the ignorance and hate of the Malheur NWR occupiers.” By the end of the occupation, the movement, “Go Home Malheur” or #gohomemalheur had raised more than \$135,000. GOHOMEMALHEUR, *supra* note 28. The local Burns Paiute Tribe also voiced strong concerns against the occupation, arguing that “[c]ondoning the illegal occupation of a federal facility by armed lawbreakers only encourages others to believe they can behave in the same way, with impunity.” Hammill, *supra* note 28. Harney County Judge Steve Grasty, who opposed the Bundy occupation, survived a recall election, with voters overwhelmingly (some 70 percent) rejecting the recall. See Selsky, *supra* note 28. On the other hand, some locals “have welcomed the occupation and the attention it has brought to local frustration over the management of federal lands.” See Amelia Templeton, *Oregon Occupation Sheds Light on Local Frustrations, But Divides Residents*, NPR (Jan. 5, 2016), <http://www.npr.org/2016/01/05/462052656/oregon-standoff-sheds-light-on-local-frustrations-but-divides-residents> (last visited Dec. 15, 2016).

77. Bundy's reading of the Constitution reflects the views of Cleon Skousen, a far-right political thinker. See Betsy Gaines Quammen, *The War for the West Rages On*, N.Y. TIMES (Jan. 29, 2016), [http://www.nytimes.com/2016/01/30/opinion/the-war-for-the-west-rages-on.html?\\_r=0](http://www.nytimes.com/2016/01/30/opinion/the-war-for-the-west-rages-on.html?_r=0). Cleon Skousen was an “exemplar of the right-wing ultras;” his interpretation of the Constitution was that the Founders sought to establish a Christian Nation, with a Christian God, and “never intended the federal government to have any power over its people.” See Nigel Duara, *Oregon Armed Protesters Invoke the Constitution*

Although the occupation provided Bundy with a broader platform for his message, he risked a lengthy prison term.<sup>78</sup> However, the intense media coverage of the Malheur Refuge occupation may have buoyed the political momentum for Bundy's cause.<sup>79</sup> Whatever his political prospects may be, Bundy's legal claims are completely unfounded, as the next Parts demonstrate.

## II. THE PROPERTY CLAUSE AND ITS INTERPRETATION

This Part discusses the origins of the Property Clause and analyzes its interpretation by both the Supreme Court and Congress. The first subpart explains that the Property Clause ratified the Northwest Ordinance of 1787, which aimed, among other things, to give the federal government control over western settlement, at least in the area north of the Ohio River. The second subpart discusses the Supreme Court's decisions interpreting federal power under the Property Clause, which the Court consistently held to be "without limitation." The third subpart provides examples of how Congress has used its broad Property Clause powers to manage federal lands.

### A. *The Northwest Ordinance*

The 1787 Northwest Ordinance, the most significant legislation enacted by the Confederation Congress, passed with near unanimity, reflecting general agreement as to how the federal government should manage the western lands ceded to it by the states.<sup>80</sup> Although the ordinance ratified federal control of the

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– Annotated by a *Conspiracy Theorist*, L.A. TIMES (Jan. 21, 2016, 6:27 PM), <http://www.latimes.com/nation/la-na-ff-oregon-standoff-constitution-20160121-story.html>. Skousen relied on quotations from the Founders, either deliberately altered or taken out of context, to illustrate the need for people to take power for themselves and exclude the government from their affairs. *See id.*

78. *See supra* notes 47–48 and accompanying text. If convicted, Bundy could have faced between six years and two decades in prison. *See* Sara Roth, *What to Know Before the Oregon Occupation Trial Begins*, KGW (Sept. 1, 2016), <http://www.kgw.com/news/investigations/bundy-occupation-trial-in-september-what-to-expect/312650362>. Although the law was clearly against them, the Bundys avoided conviction because of "unpredictable juries." *See* Jeremy P. Jacobs, *Why Bundy Convictions are No Slam Dunk: Unpredictable Juries*, GREENWIRE (Oct. 11, 2016), <http://www.eenews.net/greenwire/2016/10/11/stories/1060044089> (explaining that "[a]ttorneys who have experience trying cases in Western states have found juries notoriously unpredictable and hard to read in trials involving public lands and property rights"). Jacobs' predictions turned out to be true as the jury acquitted all seven defendants on October 27, 2016. *See Postscript, infra.*

79. Public land management became an issue in the presidential election of 2016. *See, e.g.,* Rocky Barker, *GOP Candidates Divided Over Public Land in Idaho, West*, IDAHO STATESMAN (Feb. 19, 2016, 2:20 PM), <http://www.idahostatesman.com/news/politics-government/election/article61349767.html>; *see also* Peterson, *supra* note 15 (discussing the 2016 Republican Platform provision to convey federal lands to the states).

80. *See* Matthew J. Festa, *Property and Republicanism in the Northwest Ordinance*, 45 ARIZ. ST. L. J. 409, 427 (2014) (explaining the federal government's acceptance of the first state land cessions in the 1780s). New York was first in 1782; Virginia in 1784; Massachusetts in 1785; and Connecticut in 1786. *See* NORMAN K. RISJORD, *JEFFERSON'S AMERICA: 1760-1815*, at 200–01 (3d ed. 2009). The day that Virginia ceded its claims, Thomas Jefferson, chair of a committee deciding the issue of the western

western settlements, the statute also prohibited slavery,<sup>81</sup> established a process to admit new states to the Union “on an equal footing,”<sup>82</sup> anticipated federal-land sales to repay the Revolutionary War debt,<sup>83</sup> and called for good-faith dealings with local Indian tribes and protection of native property rights.<sup>84</sup> Throughout its text, the statute exhibited anti-colonial and anti-monarchical sentiments, reflecting Thomas Jefferson’s ideals.<sup>85</sup> The legislation aimed to promote both widespread land ownership and participation in civic life,<sup>86</sup> consistent with Jeffersonian notions about property.<sup>87</sup> These anti-monopolistic ideas inspired the Property, Contract, Takings, and Due Process Clauses of the U.S. Constitution, all of which are traceable to the Northwest Ordinance.<sup>88</sup>

Before 1784, conflicts with Native Americans impeded settlement of western lands and made for an unstable western frontier. Alexander Hamilton ingeniously proposed that the federal government assume the states’ considerable Revolutionary War debts *if* the states with western claims (about half the original states) ceded their claims to the federal government.<sup>89</sup> After the states largely ratified that deal,<sup>90</sup> the new federal government prioritized the cession of state claims to western lands. New York became the first state to cede title to its claims in 1782, and Virginia came next in 1784.<sup>91</sup> The rest of

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territories, submitted the first draft of what would become the Northwest Ordinance. See JAY A. BARRETT, *EVOLUTION OF THE ORDINANCE OF 1787*, at 17–18 (1891).

81. Ordinance of 1787: The Northwest Territorial Government, art. VI, reprinted in 1 U.S.C. LVII (2012) [hereinafter Northwest Ordinance].

82. Northwest Ordinance, art. V.

83. See Festa, *supra* note 80, at 412.

84. Northwest Ordinance, art. III.

85. See Blumm & Tebeau, *supra* note 29, at 163–65. Anti-monarchical sentiments fueled Anti-Federalist concern over widespread federal ownership of Western lands as a source of wealth independent of taxpayer control. See Carol M. Rose, *Claiming While Complaining on the Federal Public Lands: A Problem for Public Property or a Special Case?*, 104 GEO. L. J. ONLINE 95, 107–11 (2015) (suggesting that this sentiment was a legacy of the English Civil War and King Charles I’s efforts to evade parliamentary control, later dismissed by Joseph Story as inapplicable to a republic like the United States).

86. See Festa, *supra* note 80, at 432.

87. See *id.* at 442. Jefferson was in fact a principal drafter of the initial ordinance, which the Confederation Congress first enacted in 1784. See *id.*; LIBR. OF CONGRESS, PRINTED RESOLUTION ON W. TERRITORY GOV’T; WITH NOTATIONS BY THOMAS JEFFERSON (1784), <https://www.loc.gov/item/mtjbib000873/>.

88. See Festa, *supra* note 80, at 416.

89. Although the Revolutionary War debt was with the individual states (whose uncertain funding undermined the war effort), in 1790 Alexander Hamilton convinced Congress to assume the remaining debt. His idea was that the federal government would finance the debt largely through public-land sales. See RON CHERNOW, *ALEXANDER HAMILTON 176–77* (2004); Paul W. Gates, *An Overview of American Land Policy*, 50 AGRIC. POL’Y 213, 217 (1976).

90. See JOSEPH ELLIS, *FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION 73–74* (2002).

91. See PETER S. ONUF, *THE ORIGINS OF THE FEDERAL REPUBLIC: JURISDICTIONAL CONTROVERSIES IN THE UNITED STATES 104* (1983); see also 26 J. OF THE CONTINENTAL CONGRESS 90 (Feb. 23, 1784), <http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field%28DOCID+@lit%28jc02648%29%29>.

the states with western-land claims followed.<sup>92</sup> The federal government followed the plan codified in the Northwest Ordinance, and created new republican settlements in the West that eventually became new states, entering the union “on equal footing with the said original states.”<sup>93</sup> The focus on equality reflected the anti-colonial sentiment widespread in Revolutionary America.

### *1. Managing Western Settlements*

The Northwest Ordinance established a framework of surveying and then selling the western lands in an orderly fashion, providing security for individual property rights recognized by the federal government and financing the war debt.<sup>94</sup> The ordinance provided the government with the ability to manage and dispose of lands for the public benefit. Once in possession of western lands, the United States government sold them to settle its Revolutionary War debts.<sup>95</sup> As owner and manager of these lands, the federal government also resolved some of the conflicts animating the West by giving settlers the security of legally recognized title<sup>96</sup> and working with the Native Americans to minimize the risks of war by pledging “good faith” toward them and security for their “property, rights and liberty.”<sup>97</sup>

The Northwest Ordinance also introduced the concept of compensation for government takings of private land. Article II of the ordinance provided: “[S]hould the public exigencies make it necessary, for the common preservation, to take any person’s property, or to demand his particular services, full compensation shall be made for the same.”<sup>98</sup> The ordinance’s recognition of the federal eminent domain power shows that even after selling lands to settlers, the government retained the ability to take private land for

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92. The so-called “landed” states had a great potential advantage over the six “landless” states: the sale of western lands would enrich the landed states, while the landless states feared they would lose residents and significance. Most states quickly followed the example of New York and Virginia, two of the largest states. But Georgia did not cede its western lands until 1802, twelve years after all the other states. See Onuf, *supra* note 91, at 104–05. And Connecticut, while ceding the rest of its claims, did not cede its Western Reserve in Ohio until 1800. Festa, *supra* note 80, at 429 n.118.

93. Northwest Ordinance, art. V (“[W]henver any of the said states shall have sixty thousand free inhabitants therein, such state shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original states in all respects whatever”).

94. See PETER S. ONUF, *STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE* 31, 33 (1987).

95. By 1795, the U.S. government no longer owed money to foreign governments. *U.S. Debt and Foreign Loans, 1775–1795*, in U.S. DEPT. OF STATE, OFFICE OF THE HISTORIAN, <https://history.ostate.gov/milestones/1784-1800/loans> (last visited Mar. 2, 2016).

96. See Robert S. Hill, *Federalism, Republicanism, and the Northwest Ordinance*, 18 *PUBLIUS* 41, 51–52 (1988).

97. Northwest Ordinance, art. III. See Festa, *supra* note 80, at 428, 434. Under the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and the Non-Intercourse Act of 1790, Pub. L. No. 1-33, § 4, 1 Stat. 137 (1790), the federal government had exclusive authority to negotiate treaties with Indian tribes.

98. Northwest Ordinance, art. II.



public use upon providing just compensation. Thus, as early as 1787, the federal government announced its sovereign authority over private lands as well as declaring that it would use its proprietary power over public lands for the benefit of the public.

The Northwest Ordinance created a legal and political framework aimed at promoting the economic and social development of the West.<sup>99</sup> Reflecting antimonopoly sentiment, the ordinance sought to spread land ownership among a large number of settlers. Widespread land ownership created an incentive to participate in political life as a citizen.<sup>100</sup> By providing security of land title, the ordinance sought to invest settlers in the development of stable communities.

Finally, Article IV of the Northwest Ordinance required new states admitted to the Union to not interfere with the disposal of land by the United States or with the title to land granted to bona fide purchasers.<sup>101</sup> This promise of non-interference with federal management reflected federal supremacy over state rules concerning public land and promoted security for individuals who purchased lands from the government.<sup>102</sup>

## 2. *Prohibiting Slavery in the Northwest*

Article VI of the Northwest Ordinance declared that “[t]here shall be neither Slavery nor involuntary Servitude in the said territory,”<sup>103</sup> a provision reflecting the federal government’s broad authority to enact laws regulating the lands it owned and to control the disposition of private property rights.

Later, the text of the Property Clause and the cases interpreting it reiterated and amplified this power. Abolishing slavery north of the Ohio River was a republican idea.<sup>104</sup> Prohibiting slavery had important effects on property rights, not merely affecting existing landowners’ property rights in the Northwest, but also effectively precluding large, slave-owning plantation owners from moving to the Northwest. The Northwest Ordinance instead favored widespread distribution of property among smaller, independent farmers.<sup>105</sup> By disfavoring large plantation owners, the ordinance reflected the

99. See Peter S. Onuf, *Liberty, Development, and Union: Visions of the West in the 1780s*, 43 WM. & MARY Q. 179, 181 (1986).

