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THE PROPERTY CLAUSE, ARTICLE IV, AND CONSTITUTIONAL STRUCTURE

*Eric Biber**

ABSTRACT

Federal public lands account for approximately thirty percent of the United States and have been the grounds for fierce political and legal battles: whether to lease those lands for the extraction of fossil fuels, whether to protect landscapes and Native sacred sites as national monuments, whether federal law on the public lands preempts state law, and even whether federal ownership of lands within states is constitutional. Those battles turn on questions of executive versus congressional power to control the management of the public lands, and state versus federal authority on those lands. Answering those questions depends on a proper understanding of federal power under the Property Clause—Article IV, Section 3, Clause 2 of the U.S. Constitution—which empowers Congress to “dispose of and make all needful Rules and Regulations” for the property of the United States, including the public lands.

Scholars have debated the meaning of the Clause and how it might inform separation-of-powers and federalism questions. But until now, they have not considered in-depth the implications of the location of the Clause in Article IV of the Constitution. Article IV’s provisions address interstate relationships, generally mediated outside the federal government, as part of an effort to build those relationships and advance a stronger Union. The history of the drafting of the Property Clause shows that, while the Clause authorizes a powerful role for the federal government in managing the public lands, the Clause was intended to resolve interstate disputes among the original thirteen states as to western land claims and the creation of new western states.

This understanding of Article IV as a “horizontal federalism” Article focused on interstate relations leads to important conclusions as to how to properly understand the Property Clause. It supports emphasizing congressional primacy in implementing the Clause—although this congressional primacy is moderated by the recognition of a necessary executive

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power that has discretion to manage the public lands where Congress is silent. This understanding also supports a strong federal role vis-à-vis states in the management and retention of public lands within those states. The Article applies these principles to resolve key disputes over public lands management, such as executive power to revoke national monuments or terminate existing fossil fuel leases, and claims that federal power over public lands should be constrained or even eliminated. It also identifies how a “horizontal federalism” understanding of Article IV could resolve other important questions about how to interpret the Property Clause and other provisions of Article IV.

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INTRODUCTION

In early 2021, the Biden administration froze issuance of all new oil and gas leases on federal lands in the United States as part of an aggressive climate effort.¹ That step triggered political pushback on the grounds that the freeze exceeded executive power under the statutes that guide development of fossil fuels on federal lands.²

Just four years earlier, the Trump administration unilaterally scaled back national monuments that had been proclaimed by Presidents Obama and Clinton on federal public lands in Utah.³ National monument designation can restrict the development of public lands for resource extraction, including minerals, oil, and gas.⁴ The Trump administration was sued for overreach, on the grounds that it had exceeded its powers under the relevant statutory schemes.⁵

In early 2016, armed groups occupied a federal national wildlife refuge in southeastern Oregon, contending that the federal government had no power to retain land ownership in the western United States and that the millions of acres of federal lands in the West—including national parks and national forests—should be turned over to the states, counties, or private parties.⁶ The occupation ended in violence and death.⁷ The legal arguments behind it have a long preceding history, including threats of litigation by the state of Utah to force the

¹ See Exec. Order No. 14,008, 86 Fed. Reg. 7,619 (Jan. 27, 2021). That freeze was enjoined in the summer of 2021 by a federal district court on the grounds that the freeze violated federal laws mandating a minimum amount of oil and gas development on federal lands. See Niina H. Farah & Heather Richards, *Federal Judge Overturns Oil Leasing Freeze in Blow to Biden*, POLITICO: E&E NEWS (June 16, 2021, 7:16 AM), <https://subscriber.politicopro.com/article/eenews/1063735105>.

² See Emma Dumain, *Biden Drilling Order Sparks Legislative Backlash*, POLITICO: E&E NEWS (Jan. 29, 2021, 6:53 AM), <http://subscriber.politicopro.com/article/eenews/1063723841>.

³ See Richard Gonzales, Kirk Siegler & Colin Dwyer, *Trump Orders Largest National Monument Reduction in U.S. History*, NPR (Dec. 4, 2017, 5:14 AM), <https://www.npr.org/sections/thetwo-way/2017/12/04/567803476/trump-dramatically-shrinks-2-utah-national-monuments>.

⁴ See *infra* Part III.A.

⁵ See, e.g., Complaint at 3–4, *Nat. Res. Def. Council v. Trump*, No. 17-cv-2606 (D.D.C. Dec. 7, 2017).

⁶ Kirk Johnson, *Trial to Begin in Standoff at Oregon Wildlife Refuge*, N.Y. TIMES (Sept. 12, 2016), <https://www.nytimes.com/2016/09/13/us/oregon-malheur-wildlife-refuge-bundy.html>.

⁷ Julie Turkewitz & Kirk Johnson, *Ammon Bundy and 7 Oregon Protestors Held; LaVoy Finicum is Reported Dead*, N.Y. TIMES (Jan. 26, 2016), <https://www.nytimes.com/2016/01/27/us/oregon-armed-group-arrest-bundy.html>.

transfer of federal public lands to Utah⁸ and prior political claims for state or local government ownership of federal lands.⁹

States like California and Oregon have sought to restrict mining activities on federal lands that they believe cause significant environmental harms—in particular, mining for gold in streambeds.¹⁰ Those states passed laws restricting or temporarily prohibiting gold mining on riverbeds in their states. Mining groups challenged the laws as preempted by federal law.¹¹

These different conflicts—all with varying policy and ideological valences—are examples of the many disputes over the management of the almost thirty percent of the country owned and managed by the United States.¹² These disputes date back to the first days of the federal government in the late eighteenth century and have real policy stakes—touching climate change, the conservation of lands sacred to Native American communities and important for biodiversity, the relationship of the federal government to states in the West, and the protection of water quality.

Resolving these legal and policy disputes implicates constitutional law, as applied through the Property Clause, the constitutional provision that is the basis for most federal land management and ownership in the United States.¹³ Does the Clause authorize federal law that preempts state law? Does it authorize

⁸ Transfer of Public Lands Act and Related Study, H.B. 148, 2012 Gen. Sess. (Utah 2012); Debbie Hummel, *Utah Demands Federal Government Return Public Lands to State*, REUTERS (Mar. 23, 2012, 11:50 PM), <http://reuters.com/article/us-utah-lands/utah-demands-federal-government-return-public-lands-to-state-idUSBRE82N03420120324>. For legal analysis supporting Utah's claims, see generally DONALD J. KOCHAN, A LEGAL OVERVIEW OF UTAH'S HB 148—THE TRANSFER OF PUBLIC LANDS ACT (2013) [hereinafter KOCHAN, A LEGAL OVERVIEW], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2200471; JOHN W. HOWARD, JAMES S. JARDINE, RONALD D. ROTUNDA, RICHARD SEAMON & GEORGE R. WENTZ, JR., LEGAL ANALYSIS OF THE LEGAL CONSULTING SERVICES TEAM PREPARED FOR THE UTAH COMMISSION FOR THE STEWARDSHIP OF PUBLIC LANDS (2015), <https://www.congress.gov/116/meeting/house/110088/documents/HHRG-116-II13-20191017-SD046.pdf>; 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 (2013) [hereinafter Kochan, "Duty to Dispose"].

⁹ John D. Leshy, *Are U.S. Public Lands Unconstitutional?*, 69 HASTINGS L.J. 499, 574–75 (2018).

¹⁰ See Jonathan Rosenthal, *People v. Rinehart: No Preemption of State Environmental Regulations Under the Mining Act of 1872*, 44 ECOLOGY L.Q. 555, 557 (2017).

¹¹ See Sean Hecht, *California Supreme Court Holds Unanimously that the State May Restrict Mining Methods on Federal Lands*, LEGALPLANET (Aug. 22, 2016), <https://legal-planet.org/2016/08/22/california-supreme-court-holds-unanimously-that-the-state-may-restrict-mining-methods-on-federal-lands/>; Bohmker v. Oregon, 903 F.3d 1029, 1031 (9th Cir. 2018).

¹² See CONG. RSCH. SERV., FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 1 (2020), <https://sgp.fas.org/crs/misc/R42346.pdf>.

¹³ See, e.g., Kochan, "Duty to Dispose," *supra* note 8, at 1136 (stating that the legality of federal ownership of public lands "depends, in large part, on the proper interpretation of the Property Clause in the Constitution"); U.S. CONST. art. 4, § 3, cl. 2.

federal land ownership within states? And what is the relationship between executive and congressional power in the implementation of the Clause?

The disputes about the meaning of the Property Clause and its relationship to the sovereignty of states have ramifications beyond the Clause itself. Arguments about the constitutionality of federal land ownership within states depend in part on the “equal footing” doctrine, a doctrine developed by the Supreme Court to limit the extent to which Congress can leverage its power over the admission of states so as to deprive those new states of equality in key components of their political sovereignty.¹⁴ Recently, the Supreme Court has controversially extended this case law to produce an “equal sovereignty” doctrine that required striking down a key provision of the Voting Rights Act on the grounds that the Act improperly treated states differently.¹⁵

This Article puts the Property Clause in a broader constitutional context by explaining how the Clause’s history, text, structure, and placement in Article IV of the Constitution can help answer these difficult questions. The Clause was intended to resolve a dispute between states over conflicting claims to western lands after the American Revolution, responding to a major gap in the Articles of Confederation.¹⁶ The Clause empowers the federal government to have meaningful sovereignty in its management of those lands, ensuring that the federal government can prevent interstate disputes and facilitate the development of new, independent states. This role for the federal government as a neutral party between disputing states also means that it owns and manages the public lands for all Americans—whether in new states or old, whether in states that had western claims or no claims at all. This role does not change simply because the federal government owns land within the borders of a state. Accordingly, the Clause can be best understood as authorizing federal land ownership in states and authorizing federal preemption of contrary state law.

The Clause’s text allocates management power to Congress, implying congressional primacy in management of federal lands vis-à-vis the Executive. The structure of Article IV further supports this reading. While the first three Articles of the Constitution create the structure for the nascent federal government, Article IV does something very different. All provisions of Article IV attempt to deepen the relationships between the component states in the

¹⁴ For example, the Court struck down a law that constrained where the newly admitted state of Oklahoma could locate its state capitol. *Coyle v. Smith*, 221 U.S. 559, 574 (1911).

¹⁵ *Shelby County v. Holder*, 570 U.S. 529, 542 (2013).

¹⁶ *See infra* Part II.A.

Union, also known as “horizontal federalism.”¹⁷ Facilitating deeper state-to-state relationships can involve connections directly between state governments—for example, in the extradition of a fugitive of justice from one state to another. Or it can involve connections between the residents or citizens of the separate states—connections made through interstate travel and commerce that in turn are facilitated by requiring states to grant equivalent privileges and immunities to residents of other states. Horizontal federalism may be advanced without any explicit mediating role by the federal government, as in the Article IV Privileges and Immunities Clause, which simply requires that citizens of one state “shall be entitled to all Privileges and Immunities of the Citizens in the several States.”¹⁸ Or, alternatively, there might be a role for the federal government in advancing interstate connections, such as the empowerment of Congress to implement the Full Faith and Credit Clause, which ensures that judgments in one state are recognized in another state.¹⁹ Regardless, deepening relationships between states can help build a stronger Union independent of the creation of a central government.

In contrast, “vertical federalism” focuses on the creation of a federal government that acts as a unitary entity for the United States as a whole.²⁰ Vertical federalism entails the development of a federal government for the nation—a government that is selected at least in part independently from the individual states, that undertakes actions (such as in the realm of foreign affairs) that are reserved to the nation and not the states, and that is a governmental institution separate from the state governments. Vertical federalism can play a role in advancing horizontal federalism. For instance, the strong federal power under the Property Clause helps advance the horizontal federalism goals of Article IV, given the role the Clause played in resolving interstate disputes over western land claims. But vertical federalism often acts to advance a unitary national government (for example, the relations of the United States with foreign nations, in which states do not participate).

The clear text of the Clause and Article IV’s focus on “horizontal federalism” creates a strong argument for the primacy of congressional implementation of the Property Clause. Congress is a representative of states in a way that the President is not—and as a “horizontal federalism” article, Article IV requires a focus on interstate relations. Disposal of the public lands—the

¹⁷ For prior scholarship using this term to reflect state-to-state relationships in U.S. constitutional law, see *infra* note 105.

¹⁸ U.S. CONST. art. IV, § 2.

¹⁹ *Id.* § 1.

²⁰ See, e.g., Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 494 (2008).

lands entrusted to the federal government by cessions from states as part of a resolution of interstate disputes or that were obtained by the efforts of the states together—therefore should require clear authorization by the congressional representatives of those states.

There are necessary limits to congressional primacy in the context of the Property Clause, however. The day-to-day management of those lands requires many individual decisions by the Executive Branch, decisions that Congress will rarely have the capacity to resolve *ex ante* through legislation. Thus, the management (and protection) of those lands will require some inherent discretion by the Executive. This managerial discretion is a counterpoint to a “horizontal federalism” understanding of congressional supremacy under Article IV.

