BYU Law Review

Volume 2012 | Issue 3 Article 10

9-1-2012

Utah's Enabling Act and Congress's Enclave Clause Authority: Federalism Implications of a Renewed State Sovereignty Movement

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Utah's Enabling Act and Congress's Enclave Clause Authority: Federalism Implications of a Renewed State Sovereignty Movement

I. INTRODUCTION: UTAH'S CLAIM AND THE ORIGINS OF THE CONSTITUTION'S ENCLAVE CLAUSE

On June 20, 1783, a disgruntled group of unpaid soldiers arrived at the statehouse in Philadelphia where the Continental Congress was convened.[1] The following day, the soldiers surrounded the statehouse, demanding payment and attempting to intimidate the Congress by their mere presence; some soldiers at times even "point[ed] their muskets to the windows of the hall of Congress."[2] After drinking at neighboring taverns, the soldiers formed a mock obstruction as the Congress adjourned, but ultimately let the members of Congress pass through.[3] Mixed reports circulated about the group's intentions—at one point the soldiers were reportedly "penitent," while at another they were "meditating more violent measures."[4]

In response, Congress requested the presence of the state militia. As they waited for the state to respond, members in the body doubted whether the militia could force the group to disperse, as the soldiers' obstruction may not have been considered "sufficient provocation."[5] Two days later, Congress realized the state was not going to act, so they moved their deliberations to Trenton.[6] Fueled by state inaction at Philadelphia, Congress later authorized the construction of a more

1. JAMES MADISON, JOURNAL OF THE CONSTITUTIONAL CONVENTION, *reprinted in* 5 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 93 (Jonathan Elliot ed., 1845) [hereinafter ELLIOT'S DEBATES].

2. *Id.* For a more complete description of the soldiers' actions and the early history of the Enclave Clause, see THE INTERDEPARTMENTAL COMM. FOR THE STUDY OF JURISDICTION OVER FED. AREAS WITHIN THE STATES, REPORT PART II: A TEXT OF THE LAW OF LEGISLATIVE JURISDICTION 15–28 (1957), *available at* http://constitution.org/juris/fjur /2fj1-2.txt [hereinafter JURISDICTION REPORT].

3. ELLIOT'S DEBATES, *supra* note 1, at 93.

4. *Id.*

5. *Id.*

6. *See* JURISDICTION REPORT, *supra* note 2, at 17; *see also* ELLIOT'S DEBATES, *supra* note 1, at 94.

permanent home for itself along the Delaware River. Buildings were to be erected on land over which the United States would have "the right of soil, and an exclusive or such other jurisdiction as Congress may direct."[7] Although the immediate push for a piece of separate land would subside,[8] the Framers ultimately incorporated the need for a separate location into the Constitution through a somewhat obscure provision, known as the Enclave Clause, which gives Congress power

> [t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.[9]

The Enclave Clause serves two main functions: first, it gives Congress exclusive authority over the seat of the federal government (now Washington, D.C.); second, it gives Congress authority to purchase state land for important government installations. However, due in part to state concern over federal encroachment, it also requires Congress to obtain consent if it desires exclusive authority over any of the land it purchases.[10] As will be discussed at length in this Comment, the reach of the Enclave Clause and state jurisdiction over federal enclaves may actually be quite limited, given Congress's expansive authority under the Property Clause and the Supremacy Clause.[11] Furthermore, the Supreme Court has narrowly interpreted the reach of the Enclave Clause in a number of its decisions.[12]

Although the reach of the Enclave Clause is quite narrow, the state of Utah has relied on the clause in its battle against the federal government

7. NEW JERSEY RESOLUTION, *reprinted in* WILLIAM TINDALL, ORIGIN AND GOVERNMENT OF THE DISTRICT OF COLUMBIA 39 (1909).

8. JURISDICTION REPORT, *supra* note 2, at 17 ("In view of the absence of a repetition of the experience which gave rise to the resolution, it may be that the feelings of urgency for the acquisition of exclusive jurisdiction diminished.").

9. U.S. CONST. art. I, § 8, cl. 17 (the "Enclave Clause").

10. *See infra* Part III.A.

11. *See infra* Part III.D.

12. *See, e.g.*, Kleppe v. New Mexico, 426 U.S. 529 (1976); Fort Leavenworth R.R. Co. v. Lowe, 114 U.S. 525 (1885). The impact of these cases is described in greater detail in Parts III.C and III.E.

to regain control over the state's public lands. Unlike the state of Pennsylvania, which could not protect Congress on state land during its deliberations in Philadelphia, Utah is actively attempting to expel the government from the state's public lands.

For example, on March 23, 2012, Utah Governor Gary Herbert signed the Transfer of Public Lands Act—a bill that denounces federal control over the state's public lands.[13] It threatens a lawsuit if the federal government fails to return title to the vast majority of its landholdings to the state by 2015.[14] In 2010, Utah passed another bill claiming eminent domain authority over these lands because the federal government had not properly acquired the lands as required by the Enclave Clause.[15] The strength of these two pieces of the state's argument—its reliance on the Enclave Clause and attendant claim to eminent domain—are the main focuses of this Comment.

In tying its argument to the Enclave Clause, the state relies primarily on the Utah Enabling Act (UEA), which President Grover Cleveland signed into law on July 16, 1894.[16] In addition to bringing Utah into the Union, the Act effectively transferred title of state land to the federal government. However, it also provided for the sale and transfer of those lands *back* to the state, as follows:

> [F]ive per centum of the proceeds of the sales of public lands lying within said State, which shall be sold by the United States subsequent to the admission of said State into the Union, after deducting all the expenses incident to the same, shall be paid to the said State.[17]

Utah legislators have relied on this provision of the UEA in contending that the federal government has not fulfilled its obligation to sell off its public land holdings within the state, which currently amount to nearly sixty percent of Utah's land.[18] Because the lands have not otherwise been purchased under the Enclave Clause, the state of Utah contends that

13. UTAH CODE ANN. §§ 63L-6-101 to -104 (West 2012). A more complete summary of the bill and its legislative history is available at http://le.utah.gov/~2012/bills/static/HB0148 .html.

14. *Id.*

15. UTAH CODE ANN. § 78B-6-503.5 (West 2010). This bill, sponsored by Utah Representative Herrod, is discussed in greater detail in Part II.C.

16. Utah Enabling Act, 28 Stat. 107 §§ 3, 9 (1894).

17. *Id.* § 5.

18. *The Open West, Owned by the Federal Government*, N.Y. TIMES, Mar. 23, 2012, http://www.nytimes.com/interactive/2012/03/23/us/western-land-owned-by-the-federal-government.html.

its eminent domain authority extends over them.[19] The state's own legislative attorneys recognized the difficulty inherent in the state's challenge,[20] but the governor has deemed this uphill battle "a fight worth having."[21]

This Comment analyzes Utah's Enclave Clause argument and concludes that although success in court is unlikely, any potential of such success hinges on the Supreme Court's interpretation of the UEA. Most centrally, Utah must successfully argue that the federal government's ownership of the land is invalid. Part II discusses the history of public lands movements, including Utah's, to demonstrate the difficult battle that the state will face. Despite this bleak history, and even if the Court does not permit Utah to exercise its eminent domain authority, the state will still certainly be able to exert pressure on the Obama Administration to scale back its more restrictive land use policies.

Part III provides a history of the Enclave Clause and its development through Supreme Court precedent, while it also more thoroughly discusses each constitutional obstacle the state faces, including the Equal Footing Doctrine and the Property Clause. In conclusion, this Comment reviews the potential success of Utah's Enclave Clause claim in this public lands debate and weighs Utah's options in the current political atmosphere.

II. PUBLIC LANDS MOVEMENTS: FROM THE SAGEBRUSH REBELLION TO UTAH'S CURRENT EFFORTS

The fight against federal ownership of public lands is not unique to Utah; in fact, proponents for state and local management of public lands have raised many of the same concerns during previous public lands movements, including the Sagebrush Rebellion and the County Supremacy Movement.

A. FLPMA and the "Sagebrush Rebellion"

The first major public lands movement, deemed the "Sagebrush

19. UTAH CODE ANN. § 78B-6-503.5 (West 2010).

20. *Id.* The constitutional note included by the state's legislative attorneys can be found online as an appendage to the bill at http://le.utah.gov/~2010/bills/hbillint/hb0143.pdf.

21. Debbie Hummel, *Utah Demands Federal Government Return Public Lands to State*, REUTERS, Mar. 24, 2012, http://www.reuters.com/article/2012/03/24/us-utah-lands-idUSBRE82N03420120324.

Rebellion," came in response to the federal government's enactment of the Federal Land Policy and Management Act (FLPMA).[22] Numerous Western states and their Congressmen, including Utah Senator Orrin Hatch, became frustrated over President Jimmy Carter's environmental policies, which restricted access to public lands by increasing grazing fees, scaling back drilling permits, and limiting access to natural resources.[23]

Before Congress Passed FLPMA in 1976, federal lands were sold off consistently to the states and other private interests and purchasers. FLMPA dramatically reversed this longstanding policy and called for "public lands [to] be retained in Federal ownership unless . . . it is determined that disposal of a particular parcel will serve the national interest."[24] This policy of national retention upset a great deal of landowners—especially in the West—because it extended federal control over these lands instead of gradually shifting it toward private and state ownership.[25] FLPMA soon became a campaign issue, and Ronald Reagan even told supporters in a campaign speech that "[t]he next administration won't treat the West as if it were not worthy of attention. The next administration will reflect the values and goals of the Sagebrush Rebellion. Indeed, we can turn the Sagebrush Rebellion into the Sagebrush Solution."[26]

Supporters of the rebellion made the movement more about state sovereignty concerns than access to lands, and they took legal action to support their views.[27] Many credit Nevada State Senator Dean Rhoads with igniting the Sagebrush Rebellion because he initiated legislation, like several representatives in Utah, which asserted state authority over federal public lands. Supporters of the rebellion filed several lawsuits

22. Pub. L. No. 94-579 (1978).

23. Richard Blakemore, *The Sagebrush Rebellion: A Response to Federal Land Policy in the West*, 36 J. SOIL & WATER CONSERVATION 146, 148 (1981); *see The Sagebrush Rebellion*, U.S. NEWS & WORLD REP., Dec. 1, 1980, *available at* http://www2.vcdh.virginia.edu/PVCC/mbase/docs/sagebrush.html.

