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## Searching for Cliven Bundy: The Constitution and Public Lands

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# SEARCHING FOR CLIVEN BUNDY: THE CONSTITUTION AND PUBLIC LANDS

Ian Bartrum\*

*Jerry Bondi: “Jack, I’m going to tell you something. The world that you live in doesn’t exist. Maybe it never did. Out there is the real world. And it’s got real borders and real fences, real laws and real trouble. And you either go by the rules or you lose. You lose everything.”*

*Jack Burns: “You can always keep something.”*

*-Lonely Are the Brave<sup>1</sup>*

## INTRODUCTION

On September 14th, 1847, under cover of darkness, General Antonio López de Santa Anna and 9,000 loyal troops withdrew from Mexico City, effectively surrendering the capital to General Winfield Scott’s invading American forces.<sup>2</sup> When interim Mexican President Manuel de la Peña y Peña could establish a stable governing coalition, he sent representatives to entreat with American commissioner Nicholas Trist at the Villa de Guadalupe, near a local shrine to Mexico’s patron saint.<sup>3</sup> On February 2nd, 1848, both sides put their hands to a final treaty, in which Mexico ceded nearly half of its territory—including most of modern day New Mexico, Arizona, Nevada, and Utah, parts of Colorado and Wyoming, and all of California—for the price of 15 million American dollars. The Senate ratified the Treaty of Guadalupe Hidalgo on March 10th, and, seemingly, America’s continental destiny was manifest.<sup>4</sup>

Through the early 1850s, settling Mormons claimed territorial rights over much of modern Nevada and the gold-rush trail to California.<sup>5</sup> By the end of the decade, however, they had largely withdrawn to Utah and the Arizona Strip; and, with the Civil War looming, Congress established a distinct Nevada Territory in 1861.<sup>6</sup> Congressional Republicans hoped the new territory would quickly accede

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<sup>1</sup> LONELY ARE THE BRAVE (Universal Pictures 1962) (written by Dalton Trumbo).

<sup>2</sup> For an excellent account of the end of the Mexican War, see generally RICHARD GRISWOLD DEL CASTILLO, THE TREATY OF GUADALUPE HIDALGO: A LEGACY OF CONFLICT 30–42 (1990).

<sup>3</sup> *Id.* at 41 fig.1.

<sup>4</sup> *Id.* at 46.

<sup>5</sup> For an excellent and fascinating overview of this period, see generally MICHAEL S. GREEN, NEVADA: A HISTORY OF THE SILVER STATE 63–82 (2015).

<sup>6</sup> *Id.* at 81–82.

to statehood, thereby providing three new electoral votes for Abraham Lincoln, and an additional vote for the 13th Amendment.<sup>7</sup> Thus, as the 1864 election drew near, Congress hastily passed an act to open Nevada's path to statehood, leaving only the final power of approval to Lincoln himself.<sup>8</sup> Nevadans quickly assembled a constitutional convention in Carson City in July, and then held a successful public vote on September 7th.<sup>9</sup> On October 31, just a week before the election, Lincoln officially declared Nevada a state.<sup>10</sup>

An uncontroversial provision of both the Enabling Act and the state's Constitution promised that Nevadans would, among other things, "forever disclaim all right and title to unappropriated public lands lying within [their] territory, [which] shall be and remain at the sole and entire disposition of the United States."<sup>11</sup> Such "disclaimer clauses" were commonplace in state enabling acts, primarily as a mechanism for quieting title to disputed tracts, so that Congress might eventually make clean transfer to future parties.<sup>12</sup> When Nevada became a state, virtually all of its bounded territory was thus disclaimed.<sup>13</sup> The Enabling Act went on, however, to promise that Congress would grant a portion of this unappropriated land to the new state for the construction of common schools, public buildings, and a state prison.<sup>14</sup> In addition, five percent of Congress's

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<sup>7</sup> *Id.* at 90.

<sup>8</sup> MICHAEL W. BOWERS, *SAGEBRUSH STATE: NEVADA'S HISTORY, GOVERNMENT, AND POLITICS* 23 (2d ed. 2002).

<sup>9</sup> *Id.*

<sup>10</sup> GREEN, *supra* note 5, at 91. Republicans would basically sweep the state elections, and the presidential vote—though only two of Nevada's three electors actually succeeded in voting. *Id.*

<sup>11</sup> NEV. CONST. ordinance 1 (1864); Nevada Enabling Act § 4, ch. 36, 13 Stat. 30 (1864). The state further promised to: (1) outlaw slavery; (2) guarantee the freedom of religion; (3) tax nonresident landholders at the same rate as residents; and (4) not impose any taxes on federal lands without congressional approval. NEV. CONST. ordinance 1; Nevada Enabling Act § 4. The entire constitution received overwhelming popular support, passing by an 8-1 margin. BOWERS, *supra* note 8, at 23.

<sup>12</sup> Similar language appears in enabling acts dating all the way back to the Northwest Ordinance of 1787, the particular language of which clearly explains these clauses' rationale: "The legislatures of . . . new States, shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the bona fide purchasers." Northwest Ordinance art. 4 (July 13, 1787), *in* 32 JOURNALS OF THE CONTINENTAL CONGRESS 334, 341 (Worthington C. Ford et. al. eds., 1904–1937). Similar clauses appear in the acts enabling all of the western continental states. See Steven Miller, *Broken Compact: The Hollowing-Out of Nevada Statehood*, NEV. POL'Y RES. INST., [http://www.npri.org/docLib/20130813\\_NPRIBrokenCompactReport.pdf](http://www.npri.org/docLib/20130813_NPRIBrokenCompactReport.pdf) [<https://perma.cc/B83N-N9SJ>] (last visited Feb. 5, 2018).

<sup>13</sup> There are, apparently, no precise records of the acreage thus disclaimed, as surveying efforts did not commence until the following year—though the Nevada State Lands agency has said that "very little land had been claimed for private ownership." Email from Diane M. Lightwood, Nev. State Data Ctr. Coordinator, Nev. State Library, to Jennifer Gross, Head of Collections, Wieners-Rogers Law Library, William S. Boyd School of Law (Oct. 17, 2017, 17:00:00 PDT) (on file with author).

<sup>14</sup> Nevada Enabling Act §§ 7–9. Congress promptly ceded more than 5 million acres of land for these purposes in 1865. NEVADA SURVEYOR-GENERAL, ANNUAL REPORT FOR THE YEAR OF 1865 5–6 (1866), <http://www.nsladigitalcollections.org/browse/surveyorgeneralofnevada>

profit on all future land sales would go to the state to pay for roads and irrigation projects.<sup>15</sup> At present, roughly 80% of the land within Nevada's boundaries remains under federal management.<sup>16</sup>

For the next half century, relatively few settlers tried to wrangle a living out of Nevada's arid rangelands. That changed in the early 1930s, however, as the Dust Bowl and the Great Depression conspired to drive thousands of migrant farmers west, in search of new lands and new lives.<sup>17</sup> Overgrazing and land disputes, together with a push to modernize agricultural practices, led Congress to pass the Taylor Grazing Act in 1934.<sup>18</sup> The Act divided federal lands into grazing districts for federal management and agricultural improvement, and the Bureau of Land Management (BLM) now administers over 150 million acres of federal rangeland for public use.<sup>19</sup> The Act also established a permitting system, whereby ranchers could pay fees to graze their cattle on public lands.<sup>20</sup> In 1976, Congress passed the Federal Land Policy and Management Act (FLPMA), which modernized the permitting system, and, more controversially, declared that "the public lands shall be retained in Federal ownership, unless . . . it is determined that disposal of a particular parcel will serve the national interest."<sup>21</sup>

On April 5th, 2014, BLM temporarily closed over 500,000 acres of public land in Clark and Lincoln Counties in order to impound cattle grazing there in violation of a federal district court order.<sup>22</sup> These cattle belonged, principally, to Cliven Bundy and his family—ranchers from Bunkerville, Nevada—who had stopped paying BLM permitting fees in the early 1990s.<sup>23</sup> In anticipation of the

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reports18651930#/item/000000083100669/view [https://perma.cc/YV9C-W3NG] (last visited Feb. 5, 2018).

<sup>15</sup> Nevada Enabling Act § 10.

<sup>16</sup> This number is down from roughly 86% in 1990. CAROL H. VINCENT ET AL., CONG. RES. SERV., R-42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 8, 16 (2017), <https://fas.org/sgp/crs/misc/R42346.pdf> [https://perma.cc/73MW-UWKJ].

<sup>17</sup> See Virgil Hurlburt, *The Taylor Grazing Act*, 11 J. LAND & PUB. UTIL. ECON. 203, 203–04 (1935) (recounting the Act's historical and economic background).

<sup>18</sup> Taylor Grazing Act, ch. 865, 73 Stat. 1269 (1934) (codified as amended at 43 U.S.C. §§ 315–316o (2012)) [hereinafter "Grazing Act"].

<sup>19</sup> The Taylor Grazing Act originally created the Department of Interior Grazing Division for this purpose; the Grazing Division combined with the General Land Office to form BLM in 1946. Vincent et. al., *supra* note 16, at 4. For the basics of rangeland management, see generally *Bureau of Land Management's Rangeland Administration System*, U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT.: RANGELAND ADMIN. SYS., <https://www.blm.gov/ras/> [https://perma.cc/E4CQ-D77Z] (last updated Dec. 4, 2012).