100. See WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 191–92* (2001).

101. Northwest Ordinance, art. IV.

102. See Festa, *supra* note 80, at 437. The ordinance was in part a response to the Shays’ Rebellion of 1786, which raised questions about the ability of a republican government to provide “an ordered society that would provide security for liberty and property to the yeoman settlers.” The ordinance aimed to protect both personal and land rights and, in so doing, root “republicanism in the habits of the people.” See Hill, *supra* note 96, at 52.

103. Northwest Ordinance, art. VI.

104. See Festa, *supra* note 80, at 458 (abolishing slavery was part of the “larger republican vision for the new territory”).

105. See *supra* text following note 99 and accompanying note 100; David Brion Davis, *The Significance of Excluding Slavery from the Old Northwest in 1787*, 84 IND. MAG. OF HIST. 75, 88–89 (1988).

Framers' disapproval of colonial governments' practice of awarding land monopolies.<sup>106</sup>

### 3. *Reducing Inequalities Among States*

The Northwest Ordinance called for the admission of new states on "equal footing," conditioned on the guarantee of a republican form of government.<sup>107</sup> Combined with several modifications of property rights that the ordinance implemented,<sup>108</sup> its equal-footing doctrine meant that western lands were the property of the United States, but the federal government would not treat the territories as colonies.<sup>109</sup> Instead, the federal government would act as a trustee and ensure that new states admitted to the Union possessed the same sovereign attributes of the original thirteen states.<sup>110</sup>

This trust concept later became important in Supreme Court interpretation of the so-called equal footing cases, extending from *Pollard v. Hagan* in 1845<sup>111</sup> to *Arizona v. California* in 1963<sup>112</sup> to *Idaho v. United States* in 2001.<sup>113</sup> The Court also used trust language to interpret the Property Clause, as in *Light v. United States*,<sup>114</sup> where the Court ratified the notion that the federal government manages public lands as a sovereign with a trust obligation to the public.<sup>115</sup>

### B. *Judicial Interpretation of the Property Clause*

Over the years, the Supreme Court has interpreted the Property Clause infrequently but consistently. With nearly no exception, the Court has ruled that

106. See John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1257–58, 1278–79 (1996) (awarding land monopolies favored economic elites; by favoring widespread ownership of lands, however, the Framers sought to diminish the power of elites by offering great numbers of people the opportunities to own lands and to participate in political life).

107. See ONUF, *supra* note 94, at 58–59.

108. The Northwest Ordinance established an intestacy scheme that promoted greater equality and encouraged wider distribution of property among citizens. See Festa, *supra* note 80, at 439. By increasing the number of property owners, the ordinance also created more stakeholders in the political process by giving them the right to participate in political life. See *id.* at 440. The ordinance also facilitated the free alienability of real and personal property through voluntary transfer, another important property rule. Northwest Ordinance, art. II.

109. See Festa, *supra* note 80, at 460.

110. See *id.*

111. 44 U.S. 212 (1845) (statehood implicitly conveyed to the states title to lands submerged beneath navigable waters at statehood).

112. 373 U.S. 546, 597–98 (1963) (statehood did not implicitly convey federal public uplands to the states).

113. 533 U.S. 262 (2001) (upholding a federal pre-statehood reservation of lands to the Coeur d'Alene Tribe).

114. 220 U.S. 523 (1911) (upholding the Forest Service's authority to require permits and fees on national forest lands).

115. *Id.* at 537.

the federal power under the Property Clause is “without limitation.”<sup>116</sup> This subpart briefly explains this Property Clause case law.<sup>117</sup>

### 1. *Disposing of Federal Lands*

The Supreme Court’s first Property Clause decision concerned a challenge to an 1807 federal statute authorizing the President to lease lead mines on federally owned lands in what became the state of Illinois in 1818.<sup>118</sup> Assuming a position remarkably similar to modern Sagebrush Rebels,<sup>119</sup> John Gratiot argued that Congress possessed authority only to dispose of public lands and make “needful rules and regulations” respecting the preparation of

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116. See, e.g., *United States v. Gratiot*, 39 U.S. 526, 537 (1840); *Light*, 220 U.S. at 537; *United States v. City of San Francisco*, 310 U.S. 16, 29 (1940). The only exception to the broad interpretation of the Property Clause came in the most reviled Supreme Court decision in constitutional history, *Dred Scott v. Sandford*, 60 U.S. 393 (1857), which helped to bring on the Civil War. Scott sued his master to gain his freedom and, after trial, the Missouri Supreme Court rejected his claim for freedom based on his earlier residences in free states and territories. *Id.* at 398, 431–32. Scott then attempted to collaterally attack that decision in federal court, which rejected his attempt to establish diversity jurisdiction. *Id.* at 400. The Supreme Court surprisingly accepted certiorari and affirmed. See *id.* at 454. Justice Taney’s opinion for a divided Court relied on the Framers’ intent to conclude that Scott, as an African-American, was not a citizen of any state, thus denying him the ability to invoke federal diversity jurisdiction. *Id.* at 403–29. Although Taney proceeded to examine the Property Clause and conclude that Congress lacked the authority to establish rules for federal territories in the West that were not in the Union at the time of the Constitution, *id.* at 432–52, that part of the opinion was *obiter dicta* and not clearly the opinion of a majority of the Court (there were seven opinions in the case). The Supreme Court has never relied on the Property Clause portion of Justice Taney’s opinion in any subsequent Supreme Court decision.

117. For a comprehensive analysis of the Supreme Court’s Property Clause jurisprudence, see Appel, *supra* note 25.

118. *Gratiot*, 39 U.S. 526. The 1807 statute calling for leasing of lead mines was not the first time the federal government reserved federal lands. For example, in 1785 and 1786, federal treaties with the Cherokee, Choctaw, and Creek tribes recognized Indian land reservations. Treaty with the Cherokee, Cherokee-U.S., Nov. 28, 1785, 7 Stat. 18; Treaty with the Choctaw, Choctaw-U.S., Jan. 3, 1786, 7 Stat. 21, Treaty with the Chickasaw, Chickasaw-U.S., Jan. 10, 1786, 7 Stat. 24. And although the first large non-Indian land reservation is often thought to be the Yellowstone reservation in 1872, actually the government reserved the lands which would become Hot Springs National Park in Arkansas in 1832, eight years before the Supreme Court affirmed the lead mines leasing legislation in its 1840 decision in *Gratiot*. See Sharon Shugart, Dep’t of the Interior, Nat’l Park Service, *The Hot Springs of Arkansas Through the Years: A Chronology of Events* 3, 5 (2004), <https://web.archive.org/web/20150401131042/http://www.nps.gov/hosp/learn/historyculture/upload/chronology.web.pdf> (explaining that President Andrew Jackson reserved the area in 1832, well before it became a National Park in 1921). All of these land reservations, along with forest reserves set aside under the authority of the General Land Law Revision Act of 1891 by Presidents Harrison and Cleveland, were reserved before the state of Utah was admitted to the Union in 1896. See Robert D. Baker et. al., *Timeless Heritage: A History of the Forest Service in the Southwest* 55 (1988), [www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/stelprdb5438144.pdf](http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5438144.pdf) (retracing the history of forest reservations and explaining the role of Presidents Harrison, Cleveland and McKinley). So the notion that Utah could not reasonably anticipate federal land reservations at the time of statehood is inconsistent with the historical record.

119. John Gratiot’s argument that the Property Clause authorized the government only to sell public lands is the main claim asserted by the Bundy movement. See Jenny Rowland, *The Bundy Legal Defense: Feds Have No Jurisdiction Over Federal Lands*, THINK PROGRESS (Apr. 27, 2016), <https://thinkprogress.org/the-bundy-legal-defense-feds-have-no-jurisdiction-over-federal-lands-a48d09b5884b#.bqsg29flc>.

the lands for sale.<sup>120</sup> He therefore maintained that leasing public lands constituted an unlawful exercise of congressional power under the Property Clause.<sup>121</sup> Resolving a divided lower court decision, the Supreme Court rejected Gratiot's argument and decided that Congress had the constitutional authority to dispose of federal property any way it wished, including leasing lead mines.<sup>122</sup> According to the 1840 Court, federal authority over public lands was "without limitation."<sup>123</sup>

A long line of Court decisions repeated this language. The *Gratiot* decision upheld the essentially unreviewable discretion of Congress to lease, sell, or maintain federal lands. The Court added that the state of Illinois could not "claim a right to the public lands within her limits,"<sup>124</sup> so the federal Property Clause power remained unaffected by statehood.<sup>125</sup>

Over a century later, in *United States v. City of San Francisco*, the Supreme Court considered the legality of a conditional transfer of interests in federal lands.<sup>126</sup> Congress conveyed public lands to the city for electricity use on the condition that the municipality would sell the electricity directly to the city residents, not to a monopolistic private utility.<sup>127</sup> The city challenged those conditions as beyond the power of Congress.<sup>128</sup> The district court enjoined the city from selling power to Pacific Gas and Electric, a private utility.<sup>129</sup> The Supreme Court affirmed, reiterating that Congress's Property Clause powers were "without limitations," and declaring that the Property Clause permitted "an exercise of the complete power which Congress has over particular public property entrusted to it."<sup>130</sup> The Court therefore upheld the conditional transfer of land that forbade the monopolization of hydropower produced on federal lands, illustrating the plenary power of the federal government to manage public lands for the "benefit of the people."<sup>131</sup>

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120. *Gratiot*, 39 U.S. at 531–32.

121. *Id.*

122. *Id.*

123. *Id.* at 537.

124. *Id.* at 538.

125. Of course, states obtained many lands (and incurred several obligations) in their statehood acts, aimed at providing lands for public schools, veterans, state buildings, penitentiaries, and universities. *See, e.g.*, Oregon Statehood Act, ch. 33, § 4, 11 Stat. 383, 383–84 (1859); *see also* North Dakota, South Dakota, Montana, and Washington Statehood Acts, ch. 180, §§ 10–18, 25 Stat. 676, 679–82 (1889).

126. 310 U.S. 16 (1940).

127. *Id.* at 18–19.

128. *Id.* at 19.

129. *Id.*

130. *Id.* at 29, 30. The court noted that Congress's Property Clause powers did not entail a federal general police power. *See id.* at 30.

131. *Id.* at 23 (quoting the legislative history of the bill at issue).

## 2. *Managing Federal Lands*

In *Camfield v. United States*, the first post-Civil War Property Clause case decided by the Supreme Court, Daniel Camfield tried to fence in approximately 20,000 acres of public lands in Colorado.<sup>132</sup> Although he did not technically fence public land (made illegal by the Unlawful Inclosures of Public Lands Act of 1885),<sup>133</sup> Camfield did fence his checkerboarded private lands in such a way as to enclose adjacent public lands as well.<sup>134</sup> At the federal government's request, a lower court enjoined erection of the fence.<sup>135</sup> The court of appeals affirmed, and so did a unanimous Supreme Court.<sup>136</sup>

The Court determined that the federal government not only possessed proprietary powers over its own lands, it also held sovereign powers, enabling it to order the removal of fences on private land because they interfered with congressional policy established by the Unlawful Inclosures Act.<sup>137</sup> In his opinion for the Court, Justice Brown declared that the “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.”<sup>138</sup> Under *Camfield*, the federal government can employ its authority as a landowner to manage uses on its lands as it sees fit; it may also invoke its sovereign powers to regulate activities on private lands adversely affecting public lands. The Court declared that “[a] different rule would place the public domain of the United States completely at the mercy of state legislation.”<sup>139</sup>

Two decades after *Camfield*, in *United States v. Grimaud*,<sup>140</sup> grazers on the federal Sierra Forest Reserve in southern California challenged the authority of the Forest Service to regulate their grazing and charge them for their use of public lands. Pierre Grimaud claimed that the management of the reserve by the Forest Service amounted to an unconstitutional delegation of legislative authority.<sup>141</sup> He therefore alleged that requiring grazing permits and fees was unlawful.<sup>142</sup> The district court ruled in favor of Grimaud, and the Ninth Circuit affirmed, but the Supreme Court reversed in a unanimous opinion by Justice Joseph Lamar.<sup>143</sup> The Court upheld as a permissible delegation of

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132. 167 U.S. 518, 519 (1897).

133. Ch. 149, 23 Stat. 321 (1885) (codified as amended at 43 U.S.C. §§ 1061–1066 (2012)).

134. *Camfield*, 167 U.S. at 519.

135. *Id.* at 521.

136. *Id.* at 528.

137. *Id.* at 524.

138. *Id.* at 525.

139. *Id.* at 526.

140. 220 U.S. 506, 514 (1911).

141. *Id.* at 514.

142. *Id.*

143. *Id.* at 523. According to the leading casebook, *Grimaud* was a “remarkable” decision, because the Court originally affirmed the lower court’s ruling in favor of Grimaud on a 4-4 vote. But the Court

legislative power<sup>144</sup> the Agriculture Secretary's authority under the Organic Administration Act<sup>145</sup> to establish and enforce administrative rules in order to "insure [protection of] the objects of such reservation."<sup>146</sup> Thus, the delegation of authority to the Forest Service to manage national forests remained well within Congress's powers under the Property Clause.<sup>147</sup>

The same day that it decided *Grimaud*, the Court also handed down *Light v. United States*,<sup>148</sup> a case involving a Colorado grazer who allowed his cattle to graze next to federal land. When the cattle roamed onto the public land, he declined to remove them and—in a claim resembling those raised by the Bundy confrontations—argued that the government could not require him to prevent his cattle from using the adjacent federal land unless the government fenced the forest reserve.<sup>149</sup> Fred Light relied on Colorado state law requiring a landowner to fence his land in order to recover damages for trespass.<sup>150</sup> The lower court found for the government and enjoined Light from cattle trespass on federal lands.<sup>151</sup>

The Supreme Court affirmed, holding that Colorado's fence laws were not a justification for trespassing on the public domain.<sup>152</sup> Citing *Buford v. Houtz*,<sup>153</sup> the Court declared that the implied consent to roam on unfenced lands under Colorado law conferred no vested rights, and that the federal government retained the power to recall any implied license Light may have enjoyed.<sup>154</sup> Justice Lamar declared that "[t]he 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."<sup>155</sup> *Light* and *Grimaud* settled the constitutionality of the 1897 Organic Administration Act governing national forest lands and reaffirmed broad congressional power to manage federal lands under the Property Clause, including the ability to preempt conflicting state laws.<sup>156</sup>

The Court's next encounter with the Property Clause occurred in the 1917 case of *Utah Power and Light v. United States*, which concerned a utility's

then proceeded to grant the federal government's petition for rehearing, and a year later reversed without a dissent. See Coggins, et al, *supra* note 16, at 118.