24. Federal Land Policy and Management Act § 102(a)(1); *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. (last visited Aug. 23, 2012), http://www.blm.gov/flpma/organic.htm.

25. *The Sagebrush Rebellion*, *supra* note 23.

26. *Id.*

27. *See* CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST 99 (1992).

against the Department of the Interior to cull federal protected land designations, but unlike the current movement in Utah, they did not focus on constitutional claims.[28]

In 1980, President Reagan was elected, and the victory "cooled off the rebellion."[29] Supportive individuals in the Reagan Administration quickly recognized that the solution offered by the Sagebrush Rebellion was problematic because it would merely replace federal bureaucratic control with state bureaucratic control.[30] Still, the sympathetic Reagan administration did work with state and local officials to develop a more collaborative regime of land management,[31] an impact that is echoed in Secretary Salazar's current efforts to co-manage land with state and local officials.[32] Furthermore, the zeal from this movement lingered into the 1990s and fueled the "County Supremacy Movement."

B. The 1990s and the County Supremacy Movement

In the 1990s, Westerners again sought to shake federal control over public lands, but this time the fervor was stoked by President Clinton's environmental policies. Legislators in Nevada were particularly ardent supporters of the movement because of the amount of the state's land held by the federal government; the government today still owns nearly eighty-five percent of Nevada land.[33]

The "County Supremacy Movement" came to a head in Nevada on July 4, 1994, when Nye County Commissioner Richard Carver bulldozed a road through Toiyabe National Forest in Nevada[34] and arrested a

28. *See, e.g.*, Sagebrush Rebellion, Inc. v. Hodel, 790 F.2d 760 (1986) (challenging a DOI conservation area designation in Idaho); Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (1983) (challenging the DOI's further designations on the land in Idaho).

29. Kurt J. Repanshek, *New 'Sagebrush Rebellion' Smolders in Western States*, L.A. TIMES; Dec. 2, 1990, at 24, *available at* http://articles.latimes.com/1990-12-02/news/mn-7915_1_sagebrush-rebellion.

30. Steve H. Hanke, *The Privatization Debate: An Insider's View*, 2 CATO J. 653, 655 (1982).

31. *Id.* at 653.

32. *See infra* note 47 and accompanying text.

33. *See id.*

34. Carolyn M. Landever, *Whose Home on the Range? Equal Footing, the New Federalism and State Jurisdiction on Public Lands*, 47 FLA. L. REV. 557, 557 (1995); *see also* William Chaloupka, *The County Supremacy and Militia Movements: Federalism as an Issue on the Radical Right*, 26 PUBLIUS: J. FEDERALISM 161, 163 (1996).

Forest Service agent for trying to intervene.[35] Carver acted in response to state legislation that had been passed in 1979 during the Sagebrush Rebellion, which asserted that the "State of Nevada owns all public lands within the borders of the State of Nevada."[36] Nevada was not the only state to pass such legislation—in fact, officials in New Mexico passed similar ordinances concerning federal public lands,[37] as did as many as fifty-eight other counties throughout the West.[38] Nye County officials were particularly upset, however, since in their county the United States owned nearly ninety-three percent of the land.[39]

In response to Commissioner Carver's actions, the Department of Justice (DOJ) filed a suit against the county and circulated a memo to federal officials reasserting federal control over these lands.[40] County officials relied heavily on the Equal Footing Doctrine to mount their defense, but unlike Utah's current efforts, they did not incorporate the Enclave Clause into their case. The County Supremacy Movement came to an end with the county's failed defense of the DOJ lawsuit in 1996.[41] The New York Times deemed the result of the lawsuit "a major blow to dozens of counties that have passed [similar] ordinances."[42]

Although unsuccessful in his goal to recapture control of the federal lands, Commissioner Carver was content that federal officials had been increasingly cooperative in their land development efforts.[43] Both the Sagebrush Rebellion and the County Supremacy Movement at the very

35. Landever, *supra* note 34, at 557–58; *see also* Paul Conable, Comment, *Equal Footing, County Supremacy, and the Western Public Lands*, 26 ENVT'L L. 1263, 1281 (1996).

36. NEV. REV. STAT. § 321.5973 (1979).

37. Chaloupka, *supra* note 34, at 162–63.

38. *Id.* at 163.

39. United States v. Nye Cnty., 920 F. Supp. 1108, 1110 (D. Nev. 1996).

40. *Id.* at 1109; DEPT. OF JUSTICE, *United States Sues Nye County, Nevada to Reaffirm Control Over Federal Lands and Quell Intimidation of Federal Employees* (Mar. 8, 1995), JUSTICE.GOV, http://www.justice.gov/opa/pr/Pre_96/March95/127.txt.html.

41. *See* Timothy Egan, *Court Puts Down Rebellion Over Control of Federal land*, N.Y. TIMES, Mar. 16, 1996, at A1.

42. *Id*.

43. *Nevada's 'Sagebrush Rebel' Happy with Results of His Defiant Bulldozing*, DESERET NEWS (Nov. 13, 1996), http://www.deseretnews.com/article/524271/NEVADAS-SAGE BRUSH-REBEL-HAPPY-WITH-RESULTS-OF-HIS-DEFIANT-BULLDOZING.html.

least can be credited with an increased willingness on the part of the federal government to collaborate on land management and regulatory concerns.[44]

C. The State of Utah's Efforts to Regain Control over its Public Lands

Like the Sagebrush Rebellion and the County Supremacy Movement, Utah's current campaign against the federal government formed in response to a new president's restrictive land use policies—this time President Obama's. In 2009, the Obama Administration suspended the sale of thirty-one oil and gas drilling parcels in Utah over concerns that the drilling would harm the surrounding wildlife.[45] Earlier that year, Secretary of the Interior Ken Salazar revoked seventy-seven leases that would have allowed for oil, gas, and mineral development on Bureau of Land Management (BLM) land within Utah.[46] In addition, Secretary Salazar instituted a process by which additional federal land would be protected from development by giving it a "wild lands" designation,[47] which has drawn

44. *See* Hanke, *supra* note 30.

45. Paul Foy, *BLM Suspends Sale of Utah Drilling Leases*, WY. TRIB. (June 23, 2009), http://trib.com/news/state-and-regional/blm-suspends-sale-of-utah-drilling-leases/article_0b673ad0-4509-506c-be56-dc02d951a9a8.html.

46. Michael B. Farrell, *Utah Uses Eminent Domain to Seize Land of . . . Uncle Sam*, ABC NEWS (May 9, 2010), http://abcnews.go.com/Politics/utah-eminent-domain-seize-land-uncle-sam/story?id=10584565; Phil Taylor, *Oil and Gas: BLM Did Not Improperly 'Rush' Canceled Utah Leases, IG Report Finds*, E&E PUB. (July 15, 2010), http://www.eenews.net/public/Landletter/2010/07/15/1.

47. *See* Julie Cart, *Salazar Backpedals: Politics Stalls Wilderness Designation, Again*, L.A. TIMES BLOG (June 11, 2011), http://latimesblogs.latimes.com/greenspace/2011/06/ politics-places-wilderness-designation-placed-in-limbo-.html. This "wild lands" designation process would inhibit development similar to the executive authority under the Antiquities Act, though it would only require secretarial approval to do so. *See* Press Release, Jason Chaffetz, Utah Congressional Delegation Supports Locally Driven Wilderness Approach (Sept. 8, 2011), *available at* http://chaffetz.house.gov/press-release/utah-congressional-delegation-supports-locally-driven-wilderness-approach.

Concerned members of Congress temporarily revoked Secretary Salazar's authority to make these designations during FY 2011. Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. 112-10, § 1769 (2011). Other states, including Utah, have taken legal action against the federal government to curb this authority as well. Brandon Loomis, *Utah*

a significant amount of criticism.[48]

In response, Utah legislators passed legislation to reassert control over the affected lands. On February 11, 2010, Utah Representative Chris Herrod introduced legislation that effectively empowered the state of Utah to exercise eminent domain authority over federal lands that were not acquired in accordance with the United States Constitution.[49] The bill contained a pessimistically worded legislative note warning legislators of the constitutional challenges the bill would undoubtedly confront because of conflicts with the Property Clause and the Equal Footing Doctrine.[50]

Two years later, and in the face of continued warnings that its claims would be deemed unconstitutional,[51] the Utah State Legislature passed a series of bills claiming eminent domain authority on behalf of the State. Governor Herbert recently signed a bill sponsored by Representative Ken Ivory that calls on the federal government to return title of the vast majority of public land back to the state of Utah.[52] Representative Ivory, who has spearheaded the most recent round of legislation, has noted that "[i]t's a promise made to Utah 116 years ago at statehood."[53]

Utah's congresspeople have backed the state legislature's efforts by recently supporting a bill that would protect Utah's lands from any further presidential monument designations.[54] They have also supported

Sues Feds over Wildlands Policy, SALT LAKE TRIB. (May 14, 2011), http://www.sltrib.com/sltrib/politics/51720408-90/wilderness-lands-utah-policy.html.csp.

48. Because of the overwhelming response, Secretary Salazar has been forced to take a more collaborative approach to the process, and has even visited Utah multiple times to demonstrate that he is interacting locally. Cart, *supra* note 47; *see also* DEPT. OF THE INTERIOR, *Salazar Takes Next Steps in Push for Bipartisan Wilderness Agenda*, (June 10, 2011), DOI.GOV, http://www.doi.gov/news/pressreleases/Salazar-Takes-Next-Steps-In-Push-for-Bipartisan-Wilderness-Agenda.cfm; Josh Loftin, *Interior Secretary Ken Salazar Visiting Utah*, DESERET NEWS (Sept. 28, 2011), http://www.deseretnews.com/article/700183105/ Interior-Secretary-Ken-Salazar-visiting-Utah.html.