<sup>20</sup> Grazing Act § 3.

<sup>21</sup> Federal Land Policy and Management Act, 43 U.S.C. § 1701 (2012); see also *id.* § 1751. Passage of FLPMA instigated the so-called "Sagebrush Rebellion" of the late 1970s.

<sup>22</sup> Tom Ragan, *Feds Start Rounding Up Bundy's Cattle in Northeastern Clark County*, L.V. REV.-J. (April 6, 2014, 7:57 AM), <https://www.reviewjournal.com/news/bundy-blm/feds-start-rounding-up-bundys-cattle-in-northeastern-clark-county/> [https://perma.cc/ULJ9-NPUF]. For the District Court order, see generally *United States v. Bundy*, No. 2:12-cv-0804-LDG-GWF, 2013 WL 3463610 (D. Nev. July 9, 2013).

<sup>23</sup> Dan Hernandez & Joseph Langdon, *Federal Rangers Face Off Against Armed Protestors in Nevada Range War*, GUARDIAN (April 14, 2014, 9:36 AM), <https://www.theguardian.com/world/2014/apr/13/nevada-bundy-cattle-ranch-armed-protesters> [https://perma.cc/Y3V4-9P49].

roundup, the Bundys put out a distress call to militia-like groups around the country, and seven days later, an armed crowd confronted federal and state officers in the desert near Gold Butte.<sup>24</sup> Another week later, federal authorities backed down, citing “serious concern[s] about the safety of employees and members of the public.”<sup>25</sup> Then, two years later, Cliven Bundy’s sons, Ammon and Ryan, led a 41-day occupation of the Malheur National Wildlife Refuge near Burns, Oregon.<sup>26</sup> An Oregon jury refused to convict the Bundy brothers, and—citing “flagrant” prosecutorial misconduct—Judge Gloria Navarro dismissed with prejudice all charges stemming from the Nevada showdown.<sup>27</sup>

To some, the Bundys are heroic republican farmers in the best Jeffersonian tradition—taking a principled stand against tyrannical federal overreach.<sup>28</sup> To others, they are welfare cowboys—tragically exploiting subsidized common lands on a fabricated constitutional pretense.<sup>29</sup> To many in law enforcement, they are simply outlaws—blowing a dog whistle for domestic terrorist groups like the Sovereign Citizens in a dangerous game of chicken with federal agents.<sup>30</sup>

According to friends, Cliven Bundy is a quiet, private man and sincerely believes in the righteousness of his cause, and in the legal case he thinks he can make.<sup>31</sup> In truth, however, the logic of that argument is often difficult to make

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<sup>24</sup> *Id.* For a version of this call, emailed to the militia members of Operation Military Aid, see generally Superseding Criminal Indictment at 25, United States v. Bundy, 2:16-CR-00046-GMN-PAL (D. Nev. March 2, 2016), <https://www.justice.gov/opa/file/830656/download> [<https://perma.cc/T33A-PEGH>] [hereinafter “Indictment”].

<sup>25</sup> Jaime Fuller, *The Long Fight Between the Bundys and the Federal Government, From 1989 to Today*, WASH. POST (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/?utm\\_term=.126e5e0b419e](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/?utm_term=.126e5e0b419e) [<https://perma.cc/XL8P-ZDUN>].

<sup>26</sup> See generally Carissa Wolf, Peter Holley & Wesley Lowery, *Armed Men, Led by Bundy Brothers, Take Over Federal Building in Rural Oregon*, WASH. POST (Jan. 3, 2016), [https://www.washingtonpost.com/news/post-nation/wp/2016/01/03/armed-militia-bundy-brothers-take-over-federal-building-in-rural-oregon/?hpid=hp\\_rhp-top-table-main\\_no-name%3Ahomepage%2Fstory&tid=a\\_inl&utm\\_term=.a3f838d5d832](https://www.washingtonpost.com/news/post-nation/wp/2016/01/03/armed-militia-bundy-brothers-take-over-federal-building-in-rural-oregon/?hpid=hp_rhp-top-table-main_no-name%3Ahomepage%2Fstory&tid=a_inl&utm_term=.a3f838d5d832) [<https://perma.cc/G8QG-T799>].

<sup>27</sup> 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) [<https://perma.cc/L6UP-M669>]; Ken Ritter, *Cliven Bundy Emerges Free, Defiant After Nevada Case Tossed*, ASSOCIATED PRESS, (Jan. 8, 2018), <https://www.apnews.com/a5c9d9736cea4d5a94f6cdb1528bee8d> [<https://perma.cc/92MW-JJY6>].

<sup>28</sup> E.g., Laurie Roberts, *Arizona Legislators See Cliven Bundy as a Hero?*, AZ CENT. (April 10, 2014), <http://www.azcentral.com/story/laurie-roberts/2014/04/19/bundy-livingston/7873813/> [<https://perma.cc/3UMU-39M5>].

<sup>29</sup> E.g., Ron Eachus, *Nevada Rancher Is Just a Welfare Cowboy*, STATESMAN J. (April 21, 2014), <http://www.statesmanjournal.com/story/opinion/2014/04/22/nevada-rancher-is-just-a-welfare-cowboy/7988891/> [<https://perma.cc/7WGM-V3HN>].

<sup>30</sup> See, e.g., J. Oliver Conroy, *They Hate the US Government, and They’re Multiplying: The Terrifying Rise of ‘Sovereign Citizens,’* GUARDIAN (May 15, 2017), <https://www.theguardian.com/world/2017/may/15/sovereign-citizens-rightwing-terrorism-hate-us-government> [<https://perma.cc/8JXJ-5QG9>].

<sup>31</sup> Interview with Michael Stickler (Cliven Bundy biographer) (October 17, 2017) (notes on file with author).

out, and courts and commentators alike have generally dismissed it out of hand.<sup>32</sup> In this essay, I hope to piece Bundy's legal position together as completely and plausibly as I can—to make the best case I can on his behalf—before turning a critical eye on his claims.

To that end, the first section below explores the arguments that Bundy has made about preemptive or prescriptive property rights, federal property retention, and the equal footing doctrine. Because these claims sometimes seem cobbled together a bit incoherently, the second section considers separately the legal roots of each constituent theory. Finally, the third section analyzes the constitutional claims within the practical modalities of constitutional argument.<sup>33</sup> For textual, historical, and structural reasons, I ultimately conclude that Bundy has failed to make a persuasive case—though he has undoubtedly tapped into a powerful current of modern constitutional ethos.

### I. CLIVEN BUNDY'S STORY

As Cliven Bundy tells it, his ancestors traveled west in 1847 with Mormon missionaries to settle near Bunkerville, when it was still Mexican territory.<sup>34</sup> If that is true, the family was nominally subject to three different political regimes over the next 17 years: the Gobierno Federal de Mexico, the United States Congress, and the State of Nevada.<sup>35</sup> More importantly, from Bundy's perspective, his ancestors began putting the land and water to beneficial use even before they came under Congressional control, and in so doing established "preemptive" claims—essentially, in Bundy's mind, squatters' rights—to the property.<sup>36</sup>

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<sup>32</sup> See, e.g., *United States v. Bundy*, No. CV-S-98-531-JBR, 1998 U.S. Dist. LEXIS 23835 (D. Nev. 1998); *United States v. Bundy*, No. 2:12-cv-0804-LDG-GWF, 2013 WL 3463610 (D. Nev. 2013).

<sup>33</sup> For more on Philip Bobbitt's description of legitimate constitutional practice, see generally: PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1980); accord Ian Bartrum, *The Modalities of Constitutional Argument: A Primer*, in LINDA H. EDWARDS, *READINGS IN PERSUASION: BRIEFS THAT CHANGED THE WORLD* (2012).

<sup>34</sup> MICHAEL STICKLER, *CLIVEN BUNDY: AMERICAN TERRORIST PATRIOT* 93–95 (2017).

<sup>35</sup> I note here, for lack of a better place, that Bundy has sometimes claimed that his ranch fell within either the Utah or Arizona Territory until Congress moved the Nevada border east and south in 1866–67. *Id.* at 98–99. In this way, he argues that the Nevada Disclaimer Clause does not apply to the relevant property, which must therefore belong to the state. *Id.* This is an interesting and creative argument, especially because Nevada's consenting legislation speaks of "additional territory ceded by the United States." See *Joint Resolution in Relation to the Boundaries of the State of Nevada, and the Acceptance of Additional Territory Ceded by the United States to this State*, in *STATUTES OF THE STATE OF NEVADA FOR 1867*, at 145 (1867). Upon careful examination, however, it turns out that Congress spoke only of changed "boundaries," and made even this enlargement expressly subject to the conditions "provided for and consented to in the constitution of the State of Nevada." See *Act Concerning the Boundaries of the State of Nevada*, ch. 73, 14 Stat. 43 (1866). When the Nevada Legislature consented to the new political boundaries, then, it did so under the terms of the state constitution—including, of course, the Disclaimer Clause. Thus, all unappropriated lands remained in federal ownership.

