The Rise of Federal Title

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Why did, and does, the federal government own most of the public domain within the United States? The standard historical answers—that states ceded their lands to the federal government and that the Property Clause confirmed this authority—turn out to be incomplete, masking a neglected process in the 1780s and '90s in which legitimate ownership came to derive primarily from the federal government.

This transformation, which I call the rise of federal title, involved two intertwined controversies. The first was a federalist struggle over whether the federal government could retain land in former territories admitted as states notwithstanding the promise of equal footing. The second concerned the nature of ownership: as states' unregulated land grants created endless litigation, claimants turned to the federal government to resolve conflicting rights and to create a land system that offered certain title. Both processes vindicated federal ownership, with the consequence that the federal government enjoyed a monopoly on one of the nation's most important sources of wealth.

DOI: https://doi.org/10.15779/Z389G5GD6P

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This history proves highly relevant. The rise of federal title is under threat, as many western states, and the Republican Party platform, have spun a theory based on erroneous history that argues federal landholding is unconstitutional. Simultaneously, in constructing a principle of equal state sovereignty, the Supreme Court's recent Shelby County *decision relied on equal footing cases that ignored this early history. But the implications transcend immediate doctrinal concerns. For property scholars, this Article posits a greater role for the state and its regulation of property than current accounts emphasize. For those focused on public law, this history suggests a more expansive early federal government—and a more modest court role in policing federalism—than most scholarship on the early United States acknowledges.*

"[T]here never was a bill of greater importance than that before the House. . . . [T]hat House were the fathers of the country, and . . . about to set out new farms to their sons, by doing which he hoped they should destroy that hydra, speculation, which had done the country great harm."

— Rep. Rutherford, speaking on the Land Office Bill, 1796[1]

"[A] patent to land, issued by the United States under authority of law, is the highest evidence of title . . . ."

— *Beres v. United States*, 64 Fed. Cl. 403, 417 (2005)

1. 5 ANNALS OF CONG. 328–29 (1796) (Joseph Gales ed., 1849).

INTRODUCTION

The federal government is the largest landowner in the United States, a fact that has excited recent discontent.[2] Ammon Bundy's occupation of a national wildlife refuge was the most spectacular manifestation of the increasingly common constitutional argument that the federal government lacks the authority to own most lands within the states.[3] Demands that the federal government "return" these lands to the states appeared in the 2016 Republican Party platform and spawned several recent congressional bills proposing to sell off federal lands;[4] in the last half decade, eleven of the twelve states in which the federal government owns more than a quarter of all land have considered, and several have enacted, laws contemplating or even mandating transfer.[5] At the same time,

2. The federal government owns 640 million acres, roughly 28 percent of the land within the United States. CAROL HARDY VINCENT ET AL., CONG. RESEARCH SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 1, 1 (2014).

3. *See, e.g.*, Liam Stack, *Wildlife Refuge Occupied in Protest of Oregon Ranchers' Prison Terms*, N.Y. TIMES (Jan. 2, 2016), https://www.nytimes.com/2016/01/03/us/oregon-ranchers-will-return-to-prison-angering-far-right-activists.html [https://perma.cc/77SV-S8V7]; Jack Healy & Kirk Johnson, *The Larger, but Quieter Than Bundy, Push to Take Over Federal Land*, N.Y. TIMES (Jan. 10, 2016), https://www.nytimes.com/2016/01/11/us/the-larger-but-quieter-than-bundy-push-to-take-over-federal-land.html [https://perma.cc/4QXH-LAML]; Courtney Sherwood & Kirk Johnson, *Bundy Brothers Acquitted in Takeover of Oregon Wildlife Refuge*, N.Y. TIMES (Oct. 27, 2016), https://www.nytimes.com/2016/10/28/us/bundy-brothers-acquitted-in-takeover-of-oregon-wildlife-refuge.html [https://perma.cc/CA4T-FPDM].

4. *See* H.R. 621, 115th Cong. (2017); H.R. 5780, 114th Cong. (2016); REPUBLICAN NAT'L CONVENTION, REPUBLICAN PLATFORM 2016, at 21–22, https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL[1]-ben_1468872234.pdf [https://perma.cc/QQ4X-V28M]; *see also* Michelle Nijhuis, *What Will Become of Federal Public Lands Under Trump?*, NEW YORKER (Jan. 31, 2017), https://www.newyorker.com/tech/elements/what-will-become-of-federal-public-lands-under-trump [https://perma.cc/D3TP-RJTX].

5. Utah enacted a statute purportedly requiring transfer, UTAH CODE ANN. § 63L-6-101 (West 2012), while Nevada passed a law creating a task force to study the issue, A.B. 227, 77th Leg. (Nev. 2013), and Montana enacted a law demanding federal money "owed" for the public lands, S.B. 298,

the Supreme Court's 2013 decision in *Shelby County v. Holder* invalidating portions of the Voting Rights Act also implicated federal lands: the Court's opinion relied on a principle of equal state sovereignty derived largely from centuries-old precedents concerning competing federal and state claims to the public domain.[6] The ensuing scholarly debate has led federalism scholars scurrying into the minutiae of nineteenth-century decisions on public landownership.[7]

This renewed attention to public lands represents a return to some of the oldest issues in American law. Although current scholarship often casts federal lands questions as a specialized subtopic within environmental law, scholars have recognized that debates over the public domain once dominated American law and politics. "In the present age, it is difficult to apprehend the former magnitude and importance of public-lands law," wrote then-Professor Antonin Scalia in 1970.[8] "Our present society contains no institution . . . whose importance to the federal government and whose effect upon the course of national development remotely approximates the dominating influence of the public lands during the nineteenth century."[9] Though Scalia and scholars like Jerry Mashaw have mined this history to illuminate current doctrine,[10] this important work has come largely in administrative law or in articles focused on current federal land issues.[11]

There remains, in other words, an important history of public lands to be told, one that would speak to the issues of property, federal authority, and federalism implicated in present controversies.[12] This Article seeks to explore

64th Leg., Reg. Sess. (Mont. 2015). Resolutions "demand[ing]" cession, in the words of Idaho's legislature, were passed in Idaho, H.C.R. 22, 62d Leg., 1st Reg. Sess. (Idaho 2013), and Nevada, S.J. Res. 1, 2015 Leg., 78th Sess. (Nev. 2015). For bills, see H.B. 115, 29th Leg., 1st Sess. (Ala. 2015); S.B. 1332, 50th Leg., 2d Reg. Sess. (Ariz. 2012); S.B. 13-142, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013); H.B. 582, 63d Leg., 2d Reg. Sess. (Idaho 2016); H.B. 292, 51st Leg., 1st Sess. (N.M. 2013); H.B. 3444, 78th Leg., Reg. Sess. (Or. 2015); H.J.M 13, 78th Leg., Reg. Sess. (Or. 2015); H.B. 1192, 64th Leg., Reg. Sess. (Wash. 2015); H.B. 209, 63d Leg., Gen. Sess. (Wyo. 2015). Wyoming recently contemplated a constitutional amendment that would mandate transfer. S.J. Res. 3, 64th Leg., Gen. Sess. (Wyo. 2017). The American Legislative Exchange Council has a model resolution that "calls on" Congress to cede lands, alleging that federal landholding violates the Constitution. *Resolution on the Transfer of Public Lands*, AM. LEGIS. EXCH. COUNCIL (Sept. 29, 2013), https://www.alec.org/model-policy/resolution-transfer-public-lands [https://perma.cc/3Q4S-K3XY]. For the twelve states in which the federal government owns more than 25 percent of all land, see VINCENT, *supra* note 2, at tbl.1 (2014).

6. 570 U.S. 529 (2013).

7. *See infra* Part V.B.

8. Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 MICH. L. REV. 867, 882 (1970).

9. *Id.*

10. *See id.*; Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–29*, 116 YALE L.J. 1636 (2007).

11. For examples of the latter, see Bruce R. Huber, *The Durability of Private Claims to Public Property*, 102 GEO. L.J. 991 (2014); *infra* note 263.

12. One excellent work addressing this issue is Alison L. LaCroix, *The Interbellum Constitution: Federalism in the Long Founding Moment*, 67 STAN. L. REV. 397 (2015), which discussed the role of federal power over public lands in resolving federalist disputes regarding internal

that history. In particular, it interrogates a question largely absent from current literature: how and why a national government invariably described as one of "limited and enumerated powers"[13] early assumed the outsized role that Scalia and others acknowledge.[14] In answering that question, this Article traces a process that I term the rise of federal title—the triumph of a conception that legitimate, initial ownership of western lands derived solely from title conferred by the federal government.

In recounting this transformation, this Article draws on published and unpublished sources from a time and place that I argue were foundational. The time is the period surrounding the drafting, adoption, and early implementation of the US Constitution usually labeled as the "Founding." Surprisingly, given the attention usually lavished on this era, even specialized histories of federal landownership have scarcely discussed this period.[15] This neglect stems partly from the commonplace assumption that ownership of the public domain was settled under the Articles of Confederation, when states ceded western lands to the national government, and was confirmed through the ratification of the

improvements. LaCroix focused on a later period, however, and did not examine the struggles over sovereign ownership of the public domain.

13. On the dominance of this approach and a critique, see Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576, 578 (2014).

14. Paul Frymer's important recent study stressed that federal title over western lands was "not an obvious power of the government at the time—individual states, people who had settled on the land, economic entrepreneurs, and rival peoples and nations all contested U.S. rights to ownership." PAUL FRYMER, BUILDING AN AMERICAN EMPIRE: THE ERA OF TERRITORIAL AND POLITICAL EXPANSION 9 (2017). But Frymer similarly elided the question of transfer of ownership to the federal government.

15. Malcolm Rohrbough's seminal study of the federal land system, for instance, covered this period in a brief introductory chapter focused primarily on the Ordinance of 1785 and the Land Laws of 1796 and 1800; nearly his entire book covered the period after 1800. MALCOLM J. ROHRBOUGH, THE LAND OFFICE BUSINESS: THE SETTLEMENT AND ADMINISTRATION OF AMERICAN PUBLIC LANDS, 1789–1837, at 3–25 (1968). The premier historian of the federal public domain, Paul Gates, likewise devoted most of his scholarly attention to the nineteenth-century history of the land office. His massive synthetic history of American land law also focused on the 1785 Ordinance, with brief coverage, organized thematically, of the early history of private land claims, military bounty lands, preemption rights, and statehood, mostly as precedent for later policies. PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 59–74, 87–91, 222–23, 255–61 (1979). Other important histories similarly focused on the political conflicts of the first half of the nineteenth century, with scant coverage of the earlier period. *See* EVERETT DICK, THE LURE OF THE LAND: A SOCIAL HISTORY OF THE PUBLIC LANDS FROM THE ARTICLES OF CONFEDERATION TO THE NEW DEAL 1–18 (1970); DANIEL FELLER, THE PUBLIC LANDS IN JACKSONIAN POLITICS 5–13 (1984); JOHN R. VAN ATTA, SECURING THE WEST: POLITICS, PUBLIC LANDS, AND THE FATE OF THE OLD REPUBLIC, 1785–1850 (2014); Paul Frymer, *"A Rush and a Push and the Land Is Ours": Territorial Expansion, Land Policy, and U.S. State Formation*, 12 PERSP. ON POL. 119 (2014). One exception to this general neglect is Farley Grubb, *U.S. Land Policy: Founding Choices and Outcomes, 1781–1802*, *in* FOUNDING CHOICES: AMERICAN ECONOMIC POLICY IN THE 1790S, at 259 (Douglas A. Irwin & Richard Sylla eds., 2011). Frymer's recent study on federal lands devoted a chapter to the early period, although he emphasized central federal planning in shaping settlement. FRYMER, *supra* 14, at 32–71. One forthcoming law review article asserts that "the debate over the history of the Property Clause should move beyond the Founding," arguing that the period's history did not resolve the constitutional question of federal landownership. Jeffrey Schmitt, *A Historical Reassessment of Congress's "Power to Dispose of" the Public Lands*, HARV. ENVTL. L. REV. 1, 1–5 (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3031877 [https://perma.cc/NLG2-A9UV].

Property Clause. In this account, an issue that has convulsed American public law for two centuries was so banal as to merit little debate. Against this narrative, I argue that ratification was followed, not by consensus, but by a decades-long, hard-fought struggle over jurisdiction, sovereignty, and the nature of property in the early United States.

The place was the nation's disputed western borderlands, particularly the two regions that served as the proving grounds for a new experiment in constitutional governance—the Northwest and Southwest Territories, which encompassed present-day Ohio, Illinois, Indiana, and Michigan on the one hand and present-day Tennessee on the other. Early Americans understood that these two territories, ruled directly by the federal government under the terms of the Northwest Ordinance, would establish the legal precedents that would govern subsequent expansion and the creation of new states.[16] They accordingly believed that the stakes involved in resolving issues of property and sovereignty there were high.

The process I describe as the rise of federal title consisted of two interlocked contests, involving two bodies of law now rarely considered in the same frame: federalism and private property. From the perspective of the history of federalism, the public domain was a crucial site in broader struggles between federal and state authority in the early United States. Cessions notwithstanding, states retained extensive property within the ostensibly federal territories, while the federal government owned most of the land within the newly sovereign states formed from the territories. These conflicts produced a fierce struggle over the meaning of the equal footing doctrine, one litigated in Congress and state legislatures and resolved through statute and compact. The ultimate result was a durable constitutional settlement in favor of federal ownership alongside an equally durable dissenting vision.

But the source and stakes of this federalist contest, I argue, cannot be understood without exploring a second, subtler struggle over the nature and origin of property rights in the early United States. Scholars such as Claire Priest and Gregory Alexander have traced how post-revolutionary reforms simplified ownership, as the elimination of feudal tenures facilitated alienability.[17]

16. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50. On constitutional history of the territories, see GARY LAWSON & GUY SEIDMAN, THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY 121–207 (2004); PETER S. ONUF, STATEHOOD & UNION: A HISTORY OF THE NORTHWEST ORDINANCE 20–87 (1987).

17. The literature on this topic, especially on the end of the fee tail in the revolutionary period, is large. *See, e.g.*, GREGORY S. ALEXANDER, COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776–1970, at 37–42 (1997); STUART BANNER, AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN 4–22 (2011); John F. Hart, *"A Less Proportion of Idle Proprietors": Madison, Property Rights, and the Abolition of Fee Tail*, 58 WASH. & LEE L. REV. 167 (2001); Stanley N. Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 MICH. L. REV. 1, 1–29 (1977); David Thomas Konig, *Jurisprudence and Social Policy in the New Republic*, *in* DEVISING LIBERTY: PRESERVING AND CREATING FREEDOM IN THE NEW AMERICAN REPUBLIC 178, 188–96 (1995); Claire Priest, *Creating an American Property*

Reflecting this shift, nearly all western lands were granted in fee simple absolute. But contemporaries found as remarkable a phenomenon largely invisible in current scholarly accounts. Partly because of tenure reforms, the early United States experienced an unprecedented and voracious market in western lands that early Americans routinely described as an illness—a "mania" or a "fever."[18] "Were I to characterize the United States," an English visitor wrote in 1796, "it would be by the appellation of the land of speculations."[19] Western land became a hugely valuable commodity: initially sold cheaply, it promised to rise inexorably in value as Anglo-American settlement expanded. All classes of Anglo-American society gambled on western lands: New York and Philadelphia financiers built and lost vast paper empires of frontier titles;[20] leading members of the national political elite like George Washington and James Wilson staked and squandered fortunes on western lands;[21] yeomen sought to secure a few hundred acres to sell once value rose.

Western land was a gamble partly because simplification and commodification paradoxically made title less, rather than more, secure. Governments, particularly the states, made expansive promises of land—to preexisting owners, first settlers, veterans, and would-be purchasers—but then made little effort to regulate land's distribution. The consequence was the proliferation of inchoate, quasi title, nonetheless often enforceable against other claimants, based on the bare promise of eventual, authoritative governmental title. Cast into the ravenously hungry land market, these documents freely circulated, producing overlapping claims and snarls of property rights that required decades to resolve.

The confusion in private title produced by permissive state land laws doubly contributed to the rise of federal authority over land. For one, it encouraged the creation of a heavily regulated national land system that

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Law: Alienability and Its Limits in American History, 120 HARV. L. REV. 385 (2006); Claire Priest, *The End of Entail: Information, Institutions, and Slavery in the American Revolutionary Period*, 33 LAW & HIST. REV. 277 (2015).

18. *See generally* Michael Albert Blaakman, Speculation Nation: Land and Mania in the Revolutionary American Republic, 1776–1803 (Mar. 2016) (unpublished Ph.D. dissertation, Yale University) (on file with author) (describing the rise of land mania in the early United States); *see also* THOMAS PERKINS ABERNETHY, WESTERN LANDS AND THE AMERICAN REVOLUTION 288–369 (1937) (recounting how during and after the Revolution "a tumultuous rush to the West began—not for political freedom, but for private gain"); A.M. SAKOLSKI, THE GREAT AMERICAN LAND BUBBLE: THE AMAZING STORY OF LAND-GRABBING, SPECULATIONS, AND BOOMS FROM COLONIAL DAYS TO THE PRESENT TIME 29–191 (1932) (narrating what Sakolski describes as the "post-revolutionary wild-land mania").

19. SAKOLSKI, *supra* note 18, at 30.

20. *See, e.g.*, ROBERT F. JONES, "THE KING OF THE ALLEY": WILLIAM DUER: POLITICIAN, ENTREPRENEUR, AND SPECULATOR, 1768–1799, at 185–206 (1992); CHARLES RAPPLEYE, ROBERT MORRIS: FINANCIER OF THE AMERICAN REVOLUTION 478–515 (2010).

21. *See* JOEL ACHENBACH, THE GRAND IDEA: GEORGE WASHINGTON'S POTOMAC AND THE RACE TO THE WEST 1–212 (2004) (discussing Washington's extensive western land speculations); CHARLES PAGE SMITH, JAMES WILSON: FOUNDING FATHER, 1742–1798, at 360–88 (1956) (recounting Wilson's investments in land).

repudiated earlier failed systems. For another, it forced federal officials in the territories to engage in ad hoc administrative adjudication among conflicting rights, a jerry-rigged resolution subsequently hardened into precedent. Uncertainty led many claimants to embrace, not abjure, federal involvement, if only to secure ownership rights. But this individual reliance on federal authority had broad consequences—both because it tied the validity of the myriad landowners' ownership rights to the security of initial federal title and because, as claimants in early United States repeatedly discovered, it greatly mattered *which* sovereign determined the legitimacy of property rights. This process, in short, expanded and entrenched federal power over land, power that persisted even after the former territories gained admission as states.

These linked, and largely ignored, struggles over sovereign ownership and the uncertainty of commodified property have important implications for present-day property and constitutional law. For property law, they suggest that accounts of property's origin offered by both traditional and progressive property scholars obscure the role of the state in property's past within the United States. Those struggles also demonstrate how the simplicity of title unexpectedly undermined the security of ownership and prompted regulation, an argument contrary to some current property work.

Integrating the history of struggles over the public domain also helps reframe current debates in public and constitutional law. At the most concrete level, this history underscores the constitutional foundation for federal landownership. But it also addresses more abstract public law questions. The history of federal title, I suggest, questions interpretations that portray a limited early American federal government with narrow and confined powers. It also helps shift current debates precipitated by *Shelby County* over the existence *vel non* of a constitutional principle of state equality. Though some uncertain notion of state equality early existed, the resolution of these contentions through sovereign negotiation suggests a more limited role for the Supreme Court, which has subsequently enforced this principle inconsistently and capriciously.

More broadly, this Article seeks to reexamine how legal scholars might construct a useable past. Recent years have seen heated debates between originalists and historians about constitutional interpretation.[22] Despite strong disagreements, these arguments share a common presumption that constitutional meaning is to be found through the history of ideas, broadly construed.[23] The

22. For recent entries in this debate, see Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 FORDHAM L. REV. 721 (2013); Jonathan Gienapp, *Historicism and Holism: Failures of Originalist Translation*, 84 FORDHAM L. REV 935 (2015); Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, the Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575 (2011); Lawrence B. Solum, *Intellectual History as Constitutional Theory*, 101 VA. L. REV. 1111 (2015).

23. I consider the search for "semantic meaning" of a particular term at a particular moment in history as a form of the history of ideas, even if the term "intellectual history" carries a particular charge in this debate that originalists reject. *See* Solum, *supra* note 22.

history of property, too, has largely been written as an intellectual history of ownership expressed through treatises and doctrine.[24] Without minimizing the important contributions of these approaches, this Article adopts a different tack: it takes seriously the role of governance in shaping the development of law and the state in the early United States. Governance differed from policy, appellate court decisions, and even congressional debates; it involved routinized decision-making rather than grand, systematizing pronouncements. Eleven of the twelve public land statutes Congress passed prior to 1800, for instance, intervened in local contests over ownership in the territories.[25] These statutes were typical of the early federal government, which often acted, as the history of title underscores, in confusing, complicated, and seemingly minor ways. This Article builds on other histories of governance to suggest that important work was nonetheless going on in these quotidian contests.[26] These local disputes importantly shaped subsequent history, even if the outcome was not always what policy-makers foresaw or intended.

In advancing these arguments, this Article proceeds in five parts. Part I explores the evolution of ownership and sovereignty in colonial and post-revolutionary America. Part II shifts westward, to explore state property law schemes and their persistence within the ostensibly federal western territories. Part III considers how conflicting claims to ownership thrust federal administrators into the role of adjudicating property rights in the new territories. Part IV returns to federalist controversies over the public domain prompted by the admission of federal territories to statehood, beginning with Tennessee in

24. Comprehensive legal histories of property during this era include ALEXANDER, *supra* note 17, and JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 10–58 (3d ed. 2008).

25. *See* Act of Mar. 2, 1799, ch. 34, 1 Stat. 728; Act of Mar. 2, 1799, ch. 29, 1 Stat. 724; Act of Mar. 3, 1797, ch. 14, 1 Stat. 507; Act of June 1, 1796, ch. 46, 1 Stat. 490; Act of Mar. 3, 1795, ch. 49, 1 Stat. 442; Act of June 9, 1794, ch. 62, 1 Stat. 394; Act of Feb. 21, 1793, ch. 10, 1 Stat. 318; Act of May 5, 1792, ch. 30, 1 Stat. 266; Act of Apr. 21, 1792, ch. 25, 1 Stat. 257; Act of Mar. 3, 1791, ch. 27, 1 Stat. 221; Act of Aug. 8, 1790, ch. 40, 1 Stat. 182. Only one statute during this period created a general land system. Act of May 18, 1796, ch. 29, 1 Stat. 464. Congress also enacted four private acts distributing the public domain. Act of July 16, 1798, ch. 87, 6 Stat. 36; Act of June 25, 1798, ch. 59, 6 Stat. 35; Act of May 17, 1796, ch. 28, 6 Stat. 27; Act of Apr. 12, 1792, ch. 19, 6 Stat. 7.

26. Most such grounded histories of early American governance have focused on administrative law. *See, e.g.*, JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW (2012); NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940 (2013); GAUTHAM RAO, NATIONAL DUTIES: CUSTOM HOUSES AND THE MAKING OF THE AMERICAN STATE (2016). As discussed in Part III, *infra*, property disputes helped craft the nascent American administrative state. But federal governance was not confined to a single branch or institution: the President, the courts, and especially Congress all became entangled in day-to-day resolution of the recurrent issues of title in the early United States. For approaches that emphasize the significance of local governance, see LAURA F. EDWARDS, THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH (2009); WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996). For a discussion of the significance of governance in creating federal law and policy, see KAREN M. TANI, STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935–1972 (2016).

