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A STATE WITHIN A STATE: RE-EXAMINING THE FEDERAL LANDS QUESTION AND ITS EFFECT ON STATE SOVEREIGNTY

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INTRODUCTION

Who ought to control the land?

The battle between the states and the federal government over the control of federal lands is a fight as old as the republic itself. Even longer, in fact, for the spirit of the struggle dates back to the American colonies and their decision to break away from Great Britain.[1] Hanging in the balance of the schism are the lands themselves. State advocates argue that their intimate knowledge of the terrain combined with their natural 'skin in the game' make them the best positioned to properly maintain the lands in harmony with their state's interest.[2] On the other side of the ledger, advocates for federal oversight believe that the federal government has a duty to keep these lands free from state politics and to preserve the national interest of environmental conservation.[3]

In the last fifty years, the Supreme Court's reading of the Property Clause in Article IV of the Constitution, which they describe as being "'without limitation,'" has come under intense scrutiny.[4] Critics of this broad reading argue that it is inconsistent with the historical understanding of the Clause and violates the equal footing doctrine.[5]

Though the path of the public lands debate is well-trodden, this Note will seek to answer the question in novel ways. First, it uses the Corpus of Founding Era American English to perform an objective linguistic

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* JD Candidate, William & Mary Law School, 2023. I would like to thank the *ELPR* Board and Staff for their diligent edits and feedback on this Note. I would also like to thank the staff of Senator Mike Lee for introducing me to this issue and being such effective advocates for the western states' cause. Finally, I would like to thank my wife Tessa, and my kids Talmage and Penelope for their immense love and support throughout my law school experience.

[1] *See* Jeffrey Schmitt, *A Historical Reassessment of Congress's 'Power to Dispose of' the Public Lands*, 42 HARV. ENV'T L. REV. 453, 464–65 (2018).

[2] *Id.* at 513–14.

[3] *Id.* at 456–57, 503–04, 518.

[4] *Id.* at 454–57, 492, 514.

[5] *Id.* at 469, 501–02.

analysis of the phrase "dispose of" in the Property Clause.[6] Through this analysis, it appears that an ordinary person at the time the Constitution was adopted would most likely have read the phrase "dispose of" in the Property Clause to mean sell, give away, bestow, or put into another's hand or power.[7]

Next, this Note investigates the historical and philosophical understandings of state sovereignty in the Anglo-American legal tradition.[8] Through this, this Note discovers that this issue was present in all British federalist systems, and thus British common law ought to be considered on the subject.[9] Once examined, this Note finds that the record of British federalist systems strongly supports the argument that the Court's established jurisprudence on this topic is misguided and should be revisited.[10]

Finally, when this Note considers the consequences of federal control, it seems plausible that the dangers it poses to the states' individual interest in public safety and our system of vertical separation of powers outweigh any federal government's interest in keeping the lands to themselves. Regarding the former, state and local officials in western states are left in the unenviable position of witnessing the mismanagement of federal lands within their states, knowing that it will risk real harms to their communities, yet are left powerless to do anything about it. Moreover, the premise used to justify this entire enterprise—that federal officials care more deeply about the western lands than the inhabitants of these areas—is a premise that does not withstand scrutiny. All available evidence suggests that western voters across the political spectrum care deeply about the conservation of their lands.[11] But most importantly, however, is the risk federal control poses to our vertical separation of powers. Though this danger laid dormant for nearly a century, political actors are now pressuring the federal executive to use the federal lands within states to thwart their internal public policy objectives with which

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[6] *See infra* Part I.
[7] *See infra* Section I.A.
[8] *See infra* Section I.B.
[9] BRYAN A. GARNER, CARLOS BEA, REBECCA WHITE BERCH, NEIL M. GORSUCH, HARRIS L. HARTZ, NATHAN L. HECHT, BRETT M. KAVANAUGH, ALEX KOZINSKI, SANDRA L. LYNCH, WILLIAM H. PRYOR JR., THOMAS M. REAVLEY, JEFFREY S. SUTTON & DIANE P. WOOD, THE LAW OF JUDICIAL PRECEDENT 738 (2016).
[10] *Id.*
[11] *See* Dac Collins, *Survey Says Vast Majority of Western Voters Care Deeply About Public Lands*, OUTDOOR LIFE (Feb. 20, 2022, 3:00 PM), https://www.outdoorlife.com/conservation/survey-says-vast-majority-of-western-voters-care-deeply-about-public-lands/ [https://perma.cc/K5LG-PFTB].

the administration disagrees.[12] If the original goal of land preservation is being abandoned for a means of controlling state policies completely unrelated to the lands themselves, federal management theory's risk to the separation of powers is made bare and beckons for reconsideration.

While the Court granted the federal government nearly absolute discretion over these lands in the past,[13] the textual, historical, and consequential evidence on this matter all point to the opposite conclusion. It is well time to recognize western states' legitimate interests in the management of the lands within their borders.

I. TEXTUAL ANALYSIS OF THE ARTICLE IV PROPERTY CLAUSE

A. Understanding the Phrase "Dispose of"

While many debates about the intended meaning of the Property Clause took place around the "Sagebrush Rebellion" in the 1980s, new methods of linguistic analysis (specifically, corpus linguistics) not available during the debate's heyday bring important insights into its original public meaning.[14] Dictionaries available at the time of the founding give two acceptable meanings of the phrase "dispose of."[15] The first meant "to part with; to alienate; to bestow; to put into another's hand or power; to give; or to sell," while the second meant "to regulate; to adjust; to apply to any purpose; or to apply to any end."[16]

These competing definitions give each side of the public lands debate exactly what it wants. Sagebrush sympathizers insist that the first meaning of the phrase be applied, while their opponents argue that the latter be used.[17] But this kind of linguistic gymnastics is especially troublesome when the two conflicting definitions mean opposite things. Both meanings cannot plausibly be correct.[18] But instead of hashing out the same arguments on this question, this Note attempts to answer this

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[12] *See* John C. Ruple, *The Transfer of Public Lands Movement: The Battle to Take 'Back' Lands that Were Never Theirs*, 28 COLO. NAT. RES., ENERGY & ENV'T L. REV. 102, 169–70 (2018).
[13] *See also id.* at 115–17, 119–21, 140, 153–55.
[14] *See* Stephen C. Mouritsen, *The Dictionary Is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning*, 2010 BYU L. REV. 1915, 1919, 1952–54 (2010).
[15] *Dispose*, SAMUEL JOHNSON'S DICTIONARY, https://johnsonsdictionaryonline.com/1755/dispose_va [https://perma.cc/G4YV-7T7F] (last visited Jan. 16, 2023).
[16] *Id.*
[17] *See* Schmitt, *supra* note 1, at 458–59.
[18] *See* Ruple, *supra* note 12, at 119.

question through a dispassionate linguistic analysis.[19] As explained by the method's chief expositors:

> [O]riginal public meaning originalism often relies heavily on an imperfect tool—contemporaneous dictionaries—to determine how a reasonable person of the time would have understood a Constitutional word or phrase. This tool has [several] problems. First, while dictionaries are a good starting point, when faced with dueling plausible meanings, dictionaries cannot solve the dilemma of ambiguity because they only tell whether 'a particular meaning is linguistically permissible,' not whether it is ordinary. Second, contemporaneous dictionaries do not define phrases; they define words. A phrase's meaning may be more than just the linguistic sum of its parts. Context matters, and dictionaries (especially from the Founding Era) do not capture context and phrasal meanings.[20]