This Article is the first to draw on a systematic analysis of Article IV as a whole and its place in the overall structure of the Constitution and to use that analysis to resolve crucial constitutional questions about the scope and application of the Property Clause. There is a wide range of literature examining the scope of federal power under the Clause, but it has not engaged in-depth with the implications of the Clause’s inclusion within Article IV.²¹ Nor has that literature generally engaged with how the text of the Clause and its location within Article IV might shape our understandings of the boundary between

²¹ For prior literature examining the Property Clause with respect to executive versus congressional power, see generally David H. Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 NAT. RES. J. 279 (1982); Harold H. Bruff, *Executive Power and the Public Lands*, 76 U. COLO. L. REV. 503 (2005); John Yoo & Todd Gaziano, *Presidential Authority to Revoke or Reduce National Monument Designations*, 35 YALE J. ON REGUL. 617 (2018); John D. Leshy, *A Property Clause for the Twenty-First Century*, 75 U. COLO. L. REV. 1101 (2004); Eugene R. Gaetke, *Congressional Discretion Under the Property Clause*, 33 HASTINGS L.J. 381 (1981) [hereinafter Gaetke, *Congressional Discretion*]. For prior literature examining the power of the federal government with respect to states under the Property Clause, see generally Leshy, *supra* note 9; Dale D. Goble, *The Myth of the Classic Property Clause Doctrine*, 63 DENV. U. L. REV. 495 (1986); Eugene R. Gaetke, *Refuting the “Classic” Property Clause Theory*, 63 N.C. L. REV. 617 (1985) [hereinafter Gaetke, *Refuting*]; Robert G. Natelson, *Federal Land Retention and the Constitution’s Property Clause: The Original Understanding*, 76 U. COLO. L. REV. 327 (2005); Kochan, “*Duty to Dispose*,” *supra* note 8; Jeffrey M. Schmitt, *Limiting the Property Clause*, 20 NEV. L.J. 145 (2019) [hereinafter Schmitt, *Limiting the Property Clause*]; David E. Engdahl, *State and Federal Power over Federal Property*, 18 ARIZ. L. REV. 283 (1976); Robert E. Hardwicke, Carl Illig & C. Perry Patterson, *The Constitution and the Continental Shelf*, 26 TEX. L. REV. 398 (1948); C. Perry Patterson, *The Relation of the Federal Government to the Territories and the States in Landholding*, 28 TEX. L. REV. 43 (1950); Jeffrey Schmitt, *A Historical Reassessment of Congress’s “Power to Dispose of” the Public Lands*, 42 HARV. ENV’T L. REV. 453 (2018); Peter A. Appel, *The Power of Congress “Without Limitation”: The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1 (2001); Albert W. Brodie, *A Question of Enumerated Powers: Constitutional Issues Surrounding the Federal Ownership of the Public Lands*, 12 PAC. L.J. 693 (1981); Carolyn M. Landever, *Whose Home on the Range? Equal Footing, the New Federalism and State Jurisdiction on Public Lands*, 47 FLA. L. REV. 557 (1995).

executive and congressional power under the Property Clause.²² And while scholars have examined Article IV as a whole, the most significant work has focused on other topics besides the Property Clause, such as congressional power to implement specific clauses in the Article.²³

Part I of this Article provides an overview of the Property Clause and the disputes about executive and federal power under the Clause, using the specifics of the fights over national monuments, federal fossil fuel leasing, preemption of state law, and divestment of federal lands within states. Part II contains the heart of the constitutional contributions of the piece: an overview of the historical context of the Property Clause; an understanding of Article IV as a separate and coherent component of the Constitution in ways that are meaningful for constitutional interpretation; and an explanation of the need for residual executive discretion to manage the day-to-day decisions of the public lands.

Part III applies the theory developed in Part II to the problems identified in Part I. It identifies a key distinction between the revocation of national monuments and the termination of future or current oil and gas leases—the former allows for divestiture of interests in public lands while the latter does not. That distinction is crucial because divestiture of federal ownership of lands is a step that should require a clear congressional authorization for executive action to occur—a principle long recognized as a matter of statutory interpretation by the courts. The text of the Clause and the “horizontal federalism” nature of Article IV provide a constitutional grounding for this statutory interpretation principle. However, the need for executive management discretion is more

²² The placement of the Clause in Article IV has generally been mentioned only in passing while discussing the Clause and its interpretation. See GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY* 27–29 (2004) (rejecting an interpretation of the Clause as the primary basis for congressional spending powers because of its placement in Article IV as opposed to Article I); Lance F. Sorenson, *The Hybrid Nature of the Property Clause: Implications for Judicial Review of National Monument Reductions*, 21 U. PA. J. CONST. L. 761, 781 (2019) (noting briefly the placement of the Clause in Article IV as opposed to Article I as a basis for the argument that executive decisions under the Clause should be shielded from judicial review); Robert L. Glicksman, *Severability and the Realignment of the Balance of Power over the Public Lands: The Federal Land Policy and Management Act of 1976 After the Legislative Veto Decisions*, 36 HASTINGS L.J. 1, 59 n.360 (1984) (noting and rejecting the argument that placement of the Clause in Article IV might affect the constitutionality of legislative veto provisions for laws enacted pursuant to the Clause). A few scholars have argued, without much detailed analysis, that the placement of the Clause in Article IV supports divestiture of federal ownership of public lands within states. See Landever, *supra* note 21, at 577; Brodie, *supra* note 21, at 719–21.

²³ See generally Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468 (2007) (exploring congressional power under the Article); JOSEPH F. ZIMMERMAN, *UNIFYING THE NATION: ARTICLE IV OF THE UNITED STATES CONSTITUTION* (2015) (providing an overview of the implementation of the Article). For an example of scholarship that has focused on other sections of Article IV, see generally Ryan C. Williams, *The “Guarantee” Clause*, 132 HARV. L. REV. 602 (2018).

important when divestiture is not at stake, as in the context of terminating current or future fossil fuel leasing.

Part III also applies the text of the Clause and the “horizontal federalism” conception of Article IV to conclude that federal preemption of state law is mandated by the text and structure of the Constitution. The Clause grants broad authority to Congress in the text to enact laws that are preeminent over state law under the Supremacy Clause of Article VI. The “horizontal federalism” conception of Article IV supports a strong role as proprietor and sovereign for the federal government with respect to its lands. Part III then shows that while a “horizontal federalism” conception of Article IV might support a narrow version of the equal footing doctrine, as developed by the Supreme Court in the nineteenth and twentieth centuries, it cannot support a broad version of that doctrine that would divest the federal government of ownership of public lands within states, nor can it support its transformation into an “equal sovereignty” doctrine that requires Congress to provide for uniformity with respect to states outside the context of admitting states to the Union.

Part IV examines some possible extensions of the analysis in this Article to other questions with respect to the Property Clause. A horizontal federalism understanding of Article IV may support broader congressional power to structure territorial governments or federal land agencies outside the constraints of the Appointments Clause, for instance, or broader congressional power to structure courts and manage dispute resolution in territories or with respect to federal lands outside the constraints of Article III.

Finally, in the Conclusion, this Article notes how a horizontal federalism understanding of Article IV may also have traction for a range of other issues that relate to the rest of Article IV, such as the Guarantee Clause.

I. PROPERTY CLAUSE CONFLICTS

The federal government owns approximately 640 million acres of land within the United States, or about thirty percent of the total land area of the nation.²⁴ Those lands are managed by a diverse range of agencies, from the Department of Defense (for military bases) to the U.S. Fish and Wildlife Service (for national wildlife refuges); from the National Park Service to the U.S. Forest Service and the Bureau of Land Management.²⁵ The public lands contain some

²⁴ CONG. RSCH. SERV., *supra* note 12.

²⁵ CAROL HARDY VINCENT, LAURA A. HANSON & CARLA N. ARGUETA, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 1 (2017).

of the most iconic landscapes and protected areas in the country; over many decades, timber, minerals, and fossil fuels have been extracted from them; they are used for recreation and grazing and conservation; and they include sites that are important or even sacred for many Americans.

Those 640 million acres of public lands are in fact only a fraction of the total amount of land that the federal government has owned since the founding of the United States—the federal government at one point or another has owned land that exceeds eighty percent of the total area of the country but sold or transferred most of that land to private parties, corporations, or states over most of the nineteenth century.²⁶ That great land transfer helped facilitate the settlement of much of the United States by European Americans.

Transfers happened through grants to individuals—as in the Homestead Act, where settlers who worked 160 acres of land for five years could obtain fee simple ownership of that land.²⁷ There were also land grants to states upon admission to the Union to support schools and other infrastructure objectives, and land grants to corporations to subsidize the construction of railroads.²⁸ Transfers also happened through sale—much of the land transfers in the first half of the nineteenth century were through sales of land through land offices dispersed throughout the United States.²⁹ Transfers were often in the form of fee simple ownership, but there were exceptions: the Stock-Raising Homestead Act of 1916 allowed the grant of up to 640 acres of land chiefly valuable for grazing, but the federal government retained ownership of the subsurface minerals of granted lands.³⁰ And the General Mining Act of 1872 authorized the granting of a limited property interest to miners who discovered valuable minerals on the public lands, with the interest generally being restricted to the right to extract the minerals from those lands and the possibility of eventual fee simple ownership.³¹

The great extent of the public lands, their central role to the development of the United States, and their great value—in economic and non-economic terms—to the present and the future of the country make public lands a vital political, legal, and policy topic. They are, for instance, at the center of the Biden

²⁶ See CHRISTINE A. KLEIN, FEDERICO CHEEVER, BRET C. BIRDSONG, ALEXANDRA B. KLASS & ERIC BIBER, *NATURAL RESOURCES LAW: A PLACE-BASED BOOK OF PROBLEMS AND CASES* 38–39 (4th ed. 2018).

²⁷ The Homestead Act of 1862, Pub. L. No. 37-64, 12 Stat. 392.

²⁸ See KLEIN ET AL., *supra* note 26, at 85.

²⁹ See MALCOLM J. ROHRBOUGH, *THE LAND OFFICE BUSINESS: THE SETTLEMENT AND ADMINISTRATION OF AMERICAN LAND PUBLIC LANDS 1789-1837*, at 233–34 (Wadsworth Publ'g Co. 1990) (1968).

³⁰ Stock-Raising Homestead Act of 1916, Pub. L. No. 64-290, 39 Stat. 862.

³¹ General Mining Act of 1872, 30 U.S.C. § 26; see also JOHN D. LESHY, *THE MINING LAW: A STUDY IN PERPETUAL MOTION* 35, 39–40 (1987) (providing an overview of the law).

administration's efforts to address climate change through restoration of ecosystems and landscapes and the production of renewable energy.³²

The Property Clause is the most significant and relevant constitutional provision for federal government power over the public lands. And interpreting the Property Clause has been at the heart of a series of controversial and difficult questions about that federal power over the public lands—whether it is determining which branch of the federal government has primacy in managing those lands, understanding the proper scope of federal power over those lands vis-à-vis states, or even recognizing the basis for federal ownership of those lands.

This Part surveys three key disputes over the Property Clause. Part I.A provides an overview of the disputes over executive versus congressional power in the context of the Property Clause. Part I.B describes the conflict over whether federal law, pursuant to the Clause, preempts state law. And Part I.C introduces the equal footing doctrine and arguments based on that doctrine that extensive federal land ownership within states is unconstitutional.

A. Executive Versus Congressional Power

A constant question in public lands law concerns the power of the President to interpret and administer laws enacted by Congress. This is necessarily an inter-branch dispute because a broad executive power to interpret (or arguably, at the extreme, disregard) congressional legislation increases executive power at the expense of Congress. Reciprocally, constraining executive power to interpret or implement public lands laws would empower Congress, as the President would need to return to Congress for additional authority when faced with ambiguity or uncertainty as to executive power.

Conflicts over the scope of executive power to interpret and administer public land statutes extend back to the early days of the United States—for instance, a high-stakes conflict between President Andrew Jackson and Congress involved whether the President could unilaterally determine if the federal government would accept only gold or silver in payment for sales of federal lands to the public.³³ In the late-nineteenth and early-twentieth centuries, there were prominent debates and litigation over whether presidents had the

³² See Exec. Order No. 14,008, 86 Fed. Reg. 7,619 (Jan. 27, 2021) (aiming at “[t]ackling the [c]limate [c]risis at [h]ome and [a]broad”).

³³ See *infra* notes 160–66 and accompanying text.

power to protect public lands from privatization by withdrawing them from disposal statutes.³⁴

Today, these debates focus on the extent to which public lands should be protected from large-scale industrial development, such as mining or oil and gas extraction. Since the early twentieth century, presidents have had the power to designate national monuments pursuant to the Antiquities Act. Under the Act, the President is authorized to do the following:

[T]he President of the United States is hereby authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.³⁵

Since President Theodore Roosevelt, during whose administration the Act was passed, many presidents have used the Antiquities Act to set aside large areas of land from development. President Theodore Roosevelt protected the Grand Canyon; President Franklin Roosevelt protected areas adjoining Grand Teton National Park; President Carter protected large swaths of Alaska; President Clinton protected red rock deserts in southwestern Utah; and President Obama protected additional areas of Utah, including the Bears Ears National Monument, proclaimed in late 2016.³⁶

The current controversy entails efforts by the Trump administration to unilaterally eliminate or substantially shrink national monument designations by past administrations—most significantly, those of the Bears Ears National Monument in Utah by the Obama administration and the Grand Staircase-Escalante National Monument in Utah by the Clinton administration.³⁷ The language of the Antiquities Act does not explicitly empower the President to undo designations of monuments. While there are past examples of executive changes to previously designated monuments, only one approaches the scope of the Trump administration's changes, and none of the previous changes were

³⁴ See *infra* Part III.A.