144. *Grimaud*, 220 U.S. at 521.

145. Ch. 2, 30 Stat. 34 (1897) (codified as amended in scattered sections of 16 U.S.C.).

146. *Grimaud*, 220 U.S. at 515; 30 Stat. at 35 (codified as amended at 16 U.S.C. § 551 (2012)).

147. *Grimaud*, 220 U.S. at 521.

148. 220 U.S. 523, 535 (1911).

149. *Id.* (Light claimed that "unless the government put a fence around the reserve, it had no remedy, either at law or in equity, nor could he be required to prevent his cattle straying upon the reserve from the open public land on which he had a right to turn them loose.").

150. *Id.* at 526.

151. *Id.*

152. *Id.* at 537.

153. 133 U.S. 320 (1890) (declaring that public-lands grazers had an implied license to roam on unfenced public lands).

154. *Light*, 220 U.S. at 535.

155. *Id.* at 536.

156. *Id.* at 537–38; *United States v. Grimaud*, 220 U.S. 506, 523 (1911).

unpermitted electric facilities on national forest land.<sup>157</sup> Utah Power contended that since the land was never ceded to the federal government under the Enclave Clause, only state law governed.<sup>158</sup> The lower court ruled against the utility, and a unanimous Supreme Court affirmed in an opinion by Justice Van Devanter, who wrote that “the power of Congress is exclusive and that only through its exercise in some form can rights in lands belonging to the U.S. be acquired.”<sup>159</sup> The Court reiterated the notion first expressed in *Camfield* that the federal government would be at the mercy of state legislation without this exclusive power.<sup>160</sup> Justice Van Devanter declared that “state laws, including those relating to the exercise of the power of eminent domain, have no bearing upon a controversy such as here presented.”<sup>161</sup> Thus, as first established in *Light*, state laws may be preempted on federal land.<sup>162</sup>

Decisions like *Camfield*, *Grimaud*, *Light*, and *Utah Power* made clear that the inclusion of federal lands within state boundaries did not undermine the federal power to control occupancy and use of public lands.<sup>163</sup> Instead, the federal government retained plenary authority to protect its lands from trespass and injury and to prescribe the conditions upon which users may obtain rights in these federal lands.

### 3. Protecting Federal Lands

*Kleppe v. New Mexico*,<sup>164</sup> the most important recent Property Clause case, considered the power of Congress under the Property Clause to protect wildlife on federal lands when doing so conflicted with state laws. The dispute began when a public-land grazer invoked the New Mexico Estray Law to round up wild horses near a water source and sell them.<sup>165</sup> The federal Wild Free-Roaming Horses and Burros Act<sup>166</sup> protected the horses and required the grazer

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157. 243 U.S. 389 (1917).

158. *See id.* at 403. The Enclave Clause provides for federal authority over the District of Columbia and other federal enclaves; states must consent for the Enclave Clause to apply on their territory. *See Appel, supra* note 25, at 4 n.15.

159. *Utah Power*, 243 U.S. at 404. Justice Van Devanter was well-equipped to discuss the power of Congress under the Property Clause, given his experience as assistant attorney general assigned to the Department of Interior in Washington, D.C. *See* Lori Van Pelt, *Willis Van Devanter, Cheyenne Lawyer and U.S. Supreme Court Justice*, WYO. STATE HISTORICAL SOC'Y, <http://www.wyohistory.org/encyclopedia/willis-van-devanter-cheyenne-lawyer-and-us-supreme-court-justice> (last visited Mar. 31, 2016).

160. *Utah Power*, 243 U.S. at 405.

161. *Id.*

162. *Light v. United States*, 220 U.S. 523, 532 (1911).

163. *See* 16 U.S.C. § 551 (2012) (authorizing the Forest Service to regulate “occupancy and use” of national forest land); *United States v. City of San Francisco*, 310 U.S. 16, 18–19 (1940) (upholding the federal government’s grant to allow San Francisco to generate electricity on the condition that only a public utility could sell that electricity).

164. 426 U.S. 529 (1976).

165. *Id.* at 533.

166. Pub. L. No. 92–195 (1971) (codified as amended at 16 U.S.C. §§ 1331–1340 (2012)).

to notify BLM if they were interfering with his cattle.<sup>167</sup> When BLM refused to allow an auction sale of the horses, the state sued, challenging the constitutionality of the federal statute.<sup>168</sup> The lower court declared the Act unconstitutional and enjoined the federal government from enforcing it, deciding that the wild animals did not become federal property by merely being on federal land; therefore, the government could not regulate them.<sup>169</sup>

The Supreme Court unanimously reversed, upholding the constitutionality of the Wild Horses Act as a “needful regulation ‘respecting’ the public lands,”<sup>170</sup> and deferring to Congress’s determination of what constituted a “needful regulation.”<sup>171</sup> The Court also upheld the congressional finding that the horses were an integral part of the natural system of the public lands,<sup>172</sup> expressly rejecting the state’s argument that the Enclave Clause limited the government’s authority under the Property Clause.<sup>173</sup> Justice Thurgood Marshall’s opinion noted that even if a state retained jurisdiction over federal lands within its territory under the Enclave Clause, Congress retained the power under the Property Clause to enact legislation affecting federal lands.<sup>174</sup> In case of conflict with state law, the federal legislation prevailed under the Supremacy Clause.<sup>175</sup> Finally, the *Kleppe* Court qualified its previous holding in *Geer v. Connecticut*, which upheld broad state power over the taking and possession of wildlife under the “state ownership” doctrine,<sup>176</sup> rejecting the argument that

167. 16 U.S.C. § 1334 (2012).

168. *Kleppe*, 426 U.S. at 534. An auction of the wild horses would most likely be won by slaughterhouses wishing to sell horsemeat in dog food.

169. *See id.* (discussing the district court decision).

170. *Id.* at 536.

171. *Id.* (such a determination should be “entrusted primarily to the judgment of Congress”).

172. *See* 16 U.S.C. § 1331 (2012) (“Congress finds and declares that wild free-roaming horses and burros are living symbols of the historic and pioneer spirit of the West; that they contribute to the diversity of life forms within the Nation and enrich the lives of the American people; and that these horses and burros are fast disappearing from the American scene. It is the policy of Congress that wild free-roaming horses and burros shall be protected from capture, branding, harassment, or death; and to accomplish this they are to be considered in the area where presently found, as an integral part of the natural system of the public lands”).

173. *Kleppe*, 426 U.S. at 541–43. The state argued that the Enclave Clause required that it consent to federal jurisdiction before Congress could exercise its authority to manage the federal lands. *Id.* However, the Court ruled that

while Congress can acquire exclusive or partial jurisdiction over lands within a State by the State’s consent or cession [under the Enclave Clause], the presence or absence of such jurisdiction has nothing to do with Congress’ powers under the Property Clause. Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause.

*Id.* at 542–43.

174. *Id.* at 542.

175. *Id.* at 543 (“A different rule would place the public domain of the United States completely at the mercy of state legislation.” (citing *Camfield v. United States*, 167 U. S. 518, 526 (1897))).

176. *Geer v. Connecticut*, 161 U.S. 519 (1896) (upholding the state of Connecticut’s ban on out-of-season, interstate transport of harvested wildlife on the ground that the state, as owner of the wildlife,



state ownership of wildlife restricted Congress from enacting wildlife legislation if it conflicted with state wildlife law.<sup>177</sup>

Although *Kleppe* focused on regulation of nonfederal activity on federal public lands, the opinion did suggest that federal authority over wild horses extended to nonfederal lands.<sup>178</sup> Following the case, lower courts consistently reaffirmed broad Property Clause power.<sup>179</sup> For example, in *Minnesota v. Block*, the Eighth Circuit held that Congress's power included regulation of conduct off of public land that threatened the designated purpose of federal lands.<sup>180</sup> At least within a federal reservation, federal authority includes the ability to impose restrictions on nonfederal lands reasonably related to protecting both the purposes and authorized uses of the federal land.<sup>181</sup>

### C. Congressional Interpretation of the Property Clause

Toward the end of the nineteenth century, Congress gradually shifted federal policy from privatizing public lands to managing them for conservation, recreation, and other public uses.<sup>182</sup> This subpart surveys some of the main statutes that Congress enacted to promote these policies. As early as 1872, Congress reserved public lands in the territories of Montana and Wyoming for what would become the nation's first national park "as a public park or pleasuring-ground for the benefit and enjoyment of the people."<sup>183</sup> Congress

could regulate its harvest and transport); see Michael C. Blumm & Aurora Paulsen, *The Public Trust in Wildlife*, 2013 Utah L. Rev. 1437, 1451–65 (discussing *Geer*).

177. *Kleppe*, 426 U.S. at 545 ("The Act does not establish exclusive federal jurisdiction over the public lands in New Mexico; it merely overrides the New Mexico Estray Law insofar as it attempts to regulate federally protected animals. And that is but the necessary consequence of valid legislation under the Property Clause."). In *Hughes v. Oklahoma*, 441 U.S. 322 (1979), the Court called it a "fiction" that states own the wildlife. *Id.* at 337. Although *Hughes* did not affect states' sovereign ownership of wildlife, the Court declared that state ownership did not insulate states from discrimination against interstate commerce: under the Commerce Clause, since federal law can expressly preempt state wildlife laws. *Id.* at 335–36.

178. *Kleppe*, 426 U.S. at 546 ("[I]t is clear that regulations under the Property Clause may have some effect on private lands not otherwise under federal control.>").

179. See, e.g., *United States v. Vogler*, 859 F.2d 638, 641 (9th Cir. 1988) ("Congressional power to regulate federal land under the property clause is in no way limited to the regulation of land held before ratification of the Constitution."); *Diamond Bar Cattle v. United States*, 168 F.3d 1209, 1214 (10th Cir. 1999) (ruling that a state statute purporting to grant possessory grazing interests on national forest land, provided no enforceable right against the federal government); *United States v. Armstrong*, 186 F.3d 1055, 1061 (8th Cir. 1999) (upholding federal regulations restricting a tour boat business lying outside of a national park because the business adversely affected neighboring federal lands).

180. *Minnesota v. Block*, 660 F.2d 1240, 1249 (8th Cir. 1981).

181. *Id.* at 1250 ("[I]f Congress enacted the motorized use restrictions to protect the fundamental purpose for which the BWCAW had been reserved, and if the restrictions in [the federal statute] reasonably relate to that end, we must conclude that Congress acted within its constitutional prerogative.>").

182. See GEORGE C. COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 2:3 (2d ed. 2007); see also David H. Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 NAT. RESOURCES J. 279, 283 (1982).

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

directed the Interior Secretary to manage Yellowstone National Park, giving the Interior Department a conservation mission for the first time.<sup>184</sup>

Two decades after Yellowstone, Congress ushered in a new era when it authorized the Executive to establish forest reserves under the General Revision Act (or Forest Reserve Act) of 1891.<sup>185</sup> The statute enabled the President to create forest reserves by withdrawing public lands from settlement and private appropriation, authority that would eventually establish reservation and management as the dominant federal land policy instead of disposition.<sup>186</sup>

In 1897 Congress supplied management directives for the forest reserves in the so-called National Forest Organic Act, which the Court would broadly interpret in its *Grimaud*, *Light*, and *Utah Power* decisions.<sup>187</sup> After the transfer of management of these forest reserves from the Department of the Interior to the Department of Agriculture in 1905, the Forest Service became the management agency for the National Forest System under the leadership of the visionary Gifford Pinchot.<sup>188</sup> In 1911 the Supreme Court interpreted the Organic Act to establish the Forest Service as “trustee” of the national forests.<sup>189</sup>

In the years following the 1872 reservation of Yellowstone, Congress set aside other lands that would become national parks in 1916, when it enacted the National Park Service Organic Act, establishing the National Park Service and giving it management authority.<sup>190</sup> Earlier, Congress also gave broad authority to the President to designate national monuments in the Antiquities Act of 1906, many of which later became national parks.<sup>191</sup>

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184. 16 U.S.C. § 22 (2012). Faced with difficulties in protecting the park, Congress called on the War Secretary for assistance and, in 1886, the U.S. Army took charge of Yellowstone to enforce regulations in the park and protect its resources from poachers and squatters. *Birth of a National Park*, NAT'L PARK SERV., <https://www.nps.gov/yell/learn/historyculture/yellowstoneestablishment.htm> (last visited Apr. 6, 2016).