Legal scholars who take the side of public ownership often argue that the phrase "dispose of" in the Property Clause was meant to grant the federal government power to retain the lands indefinitely.[21] Or at the very least, that it could plausibly be read to permit such a meaning.[22] But this is not the way legal texts, or any other text for that matter, are interpreted.[23] The Supreme Court made clear in *Bostock v. Clayton County* that, "[t]his Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment."[24] And while dictionaries are certainly one source to consider, "they are not the only source of relevant evidence, and what matters in the end is the answer to the question that the evidence is gathered to resolve: How would the terms of a statute have been understood by ordinary people at the time of enactment?"[25] Thus, in order to ascertain the correct reading of the law, "a judge interpreting a statute should ask 'what one would

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[19] *See* Schmitt, *supra* note 1, at 105.
[20] James C. Phillips, Daniel M. Ortner & Thomas R. Lee, *Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical*, 126 YALE L.J.F. 21, 23 (2016).
[21] *Id.* at 25.
[22] *Id.*
[23] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1738 (2020).
[24] *Id.*
[25] *Id.* at 1766 (Alito, J., dissenting).

ordinarily be understood as saying, given the circumstances in which one said it.'"[26]

The insufficiency of dictionaries is especially apparent when a phrase, rather than a single word, is interpreted.[27] As Dean John F. Manning explains, "[O]ne can make sense of others' communications only by placing them in their appropriate social and linguistic context, [and] textualists further acknowledge that '[i]n textual interpretation, context is everything.'"[28] Given the long-standing debate over which meaning of the Property Clause is appropriate, an "ordinary meaning" linguistic analysis seems especially appropriate and long overdue.

Using Brigham Young University's Corpus of Founding Era American English, the Author drew a large, randomized sample of founding-era documents that include the phrase "dispose of."[29] Next, the Author took this sample and read them in context to determine which of the two meanings the phrase bore in the document.[30] Also identified was the phrase's referent in each document for additional insights into when a certain meaning is especially appropriate.[31]

In this sample, it was nearly 2.5 times more common for founding-era speakers to use the phrase "dispose of" in the sense of parting with something than it was to use it in the sense of regulating or applying it to any kind of purpose.[32] Moreover, the analysis revealed that the latter sense was used most often when the phrase's referent was a person (e.g., "I beg of you to dispose of me in your service"; "He possesses the only right and power to dispose of us, and has commanded us to worship him").[33] When the phrase was used in reference to property, however, founding-era Americans used the phrase almost exclusively in the sense of transferring, parting with, or placing into the hands of another.[34] And in every

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[26] *Id.* (internal quotations omitted) (quoting John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2388, 2397–98 (2003)).
[27] *Id.* at 1750 (majority opinion), 1825–28 (Kavanaugh, J., dissenting).
[28] John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 79–80 (2006).
[29] *See Search Results for "Dispose of,"* CORPUS OF FOUNDING ERA AMERICAN ENGLISH (COFEA) [hereinafter COFEA *Results*], https://lawcorpus.byu.edu/cofea/concordances [https://perma.cc/WM6C-YVX9] (search "dispose of" in query box) (last visited Jan. 16, 2023). Note that this corpus displays results from 1760 to 1800. *See id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] COFEA *Results*, *supra* note 29.

instance that the phrase was used in reference to public lands in our sample, the speaker used it in the sense of transfer or sale of property.[35]

The ordinary meaning doctrine is meant as a safeguard to the democratic process. As Justice Gorsuch's majority opinion in *Bostock* explained:

> If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives. And we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations.[36]

It is imperative that the Property Clause be granted the same courtesy.[37] And when this is done, it becomes clear: The Property Clause of the Constitution would have been understood by the common public, at the time it was enacted, to refer to the sale or bestowal of public lands.[38] And so, if the federal control reading is going to win the day, it must do so on other grounds.

B. What Does It Mean to "Make All Needful Rules and Regulations"?

The Supreme Court has adopted the view that Congress's power to regulate federal lands under the Property Clause is nearly without limitation.[39] But a closer analysis of the text and structure of this clause—both independently and in context of the Constitution as a whole—suggests a much narrower reading. Throughout the Constitution, Congress is granted authority to regulate in areas that appear outside the realm of the federal legislative power.[40] But when reading these provisions, it is important to interpret the text in harmony with the overarching constitutional structure of separation of powers explicated in the Constitution, which is fundamentally designed to preserve individual liberty.[41] The

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[35] *Id.*
[36] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1738 (2020).
[37] *See also id.* at 1766–67 (Alito, J., dissenting).
[38] *See supra* notes 17–23 and accompanying text.
[39] Kleppe v. New Mexico, 426 U.S. 529, 529–30 (1976).
[40] *See, e.g.*, U.S. CONST. art. III, § 2.
[41] *See* Bradford R. Clark, *The Constitutional Structure and the Jurisprudence of Justice Scalia*, 47 ST. LOUIS L.J. 753, 754, 767 (2003).

Property Clause in Article IV represents such a tension with the American system's vertical separation of powers between state and federal government.[42] Similarly, the Exceptions Clause of Article III represents a tension with horizontal separation of powers between federal branches of government.[43] Thus, interpreting Congress's power to regulate, as described in Articles III and IV, can only be done properly by taking into account constitutional structure.

In the 1980s when talk abounded about using the Exceptions Clause to strip the Supreme Court's jurisdiction over controversial topics such as abortion, flag burning, and school prayer, Justice Robert Bork argued on structural grounds that such action was most likely unconstitutional: "The power to make 'Exceptions' is probably a housekeeping power, a power to control the appellate jurisdiction in the interest of efficiency and convenience as circumstances change. It was certainly not a power to assert democratic supremacy over the judiciary."[44] Since then, a lively debate has taken place over the exact scope of Congress's power under the Exceptions Clause.[45] While some look solely to the text (i.e., not looking beyond the Clause itself) and find it grants near plenary powers to Congress to do with it as they will, other prominent legal scholars argue that taking intertextual and structural arguments into account changes the calculus.[46]

Such analysis is appropriate with the Property Clause also. "The 'equal footing' clause has long been held to refer to political rights and to sovereignty."[47] Courts have stressed, however, that this doctrine does not apply to economic equality.[48] Advocates of federal land control lay hold of this exception and argue that the control of large tracts of lands within a state's borders is not a matter of sovereignty but merely an economic consideration.[49] But such arguments are unpersuasive for several reasons. First, it is necessary to understand what courts meant by the economic considerations exception to the equal footing doctrine. In *United States v. Texas,* the Supreme Court explained:

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[42] *See* U.S. CONST. art. IV, §§ 3–4.
[43] *See* U.S. CONST. art. III, § 2.
[44] ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 116 (1996).
[45] *See* Michael L. Wells, *Congress's Paramount Role in Setting the Scope of Federal Jurisdiction*, 85 NW. UNIV. L. REV. 465, 465, 468–69 (1990).
[46] *See* Steven G. Calabresi & Gary S. Lawson, *The Unitary Executive, Jurisdiction Stripping, and the* Hamdan *Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1007, 1022, 1025, 1027–28 (2005).
[47] United States v. Texas, 339 U.S. 707, 716 (1950).
[48] *Id.*
[49] Ruple, *supra* note 12, at 127–29.