49. UTAH CODE ANN. § 78B-6-503.5 (West 2010). The text of this bill is available online with an important legislative note at http://le.utah.gov/~2010/bills/hbillint /hb0143.pdf.

50. *Id*.

51. *See* Robert Gehrke, *Utah House Panel OKs Bill to Let Cities Seize Fed Land*, SALT LAKE TRIB. (Feb. 16, 2012), http://www.sltrib.com/sltrib/politics/53529358-90/authority-bill-cities-counties.html.csp.

52. 2012 Utah Laws Ch. 353 (H.B. 148).

53. Bob Bernick, *Bill Stakes Claim to Federal Lands in Utah*, UTAHPULSE.COM (Jan. 30, 2012), http://utahpulse.com/bookmark/17331882-Bill-Stakes-Claim-to-Federal-Lands-in-Utah.

54. Utah Lands Sovereignty Act, H.R. 2147, 112th Cong. (2011) (prohibiting the further

efforts to sell off more public lands, which has met some opposition (parodied by a recent Salt Lake Tribune political cartoon, below).[55] Like many other members of Congress from the West, Utah's delegation is concerned that the current administration will overextend federal authority under the Antiquities Act, which permits the president to make such designations.[56]

The delegation has real cause for concern since President Clinton used his power under the Antiquities Act to protect 1.9 million acres of land in Southern Utah from development by giving it the designation of Grand Staircase Escalante National Monument.[57] Utah's state legislature is similarly concerned, and has ridden the recent anti-federal sentiment[58] by factoring the issue into the recent decennial redistricting process.[59]

extension or establishment of national monuments in Utah except by express authorization of Congress);*see also* Press Release, Bishop, Chaffetz, Hatch, Lee Introduce Bill to Protect Utah from Presidential Monument Designations (June 14, 2011), *available at* http://lee.senate.gov/public/index.cfm/press-releases?ID=cb082493-7628-4a25-906b-3cc73349343c.

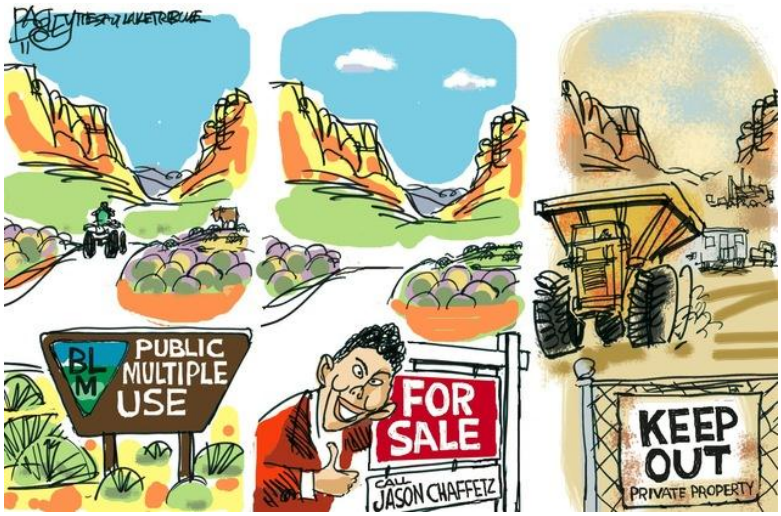
55. Thomas Burr, *Chaffetz Pushes Bill to Sell 'Excess' Federal Lands*, SALT LAKE TRIB. (Oct. 24, 2011), http://www.sltrib.com/sltrib/politics/52774161-90/lands-chaffetz-utah-bill.html.csp; *see* Pat Bagley, *Bagley Cartoon: Sign, Sign, Everywhere a Sign*, SALT LAKE TRIB. (Oct. 25, 2011), http://www.sltrib.com/sltrib/opinion/52781990-82/sign-bagley-cartoon-everywhere.html.csp.

56. NAT'L PARKS SERV., *National Monument Proclamations under the Antiquities Act*, NPS.GOV, http://www.cr.nps.gov/history/hisnps/npshistory/monuments.htm (last visited Aug. 23, 2012). For a thorough discussion of these concerns and the history of the Antiquities Act, see Frank Norris, *The Antiquities Act and the Acreage Debate***,** GEORGE WRIGHT F., 2006, at 6**,** *available at* http://www.georgewright.org/233norris.pdf.

57. Kirk Johnson, *In the West, 'Monument' Is a Fighting Word*, N.Y. TIMES (Feb. 19, 2010), http://www.nytimes.com/2010/02/20/us/politics/20utah.html.

58. *See, e.g.*, Jim Carlton, *Federal Land Seizures Urged by Utah Governor*, WALL ST. J. (March 30, 2010), http://online.wsj.com/article/SB10001424052702304370304575151693915722022.html.

59. H.C.R. 17, 59th Leg., Gen. Sess. (Utah 2010); *see also* Amy Joi O'Donoghue, *Utah Legislature: Opposition to Future National Monuments Clears House*, DESERET NEWS (Mar. 9, 2010), http://www.deseretnews.com/article/700014943/Utah-Legislature-Opposition-to-future-national-monuments-clears-house.html; Josh Loftin, *Public Lands Driving Utah Redistricting Debate*, REAL CLEAR POLITICS (Oct. 2, 2011), http://www.realclearpolitics.com/news/ap/politics/2011/Oct/02/public_lands_driving_utah_redistricting_debate.html.



Utah's state legislature and congressional delegation have both been strong proponents of local public land management and have brought attention to the state's concerns, but opponents have attacked their bills, calling them mere "message bills."[60] Utah undoubtedly has several constitutional hurdles to clear,[61] but Utah lawmakers feel that this opposition is worth challenging—especially considering the potential benefits to the state, including both control over land rich in natural resources and property tax revenues that would increase significantly.[62] Representative Herrod estimates that the coal reserves under Grand Staircase-Escalante National Monument alone are valued at around $1 trillion,[63] and supporters see it as a chance to gain back "the right to develop the disputed land and generate some $50 billion for the state's public schools."[64]

60. Scott Streater, *Utah Eminent Domain Law More than a "Message Bill"*, N.Y. TIMES (Apr. 2, 2010), http://www.nytimes.com/gwire/2010/04/01/01greenwire-utah-eminent-domain-law-more-than-a-message-bi-25839.html?pagewanted=all.

61. This is especially true given the more recent failure of Nye County. *See* United States v. Nye Cnty., 920 F. Supp. 1108, 1109 (D. Nev. 1996); *see also* Eugene Volokh, *Can a State Take Federal Land by Eminent Domain?*, VOLOKH CONSPIRACY (Mar. 29, 2010, 3:57 PM), http://volokh.com/2010/03/29/can-a-state-take-federal-land-by-eminent-domain/ (likening seizing federal property to taxing the Bank of the United States).

62. UTAH CODE ANN. § 78B-6-503.5 (West 2010).

63. Chris Herrod, *Reasserting State Sovereignty in Public Lands Management: The Eminent Domain Authority for Federal Lands Act*, INSIDE ALEC, Nov./Dec. 2010, at 6–7.

64. Robert Gehrke, *Utah Lawmakers Propose Using Eminent Domain to Take Federal Land*, S.L. TRIB., Feb. 11, 2010, http://www.sltrib.com/ci_14377307.

Because the state's actions do pose serious constitutional concerns, as noted by the state's own legislative attorneys, this Comment will focus on the soundness of the state's constitutional claims. A major premise of Utah's claim is that it never ceded exclusive jurisdiction over the state's public lands under the Enclave Clause.[65] Furthermore, the state contends that the federal government has failed to divest itself of the state's public lands in accordance with the Utah Enabling Act (UEA),[66] which acts as a mandate on Congress to sell off the public lands that were temporarily entrusted to it during Utah's admission into the Union. In making this argument, Utah lawmakers point to language in the UEA: "five per centum of the proceeds of the sales of public lands lying within said State, which shall be sold by the United States subsequent to the admission of said State into the Union . . . shall be paid to the said State . . . ."[67] State and local opposition to the federal government's restrictions on public land use is nothing new, but the fact that Utah so centrally asserted its authority under the Enclave Clause is a position unique to this movement.[68] Since the state has not yet filed suit, and hence there are no official legal arguments made by the state as of yet, this Comment will evaluate arguments that are both incorporated into legislation and commonly made by its lawmakers. Thus, any reference hereafter to the "state's" claims or "Utah's" claims refers only to likely arguments posited by state lawmakers and/or incorporated into legislation.

III. CONSTITUTIONAL OBSTACLES TO UTAH'S CLAIMS

To more fully understand how the state's Enclave Clause argument is impacted by the UEA and the various aforementioned constitutional provisions, this Part of the Comment first briefly summarizes these interactions. It then reviews the text and history of the Enclave Clause and analyzes Utah's cession of land in the Utah Enabling Act in light of this understanding. Finally, this Part examines the limitations and

65. Herrod, *supra* note 63; *see also* Utah Enabling Act, 28 Stat. 107 §§ 3, 9 (1894). By public lands, these lawmakers are not referring to National Parks and other valid federal enclaves. *See* UTAH CODE ANN. §§ 63L-6-101 to -104 (West 2012).

66. Utah Enabling Act §§ 3, 9.

67. *Id.* § 9.

68. *See* Part II.A (Sagebrush Rebellion); II.B (The County Supremacy Movement).

challenges on Utah's Enclave Clause argument by reviewing the Supreme Court's Enclave Clause, Equal Footing, and Property Clause jurisprudence.

A. A Brief Summary: Some Complex Constitutional Interactions

It is impossible to gauge the strength of Utah's Enclave Clause argument without first understanding how the Property Clause and the Equal Footing Doctrine potentially weaken the state's claim. This Part briefly summarizes the impact of these provisions and how they bear on the Supreme Court's possible future ruling and interpretation of the Utah Enabling Act.