<sup>36</sup> See STICKLER, *supra* note 34, at 93–95. Bundy characterizes these as "ancestral" rights, and suggests that they include "his water rights, his grazing rights, his property rights in the way of range improvements, and his inalienable rights to live in a way that makes his life full and

Though his great-grandfather moved to the Arizona Strip for a time, Bundy says his mother's family continued to ranch the Bunkerville land through the homesteading era and into the Taylor Grazing and FLPMA eras; and that they, like others, initially welcomed federal management.<sup>37</sup> In the early 1990s, however, as BLM began to protect habitat for the newly endangered desert tortoise, Bundy chafed at ever more restrictive grazing regulations.<sup>38</sup> When he came to believe that BLM cared more about environmentalists than ranchers, he says he "fired" the agency and stopped paying grazing fees.<sup>39</sup>

Bundy also makes several constitutional arguments. He says that the federal government has no legal authority to acquire or own land within a state's territorial boundaries, unless it is land purchased and used pursuant to the so-called Enclave Clause.<sup>40</sup> Despite contrary language in, among other places, the Property Clause, Bundy argues that the federal government must dispose of all its enclosed landholdings at the time a territory becomes a state.<sup>41</sup> He bases this counterintuitive claim largely on the so-called equal footing doctrine, which he says ensures that each new state enters the Union with the same title to public lands that the original thirteen states enjoyed.<sup>42</sup> This means, to Bundy at least, that virtually all of the land within Nevada's boundaries became state land in 1864. And if anyone has the right to regulate his grazing practices, it is the state, or perhaps the Clark County Sheriff—but not the federal government.

Bundy, by his own admission, is no lawyer, and it should be no surprise that his legalistic claims sometimes seem to get confused in the storytelling. In the subsections that follow, I try to clear up this confusion and present the *best* legal case for each of Bundy's propositions. He did not, in other words, invent these arguments out of whole cloth—there are academics and other lawyers who have

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complete (happy)." *Id.* at 92–93. He also claims to have something like an easement or prescriptive rights over the land. *Id.* at 117.

<sup>37</sup> *Id.* at 92. Bundy points to a statue of a maternal relative in Mesquite as evidence of this history. *Id.* On the initial federal management: "[T]he ranchers saw the fees they would pay for services that would be provided to them and that the fee was reasonable. So it made sense." *Id.* at 122. In this way, Bundy seems to suggest that he entered into some sort of contract for services with BLM. *Id.*

<sup>38</sup> *Id.* at 126. The desert tortoise was first listed as endangered under the Endangered Species Act in 1990. 55 Fed. Reg. 12178 (April 2, 1990).

<sup>39</sup> STICKLER, *supra* note 34, at 124–25.

<sup>40</sup> *Id.* at 95–96. The Enclave Clause authorizes Congress,

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

U.S. CONST. art. I, sec. 8, cl. 17.

<sup>41</sup> The Property Clause provides:

The Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

U.S. CONST. art. IV, sec. 3.

<sup>42</sup> STICKLER, *supra* note 34, at 105.

made similar claims—and, rather than knock down a strawman, I hope to put Bundy’s case in its most coherent and favorable legal form before raising my objections.

## II. PROPERTY CLAIMS: PREEMPTIVE OR PRESCRIPTIVE RIGHTS

These are difficult cases to make on Bundy’s behalf.<sup>43</sup> It is difficult not because preemptive and prescriptive property rights do not exist, but because the facts—even if we take Bundy’s own account entirely at face value—do not actually establish any such claims. With that said, however, I will lay out the legal groundwork for preemptive and prescriptive rights, before explaining why Bundy cannot assert them.

### A. *Preemptive Rights*

The first way that the Bundys might have acquired preemptive property rights is under the federal Preemption Act of 1841.<sup>44</sup> When the Panic of 1837 crushed the hopes of many western squatters, Congress—still eager to promote settlement—passed the Preemption Act to help protect those pioneers “who have spent two years of trial and hardship together with large sums of money in improving their lands [and who] would be wholly unable to purchase them even at the minimum [market] price.”<sup>45</sup> The Act provided that a settler could venture onto surveyed public land, stake and improve a claim, and then enjoy a right of first refusal to purchase up to 160 acres at a minimum price of \$1.25 per acre.<sup>46</sup> To be eligible, a settler had to: be the head of a family, a widow, or a single man over 21; be an American citizen or have declared that intention; and not own more than 319 acres of land in any state or territory.<sup>47</sup> A settler could exercise the preemptive right only once, and, to acquire a fully vested right, he or she must have recorded title with the registrar of the appropriate land district.<sup>48</sup>

Another possible source of preemptive rights is the federal Homestead Act of 1862.<sup>49</sup> By the early 1860s, Congress had sold off most of the best, most arable

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<sup>43</sup> This perhaps explains why Bundy himself has not generally made these claims in court. *See, e.g.*, Bundy’s Opposition to United States’ Motion for Summary Judgment and Motion to Dismiss, *United States v. Bundy*, No. CV 2:12-cv-00804-LDG-GWF (D. Nev. Jan. 11, 2013). But he does continue to make them in the press and elsewhere. *See, e.g.*, STICKLER, *supra* note 34, at 101, 117–18.

<sup>44</sup> General Preemption Act of 1841, ch. 16, 5 Stat. 453 (1841) [hereinafter “Preemption Act”]. For an excellent overview of this period, see generally ROY M. ROBBINS, *OUR LANDED HERITAGE: THE PUBLIC DOMAIN, 1776–1936*, at 75–92 (1942). This Act replaced a series of temporary laws that recognized the retrospective rights of pre-existing squatters. *Id.* at 89–91. Bundy, however, does not claim that his family’s settlement took place before 1841.

<sup>45</sup> ROBBINS, *supra* note 44, at 75 (statement of Racine Argus (Feb. 14, 1838)).

<sup>46</sup> Preemption Act, §§ 9, 10.

<sup>47</sup> *Id.* § 10.

<sup>48</sup> *Id.* § 13.

<sup>49</sup> Homestead Act of 1862, ch. 75, 37 Stat. 392 (1862) [hereinafter “Homestead Act”]. For a brief overview of the homesteading era, see GEORGE CAMERON COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW 104–07* (6th ed. 2007).



public lands, and, as it became increasingly difficult to get a cash return, Congress effectively began to give away the land it wanted settled quickly.<sup>50</sup> Congressional Republicans, who had won a majority in 1856, hoped that liberalizing federal land grants in the West would encourage settlement by small farmers, who then would populate future free (rather than slave) states.<sup>51</sup> The terms of the Homestead Act were nearly identical to the Preemption Act. The same classes of people were eligible, with the new exclusion of any person who had ever “borne arms against the United States or given aid or comfort to its enemies.”<sup>52</sup> Again, a settler could enter onto unappropriated surveyed land and stake a claim of not more than 160 acres.<sup>53</sup> And, again, he or she could exercise the right of preemption by purchasing the land for not less than \$1.25 an acre.<sup>54</sup>

The new Act, however, also allowed a settler who occupied and improved the land over a continuous five-year period to acquire fully vested property rights simply by paying a \$10 fee and recording title.<sup>55</sup> To prevent rampant speculation, the Act further required applicants to swear that they would use the land for “actual settlement and cultivation.”<sup>56</sup> By the 1880s, homesteading had largely replaced preemption as the predominant means of settlement in the West.<sup>57</sup> When 160 acres proved too small an allotment for successful ranching on more arid rangelands, Congress passed the Enlarged Homestead Act (1909) and the Stock-Raising Homestead Act (1916), which increased the allowable acreage to 320 and 640 acres, respectively.<sup>58</sup>

Cliven Bundy, however, has not—to my knowledge—ever made a case that his pioneer family availed themselves of either of these federal statutes. As an initial matter, the land in question does not appear to have been surveyed until 1865, and was thus ineligible for preemption or homesteading until a year after Nevada became a state.<sup>59</sup> If we are to take Bundy’s constitutional arguments seriously, Congress no longer owned the land at that time, and thus cannot have conveyed property rights to anyone. Even if we allow for an argument in the alternative—such that the preemption claims pertain only if the constitutional arguments fail—Bundy has never suggested that his rights are limited to 160, or even 640, acres; nor that his family purchased or recorded any relevant title.<sup>60</sup>

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<sup>50</sup> On this period of liberalized land grants, see ROBBINS, *supra* note 44 at 208–237.

<sup>51</sup> *Id.* at 208–09. The thought was that small farmers would be in a state of “natural antagonism” with the plantation system. *Id.* at 209.

<sup>52</sup> Homestead Act, § 2.

<sup>53</sup> *Id.* § 1.

<sup>54</sup> *Id.* § 8.

<sup>55</sup> *Id.* § 2.

<sup>56</sup> *Id.*

<sup>57</sup> COGGINS ET. AL, *supra* note 49, at 105.

<sup>58</sup> Enlarged Homestead Act of 1909 § 3, ch. 160, 60 Stat. 639 (1909); Stock-Raising Homestead Act of 1916 § 3, ch. 9, 64 Stat. 862 (1916). Both the Preemption Act and the Homestead Acts were repealed by the FLPMA in 1976.