1796. Finally, Part V considers some of the legacies of these struggles over ownership and jurisdiction, exploring implications for accounts of the origins of property as well as for current debates in federalism and constitutional law.

I.
PROPERTY AND SOVEREIGNTY: THE VIEW FROM PHILADELPHIA

Anglo-American colonists arrived in North America with heads stuffed full of law. As historians have traced, English charters, letters patent, treatises, and other documents justifying occupation and possession drew on a rich amalgam of legal sources swirling around early modern Europe: feudal English common law, Roman law, natural law, and international law.[27]

But such legal visions, potent against other colonizers, rarely dictated actual settlement. For one, Anglo-American colonists found themselves not in a new world but in a Native world.[28] Confronted with the realities of indigenous power, Anglo-Americans largely abandoned airy debates over Indian[29] ownership in favor of the pragmatic policy of purchasing Native lands.[30] For another, the quasi-feudal charters, with their vague grants of title, offered little guidance on how property would actually be distributed.[31] Regional English laws filled gaps to govern tenures,[32] even as land's widespread availability served to enshrine

27. The literature on European legal justifications for ownership of North America is large. For exemplary recent works, see KEN MACMILLAN, SOVEREIGNTY AND POSSESSION IN THE ENGLISH NEW WORLD: THE LEGAL FOUNDATIONS OF EMPIRE, 1576–1640 (2006); ANTHONY PAGDEN, LORDS OF ALL THE WORLD: IDEOLOGIES OF EMPIRE IN SPAIN, BRITAIN AND FRANCE C. 1500–C. 1800, at 66–102 (1995); PATRICIA SEED, CEREMONIES OF POSSESSION IN EUROPE'S CONQUEST OF THE NEW WORLD, 1492–1640 (1995); CHRISTOPHER TOMLINS, FREEDOM BOUND: LAW, LABOR, AND CIVIC IDENTITY IN COLONIZING ENGLISH AMERICA, 1580–1865, at 133–90 (2010); Lauren Benton & Benjamin Straumann, *Acquiring Empire by Law: From Roman Doctrine to Early Modern European Practice*, 28 LAW & HIST. REV. 1, 1–38 (2010).

28. For works emphasizing this point, *see generally* MICHAEL WITGEN, AN INFINITY OF NATIONS: HOW THE NATIVE NEW WORLD SHAPED EARLY NORTH AMERICA (2012); Neal Salisbury, *The Indians' Old World: Native Americans and the Coming of Europeans*, 53 WM. & MARY Q. 435 (1996).

29. In this Article, I use the terms "Native" and "indigenous" when describing the descendants of the aboriginal inhabitants of North America while using the term "Indian" to describe Anglo-Americans' perceptions of, and the legal principles they applied to, Native peoples. Within the field of federal Indian law—the law crafted and applied by the United States to govern its relationship with Native nations and peoples—Indian remains a term of art, especially for core concepts written into federal law such as Indian country and Indian title. *See, e.g.*, ROBERT ANDERSON ET AL., AMERICAN INDIAN LAW: CASES AND COMMENTARY 210–29, 271–95 (3d ed. 2015). I examine the complicated history and meaning of the term "Indian" more fully elsewhere. *See* Gregory Ablavsky, *"With the Indian Tribes": Race, Citizenship, and Original Constitutional Meanings*, 70 STAN. L. REV. 1025 (2018).

30. *See generally* STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER 10–29 (2005) (tracing how early debates over Native property rights evolved into the near-universal practice of purchasing Indian title).

31. *Cf.* TOMLINS, *supra* note 27, at 133–90 (providing a detailed examination of colonial charters).

32. On the role of English regionalism in early American land law, see MARY SARAH BILDER, THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE 33–46 (2004);

freehold title and eliminate feudal incidents.[33] But England had not had "vacant" land for centuries. Each colony instead relied on diverse experiments to distribute property: headrights in Virginia, townships in New England, and grants and warrants in the proprietary colonies.[34]

These land systems blurred the distinction between ownership and sovereignty. Early Americans distinguished between property rights, "the right of soil," and the power to govern, "jurisdiction."[35] But these two sources of power were complicatedly intertwined in early America. Obtaining ownership in colonial British America involved uniting two sources of property rights: "Crown title" and "Indian title."[36] Both came from sovereigns. "Crown title" derived from the monarch through the charter holder, usually each colony's government. "Indian title" came from Native nations in purchases that Anglo-Americans presumed to encompass Indian peoples' jurisdictional as well as property rights.[37]

For nearly a century, colonies' ad hoc precedents governed rapidly spreading Anglo-American settlements along the Atlantic coast. But beginning in the mid-eighteenth century, the scale of Anglo-Americans' landed ambitions dramatically expanded. Colonial elites began to cast covetous glances beyond the Appalachians, toward the rich bottomlands of the Ohio and Tennessee River Valleys, regions lumped together as the "western waters."[38] After France's defeat in the Seven Years' War, the vision of millions of acres now seemingly available for settlement and sale entranced Anglo-Americans. Few laws or

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David Thomas Konig, *Regionalism in Early American Law*, *in* 1 THE CAMBRIDGE HISTORY OF LAW IN AMERICA: EARLY AMERICA (1590–1815), at 144 (Michael Grossberg & Christopher Tomlins eds., 2008).

33. *See* David W. Galenson, *The Settlement and Growth of the Colonies: Population, Labor, and Economic Development*, *in* 1 THE CAMBRIDGE ECONOMIC HISTORY OF THE UNITED STATES 135, 152 (Stanley L. Engerman & Robert E. Gallman eds., 1996) ("[F]reehold land ownership became a dominant characteristic of the colonial economy.").

34. New England distributed land through grants to towns; Virginia and other southern states employed headrights, which awarded acreage for each colonist imported; and, in Pennsylvania and other proprietary colonies, the proprietors, not the government, owned and distributed property. ALAN TAYLOR, AMERICAN COLONIES 133–34, 170–71, 224, 266–67, 287, 322–23 (2001). There was more recent English precedent in the distribution of title in Ireland. *See* Nicholas P. Canny, *The Ideology of English Colonization: From Ireland to America*, 30 WM. & MARY Q. 575, 577–78 (1973).

35. These were the legal terms of art used to describe rights in states' land cessions. *See infra* text accompanying notes 50–51; *see also* BANNER, *supra* note 30, at 14 ("In the colonies . . . sovereignty and property were usually understood as distinct issues.").

36. *See, e.g.*, James Wilson & William Samuel Johnson, *Arguments before the Court of Commissioners*, FOUNDERS ONLINE (Dec. 14–23, 1782), https://founders.archives.gov/documents/Jefferson/01-06-02-0369-0003 [https://perma.cc/59MM-Y92C] (recounting how colonies sought to establish property rights by "combining" the "Crown title" with "Indian title").

37. *See* Daragh Grant, *The Treaty of Hartford (1638): Reconsidering Jurisdiction in Southern New England*, 72 WM. & MARY Q. 461, 472 (2015) ("[C]olonial governments often simply assumed that the transfer of a title to possession also extinguished indigenous jurisdiction.").

38. ERIC HINDERAKER & PETER C. MANCALL, AT THE EDGE OF EMPIRE: THE BACKCOUNTRY IN BRITISH NORTH AMERICA 98–125 (2003).

precedents yet governed the region. Instead, colonial elites formed land companies that sought to purchase enormous portions of western land from its Native owners and create small fiefdoms in the continent's interior.[39] Yet the imperial British government, its treasury drained from decades of imperial conflict, banned both individuals and colonies from purchasing Indian land and barred settlement west of the Appalachians.[40] The collision between Anglo-Americans' avarice and Britain's poorly enforced law contributed to colonists' decision to break from Britain; it also meant that for nearly two decades, ownership and jurisdiction in the West remained unsettled.[41]

The Revolutionary War accelerated change. The sudden absence of British imperial law created a vacuum that states, settlers, and land companies rushed to fill. Even as the war raged, Anglo-American settlers poured onto lands within present-day Kentucky and Tennessee, then part of Virginia and North Carolina respectively. Both states enacted laws opening their western territories to purchase,[42] and both constitutionalized their colonial charters, asserting the lands within their borders to be, in the words of North Carolina's Constitution, "the right and property of the people of this State, to be held by them in sovereignty."[43]

These expansive charters—written when the English barely knew the continent and often purporting to extend to the Pacific—quickly caused

39. For background on these land companies and similar prerevolutionary schemes, see WOODY HOLTON, FORCED FOUNDERS: INDIANS, DEBTORS, SLAVES, AND THE MAKING OF THE AMERICAN REVOLUTION IN VIRGINIA 5–40 (1999); BLAKE A. WATSON, BUYING AMERICA FROM THE INDIANS: *JOHNSON V. MCINTOSH* AND THE HISTORY OF NATIVE LAND RIGHTS 41–63 (2012); JOHN C. WEAVER, THE GREAT LAND RUSH AND THE MAKING OF THE MODERN WORLD, 1650–1900, at 96–111 (2003); ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 239–80 (1990).

40. By the King, a Proclamation, Oct. 7, 1763, *in* 1 DOCUMENTS LEGISLATIVE AND EXECUTIVE OF THE CONGRESS OF THE UNITED STATES IN RELATION TO THE PUBLIC LANDS, FROM THE FIRST SESSION OF THE FIRST CONGRESS TO THE FIRST SESSION OF THE TWENTY-THIRD CONGRESS: MARCH 4, 1789, TO JUNE 15, 1834, at 30–31 (Walter Lowrie ed., Washington, printed by Duff Green 1834) [hereinafter AMERICAN STATE PAPERS: PUBLIC LANDS]. For additional background on the proclamation, see generally COLIN G. CALLOWAY, THE SCRATCH OF A PEN: 1763 AND THE TRANSFORMATION OF NORTH AMERICA (2006).

41. *See* THE DECLARATION OF INDEPENDENCE (U.S. 1776) (accusing the King of "raising the conditions of new appropriations of lands"); *see also* HOLTON, *supra* note 39, at 5–40 (arguing that discontent with the Proclamation of 1763 and its restriction on speculation contributed to the colonists' break with Britain).

42. Act of Nov. 15, 1777, ch. 1, *reprinted in* THE ACTS OF ASSEMBLY OF THE STATE OF NORTH CAROLINA 3–7 (New Bern, printed by James Davis 1778); Act of May 3, 1779, *in* 10 STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 1 (William Waller Hening ed., 1823). For background on the early settlement of Kentucky and Tennessee, see STEPHEN ARON, HOW THE WEST WAS LOST: THE TRANSFORMATION OF KENTUCKY FROM DANIEL BOONE TO HENRY CLAY 29–81 (1996); KRISTOFER RAY, MIDDLE TENNESSEE, 1775–1825: PROGRESS AND POPULAR DEMOCRACY ON THE SOUTHWESTERN FRONTIER (2007).

43. N.C. CONST. OF 1776, art. XXV; *see also* VA. CONST. OF 1776 ("The western and northern extent of Virginia shall . . . stand as fixed by the Charter of King James I.").

discord.[44] Many charters overlapped.[45] Moreover, states' purported territories were enormous and virtually unsettled by Anglo-Americans, to whom these regions were little more than lines on a map. Virginia's enormous claim, for instance, encompassed nearly the entire present-day Midwest.[46] So-called "unlanded" states—those with defined borders—balked that territory obtained through the shared cost of the Revolution would enrich a handful of states.[47] During the Revolution, these bitter fights over speculative ownership and jurisdiction of unknown territories threatened to paralyze Congress. Maryland refused to ratify the Articles of Confederation until the charter claims were cabined.[48] In the Wyoming Valley (present-day Pennsylvania) and the New Hampshire grants (now Vermont), confrontations between armed partisans of rival state claims threatened to erupt in violence.[49]

Over the 1780s, the nascent federal government worked to resolve these disputes, achieving what many historians have described as Congress's greatest success under the Articles of Confederation. Congress convinced most of the states to cede their land claims to the federal government; only North Carolina and Georgia held out. The most significant cession was Virginia's, which, in 1784, granted the United States "all right title and claim as well of soil as jurisdiction"—that is, both ownership and sovereignty—over all of its enormous territory north of the Ohio River.[50] One historian has labeled this cession as the moment of the "creation of the national domain."[51]

Cessions largely achieved, Congress next created a legislative framework to govern its expansive new lands. In the Land Ordinance of 1785, it anticipated dividing the national domain into presurveyed 640-acre rectangular parcels and subsequently selling them at public auction.[52] Two years later, Congress passed the Northwest Ordinance, which created the first federal territory, the Northwest

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44. The best and most thorough coverage of the conflicting charter rights appears in PETER ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC: JURISDICTIONAL CONTROVERSIES IN THE UNITED STATES, 1775–1787, at 3–20, 49–73 (1983); *see also* Merrill Jensen, *The Creation of the National Domain, 1781–1784*, 26 MISS. VALLEY HIST. REV. 323 (1939); Merrill Jensen, *The Cession of the Old Northwest*, 23 MISS. VALLEY HIST. REV. 27 (1936).

45. ONUF, *supra* note 44, at 3–20.

46. Peter Onuf, *Toward Federalism: Virginia, Congress, and the Western Lands*, 34 WM. & MARY Q. 353, 353–55 (1977).

47. GATES, *supra* note 15, at 49–58; Jensen, *The Creation of the National Domain*, *supra* note 44.

48. GATES, *supra* note 15, at 49–58.

49. ONUF, *supra* note 44, at 9–10, 127–43.

50. *Virginia: Cession of Western Land Claims, Mar. 1, 1784*, *reprinted in* 2 THE TERRITORIAL PAPERS OF THE UNITED STATES, THE TERRITORY NORTHWEST OF THE RIVER OHIO, 1787–1803, at 6–9 (Clarence Edwin Carter ed., 1934) [hereinafter *Virginia Cession*]; *see also* Peter Onuf, *supra* note 44, at 353–74.

51. Jensen, *The Creation of the National Domain*, *supra* note 44.

52. 28 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 375–81 (John C. Fitzpatrick ed., 1933). For additional background on the Ordinance, see GATES, *supra* note 15, at 59–74; ROHRBOUGH, *supra* note 15, at 6–11; George W. Geib, *The Land Ordinance of 1785: A Bicentennial Review*, 81 IND. MAG. HIST. 1 (1985).

Territory, from Virginia's ceded lands. The statute also provided a durable template for how the new territories would be governed and ultimately admitted to statehood. The Ordinance's provisions were soon extended to encompass subsequent federal territories as well—including the second federal territory, the Southwest Territory, carved from western land that North Carolina finally ceded in 1790.[53] The Ordinance provided that new states were to be "on an equal footing with the original States, in all respects whatever" and stipulated that the new states would "never interfere with the primary disposal of the [s]oil by the United States."[54]

The new Constitution, drafted at the same moment as the Ordinance, seemingly endorsed these statutes' approach to public lands. The Property Clause, a late and apparently uncontroversial addition proposed by James Madison, granted Congress the authority to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," its language conflating, as the state cessions did, jurisdiction over the territories with ownership of the public domain.[55] In less than a decade, the United States had seemingly determined that the federal government would control and distribute the public lands.

Yet the apparent clarity masked deeper uncertainties. After a heated exchange, the Convention punted on the question of state and federal ownership, explicitly entrenching the status quo.[56] Georgia accordingly still controlled nearly half of the nation's western territory, which it stubbornly refused to cede.[57] And the constitutional status of the Northwest Ordinance was itself uncertain, creating doubts that would long persist.[58]

The result was that the Constitution could be interpreted to endorse either federal or state supremacy over land, as the ratification debates demonstrated. Federalist proponents of ratification soothed that the Constitution would not alter ownership. In two brief sentences in *The Federalist No. 43*, Madison merely described the Property Clause as "absolutely necessary" in light of earlier

53. 32 JOURNALS OF THE CONTINENTAL CONGRESS, 334–43 (Roscoe R. Hill ed., 1936). The first Congress subsequently reenacted the Northwest Ordinance after the adoption of the Constitution. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50.

54. 32 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 53, at 339, 341–42.

55. U.S. CONST. art. IV, § 3, cl. 2. Madison originally proposed the language that became the Property Clause on August 18. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 321, 324 (Max Farrand ed., 1911) (proposing that Congress enjoy the power to "dispose of the unappropriated lands of the U. States" and create "temporary Governments for New States").

56. *See* U.S. CONST. art. IV, § 3, cl. 2 ("[N]othing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."); 2 RECORDS OF FEDERAL CONVENTION, *supra* note 55, at 461–66.

57. CHARLES F. HOBSON, THE GREAT YAZOO LANDS SALE: THE CASE OF FLETCHER V. PECK 23–26 (2016).

58. *See* THE FEDERALIST NO. 38, at 207–39 (James Madison) (Clinton Rossiter ed., 1961) ("Congress . . . have proceeded to form new States, to erect temporary governments, to appoint officers for them . . . . without the least color of constitutional authority."); *see also* ONUF, *supra* note 16, at 133–52 (recounting controversies over the validity of the Northwest Ordinance, particularly after statehood).

contentions over ownership of western lands,[59] while Federalist Tench Coxe, writing in the *Pennsylvania Gazette*, reassured his readers that "[t]he lordship of the soil is one of the most valuable and powerful appendages of sovereignty—This remains in full perfection with every state. From them must grants flow . . . ."[60] Several of ratification's Anti-Federalist opponents, however, construed the Clause differently. They saw it as deceptively innocuous, its "smooth and easy language" disguising the "art and intrigue."[61] Only upon rereading it multiple times, they recounted, did they realize its true import: it was "a complete deed and absolute grant of all our western territory," a "surrender into the hands of Congress all the western territory, of larger extent, I conceive, than the kingdoms of Great Britain and Ireland."[62]

But the dominant response to the Property Clause during the Convention and ratification was silence. As the debate during the Convention suggested, few wanted to reopen the uneasy détente over ownership of the public domain reached under the Articles. The nation's political elite fixated on another aspect of the public domain instead—its potential value, particularly its promise to pay off the nation's crushing war debt. Nearly all looked hopefully to the sale of western lands as the nation's primary "fund," a way to repay public securities without taxation.[63] Anti-Federalists even insisted that these lands obviated the need for expanded federal powers of taxation.[64]

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59. THE FEDERALIST NO. 43, at 242 (James Madison) (Clinton Rossiter ed., 1961).

60. *A Freeman III*, PA. GAZETTE, Feb. 6, 1788, *reprinted in* 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION, NO. 4, at 49 (John P. Kaminski et al. eds., 2009); 34 JOURNALS OF THE CONTINENTAL CONGRESS, at 49, 95–101 (Roscoe R. Hill ed., 1937).

61. Letter from Massachusetts, Oct. 17, 24, 1787, *in* 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: DELAWARE, NEW JERSEY, GEORGIA, AND CONNECTICUT 1, 377 (John P. Kaminski et al. eds., 2009); Speech by Benjamin Gale, Nov. 12, 1787, *in* 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra*, at 428.

62. Letter from Massachusetts, *supra* note 61, at 377; Speech by Benjamin Gale, *supra* note 61, at 428.

63. *See, e.g.*, Grubb, *supra* note 15, at 259–89 (discussing this vision of the public domain); *see also* Letter from William Grayson to James Monroe (Oct. 22, 1787), *in* 24 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at 490 (Paul H. Smith ed., 1996) ("Congress [is] *now* looking upon the Western country in its true light, i.e., as a most valuable fund for the total extinguishment of the domestic debt"); Letter from James Madison to George Nicholas (May 17, 1788), *in* 11 PAPERS OF JAMES MADISON: CONGRESSIONAL SERIES 44, 45 (Robert A. Rutland & Charles F. Hobson eds., 1977) ("As the establishment of the new Govt. will thus promote the sale of the public lands, it must for the same reason enhance their importance as a fund for paying off the public debts.").

64. *See, e.g.*, A Plebian, An Address to the People of the State of New York, Apr. 17, 1788, *in* 17 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION, NO. 5, at 146, 151 (John P. Kaminski & Gaspare J. Saladino eds., 1995) (arguing against haste in adopting the Constitution, as "the western territory, which has always been relied upon as a productive fund to discharge the national debt, has at length been brought to market, and a considerable part actually applied to its reduction"); Publicola, *An Address to the Freeman of North Carolina*, STATE GAZETTE OF N.C., Mar. 20, 1788, *reprinted in* 16 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION, NO. 4, at 435, 441 (John P. Kaminski et al. eds., 2009) ("[T]he sale of the western territory . . . will, in all probability, be more than equal to our wants while we continue in peace.").

This single-minded focus on the public lands' financial value demonstrates the shallowness of the resolutions of the 1780s. Congress's broad and grandiose policy statements rested on a conception of the public domain as an abstraction—notional parcels of land with theoretical future value. But this view from Philadelphia rested on ignorance. As the newly created federal government quickly learned, its western territories were real and complicated places. Instead of an asset, western lands soon became a burden, presenting challenges of governance that nearly overwhelmed the fledgling national government.

The ensuing process revealed how little the Constitution and states' cessions had settled questions about title and jurisdiction. Rather than consensus, ratification produced a two-decades-long debate over property and sovereignty in the early West. Through this contest, federal officials would give meaning to the nominal rights established in the nation's foundational documents and make federal authority consequential.

II.
STATE PROPERTY IN FEDERAL JURISDICTION

For those who envisioned a vacant national domain awaiting sale, Secretary of State Thomas Jefferson's 1791 report on land in the territories came as a rude surprise.[65] Filling fifteen printed pages, Jefferson's catalogue traced, in addition to Native ownership rights, preexisting claims to twenty-one million acres of western land by non-Indians. [66]

Where did all these purported owners of supposedly federal land come from? Though Jefferson noted many sources of title, the simple answer was that the states had gotten there first. Virginia and especially North Carolina had given, sold, and promised millions of acres of western land amidst a nearly unprecedented orgy of speculation. Only after triggering this enormous land rush did the states cede their lands to the federal government—along with the explicit stipulation that the federal government honor all state land grants, even inchoate ones.

The consequence of state cessions, then, was not the straightforward creation of a national public domain. Rather, the cessions created the anomaly of a vast, ostensibly federal domain where state legislatures still dictated property law. Worse still, state property law often acknowledged multiple conflicting sources of title and made little effort to prevent overlapping claims. The federal government sought to replace state practices and establish clear title. But federal officials found that law, weakness, and confusion hampered these efforts. Rather than offering a resolution, state cessions of the territorial property morass to the

65. Report of the Secretary of State to the President (Nov. 8, 1791), *in* 4 THE TERRITORIAL PAPERS OF THE UNITED STATES: THE TERRITORY SOUTH OF THE RIVER OHIO, 1790–1796, at 85 (Clarence Edwin Carter ed., 1936).

66. Report of the Secretary of State to the President, *supra* note 65, at 91 n.78, 99.

federal government marked the beginning of a lengthy struggle over title in early America.

A. Sources of Title

Three sets of claimants Jefferson identified proved especially significant and time-consuming for the new federal government: "Ancient Companies" claiming lands based on Indian purchase; grant holders who had obtained land "vested in Individuals by the Laws of the State"; and "intruders," who settled lands, in Jefferson's words, "without Right or License."[67] Despite seeming differences, the validity of all three sets of claims depended, in the first instance, on state law.