First, Utah is likely to face a challenge by the federal government's authority under the Property Clause. As articulated in the Constitution, the Property Clause gives Congress 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."[69]

The authority granted to Congress here is quite encompassing—Congress may "dispose of" and "make *all* needful Rules and Regulations" concerning its lands.[70] The Supreme Court has also interpreted this clause as a broad grant of authority—a power "without limitations."[71] Utah's legislative attorneys have clearly identified the Property Clause as the single-largest barrier to the state's claim.[72]

However, the Property Clause extends only to "[t]erritory or other Property belonging to the United States."[73] The state of Utah contends that the public lands in question do not rightfully "*belong*[] to the United States"[74] because Congress was to "dispose of"[75] these lands under the UEA. The language of the UEA seems to support this argument, since it provides that Utah would receive "five per centum of the proceeds of the sales of public lands lying within said State," and that these public lands

69. U.S. CONST. art. IV, § 3, cl. 2.

70. *Id*. (emphasis added).

71. Kleppe v. New Mexico, 426 U.S. 529, 530 (1976) (quoting United States v. San Francisco, 310 U.S. 16, 29 (1940); *see also infra* Part III.D.

72. *Supra* note 20.

73. U.S. CONST. art. IV, § 3, cl. 2.

74. *Id*. (emphasis added).

75. *Id*.

"*shall* be sold by the United States subsequent to the admission of said State into the Union."[76] Although Congress previously divested itself of large sections of land under the UEA for schools and other government buildings,[77] this ended with the passage of FLPMA in 1976.[78] At bottom, to overcome a property clause challenge, Utah must successfully argue that federal ownership of the contested lands is outright invalid.

Second, the federal government is likely to challenge Utah's claim to eminent domain authority over the contested lands. Through HB 143, passed in 2010, Utah claimed eminent domain authority over lands not "owned by the federal government in accordance with the United States Constitution Article I, Section 8, Clause 17."[79] This provision, known as the Enclave Clause, gives Congress the power "[t]o exercise [exclusive legislation] 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."[80] Because Congress did not acquire the public lands in question by consent and is not using the land for "Forts, Magazines, Arsenals, dock-Yards, and other *needful Buildings*,"[81] the state claims the federal government lacks authority over the land.

If Utah were to rely on this clause alone, however, it would face constitutional difficulties because the federal government may acquire land not only under the Enclave Clause, but also through the exercise of eminent domain, which supersedes state authority under the Supremacy Clause.[82] Thus, although the Enclave Clause arguably pertains to only a very "narrow category of federal property,"[83] later discussion will show that the federal government may also rightfully acquire land by eminent

76. Utah Enabling Act, 28 Stat. 107, (1894) (emphasis added).

77. *Id*. §§ 6–8.

78. FLPMA fundamentally altered the federal-state relationship with regards to public lands holdings—an issue that is discussed in more detail in Robert L. Fischman & Jeremiah Williamson, *The Story of* Kleppe v. New Mexico*: The Sagebrush Rebellion as Un-Cooperative Federalism*, 83 U. COLO. L. REV. 123, 146 (2011) ("The FLPMA required the BLM, for the first time, not only to coordinate with and 'assure that consideration is given to' relevant state-authorized plans, but also to 'provide for meaningful public involvement of State and local government officials.'") (citing 43 U.S.C. § 1712(c)(9) (2006)).

79. UTAH CODE ANN. § 78B-6-503.5 (West 2010).

80. U.S. CONST. art. I, § 8, cl. 17 (emphasis added).

81. *Id*.

82. *See infra* Part III.D.

83. Eugene R. Gaetke, *Refuting the "Classic" Property Clause Theory*, 63 N.C. L. REV. 617, 619 n.5 (1985).

domain for valid governmental purposes like national parks.[84] However, Congress has not exercised such authority here. The millions of acres of federal public lands in question have never been acquired either through Congress's Enclave Clause authority or through eminent domain. In sum, to survive a challenge to the state's exercise of eminent domain, Utah must centrally assert that the federal government's control of the contested lands is invalid, since it has neither obtained the land through the Enclave Clause nor claimed it through the exercise of eminent domain. The federal government is unlikely to make a claim of eminent domain here, as this would signify that it does not currently hold title to the contested lands.

Third, and finally, the federal government will likely challenge Utah's assertions under the Equal Footing Doctrine. While the doctrine itself is unlikely to fully support the state, the state is likely to use the Supreme Court's broad dicta and federalism discussion on the issue. The Equal Footing Doctrine, as utilized by public lands movements in the past,[85] can be summarized as follows: when a new state is admitted to the Union, it must be given the same legal and political rights as the preexisting states. In terms of authority over public lands, this means that states must be granted equal authority over public lands within their state boundaries. However, the doctrine may be limited to claims that concern the land underlying navigable waters.[86] States' rights supporters rely heavily on a particular statement in *Pollard v. Hagan*, though, to expand its reach: "[T]he United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory, of which Alabama or any of the new states were formed; except for temporary purposes . . . ."[87]

Using this language, Utah is likely to argue that in order for states like Utah to be admitted on "equal footing," the Court must interpret Utah's cession of land under the UEA as being done "for temporary

84. *See infra* Part III.D.

85. *See supra* Parts II.A–.B.

86. For states admitted to the Union after the country's formation, the Supreme Court has held (as in *Pollard*), that such an interpretation applied to the land underlying waterways. However, the Equal Footing Doctrine does not necessarily touch such a narrow category of land—the Supreme Court has also held that it acts as a limit on Congress from requiring anything in a state's Enabling Act that would limit its future sovereignty as a state, including the power to change the location of a state capital. *See* Coyle v. Smith, 221 U.S. 559, 565 (1911).

87. Pollard v. Hagan, 44 U.S. 212, 221 (1845).

purposes"[88] only. Utah legislators have thus argued that the federal government was supposed to act only as a temporary trustee over Utah's lands until the conditions in the UEA were fulfilled.[89] The state's public lands were then to be sold and the State was to receive five percent of the proceeds of those sales.[90]

In support of its claim, Utah is likely to rely on supporting arguments offered by all of the aforementioned constitutional provisions—the Property Clause, the Enclave Clause, and the Equal Footing Doctrine. And for its claim to succeed, Utah must strategically employ the language from the UEA in light of these provisions—particularly the Enclave Clause—to argue that the federal government is bound by the UEA's conditions and that it has never validly held title to the contested lands.

B. History of the Constitution's Enclave Clause

To better understand the impact of the Enclave Clause, it is useful to review its history, as it lends some support to the federalism thrust of Utah's argument. On August 18, 1787, delegates to the Constitutional Convention responded to the soldiers' actions in Philadelphia by attempting to both establish a separate home for the federal government and meanwhile assuage the individual states that their sovereignty would not be violated. James Madison led the cause by proposing that Congress be given the power "[t]o exercise exclusively Legislative authority at the seat of the General Government, and over a district around the same, not exceeding [ten] square miles, the Consent of the Legislature of the State or States comprising the same, being first obtained."[91] Madison also proposed that the Convention "authorize the Executive to procure and hold for the use of the U.S. landed property for the erection of Forts, Magazines, and other necessary buildings."[92]

88. *Id*.

89. Herrod, *supra* note 65, at 7.

90. *See* Utah Enabling Act, 28 Stat. 107 (1894).

91. James Madison, Madison Debates (Aug. 18, 1787), *available at* http://Avalon.law.yale.edu/ 18th_century/debates_818.asp. The Convention would decide on the size of ten square miles at a later date, the size which was incorporated into the Enclave Clause. U.S. CONST. art. I., § 8, cl. 17.

92. *Id*.

The first of these powers was proposed in an effort to establish a central, geographical seat of authority for the nation that was to be free from the will of any individual state.[93] Ultimately, Washington, D.C., was formed, and Congress obtained exclusive authority over the District.[94] The Supreme Court affirmed Congress's exclusive authority over the District soon after ratification.[95] The second of these powers was proposed in an effort to extend the general legislative power to purchases of federal installations within the different states, though it was unclear whether federal legislative authority would supersede that of the state on these properties.[96] Both proposals became part of what is now known as the "Enclave Clause," which gives Congress the enumerated power

> [t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.[97]

The final draft of the Enclave Clause limited the location and size of the district, but the most important limitation was that of consent—it ensured that *any* land conveyance for the district occur "by Cession" of each affected state, and that any other land purchase occur "by the Consent of the [state] Legislature."[98] Through an analysis of the constitutional debates and convention history, constitutional scholar Robert Natelson noted that these two limitations (location and size/ cession or consent) exemplify the emphasis the founders placed on protecting federalism in drafting the Enclave Clause.[99]

93. *See* THE FEDERALIST NO. 32, at 151–52 (Alexander Hamilton) (Kessinger Publishing 2004); for a discussion of events that likely fomented this desire, see *supra* Part I.

94. U.S. CONST. art. I, § 8, cl. 17.

95. Reily v. Lamar, 6 U.S. (2 Cranch) 344, 354–55 (1805).

96. *See* Robert G. Natelson, *Federal Land Retention and the Constitution's Property Clause: The Original Understanding*, 76 U. COLO. L. REV. 327, 346–47 & nn.96–97 (2005).

97. U.S. CONST. art. I, § 8, cl. 17.

98. *Id.*

99. Natelson, *supra* note 96, at 346–57.

1. Place- and size-limitation requirement

During the Constitutional Convention debates, several delegates expressed their concern over establishing any geographical district to seat the central government.[100] Not only were delegates concerned over jurisdictional problems, but they also worried it might upset the federalism balance—namely, that it would give a "provincial tincture to [the National] deliberations."[101] Other delegates generally agreed that creating the District would prevent favoritism in New York or Philadelphia and would "better effectuate the fiduciary ideal of impartiality."[102]

Different sizes for the District were suggested, but to assuage concerns, those in favor of a central geographical District ensured that the District would be limited in size. During the Virginia ratifying convention, James Madison even ensured the representatives that the District "cannot exceed ten miles square."[103] This concern was echoed in ratifying conventions throughout the several states.[104] Convinced that the size limitation had assuaged any fears of an overbearing federal government, Madison claimed that "[t]he extent of this federal district is sufficiently circumscribed to satisfy every jealousy of an opposite nature."[105]

Although these limitations may seem minor given the reach of Congress's other enumerated powers,[106] their symbolic importance is without question. Not only would the national government be separate in power and in kind from that of the states, but the federal government would also have its own separate geographic location over which it would exercise sovereign power. But this power would not extend beyond a small, ceded plot of land for the District, nor would it extend to any federal enclave other than "needful Buildings."[107] These

100. *Id.* at 353–55.