<sup>59</sup> See *supra* notes 13–14.

<sup>60</sup> Deposition of Cliven Bundy at 34–35, *United States v. Cliven Bundy*, No. 2:12-CV-804-LDG-GWF (Oct. 3, 2011). Indeed, Bundy claims the entire 150,000 Gold Butte division as his “ranch.” *Id.* at 33.

Indeed, the only recorded title in the family name is for 160 acres and some water rights, dating to 1948.<sup>61</sup>

It is true that initially the “[l]ands that remained in public ownership were considered to be a grazing commons for livestock owners,” but this practice gave rise to the “range wars” that the Taylor Grazing Act was intended, in part, to resolve.<sup>62</sup> That Act made clear, if it had not been so before, that private property rights could not arise out of simply grazing the common public lands.<sup>63</sup> Thus, even if Bundy was to concede that Congress retained possession of property in Nevada after statehood, he has yet to present a factual scenario in which the relevant statutes would apply. For these reasons, he cannot successfully claim preemptive rights rooted in either the Preemption or Homestead Acts.

With all that said, however, Bundy still sometimes claims to have preemptive rights rooted in the Treaty of Guadalupe Hidalgo itself, which promised to protect the claims of Mexican property owners.<sup>64</sup> Article VIII of the Treaty provides:

Mexicans now established in territories previously belonging to Mexico, . . . shall be free to continue where they now reside, . . . retaining the property which they possess in the said territories . . . .

. . . .

. . . [They] shall enjoy with respect to it guarantees equally ample as if the same belonged to citizens of the United States.<sup>65</sup>

Bundy argues that the Constitution’s Treaty Clause (which he here concedes authorizes federal land acquisition) thus ensures that the “supreme Law of the Land” now guarantees his ancestral property rights.<sup>66</sup> Again, however, the facts seem to get in Bundy’s way. While his ancestors may have lived in Mexican territory, he has never produced any evidence that they were Mexican citizens before the Treaty—much less that they held any property rights recognized by the Mexican government. So, as with the statutory preemption claims, Bundy has simply failed to adduce any facts that would invoke the Treaty’s protections.

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<sup>61</sup> Steve Kanigher, *An Abbreviated Look at Rancher Cliven Bundy’s Family History*, LASVEGASNOW.COM, <http://www.lasvegasnow.com/news/an-abbreviated-look-at-rancher-cliven-bundys-family-history/70830238> [<https://perma.cc/6QY9-HHS9>] (last visited Feb. 12, 2018). The size of the deeded parcel—160 acres—suggests that it might originally have been disposed of under either the Preemption or Homestead Acts; the Bundys, however, purchased it from another family, who may have originally acquired title in one of these ways. *Id.*

<sup>62</sup> COGGINS ET. AL, *supra* note 49, at 105.

<sup>63</sup> Grazing Act, § 3. The Act did allow for preferential assignment of grazing districts based upon preexisting improvements or water rights. *Id.*

<sup>64</sup> Treaty of Guadalupe Hidalgo art. VIII, Mex.-U.S., Feb. 2, 1848, 9 Stat. 922.

<sup>65</sup> *Id.*

<sup>66</sup> STICKLER, *supra* note 34, at 101; U.S. CONST. art. VI. One might note, again, that Bundy must recognize federal land ownership—which he has repeatedly rejected—in order to claim this protection.

### B. Prescriptive Rights

Bundy also sometimes talks about prescriptive property rights arising, presumably, under state law.<sup>67</sup> Though Bundy has never made this argument to a court, other like-minded Nevada ranchers have tried it on.<sup>68</sup> In fact, in 2013 rancher Wayne Hage found a sympathetic judge in the Federal District Court—although the Ninth Circuit decisively overruled that decision and issued a “rare and extraordinary” reprimand to the lower court judge.<sup>69</sup> Hage claimed title to stock water rights on federal land.<sup>70</sup> Between 1978 and 1993, Hage paid for permits to graze cattle on that land, and thus utilized the water source thereon.<sup>71</sup> When he died in 2006, he had not held a relevant permit in 13 years, but he had claimed that he owned a prescriptive right—an easement—to have his cattle cross the land to get to the water.<sup>72</sup> Essentially, this would be analogous to the sort of “easement by necessity” that arises when property is subdivided in such a way that an interior parcel has no access to public roads or byways.<sup>73</sup> In such circumstances, the landlocked property may enjoy a prescriptive right to cross the enclosing parcel.<sup>74</sup>

Unfortunately for Hage, and also for Bundy’s rhetorical case here, this argument has no grounding in law. The common law provides:

An easement by necessity is created when: (1) the title to two parcels of land was held by a single owner; (2) the unity of title was severed by a conveyance of one of the parcels; and (3) at the time of severance, the easement was necessary for the owner of the severed parcel to use his property.<sup>75</sup>

Under Nevada law, however, a water right confers ownership of “neither the land nor the water”; it simply recognizes authority to put the water to beneficial use.<sup>76</sup>

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<sup>67</sup> See Kanigher, *supra* note 61 (“My family has preemptive, adjudicated livestock water rights filed with the state of Nevada. They were established in 1877 . . .”). I presume the state law claim based on Bundy’s rejection of federal property ownership. The law is clear, however, that federal law “governs a claim of easement over lands owned by the United States.” *McFarland v. Kempthorne*, 545 F.3d 1106, 1110 (9th Cir. 2008). Indeed, Nevada has itself recognized that the Taylor Grazing Act preempted any such state law claims. *Ansolabehere v. Laborde*, 310 P.2d 842, 849–50 (Nev. 1957).

<sup>68</sup> Sean Whaley, *U.S. Supreme Court Closes Book on Wayne Hage, Sagebrush Rebellion Court Case*, L.V. REV.-J. (Oct. 26, 2016, 2:59 AM), <https://www.reviewjournal.com/news/politics-and-government/nevada/us-supreme-court-closes-book-on-wayne-hage-sagebrush-rebellion-court-case/> [<https://perma.cc/ET3H-ESPU>].

<sup>69</sup> *United States v. Estate of Hage*, 810 F.3d 712, 722–24 (9th Cir. 2016). On Senior District Court Judge Robert Clive Jones’s erratic behavior in this and other cases, see Jane Ann Morrison, *Nevada’s Most-Reversed Federal Judge Should Call It Quits*, L.V. REV.-J., (March 16, 2016, 5:29 PM), <https://www.reviewjournal.com/news/news-columns/jane-ann-morrison/nevadas-most-reversed-federal-judge-should-call-it-quits/> [<https://perma.cc/WS9D-SAMY>].

<sup>70</sup> *Estate of Hage*, 810 F.3d at 715.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *McFarland v. Kempthorne*, 545 F.3d 1106, 1111 (9th Cir. 2008).

<sup>75</sup> *Id.* (quoting *Fitzgerald Living Trust v. United States*, 460 F.3d 1259, 1266 (9th Cir. 2006)).

<sup>76</sup> *United States v. Estate of Hage*, 810 F.3d 712, 719 (9th Cir. 2016).

In the case of Hage's water right, then, there has been no severance of title—there is simply no second, enclosed parcel that might give rise to the necessity.<sup>77</sup> The Ninth Circuit *has* recognized a statutory easement in these circumstances, such that Hage might possess a right of way over federal lands for the purpose of diverting the water “by ‘the construction of ditches and canals.’”<sup>78</sup> Such an easement would not, however, “entitle[] him to an appurtenant right to graze” on the federal land.<sup>79</sup> In other words, Hage might bring the water across federal land to his cattle, but if he wants his cattle to eat their way over to the water, he still needs a grazing permit.<sup>80</sup>

Whatever the rhetorical power of Cliven Bundy's occasional claims to preemptive or prescriptive property rights, then, these arguments find no purchase in the law.<sup>81</sup> Beginning in the mid-19th century, Congress liberally disposed of western lands between 1862 and 1937—essentially giving them away for the price of filing—but Bundy's family never took advantage of these federal initiatives. This may have been a rational decision: Why pay for common lands you can use for free? But when the Taylor Grazing Act put an end to the common lands policy, it would have made sense to stake an actual claim and perfect title. Indeed, this is what the Bundy family appears to have done with the deed recorded in 1948. He cannot now make a legal claim, however, to land that the family was either unwilling or unable to purchase at that time. Alternatively, if Bundy can show, as Wayne Hage did, that he owns water rights on federal land that predate FLPMA, he might be able to divert that water across federal land to his cattle. But he cannot use the water right to do an end run around grazing fees. For these reasons, Bundy's appeal to notions of preemptive or prescriptive property rights ultimately fall well short of the mark.

### III. CONSTITUTIONAL CLAIMS: FEDERAL LANDS AND EQUAL FOOTING

Congress's authority to acquire and retain property within a state is a much more controversial issue—at least among some constitutional historians.<sup>82</sup> This, then, is Cliven Bundy's strongest potential argument, and it is in fact the only

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<sup>77</sup> *Id.*

<sup>78</sup> *Estate of Hage*, 810 F.3d at 717 (quoting *Hunter v. United States*, 388 F.2d 148, 154 (9th Cir. 1967)). FLPMA overruled the statutory basis for these diversionary easements, but left preexisting claims intact. See 43 U.S.C. § 1769(a) (2012).