185. Ch. 561, 26 Stat. 1095 (1891).

186. See COGGINS & GLICKSMAN, *supra* note 182, § 2:16; Getches, *supra* note 182, at 313.

187. See *supra* notes 140–163 and accompanying text; National Forest Organic Act of 1897, ch. 2, 30 Stat. 34 (1897) (codified as amended in scattered sections of 16 U.S.C.). The Act sought to protect the forest from fire, preserve watersheds, and promote timber production. 16 U.S.C. §§ 551c, 563, 569 (2012); see also *United States v. New Mexico*, 438 U.S. 696, 707 (1978) (concluding that the primary purposes of the Organic Act were to promote timber harvests and watershed protection).

188. See *Managing Multiple Use on National Forests, 1905-1995*, U.S. FOREST SERV., [http://www.foresthistory.org/ASPNET/Publications/multiple\\_use/chap1.htm](http://www.foresthistory.org/ASPNET/Publications/multiple_use/chap1.htm) (last visited Mar. 12, 2016).

189. *Light v. United States*, 220 U.S. 523, 537 (1911). (“All the public lands of the nation are held in trust for the people of the whole country.” (citing *United States v. Trinidad Coal Co.*, 137 U.S. 160 (1890))).

190. National Park Service Organic Act of 1916, ch. 408, 39 Stat. 535; Hot Springs Reservation Act, ch. 126, 16 Stat. 149 (1877); Yosemite Reservation Act, ch. 184, 13 Stat. 325 (1864).

191. American Antiquities Act of 1906, ch. 3060, 34 Stat. 225 (1906) (codified as amended at 16 U.S.C. §§ 431–433 (2012)). The Antiquities Act has been used by sixteen presidents. Congress has also invoked the Act forty times. See *The Antiquities Act*, WILDERNESS SOC'Y, <http://wilderness.org/article/antiquities-act> (last visited Mar. 12, 2016). The Antiquities Act has been under recent attack by some lawmakers, including Rep. Don Young (R-Aka.), former Chair of the House Committee on

The Park Service regulates the national parks and most national monuments with the purpose of conserving the scenery, wildlife, and historic resources to leave the reservations “unimpaired for the enjoyment of future generations.”<sup>192</sup> Today, the National Park System comprises more than four hundred different areas,<sup>193</sup> illustrating the repeated use of Congress’s Property Clause powers to manage and protect federal lands for public benefit.

After establishing a new framework to provide for the reservation of public lands in national forests, parks, and similar areas for conservation purposes, Congress turned its focus to more specific land-use activities, principally out of concern over overexploitation of mineral resources. This concern resulted in a policy shift in managing public lands containing oil. In 1909 President Taft withdrew oil lands in California and Wyoming to prevent private mineral entry under the Mining Act.<sup>194</sup> The government then filed suit against Midwest Oil Company in the District Court for the District of Wyoming, seeking to recover the reserved lands from mineral claimants and to

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Transportation and Infrastructure, who introduced a bill in January 2015 to amend the Act to prevent the president from designating any monument without congressional approval. See Claire Moser, *New Congress Begins Anti-Environment Attack with ‘No More National Parks’ Bill*, THINK PROGRESS (Jan. 16, 2016), <http://thinkprogress.org/climate/2015/01/16/3612702/new-congress-no-more-national-parks-bill/>; see also the efforts of Rep. Rob Bishop (R-Utah), discussed *infra* note 285 and accompanying text. In June 2016, the House Appropriations Committee approved an appropriation bill that would restrict the President’s authority to designate national monuments. See Tiffany Stecker, *Lawmakers Say Spending Bill Rider Threatens Negotiations*, E&E NEWS (June 16, 2016), <http://www.eenews.net/eedaily/2016/06/16/stories/1060038913>. President Obama recently exercised his Antiquities Act authority to designate three new national monuments in California in early 2016, putting some 1.8 million acres of public lands into national monument status. See Mark Lander & Julie Turkewitz, *With 3 California Sites, Obama Nearly Doubles Public Land He’s Protected*, N.Y. TIMES (Feb. 12, 2016), <http://www.nytimes.com/2016/02/13/us/obama-california-national-monument.html>. In the waning days of his tenure, Obama added Bear Ears (in Utah) and Gold Butte (Nevada) Monuments and substantially expanded the Cascade Siskiyou Monument (in California and Oregon). See Nathan Roth, *Obama Designates Two New National Monuments in Nevada and Utah*, NPR (Dec. 28, 2016), <http://www.npr.org/sections/thetwo-way/2016/12/28/507314596/obama-designates-two-new-national-monuments-in-nevada-and-utah> (describing the designations of Bear Ears and Gold Butte); see also *Obama Expands Cascade-Siskiyou National Monument*, WASHINGTON TIMES (Jan. 12, 2017) <http://www.washingtontimes.com/news/2017/jan/12/obama-expands-cascade-siskiyou-national-monument/>. In all, Obama established or expanded 34 monuments, breaking the record of Franklin Delano Roosevelt, who established or expanded 32 monuments.

192. 54 U.S.C. § 100101(a) (2012).

193. See *About Us*, NAT’L PARK SERV., <http://www.nps.gov/aboutus/index.htm> (last visited Mar. 9, 2016).

194. See *Taft’s Withdrawal of Oil Land Upheld by Supreme Court Federal Judges Declare Executive [sic] Orders Are Legal Because of Assent by Congress*, SACRAMENTO UNION (Feb. 24, 1915), <https://cdnc.ucr.edu/cgi-bin/cdnc?a=d&d=SU19150224.2.20>. Under the 1872 Mining Law, miners could enter public land to prospect for mineral deposits. A discovery of a “valuable mineral” entitled them to ownership of the minerals. See generally COGGINS & GLICKSMAN, *supra* note 182, § 42:4. After discovery, the government would have had to “buy back” any oil on such claims, even if it had not been extracted, until the Mineral Leasing Law of 1920 was passed to disqualify oil and gas from staking claims. See *id.* § 39:2.

obtain accounting of oil extracted after the withdrawal.<sup>195</sup> After the lower court dismissed the suit, the government appealed to the Tenth Circuit, which certified certain questions to the Supreme Court.<sup>196</sup> The Court upheld the oil withdrawals in 1915 in *United States v. Midwest Oil Company*, citing longstanding congressional acquiescence to executive-branch land withdrawals.<sup>197</sup> Five years later, the Mineral Leasing Act of 1920 withdrew fuel minerals like oil, gas, and coal from the 1872 law and authorized leasing, with the federal government retaining title to the leased lands.<sup>198</sup>

The Taylor Grazing Act of 1934<sup>199</sup> marked a major shift toward land retention and conservation, effectively ending the disposition era.<sup>200</sup> In the 1920s and early 1930s, unreserved western lands suffered large-scale degradation from excessive grazing and drought, prompting Congress to enact the Taylor Act to “stop injury to the public grazing lands by preventing overgrazing and soil deterioration [and] to provide for their orderly use, improvement, and development.”<sup>201</sup> The statute reflected congressional awareness of the unsustainability of unregulated grazing practices and established the Grazing Service in the Interior Department, later combined with the General Land Office to form BLM in 1946.<sup>202</sup> The federal government proceeded to issue grazing permits on some 16 million acres of public lands under ten-year leases from 1934 to 1968.<sup>203</sup> In the 1960s, new BLM regulations recognized a “multiple-use management” policy.<sup>204</sup> This policy committed BLM to more active management, but Congress did not permanently codify multiple-use management<sup>205</sup> until the enactment of the

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195. The controversy over the oil land withdrawals led Congress to pass the Pickett Act of 1910 giving the President authority to withdraw lands for “public purposes to be specified in the orders of withdrawals.” Pickett Act of 1910, ch. 421, 36 Stat. 847 (1910). The Pickett Act contained an exception for “metalliferous” substances. See Getches, *supra* note 182, at 294.

196. See *United States v. Midwest Oil Co.*, 236 U.S. 459, 468 (1915).

197. *Id.* at 469–71.

198. Mineral Leasing Act of 1920, ch. 85, 41 Stat. 437 (codified as amended at 30 U.S.C. §§ 181, 201–263 (2012)). See COGGINS & GLICKSMAN, *supra* note 182, §§ 39:2, 42:7. Under the Act, the federal lessor benefits from payments of rents, bonus bids, and royalties. § 17, 41 Stat. at 443. The Act also contained several conservation measures; for example, (1) prohibiting the filling of a well within 200 feet of the exterior boundary of the permitted or leased area, and (2) requiring each lease to be conditioned on prevention of waste of oil or gas. § 16, 41 Stat. at 443.

199. Ch. 865, 48 Stat. 1269.

200. See COGGINS ET AL., *supra* note 16, at 96.

201. See *The Taylor Grazing Act*, BUREAU OF LAND MGMT., [http://www.blm.gov/wy/st/en/field\\_offices/Casper/range/taylor.print.html](http://www.blm.gov/wy/st/en/field_offices/Casper/range/taylor.print.html) (last visited Mar. 12, 2012).

202. See COGGINS ET AL., *supra* note 16, at 26.

203. See BUREAU OF LAND MGMT., *supra* note 201.

204. See *id.* Multiple use management had been a hallmark of the Forest Service from its inception, later codified by Congress in the Multiple-Use Sustained-Yield Act of 1960, Pub. L. No. 86-517, 74 Stat. 215 (1960).

205. See U.S. DEPT. OF THE INTERIOR, FINAL ENVIRONMENTAL STATEMENT FEDERAL COAL MANAGEMENT PROGRAM 5-207 (1979). Congress enacted a temporary multiple-use directive for BLM in the Classification and Multiple-Use Act of 1964, Pub. L. No. 88-607, 78 Stat. 986 (1964).

Federal Land Policy and Management Act of 1976 (FLPMA),<sup>206</sup> which made permanent BLM's multiple-use directives and established comprehensive planning as the chief characteristic of BLM land management.

Congress enacted FLPMA after a lengthy process initiated by completion of the Public Land Law Review Commission's final report in 1970.<sup>207</sup> FLPMA articulated BLM's management responsibilities<sup>208</sup> and established the fundamental policy that:

[T]he public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife. . . .<sup>209</sup>

FLPMA granted broad authority to BLM to manage public lands, formalized multiple-use, sustained yield management, and established environmental protection as a purpose of public-land management.<sup>210</sup> The statute expressly recognized the priority of protecting lands with high environmental value for public benefit.<sup>211</sup>

With the enactment of FLPMA, Congress largely completed a comprehensive framework to conserve and manage resources on public lands to preserve parks, forests, grazing lands, and surface and subsurface resources.<sup>212</sup> Federal management of public lands for the benefit of the people is thus a well-settled national policy, a reflection of the overwhelmingly shared concern for the protection and sound management of publicly-owned lands and natural resources. The Supreme Court, Congress, and the Executive Branch all have clearly and broadly interpreted the power to manage federal lands under the Property Clause.

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206. Federal Land Policy and Management Act of 1976, PL 94-579, 90 Stat 2743 (1976) (codified as amended at 43 U.S.C. §§ 1701-1785 (2012)).

207. PUBLIC LAND LAW REVIEW COMM'N, ONE THIRD OF THE NATION'S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS (1970), <https://ia802703.us.archive.org/10/items/onethirdofnation3431unit/onethirdofnation3431unit.pdf>.

208. FLPMA is sometimes referred as the BLM Organic Act. See *The Federal Land Policy and Management Act (FLPMA) of 1976: How the Stage Was Set for BLM's "Organic Act"*, BUREAU OF LAND MGMT., <http://www.blm.gov/flpma/organic.htm> (last visited Mar. 31, 2016).

209. FLPMA § 102 (codified at 43 U.S.C. § 1701(a)(8) (2012)).

210. See BUREAU OF LAND MGMT., *supra* note 208. FLPMA required BLM to prevent unnecessary or undue degradation of public lands, § 302 (codified as amended at 43 U.S.C. § 1732(b)), and called for designation of wilderness study areas, § 603 (codified as amended at 43 U.S.C. § 1782).

211. FLPMA gave priority to BLM's designation of "areas of critical environmental concern." § 201 (codified at 43 U.S.C. § 1711(a)).

212. Congress added to this framework the National Wildlife Refuge System Improvement Act of 1997, Pub. L. No. 105-57, 111 Stat. 1252 (codified as amended at 16 U.S.C. § 668dd-668ee (2012)), establishing a statutory goal of conserving national wildlife refuges and defined conservation in ecological terms. See Robert L. Fischman, *The Significance of National Wildlife Refuges in the Development of U.S. Conservation Policy*, 21 J. OF LAND USE & ENVTL. L. 1, 16 (2005). The statute aimed to establish a national system of refuges, calling for the preservation of biodiversity as a management goal, while recognizing hunting as a second-priority recreational use. See *id.*

## III. THE DISCONTENTS' LEGAL CLAIMS

The anti-environmental movement called the “Sagebrush Rebellion” began in the 1970s, mostly growing out of unhappiness among grazers and some states with the decision in *NRDC v. Morton*.<sup>213</sup> That decision ordered BLM to prepare Environmental Impact Statements (EISs) on its land-use plans, which threatened grazing restrictions.<sup>214</sup> The then-director of the Utah BLM office predicted in 1980 that the legal uncertainty caused by the rebellion would “bring all actions on public lands to a halt for ten years.”<sup>215</sup> When the Reagan Administration (led by a self-proclaimed sagebrush rebel) took office, newly appointed Interior Secretary James Watt questioned the science underlying the EISs and stated that he would always “err on the side of public use versus preservation.”<sup>216</sup> He refused to accept any grazing restrictions based on the EISs, a position upheld in *NRDC v. Hodel*, which approved a BLM land plan that largely ignored the need to improve degraded public rangeland through grazing restrictions.<sup>217</sup> As a result, there was no definitive legal ruling on the rebels’ claims that the federal government lacked authority to cut back grazing, although the decisions in *Kleppe v. New Mexico*<sup>218</sup> (on the scope of the Property Clause power) and in *Arizona v. California*<sup>219</sup> (limiting the equal-footing doctrine to submerged lands beneath navigable-in-fact waters at the time of statehood) put the handwriting on the wall concerning those types of claims.