³⁵ Antiquities Act of 1906, Pub. L. No. 59-209, 34 Stat. 225.

³⁶ See KLEIN ET AL., *supra* note 26, at 584–88.

³⁷ See John C. Ruple, *The Trump Administration and Lessons Not Learned from Prior National Monument Modifications*, 43 HARV. ENV'T L. REV. 1, 3 (2019); Mark Squillace, Eric Biber, Nicholas S. Bryner & Sean B. Hecht, *Presidents Lack the Authority to Abolish or Diminish National Monuments*, 103 VA. L. REV. ONLINE 55, 55 n.2 (2017).

challenged in court.³⁸ Scholarly defenders of the Trump administration argued that the ability to undo the actions of past presidents is an inherent component of executive power and should be read into the statutes even if not explicitly granted to the President in the text of the statute—these defenders accordingly developed a broad narrative of executive power in the context of public lands.³⁹ Critics took a narrower vision of presidential power, emphasizing the textual grant of power to Congress under the Property Clause.⁴⁰

The positions, however, will likely be reversed under the Biden administration when it comes to the development of federal public lands for fossil fuel extraction. Pursuant to statute, the Executive Branch can lease areas of federal public lands for coal, oil, and gas production—to date over thirteen million acres are leased, producing a substantial fraction of the total fossil fuel production in the United States.⁴¹ Fossil fuel production from federal public lands is significant from a climate change perspective, ultimately contributing about one-quarter of all greenhouse gas emissions in the country.⁴²

As with the Antiquities Act, the Executive Branch is given broad discretion about whether and which lands to lease for fossil fuel development. There are provisions that allow for the termination of leases for violation of lease terms and other causes—in addition, like the Antiquities Act, the statute neither explicitly authorizes nor prohibits unilateral executive termination of existing leases without cause.⁴³

Environmental advocates have long urged the United States to cease leasing new areas for fossil fuel leasing, contending that the Executive's broad discretion to decide whether and which lands to lease enables a president to also refuse to lease any lands.⁴⁴ These advocates contend this step is necessary because of the need both to protect public lands from the localized negative impacts of development and to restrict greenhouse gas emissions that contribute

³⁸ See Ruple, *supra* note 37, at 3–4. Several of these reductions involved military operations or the need for resources for military operations during war, and therefore might be understood as based on presidential war powers. Jedediah Britton-Purdy, *Whose Lands? Which Public? The Shape of Public-Lands Law and Trump's National Monument Proclamations*, 45 *ECOLOGY L.Q.* 921, 939 n.76, 953 (2018).

³⁹ See Yoo & Gaziano, *supra* note 21, at 639–40.

⁴⁰ See, e.g., Squillace et al., *supra* note 37, at 56.

⁴¹ See BUREAU OF LAND MGMT., *LAND STATISTICS 2019*, at 84–85 tbl.3-12, 86–93 tbl.3-13 (2020) (providing statistics for oil and gas leases); Eric Biber & Jordan Diamond, *Keeping it All in the Ground?*, 63 *ARIZ. L. REV.* 279, 282 (2021) (noting federal leases produce twenty-four percent of oil production, thirteen percent of natural gas, and forty-three percent of coal in the United States).

⁴² See Biber & Diamond, *supra* note 41.

⁴³ *Id.*

⁴⁴ *Id.* at 280.

to climate change.⁴⁵ Opponents contend that the language and the purpose of the statute mandate the development of federal lands for fossil fuels and a minimum level of leasing and development.⁴⁶ One can go even further, however, in restricting fossil fuel development on federal lands by terminating existing leases on a piecemeal or wholesale basis.⁴⁷

Debates over executive power under the Property Clause come and go in significant part because of the importance of statutes granting broad discretion to the Executive under the Clause. For instance, the Mineral Leasing Act, which sets up the system for leasing federal lands for oil and gas development, authorizes the Secretary of the Interior “to do any and all things necessary to carry out and accomplish the purposes of this chapter.”⁴⁸ Likewise, the language of the Antiquities Act allows broad discretion as to what kinds of resources qualify lands for designation as national monuments—so broad that courts have mostly refused to second-guess presidential proclamations of monuments.⁴⁹ Accordingly, these debates over executive power will recur and persist beyond the current debates over national monuments and fossil fuel leasing. And the application of congressional statutes to millions of acres of land and thousands of individual management actions also necessarily means that the Executive has discretion to interpret and apply even relatively clear and specific laws.

B. Preemption

Another key constitutional debate over the Property Clause has been the extent to which legislative powers exercised by Congress pursuant to the Clause preempt state law. The Supreme Court definitively stated in 1976 that

⁴⁵ *Id.*

⁴⁶ See *Wyoming v. U.S. Dep’t of Interior*, 493 F. Supp. 3d 1046, 1062, 1086 (D. Wyo. 2020) (holding that regulations restricting methane emissions from oil and gas exceeded the scope of agency authority in part because it exceeded the power of the Bureau of Land Management under the Mineral Leasing Act (MLA), which is “to promote the orderly development of oil and gas deposits” (quoting *Geosearch, Inc. v. Andrus*, 508 F. Supp. 839, 842 (D. Wyo. 1981))); see also *Harvey v. Udall*, 384 F.2d 883, 885 (10th Cir. 1967) (stating that the purpose of the MLA, which structures leasing of federal lands for oil and gas development, is “to promote the orderly development of the oil and gas deposits in the publicly owned lands of the United States through private enterprise” (citation omitted)); *Conway v. Watt*, 717 F.2d 512, 514 (10th Cir. 1983) (“The purpose behind [the MLA] was . . . [the] development of the nation as a whole.”); *Cal. Co. v. Udall*, 296 F.2d 384, 388 (D.C. Cir. 1961) (“The Act was intended to promote wise development of these natural resources and to obtain for the public a reasonable financial return on assets that ‘belong’ to the public.”).

⁴⁷ See *Biber & Diamond*, *supra* note 41, at 283.

⁴⁸ Mineral Leasing Act of 1920, 30 U.S.C. § 189.

⁴⁹ See, e.g., *Wyoming v. Franke*, 58 F. Supp. 890, 892 (D. Wyo. 1945) (dismissing request to void presidential proclamation). A recent opinion by Chief Justice Roberts questioned broad presidential authority to designate national monuments. See *infra* note 162.

congressional acts under the Clause have preemptive authority.⁵⁰ Such an argument has a strong grounding in the text of the Constitution, as acts of Congress are “Laws” pursuant to the Supremacy Clause of Article VI.⁵¹

Nonetheless, a range of commentators continues to argue against preemption or for significantly limited preemption pursuant to the Clause.⁵² These arguments often draw on claims that Property Clause powers are “proprietary” in nature, and therefore do not warrant full preemptive powers.⁵³ Alternatively, they draw on arguments that the text of the Clause grants Congress only the power either to “dispose” of its lands or to enact “needful” rules and regulations that implement other congressional powers under the Constitution, such that there is not a standalone congressional power under the Clause that can support preemption.⁵⁴ Most recently, one scholar has drawn on the history of congressional debates over the Clause to oppose preemption.⁵⁵

C. Divestiture of Federal Lands Under the Equal Footing Doctrine

The most fundamental constitutional debate over the Property Clause is the extent to which the federal government should even have ownership and control over lands within the borders of states. The argument, in its most basic form, is that once a state is admitted to the Union, it must enter on equal footing with existing states. That in return requires the federal government to transfer ownership of its remaining lands within newly admitted states—either to private entities or to the state—to ensure that the newly admitted state enters on equal footing.⁵⁶ In particular, equality is required with the original thirteen states, none of which would have originally had federal lands within their borders, except for limited pieces of property needed for federal buildings, military bases, and similar facilities.⁵⁷

The argument has been in the political and legal discourse since the 1830s. Dicta in a Supreme Court case from the 1840s, *Pollard v. Hagan*, supports the claim.⁵⁸ That opinion became the basis for the equal footing doctrine, which the

⁵⁰ *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976); *see also* *Cal. Coastal Comm’n v. Granite Rock Co.*, 480 U.S. 572, 580–81 (1987) (applying preemption under the Clause).

⁵¹ Appel, *supra* note 21, at 10.

⁵² *See, e.g.*, Engdahl, *supra* note 21, at 304; Schmitt, *Limiting the Property Clause*, *supra* note 21, at 148.

⁵³ *See, e.g.*, Engdahl, *supra* note 21, at 304, 308–10.

⁵⁴ Natelson, *supra* note 21, at 350, 363–65; Brodie, *supra* note 21, at 710–11.

⁵⁵ Schmitt, *Limiting the Property Clause*, *supra* note 21, at 154–55.

⁵⁶ Louis Touton, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 COLUM. L. REV. 817, 833 (1980).

⁵⁷ *Id.*

⁵⁸ 44 U.S. (3 How.) 212, 216 (1845).

Supreme Court has adopted and applied to a range of contexts.⁵⁹ But the Supreme Court has never applied the equal footing doctrine to question federal land ownership within states since *Pollard*, and federal courts have repeatedly and uniformly upheld federal land ownership against equal footing challenges.⁶⁰

That lack of legal success has not stopped the doctrine from being adopted by a range of political actors on a regular basis. In the 1950s, 1970s, 1990s, and 2010s, there were calls for divestment of some or all federal public domain to states, local governments, or private entities—calls that were on occasion associated with violence against federal land managers.⁶¹ In the late 2010s, Utah even appropriated millions of dollars to support a lawsuit challenging federal ownership of lands within the state.⁶²

The Supreme Court has most frequently applied the equal footing doctrine in two contexts. First, the Court has held that ownership of lands submerged beneath navigable waters at the time a state is admitted to the Union transfers automatically to the newly admitted state.⁶³ Second, the Court has drawn on the doctrine in interpreting and understanding the scope of the laws admitting states to the Union. In particular, the Court has relied on the doctrine to strike down or narrowly interpret a range of provisions in admissions statutes that imposed conditions on states as part of their admission. For instance, the Court struck down a condition in Oklahoma's admission act that required it to keep its state capital in a specific city for a period of time.⁶⁴ The Court argued that Congress could not use its power to admit states under Article IV, Section 3 to impose fundamental political inequality on a state relative to other states.⁶⁵ A state's choice of the location of its state capital, the Court held, was a core example of political sovereignty that Congress could not diminish.⁶⁶

⁵⁹ See, e.g., *Coyle v. Smith*, 221 U.S. 559, 575–77 (1911).

⁶⁰ See *Arizona v. California*, 373 U.S. 546, 597–98 (1963); *Scott v. Lattig*, 227 U.S. 229, 244 (1913); *Texas v. Louisiana*, 410 U.S. 702, 713 (1973); *United States v. Gardner*, 107 F.3d 1314, 1317–18 (9th Cir. 1997); see also *infra* note 202 and accompanying text (noting that the case law has not been applied to terrestrial land ownership).

⁶¹ See *supra* notes 8–9 and accompanying text.

⁶² See Hummel, *supra* note 8; Nick Lawton, *Utah's Transfer of Public Lands Act: Demanding a Gift of Federal Lands*, 16 VT. J. ENV'T L. 1, 16 (2014).

⁶³ See *Pollard*, 44 U.S. at 229.

⁶⁴ *Coyle*, 221 U.S. at 574.

⁶⁵ *Id.*

⁶⁶ *Coyle*, 221 U.S. at 565 (“The power to locate its own seat of government, and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers.”).

In the 2010s, the Court significantly extended this equal footing doctrine by identifying an “equal sovereignty” doctrine that may limit Congress’s ability to impose unequal burdens on existing states outside the context of admitting states.⁶⁷ The Court relied on this principle to strike down a provision of the Voting Rights Act that required specific states to have changes in their voting rules pre-cleared by the federal government.⁶⁸

* * *

All three of these sets of arguments—about (1) executive power under the Clause, (2) the preemptive power of federal law under the Clause, and (3) the federal government’s power to retain ownership of lands within admitted states—depend on a proper understanding of the role that the Clause plays in the Constitution’s overall structure. Understanding that role in turn requires placing the Property Clause within historical context and within the broader structure of Article IV.

II. UNDERSTANDING THE PROPERTY CLAUSE IN CONTEXT

The Property Clause explicitly grants Congress the “Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”⁶⁹ A simple textualist argument would assert that this gives Congress primacy in determining how to manage federal lands, and it would argue against broad executive power in interpreting and applying relevant statutes. Likewise, congressional actions pursuant to the Clause are “laws” that qualify for preemptive power over the states under the Supremacy Clause of Article VI. Any arguments against preemptive power or for executive power, therefore, must be structural or based on history or a claim about the purpose of the Clause. However, as this Part shows, any structural or historical arguments generally cut against state supremacy or strong executive power in the Property Clause context. There is one important exception, developed at the end of this Part—the structural necessity for some residual executive power to fill in gaps in congressional statutes where relevant for pressing decisions to protect or manage the public lands. As for historical

⁶⁷ *Shelby County v. Holder*, 570 U.S. 529, 535 (2013).

⁶⁸ *Id.* at 544.