> It does not, of course, include economic stature or standing. There has never been equality among the States in that sense. . . . Area, location, geology, and latitude have created great diversity in the economic aspects of the several States. The requirement of equal footing was designed not to wipe out those diversities but to create parity as respects political standing and sovereignty.[50]

Taken at face value, the economic conditions language articulated by the Court is merely a recognition that each State has different characteristics, similarly to how individuals each possess unique traits.[51] Asking to judicially mandate these traits—or at least their natural effects and consequences—away is not the kind of equality contemplated by the Constitution.[52] For example, it is illogical to assume that the State of New York, with its deep harbors, concentrated population centers, and well-developed financial sector, should have an identical economic ecosystem as Wyoming. Their natural differences all but guarantee vastly different economic outcomes in terms of tax revenue, the kinds of business sectors most prominent in the state, housing prices, and more.[53] But federal land control is not analogous to any of these natural differences.[54] It is a difference in the states' authority to control land within their borders. Put differently, Wyoming may not demand that the average price per acre in the state be the same as that of New York.[55] That is the kind of inequality that is created by nature and the individual choices of citizens, and it is not the role of the Constitution to mandate that they be equal in that regard.[56] But the question of who controls an acre of land in New York versus an acre in Wyoming is not a natural but a *political* question of inequality—existing only through the exercise of federal power.[57]

Arguing that these are the same thing seems inconsistent with the Supreme Court's explanation of the doctrine and discounts legitimate sovereignty concerns.[58] It is common knowledge that "[s]tate sovereignty implies governmental control over resources inside the territory of the

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[50] 339 U.S. at 716.
[51] *Id.*
[52] *Id.*
[53] *See id.*
[54] *Id.*
[55] *Id.*
[56] *Texas*, 339 U.S. at 716.
[57] *Id.*
[58] Ruple, *supra* note 12, at 127–29.

state, in relation to other states."[59] And thus any abridgement on a state's control over such resources should be viewed first and foremost as a concern over sovereignty, not economics.[60] This is proven through a hypothetical taking the argument to the extreme. Imagine the United States votes to admit a new state the size of Alaska into the Union, but only grants them control over the forty acres allotted for their State Capitol building while reserving for the federal government exclusive control over all remaining 99.99% of lands within the state's boundaries. Would any legal scholar have the courage to argue that this new state is on equal footing with New York or Virginia with respect to *sovereignty*? James Kent warned of such threats to sovereignty in his Commentaries:

> If, therefore, the government of the United States should carry into execution the project of colonizing the great valley of the Columbia or Oregon River, to the west of the Rocky Mountains, it would afford a subject of grave consideration, what would be the future civil and political destiny of that country. It would be a long time before it would be populous enough to be created into one or more independent states; and in the mean time, upon the doctrine taught by the acts of Congress, and even by the judicial decisions of the Supreme Court, the colonists would be in a state of the most complete subordination, and as dependent upon the will of Congress as the people of this country would have been upon the king and parliament of Great Britain, if they could have sustained their claim to bind us in all cases whatsoever. Such a state of absolute sovereignty on the one hand, and of absolute dependence on the other, is not congenial with the free and independent spirit of our native institutions; and the establishment of distant territorial governments, ruled according to will and pleasure, would have a very natural tendency, as all proconsular governments have had, to abuse and oppression.[61]

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[59] DAG HARALD CLAES, *Chapter 1: Sovereignty and Ownership*, *in* THE POLITICS OF OIL 2, 16 (2018), https://www.elgaronline.com/view/9781785360176/chapter01.xhtml#:~:text=State%20sovereignty%20implies%20governmental%20control,to%20domestic%20actors%20and%20individuals [https://perma.cc/GBX6-T95P].

[60] *Id.*

[61] Carman F. Randolph, *Constitutional Aspects of Annexation*, 12 HARV. L. REV. 291, 303 (1898).

The danger posed by our current reading of the Property Clause to the vertical separation of powers was made clear by recent political discourse. At the close of the Supreme Court's 2022 term, the Court released its ruling in *Dobbs v. Jackson Women's Health Organization*, which returned the authority to regulate abortion to the states.[62] In the political firestorm that followed, several prominent politicians, news outlets, and academics called on President Joe Biden to open abortion clinics on the federal lands within states whose legislatures passed abortion restrictions.[63] This marked a radical shift in the perceived role of the federal government with regards to public lands.[64] Once seen as a steward to protect the lands themselves from local economic interests, the federal government is now being urged to use the lands as a political mechanism that can thwart duly implemented state policies that have no relationship to the public lands whatsoever.[65] And so whenever a state implements a policy—social, economic, or otherwise—the president can singlehandedly negate its effect by playing king of the federal lands, using them as a sort of "state within a state" whereby he counters any state policies with edicts of his own. Such a reading does not just threaten the system of vertical separation of powers—it destroys it. To borrow a phrase from Justice Scalia, it is a wolf that comes as a wolf.[66]

II. HISTORY OF LAND POLICY DISPUTES IN AMERICA

A. Colonial History

The British model of governing distant provinces was patterned from the system developed by the Roman Empire centuries earlier.[67] As Rome's dominion began to stretch across the continent, emperors found

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[62] 142 S. Ct. 2228, 2283 (2022).
[63] David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. (forthcoming 2023); Khaleda Rahman, *How Abortion Clinics on Federal Land Could Work*, NEWSWEEK (June 29, 2022, 12:10 PM), https://www.newsweek.com/how-abortion-clinics-federal-land-could-work-1720320 [https://perma.cc/F86B-Z4T6]; Robin Bravender & Jennifer Yachnin, *Dems Look to Federal Land for Red-State Abortion Access*, E&E NEWS (June 27, 2022, 1:34 PM), https://www.eenews.net/articles/dems-look-to-federal-lands-for-red-state-abortion-access/ [https://perma.cc/6T23-9SBR].
[64] *See* Bravender & Yachnin, *supra* note 63.
[65] *See generally* Cohen et al., *supra* note 63.
[66] Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).
[67] HERBERT BROOM & EDWARD A. HADLEY, COMMENTARIES ON THE LAWS OF ENGLAND 104 (London, William Maxwell & Son, Henry Sweet, and Stevens & Sons 1869).

it increasingly difficult to impose their will over distant provinces.[68] And thus, arising more from political necessity than benevolence, the Roman Empire developed a nascent form of federalism.[69] Under this system, Rome limited its focus to higher-level government responsibilities such as foreign affairs.[70] And day-to-day governance, they decided, was best administered by the territories themselves, since they could better address the particular needs of their localities.[71] So Rome began to grant more autonomy to the local territorial governments, and by the thirteenth century, recognized local rulers as *domini terrae*, meaning "Lords of the Lands."[72] While theoretically still subject to the courts of the Roman Empire, the status of domini terrae in practice granted local magistrates a large degree of freedom to control their territorial lands and internal affairs.[73]