The rebellion against federal authority resurfaced in the 1990s when Interior Secretary Bruce Babbitt (from a ranching family) announced his “rangeland reform” program, which called for more environmentally sensitive public-land grazing.<sup>220</sup> Grazers responded by filing suit in federal district court

213. 388 F. Supp. 829 (D.D.C. 1974). On the origins and goals of the Sagebrush Rebellion, see generally John D. Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics, and Federal Lands*, 14 U.C. DAVIS L. REV. 317 (1980).

214. See Jonathan Thompson, *The First Sagebrush Rebellion: What Sparked It and How It Ended*, HIGH COUNTRY NEWS (Jan. 14, 2016), <http://www.hcn.org/articles/a-look-back-at-the-first-sagebrush-rebellion>.

215. See Marjane Ambler, *The Sagebrush Rebellion: Misdirected Dynamite*, HIGH COUNTRY NEWS 2 (Feb. 22, 1980), [http://s3.amazonaws.com/hcn-media/archive-pdf/1980\\_02\\_22.pdf](http://s3.amazonaws.com/hcn-media/archive-pdf/1980_02_22.pdf). Although the Sagebrush Rebellion mostly focused on suing the federal government and on legislative efforts, the movement built the foundations for the Bundys to act in a more “physical” manner.

216. See George C. Coggins & Doris K. Nagel, “Nothing Beside Remains”: *The Legal Legacy of James G. Watt’s Tenure as Secretary of the Interior on Federal Land Law and Policy*, 17 B. C. ENVTL. AFF. L. REV. 473, 489 (1989). Watt also described his mission as to “fight in the courts those bureaucrats and no-growth advocates who create a challenge to individual liberty and economic freedoms.” Elizabeth Drew, *Reporter at Large: Secretary Watt*, NEW YORKER, May 4, 1981, at 108.

217. 624 F. Supp. 1045 (D. Nev. 1985) (holding that BLM did not violate NEPA by choosing an action before preparing an EIS), *aff’d*, 819 F.2d 927 (9th Cir. 1987).

218. 426 U.S. 529 (1976); see *supra* notes 164–171 and accompanying text.

219. 373 U.S. 546 (1963); see *supra* note 63 and accompanying text.

220. See *Pub. Lands Council v. Babbitt*, 529 U.S. 728, 750 (2000) (unanimously upholding various provisions of Secretary Babbitt’s rangeland reform program). See generally Scott Nicholl, *The Death of Rangeland Reform*, 21 J. ENVTL. L. & LIT. 47 (2006).

in Nevada, arguing that the federal government lost title to lands of the state when Nevada joined the Union.<sup>221</sup> The grazers also argued that federal ownership of 80 percent of land within the state unconstitutionally infringed on the state's police powers and violated the equal-footing doctrine by putting the state at an economic disadvantage compared to other states.<sup>222</sup> But the grazers' equal footing, Tenth Amendment, and Statehood Act claims failed in the Ninth Circuit.<sup>223</sup> Undaunted, the grazers and the states have advanced new legal theories, none of which has succeeded, as we explain below.

A. *State Water Rights as a Limit on Federal Land Use Discretion*

Western public-lands ranchers advanced another theory that their state water rights on federal lands provide them with implied easements to graze on public lands so their cattle can access the water. Although the argument has met with some success in the lower courts, appellate courts have consistently rejected it.<sup>224</sup>

The latest judicial rejection occurred early in 2016 when the Ninth Circuit ruled in favor of the government against the estate of the late rancher Wayne Hage in a trespass case.<sup>225</sup> Hage and his son held a federal grazing permit until 1993, but failed to renew it properly.<sup>226</sup> When they continued to graze cattle on federal lands, the federal government sued in trespass.<sup>227</sup> The district court ruled for the Hages, concluding that their state water rights gave them an easement by necessity for their cows to access the water on public lands.<sup>228</sup>

The Ninth Circuit summarily reversed,<sup>229</sup> holding that “the ownership of water rights has no effect on the requirement that a rancher obtain a grazing permit.”<sup>230</sup> The court relied on case law from both federal and Nevada state courts in determining that “water rights do not include, as a matter of state law,

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221. *United States v. Gardner*, 107 F.3d 1314, 1317 (9th Cir. 1997).

222. *Id.* at 1318–19.

223. *See id.* (declaring that equal footing does not give the states title to the public lands within their boundaries; instead, it conveys to the states only lands submerged beneath navigable-in-fact waters at statehood).

224. *See Hunter v. United States*, 388 F.2d 148, 154 (9th Cir. 1967) (holding that ownership of water rights implies a right-of-way on public lands but only for diversionary purposes); *Diamond Bar Cattle Co. v. United States*, 168 F.3d 1209, 1214–15 (10th Cir. 1999) (rejecting ranchers' argument that state water rights gives them an appurtenant right to graze on federal lands); *Colvin Cattle Co. v. United States*, 468 F.3d 803, 807–08 (Fed. Cir. 2006) (rejecting the argument that a federal land grazing right is inherent in a state water right).

225. *United States v. Estate of Hage*, 810 F.3d 712 (9th Cir. 2016).

226. *Id.* at 715.

227. *Id.*

228. *See id.*

229. Sean Whaley, *Nevada Ranching Family Loses Federal Lands Court Case*, LAS VEGAS REV.-J. (Jan. 18, 2016), <http://www.reviewjournal.com/news/nevada/nevada-ranching-family-loses-federal-lands-court-case>. The court also took the unusual step of granting the federal government's request that the appeals court remove the district judge from the case, as he had demonstrated hostility to federal officials, citing them for contempt. *Estate of Hage*, 810 F.3d at 715.

230. *Estate of Hage*, 810 F.3d at 717.

an implicit, appurtenant grazing right on federal lands,” because the Taylor Grazing Act preempted any such state rights.<sup>231</sup> Both the Ninth and Tenth Circuits have now clearly rejected the argument that water rights perfected under state law entitle ranchers to graze their cattle on federal land adjacent to a water source.<sup>232</sup>

### B. Public Grass as a Private Property Right

Ranchers have also argued for a kind of “labor theory of grass.”<sup>233</sup> They maintain that, because their families have been grazing on public lands for a long period of time, they acquired rights to the grass on those lands, even though the Taylor Act clearly stipulated that federal grazing permits gave them “no right, title, or interest” in public lands.<sup>234</sup> The grazers’ argument resembles the common-law doctrine of accession, which, according to a nearly century-old account, “comprehends the case of one who by his labor and skill, has created a new product out of another’s article.”<sup>235</sup> Their claim would be based on their cultivation of public land grass, which allegedly provides the dominant value of the lands. But accession law is premised on private land ownership, not land owned by the sovereign.<sup>236</sup> Moreover, it is hardly clear that the chief value of the public rangelands is grass devoted to livestock grazing, not the wildlife and watershed values that grazing damages.

The grazer’s argument also founders on the fact that they have no ownership to the land on which the grass grows, and the federal statute authorizing their permits expressly denies them land rights.<sup>237</sup> Courts have not yet had the opportunity to consider the grazers’ “grass ownership” argument, but they may soon. Using the accession-related common-law doctrine of emblements,<sup>238</sup> the grazers might argue that the grass is a crop that they nurtured as tenants of a federal grazing permit, and that even after the termination of a lease, they are entitled to the value of the grass they

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231. *Id.* at 719 (relying on *Colvin Cattle Co. v. United States*, 468 F.3d 803, 807–08 (Fed. Cir. 2006) and *Ansolahehere v. Laborde*, 310 P.2d 842, 849–50 (Nev. 1957)).

232. Hage’s estate has appealed the Ninth Circuit’s decision to the Supreme Court. *See* Juan Carlos Rodriguez, *Ranchers Seek 9th Circ. Stay of Grazing Trespass Ruling*, LAW360 (Apr. 20, 2016), <http://www.law360.com/articles/787055/ranchers-seek-9th-circ-stay-of-grazing-trespass-ruling>.

233. *See* JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* § 27, 17 (Thomas P. Reardon ed., Liberal Arts Press 1952) (reasoning that “every man has a property in his own person . . . . The labor of his body and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that Nature has provided, and left it in, he has mixed his labor with, and joined to it something that is his own, and thereby makes it his property.”).

234. Ch. 865, § 3, 48 Stat. 1269, 1270 (1934) (codified at 43 U.S.C. § 315b (2012)).

235. *See, e.g.*, Earl C. Arnold, *The Law of Accession of Personal Property*, 22 COLUM. L. REV. 103 (1922).

236. *See* Thomas W. Merrill, *Accession and Ownership*, 1 J. LEGAL ANALYSIS 459, 465 (2009).

237. *See supra* note 234 and accompanying text.

238. *See* Merrill, *supra* note 236, at 465.



produced.<sup>239</sup> However, the doctrine of emblements applies only to indefinite lease terms,<sup>240</sup> which federal grazing permits do not have. Moreover, the grazers could, at best, obtain a remedy equaling the value of one season of grass.

The grazers might also analogize their grass-ownership argument to what the Supreme Court once referred to as “constituent elements of the land,” concerning claims to minerals and timber in connection with an Indian reservation in *United States v. Shoshone Tribe of Indians*.<sup>241</sup> In that case, the tribe sought compensation from the federal government for settling a different tribe on part of the reservation in violation of its treaty. The government acknowledged that it owed the Shoshone Tribe compensation but claimed the valuation should not include the value of the land’s timber and minerals.<sup>242</sup> The Court ruled against the government because it had assured the tribe “peaceable and unqualified possession of the land in perpetuity,” which implicitly included minerals and timber as constituent elements of the land; otherwise, the reservation would transfer little in the way of beneficial interest.<sup>243</sup>

But the government made no similar promise to public-land grazers; in fact, it clearly stated that grazing permits were at the discretion of the federal government.<sup>244</sup> Moreover, the Indian law rule of construing agreements with the government in favor of the tribes<sup>245</sup> does not apply to the public-land grazing context, where a contrary interpretative rule favors the federal government in disputes with its grantees.<sup>246</sup> Finally, ranchers were never the beneficiaries of a land reservation held by the government as a trustee for them, as is the case with tribes.<sup>247</sup> The federal government is not a trustee for public-

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239. In the agricultural context of accession the common-law doctrine of emblements protects a tenant’s right to harvest annual crops, provided the lease term is for an indefinite period. *See* *Reeder v. Sayre*, 70 N.Y. 180 (1877) (recognizing the doctrine). If a tenant plants a crop, and the landowner terminates his lease not due to tenant wrongdoing, the tenant can invoke the doctrine of emblements to harvest the crop even after the termination of the lease. *See* Richard D. Boyle, *Tenant Ownership Rights to Crops and Improvements on Leased Property*, <http://www.scolaro.com/wp-content/uploads/Tenant-Ownership-Rights-to-Crops-and-Improvements-on-Leased-Property.pdf> (last visited Nov. 15, 2016).

240. *See* *Jacob H. Rottkamp & Son, Inc. v. Wulforst Farms, LLC*, 844 N.Y.S.2d 600 (Sup. Ct. 2007). The doctrine of emblements applies to annual crops only, not perennial crops, which are considered part of the realty. *See, e.g.,* *Benson v. Morse*, 109 N.Y.S.2d 57 (Sup. Ct. 1951).

241. 304 U.S. 111 (1938).

242. *Id.* at 116.

243. *Id.*

244. 43 U.S.C. § 315b (2012).

245. *See* COHEN’S HANDBOOK ON FEDERAL INDIAN LAW § 2.02[1] (Nell Jessup Newton, et al., eds. 2012) [hereinafter COHEN HANDBOOK]; Richard B. Collins, *Never Construed to Their Prejudice: In Honor of David Getches*, 84 U. COLO. L. REV. 1, 5–6 (2013).

246. *See* *United States v. Union Pac. R.R.*, 353 U.S. 112, 116 (1957) (applying the federal land law canon resolving doubts concerning federal grants in favor of the federal government).

247. *See* COHEN HANDBOOK, *supra* note 245, at § 17.01.

land grazers; on the contrary, it holds public lands in trust for the entire U.S. public.<sup>248</sup>

### C. *The Enclave Clause as a Limit on Federal Lands*

Krisanne Hall, speaking on behalf of the grazers, has advanced the novel theory that the federal government's authority to own land covers only ten square-miles from Washington, D.C. under the Enclave Clause.<sup>249</sup> Her claim overlooks more than a century of Enclave Clause case law, which has uniformly interpreted the clause liberally.<sup>250</sup> For example, the Supreme Court has interpreted the language "needful Buildings" in the clause to include dams<sup>251</sup> and a national park.<sup>252</sup>

The Enclave Clause has, moreover, never been interpreted to limit federal authority under the Property Clause.<sup>253</sup> Eleven western state attorneys general recently agreed that that the former does not limit the latter.<sup>254</sup> As discussed above, the consistent judicial interpretation of the Property Clause is "without limitation."<sup>255</sup>

### D. *The Supreme Court's Alleged Misinterpretation of the Property Clause*

Ammon Bundy adopted a somewhat different approach from Hall's judicial review argument in his defense in the Malheur Refuge case.<sup>256</sup> Although he acknowledged the judicial review power of the Supreme Court, he argued that the federal government has no authority over that refuge, and that

248. See, e.g., *Light v. United States*, 220 U.S. 523, 537 (1911); Blumm & Schaffer, *supra* note 26, at 421–22 (citing other case law).