⁶⁹ U.S. CONST. art. IV, § 3. The Property Clause has been the basis for congressional power over both federal territories and federal lands within admitted states. The focus of this Article is on the application of the Clause in the public lands context; but, where relevant, I will draw on the territorial context. Part IV notes how the analysis developed in this Article might have relevance in the territorial context as well.

practice, Part III develops that in more detail, exploring the application of the principles developed in this Part to the specific problems introduced in Part I.

Part II.A begins with an overview of the historical context, examining how the Clause was a key component of resolving disputes among the original thirteen states as to claims in the West of the new nation. This context clarifies how the Property Clause is closely tied to interstate relations and horizontal federalism, and thus can inform two types of arguments: (1) congressional power arguments under the Clause to preempt state law, and (2) equal footing arguments about the constitutionality of federal land ownership. Part II.B explains how an understanding of Article IV as a coherent component of the Constitution that advances horizontal federalism—rather than a grab-bag of miscellaneous provisions—provides structural arguments for congressional primacy in administering the Clause. Finally, Part II.C describes how, despite congressional primacy, there is also an inherent need for some level of executive discretion in the day-to-day management of public lands.

A. The Resolution of State Western Land Claim Disputes

The Property Clause's location in Section 3 means that it is co-located with the Admissions Clause, the source of the federal government's power to create new states.⁷⁰ That co-location is not accidental—indeed, it is central to understanding the historical context of the Property Clause. The Property Clause was added to the Constitution as part of an overall resolution of disputes between the original thirteen states over claims to lands west of the Appalachians—disputes that were at the center of the politics of the Articles of Confederation and the drafting of the Constitution. That historical context is important because it explains the connection between the Property Clause and a broader understanding of Article IV as oriented towards horizontal federalism.

After the American Revolution, the newly independent states were faced with overlapping and conflicting claims to western lands, without the possibility of arbitration by the British government.⁷¹ Several states had no western land

⁷⁰ *Id.*

⁷¹ See PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC: JURISDICTIONAL CONTROVERSIES IN THE UNITED STATES 1775–1787, at 8–9, 45–51 (1983) [hereinafter ONUF, ORIGINS]; DAVID C. HENDRICKSON, PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING 10, 120–21 (2003); Metzger, *supra* note 23, at 1497–98; THE FEDERALIST NO. 7, at 60–61 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting risks of conflicts over western land claims); Fletcher v. Peck, 10 U.S. 87, 142 (1810) (Marshall, C.J.) (stating that resolution of western land claims “was a momentous question which . . . threatened to shake the American confederacy to its foundation. This important and dangerous contest has been compromised, and the compromise is not now to be

claims and strongly argued that those western land claims should benefit all states, since all states had fought for independence from the British.⁷² Maryland felt so strongly about the importance of western land claims that it refused to ratify the Articles of Confederation for several years because the Articles did not address the issue.⁷³ In part, because of these disputes, New York and Virginia both offered to cede their claims to the Confederation Congress in return for specific conditions—most importantly, that the western lands would be set up as new states once settled by European-Americans.⁷⁴ This condition was based on a concern that otherwise western lands might permanently be held in a position of political subordination or that they would be part of large, unwieldy states that would be ungovernable as republics and vulnerable to secessionist movements in the West.⁷⁵ Accordingly, the Northwest Ordinance of 1787, which was the compromise reached by the Confederation Congress to facilitate the transfer of the ceded land claims by Virginia and other states to the United States, provided for the admission of new states when population thresholds had been met.⁷⁶

disturbed”); JOSEPH STORY, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 214–16 (1833) (noting the importance of these conflicts); Peter S. Onuf, *Territories and Statehood*, in 1 ENCYCLOPEDIA OF AMERICAN POLITICAL HISTORY 1283, 1286 (Jack P. Greene ed., 1984) [hereinafter Onuf, *Territories and Statehood*] (stating western land claims were “critical to the very survival of the states” and “a chronic source of conflict among the United States and thus jeopardized cooperation in the war effort”); *Edwards v. Carter*, 580 F.2d 1055, 1059 (D.C. Cir. 1978) (per curiam); JOHN D. LESHY, OUR COMMON GROUND: A HISTORY OF AMERICA’S PUBLIC LANDS (forthcoming 2022). Conflict over these western land claims was significant enough to prevent adoption of a proposed provision in the Articles that would have provided a guarantee by the United States of state borders precisely because those borders were contested between the states. Williams, *supra* note 23, at 636–37.

⁷² See HENDRICKSON, *supra* note 71, at 135, 138–41; LESHY, *supra* note 71, at 6–7; Luther Martin, *Genuine Information XI*, BALT. MD. GAZETTE, Feb. 5, 1788, reprinted in 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 39, 39–42 (John P. Kaminski & Gaspare J. Saladino eds., 1986).

⁷³ See HENDRICKSON, *supra* note 71, at 148, 150; STORY, *supra* note 71, at 215. Other landless states also delayed their ratification of the Articles on similar grounds. See Williams, *supra* note 23, at 639; ONUF, ORIGINS, *supra* note 71, at 13 (“Ratification of the Articles without prior boundary negotiations would fix the existing unequal distribution of territory among the states. ‘It would not be safe’ for the small states to confirm the large, landed states (particularly Virginia) in their extensive charter claims, said Samuel Chase of Maryland.”).

⁷⁴ See ONUF, ORIGINS, *supra* note 71, at 14–17; Williams, *supra* note 23, at 639–40.

⁷⁵ Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119, 132–35 (2004).

⁷⁶ *An Ordinance for the Government of the Territory of the United States North West of the River Ohio*, in 32 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 334, 342 (Roscoe R. Hill ed., 1936) (1787); PETER S. ONUF, STATEHOOD AND UNION, at xviii–xxi (1987). Congress did not consider itself bound by this provision in future admission decisions and did not, in fact, automatically grant admission once the population threshold had been met. See Biber, *supra* note 75, at 126 n.19, 127.

Thus, the establishment of new states was a key component of the resolution of land claim disputes.⁷⁷ In addition, states without western land claims (so-called “landless” states) and small states generally feared that without splitting off the western land claims of the large states, the small states would eventually be dominated by the large states.⁷⁸ Some small state delegates argued in the Convention and in ratification that Congress should have the power to unilaterally split states into smaller units to provide greater equity.⁷⁹ Those arguments failed⁸⁰—the Admission Clause has explicit language requiring the consent of a state for its division⁸¹—but they show how the admission of new states was intimately connected with the interrelationship of the existing states.⁸²

⁷⁷ See Williams, *supra* note 23, at 628 (noting that the Admissions and Property Clauses “addressed one of the most significant sources of rivalry between the states at the time of the Constitution’s formation—namely, rivalrous claims to sovereignty over western lands”).

⁷⁸ See ONUF, ORIGINS, *supra* note 71, at 3–4, 151; Onuf, *Territories and Statehood*, *supra* note 71, at 1286 (noting the “imbalance” between landed and landless states “was a continuing source of friction, subverting the equality of the states, the fundamental principle of union on which the Articles of Confederation were grounded”). Ryan C. Williams noted the following:

The landless states, wary of entering into a political union with states whose boundaries would dwarf their own, insisted that title and jurisdiction to the western lands should be held in collective trust by the Confederation government and used as a public fund to repay debts incurred during the Revolution. The landed states insisted on the validity of their extensive territorial claims.

Williams, *supra* note 23, at 636–37.

⁷⁹ See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 461–62 (Max Farrand ed., 1911) [hereinafter 2 FARRAND’S RECORDS] (presenting how Carrol, a Maryland delegate, sought to eliminate language that required the consent of a state for its division, partly on concerns about landed states monopolizing the western lands); *id.* at 463–64 (presenting similar objections to another Maryland delegate, Luther Martin, who “urged the unreasonableness of forcing & guaranteeing the people of Virginia beyond the Mountains, the Western people, of N. Carolina. [sic] & of Georgia, & the people of Maine, to continue under the States now governing them, without the consent of those States to their separation” and threatened that the small landless states might leave the Convention if consent by states for splitting was required); Luther Martin, *The Genuine Information, Speech to Legislature of Maryland in Opposition to the Constitution* (Nov. 29, 1787), *reprinted in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 172, 224–27 (Max Farrand ed., 1911) [hereinafter 3 FARRAND’S RECORDS].

⁸⁰ See 2 FARRAND’S RECORDS, *supra* note 79, at 464.

⁸¹ See Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CALIF. L. REV. 291, 332–95 (2002) (conducting a thorough analysis of the history and text of the provision).

⁸² Roger M. Sullivan, Jr., *The Power of Congress Under the Property Clause: A Potential Check on the Effect of the Chadha Decision on Public Land Legislation*, 6 PUB. LAND L. REV. 65, 82 (1985) (explaining the jealousy over new western states potentially dominating existing states and how “this concern ultimately had a direct impact on the new states clause as well as a significant, though more subtle, impact on the property clause”). The contemporary importance of the consent requirement for merger and splitting of existing states is shown by the fact that those provisions received some of the greatest attention of the provisions in Article IV in the Convention and ratification debates. See THE FEDERALIST NO. 43, at 273–74 (James Madison) (Clinton Rossiter ed., 1961) (noting the importance of providing for the admission of new states but focusing primarily on protections against creating new states from existing ones or merging states). The Clause received particular attention in ratification debates in Virginia and Massachusetts because of the possibility of splitting off Kentucky

Granting Congress the power to admit new states also raised the question of whether new states would be put on an equal footing with the existing states. There was sharp division over this in the Convention. Some delegates expressed concerns that western states would eventually dominate the eastern states, and accordingly proposed that any new western states should be granted subordinate status relative to the eastern states.⁸³ Many other delegates argued for equal treatment of new states, both on the grounds that such equality was normatively desirable and that otherwise westerners might secede or ally with foreign powers.⁸⁴ Explicit language requiring admission of new states on an “equal footing” was rejected by the Convention, leaving broad plenary power in Congress.⁸⁵

This history of the Admissions Clause as an effort to resolve interstate disputes over the western land claims directly connects to the Property Clause. While a key component of resolving the disputes over western land claims required the transfer of those claims from states to the United States, the Articles of Confederation provided no method for managing the lands ceded to the United States.⁸⁶ The Property Clause was developed to facilitate the solution to

and Maine, respectively, as separate states. *See, e.g.*, Pa. Herald, 9 February, *as reprinted in* RATIFICATION BY THE STATES: MASSACHUSETTS 884–85, *in* 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (John P. Kaminski et al. eds., 1998) (reporting on the importance of this provision for Maine delegates to the Massachusetts constitutional convention); Letter from John Brown (June 7, 1788), *reprinted in* 11 THE PAPERS OF JAMES MADISON 88, 89 (Robert A. Rutland et al. eds., 1977) (reporting on the importance for Kentucky to be able to form a separate state).

⁸³ *See, e.g.*, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 533–34 (Max Farrand ed., 1911) [hereinafter 1 FARRAND’S RECORDS] (recording Governour Morris, a Convention delegate from New York, proposing to fix representation in the House of Representatives to ensure that existing states always had more votes than any new states); *id.* at 559–60 (recording Gorham proposing that western state representation be adjusted to ensure eastern states retain control); 2 FARRAND’S RECORDS, *supra* note 79, at 2–3 (recording Gerry making a similar proposal); 1 FARRAND’S RECORDS, *supra*, at 541 (recording King’s concern that western states with small populations will get disproportionate representation in Congress).

⁸⁴ *See, e.g.*, 1 FARRAND’S RECORDS, *supra* note 83, at 578–79 (depicting George Mason supporting equal representation for western states); *id.* at 584–85 (depicting Madison taking the same position); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 72–73 (1996); HENDRICKSON, *supra* note 71, at 239–40. The debate over new state equality had a sectional valence, as the expectation at the time of the Convention and ratification debates was that most new states would be southern in orientation; southern delegates accordingly supported equality of new states and broad powers to admit new states in Congress. HENDRICKSON, *supra* note 71, at 227–28, 237.

⁸⁵ *See* 2 FARRAND’S RECORDS, *supra* note 79, at 454, 457–58, 464 (showing equal footing language was dropped on the motion of Morris, with no explanation as to why); *see also* Metzger, *supra* note 23, at 1499 (noting that the equal footing language was intentionally omitted at the Convention).

⁸⁶ The Articles also did not provide a generic provision authorizing Congress to admit new states but instead only included specific language that addressed how Canada might join the Union. This left open the question of whether Congress could admit other new states under the Articles or manage the lands ceded to the United States. *See* THE FEDERALIST No. 43, at 270 (James Madison) (Clinton Rossiter ed., 1961). *See generally*

interstate conflict: by providing a constitutional basis for governance of the public lands, it transferred the source of interstate conflict (the western lands) to the United States, which would manage it on behalf of all the states.⁸⁷ The connection of the provision to the interstate conflict over land claims is made clear by the inclusion of a disclaimer in the second part of the Property Clause that the Constitution did not “Prejudice any Claims of the United States, or of any particular State.”⁸⁸

This historical context shows that giving Congress the power to manage the federal public lands was a central part of resolving a dispute among the states as to who should control the western lands. Granting the federal legislature—Congress—power in the Property Clause advanced the growth and development of the federal government and thus, in part, advanced vertical federalism. However, the Clause was also crucial in advancing inter-state relationships by resolving inter-state disputes over western land claims, and thus advanced horizontal federalism as well.