1. Private Purchases from Indians

With the territories, the federal government inherited a generation-long legal struggle over whether nonsovereigns could purchase land from Native peoples. Long viewed askance and forbidden in the Proclamation of 1763,[68] such purchases nonetheless persisted, with Anglo-Americans self-interestedly insisting that Indians were free to sell their lands to whomever they pleased.[69] Acting under this theory, on the eve of the Revolution, two sets of speculators made enormous purchases from Native nations in the future territories: the Transylvania Company, which bought "several millions of Acres" of Cherokee land,[70] and the Illinois & Wabash Company, which purchased a similarly enormous tract from the Illinois and Piankeshaw Indians.[71]

Freed from the strictures of British law, both companies hoped they could persuade the regions' new sovereigns—the states—to honor their claims.[72] But after vigorous debate, they failed. Both Virginia and North Carolina invalidated the Transylvania and Wabash claims by constitutionalizing the principle that the state alone possessed the right to purchase land from Indians.[73]

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67. Report of the Secretary of State to the President, *supra* note 65, at 87, 91 n.78, 113.

68. By the King, a Proclamation, *supra* note 40, at 31 (forbidding private purchases because of the "great frauds and abuses . . . committed in the purchasing lands of the Indians").

69. BANNER, *supra* note 30, at 100–11.

70. Memorial of the Surviving Partners of the Henderson Company, Dec. 30, 1791, Petitions (regarding real estate and confiscated property), GASR Dec. 1791–Jan. 1792, Box 3, North Carolina State Archives, Raleigh, N.C.; *see also* CLAUDIO SAUNT, WEST OF THE REVOLUTION : AN UNCOMMON HISTORY OF 1776, at 17–26 (providing background on the Transylvania purchase).

71. On the history of the Illinois and Wabash purchases, see WATSON, *supra* note 39, at 66–92.

72. THE PROCEEDINGS OF THE CONVENTION OF DELEGATES FOR THE COUNTIES AND CORPORATIONS IN THE COLONY OF VIRGINIA: HELD AT RICHMOND TOWN, IN THE COUNTY OF HENRICO, ON THE 20TH OF MARCH, 1775, at 180–82, 192 (1816).

73. *See* N.C. CONST. OF 1776, Art. XLII ("[N]o purchase of lands shall be made of the Indian natives, but on behalf of the public, by authority of the General Assembly."); VA. CONST. OF 1776 ("[N]o purchases of lands shall be made of the Indian natives, but on behalf of the public, by authority of the General Assembly."); *see also* Act of Oct. 5, 1778, ch. 33, *reprinted in* 9 STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 571–72 (invalidating Henderson's purchase but awarding 200,000 acres as compensation); Act of April 18, 1783, ch. 38, *reprinted in* A COLLECTION

The companies, in turn, sought a more favorable sovereign, lobbying powerfully and effectively for cession.[74] With some reason, they believed that the federal government might legitimate their rejected land claims, a fear that James Madison described as one of the "principal topics of . . . discussion & intrigue" during Virginia's ratifying convention for the proposed Constitution.[75]

2. State Grants and the System of Indiscriminate Location

Virginia and North Carolina's zealousness to void land companies' purchases stemmed from the states' eagerness to distribute western lands themselves. Even before the end of the Revolution, the two states enacted laws extending their property systems deep into their western territories.[76] These nearly identical statutes codified a system known as "indiscriminate location." This system gave nearly all control for securing land rights to would-be claimants, who selected available lands from any of the state's "waste and unappropriated lands," determined the acreage they desired and identified the parcel's (often irregular) boundaries using landmarks like trees and waterways, and paid all fees.[77] Only two state officials were involved. The entry taker recorded the initial claim and issued a warrant to permit survey. After survey and upon submission of a completed plat, the state secretary issued a formal grant.[78] The claimant was then obligated to record the title in the local county court.[79]

This loosely regulated system reflected an ideology that emphasized localism and the democratic availability of landed property to all white men. The system required little state involvement and promised to reward first occupants. Prices, already low, were payable in heavily depreciated state securities, even as much of the land was simply given away, to satisfy bounties promised to revolutionary veterans.[80] Even the most glaring deficiency in the system—the risk of conflicting claims, which states made no effort to prevent—was to be

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OF THE PRIVATE ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF NORTH-CAROLINA, FROM THE YEAR 1715, TO THE YEAR 1790, INCLUSIVE, NOW IN FORCE AND USE 116 (New Bern, N.C., printed by François-Xavier Martin 1794) (similarly awarding the Transylvania Company 200,000 acres compensation).

74. Jensen, *The Cession of the Old Northwest*, *supra* note 44, at 38; Jensen, *The Creation of the National Domain*, *supra* note 44, at 325–34.

75. Letter from James Madison to George Washington (June 13, 1788), *in* 6 THE PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES 329 (W.W. Abbot ed., 1997).

76. Act of May 3, 1779, *supra* note 42; Act of Nov. 15, 1777, *supra* note 42; Act of Apr. 18, 1783, *reprinted in* 24 THE STATE RECORDS OF NORTH CAROLINA 478–82 (Walter Clark et al. eds., Goldsboro, N.C, Nash Brothers, 1886).

77. Act of Apr. 18, 1783, *supra* note 76, § 11; Act of May 3, 1779, *supra* note 42, § 3, at 38.

78. Act of Apr. 18, 1783, *supra* note 76, §§ 13, 15; Act of May 3, 1779, *supra* note 42, §§ 1, 3, at 35. County surveyors were also involved; in Virginia, they were selected not by the state but by the professors of William & Mary. Act of May 3, 1779, *supra* note 42, § 3, at 34.

79. Act of Apr. 18, 1783, *supra* note 76, § 15; Act of May 3, 1779, *supra* note 42. For a more detailed account of the processes of indiscriminate location, see MARY K. BONSTEEL TACHAU, FEDERAL COURTS IN THE EARLY REPUBLIC: KENTUCKY, 1789–1816, at 167–75 (1978).

80. *See* Act of Apr. 18, 1783, *supra* note 76, § 10 (setting the price at ten pounds per hundred acres); Act of May 3, 1779, *supra* note 42, § 2 (setting the price at forty pounds per hundred acres).

resolved through republican means. Competing claimants could file "caveats" that would transfer a dispute over ownership to a local county court where a jury would decide which claimant held the stronger title.[81] This approach comported with an understanding of ownership that valorized what Thomas Jefferson referred to as "local Informations" in adjudicating property disputes.[82] If a "Conflict of Claims should arise," Jefferson was confident that local courts would "decide them without Delay."[83]

But few of indiscriminate location's supposed virtues appeared when the system was extended to states' western lands. Predictably, a chaotic land rush immediately followed the opening of the public domain, as speculators frantically staked out claims. Three years after North Carolina's statute, the state's entry taker had recorded entries for nearly 4.4 million acres of land—16 percent of present-day Tennessee.[84] North Carolinians and Virginians knew virtually nothing of the land they purported to buy, with entries reflecting their extreme ignorance of the region.[85]

Far from egalitarian, this frenzied process allowed the wealthy to engross enormous quantities of land. North Carolina's governor later lamented that "scheming and capable men . . . swallowed up the property of the state."[86] The other predictable result was the uncertainty of title, which predictably spawned litigation. Part of the problem, as one recent study has suggested, was the ambiguity of so-called "metes and bounds" surveying—surveying using natural landmarks rather than a rectangular grid.[87] But the far greater problem was title's unregulated distribution, which led to the constant problem of overlapping land rights. Kentucky, settled under Virginia's land law, exemplified these challenges. In 1797, the state's surveyor general reported that over twenty-four million acres in grants had been issued—twice as much land as the state contained.[88] One observer estimated that each tract in Kentucky had been

81. Act of Apr. 18, 1783, *supra* note 76, § 20; Act of May 3, 1779, *supra* note 42, § 3. On the caveat process, see St. George Tucker, *Note B: Of the Proceedings upon Petitions for Lapsed Lands under the Former Government; and upon Caveats*, *in* 4 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA 31 (1803).

82. Report of the Secretary of State to the President, *supra* note 65, at 100.

83. *Id.*

84. 18 THE STATE RECORDS OF NORTH CAROLINA 1786, at 456 (Walter Clark ed., 1900).

85. *See, e.g.*, Land Warrants, November 31, 1793, John Gray Blount Papers, Box 193.28, North Carolina State Archives, Raleigh, N.C. (recording North Carolina Warrant No. 1159 for two thousand acres of land in the western district of Tennessee—five hundred miles distant from the land office—which stated only that the tract lay "between the river Tennisee & Missippi [a roughly hundred-mile distance] & upon a small river or Creek, lying on both sides inclosing a tree Mark M.B. standg among a parcel chopd & Deaded trees").

86. Thomas B. Jones, *The Public Lands of Tennessee*, 27 TENN. HIST. Q. 13, 17 (1968).

87. Gary D. Libecap & Dean Lueck, *The Demarcation of Land and the Role of Coordinating Property Institutions*, 119 J. POL. ECON. 426, 426–67 (2011).

88. ARON, *supra* note 42, at 84; *see also* Fredrika Johanna Teute, Land, Liberty, and Labor in the Post-Revolutionary Era: Kentucky as the Promised Land 194311 (1988) (unpublished Ph.D.

encompassed within as many as eight or nine different surveys.[89] Similar problems plagued North Carolina's distribution of its western lands: one visitor reported, "there are and will be many disputes and litigations about titles to Land."[90]

This confusion over title caused by state land law transformed ownership in the early United States. Rather than providing independence for ordinary citizens, indiscriminate location served "[t]hose who wish only to deceive and defraud others" and created "endless law-suits," bewailed eminent jurist St. George Tucker.[91] He regarded the trade in inchoate promises of ownership as nothing but a "traffic in parchment":

> Patents for lands in Virginia, land-warrants, military rights to land, certificates of survey, nay, even bonds to procure, survey, and patent lands, have, for the space of the last ten or twelve years, become a species of mercantile paper, passing from hand to hand, sometimes in a depreciated, and sometimes in an opposite state, and contributed to swell the vast influx of paper money, that has deluged the United States for some years past.[92]

In short, physical ground had become far less important than title—some governmental document that conferred ownership if it could be upheld in constant and unpredictable litigation.

State land law soon entangled the federal government. As Anti-Federalists had feared, the federal courts ended up adjudicating local titles. Title disputes constituted nearly half of all federal cases in Kentucky prior to 1816[93] and nearly a quarter of all nonconstitutional cases decided by the US Supreme Court between 1815 and 1835, most of which traced to state grants under indiscriminate location.[94] But state land rights also became a federal matter

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dissertation, Johns Hopkins University) (on file with author) (describing the confusions of Kentucky's land system).

89. Letter from Samuel Holder Parsons to His Children (Jan. 7, 1786), Folder 6, Samuel Parsons Papers, Connecticut Historical Society, Hartford, Conn.

90. Letter from Thomas Dillon to James McHenry (May 22, 1796), Box 1, James McHenry Papers, Clements Library, University of Michigan.

91. St. George Tucker, *Note D: The Manner of Obtaining Grants of Land, Under the Commonwealth of Virginia; and from the United States*, *in* 3 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA 66, 70–71 (1803).

92. *Id.* at 68, 71.

93. TACHAU, *supra* note 79, at 167–90.

94. Edward White recorded 172 real property cases during the period out of a total of 791 nonconstitutional cases, making title disputes the "largest number of substantive nonconstitutional cases on the Court's docket," eclipsing such vital areas as contracts, credit disputes, and admiralty. White observed that many of these cases arose from "state public land grants" from "Virginia [including the Military District in Ohio], Tennessee, and especially Kentucky." G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE: 1815–1835, at 752, 763, 978–79 (1988). A similar pattern held for the first fifteen years of the nineteenth century, when other categories of cases on the Court's docket were "dwarfed in economic magnitude by the great cases involving real property and public land grants." GEORGE LEE HASKINS, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801–1815, at 588–603 (1981).

because, outside of Kentucky, the lands that the states granted became federal territories under federal jurisdiction. Cession made the confusion caused by state property law a federal concern.

3. "Intruders" and Preemption Rights

Jefferson's "intruders" presaged a common figure in the history of federal lands—the people later dubbed "squatters" who settled on public lands without any formal legal title or right. These would-be claimants have often appeared as almost heroic figures in narratives of American land law.[95] Recent scholarship by Eduardo Penalver and Sonia Katyal, as well as by the economist Hernando de Soto, has placed squatters at the center of the history of American property.[96] Tracing squatters' resistance to laws denying them title, these works have described the triumph of custom over formal law, as these "outlaws" achieved informal acknowledgment and, ultimately, formal statutory recognition of their ownership.

This narrative, however, misleadingly elides the federalist nature of early American property law. Under state law, the people commonly known in the late eighteenth century as "intruders" (squatters was a later neologism) were not outlaws. They were claiming a widely codified right known (confusingly) as the "right of preemption." Distinct from the sovereign right to purchase Indian lands, this right of preemption gave the first settlers who had improved a particular tract of land the first right to purchase it from the state, notwithstanding competing claims.[97]

Preemption rights had deep roots within Anglo-American legal thought, particularly the conception that occupancy coupled with improvement—clearing, planting, or building on land—could yield title.[98] But by the late eighteenth century, preemption rights derived from statute: both Virginia and

95. *See* WEAVER, *supra* note 39, at 378 n.63 ("There is a strain of admiration for the squatters among a number of American historians of the early republic."). Much of this admiration traces to legal historian Willard Hurst's celebratory narrative of squatters in nineteenth-century Wisconsin. *See* JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 6–12 (1956).

96. *See, e.g.*, EDUARDO MOISÉS PEÑALVER & SONIA K. KATYAL, PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP 55–70 (2010) ("The history of land law in the nineteenth-century American West is, in part, one of protracted conflict between those who held legal title . . . and white settlers who resided on the land, often without any formal legal entitlement."); HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 107–36 (2000) (depicting how western squatters helped force the transition "from extralegal rights to an integrated legal property system").

97. On the history of preemption rights under colonial law, see AMELIA CLEWLEY FORD, COLONIAL PRECEDENTS OF OUR NATIONAL LAND SYSTEM AS IT EXISTED IN 1800, at 112–42 (1910).

98. For background on improvement in Anglo-American legal thought, see TOMLINS, *supra* note 28, at 133–90; JOYCE E. CHAPLIN, SUBJECT MATTER: TECHNOLOGY, THE BODY, AND SCIENCE ON THE ANGLO-AMERICAN FRONTIER, 1500–1676, at 202–42 (2001); PATRICIA SEED, CEREMONIES OF POSSESSION IN EUROPE'S CONQUEST OF THE NEW WORLD, 1492–1640, at 18–39 (1995).

North Carolina codified the right.[99] Intruders cited these statutes whenever their right to simply settle on supposedly vacant lands was challenged. They had "only followed the practice of the different states who had unappropriated lands to settle, who from time immemorial confirmed the actual settlers in their settlements upon their paying the price settled by Law," insisted one group of intruders in the Southwest Territory.[100] In the Northwest Territory, settlers sought to "derive a Title to themselves by prior Occupancy according to the Mode which has heretofore prevaild in Virginia & Pensylvania."[101]

Seemingly a vindication of the property ideology of poorer claimants primarily seeking self-sufficiency—often referred to as smallholders—state recognition of preemption rights in practice swept would-be owners into the land market's traffic in quasi title. Intruders who improved lands recorded preemption claims before local courts; they then freely bought and sold these state-recognized rights. Surviving preemption cases from this era suggest two conclusions: preemption rights primarily served as yet another legal trump in the constant land contests,[102] and claimants in these cases were often speculators, demonstrating how the preemption market often benefitted elites.[103]

Smallholders, of course, also embraced preemption rights, and complained bitterly when they were denied—often invoking extravagant natural-law language that has led modern scholars to read them as anti-statist populists.[104] But intruders opted for preemption rights largely as the cheapest, readiest vehicle to achieve the same end that all participants in the land market sought—valid, state-recognized title that could be invoked against other claimants. They

99. Act of Nov. 15, 1777, ch. 1, *The Acts of Assembly of the State of North Carolina* (Newbern, N.C., printed by James Davis, 1778), 3–7 *in* 24 THE STATE RECORDS OF NORTH CAROLINA 214 (Walter Clark ed., 1905) (granting those who "possessed and actually improved" vacant lands the right to obtain 640 acres "in preference to all others"); Act of May 3, 1779, *supra* note 42, § 5 (granting settlers who had "built any house or hut, or made other improvements" the first right to purchase 1,000 acres of land).

100. Report on the Petition of Persons Settled on the Lands of the Cherokee Indians (with Petition) (Nov. 25, 1788), Committee of Propositions & Grievances, GASR Nov.–Dec. 1788, Box 2, North Carolina State Archives.

101. Letter from Samuel Holden Parsons to Winthrop Sargent, June 26, 1786, Reel 2, Winthrop Sargent Papers, Massachusetts Historical Society.

102. *See, e.g.*, Hays v. Harris (Wash. Cnty. Super. Ct. of L. & Equity 1795), *in* Minutes of the Superior Court of Law & Equity of Washington County, 1791–1799, at 11, 25, 40–41 (Tenn. Hist. Records Survey ed. 1941) (unpublished manuscript in Tennessee State Library and Archives) (finding in favor of plaintiff's preemption-rights claim over defendant's title based on a subsequent land grant).

103. *See, e.g.*, Tatum v. Winchester (Mero Dist. Super. Ct. of L. & Equity 1795), *in* Minutes of the Superior Court of the Mero District, 1788–1803: Part I, 1788–1798, at 189 (Josie Smith et al eds., 1938) (unpublished manuscript in Tennessee State Library and Archives) (recording a preemption-right dispute between two politically powerful land speculators).

104. *See* Letter from Colonel Harmar to the President of Congress (May 1, 1785), *reprinted in* 2 THE ST. CLAIR PAPERS: THE LIFE AND PUBLIC SERVICES OF ARTHUR ST. CLAIR: SOLDIER OF THE REVOLUTIONARY WAR; PRESIDENT OF THE CONTINENTAL CONGRESS; AND GOVERNOR OF THE NORTH-WESTERN TERRITORY: WITH HIS CORRESPONDENCE AND OTHER PAPERS 3, 5 (William Henry Smith ed., 1882) (reporting an advertisement issued by intruders asserting that "all mankind, agreeable to every constitution formed in America, have an undoubted right to pass into every vacant country, and there to form their constitution, and . . . Congress is not empowered to forbid them").

accordingly grasped at *any* form of quasi title that promised to ultimately secure their land rights, routinely purchasing land warrants or entering contracts as alternate ways to assert title.[105] In short, "squatters" were neither at odds with speculators nor hostile to state recognition; thanks to the uncertainty of title, they *were* speculators, regardless of whether they wished to be, and profoundly craved state validation.

B. Limits on Federal Intervention

For all these groups—"ancient" companies, state grant holders, and intruders—matters shifted dramatically in the late 1780s and early 1790s, when North Carolina's and Virginia's ceded lands became the Southwest and Northwest Territories respectively. Representatives of one land company understood the consequences, immediately petitioning Congress to honor claims Virginia had rejected: "Your Honors," they noted, "have now succeeded to the Sovereignty of the Territory in question."[106] As these petitioners recognized, the validity of claimants' land rights now rested with the federal government.

Claimants had good reason for concern, since many federal officials strongly disliked the lax state land law systems. Many abhorred indiscriminate location, which, one critic complained, served merely "to create law-suits."[107] Others sharply opposed preemption rights, which officials thought undercut revenue and, by encouraging settlement on Indian land, prompted violence. "[G]ratify[ing] a few intruders," Thomas Jefferson warned, would "cost the other inhabitants of the U.S. a thousand times" the land's value in an Indian war.[108]

Federal officials anticipated the creation of a federal land system that would remedy state failures. Federal lands, promoters believed, would offer a "great advantage" over state systems: "that *the Title is indisputable.*"[109] Yet, despite federal efforts, confusion persisted, with the federal government continually dragged back into earlier controversies over Indian title, state grants, and preemption rights. This Section traces some of the reasons for this failure: legal constraints, particularly the terms of state cessions; disagreements within the federal government over land policy; and enforcement challenges.

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105. For instance, any intruders in the Southwest Territory later petitioned Congress, reporting that they had purchased North Carolinian land warrants and "laid them on their lands," rather than relying on preemption rights alone. Memorial of the French Broad Settlers, Sept. 12, 1794, *reprinted in* J. G. M. RAMSEY, THE ANNALS OF TENNESSEE TO THE END OF THE EIGHTEENTH CENTURY 631 (Charleston, Walker & James, 1853); *see also* WEAVER, *supra* note 39, at 68 (For squatters, "[l]and warrants, scrip, compensation rights, and deeds of grant were government-issued face cards in a game of land poker.").

106. Jensen, *The Creation of the National Domain*, *supra* note 44, at 327.

107. 2 ANNALS OF CONG. 1831 (1790) (statement of Rep. Boudinot) (observing that "more money had been spent at law, in disputes arising from that mode of settlement . . . than would have been necessary to purchase all the land of the State").

108. Letter from the Secretary of State to David Campbell (Mar. 27, 1792), *in* 4 TERRITORIAL PAPERS, *supra* note 65, at 130–31.

109. Letter from Samuel Holder Parsons to His Children, *supra* note 89.

1. Law

State cessions began with broad statements granting ownership, but they ended with significant qualifiers preserving state land laws even for future grants. To satisfy future claims by its veterans, Virginia reserved a four-million-acre region in the Northwest Territory later known as the "Virginia Military District."[110] North Carolina stipulated that all future state land grants in the Southwest Territory would have the "same force and effect as if such Cession had not been made."[111]

These provisions ensured that state property law, including indiscriminate location, still governed much of the territories, with the key difference that it was now federal officials and territorial courts that had to parse their intricacies.[112] In the Virginia Military District, for instance, the War Department, the Secretary of State, and the President issued patents based on Virginian grants and land law.[113] This entrenchment of indiscriminate location meant that, although land distribution began years after the region had passed to federal control, property there proved just as tangled as elsewhere. "The uncertainty of title, in the Virginia military district, is proverbial," the Ohio Supreme Court observed in 1825, likely fatigued from the sixty-four cases concerning the region's titles it heard over the nineteenth century—a period when the US Supreme Court itself adjudicated twenty cases from the Virginia Military District.[114] Congress did not resolve the last claims to the District until 1907.[115]

The federal government, then, might have wished to create clear title, but states' cessions ensured that much of these nominally federal territories remained colonies of state property law. In a reversal of contemporary concerns over federal commandeering of state officers, reluctant federal officials had become the administrators of state law.[116]

110. *Virginia Cession*, *supra* note 50, at 6–9.

111. *North Carolina: Cession of Western Land Claims, Dec. 22, 1789*, *in* 4 TERRITORIAL PAPERS, *supra* note 65, at 3, 5.

112. In the Southwest Territory, for instance, the federal governor often consulted with Jefferson and North Carolina's governor about the legitimacy of state land grants. *See, e.g.*, Letter from William Blount to Alexander Martin (Jan. 22, 1791), *in* 2 THE JOHN GRAY BLOUNT PAPERS, 1790–1795 163–64 (Alice Barnwell Keith ed., 1959); Letter from William Blount to the Secretary of State (Apr. 23, 1791), *in* 4 TERRITORIAL PAPERS, *supra* note 65, at 142–43.