101. Col. Mason, Madison Debates (July 26, 1787), *available at* http://avalon.law.yale.edu/18th_century/debates_726.asp.

102. Natelson, *supra* note 96, at 350.

103. James Madison, Virginia Ratifying Debates, 3 ELLIOT'S DEBATES, *supra* note 1, at 432.

104. Natelson, *supra* note 96, at 354 n.128.

105. THE FEDERALIST NO. 43, at 209 (James Madison) (Terrence Ball ed., 2003).

106. *See* U.S. CONST. art. I, § 8.

107. U.S. CONST. art. I, § 8, cl. 17.

circumscribed limits not only act as a protection from federal encroachment onto state land,[108] but they also symbolize the distinct separation between state and federal power.

2. State-consent requirement

Although the location and size limitations were important restrictions, even more essential to the successful passage of the Enclave Clause was its consent requirement for land purchases. The Framers were concerned that extensive land holdings by the federal government within the states "might be made use of to enslave any particular State by buying up its territory, and that the strongholds proposed would be a means of awing the State into an undue obedience to the [General] Government."[109] To ensure that this power was not abused, "after the word 'purchased' the words 'by the consent of the Legislature of the State'" were added.[110]

James Madison also noted the important federalism implication inherent in control over these installations: "The public money expended on such places and the public property deposited in them, requires that they should be exempt from the authority of the particular State."[111] As with the size limitation, the consent requirement (or concession, in the case of creating the District) was also an important theme in the state ratifying debates.[112] In fact, many state convention representatives understood that this limitation was so reaching that individual states could place jurisdictional conditions on any cession of land.[113]

The state consent requirement was not only a practical limitation, but also a symbolic limitation on federal authority. It was the *states* that would be tasked with ceding land for a national seat of government. It was the *states* that would have to agree to cede land purchased for

108. Natelson, *supra* note 95, at 353–54 (noting in particular that an overarching concern of the Anti-Federalists was that the Enclave Clause "might be abused" and that the Federal Government might use the enclaves, particularly military ones, "to intimidate the states and thereby undermine the independence of state governments from undue federal influence.").

109. Mr. Gerry, Madison Debates (Sept. 5, 1787), *available at* http://avalon.law.yale.edu/18th_century/debates_905.asp.

110. 5 ELLIOT'S DEBATES, *supra* note 1, at 511 (Mr. King).

111. THE FEDERALIST NO. 43, at 209 (James Madison) (Terrence Ball ed., 2003).

112. Natelson, *supra* note 96, at 355 n.132.

113. *Id.*

federal installations and "needful Buildings,"[114] and it was the *states* that would set the limits on federal jurisdiction within these enclaves. As with the location and size limitations, the state consent requirement is another example of the federalism implications inherent in the text and history of the Enclave Clause.[115]

C. Utah's Enabling Act and the Argument Against Complete Jurisdictional Cession

In light of the federalism underpinnings inherent in the text and history of the Enclave Clause, the impetus behind Utah's current public lands debate and Enclave Clause arguments begins to become clear. In order to assess the validity of the state's arguments, however, one must analyze the instrument through which Utah originally ceded its lands to the federal government—the Utah Enabling Act.

1. An understanding of the UEA

On July 16, 1894, after much anticipation, and some political and religious compromise,[116] President Grover Cleveland signed Utah's Enabling Act into law.[117] Almost six months later, on January 4, 1896, President Cleveland welcomed Utah as a state into the Union by proclamation, thus taking the final step required for Utah statehood.[118] Although no legal challenges to the Act arose during Utah's early years, the state's current success depends heavily on connecting the Enclave Clause and Utah's interpretation of the Enabling Act—specifically that the federal government has failed in its contractual obligations to sell off its land.

As with the enabling acts used in many other admitted states, Utah's

114. U.S. CONST. art. I, § 8, cl. 17.

115. *See also* C. Perry Patterson, *The Relation of the Federal Government to the Territories and the States in Landholding*, 28 TEX. L. REV. 43, 43 (1949) ("[The landholding relation] is one of the most basic foundations of our federalism, if, indeed, it is not the corner stone."); *cf.* Allan Erbsen, *Constitutional Spaces*, 95 MINN. L. REV. 1168, 1237 (2011) ("[T]he Enclave Clause does not bar Congress from taking land from an unconsenting state by eminent domain.")

116. For a discussion of the role of polygamy in Utah's statehood prospects, *see* ORSON F. WHITNEY, POPULAR HISTORY OF UTAH 332–46 (1916).

117. *Utah to Become a State*, N.Y. TIMES, July 18, 1894, at 9, *available at* http://query.nytimes.com/mem/archive-free/pdf?res=F30811FC3C5415738DDDA10994DF405B8485F0D3.

118. WHITNEY, *supra* note 116, at 506.

Enabling Act set very specific conditions on Utah's admission into the Union. It limited state and federal action in four important ways: (1) Utah ceded all "right and title" to unappropriated public lands to the United States[119]; (2) the state had to tax all landowners equally and could not tax federal property[120]; (3) some of these public lands would be given back to the state for state government and public buildings[121]; and (4) five percent of the proceeds from the sale of excess public lands would go back to the state for a common school trust fund. Utah's public lands arguments hinge primarily on the first and fourth of these provisions.[122]

2. Right and title

One common argument made by Utah lawmakers is that, although Utah conceded all "right and title" to the unappropriated public lands in the state, it did not concede its jurisdiction over those lands.[123] Section 3 of the UEA concedes all right, title, *and* jurisdiction over Indian lands within the state, but for all other public lands, the state conceded only "right and title." Utah lawmakers here rely on the canon of construction *expressio unius* to claim that Congress intended to exclude such jurisdiction as it relates to the state's public lands.

State Representative Chris Herrod has argued that this distinction

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

> [T]he people inhabiting said proposed State do agree and declare 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, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States . . . . *Id.*

120. *Id.* ("[T]he lands belonging to citizens of the United States residing without the said State shall never be taxed at a higher rate than the lands belonging to residents thereof; that no taxes shall be imposed by the State on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use.").

121. *Id.* § 7 (Large sections of unappropriated public lands would be provided to "erect[] public buildings, at the capital of said State, when permanently located, for legislative, executive, and judicial purposes.").

122. *Id.* § 9 ("That five per centum of the proceeds of the sales of public lands lying within said State, which shall be sold by the United States subsequent to the admission of said State into the Union, after deducting all the expenses incident to the same, shall be paid to the said State, to be used as a permanent fund, the interest of which only shall be expended for the support of the common schools within said State.").

123. *Id.* § 3.

between "right and title" and jurisdiction is key to understanding the chain of title underlying Utah lands. In a recent article to the American Legislative Exchange Council (ALEC), he argued:

> Utah did not give up its claim of jurisdiction or sovereignty. By forfeiting 'right and title,' Utah simply forfeited claim of ownership, which was needed to give clean title to the land. This is often referred to as 'proprietary' title and is the same type of ownership that any property owner holds. In contrast, Utah gave up 'right, title, and jurisdiction' over sovereign Indian lands within its boundaries.[124]

Representative Herrod's position is that the Enabling Act was but a medium through which the United States would hold the land temporarily to obtain "clean title" and wash away any lasting notion of territorial sovereignty. The federal government in this stage would be "more of a proprietor."[125] In turn, the excess public lands not dedicated to other purposes as outlined in the Act would eventually be sold back to the state or privatized, with five percent of the proceeds going to Utah's common school trust fund. The federal government could purchase these lands "by the Consent of the Legislature"[126]—as required by the Enclave Clause—but if the lands were not sold off as agreed to, Utah's position is that the federal government no longer has jurisdiction, and its right and title to the lands should be revoked because its right to hold title of the lands was only temporary.

Instead, Utah lawmakers argue, the state may exercise its power of eminent domain over these excess public lands, sell or purchase them, and retain the five percent in its trust fund coffers.[127] Although this argument is novel and unique to Utah because of the text of the UEA, the state's argument must overcome a variety of obstacles: not only will the Equal Footing Doctrine and the Property Clause pose significant barriers, but the state will also face mounting political and environmental opposition to its cause.

124. Herrod, *supra* note 63, at 6.

125. Phil Taylor, *U.S. Not 'Sovereign' Over Federal Lands, Utah GOP Senate Candidate Says*, N.Y. TIMES, July 2, 2010, http://www.nytimes.com/gwire/2010/07/02/02greenwire-us-not-sovereign-over-federal-lands-utah-gop-s-30438.html?pagewanted=all (quoting now-Senator Mike Lee).

126. U.S. CONST. art. I, § 8, cl. 17.

127. See Kohl v. United States, 91 U.S. 367 (1875) for a discussion of the underpinnings of the federal-state eminent domain power. *See also* Note, *The Power of a State to Condemn Land for a Federal Park*, 44 YALE L.J. 1458 (1935).

But while the text and history of the UEA and the Enclave Clause seem to strongly support Utah's authority to regain control of these contested lands, over 200 years of Supreme Court decisions have re-shaped public lands issues. As such, it is important to analyze Utah's potential argument in light of the Court's Enclave Clause jurisprudence (collectively, the limitations imposed by the Property Clause,[128] the federal government's eminent domain authority,[129] and the "Equal Footing doctrine,"[130]) as discussed below.

D. Challenges Posed by the Property Clause

First, the success of Utah's Enclave Clause argument depends heavily on the extent of federal power under the Constitution's Property Clause.

1. The Property Clause: Text and structure

The federalism implications inherent in the text and structure of the Property Clause might provide support for Utah's defense of a Property Clause challenge, which is essentially that the United States holds a mere "proprietorship"[131] over the land. If the land in Utah were still under control as federal property, then "Congress has the same power over it as over any other property belonging to the United States; and this power is vested in Congress without limitation . . . ."[132] Utah lawmakers argue, however, that the state's land in question is still retained only in an escrow-type holding, even though the United States is acting as both a broker and contracting party. After forming the new state, "the power of the United States over these lands, as property, was to cease."[133] To understand the extent of federal control over these specific lands, a more thorough analysis of the text of the Property Clause is warranted.