B. A Horizontal Federalism Model for Article IV

Complementing this historical context for the Property Clause is the location of the Clause in Article IV. That location gives weight to the historical context, helping explain how the Clause fits within the Article and the Constitution as a whole. The Article’s focus on state-to-state relationships—horizontal federalism—supports an understanding of general primacy of congressional power in the context of the provisions of Article IV.

LESHY, *supra* note 71, at 14–27 (explaining the shortcomings of the Articles in its dealing with western lands and how the constitutional convention dealt with the issue through the Property Clause). The drafters of the Articles had left out language giving the United States authority over western lands because of the controversy between landless and landed states. HENDRICKSON, *supra* note 71, at 132–33, 146. The framers of the Constitution were aware of and sought to rectify this lack of authority for the United States under the Articles. 1 FARRAND’S RECORDS, *supra* note 83, at 28 (depicting Governor Randolph noting the need to provide for admission of new states in the Constitution); PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 73 (1968) (“The problems posed by the existence of the western lands, the formation of new states, and the questionable legality of acts of the Congress of the Confederation concerning the public lands were of utmost importance to many of the delegates of the Constitutional Convention.”); Sullivan, *supra* note 82, at 79–80.

⁸⁷ Glicksman, *supra* note 22, at 59–60 n.360 (noting the Property Clause’s location “in article IV probably reflects the Framers’ focus in enacting article IV, section 3 on the admission of new states to the union and on the resolution of the conflicting claims of the federal and state governments to the territories,” which explains why the Clause was “placed in article IV, which deals with relations among the states and between the states and the federal government, rather than in article I, which deals with legislative powers” (citations omitted)). Alexander Hamilton noted the risk of conflicting western claims for the stability of the Union and thus the need for federal control. THE FEDERALIST NO. 7, at 60–61 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also KLEIN ET AL., *supra* note 26, at 41 (noting this connection).

⁸⁸ U.S. CONST. art. IV, § 3, cl. 2.

On its face, Article IV is primarily concerned with state-to-state relations. The first Section requires states to give “Full Faith and Credit” to the “public Acts, Records, and judicial Proceedings of every other state.”⁸⁹ The first Clause of the second Section requires that citizens of a state “shall be entitled to all Privileges and Immunities of the Citizens in the several States.”⁹⁰ The second Section also requires states to extradite to other states’ fugitives from justice and to return fugitive slaves.⁹¹ The third Section allows Congress to admit new states, creates a process for the merging or division of existing states, and authorizes Congress to “dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”⁹² The fourth Section provides that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government” and will protect states against invasion and “domestic Violence.”⁹³

The various provisions in the Article were combined into a single article by the Committee on Style at the end of the Constitutional Convention.⁹⁴ The Supreme Court has stated that the Committee on Style’s edits to the constitutional text should not be given great weight in interpreting the meaning of the Constitution because the Committee was not authorized to make substantive changes to the text.⁹⁵ But even earlier drafts of the Constitution separated out the provisions of what is now Article IV into a series of Articles located together at the end of the Constitution.⁹⁶ The notes from the Committee of Detail as to the initial draft of the entire Constitution presented to the full Convention described the structure as “treat[ing] of the legislative, judiciary and executive in their order, and afterwards, of the miscellaneous subjects, as they occur, bringing together all the resolutions, belonging to the same point, howsoever they may be scattered about and leaving to the last the steps necessary to introduce the government.”⁹⁷ Those miscellaneous provisions included the Admission Clause and the Guarantee Clause.⁹⁸ This drafting history

⁸⁹ *Id.* § 1.

⁹⁰ *Id.* § 2, cl. 1.

⁹¹ *Id.* § 2, cls. 2–3. The third Clause was effectively repealed by the adoption of the Thirteenth Amendment abolishing slavery. *Id.* amend XIII, § 1.

⁹² *Id.* art. IV, § 3.

⁹³ *Id.* § 4.

⁹⁴ 2 FARRAND’S RECORDS, *supra* note 79, at 601–02.

⁹⁵ *See, e.g.*, U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 792 n.8 (1995) (noting the Committee on Style was appointed to merely arrange the agreed upon articles).

⁹⁶ 2 FARRAND’S RECORDS, *supra* note 79, at 187–88.

⁹⁷ *Id.* at 138 (emphasis omitted).

⁹⁸ *Id.* at 147–48.

lends additional support to an interpretation that focuses on the separate identity of Article IV.

In contrast to the first three articles of the Constitution, Article IV only has limited provisions with respect to the powers of the federal government: Congress is authorized to implement Section 1 on full faith and credit;⁹⁹ under Section 3, Congress can admit new states and manage the property and territories of the United States,¹⁰⁰ and the United States will guarantee the republican nature of the states.¹⁰¹ Indeed, the Article has no mention whatsoever of the other two of the three branches of the federal government: the President or the Judiciary.

Article IV thus stands out from the rest of the Constitution, particularly the first three articles, in its focus on state-to-state relations rather than on the powers and limits of the federal government. Courts and commentators have noted these unique features of Article IV, identifying Article IV as a “states” Article of the Constitution focused on comity between the states.¹⁰² Friendly state-to-state relationships are of obvious importance in any sustained political relationship between those states, whether that political relationship is more confederal (as under the Articles of Confederation) or federal. So, it is perhaps not surprising that many of the provisions in Article IV are very similar to provisions of the Articles of Confederation, in that the relationships between states was the component of the Articles that was least different from the Constitution.¹⁰³ In

⁹⁹ U.S. CONST. art. IV, § 1.

¹⁰⁰ *Id.* § 3.

¹⁰¹ *Id.* § 4.

¹⁰² See, e.g., *Austin v. New Hampshire*, 420 U.S. 656, 661 (1975) (calling Article IV the “comity article”); *Baldwin v. Fish & Game Comm’n of Mont.*, 436 U.S. 371, 379 (1978) (calling Article IV the “so-called States’ Relations Article”); Brainerd Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 14 (1958) (stating that Article IV relates to “the comity of nations” and “interstate conflicts”); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 566 (1994) (calling Article IV the “states” article).

¹⁰³ Both the Full Faith and Credit provision and the Privileges and Immunities provision borrowed heavily from the Articles. Compare U.S. CONST. art. IV, § 1 (the Constitution’s Full Faith and Credit provision), with ARTICLES OF CONFEDERATION of 1781, art. IV, para. 3 (the Articles of Confederation’s Full Faith and Credit provision); compare U.S. CONST. art. IV, § 2, cl. 1 (the Constitution’s Privileges and Immunities provision), with ARTICLES OF CONFEDERATION of 1781, art. IV, para. 1 (the Articles of Confederation’s Privileges and Immunities provision). For discussion on the ratification debates, see generally CHARLES PINCKNEY, OBSERVATIONS ON THE PLAN OF GOVERNMENT SUBMITTED TO THE FEDERAL CONVENTION (1787) (Pinckney, a delegate from South Carolina, noting how many Article IV provisions were based on the Articles). For courts and commentators noting the similarities between the Full Faith and Credit provisions of the Constitution and Articles of Confederation, see Kurt H. Nadelmann, *Full Faith and Credit to Judgments and Public Acts: A Historical-Analytical Reappraisal*, 56 MICH. L. REV. 33, 54 (1957); Charles M. Yablon, *Madison’s Full Faith and Credit: A Historical Analysis*, 33 CARDOZO L. REV. 125, 144 (2011); Daniel A. Crane, *The Original*

contrast, the Constitution structured the federal government of the United States in a way very different from the Articles—in fact, one of the key purposes of developing the Constitution was to replace the state-to-state treaty system of the Articles, in which the Union had to act through the individual states, with a system in which the federal government could operate independently of the states with respect to revenue and regulation.¹⁰⁴

The distinction between the material in Articles I, II, III, and IV of the Constitution can be understood as the distinction between vertical and horizontal federalism, with Articles I through III focused on creating the institutional infrastructure necessary for vertical federalism—the federal government—while Article IV focused on creating the institutional infrastructure of horizontal federalism—relationships between the states.¹⁰⁵ Given this focus on horizontal federalism, a number of scholars have drawn connections between Article IV and international law, with Article IV serving more as a guide to ensuring

Understanding of the “Effects Clause” of Article IV, Section 1 and Implications for the Defense of Marriage Act, 6 GEO. MASON L. REV. 307, 330–31 (1998). Some courts and commentators also note the similarities between the Privileges and Immunities provisions. See *Austin*, 420 U.S. at 661 n.6; *United States v. Harris*, 106 U.S. 629, 643–44 (1883); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 359 (1998); David S. Bogen, *The Privileges and Immunities Clause of Article IV*, 37 CASE W. RESRV. L. REV. 794, 795 (1987); Chester James Antieau, *Paul’s Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four*, 9 WM. & MARY L. REV. 1, 3 (1967). The similarities are likely one reason Article IV was not a focus of discussion at the Convention or in the ratification debates. See Bogen, *supra*, at 840; Crane, *supra*, at 330–31.

¹⁰⁴ See JOSEPH J. ELLIS, *THE QUARTET: ORCHESTRATING THE SECOND AMERICAN REVOLUTION, 1783–1789*, at 123–26 (2015) (explaining Madison’s successful “shift in sovereignty from the state to the national level”).

¹⁰⁵ See, e.g., John M. Gonzales, *The Interstate Privileges and Immunities: Fundamental Rights and Federalism?*, 15 CAP. U. L. REV. 493, 499–500 (1986) (“All of article IV, except perhaps for section 3, clause 2, prohibits in one way or another state imposed obstacles to effective federalism.”); Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 NW. U. L. REV. 1027, 1051 (2002) (distinguishing between the constitutional provisions that “invested the three branches of general government with national powers intended to create a strong, wealthy, and unified polity where the States were conceived of as constituent parts of one nation” and the provisions of Article IV, which were “designed to increase cooperation and to decrease conflict among the States without denigrating their individual internal sovereignties”); Williams, *supra* note 23, at 626–27 (“Articles I, II, and III define the composition and the powers of the three departments of the federal government—legislative, executive, and judicial, respectively. . . . Article IV . . . takes as its central focus the ‘horizontal’ relationships between states within the federal Union.”); Stephen E. Sachs & Steve Sanders, *Interactive Constitution: Article IV, Section 1: Full Faith and Credit Clause*, NAT’L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/article-iv/clauses/44> (last visited Feb. 2, 2022) (“Most of the original Constitution focuses on creating the federal government, defining its relationship to the states and the people at large. Article IV addresses something different: the states’ relations with each other, sometimes called ‘horizontal federalism.’”).

harmonious relationships between sovereigns than in the creation of an overarching government.¹⁰⁶

Horizontal federalism—establishing harmonious and friendly relationships directly between the states, as opposed to through the mediating structures of the federal government—was seen by the framers of the Constitution as a central component of building a cohesive Union. The framers identified the conflicts between states, as well as differential treatment by states of other states' citizens, as a crucial flaw under the Articles of Confederation and a real threat to the integrity of the Union.¹⁰⁷

What are the implications of a horizontal federalism understanding of Article IV as a whole for interpretation of the meaning of the Property Clause? A key one is that the focus on horizontal federalism in Article IV implies a primary role for Congress, rather than the President, in the implementation of Article IV. After all, the text of Article IV nowhere mentions the President, but grants any implementation power for the federal government to Congress or the United States as a whole.

But there are other bases for a primary role for Congress in the implementation of Article IV. Congress was understood by the framers as the representative of the states—indeed, the most important debates in the Constitutional Convention were whether states would be represented in Congress equally or by population. The result was a compromise in which representation would be equal in one chamber (the Senate) and by population in the other (the House of Representatives). Allocation of seats by state population in the House means that states are not equally represented in Congress, but representation is not purely population based. States that have a population below the minimum for one Representative still receive representation, and that

¹⁰⁶ See Williams, *supra* note 23, at 626–27; Lee, *supra* note 105, at 1051–52; Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 259–60 (1992).

¹⁰⁷ See, e.g., HENDRICKSON, *supra* note 71, at 214 (noting multiple “trespasses of the states on the rights of each other” under the Articles of Confederation, including restrictions on trade and commerce, use of paper money, and debts and contracts, and that these restrictions could beget “retaliations[] . . . ‘adverse to the spirit of the Union’ and ‘destructive of the general harmony’”); STORY, *supra* note 71, at 185 (referring to the conflicts among states over commerce and trade under the Articles of Confederation by explaining “[t]he difference of regulations was a perpetual source of irritation and jealousy. Real or imaginary grievances were multiplied in every direction; and thus State animosities and local prejudices were fostered to a high degree, so as to threaten at once the peace and safety of the Union”).

has been reflected in the actual distribution of Representatives throughout much of the history of Congress.¹⁰⁸

In contrast, the President is the sole federal official elected on a national basis. This point is regularly and repeatedly relied upon in modern constitutional and administrative law, often as a justification for primacy of the President in supervision of the federal bureaucracy.¹⁰⁹ It is true (as with the House of Representatives) that the President's election is mediated at the state level by electors through the Electoral College. The difference between the President, a Representative, and a Senator is that, of course, only the President is chosen by all states as an individual, while the Senate and the House are collectivities representing members from individual states. It is also true that the national nature of the election of the President did not receive a large amount of attention in the framing and ratification of the Constitution¹¹⁰—perhaps because it was obvious that the Executive (whether plural or singular, whether elected by the Congress or by the people or electors) would necessarily be in charge of the entire national government. In the Constitutional Convention, James Madison did rely on the national constituency for the President in making arguments that

¹⁰⁸ For an overview of the problem, see generally Jeffrey W. Ladewig & Mathew P. Jasinski, *On the Causes and Consequences of and Remedies for Interstate Malapportionment of the U.S. House of Representatives*, 6 PERSPS. ON POL. 89 (2008). Particularly notorious is the example of Nevada, which was admitted with a population far below the minimum needed for one representative in 1864 and continued to have a population below the minimum until the second half of the twentieth century. See Charles Stewart III & Barry R. Weingast, *Stacking the Senate, Changing the Nation: Republican Rotten Boroughs, Statehood Politics, and American Political Development*, 6 STUD. AM. POL. DEV. 223, 227, 231–32 (1992) (noting how Nevada was characterized as “America’s Rotten Borough” in the nineteenth century because its population was so small relative to other states, characterizing Nevada’s admission as the “most egregious effort in the nation’s history to disregard population and economic criteria in order to admit a state for political reasons,” and noting that “[h]ad Nevada waited until the standard population criterion had been met, of having enough population to entitle a state to one member of the House, it would not have entered the Union until 1970”).