113. Act of Aug. 10, 1790, 1 Stat. 182.

114. Wills v. Cowper, 2 Ohio 124 (1825). The number of cases derives from a Westlaw search of "Virginia Military District" in the reporters of the US and Ohio Supreme Courts.

115. WILLIAM THOMAS HUTCHINSON, THE BOUNTY LANDS OF THE AMERICAN REVOLUTION IN OHIO 237–38 (1979).

116. *Cf.* Margaret Hu, *Reverse-Commandeering*, 46 U.C. DAVIS L. REV. 535 (2012) (discussing state incursions into federal sovereignty).

2. *Land Policy Disagreement*

Even with millions of acres reserved for the states, the federal government still held millions more supposedly free of both state and Native claims.[117] All sought to establish clear title when the federal government distributed this land, but there was little consensus on how to achieve that goal. Many in Congress were partisans for codifying the "usages of the States" into federal law, producing months of acrimonious debate.[118]

The most contentious issues were indiscriminate location and preemption rights. Although indiscriminate location had many critics,[119] western representatives championed the land rush it occasioned. Lands settled the most quickly, they argued, when they "were not bound down to any . . . restrictions."[120] Westerners were also the loudest proponents of preemption rights and succeeded in ramming a bill through the House that would have honored the right of "actual settlers."[121] But the bill failed in the Senate.[122]

In the end, it took seven years of vociferous debate before Congress enacted the first statute authorizing general land sales. The resulting 1796 law settled some important questions: it codified the rectangular grid so that "no dispute might arise hereafter" and made no provision for preemption rights.[123] Nonetheless, almost no federal land was sold for another four years, until 1800, when Congress enacted yet another land law, this one opening land offices in the territories.[124] Only then—sixteen years after Virginia's cession—were purchasers able to buy the clearly defined rectangular parcels long dreamt of in Philadelphia.

3. *Enforcement Struggles*

Though it dithered on land sales, Congress was not muddled on all areas of land law. But even when Congress acted decisively, federal officials in the territories struggled to use their authority to enforce the government's edicts.

For instance, Congress outlawed private purchases from Indians months into its first session.[125] Yet criminalizing private purchases did not halt the

117. *See* Report of the Secretary of State to the President (Nov. 8, 1791), *supra* note 65, at 98–100 (estimating that the United States could "rightfully dispose" of twenty-one million acres in the territories).

118. 5 ANNALS OF CONG. 414 (1796) (statement of Rep. Madison).

119. *See, e.g.*, 2 ANNALS OF CONG. 1831 (1790) (Joseph Gales ed., 1834) (statement of Rep. Williamson) (recording the North Carolinian representative's remarks describing how his state's system of indiscriminate location had allowed "persons rich in securities and cash" to seize the best lands).

120. 2 ANNALS OF CONG. 1830 (1790) (statement of Rep. Scott).

121. *Id.* at 1831.

122. *Id.*

123. Act of May 18, 1796, ch. 29, 1 Stat. 464; 5 ANNALS OF CONG. 865 (1796) (statement of Rep. Venable).

124. Act of May 10, 1800, ch. 55, 2 Stat. 73.

125. Act of July 22, 1790, ch. 33, § 4, 1 Stat. 137, 138 ("[N]o sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons . . . unless

practice. Many continued to trade in Indian deeds, hoping to convince, or dupe, some authority into honoring their bargains. In 1795, two men boldly tried to bribe Congress to permit them to buy nearly all of present-day Michigan from its Native owners.[126] Others rejected federal authority altogether: "Congress has nothing to do with the lands," asserted one group of settlers, "but that they belong to the Indians who may dispose of them as they please."[127]

Land companies like the Wabash Company remained similarly indefatigable, bombarding Congress with petitions.[128] Initially sympathetic, Congress nonetheless feared that recognizing the companies' claims would set a dangerous precedent and undermine federal Indian policy.[129] For twenty years, each successive Congress rejected the companies' repeated petitions until the final petition failed in 1811.[130]

This setback merely led the companies to turn from petitions to litigation, crafting a collusive suit that culminated in the 1823 Supreme Court decision *Johnson v. M'Intosh*.[131] The case's outcome—Chief Justice Marshall's authoritative rejection of private purchases from Native nations—was unsurprising, given that three separate sovereigns had already adjudicated and rejected the companies' claim.[132] Rather, the case's most remarkable feature was arguably its late date, as the decision was a belated capstone to the nearly century-long struggle over private purchases. The long delay reflected the shifting jurisdiction over the West, which had allowed companies to try to persuade each new sovereign to change the law or grant them an exception. In the end, *Johnson* was the final word, less because of the Supreme Court's authority and more because, after four attempts, the speculators had finally exhausted the sovereigns to which they could appeal.[133]

The federal government also struggled to enforce its resolution not to honor preemption rights. In the Northwest Territory, the federal government repeatedly

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the same shall be made and duly executed at some public treaty, held under the authority of the United States.").

126. 5 ANNALS OF CONG. 166–70 (1795).

127. Letter from John Edgar to Arthur St. Clair (Aug. 25, 1797), Reel 4, Winthrop Sargent Papers, Massachusetts Historical Society.

128. *See, e.g.*, WATSON, *supra* note 39, at 224–49 (describing the repeated petitions of the Wabash and Illinois Companies).

129. No. 12: Illinois and Wabash Companies, Apr. 3, 1792, *in* 1 AMERICAN STATE PAPERS: PUBLIC LANDS, *supra* note 40, at 22; *see also* No. 186: Illinois and Wabash Land Companies, Jan. 30, 1811, *in* 2 AMERICAN STATE PAPERS: PUBLIC LANDS, *supra* note 40, at 219–20 (concluding that acknowledging the claim would "encroach upon the great system of policy so wisely introduced to regulate intercourse with the Indian tribes").

130. No. 186: Illinois and Wabash Land Companies, *supra* note 129, at 219–20.

131. 21 U.S. 543 (1823).

132. *Id.*

133. Lindsay Robertson offered an additional explanation for Marshall's decision, pointing out that Marshall had a financial stake in preemptive rights to Native land in Kentucky (essentially, an executory interest in land once Indian title was extinguished), and so crafted a broad-based decision that legitimated these land rights. LINDSAY G. ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS 77–96 (2005).

used the army to evict intruders on public lands, burning their homes and crops.[134] But this was often a temporary expedient: as one congressman observed, "[T]hree hours after the troops were gone, these people returned again, repaired the damage, and are now settled upon the lands in open defiance of the authority of the Union."[135] This failure led officials to adopt a softer approach in the Southwest Territory, where Secretary of State Jefferson urged a policy of persuasion that would offer "as little trouble and injury to the intruders . . . as you can."[136]

These interactions established a long-standing pattern of uneasy tension between accommodation and confrontation. As discussed, Congress dramatically broke with state practice and rejected preemption rights in its earliest land statutes; preemption rights would not receive general statutory acknowledgment until 1830 and formal recognition until 1841.[137] Yet the intruders persisted, and the federal government oscillated between evicting them at gunpoint and tacitly accepting their presence. In justifying their resistance, settlers continued to insist on the validity of state preemption laws, even though those laws no longer applied. In this sense, the struggle over preemption rights, on federal lands within an exclusively federal jurisdiction, was nonetheless, and ironically, a federalist contest.

C. State Land and Federal Law

Visions of empty land neatly arrayed into rectangular parcels danced in the heads of early American politicians just as they have continued to entrance scholars. But as Jefferson's report demonstrates, the reality was starkly different. Territorial lands teemed with claimants, their land rights frequently predicated on state statutes. In less than a decade, state land law had dramatically extended its reach into regions Anglo-Americans barely knew by making private actors, not state officials, the primary agents. But this rapid growth came at the cost of a half century of confusion and litigation.

States' actions hampered the region's new sovereign, the federal government. Although the failures of indiscriminate location ultimately pushed a divided Congress to reject the practice, the federal government found itself both formally and informally bound to state land law.

Much of the challenge stemmed from the ongoing tension between ownership and jurisdiction. Deeds, warrants, and even inchoate title claims

134. Letter from Josiah Harmar to Henry Knox (Aug. 4, 1786), *in* Josiah Harmar Papers, Clements Library, University of Michigan, Vol. 28, Letterbook A, at 144–45.

135. 1 ANNALS OF CONG. 412 (1789) (Joseph Gales, Sr. ed., 1834) (statement of Rep. Scott).

136. Letter from the Secretary of State to Governor Blount (Nov. 14, 1792), *in* 4 TERRITORIAL PAPERS, *supra* note 65, at 218.

137. Act of May 18, 1796, ch. 29, 1 Stat. 464, at 421–25; Act of May 10, 1800, ch. 55, 2 Stat. 73, at 73–78; Act of May 29, 1830, ch. 208, 4 Stat. 420, at 420–21; Act of Sept. 4, 1841, ch. 16, 5 Stat. 453, at 453–558; *see also* FELLER, *supra* note 15, at 129–31, 186–88, 194–98 (recounting congressional struggles over preemption rights).

entrenched earlier legal regimes and made the federal government's authority hollow in large parts of the territories. The result, as the Supreme Court would later write when warning about the analogous extension of Virginian land law into Kentucky, was "the anomaly presented of a sovereign State governed by the laws of another sovereign—of one-half of the territory . . . hopelessly and forever subjected to the laws of another State."[138] As a consequence of this *de facto* jurisdiction, the ghosts of past land systems haunted a nation that had sought to repudiate them.

III.
FEDERAL LAND RIGHTS

In their eagerness to give land away, states had largely ignored most other preexisting claimants to territorial lands. But Jefferson's exhaustive report catalogued them: Native nations defending their boundaries, French settlers along the Mississippi River, and Revolutionary War veterans promised western lands by the Continental Congress.[139] As jurisdiction passed from state to federal control, these claimants demanded that the region's new sovereign confirm their title.

Adjudicating these disputes largely fell to a handful of federal officials—the early American precursor of the federal administrative state—with Congress acting as court of final appeal. Although local courts routinely resolved property disputes throughout the early United States, courts were ill-equipped either to *create* title or to resolve thousands of claims at once. Instead, in a decision that reflected exigency more than deliberation, Congress turned to federal territorial officials to sort these claims, seemingly because those officials were nearly the only representatives of the federal authority in the territories.[140] Pressure for resolution also came from below, from claimants who demanded that federal administrators acknowledge their land rights. But in relying on federal officials to sort land claims, both claimants and Congress reinforced federal authority over ownership. The translation of preexisting, inchoate rights into a federally issued ownership document helped cement the rise of federal title.

A. Native Title

Before the federal government could "extinguish" Native title, it had to determine which Native nations owned which parcels of land. This imperative resulted in part from the logic of federal land law, which mandated that the federal government purchase title from the land's true owners to create a secure and indisputable point of origin. But it also resulted from the federal need to ensure peace and placate Native leaders, who demanded that the federal

138. Hawkins v. Barney's Lessee, 30 U.S. 456, 466 (1831).
139. Report of the Secretary of State, *supra* note 65, at 86–87, 93–95.
140. See *infra* notes 150–151 and text accompanying.

government write Native boundaries into the federal treaties that guaranteed Native ownership of unsold lands.[141]

Determining which Native nation owned which land proved challenging: one official bemoaned the "tedious and . . . inconvenient altercations among [Native nations] about their boundaries, which are often extremely vague."[142] Because Native concepts were the only property law in Indian country, federal officials assumed the unlikely role of trying to understand and apply Native ideas of ownership. Often, these officials turned to Natives themselves, seeking to "ascertain *from the Indians* what tribes are the allowed proprietors" of the lands under discussion.[143] Officials also relied on analogies to Anglo-American legal concepts, particularly occupancy, which promised a bright-line rule for resolving disputes. Tribes "who were the actual occupants of the lands," Secretary of War Henry Knox instructed, should be considered "the proper Owners thereof."[144] Federal officials subsequently codified the results of their forays into Native law in treaty provisions and statutes marking Native nations' boundaries.[145]

Officials' adjudication of Native property rights presents a paradoxical view of the rise of federal authority over title. Most federal officials had little desire to determine questions of Native property law. Yet Natives insisted. In a world of constrained choices, federal acknowledgment offered one of the few methods to protect Native land rights. But this process made Native ownership seem a form of federal title to Anglo-Americans, a shift that would grow only more pronounced in future years.

B. Private European Land Claims

While resolving Native title, federal officials were also working to interpret another body of foreign property law: that of the French villages along the Mississippi and Wabash Rivers in present-day Illinois and Indiana, then part of the Northwest Territory. Settled in the early eighteenth century as fur-trading outposts, these villages had passed from French, to British, to Virginian, to

141. At the Treaty of Fort Harmar, for instance, Wyandot leaders "strongly insisted" on an explicit treaty provision that would recognize their land rights as against those of the neighboring Shawnees. Letter from Governor St. Clair to the President (May 2, 1788), *in* 2 TERRITORIAL PAPERS, *supra* note 50, at 191–93.

142. Letter from Timothy Pickering to Anthony Wayne (Apr. 8, 1795), Folder 2, Box 5, Northwest Territory Collection, Ind. Historical Soc'y, http://images.indianahistory.org/cdm/compoundobject/collection/ONWT/id/1472/rec/2 [https://perma.cc/ZD5D-U2GR].

143. Henry Knox, Instructions to Major General Anthony Wayne Relatively to a Proposed Treaty with the Indians North West of the Ohio (Apr. 4, 1794), Folder 2, Box 5, Northwest Territory Collection, Ind. Historical Soc'y. President Washington similarly instructed the Attorney General to determine which Native nations were disputed lands' "acknowledged proprietors" based on which nations' rights were "conceded generally by other Indians." Letter from the President to the Att'y Gen. (Feb. 12, 1793), *in* 2 TERRITORIAL PAPERS, *supra* note 50, at 435.

144. Knox, Instructions to Major General Wayne, *supra* note 143.

145. E.g., Act of May 19, 1796, ch. 30, 1 Stat. 469, 469 § 1 (delineating the boundary between the United States and Native nations).

federal sovereignty.[146] Their land claims were the first of what would later become known as "private land claims"—preexisting land rights created under British, French, and Spanish rule.[147] The ad hoc system created for adjudicating the French ownership claims subsequently hardened into precedent and entrenched the principle that land claimants would look to the national government, and particularly federal officials, to secure their titles.

Although formally quite different from Native lands—the villagers ostensibly followed French law and used written deeds—in practice French claims presented a similar set of challenges involving informal land practices and haphazard recordation.[148] But unlike Natives' property, French ownership rights were specifically guaranteed under the law of nations, Virginia's act of cession, and the Northwest Ordinance.[149] Responding to villagers' petitions, the Continental Congress in 1788 dispatched Northwest Territorial Governor Arthur St. Clair to adjudicate the villagers' titles.[150] Congress seemingly selected St. Clair for this responsibility because he was the highest-ranking official in the Territory, making him the federal government's go-to fixer on Western issues.[151]

The task Congress assigned St. Clair proved daunting. "The confusion of title here," a federal territorial judge wrote from the village of Vincennes, "is a labyrinth of perplexity which requires the utmost care nay tenderness to set right."[152] Part of the challenge was volume: St. Clair received over four thousand land claims to adjudicate.[153] A greater challenge was evidence: "[N]o records are preserved," one official lamented.[154] Grants, scribbled on "small [s]crap[s] of

146. On the history of these French villages, see ROBERT MICHAEL MORRISSEY, EMPIRE BY COLLABORATION: INDIANS, COLONISTS, AND GOVERNMENTS IN COLONIAL ILLINOIS COUNTRY (2015).

147. GATES, *supra* note 15, at 87–120.

148. CARL J. EKBERG, FRENCH ROOTS IN THE ILLINOIS COUNTRY: THE MISSISSIPPI FRONTIER IN COLONIAL TIMES 31–110 (1998) (observing that "the system of land tenure in the early Illinois Country was variegated and complex," but noting that, throughout the region, nearly all the towns employed the same land use pattern, which he termed the "iron triad" of "nuclear village, compound of arable fields, [and] pasture commons").

149. *See* EMER DE VATTEL, THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, WITH THREE EARLY ESSAYS ON THE ORIGIN AND NATURE OF NATURAL LAW AND ON LUXURY 598 (Béla Kapossy & Richard Whatmore eds., 2008) ("The conqueror seizes on the possessions of the state . . . while private individuals are permitted to retain theirs."); *Virginia Cession*, *supra* note 50, at 8.

150. *Resolution of Congress: The Inhabitants of Vincennes*, Aug. 29, 1788, *in* 2 TERRITORIAL PAPERS, *supra* note 50, at 145–47.

151. While territorial governor, St. Clair also served as superintendent of Indian Affairs, commander of the US Army, and overseer of federal land auctions. *See* 1 THE ST. CLAIR PAPERS, *supra* note 104, at 137–247.

152. Letter from John Cleves Symmes to Robert Morris (June 22, 1790), *in* THE CORRESPONDENCE OF JOHN CLEVES SYMMES: FOUNDER OF THE MIAMI PURCHASE 291 (Beverley W. Bond, Jr. ed., 1926).

153. GATES, *supra* note 15, at 91.

154. Symmes to Morris, *supra* note 152, at 291.

[p]aper," often vanished.[155] Then there was the diversity of sources of ownership. Claimants invoked a "variety" of sources of ownership: "prescription, bare possession—fraudulent deeds from those who had no right to sell."[156] Dubious affidavits and depositions proliferated: later investigators described assessing this evidence as wading through the "very mire and filth of corruption."[157]

This profusion of title claims gave St. Clair tremendous discretion; he would later be condemned for his "loose manner" of resolving land rights and accused of self-dealing.[158] But St. Clair was also in a difficult situation. Although he seemed to aspire to scrupulousness, he was an uncomfortable arbiter of French colonial land law and prior local practice.

St. Clair's initial adjudications proved only the beginning. After disappointed claimants appealed to Congress, the legislature sent St. Clair back to the villages to rehear rejected claims under expanded criteria.[159] The Treasury Department finally issued the first patents to the lands in 1799,[160] but the saga dragged on, long past the admission of the regions as parts of the states of Indiana and Illinois. In 1804 and then again in 1812, Congress created boards of commissioners charged with reassessing the validity of earlier determinations.[161] The stream of petitions and congressional interventions persisted well into the 1820s.[162]

These struggles to resolve French title were a harbinger of things to come. The complicated land rights of the Illinois villages paled when compared to those in Detroit, where there was "scarcely a single Deed made where a Boundary was expressed."[163] Detroit, in turn, anticipated the plethora of claims the United States would encounter as it continued to expand across the continent into lands that Europeans already owned.[164] As scholars have traced, recognizing and

155. Report of the Proceedings of Winthrop Sargent upon the Land Claims of the Settlers of Vincennes (July 31, 1790), *in* 3 TERRITORIAL PAPERS OF THE UNITED STATES, THE TERRITORY NORTHWEST OF THE RIVER OHIO, 1787–1803, *CONTINUED* 324 (Clarence Edwin Carter ed., 1934).

156. Symmes to Morris, *supra* note 152, at 291.

157. No. 148: Lands Claims in the District of Kaskaskias, Mar. 7, 1808, *in* 1 AMERICAN STATE PAPERS: PUBLIC LANDS, *supra* note 40, at 539.

158. *Id.*

159. Act of Mar. 3, 1791, ch. 27, 1 Stat. 221.

160. Letter from Governor St. Clair to the Senate (Jan. 7, 1799), *in* 3 TERRITORIAL PAPERS, *supra* note 155, at 3–4.

161. On the subsequent history of these lands, see GATES, *supra* note 15, at 90–92; LEONARD LUX, VINCENNES DONATION LANDS 468–81 (1949); FRANCIS S. PHILBRICK, THE LAWS OF INDIANA TERRITORY 1801–09, at lxv–c (1930).

162. LUX, *supra* note 161, at 477–84.

163. Letter from Winthrop Sargent to the Secretary of State (Sept. 30, 1796), *in* 3 TERRITORIAL PAPERS, *supra* note 155, at 457.

164. GATES, *supra* note 15, at 87–120; *see also* STUART BANNER, LEGAL SYSTEMS IN CONFLICT: PROPERTY AND SOVEREIGNTY IN MISSOURI, 1750–1860, at 137–48 (2000) (tracing struggles over common lands in Missouri); MARÍA E. MONTOYA, TRANSLATING PROPERTY: THE MAXWELL LAND GRANT AND THE CONFLICT OVER LAND IN THE AMERICAN WEST, 1840–1900, at 156–255 (2002) (describing the confrontation over an expansive land grant in New Mexico); TAMARA VENIT SHELTON, A SQUATTER'S REPUBLIC: LAND AND THE POLITICS OF MONOPOLY IN CALIFORNIA, 1850–1900, at 11–18, 40–46 (2013) (recounting the adjudication of Mexican land grants in California).

adjudicating these claims consumed enormous amounts of federal time and resources over the nineteenth century.[165]

As claims were resolved, the seemingly unthinking early decision to make federal territorial officials responsible for arbitrating prior property rights hardened into precedent. Although federal courts played an increasing role as avenues for appeal—the US Supreme Court ultimately heard 126 cases concerning private land claims over the ensuing century—the initial decision to accept or reject claims remained with federal administrators.[166] Congress, too, continued to play an important role, as it frequently intervened in these jejune land disputes through statute and its committee on private land claims issued voluminous reports on land rights.[167]

The results of this process might strike present-day observers as odd. Wading into local disputes over ownership, Congress appears more like a town zoning board than a national deliberative body. But the aggregate effect of these myriad adjudications was nationally significant. The centralized translation of preexisting rights into definitive land title gave the federal government exclusive authority to determine the value of hugely lucrative assets. It also reinforced the conception that valid, legally enforceable title derived from the federal government.

C. Federal Military Bounty Lands

In addition to Native nations, Europeans, and states, the federal government was also a source of preexisting title in the territories: it had pledged millions of acres in the West—so-called military bounty lands—to Continental Army veterans. Called on to honor these promises, the federal government sought to avoid states' failures and ensure clarity of title. Yet the same voracious land market that tangled state efforts implicated federal attempts to distribute title, forcing an unwilling federal government to adjudicate ownership.

During the Revolution, the Continental Congress, like the states, had recruited soldiers with promises of land.[168] Congress finally created a system for redeeming these claims in 1796.[169] After approval by the Secretary of War, warrant holders entered a lottery that determined the order in which they could select their lands from the presurveyed Military Tract in present-day Ohio, then

165. *See* GATES, *supra* note 15, at 87 ("No problem caused Congress, officials of the General Land Office, and Federal courts more difficulty or took up as much time as the private land claims, that is the grants of land made by predecessor government[s] . . . .").

166. *Id.* at 87–120.

167. These reports appear in the multiple volumes of Congress's land records. AMERICAN STATE PAPERS: PUBLIC LANDS, *supra* note 40.

168. 28 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 52, at 762–63.