The Constitution's Property Clause gives Congress several powers, including the power "to dispose of and make all needful Rules and

128. U.S. CONST. art. I, § 8, cl. 17; *see infra* Part III.D.

129. U.S. CONST. art. IV, § 3, cl. 1; *see infra* Part III.E.

130. U.S. CONST. art. IV, § 3, cl. 2; *see infra* Part III.F.

131. As discussed, this refers to lands still within federal purview, but not yet "dispose[d]" of in accord with the UEA's mandate that these lands "shall be sold." Utah Enabling Act, 28 Stat. 107 §§ 6, 9 (1894).

132. United States v. Gratiot, 39 U.S. 526, 537 (1840). *See also* Kleppe v. New Mexico, 426 U.S. 529, 539 (1976).

133. Pollard v. Hagan, 44 U.S. 212, 224 (1845).

> 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."[134]

On its face, the Property Clause grants a host of powers to Congress—if it owns the land, it can "dispose of" it and "make all needful Rules and Regulations" concerning it.[135] Furthermore, no state action can "Prejudice any [of] these Claims."[136] But Congress's authority under this clause applies only to "[t]erritory and other Property belonging to the United States."[137] Thus, if the land does not *belong* to the United States, because the United States had *disposed* of the land in forming a new state under Article IV, Section 3, Clause 1, then the federal government's authority does not reach, unless it purchases the land or exercises its authority of eminent domain.

The structure of the Property Clause within Section 3 lends support for a more state-protective interpretation of the Clause. There are only two clauses in Section 3—the first sets forth the procedure of forming new states,[138] and the second (the Property Clause) discusses the procedure for disposing those lands. When read together with the first clause, the Property Clause can be seen as a call to Congress to dispose of lands it uses to form new states. This interpretation is strengthened by yet another structural argument: the Property Clause is located in Article IV, which contains a host of rights protective of the states. Unlike Congress's authority to "purchase" lands under the Enclave Clause, which is part of Congress's enumerated powers in Article I, the Property Clause cannot be read as an enumerated power but instead (for disposal purposes) as a procedural limitation when it has decided to form a new state from its existent territorial holdings.

134. U.S. CONST. art. IV, § 3, cl. 2.

135. *Id*.

136. *Id.*

137. *Id*.

138. U.S. CONST. art. IV, § 3, cl. 1 ("New States may be admitted by the Congress into this Union; but no new State 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.").

2. The Property Clause after Kleppe

Despite these potential insights, the Supreme Court has interpreted the Property Clause as a broad grant of authority to Congress. But if the Property Clause is read in light of the Enclave Clause as the Court interprets the UEA, however, this view may change, since the Court will be examining the Property Clause through a new lens—a contractual claim in an enabling act.

After Congress passed FLPMA in 1976, it completely reversed direction in its policy to dispose of federal lands and instead "formally declared that its 'ownership' of public domain lands was permanent" through an exercise of its power under the Property Clause.[139] Utah could argue here that this decision stands as an implicit recognition that congressional ownership was not "permanent," and instead the standing policy since the Founding was to "dispose" of these lands (which is in line with the structural arguments noted above). However, the Supreme Court paved the way for a more expansive exercise of federal power when, months earlier, it decided *Kleppe v. New Mexico*.[140]

At issue in *Kleppe* was an action by the New Mexico Livestock Board (NMLB) when it took and sold nineteen unbranded burros from BLM land. The United States contested the NMLB's authority on the lands and argued that the Wild and Free-Roaming Horses and Burros Act protected the burros from "capture, branding, harassment, or death."[141] The Court held for the United States and gave the Property Clause a broad reading. Not only could Congress clearly manage and sell federal lands, but also when state action contradicts this authority, congressional legislation "necessarily overrides conflicting state laws under the Supremacy Clause."[142] The Court's preemptive view of federal authority on these lands struck yet another blow to supporters of federalism and the Sagebrush Rebellion.[143] In fact, the language used by the Court was so broad as to seemingly undercut any hope that the Enclave Clause might pose for public lands movements—the Court held that the federal

139. Landever, *supra* note 34, at 597.

140. 426 U.S. 529 (1976).

141. Pub. L. 92–195 (1971).

142. *Kleppe*, 426 U.S. at 543.

143. *See supra* Part II.A.

government possessed "complete power,"[144] "plenary power,"[145] "police power,"[146] "power . . . without limitations,"[147] and "the powers . . . of a legislature over the public domain.'"[148]

The *Kleppe* Court also discussed the Enclave Clause, and noted that while the acquisition of jurisdiction over lands within a state is the impetus of the Enclave Clause, it "has nothing to do with Congress' powers under the Property Clause."[149] Absent such jurisdiction, Congress may still legislate with respect to its lands under its Property Clause authority.[150] The implication of this distinction is that, to legislate under the Enclave Clause, Utah lawmakers must make a clear case for the application of the Enclave Clause and successfully argue that the federal government's claim to the contested lands is invalid. Otherwise, the federal government's exercise of authority under the Property Clause will necessarily invalidate the state's exercise of eminent domain.

3. Looking to the future: Commerce Clause federalism and the Enclave Clause

What makes the *Kleppe* decision so intriguing in the context of state-federal relations is that it was decided just a week before the Supreme Court's decision in *National League of Cities v. Usery*.[151] The Court's decision in *National League of Cities* empowered states because the Court refused to extend Congress's Commerce Clause authority under the Fair Labor Standards Act, which required states to apply minimum-wage and maximum-hour requirements.[152] Although the Court's decision in *Garcia v. San Metropolitan Transit Authority*[153] marked a clear change in direction for the Court from this position, the wake left

144. *Kleppe*, 426 U.S. at 540.

145. *Id.*

146. *Id.*

147. *Id.* at 539.

148. *Id.* at 540; *see* WILKINSON, *supra* note 27, at 11 (for a broader discussion of the expanded property clause in *Kleppe*.

149. *Kleppe*, 426 U.S. at 542.

150. *Id.*

151. 426 U.S. 833 (1976); for a much more thorough discussion of the possibilities of advancing the cause of federalism through the public lands debate, see *Landever*, *supra* note 34, at 600.

152. National League of Cities, 426 U.S at 855.

153. 469 U.S. 528 (1985).

behind after its decisions in *United States v. Morrison*[154] and *United States v. Lopez*[155] supports the prospective Utah case in terms of general support for federalism ideals.

Although these cases touched on federalism through an analysis of the Commerce Clause authority, Utah lawmakers are undoubtedly hopeful that the Court will extend its federalism ideals through its analysis of the Enclave/Property Clause authority. A glimmer of hope for this future outcome came in the Court's public lands decision in *Utah Division of State Lands v. United States*.[156] Although this was an "equal footing" case and not an Enclave Clause case, the Court again emphasized the notion that Congress's policy with respect to the government's large land holdings was to "hold[] this land for the ultimate benefit of the future states."[157] Only in "exceptional instances" would it "defeat[] the future States' title to the lands under navigable water."[158] A narrow reading may imply that the Court's discussion only applies to the land "under navigable water," but at the very least, the Court's decision emphasizes that Congress must act with a "sufficiently plain" intent to defeat its prior policy of divestment.[159] Given the wake effectuated by the *Morrison* and *Lopez* decisions, supporters are hopeful that the tide of federalism will work in their favor with public lands concerns as well.

The hope for this position has increased following a couple of recent Supreme Court decisions. In *Hawaii v. Office of Hawaiian Affairs*, the Supreme Court was asked to determine whether a congressional Apology Resolution in any way limited the state's sovereign authority to alienate state lands that were being held in a public trust.[160] In 1893, Congress annexed the Hawaiian Islands and claimed sovereignty over the islands by passing the Newlands Resolution; Congress returned title to the islands to Hawaii in the 1959 Admission Act, under the condition that title be held in a public trust.[161] The Supreme Court held that the 1993 Apology Resolution in no way diminished this state authority because

154. 529 U.S. 598 (2000).
155. 514 U.S. 549 (1995).
156. 482 U.S. 193 (1987).
157. *Id.* at 209.
158. *Id*.
159. *Id.* at 203.
160. 556 U.S. 163 (2009).
161. *Id*. at 166–69.

"[t]he consequences of admission are instantaneous, and it ignores the uniquely sovereign character of that event . . . to suggest that subsequent events somehow can diminish what has already been bestowed."[162] The Court also extended this notion in broad strokes and held that "[this] proposition applies *a fortiori* where virtually all of the State's public lands—not just its submerged ones—are at stake."[163] If the Court extends this principle, especially under the Equal Footing Doctrine, to the lands at issue in Utah, the state's case becomes stronger yet.

E. Eminent Domain and Separating Validly Held from Invalidly Held Lands

The second major challenge to Utah's case will likely be to Utah's eminent domain claim. Utah's argument here is, essentially, that the federal government has not properly divested itself of the state's public lands in accordance with the UEA but has instead retained them invalidly. Because the federal government may obtain land both under the Enclave Clause and by transfer or through eminent domain, this section of the Comment will make clear that the state's argument pertains to a different, third kind of landholding that is invalid—those lands which have been retained but not validly obtained. To do so, it addresses each category of land, in turn.

1. Lands validly obtained under the Enclave Clause

The first legal avenue through which the federal government can acquire land is state consent under the Enclave Clause although states can place conditions on any such transfer of land. In *Fort Leavenworth Railroad Co. v. Lowe*, for example, the state of Kansas retained the right to tax the Fort Leavenworth Military Reservation when it ceded the land to the federal government as a federal enclave.[164] When the state attempted to levy property taxes against installations on the reservation, the railroad company objected.[165] In its decision, the Court articulated two important points about state transfers of lands under the Enclave Clause—first, states may decide to cede only conditional jurisdiction over the land; second, these conditions cannot run counter to the

162. *Id.* at 175.

163. *Id.* at 176.

164. 114 U.S. 525, 528 (1885).