¹⁰⁹ John Harrison, *The Story of In re Neagle: Sex, Money, Politics, Perjury, Homicide, Federalism, and Executive Power*, in PRESIDENTIAL POWER STORIES 133, 160–61 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

¹¹⁰ RAKOVE, *supra* note 84, at 266 (noting that only Gouverneur Morris argued the President could “embody a coherent national interest” and that “[n]o one else went as far”); see also JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 141 (2012) (criticizing the idea of the President as “representative of the people” in the early Republic because of limitations on franchise and limited campaigning).

the President should have the power to nominate judges.¹¹¹ Others made similar points at a more general level.¹¹²

Nonetheless, the distinctive nature of how the President is elected and the unique nature of his national constituency is important. And for our purposes, it is important because it can be understood as reflecting a contrast between vertical and horizontal federalism. Congress, as a collective group representing the states, emphasizes a horizontal federalism perspective. The President, as a single individual representing the entire country, emphasizes a vertical federalism perspective. Given the horizontal federalism focus of Article IV, this distinction would imply that Congress should have the primary role in implementing Article IV.¹¹³

What might such a primary role mean in practice? At the very least, it weighs against easily finding unilateral presidential power in this context, outside of explicit congressional authorization. As the next Part develops, this presumption can be overcome in the right context. This presumption is also not so strong that it might, for instance, prevent an agency from receiving *Chevron* deference for its interpretation of a relevant statute. But it is a presumption that might shift our understandings of the baseline power of the Executive to act when there is no explicit statement in the relevant statutory language as to executive power, just as the courts have sometimes found greater leeway for executive action in the face of congressional silence in the context of war or foreign affairs.

¹¹¹ See 2 FARRAND'S RECORDS, *supra* note 79, at 80–81 (stating the President should nominate judges because the “Executive Magistrate wd [sic] be considered as a national officer, acting for and equally sympathising with every part of the U. States,” in contrast to the Senate, where, because of equal representation of the states, a minority might be able to appoint judges).

¹¹² See *id.* at 52–53 (Morris stating “[t]he Executive therefore ought to be so constituted as to be the great protector of the Mass of the people” and therefore needs to be independent of the legislature); *id.* at 82 (Morris supporting the presidential nomination of judges by stating “[t]he Executive in the necessary intercourse with every part of the U. S. required by the nature of his administration, will or may have the best possible information” about which judges to nominate).

¹¹³ My distinction between the national basis for the election of the President and the state basis for the election of members of Congress should not be taken as a claim that the President will necessarily advance policy that is more responsive to the nation as a whole compared to Congress. How different electoral mechanisms might produce different policy preferences or incentives for elected officials depends on a range of additional factors. See Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. Rev. 1217, 1231–42 (2006) (describing political dynamics that can make Congress as a whole consider national-level implications of policy and make presidents focus on policy implications for particular sections of the country). My distinction simply notes that, as a matter of formal structure, the President is the only nationally elected official in the Constitution, and that this point further supports the grant in the text of the Property Clause of decision-making power to Congress.

There is some irony in applying a horizontal federalism theory of Article IV to interpreting the Property Clause. Of all the provisions of Article IV, the Property Clause has driven the growth of the federal government the most. The management of public lands and territories was one of the largest single components of the federal bureaucracy in the early Republic¹¹⁴ and continues to this day to be the basis for four separate federal agencies, plus the relationship of the federal government with Puerto Rico, the Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa. But as noted in the prior Part, this growth in the federal government was born by a desire to resolve a horizontal federalism problem—the federal government was needed as a neutral party between the states to manage the lands held in common by the states and ensure the creation of new, independent states.¹¹⁵ And like congressional power under the Admissions Clause, congressional power under the Property Clause over federal territories has been historically justified by some courts and scholars as needed (and limited) to support the development of political entities that could become members of the Union as states¹¹⁶—an argument that connects to the horizontal federalism problem of admitting new states to the Union.¹¹⁷

¹¹⁴ GREGORY ABLAVSKY, *FEDERAL GROUND: GOVERNING PROPERTY AND VIOLENCE IN THE FIRST U.S. TERRITORIES* 5 (2021) (“The territories were unique sites of federal authority[;] . . . many of the new federal government’s nationwide responsibilities concentrated there.”); Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from Public-Lands Cases*, 68 MICH. L. REV. 867, 882 (1970) (“In the present age, it is difficult to apprehend the former magnitude and importance of public-lands law.”).

¹¹⁵ See *supra* Part I. Commentators at the time argued that admitting new western states to the Union by increasing the number of states would reduce interstate conflicts and increase the power of the federal government vis-à-vis the states. ONUF, *ORIGINS*, *supra* note 71, at 155.

¹¹⁶ Onuf, *Territories and Statehood*, *supra* note 71, at 1283 (“Though congressional power was constitutionally unlimited and might appear arbitrary and despotic to settlers, its mandate was simply to prepare a territory for statehood, the culmination of a process of political development.”); Elmer B. Adams, *Causes and Results of Our War with Spain from a Legal Standpoint*, 8 YALE L.J. 119, 124, 129 (1898) (arguing that Property Clause powers should be limited to the purpose of admitting new states and “no territory can be acquired to be permanently governed . . . as a dependent colony”); Carman F. Randolph, *Constitutional Aspects of Annexation*, 12 HARV. L. REV. 291 (1898) (arguing the same); *O’Donoghue v. United States*, 289 U.S. 516, 536–38 (1933) (relying on the temporary role of territorial governments as preparation for statehood to uphold the creation of non-Article III territorial courts). This justification is in sharp tension with case law that limited the application of the Constitution to territories such as the Philippines and Puerto Rico. See, e.g., *Downes v. Bidwell*, 182 U.S. 244, 263, 277–79 (1901); *Dorr v. United States*, 195 U.S. 138, 142 (1904). That case law drew on racist preconceptions about the ability of non-Anglo-American communities to self-govern and on the desire to establish an American empire that did not require eventual self-governance for all its components, and therefore rejected arguments that congressional power over territories was limited to facilitating the entry of territories into statehood. Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT’L L. 283, 286, 291–96 (2007).

¹¹⁷ Arguments about the obligation of the federal government to admit territories to statehood have been used also to contest federal ownership of public lands within states. See *infra* Part III.C.

There is much more to work out about the possible meaning and implications of understanding Article IV as a coherent and unified component of the U.S. Constitution. This Article only sketches a tentative, initial argument. But even this tentative and initial argument indicates that structural arguments likely cut against broad claims of executive power under the Property Clause.

C. Executive Management Power

Does the primacy of Congress in implementing the Property Clause and a tentative understanding of Article IV as a whole mean that there is no role for executive discretion to play in implementing the Clause? The answer to that question is no. Given the logistical challenges of managing millions of acres of federal lands, addressing the myriad complications of day-to-day management choices, and navigating unforeseen on-the-ground circumstances, the President must necessarily play some role in filling in the gaps of the statutory commands issued by Congress.

As an example, consider the broad powers that Congress has over the territories. As the Supreme Court has noted, Congress functions as the general government over the territories, like a state government over a county.¹¹⁸ Given the challenges of managing territorial governments, delegation by Congress to the Executive, whether explicit or implicit, is inevitable. Unless Congress is going to pass legislation, for example, to create counties and cities, regulate land-use, provide for full penal codes, run public schools, and more, Congress will necessarily have to delegate these kinds of powers to some sort of territorial government. This issue would have been obvious to the drafters of the Constitution, who were aware of the Northwest Ordinance and the governance structure it created for the territories north and west of the Ohio River.

As with territorial governance, management of federal public lands necessarily requires management decision-making that is interstitial to any statutory regime.¹¹⁹ Courts have therefore at times noted that the President acts

¹¹⁸ See, e.g., *Nat'l Bank v. County of Yankton*, 101 U.S. 129, 133 (1879) ("The Territories are but political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations.").

¹¹⁹ Getches explained the following:

[T]he obligation to protect public resources demands that the land management agencies be relatively unfettered in carrying out their duty. It is not practical for Congress, charged by the Constitution with ultimate responsibility for management and disposal of extensive public lands, to do any more than to set broad policies. Consequently, Congress must entrust the executive

as an “agent” for Congress in the management of the federal government’s “proprietary” interests in its lands and has broad power to interpret and apply law in this context.¹²⁰

The constitutional necessity of residual executive management discretion has been developed in a range of contexts. Courts have more broadly noted the importance of executive discretion in the context of property and other forms of day-to-day government management.¹²¹ Henry Monaghan developed a version of the concept when he articulated that the Executive necessarily had a “protective power,” independent of explicit congressional authorization, to shield the institutions, personnel, and assets of the U.S. government from

with responsibility for implementing those policies. In turn, reviewing courts regularly defer to an administrative official’s plausible interpretation of how legislation should be implemented, including the official’s view of the scope of his delegated authority.

Getches, *supra* note 21, at 289; *see also* United States v. Midwest Oil, 236 U.S. 459, 474 (1915) (in discussing the public land laws, noting the need for executive power to respond to any “[e]mergencies [that] may occur, or conditions [that] may so change”); Note, *Implied Authority of the President to Withdraw Public Lands from Entry*, 28 HARV. L. REV. 613, 615 (1915) (characterizing *Midwest Oil* as “merely a judicial recognition of the fact that Congress is as likely as any other property owner, busy with affairs, to employ a general administrative agent whose authority is implied from the principal’s acquiescence”); Bruff, *supra* note 21, at 503 (“[T]he function of managing a vast and diverse collection of federal lands has always seemed to call for flexible administration, for it demands attention to local needs and changing conditions as the manager balances priorities among many competing uses.”).

¹²⁰ For case law describing the President as an agent of Congress acting to implement a trust that Congress holds over the lands for the American people, and accordingly deferring to executive decisions about management, *see, e.g.*, United States *ex rel.* McLennan v. Wilbur, 283 U.S. 414, 419 (1931) (upholding refusal to lease lands for oil and gas under withdrawals in part in “consideration of [the President’s] general powers over the public lands as guardian of the people”); United States v. Beebe, 127 U.S. 338, 342 (1888) (holding that the Attorney General has power to file suit to undo land patent for fraud because “[t]he public domain is held by the government as part of its trust. The government is charged with the duty and clothed with the power to protect it from trespass and unlawful appropriation”); United States v. Trinidad Coal & Coking Co., 137 U.S. 160, 170 (1890) (upholding a lawsuit by the Executive to enforce a land disposal statute because the public lands “were held in trust for all the people; and in making regulations for disposing of them, Congress took no thought of their pecuniary value, but, in the discharge of a high public duty and in the interest of the whole country, sought to develop the [country’s] material resources”); *Midwest Oil*, 236 U.S. at 474 (“The power of the Executive, as agent in charge, to retain that property from sale need not necessarily be expressed in writing.”).

¹²¹ For case law specific to property management, *see* Springer v. Gov’t of Philippine Islands, 277 U.S. 189, 203 (1928) (finding property management to be an executive power in resolving a dispute over whether the Executive Branch of the Philippine government can manage a corporation). The principle also applies in other management contexts. *See, e.g.*, United States v. Tingey, 30 U.S. (5 Pet.) 115, 121 (1831) (holding it appropriate for the Executive to enter into bond without explicit statutory authority); United States v. Macdaniel, 32 U.S. (5 Pet.) 1, 2 (1833) (upholding an executive decision with respect to staffing and pay that proceeded without express statutory authority); Contractors Ass’n of E. Pa. v. Sec’y of Lab., 442 F.2d 159 (3d Cir. 1971) (holding that the President has power to adjust terms of contracts if not in violation of law); *see also* Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 57–58 (1993) (arguing that “[w]ell before *Midwest Oil*, the Supreme Court had endorsed a spacious conception of the Executive’s ‘managerial’ power to fill in the details of statutes”).

attack.¹²² Jack Goldsmith and John Manning identified the President's "completion power" to implement constitutional or statutory powers invested in the President.¹²³ This "completion power" is independent of explicit congressional authorization, instruction, or prohibition.¹²⁴ Other scholars, in passing, have also noted the possibility.¹²⁵ But in the context of the Property Clause, where congressional power is at its possible maximum and where management is also essential and requires flexibility, the need for some residual executive power becomes clear.