169. Act of June 1, 1796, ch. 46, 1 Stat. 490.

part of the Northwest Territory.[170] These requirements helped avoid overlapping claims, but they did not determine which claimants were entitled to lands in the first place. Like all promises for land in the early republic, the federal bounty land warrants quickly became freely traded, speculative investments. One congressman observed that he did not know a "single soldier" who still held one; another observed that they could be purchased in New York for a "mere trifle."[171]

This freewheeling market in bounty land certificates challenged the federal government. Congress allowed veterans to sell their land rights but also felt obligated to ensure that veterans were not cheated.[172] Reconciling these mandates frustrated both claimants and the War Department. Claimants complained that getting the warrants recognized required "an inconceivable deal of trouble," with one making over twenty visits to the War Office.[173] But bureaucratic precautions failed to halt fraud. "Every devise of dishonest cunning," Secretary of War James McHenry complained, had been used to strip "the hard earned dues of Officers and Soldiers."[174] McHenry urged his clerks to use "strictness and caution" to protect rightful claimants but feared these measures would be "ineffectual."[175]

McHenry urged Congress to create a formal administrative tribunal to adjudicate disputed land rights,[176] echoing earlier proposals by both Alexander Hamilton and Thomas Jefferson.[177] But McHenry's plan was more concrete than Hamilton's and Jefferson's. He envisioned the appointment of federal officials who would hear evidence on military land warrants and rule on their validity. His plan's most significant innovation was to shift the burden of proof by granting the original warrant holders "the footing of Defendants" and requiring the purported transferee to "make out his own rights."[178]

Treasury Secretary Oliver Wolcott opposed McHenry's approach. Wolcott argued that the 1796 statute granted federal officials "no power to investigate or

170. *Id.*; Act of May 18, 1796, ch. 29, 1 Stat. 464; Act of June 1, 1796, ch. 46, 1 Stat. 490; Act of Mar. 2, 1799, ch. 29, 1 Stat. 724. With repeated extensions by Congress, this lottery was not held until February 1800.

171. 5 ANNALS OF CONG. 418–19 (1796).

172. *See* 34 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 60, at 95–101.

173. Letter from John Cleves Symmes to Jonathan Dayton (May 16, 1789), *in* CORRESPONDENCE OF JOHN CLEVES SYMMES, *supra* note 152, at 218.

174. Letter from James McHenry to Congress (Apr. 15, 1800), Box 5, James McHenry Papers, *supra* note 90.

175. *Id.*

176. *Id.*

177. As Treasury Secretary, Alexander Hamilton urged that land office officials be empowered to "determine[]" the "controversies concerning rights to patents or grants of land," Plan for Disposing of the Public Lands, July 22, 1790, *in* AMERICAN STATE PAPERS: PUBLIC LANDS, *supra* note 40, at 4–5, while Thomas Jefferson advocated for "the establishment of a proper judicature for deciding speedily all land controversies between the public and individuals." Letter from Secretary of State to John Cleves Symmes (Dec. 4, 1791), *in* 2 TERRITORIAL PAPERS, *supra* note 50, at 352–53.

178. Letter from McHenry to Congress, *supra* note 90.

decide on the titles of the holder of military land Warrants."[179] He informed disgruntled veterans that "the merits of their claims can only be determined at Law"—that is, through the courts, as state land law systems required.[180]

Congress briefly flirted with McHenry's proposal[181] but ultimately sided with Wolcott: it told petitioners alleging fraud to seek "full and complete relief" from a "court of competent jurisdiction."[182] Yet, notwithstanding that decision, the pressure of so many claimants necessitated the de facto persistence of an administrative solution. In the decades following 1800, the War Department continued to assess the validity of land warrants, rejecting nearly four claims for every warrant that it issued.[183] And in some respects, Congress itself fulfilled the role McHenry urged: even as it claimed to oppose legislative resolution of individual claims, it constantly extended the deadline for filing and passed statutes that relieved individuals who lost bounty rights.[184] After the War of 1812, it attempted to preemptively forestall the recurrence of the problem by barring the transfer and sale of bounty rights.[185] This prohibition failed, and the land office found itself once again confronting caveats filed by disgruntled claimants.[186] In short, however much Congress and the Executive wished to avoid adjudicating individual claims, the federal government still found itself making quasi-judicial decisions to afford meritorious claimants relief.

Unlike Native, French, or even land company title, the military bounty warrants were federal rights from the beginning. But the warrants were also yet another form of quasi title that required federal action before claimants could obtain definitive ownership. The existence of the vigorous market in land rights meant that confusion persisted, and the federal government, through quasi-administrative means, had to intervene to clarify it.

D. Federal Title and Federal Administration

In 1800, Congress enacted the Harrison Land Act, creating a system of land offices that provided the framework for all subsequent federal land sales.[187]

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179. Letter from Oliver Wolcott, Secretary of Treasury, to Joseph Nourse, Registrar of the Treasury (Jan. 9, 1800) (letters received by the Secretary of the Treasury, 1796–1851).

180. *Id.* Wolcott adopted a similar approach for disputes that arose through the Land Office. *See* Letter from the Secretary of the Treasury to Thomas Worthington (June 10, 1801), *in* 3 TERRITORIAL PAPERS, *supra* note 155, at 139–40; Letter from the Secretary of the Treasury to the Judge of the Court of Common Pleas of Ross County (Aug. 7, 1802), *in* 3 TERRITORIAL PAPERS, *supra* note 155, at 240.

181. *See* 10 ANNALS OF CONG. 625 (1800) (creating a committee to consider permitting or forbidding caveats in land cases).

182. Military Bounty Land Warrants Fraudulently Obtained, Feb. 27, 1809, *in* AMERICAN STATE PAPERS: PUBLIC LANDS, *supra* note 40, at 827.

183. For the number of warrants issued versus claims rejected, see HUTCHINSON, *supra* note 115, at 151.

184. LAURA JENSEN, PATRIOTS, SETTLERS, AND THE ORIGINS OF AMERICAN SOCIAL POLICY 136–70 (2003).

185. GATES, *supra* note 15, at 263.

186. *Id.* at 263–65.

187. Act of May 10, 1800, ch. 55, 2 Stat. 73.

Unlike earlier laws, the Harrison Land Act also succeeded in actually selling land. After its enactment, land sales supplied an increasing amount of federal revenue, though the public domain never became the asset earlier envisioned.[188]

The Harrison Land Act succeeded because, even after millions of acres went to Virginia, veterans, and French settlers, millions more remained to be sold in the federal land offices. (By contrast, there were no land offices in the former Southwest Territory because state grants covered nearly all available land.) But the Act also succeeded because it built on a dozen years of the federal government's prior work in sifting, adjudicating, and resolving competing claims to the public domain.

The work of the prior decade had another important consequence. Claimants—Natives, French villagers, and veterans—had little particular investment in federal power. But, just as ownership had extended state sovereignty into territories, in this instance federal jurisdiction over the territories shaped property. As would-be titleholders followed the chain of authority, they wrote and travelled to Philadelphia and Washington to secure their ownership claims.[189] For people scattered throughout the United States, their legal right to land rested on the determinations of the federal government. This transformation slowly worked to distill the plural sources of ownership in the territories into a single document—a physical title in the form of an official land grant, often signed by the President and issued under federal authority.[190]

This connection between property and jurisdiction, however, held only as long as the federal government possessed both. As the Southwest and Northwest Territories envisioned becoming sovereign states, it was uncertain whether the federal government's new and expansive powers over ownership could survive admission to statehood. Resolving this issue required a prolonged political struggle.

188. On increasing land sales, see HISTORICAL STATISTICS OF THE UNITED STATES MILLENNIAL EDITION ONLINE 5–82, tbl.Ea 588–593: Federal government revenue, by source: 1789–1939 (Susan B. Carter et al. eds., 2006). Despite the increased land sales, however, the federal government ultimately expended more on the purchase and survey of the public domain than it received in revenue. THE PUBLIC LANDS: STUDIES IN THE HISTORY OF THE PUBLIC DOMAIN, at xviii (Vernon R. Carstensen ed.,1963). This outcome in part reflected later shifts toward more liberal land policies that granted lands outright rather than requiring payment. *See* GATES, *supra* note 15, at 319–495.

189. *See, e.g., supra* Part III.C.

190. *Cf.* 6 REG. DEB. 1031 (1830) (statement of Rep. Foster) ("Go into any of our courts, and witness the trial of a suit for land. What is the very first link in the chain of title which a party introduces to establish his claim? Is it not the grant or patent from the State or United States?"). Foster, a Georgian, likely mentioned state grants because Georgia, never a federal territory, continued to distribute the land within its borders.

IV.
ADMISSION TO STATEHOOD

In 1796, the Southwest Territory became the first federal territory to seek statehood.[191] Congress debated the admission of this new state of "Tennessee" at length: its concern was primarily about setting practice for the future. "[O]ther States would be rising up in the Western wilderness, and claiming their right to admission," one representative observed, "and therefore the precedent now to be established, was of very considerable importance."[192]

The most durable confrontation over this first admission from territory to state focused on sovereign ownership of Tennessee's "waste and unappropriated lands"—its public domain.[193] The law on this question seemed contradictory. The Northwest Ordinance—which, except for its bar on slavery, extended to the Southwest Territory[194]—stipulated that the "new States shall never interfere with the primary disposal of the soil by the United States in Congress assembled."[195] But Tennessee's leaders focused on a different provision of the Ordinance: its mandate that the new state be admitted on an "equal footing" with the original states, a requirement that would later harden into quasi-constitutional law.[196] Equal footing, the Tennesseans argued, required cession of public lands to state control; Congress fiercely disagreed.

Ultimately, the federal government gained what seemed a Pyrrhic victory: it maintained its theoretical authority even as it ceded ownership to Tennessee. But, because of the precedential stakes, this limited success had important consequences. In particular, when the Northwest Territory subsequently sought admission, the federal government forced the new state of Ohio to disclaim its rights to the public domain. Because of the unique political circumstances of Ohio's statehood, the state acquiesced. As a result, conditions attached to statehood became an entrenched part of constitutional practice. The federal government's brief jurisdiction over the territories helped create a durable expansion of federal power.

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191. Kentucky and Vermont were admitted to statehood before Tennessee, but neither had been a federal territory. Rather, both were portions of *other* states—Virginia and New York respectively—at their time of admission. *See* Act of Feb. 4, 1791, 1 Stat. 189 (enabling act for admission of Kentucky); Act of Feb. 18, 1791, 1 Stat. 191 (enabling act for admission of Vermont).

192. 5 ANNALS OF CONG. 1304 (1796); *see also id.* at 1327 ("In admitting this country to a share in the General Government, we are forming a precedent for many future cases."); *id.* at 1317 ("The rule they were now about to establish must operate in future as a guide, and it needed no effort to believe that this country would on some future occasion, and that perhaps not distant, lament the adoption of the principles contained in the report.").

193. Act of Sept. 12, 1806, ch. 1, 1806 Tenn. Pub. Acts. 889, 898.

194. Act of Apr. 2, 1790, ch. 6, 1 Stat. 106, 108.

195. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50.

196. *Id.* at 52.

A. Tennessee

The issue of ownership of Tennessee's public land first arose at the would-be state's 1796 constitutional convention, when a young delegate, Andrew Jackson, proposed constitutionalizing the state's "right of soil."[197] The convention agreed only to assert the state's right of soil "so far as is consistent with the constitution of the United States," the Northwest Ordinance, and North Carolina's act of cession.[198] Ultimately, then, Tennessee's Constitution merely acknowledged the confusing muddle of sovereign claims to state land.

Some wanted a more explicit recognition of federal title: one commentator wished the constitution had included an article "recognizing the right of the United States to dispose of . . . the vacant lands" within the state.[199] Many in Congress shared this worry.[200] But Tennessee's supporters dismissed these concerns, arguing existing provisions adequately protected federal title.[201] Congress ultimately allowed Tennessee's admission without any further requirements.[202]

Yet skeptics' fear that Congress's "silent[] acquiesce[nce]" to Tennessee's assertions would later produce "disagreeable discussions" proved well founded.[203] Immediately after statehood, Tennesseans abandoned earlier caution and constructed a legal theory that asserted state ownership of all unappropriated lands within their borders. Weeks into its first sitting, the Tennessee Assembly urged Congress to expand state authority over land by invoking the state's "equal footing" with other states and emphasizing each state's "right of soil and sovereignty."[204]

Tennessee's argument for ownership of its lands quickly focused on a provision in both the Northwest Ordinance and Tennessee's act of admission: the stipulation that new states be admitted "on an equal footing with the original states, in all respects whatever."[205] In correspondence, Tennessee's first governor, John Sevier, and the state's first congressman, Andrew Jackson, fleshed out this claim's contours. Sevier instructed Jackson that "the state of

197. JOURNAL OF THE PROCEEDINGS OF A CONVENTION, BEGAN AND HELD AT KNOXVILLE, JANUARY 11, 1796, at 9 (Knoxville, George Roulstone ed., 1796); *see also* EDWARD T. SANFORD, THE CONSTITUTIONAL CONVENTION OF TENNESSEE OF 1796 (1896) (recounting the constitution's history).

198. JOURNAL OF THE PROCEEDINGS OF A CONVENTION, BEGAN AND HELD AT KNOXVILLE, JANUARY 11, 1796, *supra* note 197, at 9–10; TENN. CONST. OF 1796 (superseded 1835), art. 11, § 32.

199. Letter from Arthur Campbell to the President [Washington] (Feb. 18, 1796), *in* 4 TERRITORIAL PAPERS, *supra* note 65, at 420.

200. *See* 5 ANNALS OF CONG. 1300–30 (1796) (recording the congressional debates over Tennessee's statehood).

201. *See id.* at 1312 (noting that North Carolina's cession stipulated that "all the unappropriated lands should be reserved to the United States").

202. Act of June 1, 1796, ch. 47, 1 Stat. 491.

203. 5 ANNALS OF CONG. 1304 (1796).

204. Address and Remonstrance of the General Assembly of the State of Tennessee, Aug. 9, 1796, *in* 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS 625–26 (Walter Lowrie & Matthew St. Clair Clarke eds., 1832). The date is taken from RAMSEY, *supra* note 105, at 675–76.

205. Act of June 1, 1796, ch. 47, 1 Stat. 491–92.

Tennessee is reinvested with all the right of domain" that North Carolina had held before cession.[206] Otherwise, Sevier argued, Tennessee would "not equally stand possessed of those free and independent rights the original States enjoy": in New York, Georgia, and Virginia, for instance, states, not the federal government, owned and distributed the public domain.[207] Jackson strongly concurred with Sevier: "[T]he right to the Soil," he replied, "is so firmly invested in the sovereignty of the State, both by Constitutional principles and by the law of nations added to that . . . that nothing but the act of the Strong hand of power itself, can divest us of that right."[208] The United States, he continued, had "no solid Legal ground" for its claim to land within the state; the federal government's argument for ownership rested on the claim that "the right of Domain is not a right which must be pr[e]posterous and a perversion of the English Language."[209]

Tennessee's repudiation of federal authority over state lands was about more than the abstract rights of sovereignty and ownership; it was about *whose* property claims would be recognized. As we have seen, states and the federal government had sharply diverging ideas on this question.[210] Tennessee was eager to gain control over lands within its own borders so that it could confirm the claims of its own citizens, tracing to dubious land grants, against the land rights of the Cherokee Nation.[211] But federal law guaranteed Cherokee lands, and the federal government had no desire to pay for the expensive war that would likely result from violating Cherokee rights.[212] So federal officials instead dispatched soldiers to evict state-law claimants on Cherokee lands.[213] Tennesseans' ensuing howls of outrage forced a reluctant Adams Administration to purchase the disputed lands from the Cherokees in 1798.[214] Emboldened, Governor Sevier urged the state legislature to act: "It is time for this government to assert her just rights & claim of domain of country included in her chartered limits."[215] The legislature soon enacted a statute to open land offices to sell the disputed lands.[216]

206. Letter from John Sevier to Andrew Jackson (Dec. 12, 1796), *in* 1 THE PAPERS OF ANDREW JACKSON, 1770–1803, at 102 (Sam B. Smith & Harriet Chappell Owsley eds., 1980).

207. *Id.*

208. Letter from Andrew Jackson to John Sevier (Jan. 18, 1797), *in* 1 THE PAPERS OF ANDREW JACKSON, *supra* note 206, at 116–17.

209. *Id.* at 117.

210. *See supra* text accompanying notes 117–137.

211. Address and Remonstrance of the General Assembly of the State of Tennessee, Aug. 9, 1796, *supra* note 204, at 625–26.

212. Treaty of Holston, U.S.-Cherokee Nation, art. VII, July 2, 1791, 7 Stat. 39, 40 ("The United States solemnly guarantee to the Cherokee nation, all their lands not hereby ceded.").

213. FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS, 1790–1834, at 147–55 (1962).

214. Treaty of Tellico Blockhouse, U.S.-Cherokees, Oct. 2, 1798, 7 Stat. 62.

215. John Sevier, Legislative Message, Dec. 18, 1798, *in* 1 MESSAGES OF THE GOVERNORS OF TENNESSEE 1796–1821, at 88–89 (Robert H. White ed., 1952).

216. Act of Jan. 5, 1799, ch. 24, 1798 TENN. PUB. ACT. 174.

Congress did not capitulate to Tennessee, but appointed a committee to investigate the state's property claims.[217] The committee, which included Senator Joseph Anderson of Tennessee, issued a report that thoroughly rebuffed Sevier's and Jackson's arguments—particularly their equal footing claim.[218] Tennessee claimed the right of ownership "upon the principle that a grant of the jurisdiction over territory possesses the right of soil therein."[219] This premise, the committee argued, was false. "[T]he right of jurisdiction, and the right of soil, are distinct rights, and may be severed," the committee insisted.[220] Because of this distinction, when the Southwest Territory attained statehood, "in the opinion of the committee, the said State of Tennessee acquired the jurisdiction over, but not the right of soil, within the said territory."[221] Rather, "the right of soil remained in the United States."[222]

The committee's formalist divide between jurisdiction and right of soil was arguably a better interpretation of the equal footing doctrine than the one offered by Jackson and Sevier, especially given the explicit language of the Northwest Ordinance.[223] Yet this dichotomy was a legal fiction, particularly when applied to the early American West, where sovereigns, at once both ruler and landlord, routinely used their ownership of the public domain as a form of governance. In a state like early Tennessee—whose economy consisted almost entirely of land speculation, and where future wealth depended largely on access to cheap title[224]—control over the public lands and their distribution was arguably the most significant form of sovereignty.

The controversy dragged on. Sevier wished for "some immediate mode . . . by which the dispute could be determined," but he believed there was no neutral arbiter.[225] Sevier distrusted the "supreme judiciary of the United States," which he thought would be "very problematical."[226] Instead the Tennessee legislature opted for another approach: negotiation. It appointed the state's congressional delegation as "agents" to assert the state's "absolute right of disposing of [its] vacant and unappropriated soil."[227]

After a decade of controversy, the federal government and Tennessee at last reached an agreement in 1806. Enshrined in congressional statute, the bargain

217. 10 ANNALS OF CONG. 53–54, 66, 532 (1800).

218. No. 57: Sales of Lands Acquired by the Cession of North Carolina, May 9, 1800, *in* AMERICAN STATE PAPERS: PUBLIC LANDS, *supra* note 40, at 97–99.

219. *Id.* at 98.

220. *Id.*

221. *Id.*

222. *Id.*

223. *See* text accompanying note 195.

224. Kristofer Ray, *Land Speculation, Popular Democracy, and Political Transformation on the Tennessee Frontier, 1780–1800*, 61 TENN. HIST. Q. 161–181 (2002).

225. Letter from John Sevier to Joseph Anderson, William Cocke, and William Clairborn (Mar. 20, 1800), *in Executive Journal of Gov. John Sevier*, 1 EAST TENN. HIST. SOC'Y PUBLICATIONS 110–11 (Samuel C. Williams ed., 1934).

226. *Id.* at 111.

227. Act of Nov. 14, 1801, ch. 39, 1801 Tenn. Pub. Acts 270.

drew a line in west-central Tennessee.[228] Lands west of the line would be "at the sole and entire disposition of the United States," with Tennessee relinquishing all "right, title, or claim" to ownership.[229] In return, Congress ceded Tennessee all lands east of the line.[230] The agreement also contained provisos securing the preemption rights of "intruders," as Tennessee wished, and protecting Native title, as federal officials wanted.[231]

As a capstone to the saga of "federal" lands in Tennessee, the 1806 statute reflects federal weakness in the face of state intransigence. In practice, the potency of appeals to state sovereignty and equal footing limited the federal government's formal constitutional right to landownership. Even the 1806 statute's solemn guarantee of federal title in southwest Tennessee proved moot when, after a bitter struggle, Congress ceded these remaining lands to Tennessee in 1841.[232] In the half-century struggle for the "right of soil," Tennessee gained the ownership it had long sought.

Yet reading the 1806 statute as a hollow victory for the federal government ignores the significance of formal law in constructing federalism. Tennessee had wrangled Congress to serve its purposes, but, rather than simply asserting its ownership—Sevier's initial implicit approach and a viable option given the early federal government's tenuous authority—the state depended on congressional endorsement of its property right. Like other claimants, the state had come to rely on the federal government as the arbiter of claims of landownership.

B. Ohio

Tennessee's experience loomed large in the admission of the next state, Ohio, in 1802. Formed from the Northwest Territory's eastern portion, Ohio differed from Tennessee in three crucial respects. First, Ohio contained far more ungranted land.[233] Second, its statehood was a contested partisan issue.[234] Third, it lacked 60,000 inhabitants, which, under the Northwest Ordinance, meant it could only be admitted through an explicit act of Congress.[235]

The stakes surrounding Ohio's quest for admission, then, were high. The resulting debate over Ohio's statehood produced an important legal innovation: the creation of congressionally mandated conditions for admission. The suggestion for such conditions came from Secretary of Treasury Albert Gallatin.

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228. Act of Apr. 18, 1806, ch. 31, 2 Stat. 381.

229. *Id.* at 382.

230. *Id.*

231. *Id.* at 383.

232. Act of Aug. 7, 1846, ch. 92, 9 Stat. 66–67; *see also* Jones, *supra* note 86, at 24–36 (tracing this history of Tennessee lands).

233. *See* Report of the Secretary of State to the President, *supra* note 65, at 93, 99 (noting 300,000 acres of federal land free of claims in the Southwest Territory and over 21 million acres in the Northwest Territory).

234. ONUF, *supra* note 16, at 76–85.

235. *Id*.

Writing as Tennessee was fighting with Congress, Gallatin "forcibly" informed the committee drafting the enabling act of the need to enact "some actual provision" to "secure to the United States the proceeds of the sales of the Western lands."[236]

Public lands played a particularly important role in Gallatin's financial vision. The leading Jeffersonian thinker on political economy, Gallatin embraced public land sales as indispensable for both settling the West with smallholders and for eliminating the public debt, which he viewed as a great evil.[237] Gallatin accordingly embraced federal authority over the public domain. Although one provision in the draft Ohio Enabling Act—conspicuously absent in Tennessee's admission—explicitly applied the provisions of the Northwest Ordinance to the new state,[238] Gallatin wanted to go further: he successfully urged additional conditions to admission that would prevent the newly admitted Ohio from "interfer[ing] with the regulations adopted by Congress for the 'primary disposal of the soil.'"[239] As amended, the Enabling Act ultimately required that all lands sold by the federal government be immune from state taxes for five years.[240] Attempting to sweeten this sweeping restriction, the amended Act also directed 5 percent of the proceeds of federal land sales towards internal improvements in the new state (Ohio's advocates argued fruitlessly for fifty).[241]

There was considerable disagreement as to whether Congress could thus condition admission. Gallatin and others eager to admit a staunchly Republican state argued that the conditions were mere proposals to the Territory's constitutional convention for the delegates' "free acceptance or rejection."[242] But Federalist opponents of statehood—inverting their usual defense of federal authority—argued that the Enabling Act represented an unconstitutional interference in self-governance. These conditions, Governor Arthur St. Clair observed, were unprecedented, an "odious distinction" reserved for Ohio alone: "Were conditions imposed upon Vermont, or upon Tennessee, before they could be admitted into the Union? There was none attempted."[243]

Gallatin's counterargument—that a state whose existence depended on congressional approval could "free[ly]" determine whether to accept Congress's

236. Letter from Albert Gallatin to William B. Giles (Feb. 13, 1802), *in* 1 THE WRITINGS OF ALBERT GALLATIN 76 (Henry Adams ed., 1879).