249. U.S. Const. art. I, § 8, cl. 17: Congress may "exercise exclusive Legislation in all Cases whatsoever over [the District of Columbia] 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."

250. See, e.g., *Fort Leavenworth R.R. v. Lowe*, 114 U.S. 525 (1885) (rejecting a claim that Enclave Clause land—a military reservation in Kansas—was exempt from state taxation); *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 528 (1938) (finding that the Enclave Clause "has not been strictly construed"); *Virginia v. Reno*, 955 F. Supp. 571 (E.D. Va. 1997), *vacated for mootness by* 122 F.3d 1060 (4th Cir. 1997) (holding that the Enclave Clause does not diminish federal power under the Property Clause).

251. See *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937).

252. See *Collins*, 304 U.S. 518 (concerning Yosemite National Park).

253. See, e.g., *Utah Power & Light Co. v. United States*, 243 U.S. 389, 405 (1917) (rejecting the utility's argument that state law should apply to its dam on national forest land because the state had never ceded the land, stating: "[T]he inclusion within a state of lands of the United States does not take from Congress the power 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, even though this may involve the exercise in some measure of what commonly is known as the police power."). For a recent interpretation, see *Reno*, 955 F. Supp. at 579–80 (holding that the Enclave Clause does not diminish federal power under the Property Clause).

254. See *supra* note 66 (discussing the 2016 report of the Western Attorneys General).

255. See *supra* notes 123–131 and accompanying text.

256. See *supra* note 25.

the Court's two-hundred-year jurisprudence regarding the Property Clause powers of the government should be overturned.<sup>257</sup> Bundy rejected the extensive case law described above in Part II and argued that the Constitution "only intended to give broad federal power of property in Territories, as the Founders contemplated the expansion westward."<sup>258</sup>

Bundy's argument relies on the use of "Territories" in the Enclave Clause, rather than "territories" in the Property Clause.<sup>259</sup> He contends that "Territories," as a proper noun, reflected the Founders' intent to recognize federal power only over territorial lands that existed at the time of the drafting of the Constitution.<sup>260</sup> Since Oregon was not a territory in 1787, Bundy claims "once statehood occurred for Oregon, Congress lost the right to own the land inside the state," except for purposes of the Enclave Clause.<sup>261</sup>

Bundy's contention that "Territories" versus "territories" or "lands" has constitutional significance was considered and rejected by the Supreme Court 176 years ago in *United States v. Gratiot*.<sup>262</sup> In 1840 the Court interpreted the term "Territories" in the Property Clause as "equivalent to the word lands,"<sup>263</sup> meaning that the government has jurisdiction over all public lands, not just those "Territories" that existed at the time of the drafting of the Property Clause in 1787. In fact, Bundy's reasoning echoes Justice Taney's discredited analysis of the Property Clause in *Dred Scott*—that Congress lacked the authority to establish rules for federal territories in the West that were not part of the Union at the time of the Constitution.<sup>264</sup> Thus, Bundy relies on the most reviled decision in Supreme Court history as the only authority supporting his view.<sup>265</sup>

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257. See Lauren Fox, *Bundy's Extreme Legal Defense: Feds Have No Jurisdiction Over Federal Lands*, TPM (Apr. 25, 2016), <http://talkingpointsmemo.com/muckraker/bundy-lawyer-expected-to-say-malheur-was-not-fed-land>. Bundy's argument seemed self-contradictory. In his brief he acknowledged that the federal government has "plenary power to manage, regulate, sell or dispose of public lands." See Defendant Ammon Bundy's Motion to Dismiss for Lack of Subject Matter Jurisdiction at 6, *United States v. Bundy et al.*, No. 3:16-CR-00051 (D. Or. May 9, 2016) (No. 527). This concession implied that the government may retain public lands indefinitely, especially in light of the Supreme Court's Jurisprudence that the power to manage public lands is "without limitation." See *supra* notes 116, 123, 130, and accompanying text.

258. See Declaration of Defendant Ammon Bundy's Unopposed Motion to Extend Deadline for Motion to Dismiss for Lack of Jurisdiction at 2, *United States v. Bundy et al.*, No. 3:16-CR-00051 (D. Or. Apr. 22, 2016) (No. 453).

259. *Id.*

260. *Id.*

261. *Id.* at 2–3.

262. 39 U.S. 526, 537 (1840).

263. *Id.*

264. See *supra* note 116.

265. Justice Taney claimed that the Clause "does not speak of any territory, nor of Territories, but uses language which, according to its legitimate meaning, points to a particular thing" to argue the term "territory" could only refer to the area ceded by Virginia and New York and covered by the Northwest Ordinance. *Dred Scott v. Sandford*, 60 U.S. 393, 436, 446–47 (1857) (emphasis in original); see also Appel, *supra* note 25, at 46 ("Purely from an analysis of the legal reasoning, Taney's opinion in *Dred Scott* is disturbing. To reach his conclusion, Taney belittled the text of the Constitution and ignored or misconstrued several key cases interpreting congressional power over the territories.").

Bundy's argument also ignored the fact that the Supreme Court has already upheld federal ownership of Malheur Refuge.<sup>266</sup> In *United States v. Oregon*, the federal government sued the state to quiet title to submerged lands underlying three lakes within the Lake Malheur Reservation, established by executive order in 1908.<sup>267</sup> The Supreme Court upheld the executive order establishing Lake Malheur as a bird reservation as within the authority of the President.<sup>268</sup> The Court also decided that the lakebeds were federally owned, directly contrary to Bundy's argument that once Oregon joined the Union, the government lost the power to manage public lands in the state.<sup>269</sup> Since the lakes were non-navigable at the time of Oregon's 1859 statehood, the state never obtained title to the lakebeds under the equal-footing doctrine when it joined the Union.<sup>270</sup> Consequently, Bundy's argument was not only inconsistent with nearly two centuries of jurisprudence, but also contradicted a Supreme Court decision affirming federal ownership of Malheur Wildlife Refuge.

#### E. Utah's "Equal Sovereignty" and "Equal Footing" Claims

In connection with Utah's TPLA, a New Orleans firm hired by the state suggested that the state might have a valid claim under the so-called "equal sovereignty" and "equal footing" principles.<sup>271</sup> The "equal sovereignty" idea is essentially a restatement of political equal footing, which does not have a proprietary dimension.<sup>272</sup> The law firm argued that FLPMA, by reversing almost two hundred years of public-land policy "from one of disposal to one of near permanent retention," constituted an infringement on Utah's sovereignty as compared to states that have fewer federal lands within their borders.<sup>273</sup> The firm suggested that the state might obtain a judicial declaration that the federal government cannot forever retain the public lands within Utah's borders.<sup>274</sup>

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266. *United States v. Oregon*, 295 U.S. 1 (1935).

267. *See* Establishing Lake Malheur Reservation in Oregon as Preserve and Breeding Ground for Native Birds, Exec. Order No. 929 (1908). Malheur Lake is the principal reason for the refuges, as it attracts birds along the Pacific Flyway.

268. *Oregon*, 295 U.S. at 10. The Court did so even though the reservation preceded the enactment of the 1920 Migratory Bird Treaty Act. *Id.* at 9–10 (relying on the congressional acquiescence the Court adopted in *United States v. Midwest Oil Co.*, 236 U.S. 459, 469–75 (1910)).

269. *Oregon*, 295 U.S. at 10.

270. *See id.* at 23–25.

271. *See* Wentz et al., *supra* note 24, at 2–3.

272. *Id.* at 2 (citing to *Shelby County v. Holder*, 133 S.Ct. 2612 (2012), which held that the Voting Rights Act was unconstitutional under the Equal Sovereignty Principle because it treated states as unequal in sovereignty). On political equal footing, *see infra* text following note 274.

273. Wentz et al., *supra* note 24, at 2.

274. *Id.* The New Orleans firm working for the state tried to support this claim under what it called a "compact theory," arguing that the Utah Enabling Act was an offer accepted by Utah, thus creating a compact. This compact allegedly created an implicit duty for the U.S. government to timely dispose of the public lands within Utah's borders. *Id.* at 3–4. Bundy briefly mentioned this argument in its brief. *See* Defendant Ammon Bundy's Motion to Dismiss for Lack of Subject Matter Jurisdiction at 30, *United States v. Bundy et al.*, No. 3:16-CR-00051 (D. Or. May 9, 2016) (No. 527). Although the New Orleans

The firm's recommendation seems premised on the idea that "equal sovereignty" requires more than equal political sovereignty. All states enjoy the latter: two senators, proportionate representation in the House of Representatives, and electoral votes equal to the congressional representatives. This political representation separates states from territories like Puerto Rico and the seat of the federal government in the District of Columbia. But political equal sovereignty has never meant equal proprietary holdings. Given the numerous allocation difficulties such an interpretation would raise, it is quite unlikely that a court would reinterpret political sovereignty to include equal proprietary ownership.

The Supreme Court has rejected expanding the scope of state equal-footing claims many times. The Court's 1845 decision in *Pollard v. Hagan* decided that new states obtained ownership through an implicit federal transfer of the beds of navigable waters at statehood.<sup>275</sup> But in subsequent decisions the Court firmly declined to expand the doctrine to offshore submerged lands<sup>276</sup> and to lands above the high water mark.<sup>277</sup> Moreover, all of the western states specifically disclaimed ownership of the federal public lands within their boundaries in their statehood acts.<sup>278</sup> No court has ever suggested that these disclaimers were unconstitutional or unenforceable.<sup>279</sup>

The discontents' legal claims therefore have little prospect of judicial success. They may, however, have more success in the political arena, to which we turn in the next Part.

#### IV. THE DISCONTENTS' POLITICAL PROSPECTS

With little prospect of success in the courts, the discontents' claims might receive a more welcome reception in Congress, which has the constitutional power to dispose of federal lands. This Part examines a bill advanced by

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firm contended that the "compact theory" enjoyed "historical support," the Utah Enabling Act actually included a disclaimer of non-interference by the state. *See infra* note 319. The analysis cited no evidence of "historical support" for continued disposition, and at the time of Utah statehood in 1896, the federal government had already reserved Yellowstone and what would become Hot Springs National Parks, and Congress had authorized the President to reserve forest lands. So, this argument—which amounts to saying that a statehood act could restrain congressional authority under the Property Clause—actually lacks "historical support." The Western states attorneys general agree, *see infra* notes 301, 306.

275. 44 U.S. 212, 229 (1845) (finding ownership of navigable riverbeds necessary to give new states equal footing with the original states).

276. *United States v. California*, 332 U.S. 19, 36 (1947) ("[W]e are not persuaded to transplant the *Pollard* rule of ownership as an incident of state sovereignty in relation to inland waters out into the soil beneath the ocean, so much more a matter of national concern").

277. *Arizona v. California*, 373 U.S. 546, 597 (1963) (holding that *Pollard* and other cases involved only the shores of and lands beneath navigable waters, and cannot be understood as limiting the broad powers of the government under the Property Clause).

278. *See* Paul Conable, Comment, *Equal Footing, County Supremacy, and the Western Public Lands*, 26 ENVTL. L. 1263, 1271 (1996).

279. *See, e.g., United States v. Gardner*, 107 F.3d 1314, 1320 (9th Cir. 1997) (holding that the disclaimer clause in Nevada's statehood act is declaratory of the right already held by the United States under the Constitution to administer its property, which is constitutional).

Congressman Rob Bishop (R-Utah) that would authorize conveying public lands from the federal government to the state of Utah.<sup>280</sup> The Part also explains a new generation of local planning ordinances, which could fuel further political debate concerning the ability of local governments to control nearby federal lands.

A. *Congressman Bishop's "Grand Settlement" in Utah*

Congressman Bishop has been pushing for a so-called "grand settlement" between Utah's environmental groups, which wish to expand wilderness areas in the state, and oil and gas interests, which seek to open federal lands for fossil-fuel production.<sup>281</sup> Bishop's proposal resulted from negotiations among local and national environmental groups, recreationalists, tribes, ranchers, oil and gas companies, and county commissioners over lands in eastern Utah.<sup>282</sup> In January 2016, Bishop unveiled a draft bill that would designate a total of 4.3 million acres of new wilderness and national conservation areas, as well as 301 new miles of wild and scenic rivers.<sup>283</sup> The bill would also authorize the transfer of some federal land to the state and designate other BLM lands as priority areas for oil and gas development, grazing, and motorized vehicle use.<sup>284</sup> Although the Western Energy Alliance (representing some 450 oil and gas companies) called the bill an "important milestone," environmental groups described the bill as worse than the status quo because it contained many loopholes allowing activities usually prohibited in wilderness areas and wilderness study areas.<sup>285</sup>

The Bishop bill would also curb the authority of the President to designate national monuments under the Antiquities Act without congressional approval,<sup>286</sup> a provision that likely would have engendered an Obama veto.<sup>287</sup>

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280. See Krista Langlois, *Bishop's 'Grand Bargain' in Utah Is No Deal, Say Enviro*, HIGH COUNTRY NEWS (Feb. 22, 2016), <https://www.hcn.org/issues/48.3/the-failed-compromises-of-rep-robbishops-public-lands-masterplan>.

281. See Greg Hanscom, *New Route to End Utah's Wilderness Stalemate*, HIGH COUNTRY NEWS (July 29, 2013), [https://www.hcn.org/issues/45.12/eastern-utahs-wilderness-stalemate?b\\_start:int=0#body](https://www.hcn.org/issues/45.12/eastern-utahs-wilderness-stalemate?b_start:int=0#body).