III. APPLICATIONS TO PROPERTY CLAUSE CONFLICTS

The constitutional context developed in Part II can help provide a basis for addressing the disputes introduced in Part I. The textual grant of power to Congress in the Clause, combined with a horizontal federalism understanding of Article IV as a whole, leads towards restricting the scope of executive power to act without congressional authorization. In tension to some extent with that principle is the necessity of some foundational discretion for the Executive in implementing the Clause on a day-to-day basis. The tension can be resolved by recognizing that executive power should be broader where the stakes are lower—where the result of executive discretion will not be the divestment of federal ownership or control of land or resources, a relatively irreversible step. In contrast, where executive discretion would facilitate the protection or preservation of federal control over resources, or would advance effective

¹²² See Monaghan, *supra* note 121, at 58 ("Surely, acting under the most general statutes or under no statute at all, the executive could prescribe rules for regulating access to federal buildings or land.").

¹²³ Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2282 (2006).

¹²⁴ *Id.*

¹²⁵ Then Harvard Law professor Elena Kagan explained the following:

Most executive orders, significant and insignificant alike, involved . . . the administration of public lands, the public workforce, or other public operations The President in these cases . . . asserted his right as head of the executive branch to determine how its internal processes and constituent units were to function.

Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2291–92 (2001); see also Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for Clinton v. City of New York*, 76 TULANE L. REV. 265, 314, 363–65 (2001) (arguing that the Executive has broad discretion in the context of contracts, obligations, and debts so long as there is broad statutory authority, and that this supports excluding these areas from the nondelegation doctrine); Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 137 (1999) ("Because presidents are executives, they must be (and in practice are) regarded as having certain legal prerogatives that allow them to do what executives do: manage, coordinate, staff, collect information, plan, reconcile conflicting values, and respond quickly and flexibly to emerging problems.").

management of those resources, leeway for the Executive is consistent with congressional primacy—at least unless Congress has spoken to the contrary.

In the context of preemption and the retention of federal land ownership within the borders of admitted states, the history of the Property Clause as a resolution to the dispute between the states over western land claims helps provide a constitutional grounding in support of federal land ownership. The federal government was selected as the medium to own and manage the lands as an arbiter between the states—that role does not require disregarding the power that the Supremacy Clause grants to federal laws, nor does it require divesting the federal government of land ownership or legislative power under the Clause once a state is admitted to the Union.

A. Protecting Federal Title

To help explicate the line between congressional primacy and executive power in the context of the Property Clause and its relationship to the protection of federal title to lands, this section draws on the President’s withdrawal power—a power that extends to the early days of public land management in the United States and is connected to the controversies over both national monuments and fossil-fuel leasing. In so doing, this section shows that a horizontal federalism understanding of Article IV constitutionally requires that only explicit congressional action can divest the federal government of title to the public domain. Conversely, executive discretion in the public lands context must be limited to actions that would protect federal title, or at least not result in the divestiture of federal title. This line between congressional primacy and executive power distinguishes between unilateral presidential abolition of national monuments, which threatens federal title without explicit congressional authorization and so exceeds presidential power, and unilateral presidential termination of existing fossil fuel leases, which protects federal title and is permissible so long as there is not an explicit congressional prohibition of executive action.

This section begins by providing a historical overview of the executive withdrawal power, which protects lands from disposal or sale. It demonstrates that the history of this withdrawal power is consistent with congressional primacy over the public lands under the Property Clause and that the scope of executive withdrawal power is consistent with requiring explicit congressional authorization for the disposal of federal lands. It concludes by noting how this distinction—between executive action that protects federal title and executive action that threatens federal title—supports distinguishing between the illegality

of unilateral executive termination of national monuments and the legality of unilateral executive termination of existing fossil fuel leases.

Withdrawals are actions that remove public lands from the operation of disposal statutes.¹²⁶ As noted in Part I, a range of laws throughout the nineteenth century allowed individuals and corporations to obtain public lands when certain conditions were met. Withdrawal of public lands meant categorizing certain lands as exempt from some or all of these disposal statutes—withdrawals were typically done by the President or subordinate executive branch officials.¹²⁷ Up through the middle of the twentieth century, withdrawals were a major component of public lands law and policy in the United States.¹²⁸ The Antiquities Act is among one of the many statutes that explicitly authorized withdrawals by the President.¹²⁹ Other withdrawal laws included the creation of military and Indian reservations,¹³⁰ leasing of lands for valuable mineral resources,¹³¹ protection of natural resources such as forests,¹³² and granting of land subsidies for railroad construction.¹³³ Withdrawals are generally less relevant today because most of the disposal statutes were repealed in 1976 when Congress confirmed the policy of retaining ownership of the public lands.¹³⁴ A few statutes remain that allow for the disposal of property interests in public lands for mining activities, and relatedly for the leasing of public lands for fossil

¹²⁶ See Getches, *supra* note 21, at 285–86.

¹²⁷ *Id.*

¹²⁸ See KLEIN ET AL., *supra* note 26, at 70–71.

¹²⁹ See Antiquities Act of 1906, 54 U.S.C.A. § 320301.

¹³⁰ *Wilcox v. Jackson*, 38 U.S. 498, 512–13 (1839). Congressional approval was often found to be implicit and retrospective, based on funding for maintenance of reserved areas or on disposal statutes that excluded areas withdrawn or reserved by presidential action. See *Grisar v. McDowell*, 73 U.S. 363, 381 (1867) (“The action of the President in making the reservations in question was indirectly approved by the legislation of Congress in appropriating moneys for the construction of fortifications and other public works upon them.”).

¹³¹ Lands in the 1820s were withdrawn to allow for leasing of the lands for lead mining. LEONARD D. WHITE, *THE JEFFERSONIANS: A STUDY IN ADMINISTRATIVE HISTORY 1801-1829*, at 515–16 (1951).

¹³² See 26 Stat. 1103 (1891) (original statute authorizing presidential creation of forest reserves).

¹³³ Congress funded railroad construction in the western United States by providing grants of federal lands to railroad corporations in return for construction. This approach required preventing other claimants from taking the lands that, eventually, were to be transferred to the railroad along the route once the railroad was constructed. Congress often authorized withdrawal of (and the President sometimes unilaterally withdrew) lands along railroad routes beginning in the 1850s. LESHY, *supra* note 71, at 55–57; Darwin P. Roberts, *The Legal History of Federally Granted Railroad Rights-of-Way and the Myth of Congress’s “1871 Shift.”* 82 U. COLO. L. REV. 85, 118–20 (2011); GATES, *supra* note 86, at 181–82; see also *Wood v. Beach*, 156 U.S. 548, 551 (1895) (upholding withdrawal in aid of railroad legislation).

¹³⁴ See Federal Land Policy and Management Act of 1976, Pub. L. 94-579, §§ 701–06 (repealing many public lands disposal laws); see also 43 U.S.C. § 1701(a)(1) (declaring it the policy of Congress that “the public lands be retained in Federal ownership”). In practice, most disposal statutes had become mostly inoperative after 1934, when President Franklin Roosevelt withdrew most of the public lands under the authorization of the Taylor Grazing Act, which provided for leasing of public lands for grazing. See KLEIN ET AL., *supra* note 26, at 360.

fuel and other mineral extraction activities.¹³⁵ The concept of withdrawal is still relevant to the extent that it removes public lands from the operation of these statutes. Congress in 1976 also provided a procedural framework to guide and constrain presidential withdrawal powers, repealing most other withdrawal statutes, but retaining the Antiquities Act.¹³⁶

One ground for the withdrawal power has been statutory grants of power by Congress to the Executive.¹³⁷ However, particularly from 1900 onwards, presidents began to claim the authority to unilaterally withdraw lands from the operation of disposal statutes without any congressional authorization,¹³⁸ often on the grounds that presidential intervention was needed to maintain the status quo pending congressional action.¹³⁹ The source of this claimed authority varied—sometimes it was framed as a constitutional power inherent in the President, and sometimes as a power that the President had regularly asserted and had been acquiesced in by congressional inaction.¹⁴⁰

¹³⁵ See *Mason v. United States*, 260 U.S. 545, 552–54 (1923) (holding that mining claims are a form of “appropriation” covered by a withdrawal); *LESKY*, *supra* note 31, at 35, 39–40.

¹³⁶ *Getches*, *supra* note 21, at 280.

¹³⁷ See *supra* notes 129–33 and accompanying text.

¹³⁸ See *WHEATLEY*, *supra* note 119, at 82 (providing overview); *DOUGLAS BRINKLEY, THE WILDERNESS WARRIOR: THEODORE ROOSEVELT AND THE CRUSADE FOR AMERICA* 442–47, 491–92, 501–02, 570–71, 712, 718–19, 726, 737–38, 747–48 (2009) (providing examples); *LESKY*, *supra* note 71 (arguing the same). Examples exist earlier in history, and the Court in *Midwest Oil* relied heavily on a range of examples over time. *United States v. Midwest Oil*, 236 U.S. 459, 470 (1915). President Roosevelt aggressively used withdrawal powers to create wildlife refuges. See, e.g., *BRINKLEY, supra*; *LESKY, supra* note 71. *Lesky* argues that these reservations had statutory authorization, but also notes subsequent legislation that authorized such withdrawals. *Id. But see Britton-Purdy, supra* note 38 (arguing that these reservations were “unauthorized”).

¹³⁹ Withdrawal in aid of legislation was a common basis for presidential withdrawals, preventing disposal of lands before Congress had a chance to decide how to resolve a policy or legal question about whether to protect the lands from disposal. President Taft used this rationale in the early 1900s when he withdrew large areas of land with oil and gas reserves to prevent their disposal into private hands—the withdrawal that prompted the *Midwest Oil* case, discussed *infra*. See President Howard Taft, Message Regarding Environmental Protection (Jan. 14, 1910) (message to Congress) (transcript available through the American Presidency Project, U.C. Santa Barbara). President Theodore Roosevelt used this power frequently as well. *LESKY, supra* note 55 (noting withdrawals to protect energy resources); *JOHN ISE, THE UNITED STATES FOREST POLICY* 270–71 (1920) (noting withdrawals to protect energy resources, with the justification of “pending the enactment [further] of legislation”); *BENJAMIN HORACE HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES* 506–07 (1924) (noting that in the early twentieth century there were “numerous orders by the President, or by the Secretary of the Interior, withdrawing from entry certain classes of land pending legislation by Congress”). Withdrawal in aid of legislation was used earlier, such as in the case of conflicting land grants in Iowa in the late nineteenth century. *Wolcott v. Des Moines Co.*, 72 U.S. 681, 688–89 (1866) (finding implicit authority of the Executive to be able to reserve lands to protect purpose of land disposal statutes); *Bullard v. Des Moines & Ft. Dodge R.R.*, 122 U.S. 167, 174 (1887).

¹⁴⁰ *CHARLES F. WHEATLEY, JR., 1 STUDY OF WITHDRAWALS AND RESERVATIONS OF PUBLIC DOMAIN LANDS* 131–50 (1969) (providing an overview of those arguments).

The Supreme Court upheld presidential withdrawal power on the basis of congressional acquiescence in the *Midwest Oil* case in 1915,¹⁴¹ shortly after Congress had passed legislation to provide a comprehensive statutory basis and framework for presidential withdrawal powers.¹⁴² In 1976, Congress explicitly rejected any inherent presidential power to withdraw lands and provided elaborate procedural mechanisms to structure withdrawal powers.¹⁴³

Withdrawals therefore provide a rich historical context for exploring the borders between legislative and executive power. The history both shows regular congressional intervention as well as executive efforts to assert unilateral power to act, efforts that were recognized in part by the Supreme Court.

Even more illuminating is an examination of claims by the Executive to revoke withdrawals and therefore open lands back up to disposal. Generally, presidents have not asserted the power to undo withdrawals that had been undertaken pursuant to powers explicitly authorized by Congress.¹⁴⁴ This is true

¹⁴¹ *Midwest Oil*, 236 U.S. at 459. The Court concluded that there was a long history of withdrawals by the President without explicit statutory authority and that this practice evidenced congressional acquiescence in unilateral presidential withdrawal power. *Id.* at 469–70. The dissent claimed that there was implicit or explicit statutory authorization for most if not all of these withdrawals. *Id.* at 489–92 (Day, J., dissenting). The Court declined to address claims that there was a constitutional basis for unilateral presidential withdrawal power. *Id.* at 492. The horizontal theory of Article IV would cut against such a claim. *See also* Getches, *supra* note 21, at 286 (“But arguments that the executive has some inherent constitutional authority to make withdrawals of public lands are without merit.”). The Supreme Court has never endorsed such a theory. *Id.* at 286–87 n.46; Note, *Implied Authority of the President to Withdraw Public Lands from Entry*, 28 HARV. L. REV. 613, 614 (1915) (rejecting a constitutional basis for withdrawal power); James R. Rasband, *The Future of the Antiquities Act*, 21 J. LAND RES. & ENV’T L. 619, 625 (2001) (“The Supreme Court has never suggested that the President has inherent withdrawal authority.”). Lower court claims to the contrary are usually based on incorrect interpretations of *Midwest Oil*. *See* *Shaw v. Work*, 9 F.2d 1014, 1015 (D.C. Cir. 1925); *Portland Gen. Elec. Co. v. Kleppe*, 441 F. Supp. 859, 861 (D. Wyo. 1977).