165. *Id.* at 527.

purposes the enclaves are suited to fulfill.[166] States might also choose to transfer the power of exclusive jurisdiction, which would bar any state restriction of federal authority.[167]

The Court ultimately held that Kansas could tax the railroad that ran across the federal property, but the state could not exercise its sovereign authority—such as its taxing authority—over federal installations, like the Ft. Leavenworth military base.[168] This is because it "would destroy or impair [the government's] effective use for the purposes designed."[169] The Court also articulated the structural reason that Congress is given this power of "exclusive Legislation"[170] over federal enclaves to make sure that these enclaves, or "places on which the security of the entire Union may depend," would not "be in any degree dependent on a particular member of it."[171]

Although the holding in *Fort Leavenworth* greatly restricts the exercise of state authority on these lands, the Court did emphasize that the federal government could only construct truly "needful Buildings" on the land.[172] If the land is used for other purposes, then "the legislative power of the state over the places acquired will be as full and complete as over any other places within her limits."[173] In fact, the Court reiterated the validity of the state exercise of eminent domain authority on federal land and stressed that the federal government must obtain consent if it desires to purchase state land.[174] If a state refuses to consent, the land

166. *Id.* at 539.

167. *Id*. at 542.

168. Id. at 541–42.

169. *Id.* at 539.

170. U.S. CONST. art. I, § 8, cl. 17. For a discussion of the distinction between "exclusive jurisdiction" and "exclusive Legislation" (the terminology of the Enclave Clause), see David E. Engdahl, *State and Federal Power over Federal Property*, 18 ARIZ. L. REV. 283, 288–90, nn.9–15 (1976).

171. *Fort Leavenworth*, 114 U.S. at 530.

172. U.S. CONST. art. I, § 8, cl. 17.

173. *Fort Leavenworth*, 114 U.S. at 539; *see also* Murphy v. Love, 249 F.2d 783, 786 (10th Cir. 1957), *cert. denied*, 355 U.S. 958 (1958) (discussing the validity of state taxation on federal lands, though not on federal installations). Congress has also validated this exercise. 4 U.S.C. § 105 (2006) (preventing individuals from claiming a tax exemption because the purchase was made on federal land).

174. *Fort Leavenworth*, 114 U.S. at 531–32. It is important to note that the *Fort Leavenworth* decision is read generally as a strong limitation on state sovereignty and jurisdiction. Because the Court reiterated that the federal government had the power of eminent domain and clear sovereign authority for its purposes within federal enclaves harbored within the states, this understanding is warranted. However, the case should not be read as a complete destruction of state sovereignty over

retained by the federal government would still be open to valid exercises of state authority—including that of eminent domain:

> Where lands are acquired without such consent, the possession of the United States, unless political jurisdiction be ceded to them in some other way, is simply that of *an ordinary proprietor*. The property in that case, unless used as a means to carry out the purposes of the government, is subject to the legislative authority and control of the states equally with the property of private individuals.[175]

However far this authority may extend, the Supremacy Clause[176] prevents states from abusing their jurisdictional authority, but they may reserve and exercise *concurrent* jurisdiction over these lands.[177]

2. Lands validly obtained by transfer or by eminent domain

One question that remained unanswered after *Fort Leavenworth* was the extent of state authority over lands within this second category—lands validly obtained by the federal government through means other than the Enclave Clause, such as eminent domain. In *Collins v. Yosemite Park & Curry Co.*, the Supreme Court initially answered this question flexibly in a dispute over the state exercise of jurisdiction in Yosemite National Park.[178] In 1920, the state of California transferred the Yosemite Valley to the federal government but qualified the cession by retaining the authority to tax.[179] The Court noted that in these situations,

public lands. By setting a clear line that the federal government could only exercise this authority over "needful Buildings" and terminating federal authority over land not acquired in accordance with the Enclave Clause, this Comment argues that it should also be read to emphasize the vitality of the Enclave Clause.

175. *Fort Leavenworth*, 114 U.S. at 531 (emphasis added). It is worth noting here that this very language was alluded to by Senator Mike Lee when discussing Utah's exercise of eminent domain under the Enclave Clause. *See* Taylor, *supra* note 125.

176. U.S. CONST. art. VI, cl. 2.

177. *E.g.*, James v. Dravo Contracting Co., 302 U.S. 134 (1937); Bd. of Supervisors v. United States, 408 F. Supp. 556 (E.D. Va. 1976), *dismissed*, 551 F.2d 305 (4th Cir. 1977) (both cases discussing the potential for overlapping jurisdictional coverage where the state exercise of jurisdiction does not impede the federal government's purpose for acquiring the land). For a more recent example of concurrent jurisdiction, *see* Swords to Plowshares v. Kemp, 423 F. Supp. 2d 1031 (N.D. Cal. 2005).

178. 304 U.S. 518 (1938); *see also James*, 302 U.S. at 134.

179. *Collins*, 304 U.S. at 530.

"[t]he States of the Union and the National Government may make mutually satisfactory arrangements as to jurisdiction of territory within their borders and thus in a most effective way, cooperatively adjust problems flowing from our dual system of government."[180] Like under the Enclave Clause, here states and the federal government can together decide how to divide jurisdiction over the land. Many states opt to cede exclusive jurisdiction because of the sheer cost of policing and maintaining certain public lands.[181]

But where a state has not ceded land and instead the federal government has acquired it by eminent domain, for example, a shared jurisdictional arrangement may not be desired or agreeable. In these instances, as noted in *Kleppe*, the federal government possesses "complete power" over these lands under the Property Clause.[182] In a separate case particularly pertinent to Utah's argument, *Utah Power & Light Co. v. United States*, the Supreme Court held that the federal government possesses broad authority over federal land within the states (including, here, BLM land). Furthermore, these powers supersede any eminent domain claim by a state.[183] In *Utah Power & Light Co.*, state officials authorized the construction of a power plant on a federal forest reservation without the consent of the federal government.[184] The Court held that state consent was not sufficient authorization, even if the land was "not used or needed for a fort or other governmental purpose of the United States" under the Enclave Clause.[185] This is because Congress can obtain land through means other than the Enclave Clause, including under the Property Clause.[186]

In order to survive the holding in *Utah Power & Light Co.*, Utah must make a new argument here: instead of merely arguing that the federal government did not obtain the contested lands under the Enclave Clause, it must argue that the federal government did not obtain the lands

180. *Id*. at 528.

181. For example, Nevada ceded jurisdiction over the Lake Mead National Recreation Area because of budgetary concerns over maintenance and policing of the area. *See* Charles F. Wilkinson, *The Field of Public Land Law: Some Connecting Threads and Future Directions*, 1 PUB. LAND L. REV. 1 (1980).

182. Kleppe v. New Mexico, 426 U.S. 529, 540 (1976).

183. Utah Power and & Light Co. v. United States, 243 U.S. 389 (1917).

184. *Id.* at 399.

185. *Id.* at 403–04.

186. U.S. CONST. art. IV, § 3, cl. 2.

by *any valid means*. This avenue—challenging the federal government's title to the land under the UEA—is the only way to overcome the federal government's broad authority under the Property Clause. Otherwise, the Court will hold for the federal government, as in *Utah Power & Light Co*., that "only through [congressional action] can rights in lands belonging to the United States be acquired."[187] In that case, the Court also made clear that "state laws, including those relating to the exercise of the power of eminent domain, have no bearing upon a controversy such as is here presented, save as they may have been adopted or made applicable by Congress."[188] In light of this outcome, commentators have generally concluded that Utah's exercise of eminent domain on these lands would be futile.[189] That is, of course, unless Utah is able to make

clear that is argument pertains only to a third, and distinct category of lands.

3. Third—and finally—lands retained but not validly divested

Given the extensive reach of federal authority on its land holdings as discussed above, in order for Utah to succeed, it must make clear that its claim relates to a different category of land altogether. The final question that remains unanswered, and which Utah is likely to pose to the court, is the extent of federal authority over lands that have been retained by the federal government since a state's admission into the Union but that have never been validly divested under a state's enabling act or otherwise legally acquired. The Court has yet to address this question, since previous cases never hinged on such a condition. The state of Utah will almost certainly argue that federal authority over the vast majority of its public lands holdings within the state is invalid because it was supposed to divest itself of these lands in accordance with the UEA.[190]

187. *Utah Power & Light Co.*, 243 U.S. at 404.

188. *Id.* at 405.

189. *See, e.g.*, Scott Streater, *Utah Eminent Domain Law More than a "Message Bill,"* NY TIMES, Apr. 2, 2010, http://www.nytimes.com/gwire/2010/04/01/01greenwire-utah-eminent-domain-law-more-than-a-message-bi-25839.html?pagewanted=all; Nicholas Riccardi, *In Utah, A Move to Sieze Federal Land*, L.A. TIMES, Mar. 3, 2010, http://articles.latimes.com/2010/mar/03/nation/la-na-utah-domain3-2010mar03; Eugene Volokh, *"Can a State Take Federal Land by Eminent Domain?"* VOLOKH CONSPIRACY (Mar. 29, 2010: 3:57 P.M.), http://volokh.com/2010/03/29/can-a-state-take-federal-land-by-eminent-domain/.

190. Utah Enabling Act, 28 Stat. 107 §§ 3, 9 (1894).

Although *Utah Power & Light Co*. clearly established that a state may not exercise its power of eminent domain over public lands obtained by valid congressional and executive action,[191] large percentages of land in Utah (excluding lands such as national parks, which the federal government has properly obtained) are still being retained by the federal government and have never been sold off as required under the UEA.[192] These are the lands that Utah lawmakers are specifically concerned about. Since the federal government has still not divested itself of these lands, Utah has lost out on millions of dollars in property taxes and in access to natural resources.[193]

The Supreme Court has clearly held that the federal government possesses broad powers over land it has obtained under the Enclave Clause and through other valid congressional or executive action, so Utah must successfully distinguish its claim and argue that the federal government has failed to divest itself of these lands under the UEA and has not otherwise validly obtained them. Utah must make the case that, after more than a century, Congress is still bound by the conditions it agreed to in 1894.