<sup>79</sup> *Estate of Hage*, 810 F.3d at 717–18 (discussing *Hunter*, 388 F.2d 148).

<sup>80</sup> It worth noting that, even if Hage could succeed in claiming some kind of easement—such as the statutory rights for public roads established in the Mining Act of 1866—the federal government “retains the right to issue reasonable regulations” on that right of way. *Hage*, 810 F.3d at 719. A grazing permit certainly qualifies as a reasonable regulation.

<sup>81</sup> It is certainly worth noting that the U.S. Court of Federal Claims very recently upheld a claim of regulatory takings based on the imposition of grazing fees to access a stock water right on federal land. *Sacramento Grazing Assoc. v. United States*, 2017 WL 5029063 (Fed. Cl. 2017). Depending upon appeal, this may be an interesting new legal avenue for ranchers.

<sup>82</sup> Indeed, the State of Nevada has even enacted legislation asserting title over federal lands within its boundaries. NEV. REV. STAT §§ 321.596–.599 (1979). The Federal District Court subsequently declared these statutes invalid. See *United States v. Nye Cty.*, 920 F. Supp. 1108 (D. Nev. 1996).

one he has made in official filings. To be clear, there is no doubt that controlling constitutional doctrine, well-settled in the Supreme Court, expressly recognizes the federal government's power to acquire, retain, and regulate such property, with or without state consent<sup>83</sup>—which explains why Bundy has repeatedly lost in the courts.<sup>84</sup> There are, however, some lawyers and academics who believe that the Supreme Court has gotten it wrong, and that the Constitution's ratifiers never intended to give Congress such broad authority.<sup>85</sup> In the following subsection, I will outline the strongest version of this claim, without critical comment, and save my analysis and assessment for the final subsection.

As an initial matter, however, I should be clear that I know of no serious commentator who believes that the Enclave Clause provides the *only* federal authority to acquire land, or that it establishes a size limitation on federal landholding. That Clause's plain meaning does not *limit* federal power; rather, it *grants* Congress the power of "exclusive legislation" over property acquired in a particular way for particular purposes.<sup>86</sup> The Clause simply does not speak to the other ways that the federal government might acquire land. At the very least, these include conquest,<sup>87</sup> treaty,<sup>88</sup> purchase,<sup>89</sup> eminent domain,<sup>90</sup> and under the Necessary and Proper Clause.<sup>91</sup> Such acquisitions are plainly the "territories and other property" contemplated in the Property Clause, which would otherwise be

<sup>83</sup> *E.g.*, *Kleppe v. New Mexico*, 426 U.S. 529, 542–43 (1976); *United States v. San Francisco*, 310 U.S. 16, 29–30 (1940); *Camfield v. United States*, 167 U.S. 518, 527 (1897); *Gibson v. Chouteau*, 80 U.S. 92, 99 (1871). Numerous other cases support this proposition. *See Kleppe*, 426 U.S. at 540 (citing cases).

<sup>84</sup> *See, e.g.*, *United States v. Bundy*, 1998 U.S. Dist. LEXIS 23835 (D. Nev. 1998); *United States v. Bundy*, 2013 WL 3463610 (D. Nev. 2013).

<sup>85</sup> These accounts vary widely in strength: some scholars go as far as Bundy, while others make the weaker claim that Congress may only use federal lands for an enumerated purpose. For the stronger claim, see C. Perry Patterson, *The Relation of the Federal Government to the Territories and the States in Landholding*, 28 TEX. L. REV. 43 (1949), and also Alfred W. Brodie, *A Question of Enumerated Powers: Constitutional Issues Surrounding Federal Ownership of the Federal Lands*, 12 PAC. L. J. 693 (1981). For versions of the weaker claims, see: Robert G. Natelson, *Federal Land Retention and the Constitution's Property Clause: The Original Understanding*, 76 U. COL. L. REV. 327 (2005); Allison H. Eid, *The Property Clause and the New Federalism*, U. COL. L. REV. 1241 (2004); David E. Engdahl, *State and Federal Power Over Federal Property*, 18 ARIZ. L. REV. 283 (1976).

<sup>86</sup> The only limiting language—"not to exceed ten square miles"—refers specifically to land acquired for a federal capital district. U.S. CONST. art. 1, § 8, cl. 17. That limit does not apply even to the remainder of the Enclave Clause itself. *Id.* Indeed, the Enclave Clause appears on the list of federal power *grants*; the list of federal power *limitations* appears in the following section. U.S. CONST. art. I, § 9. Even if the so-called enumeration principle somehow *implies* an Enclave Clause limitation (notwithstanding the subsequent Property Clause), that limit would apply only to Congress acting in its legislative capacity—not when it acts in concert with the Executive branch in some of the ways discussed above.

<sup>87</sup> *American Ins. Co. v. Canter*, 26 U.S. 511, 542 (1828).

<sup>88</sup> *Id.*

<sup>89</sup> *See*, Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393, 395–99 (1899) (discussing constitutional authority for the Louisiana Purchase).

<sup>90</sup> *United States v. Russell*, 80 U.S. 623, 627 (1871).

<sup>91</sup> *Kohl v. United States*, 91 U.S. 367, 373 (1875).

without effect.<sup>92</sup>

There is, however, some reasonable disagreement about whether, or on what terms, the federal government can *retain* property when it falls within state boundaries. Broadly speaking, there are two sorts of accounts that dissent from the current doctrine. The first, more plausible and widely shared view—perhaps most closely associated with attorney and professor David Engdahl—is the so-called “classic property clause doctrine.”<sup>93</sup> This theory asserts that, while the Enclave Clause grant of “exclusive Legislation in all cases whatsoever” gives Congress plenary regulatory power in a limited set of cases, the broader Property Clause empowers Congress to preempt state regulation only when exercising an enumerated legislative power.<sup>94</sup> Otherwise, the states may regulate the federal government just as they would any other landowner.

While I disagree with the classic theory for several reasons,<sup>95</sup> I need not explore those in depth here, because even if correct, this theory cannot help Cliven Bundy. First, Engdahl explicitly recognizes that requiring “permits for the use of [Property Clause] property, and similar matters of administration, were regarded as exercises of proprietary power rather than of any legislative or governmental power.”<sup>96</sup> Thus, Congress has the power, even as an ordinary proprietor, to require the permits that Bundy has refused to acquire. Second, even if we were to concede *arguendo* that the Taylor Grazing Act and FLPMA are exercises of legislative power, both statutes (as applied to the Bundys) clearly fall within the scope of modern Commerce Clause authority.<sup>97</sup> Thus, even if the Property Clause does not create an independent source of federal power, no such power is necessary to regulate grazing on public land.

The second, and more restrictive, dissenting view of the Property Clause we might call the “trust theory.” While this account—most closely associated with C. Perry Patterson’s work in the late 1940s—enjoys much less scholarly support, it would, if correct, vindicate the Bundy’s claims.<sup>98</sup> For this reason, I first state the trust theory as clearly and charitably as I can. Then, in the final subsection, I offer textual, historical, and structural reasons to reject Patterson’s view as a matter of constitutional law.

#### A. The “Trust Theory” Stated

Simply put, Patterson’s trust theory asserts that the federal government can

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<sup>92</sup> U.S. CONST. art. IV, § 3. If Congress can acquire property only via the Enclave Clause—which bestows the power of “exclusive Legislation”—the Property Clause’s authority to “make all needful rules and regulations” is simply redundant.

<sup>93</sup> Engdahl, *supra* note 85, at 288.

<sup>94</sup> *Id.* at 296, 304, 308–09.

<sup>95</sup> For a persuasive critique, see Eugene R. Gaetke, *Refuting the “Classic” Property Clause Theory*, 63 N.C. L. REV. 617 (1985).

<sup>96</sup> Engdahl, *supra* note 85, at 309.

<sup>97</sup> One need look no further than *Wickard v. Fillburn*, 317 U.S. 111 (1942).

<sup>98</sup> Patterson, *supra* note 85, at 56. Alfred Brodie has also advanced a version of this argument. See Brodie, *supra* note 85, at 721–22.

hold Property Clause land only *in trust* for future states.<sup>99</sup> Thus, when Congress admits a new state, it must cede all enclosed public lands to that state as beneficiary of the trust.<sup>100</sup> Patterson's argument develops in a series of cumulative steps,<sup>101</sup> but the foundational claims center on a historical "compact" between the states and the Confederation Congress regarding territorial lands, and the federal government's limited powers as successor-in-interest to that original agreement.<sup>102</sup>

As the Revolutionary War drew to a close, one of the stumbling blocks to American confederacy was the fate of the western lands.<sup>103</sup> Seven states claimed lands that had not yet been settled, with Virginia asserting dominion all the way to the Pacific Ocean.<sup>104</sup> States without such claims worried that the others would eventually cut their extended territories into political subsidiaries—New World empires—that would come to dominate federal politics.<sup>105</sup> Maryland thus led the landless states in refusing to ratify the Articles of Confederation until the landed states agreed to cede their unsettled territory to the new Congress as common property.<sup>106</sup> Patterson argues that these land cessions required some fancy political footwork and a series of promises to the ceding states—which, together, he calls "the compact."<sup>107</sup>

Three documents are at the heart of Patterson's argument. The first is a resolution the Continental Congress adopted in October, 1780, providing:

That the unappropriated lands that may be ceded or relinquished to the United States, by any particular states . . . shall be disposed of for the common benefit of the United States, and be settled and formed into republican states, which shall become members of the federal union, and have the same rights of sovereignty, freedom and independence, as the other states[.]<sup>108</sup>

The second is the Virginia Deed of Cession, by which that state conveyed her western lands to the Confederation Congress on March 1, 1784; and which restated the terms of the resolution as conditions of the cession.<sup>109</sup> The third is the Northwest Ordinance of 1787—reenacted by the Federal Congress in 1789—which laid out the specific "Articles of compact" and provided that any state carved out of the territory would "be admitted, by its delegates, into the Congress

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<sup>99</sup> Patterson, *supra* note 85, at 56.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 72–73.