237. On Gallatin's thinking on political economy and public lands, see ALBERT GALLATIN, A SKETCH OF THE FINANCES OF THE UNITED STATES 143–49 (N.Y., printed by William A. Davis 1796); THOMAS K. MCCRAW, THE FOUNDERS AND FINANCE: HOW HAMILTON, GALLATIN, AND OTHER IMMIGRANTS FORGED A NEW ECONOMY 250 (2012); RAYMOND WALTERS, JR., ALBERT GALLATIN: JEFFERSONIAN FINANCIER AND DIPLOMAT 173–76 (1957).

238. 11 ANNALS OF CONG. 1097, 1098 (1802).

239. Letter from Albert Gallatin to William B. Giles, *supra* note 236, at 76.

240. Act of Apr. 30, 1802, ch. 40, 2 Stat. 173; 11 ANNALS OF CONG. 1126 (1802).

241. *Id.*

242. 11 ANNALS OF CONG. 1100 (1802).

243. *Remarks of Governor St. Clair Before the Constitutional Convention, Nov. 3, 1802*, *in* 2 THE ST. CLAIR PAPERS, *supra* note 104, at 592, 596.

conditions—was, perhaps, too much of a legal fiction to be entirely persuasive.[244] So many Republicans adopted a less tortured defense of admission conditions, which were, they insisted, "additional securities for the national property,"[245] merely "explanatory" of the Northwest Ordinance's preexisting protection of federal property rights.[246] They would obviate some representatives' fears that "the Territory, when formed into a State, actuated by the inordinate possession of power, will be likely to grasp at our lands."[247] The representatives did not have to look far to find an example to warrant their anxieties: they were weighing Tennessee's grasping claims at the exact same time.[248]

In the end, Ohio's constitutional convention accepted Congress's conditions but, underscoring the model of negotiation, offered counterproposals of its own. The two most important proposals requested state trust ownership of school lands and state legislative control over a portion of the monies for roads.[249] Congress agreed, and statehood followed.[250]

Conditional admission, and the supremacy of federal title it implied, succeeded because of the peculiar politics of Ohio's statehood campaign. Anxious to smooth the path to statehood, those most likely to attack federal landholding—national and local Republicans—became defenders of the federal government's land rights. But these concessions to expediency had two lasting consequences. Ohio accepted federal ownership of the public lands as the cost of statehood, and Congress established its previously contested authority to condition state entry into the Union.

C. Precedent

Ohio's precedent proved durable. After Ohio, every state admitted to the Union from territorial status had "voluntary" conditions attached to its entry.[251] No state ever rejected Congress's terms.[252] Particularly prior to the Civil War, most conditions related to the public lands.[253] After Ohio, every state admitted from territorial status had to either acknowledge the supremacy of the Northwest Ordinance or specifically "for ever disclaim all right or title to the waste or

244. *See supra* note 242 and accompanying text.
245. 11 ANNALS OF CONG. 1125 (1802).
246. ONUF, *supra* note 16, at 85.
247. 11 ANNALS OF CONG. 1115 (1802).
248. *See supra* notes 213–219 and accompanying text.
249. *Propositions from the Ohio Constitutional Convention to the Congress of the United States*, *in* 5 OHIO ARCHAEOLOGICAL & HISTORICAL PUBLICATIONS 78, 79 (1897).
250. *Report of John Randolph Relating to the Admission of Ohio and the Public Lands Therein*, *in* 5 OHIO ARCHAEOLOGICAL & HISTORICAL PUBLICATIONS, *supra* note 249, at 159–62.
251. *See* Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119, 201–07 (2004) (listing the conditions imposed on states for admission).
252. *Id.*
253. *Id.*

unappropriated lands, lying within the said territory," in the words of the Louisiana Enabling Act, which admitted Louisiana as the first new state since Ohio's admission.[254] Nearly identical language appeared in each new state's enabling act, right through Alaska's in 1958.[255]

The existence of the conditions on statehood resolved the question of ownership of the public domain—for a while. As federal land revenues increased substantially, the ascendant Jacksonians, notwithstanding their suspicion of federal authority, came to embrace federal lands as a method to fund the government without taxation.[256] But in the early 1820s, states angered by federal land policy once again questioned the right of the federal government to own land within their borders. The renewed claim for state ownership began in Ohio, where the legislature in 1821 argued that admitted states "have an indisputable claim, to all the unappropriated lands, within their respective limits."[257] But the demand that the federal government cede its lands to the states quickly spread through the West, cresting in the late 1820s when Congress hotly debated the issue.[258]

254. Act of Feb. 20, 1811, 2 Stat. 641, 642; *see* Act of Mar. 1, 1817, ch. 23, § 4, 3 Stat. 348, 349 (enabling act for Mississippi); Act of Mar. 2, 1819, ch. 47, § 6, 3 Stat. 489, 492 (enabling act for Alabama); Act of Mar. 6, 1820, ch. 22, § 4, 3 Stat. 545, 547 (enabling act for Missouri); Act of June 15, 1836, ch. 100, § 8, 5 Stat. 50, 51 (enabling act for Arkansas); Act of June 15, 1836, ch. 99, § 4, 5 Stat. 49, 50 (enabling act for Michigan); Act of Mar. 3, 1845, ch. 63, § 7, 5 Stat. 742, 743 (enabling act for Iowa and Florida); Act of Aug. 6, 1946, ch. 89, § 7, 9 Stat. 56, 58 (enabling act for Wisconsin); Act of Feb. 26, 1857, ch. 60, § 5, 11 Stat. 166, 167 (enabling act for Minnesota); Act of Feb. 14, 1859, ch. 33, § 4, 11 Stat. 383, 384 (act for admission of Oregon); Act of May 4, 1858, ch. 26, 11 Stat. 269, 270 (act for admission of Kansas); Act of Mar. 21, 1864, ch. 36, § 4, 13 Stat. 30, 31 (enabling act for Nevada); Act of Apr. 19, 1864, ch. 59, § 4, 13 Stat. 47, 48 (enabling act for Nebraska); Act of Mar. 3, 1875, ch. 139, § 4, 18 Stat. 474, 475 (enabling act for Colorado); Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 676, 677 (enabling act for North Dakota, South Dakota, Montana, and Washington); Act of July 3, 1890, ch. 656, §§ 13, 14, 26 Stat. 215, 217 (act for admission of Idaho); Act of July 16, 1894, ch. 138, § 3, 28 Stat. 107, 108 (enabling act for Utah); Act of June 16, 1906, ch. 3335, § 25, 34 Stat. 267, 279 (enabling act for Oklahoma); Act of June 20, 1910, ch. 310, § 20, 36 Stat. 557, 569 (enabling act for New Mexico and Arizona); Act of July 7, 1958, Pub. L. No. 85-508, § 4, 72 Stat. 339, 339 (enabling act for Alaska). The sole exception was Hawai'i, to which the federal government ceded ownership over most public lands upon admission but required the acknowledgment of federal ownership of certain retained lands. *See* Act of Mar. 18, 1959, Pub. L. No. 86-3, § 5, 73 Stat. 4, 5. Maine, West Virginia, and Texas were never territories and retained ownership of their public lands; California, also never a territory, nonetheless had its admission conditioned on acknowledgment of federal title. Act of Sept. 9, 1850, ch. 50, § 3, 9 Stat. 452, 452 (act for admission of California). Indiana and Illinois both had to acknowledge the supremacy of the Northwest Ordinance for admission. Act of Apr. 19, 1816, 3 Stat. 289; Act of Apr. 18, 1818, 3 Stat. 428.

255. Act of July 7, 1958, Pub. L. No. 85-508, § 4, 72 Stat. 339, 339.

256. *See, e.g.*, ALBERT S. BOLLES, THE FINANCIAL HISTORY OF THE UNITED STATES, FROM 1789 TO 1860, at 547 (N.Y., D. Appleton and Co. 1885) (quoting Secretary of Treasury Levi Woodbury's statement praising "a government, not only virtually without any debts and without any direct taxation, but with about one-fourth of its whole annual expenses defrayed from sales of its own unencumbered and immense tracts of public lands").

257. FELLER, *supra* note 15, at 43.

258. *See id.* at 74–78 (recounting these efforts); *see also* Schmitt, *supra* note 15, at 19–40 (tracing the constitutional debate over these proposals in Congress).

The states' legal argument recapitulated the claims first advanced by Jackson and Sevier thirty years earlier: denying states authority over their own lands violated the promise of equal sovereignty.[259] While this push helped force the liberalization of federal land policies, states' sovereignty-based arguments failed to secure ownership. The Supreme Court belatedly endorsed federal landownership in *United States v. Gratiot* in 1840 when, in a dispute over ownership of lead mines, it rejected Illinois' argument that Congress could not lease, rather than sell, the public domain.[260] The Court described Congress's power over federal property as "without limitation," and observed that Illinois "surely cannot claim a right to the public lands within her limits."[261]

Merely five years after *Gratiot*, however, the Supreme Court seemingly undercut this broad language in *Pollard's Lessee v. Hagan*.[262] Most scholarly commentary on *Pollard* has emphasized it as an origin—the first Supreme Court case to enunciate the equal footing doctrine.[263] Yet, as the decision itself acknowledged, *Pollard* was the product and culmination of decades of prior arguments over equal footing and the public lands.[264] The Court's ruling questioned this half century of precedent, yet the case's aftermath ironically served to demonstrate the durability of the earlier resolutions of questions of sovereignty and ownership.

Like most of the Court's antebellum land cases, *Pollard* involved conflicting title: in this case, to drained mud flats in Mobile, Alabama that had previously inundated at high tide.[265] The plaintiffs claimed the land under a federal patent issued after Alabama's statehood, while the defendants claimed it under a Spanish grant that Alabama had seemingly honored.[266] The question became whether the state or federal government held title to the disputed land at the time of Alabama's statehood.

The majority opinion, written by Justice McKinley, an Alabaman who had previously strenuously advocated for the cession of federal lands to the states,[267] acknowledged the contrast between ownership and jurisdiction that had earlier

259. *See, e.g.*, Frederick D. Hill, *William Hendricks' Political Circulars to his Constituents: First Senatorial Term, 1826–1831*, 71 IND. MAG. HIST. 124 (1975); 4 REGISTER OF DEBATES IN CONGRESS 151–66 (1828); *see also* FELLER, *supra* note 15, at 74–78 ("[S]ound or not, the idea that the federal land system was illegal and unconstitutional was a Western commonplace by 1828.").

260. 39 U.S. 526 (1840).

261. *Id.* at 532, 537–38.

262. 44 U.S. 212 (1845).

263. *See* Peter A. Appel, *The Power of Congress "Without Limitation": The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1, 35 (2001) ("*Pollard* . . . marks the Court's first opinion in a line of cases that would develop the equal footing doctrine."); *see also* Carolyn M. Landever, *Whose Home on the Range—Equal Footing, the New Federalism and State Jurisdiction on Public Lands*, 47 FLA. L. REV. 557, 573–75 (1995); Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207, 1222–23 (2016).

264. *See infra* text accompanying notes 289–290.

265. 44 U.S. at 219–20.

266. *Id.*

267. *See infra* note 281 and text accompanying.

justified Congress's rejection of Tennessee's claim. The Property Clause, McKinley emphasized, "temporarily, deprived [states] of control over the public lands."[268] But, though the opinion professed fidelity to these earlier resolutions, it differed both in outcome and tone. McKinley concluded that ownership of lands under states' navigable waters was a sovereign rather than a property right.[269] Accordingly, this right passed to Alabama under the equal footing doctrine, which gave the new state "all the rights of sovereignty, jurisdiction, and eminent domain" held by the original states.[270] In reaching this conclusion, McKinley hinted at a broader sympathy with the opponents of federal title. In language that could just as easily have been written by Sevier a half century earlier, McKinley fretted that ownership would give the federal government a "weapon" to wield against "state sovereignty," thereby depriving the states of an "important class of police powers."[271]

McKinley's precarious balancing act—ostensibly paying homage to the earlier resolution of sovereign ownership while implicitly undermining it—drew the ire of Justice Catron, who, in a strongly worded dissent, laid out what he believed to be the implications of the majority's reasoning.[272] Catron attacked the majority's seemingly arbitrary distinction between "political jurisdiction" and the "right of property."[273] The claim that ownership of tidewater rights was a "sovereign right," Catron argued, was a "previously unheard of" doctrine that Alabama courts concocted to "defeat[] the title of the United States."[274] It was also, in Catron's view, a particularly galling claim in a dispute between two nonsovereign parties. Foreshadowing the public trust doctrine, Catron reasoned that, if Alabama truly claimed "only political jurisdiction" over the land, then it could not then turn around and grant a private party a property interest in the parcel.[275]

Catron deemed *Pollard* "the most important controversy ever brought before this [C]ourt," in large part because the majority's implausible distinction between jurisdiction and ownership could not be readily cabined.[276] McKinley's arguments, Catron noted, were not new. They had already appeared in the country's "political discussions," in which it "had been asserted, that the new state coming in with equal rights appertaining to the old ones, took the high lands as well as the low"—meaning all federal lands, not just those inundated at high

268. 44 U.S. at 224.
269. *Id.* at 228–29.
270. *Id.* at 223.
271. *Id.* at 230. For a persuasive argument placing *Pollard* in the context of McKinley's earlier advocacy for cession while serving in the Senate, see John D. Leshy, *Are U.S. Public Lands Unconstitutional?*, 69 HASTINGS L.J. 499, 531–41 (2018).
272. *Pollard*, 44 U.S. at 232 (Catron, J., dissenting).
273. *Id.* at 232.
274. *Id.* at 231.
275. *Id.* at 235; *see also* James R. Rasband, *Disregarded Common Parentage of the Equal Footing and Public Trust Doctrines*, 32 LAND & WATER L. REV. 1 (1997).
276. 44 U.S. at 235 (Catron, J., dissenting).

tide.[277] Now, McKinley had seemingly vindicated these failed arguments of advocates of state sovereignty. The Court's "principles, in my judgment," Catron wrote, are "as applicable to the high lands of the United States as the low lands and shores."[278] In other words, Catron—ironically, a Tennessean appointed by Andrew Jackson—feared that the *Pollard* Court had enabled the ultimate triumph of the argument that equal footing granted states a legal right to the public domain.

Yet Catron's fears were never realized. *Pollard* spawned ongoing struggles over the ownership of submerged lands, but courts have consistently declined to extend the equal footing doctrine to federal lands.[279] The reason these arguments failed was not necessarily because of the respective merits, given, as *Pollard* suggested, the malleable line between ownership and jurisdiction. Had states' concerted push for ownership happened in the 1790s, when matters were much more unsettled, they might have prevailed—as Tennessee's stubborn resistance did, in a narrow sense. But these arguments were much harder to advance after decades of practice made the federal government the primary source of ownership throughout the former territories, with the ownership rights of thousands of claimants dependent on the validity of the initial federal title. The federal government's symbolic maintenance of its title against Tennessee and the innovation of attaching conditions to statehood to safeguard federal title had hardened into a kind of constitutional settlement.

As this history underscores, the rise of federal title was contingent. States' cessions of their lands were a necessary first step, but they hardly resolved the matter, prompting two decades of confusion and struggle. The federal government slowly accreted authority over lands through its constant involvement in local property disputes. Federal officials then defended that authority tenaciously when states plausibly argued, based on the equal footing doctrine, that if federal sovereignty over the territories was temporary, then federal ownership there should be, too. Federal control of public lands, in other words, was neither foreordained by the nation's foundational documents nor accidental. It was, rather, the product of a hard-fought and lengthy constitutional debate over governance, in which the national ownership of public lands transformed from paper promise into settled law.

V.
PROPERTY AND SOVEREIGNTY, THEN AND NOW

The division between property and sovereignty does a lot of conceptual work in contemporary law. Alongside tort and contract, ownership and its origins are seen as the core of private law, while sovereignty and its limits are perhaps

277. *Id.* at 231.

278. *Id.* at 235.

279. On Catron, see CARL BRENT SWISHER, THE TANEY PERIOD, 1836–64, *in* 5 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 59–61 (1974).

the central topic of public law. But as Morris Cohen long ago argued, this fundamental line is blurry.[280] Both property and sovereignty, Morris recognized, are forms of power over people as well as things.[281] Less appreciated is how artificial the divide between "right of soil" and "jurisdiction" proved throughout much of the history of the United States, when sovereigns—Native nations, states, and the federal government—also owned much of the territory that they governed.

This history persists. One of the most explicit legacies of the rise of federal title is the federal government's status as the largest landholder in the United States.[282] But the imprecise boundary between ownership and sovereignty also remains in the bodies of law that emerged from these early American origins. For instance, distinguishing property and sovereignty remains one of the fundamental problems in federal Indian law today.[283] But the overlap between title and jurisdiction is also at the heart of present-day public-land controversies in the West, where the federal government owns as much as 85 percent of the land within states carved from erstwhile territories.[284]

In this Section, I turn to the two bodies of doctrine and scholarship that have emerged on each side of this private-public divide—first property, and then constitutional law—and offer a few thoughts on how this entangled history might alter our understandings of both. Reinserting sovereignty into our histories of property, I suggest, helps illuminate government's fundamental role in shaping title and markets in the United States. Conversely, integrating property into constitutional history demonstrates both the breadth of federal power in the early United States and the early dominance of models of federalism premised on negotiation rather than the courts.

A. Property

In the eighteenth century, as Anglo-Americans were trying to figure out how to distribute a continent, European intellectuals were constructing their own imagined histories of North America.[285] Based on observations of the

280. *See* Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927).

281. *Id.* at 11–13.

282. The federal government owns 640 million acres, roughly 28 percent of the land within the United States. VINCENT, *supra* note 2, at 1.

283. *See, e.g.*, United States v. Montana, 450 U.S. 544 (1981) (holding that the scope of tribal civil jurisdiction depends on ownership of the underlying land); *see also* Jessica A. Shoemaker, *Complexity's Shadow: American Indian Property, Sovereignty, and the Future*, 115 MICH. L. REV. 487, 489 (2017) ("Everything we know about property and sovereignty applies differently in the unique legal spaces of American Indian reservations."); Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 6 (1991) (noting how in Indian law, the Supreme Court has "manipulated" the distinction between sovereignty and property "in a way that has given tribal governments the worst of both worlds").

284. The five largest federal land-owning agencies own 79.6 percent of land in Nevada and over 60 percent of the land in Alaska, Idaho, and Utah. VINCENT, *supra* note 2, at 7–8 tbl.1.

285. *See, e.g.*, JOHN LOCKE, TWO TREATISES OF GOVERNMENT: AND A LETTER CONCERNING TOLERATION §§ 25–51 (Ian Shapiro ed., Yale Univ. Press 2003) (1690) (discussing the origin of

purportedly "primitive" peoples encountered there, these philosophers sought to puzzle through both the origins of property and the appropriate role of government in regulating and limiting property rights. These questions—and, in part, this method—still dominate much twentieth- and twenty-first-century scholarship on property and its origins.[286]

In this Section, I discuss how the actual history of the early United States, rather than an imagined past, contributes to debates over property's origin and regulation. My aim is not to capture some essential nature of ownership but to reexamine some of the predominant narratives that present-day American legal scholars and lawyers tell themselves about property and its past.

1. Ownership's Origins

Broadly speaking, property law casebooks present two accounts of property's origins.[287] The first, usually early on, describes Harold Demsetz's law-and-economics history with its emphasis on the tragedy of the commons and the internalization of externalities.[288] The second, often several chapters further in, recounts the history of American property law as a story of legal transplant. This account traces how Anglo-Americans adopted, and at times consciously discarded, the hoary feudal tenures and immemorial practices of English common law.[289]

Neither account devotes much attention to sovereigns. Yet, as traced here, the actual history of property rights in the United States was remarkably statist.[290] Though young lawyers-in-training dutifully memorized vestigial concepts like gavelkind and frankalmoin, the far more pressing legal and political question was how the seemingly endless supply of land would be distributed. Here,

property with extensive reference to the imagined history of "Indians" in "America"); JEAN-JACQUES ROUSSEAU, THE SECOND DISCOURSE: DISCOURSE ON THE ORIGIN AND FOUNDATIONS OF INEQUALITY AMONG MANKIND (1753), *reprinted in* THE SOCIAL CONTRACT AND THE FIRST AND SECOND DISCOURSES 69, 113–131 (Susan Dunn ed., Yale Univ. Press 2002) (framing the hypothetical origins of property by recounting the supposed development of the "savages of America").

286. *See, e.g.*, Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. (PAPERS & PROC.) 347 (1967) (recounting the origin of property rights based on the understanding of the history of the fur trade among the indigenous Montagnes of eastern Canada).

287. *Cf.* Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009, 1022 (2009) ("If you believe the casebooks, we acquire original title to property by conquering other nations, hunting animals, encroaching on our neighbors' lands, and finding lost jewels. These methods of acquisition are historically inaccurate: they do not describe the actual ways in which property titles were originally created in the United States.").

288. *See* Demsetz, *supra* note 286.

289. For examples of this account from two of the most prominent property law casebooks, see JESSE DUKEMINIER ET AL., PROPERTY 249–65 (9th ed. 2017); JOSEPH WILLIAM SINGER ET AL., PROPERTY LAW: RULES, POLICIES, AND PRACTICES 741–56 (7th ed. 2017). Both casebooks address the history of government grants elsewhere (including by citing this Article).

290. For an argument focused on contemporary property that emphasizes the state's role in creating ownership, see Katrina Miriam Wyman, *From Fur to Fish: Reconsidering the Evolution of Private Property*, 80 N.Y.U. L. REV. 117 (2005).

Blackstone provided no guidance, English law little precedent.[291] Instead, legislatures, cobbling a new body of law from snippets of republican ideology, customary practice, and experimentation, crafted the bureaucratically administered land systems that became the source of most title to land within what became the United States.[292] In short, access to ownership in early America often hinged on explicit governmental grant or recognition of title. For these early Americans, the truism that property ultimately rests on the authority of the state was lived reality, not abstract concept.

Recapturing this history of the "old" landed property of the United States makes clear how often it resembled the "new property" envisioned by Charles Reich, in which Americans' wealth "depends upon a relationship to government."[293] Unlike Reich's new property, of course, once federal or state governments conferred private ownership of land, they could not easily condition or rescind it. But it is also important not to overstate this difference given the uncertainty of title in the early republic. Many people held only inchoate rights to ownership that still depended on some further governmental act of confirmation. For that generation of early Americans, securing property rights often required persuading a bureaucrat—usually a federal official—of the merits of one's claim to ownership.