282. See Langlois, *supra* note 280.

283. See *id.*

284. See Draft Bill to Provide Greater Certainty and Local Management of Federal Land Use in Utah, and for Other Purposes, Title XI, § 1101 (Jan. 20, 2015), [http://robbishop.house.gov/uploadedfiles/discussion\\_draft\\_20jan16.pdf](http://robbishop.house.gov/uploadedfiles/discussion_draft_20jan16.pdf).

285. The bill would sanction motorized equipment and authorize new water-storage facilities in new wilderness areas. It would also allow the state to conduct predator control, including aerial shooting, and would forbid land managers from reducing livestock numbers as a response to drought. See Langlois, *supra* note 280.

286. Title XIII of the draft bill, entitled "Long-Term Land Use Certainty," was left blank, expected to host the provision limiting the president's powers under the Antiquities Act. Bishop warned President Obama at a hearing with the White House's Director of the Council on Environmental Quality that "[t]he broad and frequent application of the Antiquities Act raises questions about the lack of transparency and consultation with local stakeholders." See Michael Lehr, *Public Land Fight in Utah: Will the President Designate Bears Ears a National Monument*, COLUM. J. OF ENVTL. L.: FIELD

This attempt at a “grand bargain”—trading modified wilderness designations for state control of oil and gas development—may gain political support in the wake of the 2016 election that united all branches of the federal government under Republican control.<sup>288</sup>

### B. Local Land Planning Ordinances

Local governments can have an important effect on public-land management. The National Forest Management Act (NFMA) and FLPMA both call for coordination of state and local plans in federal land plans.<sup>289</sup> Some local ordinances have interpreted the term “coordination” to mean government-to-government negotiations on virtually all land uses.<sup>290</sup> However, local governments have long assumed that federal-land management was outside the scope of community concern.<sup>291</sup> Recently, however, the American Legislative Exchange Council (ALEC) has drafted local ordinances challenging federal control of public lands in the West.<sup>292</sup> Encouraged by ALEC, some local

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REPORTS 7 (May 5, 2016), <http://www.columbiaenvironmentallaw.org/872-2/>. The House Appropriation Committee’s bill sent to the House that restricts the President’s authority to designate national monuments was mainly motivated by a desire to prevent designation of Bears Ears as a national monument. See Stecker, *supra* note 191.

287. See Langlois, *supra* note 280.

288. See *id.*; see also *supra* note 15 (discussing the 2016 Republican Party Platform); but see Kate Sheppard, *Sorry Republicans, Donald Trump Doesn’t Want to Sell Off Public Lands*, Huffington Post (July 21, 2016, 2:54 PM), [http://www.huffingtonpost.com/entry/cramer-trump-public-lands\\_us\\_57910d964b0bddd4d393b3](http://www.huffingtonpost.com/entry/cramer-trump-public-lands_us_57910d964b0bddd4d393b3).

289. Under NFMA, the Forest Service must “develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System, coordinated with the land and resource management planning processes of State and local governments and other Federal agencies.” 16 U.S.C. § 1604(a) (2012). FLPMA requires the Interior Secretary “to the extent consistent with the laws governing the administration of the public lands, [to] coordinate the land use inventory, planning, and management activities of or for such lands with . . . local governments within which the lands are located.” 43 U.S.C. § 1712(c)(9) (2012).

290. See, e.g., PUBLIC LANDS COUNCIL, HARNEY COUNTY’S BEGINNER’S GUIDE TO COORDINATION 5 (Sept. 2012), [http://www.co.harney.or.us/PDF\\_Files/County%20Court/public%20land%20issues/Coordination%20Handbook%20-%20Public%20Lands%20Council%20-%202012.pdf](http://www.co.harney.or.us/PDF_Files/County%20Court/public%20land%20issues/Coordination%20Handbook%20-%20Public%20Lands%20Council%20-%202012.pdf).

291. See Michelle Bryan, *Learning Both Directions: How Better Federal-Local Land Use Collaboration Can Quiet the Call for Federal Lands Transfers*, 76 MONT. L. REV. 147, 148 (2015).

292. See Brendan Fischer, *Rep. Grijalva Demands Federal Investigation into ALEC’s Role in Neo-Sagebrush Rebellion*, PRWATCH (Apr. 16, 2014), <http://www.prwatch.org/news/2014/04/12451/congressman-grijalva-requests-investigation-alecs-role-nv-range-fight>; ALEC, *Resolution Demanding That Congress Convey Title of Federal Public Lands to the States*, (Jan. 28, 2013), <https://www.alec.org/model-policy/resolution-demanding-that-congress-convey-title-of-federal-public-lands-to-the-states/>. ALEC bills fit into a broader pattern developing in the West: “Utah comes up with these ideas, passes them into law through their legislature, and through the ALEC network, [legislators] try and pass them in other states.” See Lyndsey Gilpin, *How an East Coast Think Tank Is Fueling the Land Transfer Movement*, HIGH COUNTRY NEWS (Feb. 26, 2016), <https://www.hcn.org/articles/how-an-east-coast-think-tank-is-fueling-the-land-transfer-movement> (quoting Greg Zimmerman, the policy director for the Center for Western Priorities).

governments have enacted ordinances in an effort to obtain greater control over federal public-land management.<sup>293</sup>

Although these sorts of local ordinances might not be enforceable,<sup>294</sup> they could inspire amendments to NFMA and FLPMA to make them enforceable. When federal agencies' decisions seem arbitrary to local populations, the agencies may influence local governments to oppose federal-land planning and regulation, and push for local ordinances to interfere with federal planning. The feeling of distrust toward the federal government is catalyzed by the fact that the decisions of a distant entity regarding wildlife protection, watershed conservation, and management of other natural resources can affect the grazer's ability to manage land to which they feel entitled.<sup>295</sup> Local visions of the public interest in public-land management will likely reflect the heavy influence that extractive industries can bring to bear on local communities due to the creation of local employment and contributions to both local taxes and campaign expenditures of local politicians.<sup>296</sup> Although that vision would not be consistent with national perception of the public interest, as reflected in statutes like NFMA and FLPMA, local plans could influence Congress to change those statutes. Prospects for success here seem much more likely than in any court action.

#### CONCLUSION

The Malheur Refuge was an odd place for revolt against public-land management because the local population generally accepted the refuge management plan, evidenced by the fact that there was no appeal filed after the plan's promulgation.<sup>297</sup> In fact, most of the occupiers of the wildlife refuge did not even come from Oregon.<sup>298</sup> Yet, the Bundys seized the opportunity presented by the sentencing of two local ranchers to obtain publicity for their

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293. See, e.g., BAKER COUNTY, OR., NATURAL RESOURCES PLAN (2015); see also Bryan, *supra* note 291, at 149 (arguing that the growing involvement of the local communities is the product of a lack of collaboration and inconsistent federal agency policies).

294. See *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 589 (1987) (deciding that state environmental protection laws were enforceable on federal lands but state land use laws were not).

295. See Jes Burns & Tony Schick, *Before Oregon's Armed Takeover, a Long-brewing Dispute Over Rangeland Health*, PBS NEWSHOUR (Jan. 7, 2016), <http://www.pbs.org/newshour/updates/what-is-environmental-health-and-why-did-it-trigger-oregons-armed-takeover/>; see also COGGINS & GLICKSMAN, *supra* note 182, at § 1:23.

296. See Bruce Finley, *Collapse of Colorado Coal Industry Leaves Mining Towns Unsure What's Next*, DENVER POST (May 14, 2016), <http://www.denverpost.com/2016/05/14/collapse-of-colorado-coal-industry-leaves-mining-towns-unsure-whats-next/>.

297. See U.S. FISH & WILDLIFE SERV., MALHEUR NATIONAL WILDLIFE REFUGE COMPREHENSIVE CONSERVATION PLAN: EXECUTIVE SUMMARY 1, [https://www.fws.gov/uploadedFiles/Region\\_1/NWRS/Zone\\_2/Malheur/Documents/MalheurNWR\\_FCCP\\_Exec\\_Sum.pdf](https://www.fws.gov/uploadedFiles/Region_1/NWRS/Zone_2/Malheur/Documents/MalheurNWR_FCCP_Exec_Sum.pdf). See *supra* note 76 and accompanying text.

298. Bryan M. Vance, *Faces of the Malheur Refuge Occupation Trial*, OPB NEWS (Sept. 1, 2016), <http://www.opb.org/news/series/burns-oregon-standoff-bundy-militia-news-updates/820regon820-refuge-occupation-defendants-trial-status-criminal-case/>.



cause.<sup>299</sup> Although Malheur was not the first confrontation of this kind, its length and violence (including the death of one protester) raise broader concerns in the fight opposing federal agencies' efforts to protect and restore areas of federal public lands for their recreational and ecological values.<sup>300</sup>

The Malheur occupation represents only the latest of a long history of unsuccessful opposition against the Constitution's Property Clause.<sup>301</sup> This opposition is not surprising given the deep feeling of distrust among some westerners towards the federal government, a distant entity making decisions affecting highly interested locals who usually favor commodity production over water quality, wildlife habitat, and natural resource preservation.<sup>302</sup>

The tension between these two competing interests—local interests versus national interests—can now quickly escalate into highly mediatized armed conflicts like the Malheur Refuge, due in large part to the outsized influence of social media.<sup>303</sup> However, discontents like the Bundys are misguided about the legal merits of their opposition.<sup>304</sup> Although some of those involved in the Malheur occupation may still serve prison time,<sup>305</sup> sympathizers of the Bundy cause may have better prospects in the political arena, as Congress has broad powers to dispose of public lands under two hundred years of consistent Property Clause jurisprudence.<sup>306</sup>

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299. See *supra* note 2.

300. See Les Zaitz, *Oregon Standoff Spokesman Robert 'LaVoy' Finicum Killed, Bundys in Custody After Shooting Near Burns*, OREGONIAN (Jan. 26, 2016), [http://www.oregonlive.com/821regon-standoff/2016/01/bundys\\_in\\_custody\\_one\\_militant.html](http://www.oregonlive.com/821regon-standoff/2016/01/bundys_in_custody_one_militant.html).

301. Utah's latest effort to take public lands away from the federal government also seems ill founded, as eleven attorneys general, including the Republican attorney general from Utah, recently concluded that "Congress may retain ownership of public lands indefinitely." ATTORNEY GENERAL'S REPORT, *supra* note 66, at 16. The same report also found that the Enclave Clause did not limit the scope of the Property Clause, *id.* at 2, 17–21, and that neither the equal footing nor the so-called equal sovereignty doctrines required federal conveyance of public lands to the states. *Id.* at 2–3, 22–47.

302. See Burns & Schick, *supra* note 295; see also COGGINS & GLICKSMAN, *supra* note 182, at § 1:23. The Bundy standoff seems to have emboldened other discontents to take action, although they remain unsuccessful. See Tay Wiles, *Malheur Occupation Impacts Linger Throughout the West*, HIGH COUNTRY NEWS (Oct. 4, 2016), <http://www.hcn.org/articles/ammon-bundy-malheur-standoff-effects-sagebrush-rebellion> (reporting on similar conflicts in New Mexico, Utah, Idaho, and Nevada).

303. See Bever, *supra* note 9.

304. See *supra* Part III. Although a jury eventually acquitted seven defendants involved in the Malheur occupation, this decision does not alter the legal analysis in this Article. But the decision may reflect the political prospects of the discontents. See *infra* *Postscript*.

305. Although as the postscript to this Article indicates, Ammon Bundy and six other defendants surprisingly were acquitted of a federal conspiracy charge in late 2016, others still face charges and will go to trial in early 2017. Others pleaded guilty prior to the Bundy trial. See Courtney Sherwood & Kirk Johnson, *Bundy Brothers Acquitted in Takeover of Oregon Wildlife Refuge*, N.Y. TIMES (Oct. 27, 2016), [https://www.nytimes.com/2016/10/28/us/bundy-brothers-acquitted-in-takeover-of-oregon-wildlife-refuge.html?\\_r=0](https://www.nytimes.com/2016/10/28/us/bundy-brothers-acquitted-in-takeover-of-oregon-wildlife-refuge.html?_r=0).

306. See *supra* Part II. This broad authority was recently recognized in the report by eleven western attorneys general. See ATTORNEY GENERAL'S REPORT, *supra* note 66, at 4–21 (concluding the Property Clause empowers the federal government to indefinitely retain public lands in federal ownership, and that the Enclave Clause imposes no limits on the Property Clause).

Because federal lands have always been central to Americans' vision of their identity,<sup>307</sup> Congress and the President should exercise great caution in any reform of public-land-management policies.<sup>308</sup> Divestiture would radically change public-land law—even the Western states attorney generals agree<sup>309</sup>—and is inconsistent with its long history of anti-monopoly policy,<sup>310</sup> and it would surely engender great opposition and litigation.<sup>311</sup>

The Malheur Refuge standoff might not be the last of its kind in Oregon. One might think of Justice Oliver Wendell Holmes's insight about possession sinking into one's being, the so-called "endowment effect" (or divestiture aversion).<sup>312</sup> This seems especially characteristic of the psychology of grazers who have used federal lands for generations, even without any recognized land ownership rights.