Given the great distance between England and her distant colonies, the British Empire had little choice but to follow Rome's blueprint of hands-off territorial governance.[74] For the vast majority of their history, the relationship of British colonies in North America with the Crown is described today by historians as the era of "salutary neglect."[75] During this time, the colonies exercised wide control over their internal affairs, while maintaining allegiance to the Crown.[76] And while the Crown maintained the belief that the colonies were merely given a long leash that could be reeled in whenever they saw fit, the colonists became accustomed to these liberties, and would come to see self-government not as a privilege, but as an inherent right of Englishmen.[77] By 1760, this divergence in views would begin to yield real-world consequences.[78] Following a series

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[68] Heinz H.F. Eulau, *Theories of Federalism under the Holy Roman Empire*, 35 AM. POL. SCI. REV. 643, 652 (1941).
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] AARON X. FELLMETH & MAURICE HORWITZ, GUIDE TO LATIN IN INTERNATIONAL LAW 84 (2009) ("Domini terrae").
[73] RAYMOND MCFARLAND, A HISTORY OF THE NEW ENGLAND FISHERIES 390 (1911).
[74] ARTHUR MILLS, COLONIAL CONSTITUTIONS: AN OUTLINE OF THE CONSTITUTIONAL HISTORY AND EXISTING GOVERNMENT OF THE BRITISH DEPENDENCIES 45–46 (London, John Murray 1856).
[75] Jeff Wallenfeldt, *Salutary Neglect*, ENCYC. BRITANNICA, https://www.britannica.com/topic/salutary-neglect [https://perma.cc/3NQD-32AF] (Oct. 7, 2022).
[76] *Id.*
[77] CHRISTOPHER MICHAEL CURTIS, JEFFERSON'S FREEHOLDERS AND THE POLITICS OF OWNERSHIP IN THE OLD DOMINION 45–46 (2012).
[78] Rebecca Beatrice Brooks, *What Was the British Policy of Salutary Neglect?*, HIST. OF

of hostilities on the western frontier English officials began exerting heavy control over colonial land policy.[79] Believing that western expansion would lead to more conflicts between colonists and indigenous tribes, the British government decided it was in their best interest to forbid the issue of any new titles of lands beyond the Appalachian Mountains.[80] But many of the colonies, after more than a century of controlling their own land policies, rejected the proposal both as a matter of policy and constitutional right.[81] In 1766, prominent Virginian Richard Bland argued that "'[t]he colonies are distinct states . . . independent as to their *internal* government of the original Kingdom, but united with her as to their *external* policy in the closest and most intimate league and amity, under the same allegiance.'"[82] In other words, James E. Pete explains, "the common allegiance which bound the colony and England was the monarchy. It is evident that Bland conceived clearly the idea of imperial partnership."[83]

Thomas Jefferson in his essay, *A Summary View of the Rights of British America*, laid out the most radical of the colonial legal arguments.[84] Jefferson claimed that the doctrine of sovereign dominion was a legal fiction and that it could not apply to Virginia.[85] But the more politically successful argument is best encapsulated by the Fairfax Resolve, penned by George Mason and George Washington.[86] Unlike Jefferson, the Fairfax Resolve acknowledges the "solemn Compact" between the settlers and the British Crown, and considered themselves to be the King's subjects.[87] And so long as they retained the rights of Englishmen, the relationship would continue to thrive.[88] But the Crown's new land policies in the

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MASS. BLOG (Mar. 30, 2016), https://historyofmassachusetts.org/what-was-the-british-policy-of-salutary-neglect/ [https://perma.cc/B353-TTUR].

[79] *Id.*

[80] Jennifer Monroe McCutchen, *Proclamation Line of 1763*, DIGIT. ENCYC. OF GEORGE WASHINGTON, https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/proclamation-line-of-1763/ [https://perma.cc/37EJ-6XFZ] (last visited Jan. 16, 2023).

[81] *Id.*

[82] James E. Pate, *Richard Bland's Inquiry into the Rights of the British Colonies*, WM. & MARY Q., 20, 27 (1931) (emphasis added).

[83] *Id.*

[84] THOMAS JEFFERSON, A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA 1 (Williamsburg, Clementinarind 1774).

[85] *Id.*

[86] *Fairfax County Resolves, 18 July 1774*, FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Washington/02-10-02-0080 [https://perma.cc/8BMA-3UW9] (last visited Jan. 16, 2023).

[87] *Id.*

[88] *Id.*

colonies violated the British Constitution since it deprived them of the "Privileges, Immunities and Advantages" enjoyed by British citizens.[89] By March 1775, the Virginia Convention called for a committee to investigate the legal history of its colonial charter to establish the historical parameters of the relationship between the colony and the Crown.[90] But before the committee could present their findings, the colonists chose to put down their pens and pick up their muskets.[91] And thus, the great lands question would ultimately be decided not in the courthouses of England, but on the battlefields of Yorktown.[92]

B. U.S. Congressional Debates on Federal Land Policy

The first time the U.S. Congress began to meaningfully debate the proper disposal of federal lands was in the 1820s.[93] In 1826, Senator Van Buren, speaking on the Senate floor, declared that "[n]o man could render the country a greater service than he who should devise some plan by which the United States might be relieved from the ownership of this property, by some equitable mode."[94] His personal view was that the lands should be vested in the lands in the states in which they stood "on some just and equitable terms as related to the other States of the Confederacy."[95] By this, he was referring to how the funds from public land sales would be dispersed among the states.[96] Van Buren appeared

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[89] *Id.*
[90] *Image 3 of The Virginia Gazette. Williamsburg: Printed by John Pinkney for the Benefit of Clementina Rind's Children. March 30, 1775. [Negative Photostat.].* (photograph), *in* LIBRARY OF CONG., [hereinafter *Virginia Gazette Image*], https://www.loc.gov/resource/rbpe.1750130e/?sp=3&st=text [https://perma.cc/CQL4-86DU] (last visited Jan. 16, 2023).
[91] *American Revolution Begins at Battle of Lexington*, HISTORY.COM (Nov. 13, 2009), https://www.history.com/this-day-in-history/the-american-revolution-begins [https://perma.cc/Z44Z-N4JP].
[92] *Id.*
[93] *Speech of Robert Y. Hayne, of South Carolina, January 27, 1830*, *in* THE WEBSTER-HAYNE DEBATE ON THE NATURE OF THE UNION: SELECTED DOCUMENTS 162–63 (Herman Belz ed., 2000) [hereinafter WEBSTER-HAYNE DEBATE].
[94] *Elliot's Debates: Volume 4: Opinions, Selected from Debates in Congress from 1739 to 1836, Involving Constitutional Principles*, TEACHING AM. HIST., https://teachingamericanhistory.org/resource/elliot/vol4/opinions/ [https://perma.cc/S65J-NJ29] (last visited Jan. 16, 2023).
[95] *In Reply to the Speeches of Mr. Webster and Mr. Clay, on Mr. Crittenden's Amendment to Distribute the Revenue from the Public Lands among the States; Delivered in the Senate, January 30th, 1841*, *in* SPEECHES OF JOHN C. CALHOUN 610 (New York, D. Appleton & Co. 1867).
[96] *See id.*

optimistic that such an agreement was within reach, pleading that "after having full information on the subject, they would be able to effect that great object. . . . [I]f those lands were disposed of at once . . ., it would be satisfactory to all."[97]