<sup>102</sup> *Id.* at 56.

<sup>103</sup> *Id.* at 46.

<sup>104</sup> See THE SECOND CHARTER OF VIRGINIA (May 23, 1609), [http://avalon.law.yale.edu/17th\\_century/va02.asp](http://avalon.law.yale.edu/17th_century/va02.asp) [<https://perma.cc/Q255-7H3Q>] (granting title "up into the Land throughout from Sea to Sea, West and Northwest").

<sup>105</sup> See discussion *infra* pp. 84–85.

<sup>106</sup> Patterson, *supra* note 85, at 46.

<sup>107</sup> *Id.* at 46–48.

<sup>108</sup> Patterson, *supra* note 85, at 47 (quoting *Resolution on Western Lands* (1880), in 18 JOURNALS OF THE CONTINENTAL CONGRESS 915 (Worthington C Ford et. al. eds., 1904–1937)).

<sup>109</sup> *Virginia Deed of Cession*, in 26 JOURNALS OF THE CONTINENTAL CONGRESS 113–16 (Worthington C. Ford et. al. eds., 1904–1937).

of the United States, on an equal footing with the original states in all respects whatever . . . .”<sup>110</sup>

For Patterson, the first two documents are critically important because they tacitly recognize that neither the Continental nor Confederation Congresses had authority to acquire land on their own, nor to legislate for non-federated territories.<sup>111</sup> Thus, the compact could not exist between the states and Congress; instead, Congress invited the states to enter into a compact with each other.<sup>112</sup> Virginia accepted that invitation and then set out potential terms, in turn inviting Congress to become trustee of the ceded lands—and the other landed states adopted Virginia’s language to the same effect.<sup>113</sup> The resolution and subsequent deeds thus provide evidence of both the existence and conditions of a land trust.<sup>114</sup> Once the Confederation Congress accepted trusteeship, Patterson claims that “the compact was complete, and Congress was estopped from denying or violating its terms or conditions.”<sup>115</sup>

The Northwest Ordinance is also important to Patterson for three reasons. First, it codified a “monumental scheme of state-building,” by prescribing in careful specificity the number and size of new states to be created from particular land cessions.<sup>116</sup> This evinces Patterson’s claim that the overriding purpose of the land cessions—and thus the trust—was to create new states. Second, the Ordinance provided an ersatz constitution for the administration of territorial government under Congressional supervision.<sup>117</sup> As the Confederation Congress in fact lacked the authority to legislate for the territories in this way, Patterson argues that this would eventually justify new constitutional powers.<sup>118</sup> Third, when reenacted in 1789, the Ordinance established the First Federal Congress as successor-in-interest to the trusteeship of the territorial lands.<sup>119</sup> The terms of this trust would then limit the purposes for which Congress could use its new territorial powers—with the most important condition being the equal footing doctrine.

With these foundational pieces in place, Patterson’s trust theory is essentially complete. The terms of the first territorial cessions, and the Confederation Congress’s acceptance of those terms, established the original trust relationship: the unappropriated lands were to be held for the “common benefit” of future

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<sup>110</sup> NORTHWEST ORDINANCE art. 5 (July 13, 1787), in 32 JOURNALS OF THE CONTINENTAL CONGRESS 334, 339–42 (Worthington C. Ford et. al. eds., 1904-1937).

<sup>111</sup> Patterson, *supra* note 85, at 47. The important language for Patterson here is the phrase “for the common benefit of the United States.”

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 49.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> NORTHWEST ORDINANCE art. 5, in 32 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 110, at 334, 342.

<sup>117</sup> *Id.* at 338–341.

<sup>118</sup> Patterson, *supra* note 85, at 52–53. Indeed, James Madison famously commented on the Confederation’s woeful inadequacy in this regard: “All this [state-building] has been done . . . without the least colour of constitutional authority.” THE FEDERALIST NO. 38 (James Madison).

<sup>119</sup> Patterson, *supra* note 85, at 69.



states. The Northwest Ordinance evinces both this purpose and the principle that new states were to enter the Union on an equal footing with the original members. To the degree that the Constitution—particularly the Property Clause—created new congressional powers over the territories, we must understand those powers as defined by the terms of the original compact. Thus, Congress can hold and regulate territory only until it falls within the boundaries of a new state, at which point it must release the land to ensure that the state begins life on equal terms. It is Patterson’s opinion that both Congress and the Supreme Court have abandoned these original understandings and thus reneged on a fundamental founding promise.<sup>120</sup>

### B. *The “Trust Theory” Refuted*

Patterson’s arguments in support of the trust theory are largely historical, though he does make some other claims along the way. As discussed above, Patterson’s approach finds no support in modern Property Clause doctrine, so it makes little sense to measure his position against governing case law. Rather, in this final subsection, I try to meet Patterson on his own ground. In what follows, then, I offer textual, historical, and structural reasons to reject the “trust theory” of the Property Clause.

#### 1. *Constitutional Text*

There is virtually no text in the Constitution that supports the trust theory of the Property Clause. Again, the relevant language reads: “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States[.]”<sup>121</sup> Nothing here refers to any compact or trust with the states, nor is there any language suggesting terms of compulsory disposal. Indeed, quite the opposite: The plain meaning of “the power to dispose” naturally includes the authority to decide when, and on what terms, to do so—or whether to do so at all. The power to “make all needful Rules and Regulations” also seems very broad. Robert Natelson has argued that the word “needful” parallels language in the Enclave and Necessary and Proper Clauses, thus confining the regulatory power to enumerated purposes.<sup>122</sup> Even this narrow textual claim is immediately undercut, however, by the sentence’s indirect object: “the Territory and other Property belonging to the United States.” If, as it appears, Congress enjoys the same rule-making authority over the “Territor[ies]” as it does “other Property,” it is very difficult to find even an enumeration requirement in the text.<sup>123</sup> At least I am not aware of any serious claim that

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<sup>120</sup> *Id.* at 64–74

<sup>121</sup> U.S. CONST. art IV, § 3, cl. 2.

<sup>122</sup> Natelson, *supra* note 85, at 363.

<sup>123</sup> There may be *historical* reasons—and Natelson suggests there are—to treat “Territory” and “other Property” differently here, but I see no purely textual basis for that claim. Natelson, *supra* note 85, at 366–76.

the word “needful” limits Congress’s *territorial* authority in this way.<sup>124</sup>

The best quasi-textual claim that we might make for the trust theory is that the section in which the Property Clause appears is otherwise dedicated to the admission of new states.<sup>125</sup> The immediately preceding clause reads:

New states may be admitted by the Congress into this Union; but no new States shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more states, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.<sup>126</sup>

This at least suggests that the drafters dedicated Article IV, Section 3 to the topic of new states and their admission, and that we should therefore read the Property Clause within that specific framework. Thus, we might conclude that the disposal and regulation of federal property is at least *related* to the admission of new states. It is here that any trust theory inference ends, however; and, indeed, the context actually begins to undermine Patterson’s views. With the admission of new states clearly in mind, why not include the “trust compact”—or at least the duty to dispose—among the other explicit conditions? Why not codify and explain the equal footing doctrine? In these circumstances, the silence is deafening.

The constitutional text, then, does nothing to corroborate the trust theory. Quite the contrary, the total absence of any reference to the “original compact,” the trust conditions, the equal footing doctrine, or a duty to dispose of enclosed land strongly militates against Patterson’s claims. Nor does this silence imply non-enumeration or federal incapacity. On its face, the Property Clause’s text *confers a power* on Congress—the power to regulate and dispose of federal property—it does nothing to *limit* congressional authority to acquire, retain, or manage such lands. As such, not only does the text fail to support the trust theory, it presents a substantial challenge to other arguments Patterson might marshal in its defense.

## 2. *Constitutional History*

A historical argument about constitutional meaning looks to what the drafters’ and ratifiers’ thought a constitutional provision meant.<sup>127</sup> As discussed above, the bulk of Patterson’s trust theory is an extended historical argument. While there is considerably more material to work with here than in the text alone, Patterson’s historical account generally falls victim—as many originalist

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<sup>124</sup> *E.g.*, *Hoover & Allison, v. Evatt*, 325 U.S. 892, 881–82 (1945) (recognizing Congress’ plenary power in territories).