In any event, the disturbing confrontation that took place at the Malheur Refuge shed light on an alleged lack of communication between federal agencies and local populations. If more federal-local coordination is necessary, armed insurrection by opportunistic ranchers like the Bundys, taking advantage of a mediatised event to advance their personal agendas, is hardly the vehicle to produce it. Nor is wholesale conveyance of federal lands, a position adopted by the 2016 Republican Party platform.<sup>313</sup> Gifting land to states that cannot afford the burden of managing federal lands could lead to the privatization of a common heritage possessed by all Americans.<sup>314</sup> Improved cooperation

307. Public-lands retention was the great achievement of the Progressive Conservation Era. The national park system the Progressives inaugurated is not only among the most popular federal programs (although federal land reservations antedated the Progressives, reaching back to pre-constitutional America, *see supra* note 118), it is also quite central to Americans' vision of themselves. *See, e.g.,* PETER COATES, *NATURE: WESTERN ATTITUDES SINCE ANCIENT TIMES* 108 (1998):

Nature was a vital cohesive force in a country that lacked the glue of ethnic, religious and racial homogeneity. Reinforcing the shared commitment to republicanism, democracy and free enterprise, a literal sense of common ground could mitigate the centrifugal tendencies of heterogeneity. The fabled frontier thesis of Frederick Jackson Turner (1893), which rooted American culture, character and intellect firmly in the unmodified nature that colonists encountered on the frontier, represented the culmination of a way of thinking about nature as a moral quality imbued with a redemptive virtue that rubbed off almost magically on those who came into contact with it, metamorphosing Europeans into Americans.

308. *See* Spencer Sunshine, *Gunning for Office: Oregon's Patriot Movement and the May 2016 Primary*, POL. RES. (Apr. 19, 2016), <http://www.politicalresearch.org/2016/04/19/gunning-for-office-oregons-patriot-movement-and-the-may-2016-primary/#sthash.kjJcBnVe.rYrI9rNI.dpbs>.

309. *See supra* notes 66, 301, 306 and accompanying text.

310. *See* Blumm & Tebeau, *supra* note 29.

311. There might be limits imposed on the federal Property Clause power by the public trust doctrine, assuming it constrains the federal government. *See* Blumm & Schaffer, *supra* note 26.

312. Oliver Wendell Holmes, *The Path of Law*, 10 HARV. L. REV. 457, 477 (1897) ("It is in the nature of man's mind. A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it.")

313. *See supra* note 15 and accompanying text.

314. *See* Leslie Weldon, Deputy Chief, Nat'l Forest Sys., A Precious Heritage: Speech to the American Wildlife Conservation Partners Meeting (Mar. 10, 2015), <http://www.fs.fed.us/speeches/precious-heritage>.

between federal-land managers and local communities obviously would promote a better means of addressing local concerns than the Bundys' violent insurrection.

Both of the major land-management statutes—FLPMA and NFMA—require the federal agencies to coordinate with states and local governments.<sup>315</sup> States and localities are more likely now than in the past to seek to enforce those provisions. Some localities are even preparing land plans for federal lands in their vicinity.<sup>316</sup> Although limits exist as to what local plans can accomplish,<sup>317</sup> they will doubtless achieve more than the Bundys' clumsy effort at constitutional revolution.

In a larger sense, the Bundy occupation reflects a conflict between concepts of land ownership and usufructuary rights,<sup>318</sup> which only allow the use of the land without altering or impairing it. Both are property rights, but usufructuary rights—like federal grazing rights—can ripen into land ownership only in unusual circumstances, none of which are present in the case of federal-land grazing.<sup>319</sup> Moreover, the general public has great affinity to the lands it owns and uses, and therefore feels the endowment effect identified by Justice Holmes no less strongly than public-land grazers.<sup>320</sup> Both have expectations, and the general public's are much more widely possessed and more firmly grounded in law and history.

Despite the lack of any colorable legal merit of the Bundy occupation, the effort illustrates some political support for a revolution in federal public-land management.<sup>321</sup> Yet, before states launch serious efforts to de-federalize public lands, they should consider whether they can afford to manage the lands and continue the current subsidies afforded to users like grazers.<sup>322</sup> Grazers benefit from low fees and federal programs like those supporting predator-control

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315. See *supra* note 289 and accompanying text.

316. See, e.g., BAKER COUNTY, OR., NATURAL RESOURCES PLAN (2015), [http://www.bakercounty.org/commissioners/pdfs/Adopted\\_Natural\\_Resource\\_Plan\\_20160620C.pdf](http://www.bakercounty.org/commissioners/pdfs/Adopted_Natural_Resource_Plan_20160620C.pdf); GRANT COUNTY, OR., PUBLIC LANDS NATURAL RESOURCES PLAN (2015), <https://www.documentcloud.org/documents/2852061-Natural-Resources-Plan.html>.

317. See *supra* note 294.

318. Usufructuary rights are use rights—like grazing, timber harvesting, or mining—on lands owned by another.

319. See *supra* notes 235–248 and accompanying text (discussing the doctrines of accession, emblements, and constituent elements of the land). Adverse possession, a state common law doctrine, is inapplicable on federal lands. Every statehood act includes a disclaimer of state land applying to federal lands. See, e.g., Utah Enabling Act, § 3, ch. 138, 28 Stat. 107, 108 (1894) (“[T]he people inhabiting said proposed State do agree that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof”). Even if it applied, an adverse possession claim would founder because federal grazing permits would defeat any claim of adversity—an essential element of a successful adverse possession case. 28 U.S.C. § 2409(a)(n) (2012); see JOHN G. SPRANKLING & RAYMOND R. COLETTA, *PROPERTY: A CONTEMPORARY APPROACH* 18 (2d ed. 2012).

320. See *supra* note 312 and accompanying text.

321. See *supra* notes 281–288 and accompanying text; see *infra* *Postscript*.

322. See Bale, *supra* note 54.

measures.<sup>323</sup> Existing federal subsidies are perhaps unobjectionable if they provide the public widespread benefits like maintaining water quality standards and promoting watershed and wildlife protection, but the restraints that accompany such measures are the root cause of the discontents' dissatisfaction with federal control.

Any serious measures to transfer federal public lands to the states must also possess publicly enforceable conditions ensuring the continuation of those public benefits and prohibitions against privatization or monopolization.<sup>324</sup> Given recent evidence that many Western counties oppose land transfers to the states,<sup>325</sup> states should weigh whether such transfers actually further local interests. But in the final analysis, given that even politically unpopular designations of conservation units like Grand Staircase-Escalante National Monument in southeastern Utah produced widespread economic benefits,<sup>326</sup> the discontents' political agenda should meet with congressional skepticism. The long-term intergenerational costs of the loss of federal public-land rights would clearly outweigh any short-term profits from state conveyancing or privatization.

#### POSTSCRIPT

On October 27, 2016, while this article was in press, the jury in the Malheur occupation case acquitted the occupants of a conspiracy to deprive federal employees of their right to work and weapons charges. There's no

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323. See *id.*; see also Jim Caswell, Opinion, *Keep Public Lands in Public Hands*, IDAHO STATESMAN (Jan. 27, 2016), <http://www.idahostatesman.com/opinion/readers-opinion/article/56933223.html>; see also Rebecca Worby, *In Wyoming, a Cautious Public Lands Victory*, HIGH COUNTRY NEWS, Feb. 3, 2017, <http://www.hcn.org/articles/in-wyoming-a-cautious-public-lands-victory> (last visited Feb. 4, 2017) (discussing the Wyoming Senate President's dropping of a proposed state constitutional amendment which would have facilitated federal land transfers to the state, opposed by a coalition of sportsmen, recreationalists, and conservationists called "Keep It Public, Wyoming"). Two days earlier, on February 1, Rep. Jason Chaffetz (R-Utah) withdrew his bill, H.R. 621, the "Disposal of Excess Federal Lands Act of 2017," which would have called for the selling of some 3.3 million acres of federal land across ten states. The reason for the withdrawal was opposition from hunters and fishers. See Jennifer Yachnin, *Under pressure, Chaffetz withdraws bill to sell 3.3M acres*, Greenwire (Feb. 2, 2017), <http://www.eenews.net/greenwire/stories/1060049460/search?keyword=+Rep.+Jason+Chaffetz+%28R-Utah%29> (last visited Feb. 4, 2017).

324. Antimonopoly has been a cardinal principle of public-land law for centuries. See *supra* notes 29, 311 and accompanying text.

325. See Tay Wiles, *Land Transfer Support, County by County*, HIGH COUNTRY NEWS (July 25, 2016), <https://www.hcn.org/issues/48.12/battles-over-whether-to-support-the-american-lands-council-rage-on-county-by-county> (identifying, preliminarily, about 15 counties in the 11 western states—generally the more populous counties—opposing or not accepting the efforts of the American Lands Council to generate support to transfer federal lands to the states).

326. See Phil Taylor, *National Monuments: Grand Staircase-Escalante Winners and Losers*, GREENWIRE (July 14, 2016), <http://www.eenews.net/stories/1060040270> (citing the mayor of the town of Escalante stating that the economic winners were businesses like hotels, campgrounds, and restaurants in the booming town, while the losers were coal companies which proposed large-scale mining of the area).

assured way of knowing why the jury acquitted the occupants.<sup>327</sup> Perhaps the case was poorly prosecuted. Perhaps the government did a poor job of voir dire in selecting the jury. Perhaps the jury instructions were flawed. Perhaps the jury did not understand the law underpinning the government's authority to own and manage public lands. Perhaps the result was simply jury nullification of laws the jury members did not like. There is a long history of jury nullification dating back to the eighteenth century in pre-Revolutionary America.<sup>328</sup>

Whatever the reason for the acquittal, the result of the case does nothing to change the underlying law discussed in this article. But the result could foster political momentum to encourage Congress to exercise its constitutional authority under the Property Clause to dispose of federal public lands to states or private entities. There may be some limits as to those lands which Congress may dispose,<sup>329</sup> but those limits are largely undefined.

The overriding lesson from the Malheur occupation may be that although the underlying law clearly supports federal ownership of public lands, the discontents' claims have political resonance. Whether they have sufficient political resonance to support congressional disposition is a question that will be answered in the coming years. One would hope that the issue would be debated openly and publicly by elected officials, not accomplished through low-level congressional appropriation riders or other subterfuges. The American people—all of the American public, not just those in close proximity to the lands they hope to control—deserve to be involved in what would be an historic change in the relationship that the American people have had with their federal public lands.

Twelve days after the jury acquitted the Malheur defendants, Donald J. Trump was elected the forty-fifth president of the United States. On December 13, 2016, the press reported that the president-elect chose Montana Republican Congressman Ryan Zinke as Secretary of Interior after deciding against another finalist for the position, Cathy McMorris Rodgers, a Republican

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327. After the verdict, one juror explained that the jury did not think it could rely on the defendants' "defining actions" to convict them but instead to determine if "any agreement was made with an illegal object in mind," which the juror stated was "lost on the prosecution throughout." That juror suggested that the jury was influenced by the distinction that the defense lawyers drew between the "'effect' of the occupation—which undoubtedly kept federal employees from doing their jobs—from the 'intent' of the occupiers," noting that "[i]nference, while possibly compelling, proved to be insulting or inadequate to 12 diversely situated people as a means to convict" because "[t]he air of triumphalism that the prosecution brought was not lost on any of us, nor was it warranted given their burden of proof." See Maxine Bernstein, *Juror: Prosecutors Failed to Prove 'Intent,' to Impede Federal Workers*, OREGONIAN (Oct. 29, 2016), [http://www.oregonlive.com/oregon-standoff/2016/10/juror\\_4\\_prosecutors\\_in\\_oregon.html](http://www.oregonlive.com/oregon-standoff/2016/10/juror_4_prosecutors_in_oregon.html) (quoting from Juror 4, a college student at Marylhurst University, who thought the government failed to prove the fundamental elements of the alleged conspiracy charge).

328. See, e.g., Zenger Trial, 17 How. St. Tr. 675, 706, 716, 722 (1735) (acquitting newspaper publisher John Peter Zenger of libel because the accusations he published about Governor Crosby were accurate).

329. See *supra* notes 26, 311 and accompanying text.

Congressmen.<sup>330</sup> The apparent reason for choosing Zinke over McMorris Rodgers—who was favored by the Republican establishment—was due to the influence of Donald J. Trump, Jr., who opposed her over her past support for selling off federal public lands.<sup>331</sup> Thus, the early indication is that the Trump Administration will not favor large-scale parceling off of federal public lands to Western states. Some conservationists hold out hope that Secretary Zinke will become a public lands champion in the tradition of Teddy Roosevelt.<sup>332</sup>

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330. See Juliet Eilperin, *Trump taps Montana congressman Ryan Zinke as interior secretary*, WASH. POST (Dec. 13, 2016), [https://www.washingtonpost.com/news/energy-environment/wp/2016/12/13/trump-taps-montana-congressman-ryan-zinke-as-interior-secretary/?utm\\_term=.20a70e6da3b5](https://www.washingtonpost.com/news/energy-environment/wp/2016/12/13/trump-taps-montana-congressman-ryan-zinke-as-interior-secretary/?utm_term=.20a70e6da3b5).

331. Jonathan Martin & Alexander Burns, *McConnell Eyed Ryan Zinke for a Senate Seat. Donald Trump Had Other Ideas*, N.Y. TIMES (Dec. 17, 2016), [http://www.nytimes.com/2016/12/16/us/politics/ryan-zinke-mitch-mcconnell-trump-cabinet.html?\\_r=0](http://www.nytimes.com/2016/12/16/us/politics/ryan-zinke-mitch-mcconnell-trump-cabinet.html?_r=0).

332. See Ryan Zinke, *Guest Opinion: A Conservative Case for Conservation*, BILLINGS GAZETTE (April 24, 2016), [http://billingsgazette.com/news/opinion/guest/guest-opinion-a-conservative-case-for-conservation/article\\_d23e5f2a-609e-5413-af98-819d15d365aa.html](http://billingsgazette.com/news/opinion/guest/guest-opinion-a-conservative-case-for-conservation/article_d23e5f2a-609e-5413-af98-819d15d365aa.html) (in which then-Congressman Zinke drew a parallel to the conservation measures he supports and those supported by Roosevelt).

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