A year later, William Hendricks, a Senator from Indiana, argued that "the sovereignty, freedom, and independence of the new States were much impaired, and that their equality with the old States was entirely taken away by the present condition of the public lands."[98] As the representative of a state with huge tracts of lands maintained by the federal government, he stressed the urgency of the federal lands question and demanded that it be considered by the entire Senate.[99] Hendricks was confident that both the constitutional arguments and practical considerations strongly favored the transfer of public lands to the new states wherein they were located.[100] He believed that:

> [T]he Federal Government had no constitutional power to hold the soil of the States, except for the special purposes designated by the constitution, such as the erection of forts, magazines, arsenals, dock-yards, and other needful buildings, and even for this purpose, the consent of the Legislatures of the States was necessary, by the express language of the constitution. . . . [S]urely they would agree with him in saying that Congress cannot permanently hold, in full property, the entire soil of the new States.[101]

Years later in 1830, Senator Hayne on the debate floor summed up the federal lands question as follows:

> Giving up the plan of using these lands forever as a fund either for revenue or distribution, ceasing to hug them as a great treasure, renouncing the idea of administering them with a view to regulate and control the industry and population of the States or of keeping in subjection and dependence the States or the people of any portion of the

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[97] *Id.*
[98] *The Public Lands*, *reprinted in* ABRIDGMENT OF THE DEBATES OF CONGRESS, FROM 1789 TO 1856, at 476 (New York, D. Appleton & Co. 1859).
[99] *See id.* at 476–77.
[100] *See id.* at 477.
[101] *Id.* at 476–77.

> Union, the task will be comparatively easy of striking out a plan for the final adjustment of the land question on just and equitable principles. . . . In short, our whole policy in relation to the public lands may perhaps be summed up in the declaration with which I set out, that they ought not be kept and retained forever as a great treasure, but that they should be administered chiefly with a view to the creation, within reasonable periods, of great and flourishing communities to be formed into free and independent states; to be invested in due season with the control of all the lands within their respective limits.[102]

Interestingly, throughout all the debates taking place at this time, the argument was never about whether Congress should hold onto the federal lands indefinitely.[103] It seemed to be taken for granted by all sides that the land was to be disposed of.[104] The question primarily focused on the mechanics of the land sales (i.e., how the proceeds of public land sales ought to be distributed among the states). Cessionists such as John C. Calhoun and President Andrew Jackson argued that the proceeds ought to go primarily to the states in which the lands being sold were located.[105] Distributionists, led by Henry Clay, argued that revenues from federal land sales ought to be divided equally amongst all the states.[106] The important point to note throughout this history is the tacit concession by both sides that the public lands in newly created states ought to be disposed of.[107] The only question was the matter of how quickly and in what manner they should divide the spoils.[108]

In fact, once the public debt had been discharged, the Senate Public Lands Committee published a report stating that once no public debt remained, the remaining federal lands should be ceded to the states: "The speedy extinction of the Federal title within their limits is necessary to

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[102] WEBSTER-HAYNE DEBATE, *supra* note 93, at 13.
[103] *See* Magdalen Eichert, *Henry Clay's Policy of Distribution of the Proceeds from Public Land Sales*, 52 REG. KY. HIST. SOC'Y 25, 25–32 (1954).
[104] *See Penitentiary for the District-Public Lands*, *in* 2 GALES & SEATON'S REGISTER OF DEBATES IN CONGRESS, NINETEENTH CONGRESS FIRST SESSION 760, 760–62 (1826).
[105] *See* Magdalen Eichert, *John C. Calhoun's Land Policy of Cession*, 55 S.C. HIST. MAG. 198, 199–200 (1954).
[106] Eichert, *supra* note 103, at 26.
[107] *See id.* at 25–26.
[108] *See id.* at 26–27.

the independence of the new States, to their equality with elder States, to the development of their resources . . . and to the proper enjoyment of their jurisdiction and sovereignty . . . ."[109] And even more telling is that Henry Clay, the leading advocate of public lands in the Senate, in his rebuttal to the report did not question its central premise that the federal government's continued ownership of vast tracts of public lands in new states violated principles of sovereignty.[110] Rather, he merely quibbled with the assertion that the lands were not being sold quickly enough: "The general government, at a moderate price, is selling the public land as fast as it can find purchasers. The new States are populating with unexampled rapidity . . . ."[111] Not once was there talk of a constitutional right of the federal government to hold these lands indefinitely, creating a permanent concurrent jurisdiction with state governments over significant sections of land within their borders.[112]

In the decades that followed, several of the new states began to petition Congress to grant them control of all remaining federal lands within their borders.[113] And though the ambitious goal of total cession of public lands was never realized, western states won several important victories.[114] Starting in 1852, the public lands debate merged with discussions of the Homestead Act, railroads, and internal improvements.[115] Congress began offering to sell to the states land within their borders at a nominal price.[116] And in other instances, they would even grant states huge tracts of land, such as the Swamp-Land Grants and federal land grants for internal improvements.[117] Through these massive land transfers, many western states' quests for internal sovereignty were realized.[118] For example, prior to these land grants, the federal government controlled over 95% of the lands within the borders of Illinois. After the grants, that number shrank to just 1%.[119]

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[109] H.R. 6017, 79th Cong. (1946).
[110] *See On the Public Lands (June 20, 1832)*, *in* THE WORKS OF HENRY CLAY: COMPRISING HIS LIFE, CORRESPONDENCE AND SPEECHES 487, 504–05 (Calvin Colton ed., 1904).
[111] *Id.* at 504.
[112] *See id.* at 505.
[113] *See* BENJAMIN HORACE HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES 192 (1924).
[114] *See id.* at 178–79, 190, 192, 195.
[115] *See id.* at 196.
[116] *See id.*
[117] *See id.*
[118] *See id.* at 195.
[119] *See* Application of Illinois for a Reduction in the Price of the Public Lands (Feb. 2, 1829), *in* 32 AMERICAN STATE PAPERS: PUBLIC LANDS 624, 624–25 (1860).

After the year 1900, however, the federal government became increasingly jealous of its control over its remaining western lands.[120] And since the turn of the twentieth century, Congress has refused to relinquish control over the federal lands to newer states despite explicit provisions in their enabling acts stating that federally owned land within them "shall be sold by the United States subsequent to the admission of said State into the Union."[121]

C. Real-World Consequences

In talking about the historical understanding of federal public land management, it is important to remember that this issue has very real consequences for the western states.[122] For example, in July 2021, a raging wildfire engulfed several homes and businesses in California.[123] Yet local leaders argue that the disaster was entirely preventable.[124] California firefighting agencies placed the blame squarely on the quagmire of bureaucratic red tape that plagues federal land management, which is increasingly out of touch with the local conditions of the land itself.[125] The decision of whether to extinguish a wildfire or to let it burn is determined by jurisdiction.[126] Because this fire began in the Plumas National Forest, California state and local officials were left completely powerless to protect their towns until it burned across the federal land boundary.[127] By then, it was too late.[128] The fire had grown so large that