<sup>125</sup> U.S. CONST. art. IV, § 3.

<sup>126</sup> *Id.* § 3, cl. 1.

<sup>127</sup> There are many schools of constitutional originalism. For an excellent overview, see generally Lawrence Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory*, in *THE CHALLENGE OF ORIGINALISM: ESSAY IN CONSTITUTIONAL THEORY* (Grant Huscroft & Bradley W. Miller eds. 2011). I take Patterson to be taking some kind of an “intentionalist” approach, which I critique on its own terms. Though I take no position here on competing originalist approaches, I do not see a compelling “public meaning” claim that might overcome the text’s plain modern meaning.

arguments do—to what David Hackett Fischer has called the “pragmatic fallacy.”<sup>128</sup> This occurs when a historian “selects facts—immediately and directly useful facts—in the service of a social cause.”<sup>129</sup> In other words, Patterson selectively presents the evidence that best supports his favored political theory, while deemphasizing or omitting other relevant evidence that paints a more nuanced or less persuasive picture. Although this fallacy is broadly evident here, in this limited space I focus on just a few problematic examples. In these instances, not only is the pragmatism easy to identify—indeed, it is sometimes as simple as selective quotation—but it also tends to undermine critical elements of the argument.

First, Patterson relies heavily on the Continental Congress’s resolution inviting the cession of western lands, and on the Confederation Congress’s acceptance of those lands under the terms established in the Virginia Deed of Cession.<sup>130</sup> He is undoubtedly correct that these documents evince a strong desire to see these territories formed into future states. Patterson’s pragmatism, however, becomes evident in his conclusory treatment of *why* the landless states wanted the land ceded and so divided. His brief and unsupported assumption on that score is that “the states were not interested in creating a great federal domain to be exploited by an imperial government.”<sup>131</sup> If the principal motivation for divesting the landed states and creating new ones was to forestall a federal empire—then the rest of Patterson’s extra-textual assertions may at least be colorable. Then these documents might, as he claims, provide “the basis for only a trusteeship of territory by Congress for the exclusive purpose of statehood, [and impose] a complete and absolute negative on the permanent holding of territory by Congress . . . .”<sup>132</sup>

There is a wealth of other evidence, however, which suggests that limiting federal landholding was not one of the driving motivations behind the demands for western cession. And, in fact, federal land retention within future states might serve—or at least not frustrate—the states’ actual goals.<sup>133</sup> Indeed, by their very terms the cessions *increased* federal lands and authority at the expense of the existing, landed states. This strongly suggests that it was primarily a fear of *state*—not *federal*—imperialism that motivated the landless states’ demands.<sup>134</sup>

In truth, the hardest push for land cessions came from wealthy eastern speculators with dubious claims in the unappropriated territories, but Maryland made

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<sup>128</sup> DAVID HACKETT FISCHER, *HISTORIAN’S FALLACIES: TOWARDS A LOGIC OF HISTORICAL THOUGHT* 82 (1970).

<sup>129</sup> *Id.*

<sup>130</sup> Patterson, *supra* note 85, at 47–52.

<sup>131</sup> *Id.* at 46.

<sup>132</sup> *Id.* at 47.

<sup>133</sup> For an excellent and thoroughly researched account of this period, see generally MERRILL JENSEN, *THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 1774–1781*, at 108–245 (1940).

<sup>134</sup> *Id.* at 124, 200.

at least some effort to put a theoretical gloss on her demands.<sup>135</sup> And, while some of her arguments were expressly self-interested (for instance, that the landless states had equally fought the British and were so entitled to some share of the territorial spoils), others were framed as more neutral assertions of republican political theory.<sup>136</sup> There was, for example, the worry that, if Virginia's population grew to fill her unappropriated territorial claims, her sheer numbers and resources would come to dominate federal politics.<sup>137</sup> Alternatively, if it were left to Virginia to divide her territory into new states, these daughter polities would likely support the mother state in any federal contest.<sup>138</sup> Thus, the landless states wanted Congress—which represented *all* the states—to administer and divide the unappropriated lands, so as to keep all on relatively equal political terms.<sup>139</sup>

These purposes are apparent in Maryland's initial Declaration to the Continental Congress, in the Instructions given Maryland's delegates regarding the western territories, and in the very cession documents upon which Patterson relies. The opening lines of Maryland's Declaration assert a claim to all lands "gained from the king of Great Britain, or the native Indians by the blood and treasure of all, [which] ought therefore to be a common estate to be granted out on terms beneficial to *all* the United States . . ." <sup>140</sup> This language seems to bespeak interstate jealousy more plainly than a fear of federal imperialism. Similarly, the Maryland delegation's Instructions claim that Virginia herself knew that governing her "extensive dominion" would require dividing the western territory into new states "under the auspices and direction of the elder from whom no doubt it would receive its form of government, to whom it would be bound by some alliance, or confederacy, and by whose councils it would be influenced."<sup>141</sup> Again, the worry here seems to be state—not federal—imperialism.

With this in mind, the "trust" language Patterson quotes from the Continental Congress's 1780 resolution seems to reflect interstate rivalry rather than a fear of federal overreach: "[T]he unappropriated lands . . . shall be disposed of for the common benefit of the United States, and be settled and formed into distinct republican states . . . hav[ing] the same rights . . . as the other states."<sup>142</sup> The "common benefit" here is not a trust for *future* states, but an assurance that the *current* states would share equally in the wealth of unappropriated lands, so that no single state might gain undue political advantage. Patterson also fails to include or explain the resolution's unequivocal closing lines: "[T]he said lands shall be

<sup>135</sup> *Id.* at 238. In particular, speculators that had acquired property from Indian tribes feared that Virginia would not honor their claims. *Id.* at 122–23.

<sup>136</sup> *Id.* at 202.

<sup>137</sup> *Id.* at 203.

<sup>138</sup> *Id.* at 203–04.

<sup>139</sup> *Id.*

<sup>140</sup> *Declaration by the State of Maryland* (Dec. 15, 1778), in 10 HENING'S VIRGINIA STATUTES AT LARGE 549–50 (1822), <http://vagenweb.org/hening/vol10-26.htm> [<https://perma.cc/G8GD-U6N3>] (emphasis added).

<sup>141</sup> *Instructions of the General Assembly of Maryland, to George Plater, et. al.* (Dec. 15, 1778), in 10 HENING'S VIRGINIA STATUTES AT LARGE, *supra* note 140, at 553–55.

<sup>142</sup> *Resolution on Western Lands*, *supra* note 108, at 915.

granted and settled at such times and under such regulations as shall hereafter be agreed on by the United States in Congress assembled.”<sup>143</sup> In clearer light, this omission seems strategic—because granting Congress complete dispositional authority (language which presages the Constitution’s Property Clause) makes very little sense if, as Patterson claims, the point of the cessions was to prevent a federal empire. When, however, we consider the evidence that the states had distinctly more provincial interests at heart, allocating this power to the neutral federal body is perfectly rational.<sup>144</sup>

Similar pragmatism undermines Patterson’s account of the Northwest Ordinance and the equal footing doctrine. For example, Patterson’s treatment of the Ordinance radically deemphasizes the specific forum in which the new states were to enjoy equal standing.<sup>145</sup> The full phrasing is as follows: “[A new] 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 . . . .”<sup>146</sup> While Patterson reproduces the italicized language outside of quotations, he willfully ignores its critical importance to the doctrine’s meaning.<sup>147</sup> Indeed, the Ordinance’s text repeatedly identifies the precise ground on which the new states would stand with equal feet—in Congress: “[New States must] share *in the federal councils* on an equal footing with the original States . . . .”<sup>148</sup> In other words, there were to be no subservient “little Virginias” in the Confederation to upset the balance of political power. The equal footing doctrine, then, speaks to a new states’ equal status in the federal legislature—not to an absolute equality of size, wealth, population, resources, or anything else.<sup>149</sup> Frankly, the sort of all-encompassing equality “in all respects whatever” to which Patterson repeatedly appeals borders on the absurd.

This also explains how the Ordinance—and all subsequent enabling acts—can contain both an equal footing clause *and* some version of a disclaimer clause. That is, the Ordinance both promises the new states equality *and* declares that “[t]he legislatures of [the new] States, shall never interfere with primary disposal of the soil by the United States in Congress assembled.”<sup>150</sup> Nevada’s Enabling

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<sup>143</sup> *Id.* at 915–16.

<sup>144</sup> Even this language did not satisfy the Maryland delegation, however, which refused to support the resolution on the grounds that it did not do enough to protect the claims of those who had made informal acquisitions from the Indian tribes. *Id.* at 916 (protecting only claims the ceding states deemed “lawful”).

<sup>145</sup> Patterson, *supra* note 85, at 51.

<sup>146</sup> NORTHWEST ORDINANCE art. 5, in 32 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 110, at 334, 339, 342.

<sup>147</sup> Patterson, *supra* note 85, at 51.

<sup>148</sup> NORTHWEST ORDINANCE art. 5, in 32 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 110, at 334, 339, 342 (emphasis added).