Progressive property scholars have offered their own narrative of the origins of title in the United States, one more rooted in actual history. This account has accurately and importantly emphasized that all land in the United States was taken from Native peoples, often against their will.[294] Yet this perspective replicates important omissions, in part because of the oddness of its touchstone: Chief Justice Marshall's handwringing decision in *Johnson v. M'Intosh*.[295] Though it masqueraded as a description of past practice, Marshall's

291. Demonstrating this reality, St. George Tucker added lengthy appendices describing the law governing land distribution to his Americanized version of Blackstone. *See* Tucker, *supra* note 81.

292. *See also supra* Part II.

293. Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 733 (1964). In an example of excision of the public domain from property history, Reich observed that although the government "has always" distributed wealth, "in early times" this role "was minor" while "today's distribution of largess is on a vast, imperial scale." *Id.* Ironically, "vast" and "imperial" are quite literal descriptors of the federal land system.

294. *See, e.g.*, Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CALIF. L. REV. 107, 109–14, 129–36 (2013) (arguing that progressive property scholars should focus more on the processes of acquisition, and discussing the dispossession of Native peoples as a prime example); Daniel J. Sharfstein, *Atrocity, Entitlement, and Personhood in Property*, 98 VA. L. REV. 635, 655–66 (2012) (describing the "atrocity value" in American property linked to its forceful seizure from its Native owners); Joseph William Singer, *Original Acquisition of Property: From Conquest & Possession to Democracy & Equal Opportunity*, 86 IND. L.J. 763, 763–78 (2011) (discussing the origin of property in the United States through claims of conquest of Native territories). On the history of the dispossession of Native peoples, see generally BANNER, *supra* note 30.

295. 21 U.S. 543 (1823). The literature on *Johnson* is large. For key recent works, see BANNER, *supra* note 30, at 178–88; ROBERTSON, *supra* note 133; WATSON, *supra* note 39, at 272–317; Eric Kades, *Dark Side of Efficiency:* Johnson v. M'Intosh *and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065 (1999); Eric Kades, *History and Interpretation of the Great Case of* Johnson

emphasis on the doctrine of discovery is best read as another hypothetical history, one that similarly submerged the state by depicting "conquest" as an act accomplished through legal legerdemain alone.[296] This narrative erased the generations-long work of colonialism: the negotiations, treaties, and occasional warfare with Native nations undertaken, and underwritten, by the federal government.

More fundamentally, by focusing on Native title as a problem of *acquisition* and stressing the indisputable injustice of the dispossession of Native peoples, progressive property scholars have ironically risked downplaying the significance of indigenous ownership. Early American land law was more than a Machiavellian scheme to wrest land from its original owners, if only because Native nations refused to allow their rights to be so easily disregarded.[297] Native power ensured that Native title shaped land's *distribution* as well as acquisition, affecting nearly every major decision about land rights in early America—from the fraught, generation-long struggle over nonsovereign purchases from Native nations,[298] to the fierce disagreements over whether to acknowledge preemption rights,[299] to the contest between federal and state governments for ownership of the public domain.[300] In this way and others, Native peoples—who appeared in *Johnson* and elsewhere only as shadowy, off-stage figures—nonetheless helped secure the rise of federal title.

2. Commodification, Regulation, and the Early American State

The theory of property ownership and its reality were perhaps more sharply divergent in the wake of the American Revolution than at any other moment in US history.[301] The post-revolutionary era witnessed the efflorescence of an ideology that Gregory Alexander has dubbed property as propriety—a Jeffersonian civic-republican vision of land as a tool to foster the public good.[302]

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v. M'Intosh, 19 LAW & HIST. REV. 67 (2001); Jedediah Purdy, *Property and Empire: The Law of Imperialism in* Johnson v. M'Intosh, 75 GEO. WASH. L. REV. 329 (2007).

296. For a thoughtful critique of Marshall's historical claims, see Lindsay G. Robertson, *John Marshall as Colonial Historian: Reconsidering the Origins of the Discovery Doctrine*, 13 J.L. & POL. 759 (1997); *see also* BANNER, *supra* note 30, at 178–79 (observing that Marshall's imagined history "was not true").

297. *See* James H. Merrell, *Declarations of Independence: Indian-White Relations in the New Nation*, *in* THE AMERICAN REVOLUTION: ITS CHARACTER AND LIMITS 197–218 (Jack P. Greene ed., 1987) (tracing Native peoples' success in rejecting the doctrine of conquest).

298. *See supra* Part II.A.1.

299. *See supra* Part II.B.3.

300. *See supra* Part IV.A.

301. Robert Gordon made a similar point with respect to eighteenth-century English property law, noting the paradox that "in the midst of such a lush flowering of absolute dominion talk in theoretical and political discourse, English legal doctrines should contain so very few plausible instances of absolute dominion rights." Robert W. Gordon, *Paradoxical Property*, *in* EARLY MODERN CONCEPTIONS OF PROPERTY 95, 96 (John Brewer & Susan Staves eds., 1995). But Gordon's emphasis was on the diverse ways eighteenth-century law permitted the subdivision of property, rather than on the consequences of governmental distribution of ownership rights. *Id.*

302. ALEXANDER, *supra* note 17, at 27–37.

But at the same time, the early republic also experienced the triumph of property as commodity, through the creation of an unprecedented market in title dominated by uncertainty, chaotic swings in value, and the ubiquity of risk, foreshadowing the rapacious capitalism of the antebellum United States.[303] The implications were significant. As governments paid their veterans and their debts with promises of land and speculators readily swapped securities for acreage, land title became interchangeable with the era's most abstract and commodified property: paper debt.[304] Title accordingly more closely resembled securities than the physical ground it purported to represent; it became, to repurpose Alexander's description, "intangible and speculative."[305]

In this transmogrification of land into title, ironies abounded. Jefferson and others envisioned western lands as safeguarding republicanism by allowing smallholders to access land, but republican policies of ownership encouraged commodification.[306] The system of indiscriminate location, intended to make ownership available for small claimants, produced a frantic land rush that sowed confusion, enriching lawyers and the well connected. Land promises designed to reward veterans and first settlers allowed speculators to obtain public lands at bargain rates.[307]

Another irony was that this confusion resulted partly from property's simplification into ever more alienable and discrete parcels. Early Americans in the West spent little time parsing the attributes of ownership; they had little need to. Compared to treatise book intricacies, land tenure in the West was remarkably straightforward, a nearly ubiquitous triumph of fee simple absolute. But, in tension with some law and economics accounts, this simplicity of title did not solve the problem of determining ownership; in many ways, it exacerbated it.[308] The market in readily alienable lands quickly overwhelmed governments' feeble efforts at regulating grants of ownership, undermining the security of title. The result was that entire regions of the West, particularly Tennessee and Kentucky, resembled an anticommons. Even though each parcel theoretically had only one

303. For work on the risky capitalist world of the early republic and after, see JONATHAN LEVY, FREAKS OF FORTUNE: THE EMERGING WORLD OF CAPITALISM AND RISK IN AMERICA (2012); BRUCE H. MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE (2002); SCOTT A. SANDAGE, BORN LOSERS: A HISTORY OF FAILURE IN AMERICA (2005).

304. *Cf.* ALEXANDER, *supra* note 17, at 56 ("The 'new property' of the eighteenth century—marketable shares of public debt—was obviously unlike the paradigmatic form of property (land).").

305. *Id.* at 70.

306. *See id.* at 34, 59 (recounting Jefferson's vision that "the state [would] take advantage of the abundance of uncultivated land in the American West and insure that every able-bodied citizen be given a relatively small parcel of land").

307. *See, e.g.*, David F. Weiman, *Peopling the Land by Lottery? The Market in Public Lands and the Regional Differentiation of Territory on the Georgia Frontier*, 51 J. ECON. HIST. 835, 836–60 (1991) (recounting this phenomenon in Georgia in the 1820s).

308. The argument that limiting the forms of ownership advances clarity of title is the central thesis of Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000).

true owner, enough quasi owners could claim the land to severely compromise its value.[309]

Early Americans turned to regulation to save the market from itself. The federal land system was more heavily regulated than any prior land system in what became the United States: it limited the size and shape of the parcels that could be purchased, established an extensive network of government-run land offices, and set a minimum price.[310] By turning the public domain into standardized, interchangeable rectangular parcels and rejecting preemption rights, federal policy seemed to embrace commoditarian visions of land, at odds with Jeffersonians who believed these practices elitist.[311] And yet, underscoring the complicated interplay between commodity and propriety, many at the time believed that these seemingly anti-republican elements guarded property's civic as well as monetary value. The staunch Republican St. George Tucker observed that Virginia's unregulated western lands attracted only those "who buy, merely to sell."[312] By contrast, Tucker urged, "Whoever wants to set down in peaceable possession of his lands; to improve them, and to transmit them to his posterity will turn his eyes to [the federal lands] north-west of the Ohio for an establishment."[313] In this way, the federal government's embrace of regulated title seemed to preserve the intangible republican values of possession and continuity that men like Tucker sought from western lands.

B. Sovereignty

Notwithstanding its historical significance, the public domain has received little attention in constitutional law. This omission stems partly from property scholarship's fixation on eminent domain, especially when exploring the public

309. In this sense, western lands resembled Michael Heller's classic definition of an anticommons as a regime where "initial endowments are created as disaggregated rights." Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 623 (1998).

310. For an older work that discerned the precedents for the federal land system in earlier practices, see FORD, *supra* note 97.

311. *See supra* Part II.B.2.

312. Tucker, *supra* note 91, at 71; *see also* Jessica K. Lowe, *Guarding Republican Liberty: St. George Tucker and Judging in Federal Virginia*, *in* SIGNPOSTS: NEW DIRECTIONS IN SOUTHERN LEGAL HISTORY 111 (Sally E. Hadden & Patricia H. Minter eds., 2013) (recounting Tucker's republican ideology).

313. Tucker, *supra* note 91, at 71.

law of ownership in the early United States.[314] It also reflects scholars' relegation of the history of the public domain to the specialized realm of public land law.[315]

This Section briefly intervenes in debates within both of these subfields, but it also seeks to move beyond these fields' preoccupations to reintegrate the public domain into broader issues of constitutional history. I explore two applications in particular: recasting the scope of federal power in the early United States and revisiting the much-debated meaning and enforcement of the doctrine of state equality.

1. Public Lands in Constitutional Law

As the history of public lands suggests, focusing on the intersection of sovereignty and property primarily as a question of takings—understandable in light of current jurisprudence—nonetheless projects present-day preoccupations backward. In the early United States, most governments, and particularly the federal government, were anxiously trying to sell, not buy, land. In this context, the power to take land was less important than what Professors Gideon Parchomovosky and Abraham Bell have labeled "givings"—government-conferred property benefits—or what we might call "sellings"—government power to control land's alienation.[316]

Recapturing this perspective helps explain the curious lack of debate in the early republic over whether the federal government possessed the power of eminent domain, a silence that scholars have debated how to interpret.[317] This absence is more understandable once we recognize that the federal government used its ownership of the public domain to serve many of the governmental functions long associated with takings, such as building roads and creating forts.[318] This power to dispose of public lands was particularly salient because

314. For examples of work exploring the early history of eminent domain, see William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738 (2013); Maureen E. Brady, *Property's Ceiling: State Courts and the Expansion of Takings Clause Property*, 102 VA. L. REV. 1167 (2016); Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549 (2002); John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995).

315. Most property law casebooks, for instance, have little discussion of the history of the federal land system, in contrast to the expansive attention it receives in more specialized casebooks on public lands and natural resources.

316. Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547 (2001). Bell and Parchomovsky specifically discussed homestead laws as an example of givings. *Id.* at 563 n.76.

317. *Compare* Baude, *supra* note 314, at 1762–68 (noting that Congress did not exercise eminent domain outside DC or the federal territories until the end of the nineteenth century), *with* Christian R. Burset, Note, *The Messy History of the Federal Eminent Domain Power: A Response to William Baude*, 4 CALIF. L. REV. 187, 190–202 (2013) (arguing that there was disagreement over the existence of a federal eminent domain power).

318. William Baude, for instance, emphasizes the significance of *Pollard*, which he describes as a "surprisingly neglected decision" that "finally confront[ed]" the issue of a federal right to eminent domain. Baude, *supra* note 314, at 1742, 1771–73. But, as described above, see *supra* notes 262276 and accompanying text, *Pollard*, like most of the Supreme Court land cases during the era, was a case about

federal functions were heavily concentrated in the West, where the federal government was also the primary property holder.[319]

The constitutional history of public lands has also long been dominated by noisy and sometimes narrow debates over the Property Clause, prompted by the Sagebrush Rebellion and its simmering demand that the federal government "return" public lands to the states.[320] Even as the Supreme Court has endorsed broad federal power to manage federal property,[321] a dissenting view has persisted. These critics particularly attack the federal government's late nineteenth-century policy shift toward the retention rather than sale of the public lands, especially in western states.[322] These scholars regard this change as unconstitutional, insisting that the Property Clause's original understanding mandates the sale of the federal lands that are not used to further an enumerated power.[323]

The history suggests that those arguing for a narrow interpretation of the Property Clause have attempted to constitutionalize late eighteenth-century practices rather than understandings. The shift from sale to retention was a difference in degree, not kind: from the beginning, the federal government used ownership to achieve diverse ends, many seemingly outside the Constitution's enumerated powers. As the attorney general argued in *Gratiot* in 1840, for "nearly sixty years," the federal government had employed the "management of the public domain" to achieve myriad goals: "lands have been ceded for special purposes; limitations have been fixed on the sovereign powers of the states;

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land *grants*—in particular which sovereign's grant would prevail. In other words, though the Court in *Pollard* spoke of "eminent domain," the actual decision involved land *sales*, not takings.

319. On the significance of federal authority in the early American West, see BRIAN BALOGH, A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH-CENTURY AMERICA 151–218 (2009); WILLIAM H. BERGMANN, THE AMERICAN NATIONAL STATE AND THE EARLY WEST (2012).

320. For an overview of this debate, see works cited *infra* note 332.

321. *See* Kleppe v. New Mexico, 426 U.S. 529, 539 (1976) ("[W]e have repeatedly observed that '[t]he power over the public land thus entrusted to Congress is without limitations.'" (quoting United States v. San Francisco, 310 U.S. 16, 29 (1940))).

322. Much of this recent debate has focused on Utah's demands for cession. For arguments in favor of cession, see JOHN W. HOWARD ET AL., LEGAL ANALYSIS OF THE LEGAL CONSULTING SERVICES TEAM PREPARED FOR THE UTAH COMMISSION FOR THE STEWARDSHIP OF PUBLIC LANDS 51–129 (2015); Donald J. Kochan, *Public Lands and the Federal Government's Compact-Based "Duty to Dispose": A Case Study of Utah's H.B. 148— The Transfer of Public Lands Act*, 2013 BYU L. REV. 1133, 1149–89 (2013). For criticism, see ROBERT B. KEITER & JOHN C. RUPLE, WALLACE STEGNER CTR. FOR LAND, RES. & THE ENV'T, A LEGAL ANALYSIS OF THE TRANSFER OF PUBLIC LANDS MOVEMENT (2014); Leshy, *supra* note 271; Nick Lawton, *Utah's Transfer of Public Lands Act: Demanding a Gift of Federal Lands*, 16 VT. J. ENVTL. L. 1 (2014).

323. For proponents of this view, see Albert W. Brodie, *A Question of Enumerated Powers: Constitutional Issues Surrounding Federal Ownership of the Public Lands*, 12 PAC. L.J. 693, 721–22 (1981); David E. Engdahl, *State and Federal Power over Federal Property*, 18 ARIZ. L. REV. 283 (1976); Robert G. Natelson, *Federal Land Retention and the Constitution's Property Clause: The Original Understanding*, 76 U. COLO. L. REV. 327, 366–77 (2005). Other scholars have forcefully countered these arguments. *See, e.g.*, Appel, *supra* note 263, at 30–36; Leshy, *supra* note 271; Eugene R. Gaetke, *Refuting the Classic Property Clause Theory*, 63 N.C. L. REV. 617 (1985); Dale D. Goble, *The Myth of the Classic Property Clause Doctrine*, 63 DENV. U. L. REV. 495, 497–98 (1986).

school lands are set aside; timber and salt-springs are kept for public use; and the spots on which many of our fortifications and public buildings are placed, are permanently secured."[324] Moreover, the late nineteenth-century move toward greater direct retention of land instead of conditional grants to states represented a congressional determination to directly administer burdens it had previously co-opted state legislatures into performing—a course that current federalism jurisprudence depicts as more, not less, protective of state autonomy.[325]

Finally, the constitutional history of western lands demonstrates the ubiquity of administrative adjudications of private property rights in the early United States. Federally appointed commissioners routinely determined the validity of the property claims of veterans, Natives, and holders of grants from prior sovereigns, often as against other claimants and without any judicial oversight.[326] But, decades after this practice had become routine, the Supreme Court substantially cabined these precedents in *Murray's Lessee*, where the Court held that Congress could not remove from "judicial cognizance any matter which, from its nature, is the subject of a suit at common law."[327] Because this assertion was sharply at odds with the commonplace administrative resolution of western title—a practice which the Court had repeatedly endorsed—the decision immediately sought to distinguish the resolution of "[e]quitable claims to land by the inhabitants of ceded territories."[328] Those were part of a "class of cases," the Court reasoned, "involving public rights," where it "depends upon the will of congress whether a remedy in the courts shall be allowed at all."[329] Because Congress could deny a remedy, it could also "prescribe such rules of determination as [it] may think just," and the "acts of executive officers" under Congress's authority would be deemed "conclusive."[330]

The characterization of these claims in *Murray's Lessee* has facilitated the rise of the public rights doctrine, which has limited Congress's ability to resolve property rights not deemed "public" through non-Article III proceedings.[331] Yet

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324. United States v. Gratiot, 39 U.S. 526, 531 (1840).

325. *See* Nat'l Fed'n of Indep. Bus. (NFIB) v. Sebelius, 567 U.S. 519, 575–89 (2012); Printz v. United States, 521 U.S. 898, 918–25 (1997); New York v. United States, 505 U.S. 144, 162–69 (1992). *But see* Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE L.J. 1104 (2013) (arguing that during ratification, state execution of federal policy was regarded as protective of state autonomy).

326. *See supra* Part III.

327. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 284 (1855).

328. *Id.* The Court acknowledged its nearly simultaneous holdings *endorsing* administrative resolution of title disputes. *Id.* (citing Foley v. Harrison, 56 U.S. 433 (1853); Burgess v. Gray, 57 U.S. 48 (1853)).

329. 59 U.S. at 284.

330. *Id.*

331. Key cases addressing the limitations on congressional power to create non-Article III tribunals to adjudicate private disputes include *Stern v. Marshall*, 564 U.S. 462 (2011), *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), and *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). The Supreme Court recently determined that a challenge to patent issuance implicated a "public right" that could be adjudicated in an administrative tribunal. *See* Oil States Energy Servs. v.

the Court's description in *Murray's Lessee* of what were usually called, ironically, private land claims was also a strikingly odd distortion of earlier understandings. Though the Court suggested that the federal decision to recognize these "equitable" claims was discretionary, numerous treaties and statutes *mandated* their protection under federal law.[332] Even stranger was the Court's suggestion that these title disputes differed from ordinary common-law adjudication and could only be aired in court through a congressionally created remedy.[333] If the history of land litigation in the early republic proved anything, it was how readily ejectment suits facilitated the judicial resolution of disputes between parties claiming under different sources of title, precisely the questions litigated in the administrative proceedings. Given the blurry line between sovereignty and ownership, there was no clear divide between "public" and "private" ownership claims in these cases. *Pollard v. Hagan*,[334] *Johnson v. M'Intosh*,[335] and *Fletcher v. Peck*[336] were merely the most prominent of the numerous suits between competing *private* claimants that required the Court to rule on the legitimacy of *sovereign* claims to ownership; these decisions in turn profoundly implicated the title of all *private* owners whose rights derived from the sovereigns at issue.

Using the public rights doctrine, lawyers have crafted a fictitious history in which common-law courts and juries alone determined property rights, a history in which the rise of administrative tribunals appears an innovation alien to, and supposedly inconsistent with, American constitutional tradition. Yet the routine federal adjudication of ownership rights in the early United States suggests that it is administrative law's critics who are hostile to that tradition, more accurately understood.

2. Federal Sovereignty

It can be hard in the present to grasp why early American politicians cared so deeply about the minutia of land policy. It is difficult to understand, for instance, the moment during the first Congress when one congressman urged the House to stop discussing what became of the Bill of Rights and to turn to the topic of land offices instead. "[E]very candid mind," he argued, would admit that the public lands were more significant "in point of importance."[337]

This strangeness reflects how different early American governance was from that of our own era. Governments then often exercised control in ways now

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Greene's Energy Grp., 639 Fed. Appx. 639 (Fed. Cir. 2016), *aff'd*, No. 16–712, 2018 WL 1914662, (Apr. 24, 2018).

332. See *supra* note 149 and accompanying text.

333. *Murray's Lessee*, 59 U.S. at 284 (distinguishing suits involving "public rights" to land from cases that are "the subject of a suit at the common law").

334. 44 U.S. 212 (1845); *see also supra* Part IV.C.

335. 21 U.S. 543 (1823).

336. 10 U.S. 87 (1810).

337. 1 ANNALS OF CONG. 703–04 (1789) (Joseph Gales ed., 1834) (statement of Rep. Vining).

unfamiliar to us, sometimes masking state power. As Professor Hendrik Hartog convincingly argued, in the late eighteenth century municipal possession and distribution of real property was "a mode of public planning and governance."[338] This proved equally true for federal government, which deployed its extensive authority over western lands as an instance of what scholars might consider a form of "soft" power, using influence rather than command to achieve its goals. Recapturing such forms of hidden state authority furthers critiques of narratives of a minimalist early national state.[339]

Such soft power can be hard to spot without examining the practicalities of everyday governance. Such undramatic topics often got lost, for instance, amidst the abstract theorizing and heated rhetoric of the ratification debates. Moreover, those weighing ratification did not always anticipate how the new federal government would function in practice, particularly because the ambiguous constitutional text did not always mandate outcomes. For instance, though the Property Clause provided a textual hook, federal authority over land ultimately stemmed from the confluence of other considerations, many unplanned: federal sovereignty over the territories, federal insistence on preemption rights over Native lands, and the desire for an alternative to the state-created property morass.

The fact that the full scope of federal power of western lands was not fully anticipated does not mean it was inconsequential. On the contrary, because of the rise of federal title, the federal government came to hold a monopoly on the distribution of what was arguably the most important asset in the new nation. Congress and the Executive may have initially conceived of the public domain primarily in financial terms, but experience quickly taught them that title to the public lands conferred a form of governance as well as ownership.

This background explains the vitriolic debates over the public lands that convulsed national politics for the first half of the nineteenth century, debates which were only rarely about the government's concerns as a landowner.[340] Rather, like present-day fights over taxation, struggles over the public lands were much broader conflicts over how the federal government should use its authority

338. HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730–1870, at 43 (1983). Hartog developed this idea by tracing the use of water-lot grants by New York City, which, he argued, "offered the possibility of achieving positive governmental goals—paving the streets, developing the harbor—at a time when there was no theory of direct government action." *Id.* at 68.

339. This vision of "soft" power is distinct from Alison LaCroix's invocation of "shadow powers" embodied in the General Welfare and Necessary and Proper Clauses. Alison L. LaCroix, *The Shadow Powers of Article I*, 123 YALE L.J. 2044 (2014). Unlike these "shadow powers," federal authority over land is as textually specific as, say, the Commerce Clause; my argument is merely that federal power over the public domain ended up as a much more significant source of power than early Americans intuited from the text alone.