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[120] *See* JOHN FREEMUTH, THE PROGRESSIVE MOVEMENT AND CONSERVATION (1890–PRESENT) 129–40 (2014).
[121] An Act to Enable the People of Utah to Form a Constitution and State Government, and to be Admitted into the Union on an Equal Footing with the Original States, ch. 138, 28 Stat. 107 (1894).
[122] *See* Gary D. Libecap, *Federal Lands, Opportunity Costs, and the Administrate State* 21–25 (Hoover Inst., Working Paper No. 18110, 2018), https://www.hoover.org/research/federal-lands-opportunity-costs-and-administrate-state [https://perma.cc/BX5X-6Z5V].
[123] *See* Jim Parker, *U.S. Forest Service Changes Criticized 'Let It Burn' Wildfire Policy*, ABC7 KVIA (Aug. 4, 2021, 12:03 PM), https://kvia.com/news/us-world/2021/08/04/u-s-forest-service-changes-let-it-burn-wildfire-policy-after-criticism/ [https://perma.cc/8DXN-VRUF].
[124] *See id.*
[125] *See* Anita Chabria & Alex Wigglesworth, *California Says Federal 'Let It Burn' Policy Is Reckless as Wildfires Rage*, L.A. TIMES (Aug. 1, 2021, 5:00 AM), https://www.latimes.com/california/story/2021-08-01/california-federal-officials-disagree-letting-some-wildfires-burn [https://perma.cc/4DCW-T2HK].
[126] *See id.*
[127] *See id.*
[128] *See id.*

local firefighting efforts to save many of the homes in their towns became impossible.[129] Yet according to the Forest Service, these accidents which devastate western communities are acceptable consequences of their overarching land management plan.[130] In 2018, Vicki Christiansen, who was then the head of the Forest Service, argued that unplanned wildfires "'are an important land treatment tool' that required 'accepting short-term risks for longer term reductions in risk.'"[131] But when outdated, bureaucratic mission statements take precedence over the safety of the communities who actually live near these lands, one can expect to see a revolt.[132]

And that is exactly what is happening. In a virtual meeting with President Biden, California Governor Gavin Newsom blasted the federal government's incompetent approach to fire management, saying, "'This is life and death, and we can't just fight fires the way we did 20, 30, 40 years ago anymore.'"[133] The National Wildfire Institute also penned an open letter condemning the federal government's handling of the fire: "Forest Service people allowed this fire to burn for days, claiming it was unsafe for firefighters to fight, only to have it blow up and overrun communities in two states. This decision bears many hallmarks of criminal negligence."[134] Yet despite changing its "'let it burn'" policy following public outcry,[135] this story highlights the deep, structural problems of taking decision-making authority away from local communities and placing it in the hands of a distant bureaucracy.[136] This is something that has been known and admitted for decades.[137] In 1997, the Government

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[129] *See id.*
[130] *See id.*
[131] Chabria & Wigglesworth, *supra* note 125.
[132] *See id.*
[133] *See id.*
[134] Letter from Lyle Laverty, Ray Haupt, Bruce A. Courtright, David K. Nelson, Douglas R. Leisz, William A. Derr, Michael T. Rains, Philip S. Aune, Jim Petersen, Check Sheley, Ted Stubblefield, Del Pengilly, Murry A. Taylor, Frank Caroll, Ronald Stewart, Bruce Van Zee, Steve Fitch, Sid Nobles, Dave Hammond, Blaine Cornell & Dave Kohut, Nat'l Wildfire Inst., to Randy Moore, Chief Designee, U.S. Forest Serv. (July 23, 2021).
[135] Anita Chabria & Lila Seidman, *U.S. Forest Service Changes 'Let It Burn' Policy Following Criticism from Western Politicians*, L.A. TIMES, https://www.latimes.com/california/story/2021-08-04/forest-service-modifies-let-it-burn-policy [https://perma.cc/C5KK-VR9D] (Aug. 6, 2021, 1:02 PM).
[136] *See* Terry Anderson, *Public Land Mismanagement*, FORBES (Apr. 7, 2009, 4:30 PM), https://www.forbes.com/2009/04/07/public-land-mismanagement-opinions-contributors-perc.html?sh=313bc5d13ded [https://perma.cc/653J-BZZN].
[137] *See* Robert H. Nelson, *Our Languishing Public Lands*, HOOVER INST. (Feb. 1, 2012), https://www.hoover.org/research/our-languishing-public-lands [https://perma.cc/975T-X4JG].

Accountability Office reported that the "'Forest Service's decision making process is broken.'"[138] And in 2002, in a moment of unusual candor, the Forest Service acknowledged its own incompetence, noting "that it was beset by a 'costly procedural quagmire' in which perhaps 40 percent of the direct work at the individual national forest level was now taken up in 'planning and assessment'—paperwork activities which in the end often led nowhere."[139] As they readily admitted in their own internal report, "'the Forest Service operates within a statutory, regulatory, and administrative framework that has kept the agency from effectively addressing rapid declines in forest health.'"[140] But uncontrolled wildfires are just one of many problems directly attributable to government mismanagement.[141] For example, the Forest Service's bans on thinning and salvage harvesting puts the lands at much higher risk of wildfires, but also disease, pests, and winds.[142]

Despite all of these concerns, advocates will still defend the federal control of public lands, arguing that these lands need to be protected, and that relinquishing control of them to the western states will lead to local governments ravaging the land for economic purposes.[143] Yet these concerns appear to be entirely unfounded.[144] For example, a survey conducted in February 2022 revealed that voters in western states care deeply about their lands and want them to be conserved.[145] A shocking 93% of respondents stated that they participated regularly in outdoor activities, and "77 percent supported setting a national goal of conserving 30 percent of America's lands and inland waters by the year 2030."[146] In short, the current system operates on the premise that the federal government is either more competent, or more caring about the preservation of public lands than the inhabitants of the western states. But all available data point in the opposite direction. Indeed, the inhabitants of the western

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[138] *See id.*
[139] Larry Hicks, *Wyoming Can Best Manage Lands We All Cherish*, WYOFILE (Jan. 17, 2017), https://wyofile.com/wyoming-community-can-best-manage-lands-cherish/ [https://perma.cc/A6CG-NUAZ].
[140] *Id.*
[141] *See* Anderson, *supra* note 136.
[142] *See* Letter from Lyle Laverty et al., *supra* note 134, at 2.
[143] *See* Wes Siler, *Why You Don't Want the States Managing Public Land*, OUTSIDE (Nov. 2, 2017), https://www.outsideonline.com/culture/opinion/why-you-don't-want-states-managing-public-land/ [https://perma.cc/6ZLD-L9F2].
[144] *See* Collins, *supra* note 11.
[145] *See id.*
[146] *Id.*

states are extremely knowledgeable of the needs of their local areas and are extremely protective of their natural landscapes. These facts suggest that our public lands might be *more* protected by the states than by a distant federal bureaucracy—a consideration that is well worth pondering.

III. BRITISH COLONIES AND COMMON LAW

When speaking about complex constitutional issues, it often happens that one becomes so myopic as to miss the forest for the trees. Such is the state of affairs of current Property Clause scholarship. In focusing so closely on the structure of the clause, or parsing relevant court holdings, one tends to forget that it is ultimately an issue of sovereignty that one is expounding. And as one interrogates the text and history of this constitutional provision, so too must one interrogate the nature and understanding of state sovereignty itself. Specifically, one must look to see whether the histories of American or British commonwealth federalist systems help solve the riddle of who ought to control the land.