F. Pollard, *Equal Footing, the Supremacy Clause, and Some Promising Dicta*

Third, and finally, the federal government will likely challenge Utah's interpretation of, and argument concerning, the Equal Footing Doctrine. Though Utah will clearly rely on the Enclave Clause in support of its position, it also seems poised to provide a renewed interpretation of this doctrine despite a forceful legislative note against such a position.[194] The argument concerning the Equal Footing Doctrine, as utilized by public lands movements in the past,[195] can be summarized as follows: when a new state is admitted to the Union, it must be given the same legal and political rights as the preexisting states; in terms of authority over public lands, this means that states must be granted equal authority

191. 243 U.S. at 405.

192. The state of Utah has acknowledged the validity of a number of federal land holdings in its most recent bill, which excludes these lands from its purview, including national parks and national monuments. UTAH CODE ANN. §§ 63L-6-101 to 104 (2010) (West 2012).

193. *See* Herrod, *supra* note 63, at 7; UTAH STATE OFFICE OF EDUCATION, SCHOOL LAND TRUST (2012), *available at* http://www.schoollandtrust.org/school-trust/school-fund/.

194. UTAH CODE ANN. § 78B-6-503.5 (West 2010).

195. *See supra* Parts II.A–B.

over public lands within their state boundaries, though some see the doctrine as limited to land underlying waterways.[196] Support for this view stems from the 1845 Supreme Court decision of *Pollard v. Hagan*[197] in which the Court applied the Equal Footing Doctrine to reject federal ownership of land underlying waterways.[198] The Court's very broad dicta are often cited as support for the position that *Pollard* is also applicable to dry land. In fact, this position has been consistently held by states' rights activists protesting federal control over public lands.[199]

Under dispute in *Pollard* was a stretch of land underlying the Mobile River in Alabama. The two parties to the dispute had been granted conflicting deeds—one from the federal government and one from the state. The Alabama Supreme Court validated the defendants' deed to the land, which was granted to them by the state.[200] The Plaintiffs appealed, contending that their title to the land was valid because it had been granted to them by patent, which had been affirmed by Congress.[201] The Supreme Court affirmed the Alabama Supreme Court's decision and validated the defendants' deed, holding that the federal government did not possess sovereign power over the land underlying the Mobile River in Alabama.[202] Instead, the Court held that the land was ceded only temporarily to the Union before Alabama became a state, and the federal government's exercise of municipal sovereignty over that land ceased following Alabama's transition into statehood.[203] Although the Court recognized that the federal government had the power to regulate interstate waterways under its Commerce Clause authority,[204] it also held

196. For states admitted to the Union after the country's formation, the Court has held (as it did in *Pollard*), that such an interpretation applied to the land underlying waterways. However, the Equal Footing Doctrine does not necessarily encompass such a narrow view—the Supreme Court has also held that it acts as a limit on Congress from requiring anything in a state's enabling act that would limit its future sovereignty as a state, including the power to change the location of a state capital. *See* Coyle v. Smith, 221 U.S. 559 (1911).

197. 44 U.S. 212 (1845).

198. *Id.* at 230.

199. This includes the "Sagebrush Rebellion" and the "County Supremacists;" *see* Parts II.A and II.C.

200. *Pollard*, 44 U.S. at 230.

201. *Id.* at 221.

202. *Id.*

203. *Id*.

204. *Id.* at 229–30.

that the federal government's power did not extend to ownership of the land, which had never been ceded to the United States.[205] Exercising such overreaching sovereignty over these lands, the Court held, would be "repugnant to the Constitution."[206]

Because the land at issue in the case was only the land underlying the river, some read *Pollard* narrowly as an express limit on federal ownership of land underlying waterways.[207] Some subsequent Supreme Court precedent also seems to support this view, though the doctrine has in certain instances been applied more generally as well.[208] Notwithstanding, there is a strong argument to be made for its applicability to federal ownership of public lands generally. In fact, one scholar argues that "it is the very generality of the Court's chosen language and analysis that indicates that the Court did not view the power over submerged lands as different from the power over other lands held temporarily by the federal government."[209]

States' rights supporters, including numerous Utah legislators, rely on a key phrase from the *Pollard* decision in their arguments: "We think a proper examination of this subject will show, that the United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory, of which Alabama or any of the new states were formed; except for temporary purposes."[210] The fact that the Court did not specifically limit its holding to lands under waterways, coupled with the fact that the Court very openly disavowed the exercise of federal "municipal sovereignty" and "jurisdiction" over lands ceded, suggests that the holding might extend to dry land. In relation to the Court's specific Enclave Clause jurisprudence, this is of extreme significance; if the United States could hold right in the soil only for "temporary purposes,"[211] it would seem to suggest that the UEA should be read in a similar light, which implies that the federal government should have

205. *Id.* at 224; *see also* Part III.F (Utah's own case against the federal government is likely to touch on whether or not the land and exclusive jurisdiction over it was ever ceded to the federal government).

206. *Pollard*, 44 U.S. at 224.

207. Conable, *supra* note 35, at 1281.

208. For another example of the Court applying the doctrine to land underlying waterways, see Utah Div. of State Lands v. United States, 482 U.S. 193 (1987). For a case involving other state lands, see Coyle v. Smith, 221 U.S. 559 (1911).

209. Landever, *supra* note 34, at 575.

210. 44 U.S. at 221.

211. *Id.*

divested itself of its non-committed public lands soon after the UEA was enacted.

But while *Pollard* can be read to support Utah's position, subsequent Supreme Court precedent tends to undercut such support. For example, the Supreme Court has held that the Equal Footing Doctrine only guarantees political equality, specifically "[e]quality of constitutional right and power."[212] Because all of the western states were admitted under similar circumstances and given equal political rights then, the argument goes, the large areas of public lands held by the federal government are rightly held. Some cite this political equality argument as fundamental to the doctrine and discount a more extensive application of *Pollard*.[213] However, Utah could rightly argue that by holding nearly sixty percent or more of the land within the state's boundaries,[214] the federal government retains such exacting control over the land and its resources that it limits the state's ability to function as a political equivalent when the state's economy relies so heavily on the extraction of natural resources. Because the UEA serves as a binding contract between Utah and the federal government, this "political equality" argument would be only secondary to the United States' fulfillment of its promises to Utah. In addition, an understanding of the concept of limited landholdings by the federal government through an analysis of the Enclave Clause[215] supports the notion that these lands should be divested—especially when the Property Clause is seen as a call to the federal government to do so in the process of forming new states.[216]

Scholars note that whatever reading is given to *Pollard*, it must be read carefully so as not to view the Supreme Court's holding as an unlimited grant of federal authority on public lands.[217] This is especially so in light of the *Pollard* Court's statement concerning state cession of land:

> The object of all the parties to these contracts of cession, was to convert

212. Escanaba and Lake Mich. Transp. Co. v. Chicago, 107 U.S. 678, 689 (1883).

213. Alexander H. Southwell, *The County Supremacy Movement: The Federalism Implications of a 1990s States' Rights Battle*, 32 GONZ. L. REV. 417, 460–66 (1997).

214. *The Open West, Owned by the Federal Government*, N.Y. TIMES (Mar. 23, 2012), http://www.nytimes.com/interactive/2012/03/23/us/western-land-owned-by-the-federal-government.html.

215. *See* Part III.B.1.

216. *See id*.

217. Landever, *supra* note 33.

> the land into money for the payment of the debt, and to erect new states over the territory thus ceded; and as soon as these purposes could be accomplished, the power of the United States over these lands, as property, was to cease.[218]

At bottom, *Pollard* still stands as a notable limitation on federal Enclave Clause authority.

IV. CONCLUSION: POSSIBLE AVENUES FOR SUCCESS

Although Supreme Court jurisprudence in terms of the Enclave Clause, the Equal Footing Doctrine, and the Property Clause seems mixed, the hope these provisions provide for Utah's argument in terms of the UEA is nonetheless significant. First, the *history* of the Enclave Clause demonstrates the importance of limited federal landholdings, and the *text* of the Enclave Clause demonstrates the importance of state consent when lands are purchased for use as federal enclaves. It also demonstrates the caution present in the Framers' tone while drafting the Enclave Clause so as not "to enslave any particular State by buying up its territory."[219]

The text and structure of the Property Clause also support Utah's argument. Congress was to "dispose" of its lands in forming new states while it retained full power to make "rules and regulations" over the land while it still held it as territorial property.[220] This power also extends to land claimed by the federal government by eminent domain. In its argument, it is important for Utah to distinguish its case from the line of Supreme Court Property Clause cases while still highlighting the underlying policies of the Property Clause and Section 3 in general. To do so, it must make clear that its argument pertains only to lands over which the federal government does not hold valid title.

The Equal Footing Doctrine also provides, at minimum, some rhetorical support for Utah's position. Even though equal footing cases generally apply only to lands underlying waterways, the Court's broad dicta in *Pollard* emphasize the United States' policy of divesting the federal government of lands in the process of forming new states. This notion is repeated in the UEA when, concerning the non-committed public land, Congress agreed that the lands "*shall* be sold by the United

218. Pollard v. Hansen, 44 U.S. 212, 224 (1845).

219. Gerry, *supra* note 109.

220. U.S. CONST. art. IV, § 3, cl. 1–2.

States subsequent to the admission of said State into the Union."[221] Justice O'Connor's more recent opinion in *Utah Division of State Lands v. United States* also provides support for federalism ideals in the process of state divestment of lands.[222]

But any hope contained in each of these possible arguments seems doomed in light of Supreme Court precedent—particularly in relation to the Property Clause. The Court's broad interpretation of the clause, together with cases that narrow the reach of the Equal Footing Doctrine and the potential scope of the Enclave Clause, make the state's success going forward very unlikely. Utah's best chance of success lies in the somewhat untouched potential that the Enclave Clause holds, particularly when read together with Utah's century-old Enabling Act. Like the soldiers surrounding the Philadelphia statehouse in 1783, it seems that Utah legislators' demands will be unfulfilled by the federal government. But even if their case is unsuccessful in full, they have succeeded in scaling back the Obama Administration's restrictive land use policies.

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221. Utah Enabling Act, 28 Stat. 107 § 9 (1894) (emphasis added).

222. 482 U.S. 193 (1987).

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