340. For an overview of these debates, see DICK, *supra* note 15; FELLER, *supra* note 15; VAN ATTA, *supra* note 15.

to shape the future of the United States.[341] This perspective helps explain why the antebellum United States witnessed extreme and bitter conflicts over details such as the price per acre and the size of lots. For those in Congress, these seeming banalities raised very high stakes: they implicated the fundamental issues of income distribution, the future of slavery, regional power, and justice. In a world where access to cheap government lands was one of the primary sources of wealth and independence, federal power to dictate these terms was, as these congressmen understood, quite meaningful. It gave the federal government the authority to determine the nature of ownership throughout much of the United States.

3. Federalism, Equal Footing, and Equal Sovereignty

Since at least Herbert Wechsler's canonical article on the political safeguards of federalism, scholars have hotly debated the respective roles of the courts and Congress in policing the boundaries of state and federal sovereignty.[342] As this question has resurged over the last couple decades, proponents of judicial as well as political enforcement of federalism have both claimed the historical mantle of the "Framers" to bolster their claims.[343] Yet both sides have largely parsed statements during the convention and ratification, without much consideration of how early federalism actually functioned.[344]

The history presented here suggests that early governance in the United States followed a model of federalism grounded in Congress, not the courts: Congress ultimately determined the validity of Tennessee's claims to the public domain, as well as whether prospective states like Ohio deserved admission to the Union, and under what conditions. But this approach to federalism did not posit a clearly hierarchical relationship in which power flowed from Congress outward. Rather, the dominant model for state-federal relations relied on negotiation between sovereigns. The Northwest Ordinance, for instance, explicitly styled its provisions concerning rights as "articles of compact between the original States and the people and States in the said territory," which would "forever remain unalterable, unless by common consent."[345] The Ordinance was not the only such "compact": all state land cessions, right through Georgia's final 1802 agreement, were styled in such contractual language.[346]

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341. *See* Scalia, *supra* note 9, at 882 (similarly analogizing twentieth-century tax policy to nineteenth-century power over the public domain).

342. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

343. Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951 (2001); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311–406 (1997).

344. *See, e.g.*, Kramer, *supra* note 343, at 239–68; Yoo, *supra* note 343, at 1362–91.

345. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 52.

346. Initial state cessions closely resembled deeds of conveyance in form and language, outlining the terms and conditions, followed by an explicit transfer of title and accompanied by signatures of the

Such bargains might strike present-day observers as a radical endorsement of state sovereignty because they seemingly implied equality between the contracting parties, a position at odds with formal federal dominance under the Supremacy Clause. Yet, just as most early federal court decisions policed federalism by protecting *federal* authority from *state* encroachment,[347] these compacts' substance often served to bolster federal rather than state power. All the compacts—most notably the Northwest Ordinance—limited the powers of future states, including state police power over taxation, property, and slavery.[348]

This context helps illuminate the evolution of the much-discussed doctrine of state equality. In the Court's recent decision, *Shelby County*, Chief Justice Roberts invoked "equal sovereignty," a constitutional principle drawn almost solely from equal footing precedents, to invalidate the preclearance provisions of the Voting Rights Act, which applied only to certain states.[349] Judges and scholars have subsequently contested the legitimacy of Roberts' extrapolation of the equal footing doctrine.[350] Yet this debate has been mired in contested interpretations of a contradictory set of nineteenth-century public land cases decided in the wake of *Pollard*.[351] The history explored here emphasizes the importance of reframing the doctrine of equal footing in the context of late eighteenth-century debates over federalism.

The seeds of the equal footing doctrine first appeared in Virginia's 1783 negotiation of its land cession, in which the state's legislature stipulated that states formed from the ceded lands "hav[e] the same rights of sovereignty, freedom and independence as the other states."[352] Its purpose was clear. In the wake of their protracted debate over imperial governance, post-revolutionary Americans regarded the promise that the territories would become integral parts of a self-governing nation—rather than permanent colonies—as the key

duly authorized representatives. *See, e.g.*, *Virginia Cession*, *supra* note 50. Georgia's cession—styled "articles of agreement and cession"—resembled a treaty, with three articles and signatures by the respective commissioners. *See* Articles of Agreement and Cession, Apr. 24, 1802, *in* 1 AMERICAN STATE PAPERS: PUBLIC LANDS, *supra* note 40, at 113–14.

347. *See* Kramer, *supra* note 343, at 228 (endorsing Wechsler's conclusion that the "Supreme Court's only significant role in federalism has been protecting the federal government from the states").

348. *See, e.g.*, Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 52–53 (limiting future states' control over jury trials, property, navigable waters, and taxation, and declaring "[t]here shall be neither slavery nor involuntary servitude in the said territory").

349. Shelby County v. Holder, 570 U.S. 529, 542–44 (2013).

350. *See e.g.*, *id.* at 587–88 (Ginsburg, J., dissenting) (arguing that the decision was an "unprecedented extension of the equal sovereignty principle outside its proper domain—the admission of new States"); Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. 1087, 1102–25 (2016); Litman, *supra* note 263; Zachary S. Price, *Namudno's Non-Existent Principle of State Equality*, 88 N.Y.U. L. REV. ONLINE 24 (2013); Jeffrey M. Schmitt, *In Defense of* Shelby County*'s Principle of Equal State Sovereignty*, 68 OKLA. L. REV 209, 224–31 (2016); *cf.* Abigail B. Molitor, Note, *Understanding Equal Sovereignty*, 81 U. CHI. L. REV. 1839 (2014) (summarizing arguments on both sides).

351. *See, e.g.*, Colby, *supra* note 350, at 1102–32; Litman, *supra* note 263, at 1216–29. For examples of these cases, see *infra* note 376.

352. 25 JOURNALS OF THE CONTINENTAL CONGRESS, at 559–60 (Gaillard Hunt ed., 1922).

distinction between British imperialism and the new American "empire of liberty."[353] Consequently, the articulation of equal footing in the Northwest Ordinance emphasized access to governance, promising that new states would have "a share in the federal councils on an equal footing with the original States."[354] Moreover, although now perceived as a protection against federal overreach, equal footing was equally intended to police horizontal federalism by shielding new states against the claims of older states.[355]

Yet the explicit promise that new states would be on "equal footing with the original states, in all respects whatever" appeared in the very same statutes imposing stringent conditions for state admission—conditions that did not apply to existing states.[356] This reliance on conditions "freely" offered to would-be states, and the bargaining that accompanied Tennessee's and Ohio's statehood, were rooted in the dominant contractual model of negotiated federalism. These agreements have nonetheless presented a constitutional puzzle for subsequent judges and commentators up to the present. Could Congress use such bargains to expand its authority, or did such provisions merely reinforce its existing federal powers under the Constitution, converting them into mere surplusage?[357]

The problem with this dichotomy lies in its anachronistic presumption that there were unambiguously federal powers over which states had no claim. In the uncertainty of the late eighteenth century, the fluid boundaries of state and federal authority were literally being negotiated.[358] As Tennessee's land claims underscored, the federal government was rightly worried about states' power even in areas in which the national government arguably enjoyed substantial constitutional authority. Conditions attached to admission offered one way for the federal government to curb such aggressive state claims. Moreover, many at

353. PETER S. ONUF, JEFFERSON'S EMPIRE: THE LANGUAGE OF AMERICAN NATIONHOOD 1 (2000). On conceptions of empire in the early republic, see *id.* at 57–61. For an example of this distinction by post-revolutionary Americans, see Letter from James Monroe to Thomas Jefferson (May 11, 1786), *in* 2 THE PAPERS OF JAMES MONROE 298, 299 (Daniel Preston & Marlena C. DeLong eds., 2003) (noting that American territorial government was "in effect to be a colonial govt similar" to the British "with this remarkable & important difference" that the territories "shall be admitted into the confederacy").

354. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 52.

355. The concern about the original states imposing limits on new states was particularly apparent in Kentucky, which had to accede to a number of promises before Virginia would allow independence. Act of Dec. 18, 1789, *reprinted in* 13 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 17–21 (William Waller Hening ed., N.Y., R. & W. & G. Bartow 1823) (applying eight "terms and conditions" for Kentucky's statehood); *see also* Burton's Lessee v. Williams, 16 U.S. 529, 533 (1818) (tracing the "collision . . . between the states of North Carolina and Tennessee" over land titles because North Carolina asserted retained rights under its cession).

356. Act of Apr. 8, 1812, ch. 50, 2 Stat. 701; *see also* Act of Apr. 30, 1802, ch. 50, 1 Stat. 173.

357. *See, e.g.*, Biber, *supra* note 251, at 123–24 (noting how Congress routinely imposed conditions "in areas far removed from the enumerated federal powers of Article I"); Colby, *supra* note 350, at 1112 n.114 (explaining how "Congress imposed so many of these conditions, while simultaneously paying lip service to the equal footing guarantee").

358. *Cf.* Biber, *supra* note 251, at 199 ("[T]he borders between what is state and what is federal . . . have always been fuzzy, unclear, and movable.").

the time believed that quasi-constitutional compacts like the Northwest Ordinance served as independent sources of federal power that granted Congress additional authority over former territories even after statehood.[359]

Yet the subsequent history of the equal footing doctrine demonstrates two fundamental challenges of such contractual federalism. First, it was not clear how such state–federal compacts would be interpreted and enforced, and by whom. Congress asserted the sole right to arbitrate—the "United States were, in this case, made a judge in their own cause," as one congressman put it during debates over Tennessee lands—but the states sharply disagreed.[360] Such contentions echoed the era's broader confrontations over constitutional interpretation, a struggle that culminated in the Virginia and Kentucky Resolves and underscored the risks of allowing each sovereign to serve as an independent interpreter of compacts.[361] Over the nineteenth century, courts, particularly the Supreme Court, gained increasing authority as the final arbiters of state–federal disputes. Many of the Court's key early federalism decisions—from *Fletcher v. Peck*[362] to *Dred Scott*[363]—turned on the interpretation of state cessions and compacts.[364]

Second, over the nineteenth century, the inequality between state and federal bargaining power grew. It was never certain that state–federal compacts could legally restrict the federal government: one congressman argued that "all compacts between a nation and a part of its citizens" offered "no other security for the other contracting party but the obligations of good faith and the integrity of the [federal] Government."[365] By the late nineteenth century, self-aggrandizing Congresses were using the power to unilaterally withhold admission to impose ever more invasive restrictions on new states' affairs.[366] In response, the Supreme Court enshrined the equality of new states as an independent constitutional principle that it invoked to invalidate federal legislation. This process reached its apex in *Coyle v. Smith*, in which the Supreme Court struck down Congress's attempt to use conditional admission to require

359. On the Ordinance's quasi-constitutional status, see ONUF, *supra* note 16, at 133–52.

360. 4 ANNALS OF CONG. 1147–59 (1795).

361. On the Virginia and Kentucky Resolves, see Wendell Bird, *Reassessing Responses to the Virginia and Kentucky Resolutions*, 35 J. EARLY REPUBLIC 519 (2015). On debates over constitutional interpretation in the 1790s, see LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 94–127 (2004); Jonathan Gienapp, *Making Constitutional Meaning: The Removal Debate and the Birth of Constitutional Essentialism*, 35 J. EARLY REPUBLIC 375 (2015).

362. 10 U.S. 87 (1810).

363. 60 U.S. 393 (1857).

364. Other key federalist controversies that involved state cessions and compacts included *Strader v. Graham*, 51 U.S. 82 (1850) and *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

365. 5 ANNALS OF CONG. 1325 (1796).

366. Prior to the Civil War, nearly all conditions attached to admission related to public lands and navigable waters (with occasional efforts to continue the application of the Northwest Ordinance). After the Civil War, conditions expanded, encompassing issues of racial equality, polygamy, public schools, and language. *See* Biber, *supra* note 251, at 168.

that Oklahoma maintain the city of Guthrie as its capital.[367] Though this newly enunciated doctrine purported to vindicate state interests, historian Peter Onuf convincingly argued that it was better interpreted as an effort by the Supreme Court to assert its authority over and against Congress.[368]

What does this shifting history suggest for present-day federalism doctrine? I offer three possible conclusions, moving from the most concrete to the most abstract. First, the history of the equal footing doctrine conclusively rebuts state demands for cession of public lands on the basis of this constitutional history.[369] The record is clear: the "Founders," eagerly conscripted by advocates of state public landownership, firmly rejected equal footing claims to the public domain as a matter of both law and practice.[370] The argument has been repeatedly and thoroughly litigated, and consistently repudiated, ever since.

Second, to the extent that the Court should rely on original constitutional understandings in constructing current law, the early history of equal footing compromises the version of equal sovereignty invoked in *Shelby County*. Equal footing has deep if ambiguous roots in American constitutional thought, but equal sovereignty as a freestanding, judicially enforced limitation on congressional power does not. As others have pointed out, constructing the principle of equal sovereignty requires radically extending a handful of Supreme Court cases—primarily *Pollard* and its progeny—far beyond their original import.[371] What has been overlooked is that these cases are dubious as well as inapposite: they are nineteenth-century concoctions resting on questionable historical and interpretative grounds.[372]

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367. 221 U.S. 559 (1911).

368. Peter S. Onuf, *New State Equality: The Ambiguous History of a Constitutional Principle*, 18 PUBLIUS 53, 65 (1988) ("On a superficial level, the articulation of the new state equality principle was a triumph for state sovereignty . . . [but] these gains were made possible by the exercise of federal judicial supremacy.").

369. *See* Landever, *supra* note 263, at 559 ("Claims . . . of state ownership and/or control of the public lands within a state's borders, often are considered by scholars and critics to be frivolous . . . . [But] the 'equal footing' doctrine and the Article IV Property Clause provide a solid basis for this position."); Louis Touton, Note, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 COLUM. L. REV. 817, 833–39 (1980) ("[T]he equal footing doctrine may retain vitality as a limit on the federal government's power over land held since statehood."). *But see* Robert Barrett, *History on an Equal Footing: Ownership of the Western Federal Lands*, 68 U. COLO. L. REV. 761, 793 (1997) (arguing that the "equal footing doctrine, as intended and practiced, has no impact on" federal ownership of public lands); Leshy, *supra* note 271; Paul Conable, Note, *Equal Footing, County Supremacy, and the Western Lands*, 26 ENVTL. L. 1263, 1285 (1996) ("[T]he argument that the equal footing doctrine requires the federal government to transfer its lands to a state upon admission to the Union reveals a fundamental misunderstanding of the doctrine and the nature of state sovereign rights.").

370. *See supra* Part IV.

371. *See* Litman, *supra* note 263, at 1210–29; Price, *supra* note 350.

372. *See supra* notes 262276 and accompanying text. Besides *Pollard*, the primary case that defenders of a broad-based equal sovereignty norm rely on, *Escanaba Co. v. Chicago*, 107 U.S. 678 (1883), is even more ambiguous, particularly because its language concerning equal footing was dicta. But to the extent the case addressed equal footing, it interpreted the doctrine to require that new states were "entitled to and possessed of all the rights of *dominion* and sovereignty which belonged to the original States." *Id.* at 688–89 (emphasis added). To the extent dominion is read to refer to ownership

Third, the problem of line drawing remains, especially in instances like *Coyle v. Smith* when Congress engages in what might intuitively feel like overreach. Defining the exact boundaries of state and federal power lies beyond the scope of this Article, but this history does offer some hints about comparative institutional competence in defining state equality. Although messy, the model of equal footing embraced in the late eighteenth century—a process dominated by politics and negotiation centered in Congress—often worked well enough, if creakily. Tennessee's experience demonstrates that states could, and did, exercise considerable power to protect their interests through the federal government. Moreover, if one credits present-day scholars like Abbe Gluck, contemporary federalism is already centered in Congress as a descriptive matter; this outcome, these scholars have further argued, is *normatively* desirable and paradoxically serves to bolster state authority.[373] The history presented here suggests such Congress-centered conceptions lie closer to early understandings of federalism than paeans to a dual federalism policed by judicial guardians.

The Supreme Court's record in applying equal footing, by contrast, is undistinguished. Much of the problem is that equal footing's mandate that newly admitted states possess "equal sovereignty" with existing states requires construing two notoriously imprecise terms whose definitions were as contested in the late eighteenth century as they are now.[374] This formulation places enormous pressure on the nebulous boundary between "sovereignty" and other authority, and on distinguishing the myriad ways in which the federal government treats patently different states differently. As Justice Catron warned in *Pollard*, these highly malleable lines offer a clear invitation to judicial policy-making, enticing the Court to reach its favored results by decreeing certain rights as "sovereign" or unequal through *ipse dixit*.[375] Unsurprisingly, given this temptation to judicial aggrandizement, the Supreme Court's unpredictable and

rights, see, for example, *United States v. California*, 332 U.S. 19, 43 (1947) (Frankfurther, J., dissenting) ("To speak of 'dominion' carries precisely those overtones in the law which relate to property and not to political authority."), and *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. 603, 618 (1812) (interpreting a charter to grant "the complete and absolute dominion in property"). This phrasing is flatly at odds with all the history outlined here. *Escanaba*'s formulation is especially ironic given that the case arose in Illinois, a state that had earlier tried, and failed, to assert its "rights of dominion" to the public domain. *See supra* notes 257–259 and accompanying text.

373. *See* Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 1997 (2014) ("Federalism today is something that mostly comes—and goes—at Congress's pleasure.").

374. *See, e.g.*, Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after Garcia*, 1985 SUP. CT. REV. 341, 346 (1985) ("The rhetoric of state sovereignty is responsible for much of the intellectual poverty of our federalism-related jurisprudence . . . . '[S]overeignty' does not have any clear, undisputed meaning."); Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 596 (1982) ("Equality will cease to mystify—and cease to skew moral and political discourse—when people come to realize that it is an empty form having no substantive content of its own.").

375. *See supra* notes 272278 and accompanying text.

vacillating jurisprudence in this area has seemed to reflect the Court's shifting solicitude for state claims rather than principled distinctions.[376]

History rarely offers clear answers to current dilemmas but in this instance, it does seem to offer one lesson, especially for the Court: modesty. In the same way that conservative Justices once hesitated before announcing broad unenumerated rights rooted in tradition,[377] the Court should pause before dramatically expanding an ill-defined, atextual principle with a convoluted history far beyond its limited prior applications. In this instance, the messiness of negotiation embraced in the late eighteenth century, and the resolutions wrought through the hard-fought processes of governance, seem preferable to the false certainty of the Supreme Court's arbitrary line drawing.

CONCLUSION

When, in January 2016, rancher Ammon Bundy led an armed occupation of a federal wildlife refuge, his actions reflected twenty-first-century partisan politics, but they also represented the latest iteration of one of the oldest questions in American public law. Like the intruders of an earlier era, who had cited state law to vindicate their defiance of the federal government, Bundy spun a legal theory to justify his actions: Bundy, his lawyers insisted, was motivated by his "understanding of federalism and his genuine belief in originalism."[378] Citing the equal footing doctrine, including *Pollard*, and a tendentious state

376. This uncertainty appeared in a number of the Supreme Court's late nineteenth-century public lands cases. Generally, in cases involving dry lands, the Court followed *Gratiot* and upheld federal authority. *See, e.g.*, Stearns v. Minnesota, 179 U.S. 223, 240–53 (1900); Van Brocklin v. Tennessee, 117 U.S. 151, 179–80 (1886); *see also* Case v. Toftus, 39 F. 730 (C.C.D. Or. 1889) (applying this reasoning to shorelines). In cases involving submerged lands, the Court followed *Pollard* and mandated state equality. *See* Shively v. Bowlby, 152 U.S. 1 (1894); Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892); Escanaba Co. v. City of Chicago, 107 U.S. 678 (1883); Weber v. Bd. of Harbor Comm'rs, 85 U.S. 57 (1873); Withers v. Buckley, 61 U.S. 84 (1857). But the Court's unpredictable application of the equal footing doctrine is clearest in one of the doctrine's most inapposite areas: Indian affairs. In the late nineteenth century, the Court oddly held that equal footing required the extension of state jurisdiction into Indian country, Draper v. United States, 164 U.S. 240, 246–47 (1896), and the abrogation of federal Indian treaties, Ward v. Race Horse, 163 U.S. 504, 514–16 (1896), even though the Court had already held that neither power was a sovereign right enjoyed by the original states, Worcester v. Georgia, 31 U.S. 515, 557 (1832). Yet, a mere decade after this brief efflorescence of state sovereignty, the Court reversed, more sensibly acknowledging that federal power over Indian affairs did not violate state equality. *See* United States v. Sandoval, 231 U.S. 28, 49 (1913); Dick v. United States, 208 U.S. 340 (1908); *see also* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 204 (1999) (abrogating *Ward* as resting on a "false premise").

377. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 120–28 (1989) ("Although assuredly having the virtue (if it be that) of leaving judges free to decide as they think best when the unanticipated occurs, a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all.").

378. Defendant Ammon Bundy's Motion to Dismiss for Lack of Subject Matter Jurisdiction at 7, United States v. Ammon Bundy, No. 3:16-CR-00051 (D. Or. May 9, 2016).

report arguing for the cession of federal lands, Bundy's attorneys sought to relitigate the constitutionality of federal landownership.[379]

Unfortunately for Bundy and his allies demanding the cession of federal lands, the "Founding Fathers" they purport to revere crafted a constitutional settlement at odds with this allegedly "originalist" position.[380] Over two decades in the late eighteenth century, the "Founders" determined that the federal government would control the public domain, a decision they then defended against contrary state claims. Bundy's arguments reflect not "original understanding" but a durable dissenting constitutional tradition that has consistently failed to become law. At least on its historical merits, their view deserves to continue to fail.

Bundy's appeal, however, rests less on his claims' particulars than on an assumption, grounded in constitutional history, about the appropriate role of the federal government. Here, Bundy's arguments echo dominant constitutional understandings. "The Framers . . . ensured that powers which 'in the ordinary course of affairs, concern the lives, liberties, and properties of the people' were held by governments more local and more accountable than a distant federal bureaucracy," Bundy's attorneys assert, quoting Chief Justice Roberts, who was quoting James Madison.[381]

The rise of federal title questions this commonplace assumption about the historical primacy of local control. For large swaths of the United States, the "properties of the people" came to depend almost entirely on a "distant federal bureaucracy." This, perhaps, was not quite what Madison anticipated when he wrote *The Federalist*; this outcome owed much to chance and contingency. But it was nonetheless what he and the other members of his generation built as they grappled with the new world of property they had also created. The constitutional history of the United States, after all, was not the simple unfolding of the mind of James Madison. It was the chaotic and unpredictable work of millions of individuals, non-elite as well as elite, who together sought to understand, adapt to, and govern a changing world as best they could.

379. Defendant Ammon Bundy's Memorandum of Points and Authorities in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction at 4, 8 n.29, 13, United States v. Ammon Bundy, No. 3:16-CR-00051 (D. Or. May 9, 2016) (citing HOWARD ET AL, *supra* note 322).

380. *Id.* at 7; Defendant Ammon Bundy's Motion to Dismiss for Lack of Subject Matter Jurisdiction, *supra* note 378, at 7.

381. Defendant Ammon Bundy's Motion to Dismiss for Lack of Subject Matter Jurisdiction, *supra* note 378, at 3 (quoting Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 536 (2012) (quoting THE FEDERALIST No. 45, at 293 (J. Madison) (Clinton Rossiter ed., 1963)).