This Author finds that it does. A historical comparative analysis shows that this problem that has vexed our nation for nearly a century is not unique to the United States. To the contrary, every nation operating under a British federalist system encountered, debated, and settled this issue.[147] And while English Common Law that evolves after the drafting of the Constitution is not binding on American courts, it is still widely considered to be an important and persuasive source.[148] Consider the following excerpts from the congressional records and common law cases of various crown territories.

A. Australia

For the entire first half of the nineteenth century, Australian settlers and the British government sparred over the control of the Crown lands.[149] Indeed, as they began to discuss the possibility of self-government in the colonies, a lively debate ensued over whether the British government or local governments should be vested with control

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[147] JEFFERSON, *supra* note 84; *Fairfax County Resolves*, *supra* note 86; *Virginia Gazette Image*, *supra* note 90.

[148] GARNER ET AL., *supra* note 9, at 737, 743–44.

[149] ANN CURTHOYS & JESSIE MITCHELL, TAKING LIBERTY: INDIGENOUS RIGHTS AND SETTLER SELF-GOVERNMENT IN COLONIAL AUSTRALIA, 1830–1890, at 155 (Catherine Hall, Mrinalini Sinha & Kathleen Wilson eds., 2018).

over land policy.[150] Members of British Parliament unsurprisingly believed that the control over Australian land policy ought to remain with the Crown.[151] Earl Grey summarized this view in a letter he penned in 1852: "'The Waste Lands of the vast Colonial Possessions of the British Empire are held by the Crown as Trustee for the Inhabitants of that Empire at large and not for the Inhabitants of the particular Provinces . . . in which any such Waste Lands happen to be situated.'"[152] Yet this hardline position was becoming increasingly untenable in practice.[153] By 1846, the British government was prepared to give the Australian colonial legislatures control over all land matters, while stressing the fact "that the transfer of powers in this case was 'a question of expediency and not of right.'"[154] But once the door was opened to local control, the British government would never get it back.[155] Just six years after their narrow concession, they would announce the government's new policy: "Control and disposal of Crown lands was to be transferred to the colonies."[156] Decades later, the courts would sum up this decades-long battle as follows:

> So long as anything less than responsible government applied in the Australian colonies this position remained unaltered; Crown lands were vested in the Imperial Crown, they were the Sovereign's colonial lands. When responsible government was granted to the first four Australian colonies in 1855 . . . control of them passed to the colonial government.[157]

B. New Zealand

The parliamentary debates in New Zealand reveal a very similar pattern to that of Australia.[158] In 1876, Frederick Whitaker, a member of the New Zealand House of Representatives, summed up the history of the nation's land policy in a House speech.[159] According to Whitaker, during

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[150] *Id.* at 217.
[151] *Id.*
[152] *Id.*
[153] *Id.*
[154] *Id.* at 218.
[155] *See* CURTHOYS & MITCHELL, *supra* note 149, at 218.
[156] *Id.*
[157] *New South Wales v Commonwealth* (1975) 135 CLR 337, 439 (Austl.).
[158] *See, e.g.*, (1 Aug. 1876) 21 NZPD 13–37.
[159] *Id.* at 14.

the early years of the colony, the Crown claimed ownership and control over all unappropriated lands within its borders.[160] In this system, local legislatures were entirely powerless when it came to land policy.[161] "The Constitution Act [of 1852] . . . conferred on the Legislature of New Zealand . . . the power of dealing with the waste lands of the crown. . . . [B]ut with the Constitution Act in 1852, we commenced an entirely new era."[162]

C. Canada

Perhaps the most interesting land control debates took place in Canada at the turn of the twentieth century when America's northern neighbors were experiencing their own Sagebrush Rebellion.[163] After the passage of the British North America Act of 1867, the original provinces of Canada were given full ownership and legislative authority over the Crown lands within their borders.[164] Yet when the western territories of Canada were settled and began applying for formal status as provinces, the Canadian government would admit them only on the condition that the federal government retain control over all Crown lands in the new provinces.[165] The reason given was that "[t]he federal government had believed that it must control the land and resources to enable it to oversee the national goal of quickly populating the Prairie West," and that granting local control over these lands might thwart these federal objectives.[166] But the inhabitants of the Prairie Provinces flatly rejected this policy, arguing that it was an affront to the rights of Englishmen.[167] Robert Borden, then the Prime Minister of Canada, unreservedly threw his support behind the Prairie Provinces.[168] He stated in 1905:

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[160] *Id.*
[161] *Id.*
[162] *Id.* at 14–15.
[163] *See* Thomas Flanagan & Mark Milke, *Alberta's Real Constitution: The Natural Resources Transfer Agreement*, *in* FORGING ALBERTA'S CONSTITUTIONAL FRAMEWORK 165, 169, 171 (Richard Connors & John M. Law eds., 2005).
[164] 1 PETER W. HOGG & WADE K. WRIGHT, CONSTITUTIONAL LAW OF CANADA § 1:2 (5th ed. Supp. 2022). *See also British North America Act 1867*, UK PARLIAMENT, https://www.parliament.uk/about/living-heritage/evolutionofparliament/legislativescrutiny/parliament-and-empire/collections1/parliament-and-canada/british-north-america-act-1867/ [https://perma.cc/6GRN-MDU6] (last visited Jan. 16, 2023).
[165] Flanagan & Milke, *supra* note 163, at 166–67, 170.
[166] D.J. Hall, *Natural Resources Transfer Acts 1930*, CANADIAN ENCYC., https://www.thecanadianencyclopedia.ca/en/article/natural-resources-transfer-acts-1930 [https://perma.cc/SCP7-BZP6] (July 3, 2015).
[167] Flanagan & Milke, *supra* note 163, at 172–73.
[168] *Id.* at 175.

> [A]ny permanent settlement of the Natural Resources Question must be based upon the ample recognition on the part of the Dominion [of] the inherent British rights of the prairie provinces to their natural resources as from the date of provincial organization or responsible government; the restoration of full provincial beneficial control of these which remain unalienated, and compensation upon a fiduciary basis for those which have been alienated by Canada for the purpose of the Dominion.[169]

After several years of protest, the Prairie Provinces' campaign for equal sovereignty began to bear fruit.[170] While negotiating with the Prairie Province of Manitoba, the federal government entered into a special agreement, stipulating that, "because it was 'desirable and just' that the prairie provinces should be placed in a situation of equality with the other provinces of Canada in regard to their natural resources, the Dominion would guarantee to negotiate an agreement which would create just such a situation of equality."[171] And by 1928, the federal government of Canada had agreed to the premise that the Prairie Provinces were "'to be placed in a position of equality with the other provinces . . . as from its entrance into Confederation in 1870.'"[172] Two years later, Canadian Parliament would pass the Natural Resources Transfer Agreement, which fully divested all control over the Crown lands to the Prairie Provinces wherein they resided.[173] And the principle of equal footing among provinces ultimately won the day.[174]

D. Summary

As can be seen, the belief that land policy was an inseparable aspect of state sovereignty by the local governments became a fixed idea in British federalist systems of government throughout the world. A nineteenth century legal commentator summed up this historical development as follows:

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[169] *Id.*
[170] Jim Mochoruk, *Manitoba and the (Long and Winding) Road to the* Natural Resources Transfer Agreement, 12 REV. CONST. STUD. 255, 282–83 (2007).
[171] *Id.* at 283.
[172] *Id.* at 290 (quoting WILLIAM FERDINAND ALPHONSE TURGEON, PRIVY COUNCIL OFF. CAN., REPORT OF THE ROYAL COMMISSION ON THE TRANSFER OF THE NATURAL RESOURCES OF MANITOBA 5 (1929)).
[173] *Id.* at 255–56.
[174] *Id.* at 256; Flanagan & Milke, *supra* note 163, at 184–85.