<sup>149</sup> Courts have long recognized this as the historical import of the equal footing doctrine. *E.g.*, *United States v. Texas*, 339 U.S. 707, 716 (1950). In these cases, the Court treats the lineage of cases belonging with *Pollard v. Hagen*—upon which the Bundys often rely—as dealing only with submerged lands. *Id.*

<sup>150</sup> NORTHWEST ORDINANCE art. 4, in 32 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 110, at 334, 341.

Act—like many other states’ —is even clearer. On the one hand, the Act guarantees admission “into the Union upon an equal footing with the original states, in all respects whatsoever”; while on the other it requires Nevada’s to “forever disclaim all right and title to the unappropriated public lands lying within [the] territory, [which] shall be and remain at the sole and entire disposition of the United States[.]”<sup>151</sup> On Patterson’s account, these provisions are simply incompatible. If equal footing requires the federal government to turn all enclosed public lands over to a new state upon admission, Congress cannot simultaneously require that state to disclaim all title to those lands. Given the correct reading, however, no such incompatibility arises: Equal footing speaks only to a new state’s political standing in Congress, not to its ownership of public lands.

Upon closer examination, then, Patterson’s historical arguments in support of the trust theory cannot bear the weight he asks of them. It is certainly true that the original states expected that Congress would divide the unappropriated territories into new states, and it is equally true that these new states were to enjoy equal political standing in the federal legislature. This much is plainly evident in the documentary evidence that Patterson presents. It may even be true that the states envisioned Congress acting as a kind of trustee over these territories, though that is less evident in the sources. There is virtually no evidence, however, that the terms of that trust required Congress to relinquish all enclosed landholdings to a new state upon its admission to the Union. Quite to the contrary, the documents upon which Patterson relies expressly grant Congress sole authority to decide when and how to dispose of the ceded lands. This seems strange or incongruent only if we accept Patterson’s unsupported claims that the purpose of the land cessions was to preempt federal empire building. When, however, we consider the ample evidence that the states were much more concerned about their neighbors’ ambitions than they were about Congress’s, their trust in federal disposition is entirely appropriate. Even on his own documentary ground, then, Patterson’s historical arguments are ultimately unpersuasive.

### 3. *Constitutional Structure*

Structural arguments about constitutional meaning draw inferences from the relationships between constitutional institutions and actors.<sup>152</sup> Probably the best-known sorts of structural arguments are those based in the separation of powers or in principles of federalism. Patterson’s arguments about the relationship between Congress, the original states, and the new states are thus paradigmatic structural claims. What Patterson does not adequately consider, however, are the structural changes that occurred when the Articles of Confederation gave way to the Constitution. That is, the relationship between the People, the state governments, and the federal government changed radically in 1789; and, even

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<sup>151</sup> Nevada Enabling Act §§ 1, 4, ch. 36, 13 Stat. 30 (1864).

<sup>152</sup> CHARLES BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 14–15 (1969).

if we were to assume *arguendo* that Patterson's trust theory was correct in the early 1780s, that understanding did not survive ratification of the Constitution.

While the Articles of Confederation might rightly be seen as a kind of compact or league between independent sovereign states,<sup>153</sup> the Constitution plainly establishes an entirely new form of government—one which reimagines sovereignty in unprecedented ways.<sup>154</sup> First, the Constitution established ultimate sovereignty in “the People,” who therein delegated limited and contingent sovereign authority to various government institutions given various specified conditions. Second, in the Constitution, the People divided certain aspects of the traditional sovereign prerogative among three separate federal branches: the legislature, the executive, and the judiciary.<sup>155</sup> Finally, the People entirely restructured the federalist relationship by reallocating to the national government sovereign powers previously lodged solely in the state governments.<sup>156</sup> And most importantly, for present purposes, it was the *People*—not the *states*—that ratified the Constitution. Thus, whatever trust compact the state governments might have had with the Confederate Congress, it was superseded by a new relationship between the People and the federal Congress. If the old Congress had held the land in trust for the states, the new one now held it in trust for the People.

At the Pennsylvania Ratifying Convention, James Wilson described these fundamental structural changes, quoting language he himself had penned in Philadelphia:

This, Mr. President, is not a government founded upon a compact [between the states]; it is founded upon the power of the people. They express it in their name and their authority, “*We, the people, do ordain and establish*” &c.; from their ratification, and their ratification alone, it is to take its constitutional authenticity[.]<sup>157</sup>

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<sup>153</sup> See ARTICLES OF CONFEDERATION OF 1778, art. III (describing Confederation as “a firm league of friendship”).

<sup>154</sup> See, e.g., James Wilson, *State House Yard Speech* (Oct. 6, 1787), in 1 COLLECTED WORKS OF JAMES WILSON 171 (Kermit Hall & Mark David Hall eds. 2007).

<sup>155</sup> For a particularly insightful description of this division between the legislature and the executive, see generally Michael McConnell, *The Logical Structure of Article II* (unpublished draft on file with author).

<sup>156</sup> The earliest draft of the Preamble is, at least, drafted in Wilson's hand. Nicholas Pedersen, *The Lost Founder: James Wilson in American Memory*, 22 YALE J. L. & HUMAN. 257, 259 (2010).

<sup>157</sup> J. ELLIOT, THE DEBATES OF THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 497–98 (1888). Wilson was one of the most influential of the Constitution's drafters, and certainly the nation's foremost authority on the structure popular sovereignty. See generally Ian Bartrum, *James Wilson and the Moral Foundations of Popular Sovereignty*, 64 BUFF. L. REV. 255 (2016). It is also worth noting that the Anti-Federalists kept the “compact” conception of the Union alive for many years; indeed, this debate forms the not-so-hidden subtext of *McCullough v. Maryland*—giving perhaps a richer context to Marshall's famous reminder that “it is a *Constitution* [not a compact] we are expounding.” 17 U.S. 316, 407 (1819). The compact conception—never a correct one—was put decisively to rest with the Civil War. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L. J. 1425, 1451–66 (1987).

It is of course true that ratification required the assent of nine of the thirteen states, but this was largely a matter of logistics—a way of organizing debate and voting among the People. This is evident in the Constitution’s assignment of ratification to *conventions* rather than to the state *legislatures*.<sup>158</sup> Evolved from English practice, a “convention” is an *ultra vires* meeting of the sovereign people, who in this case acted outside and above the delegated authority of the state legislatures—in much the same way the drafters had done in Philadelphia.<sup>159</sup> Indeed, these conventions were interrelated: the extra-legality of the proposed Constitution required an extra-legal act of sovereign ratification to become law.<sup>160</sup> After all, legally altering the Articles of Confederation required the *unanimous* consent of the state legislatures, not the approval of just nine.<sup>161</sup> Instead, the framers took an appeal over the states’ heads, to the sovereign power itself.

What this means for present purposes is that the new Congress no longer existed as the creation or agent of the various state sovereigns; it was instead a superior power unto itself, authorized in the People’s name. Thus, whatever compact might have existed between the states and the Confederation Congress, it became void when the former entities changed shape, and the latter ceased to exist. The new Congress served the People, not the states; and if it acted as a trustee of public lands, it did so only on behalf of the People, not the states. Even if reenactment of the Northwest Ordinance did evince the terms of some trust arrangement, the beneficiary had necessarily changed—and it is simply inapposite for a state to now lay claim to the People’s land. And this, of course, means *all* the People, not just the citizens of a particular state or municipality. The federal government that emerged from ratification now dutifully manages its public lands for the common benefit of a national—not a provincial—constituency.

#### CONCLUSION

On January 8 of this year, Cliven Bundy stood on the steps of the federal courthouse in Las Vegas, a free man for the first time in nearly two years. The federal District Court had just dismissed all charges arising from his armed stand-off with BLM officers in 2014, and his first words were, “We’re not done with this.”<sup>162</sup> His defiance is hardly surprising, and we should expect to hear much more from the Bundy family and its supporters about the illegality of federal land ownership in the West. I hope I have demonstrated here that, as a legal matter, these claims have very little merit. Through the Constitution, the People firmly entrusted the management of national public lands to Congress, and theories that suggest otherwise are seriously flawed. For this reason, modern constitutional doctrine strongly supports the federal government’s authority to own and manage

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<sup>158</sup> U.S. CONST. art. VII.

<sup>159</sup> BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 174–75 (1991).

<sup>160</sup> *Id.*

<sup>161</sup> ARTICLES OF CONFEDERATION OF 1778, art. XIII.

<sup>162</sup> Ritter, *supra* note 27.



land within state boundaries. It seems very unlikely indeed that the Bundys have a path forward in either the state or federal courts.

That is not to say that there is no place for dissenting views on public land management in the West. It is to say, however, that the Bundy's best arguments are (and have always been) *political* and not *legal*. There is almost no chance that the federal courts will reverse more than a century of constitutional doctrine and try to force Congress to relinquish its landholdings in Nevada or anywhere else. But there is at least *some* chance that Congress or the Executive might revise its approach to national land management policy. Whether those revisions involve more focus on agricultural interests, greater public input on regulated land swaps, or more direct local involvement at the policymaking level, the political climate is as ripe for change as it has been in decades. Now that he has seized a national microphone, Cliven Bundy should make the most of this once-in-a-lifetime opportunity by fighting on the most advantageous ground. Don't take it to court; take it to Congress.