> When the measures thus initiated shall have been carried out, the renunciation of this branch of the royal prerogative, in respect of British Australasia, will be complete. In the European Dependencies no subject-matter for its exercise remains. In the North-American provinces it has been long relinquished. In the Antilles, with the exception of some tracts of unalienated lands in the Bahamas and Trinidad, the territories of the Crown have been appropriated. . . . In Southern Africa alone any considerable area remains unalienated, and still subject to the disposition of the Crown. But here, as elsewhere, the mere administrative control reserved to the agents of the Home Government is a barren right, which may be unpopular, and must be unprofitable; and should its renunciation be, at any period, regarded as a boon or demanded as a right, by the Provincial Parliaments at the Cape Colony, or elsewhere, it may fairly be anticipated that it will be conceded, and that the burden and responsibility of administering their national estates will, through all the Dependencies of the British Empire, be cast on those communities whose freedom from imperial intervention in the practical ownership and enjoyment of their soil has been so long and so universally acknowledged.
>
> "If we recognise the principle that colonists should govern themselves, except in those particulars where the exercise of self-government would necessarily clash with Imperial Sovereignty, this (the control over their territorial revenues) is one of the functions which should seem in theory more peculiarly fit to be exercised by the colonial, not the imperial, authorities."[175]

This evolution of English common law and customs concerning colonial land provides valuable insights into notions of state sovereignty in a federalist system of government and should be taken into account. In every British colony, the lands were originally owned and controlled

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[175] MILLS, *supra* note 74, at 45–46 (quoting Herman Merivale, Lecture XV: Effects of the Disposal of Land in New Colonies by Free Grant, and by Sale at Low Prices, Examined, Especially in North America, *in* 2 LECTURES ON COLONIES AND COLONIZATION: DELIVERED BEFORE THE UNIVERSITY OF OXFORD IN 1839, 1840 & 1841, at 90, 91 (1842)).

by the Crown.[176] But as time went on, and the colonies matured and developed into "responsible government[s]"—i.e., political bodies capable of self-governance—the control of crown lands and natural resources within the colony's borders were transferred from the Crown to the colonial legislature.[177] And while these started off as mere legislative appeasements to disgruntled colonists, they would in time evolve into "inherent British rights" to be granted to any colony once provincial organization or responsible government was established.[178] Similarly, these accounts, especially that of the Canadian Prairie Provinces, highlight the principle that in a federalist system of dual sovereignty, the control over lands is rightfully placed in the hands of the state with very limited exceptions.[179] In every instance, the federal government's attempt to control lands and natural resources within the borders of established provinces was seen as an affront to the rights of the province and violative of their federalist pact.[180]

If the concept of federalism in the United States is different than that of Great Britain, it would naturally fall on the side of *greater* deference from the federal government to state governments, not less. It would boggle the mind to suggest that the framers intended to design a federal system of government that had more control over the internal affairs of the states than the monarchy they revolted against years earlier.

When interpreting the Property Clause of the Constitution, this history ought to be taken into account. In this light, the Clause can be read as anticipating the expansion of the nation westward, which would require federal control of newly acquired territory. But once these territories were settled and admitted into the Union as new states, it would become the duty of the federal government to, at minimum, create a plan to dispose of the remaining federal lands within the state's borders quickly. The state and federal government would then strive to negotiate a compromise that balanced the state's interest of sovereignty with the nation's interest in the disbursement of the funds generated by the land sales. These were the kinds of debates that took place in Congress in the early nineteenth century.[181] But even though these debates rarely (if

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[176] *New South Wales v Commonwealth* (1975) 135 CLR 337, 439; (1 Aug. 1876) 21 NZPD 14; Flanagan & Milke, *supra* note 163, at 166–67, 170.
[177] *See, e.g.*, Flanagan & Milke, *supra* note 163, at 175.
[178] *Id.*
[179] Mochoruk, *supra* note 170, at 283.
[180] Flanagan & Milke, *supra* note 163, at 172–73.
[181] *See supra* Section II.B.

ever) resulted in the enactment of any real policies, it was at least tacitly acknowledged by all that *something* was wrong, and inherently at odds with the genius of the Constitution, to allow the federal government to continue denying new states the control of up to 95% of all lands within their boundaries.[182]

CONCLUSION

The great debate over the disposal of public lands is a truly American issue. It was here when the colonists began whispering about the idea of revolution.[183] It continued with the great Western Expansion.[184] And it remains to this day. But just because this is an American issue, does not mean that the country cannot find answers outside of its own borders. Indeed, if one is to accept that this is ultimately a question about the framework of state sovereignty within a federalist system of government, there is much to be learned from the histories of similar British colonies around the world. And these histories all speak with a single voice: Land policy is a fundamental aspect of state sovereignty, which rightly belongs in the hands of the state wherein the lands are situated. Somewhat ironically, this Crown policy was ultimately inspired by their experience with the American colonies, who revolted after the Crown tried to tighten its grip over their internal affairs.[185] And though once considered a mere allowance by the Crown, it quickly came to be regarded as the inherent right of all Englishmen to control the land within their own borders.[186] This surprising unanimity from other British territories in the aftermath of the Revolution should strongly suggest that this view of state sovereignty was present in America as well.

This hypothesis is strengthened even more when corpus linguistics are used to determine what Americans at the time the Constitution was adopted would have understood the language of the Property Clause to mean. The results show that ordinary Americans would have overwhelmingly understood it to contemplate the sale or disbursement of the public lands, rather than their maintenance or upkeep.[187] Moreover,

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[182] Application of Illinois for a Reduction in the Price of the Public Lands, *supra* note 119, at 624.
[183] *Virginia Gazette Image*, *supra* note 90; *American Revolution Begins at Battle of Lexington*, *supra* note 91.
[184] FREEMUTH, *supra* note 120.
[185] *Fairfax County Resolves*, *supra* note 86; *Virginia Gazette Image*, *supra* note 90.
[186] Flanagan & Milke, *supra* note 163, at 172–73.
[187] *See supra* Part I.

when one takes the modern expansive reading of the Property Clause to its logical end, it could neutralize the guarantee of a vertical separation of powers for new states being admitted to the union from federal territories. This internal encroachment on western states is often justified by paternalistic fears that local governments will destroy the natural beauty of these lands for quick profits.[188] But the data betray this idea—revealing that the residents of western states are overwhelmingly proud and protective of these natural landscapes.[189] Their local pride combined with their local knowledge make them ideal stewards for such a task.

In sum, this Note has sought to demonstrate that the historical, practical, and theoretical evidence point to the conclusion that the control over the lands within one's borders is not an economic issue, but a sovereignty issue. It is an issue with real-world consequences and an issue whose time has come.

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[188] Siler, *supra* note 143.
[189] Collins, *supra* note 11.