¹⁴² A few years before *Midwest Oil*, Congress passed the Pickett Act, which provided an explicit statutory basis for presidential withdrawal powers and limits on those powers. Act of June 15, 1910, ch. 421, 36 Stat. 847. However, the President continued to assert unilateral withdrawal powers, on both constitutional and statutory grounds—for the latter, by broadly construing executive authority under the Act, leading subsequent courts to conclude that congressional acquiescence was still in place. Getches, *supra* note 21, at 294–98; *Kleppe*, 441 F. Supp. at 861; *Reservation of Public Lands for Migratory Bird Refuge*, 37 U.S. Op. Att’y Gen. 502, 1934 WL 1231 (1934) (“There is no specific statutory authority for the issuance of the proposed Executive order. It is well established, however, that the President has the power to reserve or withdraw lands from the public domain for public purposes.”).

¹⁴³ *See* 43 U.S.C. § 1714 (2014) (restricting withdrawal powers). Congress in the Federal Land Policy and Management Act of 1976 (FLPMA) explicitly disclaimed any acquiescence in non-statutory presidential withdrawal powers as identified in *Midwest Oil*. FLPMA, Pub. L. 94-579, § 704(a).

¹⁴⁴ For executive branch statements, see, e.g., *Transfer of National Monuments to National Park Service in the Department of the Interior*, 36 U.S. Op. Att’y Gen. 75, 79 (1929) (“This Department has frequently ruled that, in the absence of authority from Congress, the President may not restore to the public domain lands which have been reserved for a particular purpose, nor transfer their control from one Department to another.”). For

for the designation of military reservations¹⁴⁵ as well as for National Forests¹⁴⁶—in both cases the individual units were designated by the President pursuant to an overarching statutory authority, similar to the Antiquities Act. I have not found any examples of a court upholding a presidential revocation of a withdrawal originally authorized pursuant to a statute.¹⁴⁷

case law making this point, see, e.g., *United States v. Tichenor*, 12 F. 415, 421 (D. Or. 1882) (“If there was a valid reservation established at Port Orford prior to September 11, 1854, for a military post[] . . . the land contained in it was thereby appropriated and withdrawn from the public domain, and could not be thereafter otherwise appropriated, except by the authority of congress.”); *S. Pac. R.R. v. Groeck*, 87 F. 970, 974 (9th Cir. 1898) (stating if a withdrawal is mandated by law, then “the secretary of the interior is powerless to . . . set[] aside his order of withdrawal. . . . After such lands have once been set aside by congressional act, no authority is vested in the secretary of the interior . . . to restore them”); *S. Pac. R.R. Co. v. Wiggs*, 43 F. 333 (N.D. Cal. 1890). *But see* *United States v. R.R. Bridge Co.*, 27 F. Cas. 686, 690 (N.D. Ill. 1855) (“[I]t does not follow, that where the government reserves its own land from sale, for any public purpose that a special act of congress after its abandonment is necessary for the sale of it.”).

In the Indian reservation context, clear statutory authorization is required for the President to terminate a reservation created by an executive order, based on congressional legislation that has protected those reservations. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 189, 194 n.5 (1999); *United States v. S. Pac. Transp. Co.*, 543 F.2d 676, 686 n.15 (9th Cir. 1976) (stating that legislation in 1919 and 1927 prohibited termination or shrinking of EO reservations). Prior to that legislation, Supreme Court decisions found that in some circumstances, reservations created by executive orders might be terminated by the President or Congress without compensation. *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 331 (1942); *Confederate Bands of Ute Indians v. United States*, 330 U.S. 169, 176 (1947). Reservations created by statute or treaty can only be shrunk or eliminated by Congress. 1 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 15.09[1][b] (Nell Jessup Newton et al. eds., 2012 ed.).

¹⁴⁵ For statements that military reservations depended on congressional authorization, see *Rock Island Mil. Rsrv.*, 10 U.S. Op. Att’y Gen. 359, 361 (1862) (“This selection of Rock Island for military purposes was not, as we have seen, the unauthorized act of the President; but was made in the exercise of a discretion vested in him by Congress.”). For statements that military reservations cannot be undone by the President once designated, see *id.* at 363; *Camp Wright*, 16 U.S. Op. Att’y Gen. 121, 123 (1878); *Naval Rsrv. Restoration to Pub. Domain*, 21 U.S. Op. Att’y Gen. 120, 121 (1895); *Mil. Rsrv. at Fort Fetterman*, 17 U.S. Op. Att’y Gen. 168, 168–69 (1881).

¹⁴⁶ Under the original statute authorizing presidential designation of National Forests, there was no explicit grant of authority to the President to revoke or shrink those designations. Such power was eventually granted in the Forest Service Organic Act, partly in response to doubts about presidential power here. See Britton-Purdy, *supra* note 38 (providing overview); WHEATLEY, *supra* note 140, at 282 (“Nor, it would appear, does the President have power to modify or revoke forest reserves effected by him pursuant to some specific delegation of authority other than the Act of 1891.”); Forest Service Organic Act of 1897, ch. 2, 30 Stat. 34, 36 (codified as amended at 16 U.S.C. § 473). Some have argued that the text of the statute—which specified the power of the President to revoke National Forest proclamations “to remove any doubt which may exist pertaining to the authority of the President thereunto,” Forest Service Organic Act of 1897, ch. 2, 30 Stat. 30, 34—means that no firm conclusions should be drawn from this action by Congress. See Yoo & Gaziano, *supra* note 21, at 631. However, other statutes granting presidential withdrawal powers had revocation provisions, including statutes contemporaneous with the Antiquities Act, implying that Congress did think an explicit grant of revocation power was required. See Rasband, *supra* note 141, at 627.

¹⁴⁷ The most thorough survey of withdrawal practices concluded that when “land is withdrawn by statute and the statute contains no authority to revoke the withdrawal or if the statute authorizes the Executive to withdraw lands after certain criteria have been met but contains no authority to revoke the withdrawal,” there is

Since President Theodore Roosevelt greatly expanded the use of withdrawals without any explicit statutory authorization, subsequent presidents have unilaterally revoked those types of withdrawals,¹⁴⁸ a supportable outcome since the initial withdrawals were not pursuant to congressional authorization.

Piecing this historical practice together produces the following synthesis: Absent explicit congressional authorization or prohibition, the President may have power to withdraw lands from the disposal statutes; however, the President must have explicit congressional authorization to revoke a congressionally authorized or mandated withdrawal.

Support for this synthesis comes from case law in which courts have required explicit statutory authority for the disposal of property pursuant to the Property Clause and rejected efforts by executive branch officials to dispose of federal lands unilaterally.¹⁴⁹ John Leshy has argued that this principle of statutory interpretation that reads statutes against finding divestiture of federal lands without clear statements by Congress is based in a “constitutional common law” doctrine for which the Court “has never fully articulated a rationale.”¹⁵⁰ Leshy has reasoned that the principle stems from the judicial recognition of the political imbalance among the various players in public lands politics, “a largely

no consensus over whether “the Executive’s authority to revoke the withdrawal order and restore the land.” WHEATLEY, *supra* note 140, at A-8. However, the only judicial cases cited by the author find no executive power to revoke withdrawals without explicit congressional authorization to do so. *Id.* at A-9 nn.27–28. The other citations finding executive power to revoke withdrawals are administrative decisions within the Interior Department. *Id.*

¹⁴⁸ WHEATLEY, *supra* note 140, at A-9 (“[S]ince the President was authorized to withdraw land from the public domain for public purposes, this authority necessarily implies the power to revoke the withdrawal when it has served its purpose”); Rasband, *supra* note 141, at 625–26.

¹⁴⁹ See, e.g., *Royal Indemnity Co. v. United States*, 313 U.S. 289, 294 (1941) (“Power to release or otherwise dispose of the rights and property of the United States is lodged in the Congress by the Constitution. Subordinate officers . . . are without that power, save only as it has been conferred upon them by Act of Congress”); *Greene Cnty. Planning Bd. v. Fed. Power Comm’n*, 559 F.2d 1227, 1234–35, 1239 (1976); *Equity Tr. Co. v. McDonald*, 806 F.3d 833, 834 (5th Cir. 2015) (“This Property Clause of the Constitution vests in the legislature “the absolute right to prescribe” the manner in which its property is transferred.’ . . . Absent congressional permission, government officials may not ‘release or otherwise dispose of’ government property.”); *Spirit Lake Tribe v. North Dakota*, 262 F.3d 732, 740 (8th Cir. 2001) (concluding that the United States “cannot abandon property without congressional authorization”); *Int’l Aircraft Recovery v. Unidentified, Wrecked, and Abandoned Aircraft*, 218 F.3d 1255, 1258 (11th Cir. 2000); *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 599 F.3d 1165, 1185 (10th Cir. 2010); see also *Rock Island Mil. Rsrv.*, 10 U.S. Op. Att’y Gen. 359, 361 (1862) (“[T]he power to dispose of the public lands under this clause, whether by sale or by appropriation to other uses, belongs to Congress, and not to the President.” (citation omitted)). *But see* *Edwards v. Carter*, 580 F.2d 1055, 1061–63 (D.C. Cir. 1978) (holding that the Property Clause is not the exclusive manner by which property can be transferred to foreign countries and identifying the Treaty Clause as an alternative approach). *Edwards* can be understood as allowing disposal if an alternative constitutional basis for presidential or congressional authority for action exists. This may be most plausible in the foreign relations context.

¹⁵⁰ Leshy, *supra* note 21, at 1105–13.

unarticulated but realistic assessment of the pressures brought to bear on the Congress (and, to some extent, the executive) in making federal land policy decisions” that “the political power possessed by privatization advocates” required a firm judicial counterweight.¹⁵¹

The principle of requiring explicit congressional authorization for disposal of federal lands applies beyond interpretation of the language of statutes. The Court in *Midwest Oil* found it significant that the non-statutory withdrawal actions that the President undertook would protect against disposal of valuable public resources, allowing for a broad construction of executive power in the absence of explicit statutory authorization or prohibition:

But when it appeared that the public interest would be served by withdrawing or reserving parts of the public domain, nothing was more natural than to retain what the government already owned. And in making such orders, which were thus useful to the public, no private interest was injured. For, prior to the initiation of some right given by law, the citizen had no enforceable interest in the public statute, and no private right in land which was the property of the people. The President was in a position to know when the public interest required particular portions of the people’s lands to be withdrawn from entry or location; his action inflicted no wrong upon any private citizen, and being subject to disaffirmance by Congress, could occasion no harm to the interest of the public at large.¹⁵²

In other words, we might wish to broadly defer to presidential withdrawal powers in areas where Congress has not spoken directly because it protects congressional power to decide how to use the public lands later on by preventing disposal.¹⁵³

Based on the analysis in Part II, at least two constitutional arguments underpin the principle that courts should be reluctant to find implicit statutory authorization for divestiture of federal public lands. First, the text of the Property Clause gives Congress power to “dispose” of the public lands.¹⁵⁴ This grant of

¹⁵¹ *Id.* at 1111–12.

¹⁵² *United States v. Midwest Oil*, 236 U.S. 459, 471 (1915). The Court also implied that acquiescence would not apply to disposal of public lands, consistent with case law that rejects executive power to dispose absent explicit statutory authority. *Id.* at 473–74 (distinguishing a situation where the Executive unilaterally acts such “that private rights could be created by an officer withdrawing for a Rail Road more than had been authorized by Congress in the land grant act”).

¹⁵³ *Getches*, *supra* note 21, at 280, 287 (“To allow uses without some delegation of authority from Congress arguably usurps the authority of the legislative branch under the Property Clause. To deny private uses, on the other hand, preserves congressional prerogatives and flexibility.”).

¹⁵⁴ U.S. CONST. art. IV, § 3, cl. 2.

textual power with specificity as to disposal could be understood as reserving to Congress the power to decide when and how to divest ownership through sale or grant. Disposal, however, likely had a broader meaning than simply divestiture of ownership to the drafters of the Constitution.¹⁵⁵ Thus, the better understanding of the import of the textual grant of primacy to Congress with respect to disposal and the power to enact “needful rules and regulations”¹⁵⁶ for the public lands is a practical one—divestiture is a drastic step that transfers ownership from the federal government to another party, and is in some ways irreversible.¹⁵⁷ A revocation of a withdrawal in essence opens up public lands to divestiture from the federal government—protecting congressional primacy with respect to both disposal and the power to enact needful rules and regulations would mean that we should be leery of allowing executive discretion, absent clear congressional authorization, to advance divestiture of federal lands.

The same conclusions are also supported by the second argument, a “horizontal federalism” understanding of Article IV, which likewise emphasizes congressional primacy with respect to implementation of the Clause. This horizontal federalism understanding of the role of the Property Clause within Article IV provides a structural constitutional basis for the policy-based argument that Leshy develops and dovetails with it, as both the horizontal federalism understanding and Leshy’s argument recognize the importance of preventing the loss of federal public resources without explicit congressional authorization.¹⁵⁸

Applying the principles above allows us to distinguish between the two examples for considering executive power under the Property Clause introduced in Part I: the revocation of national monuments and the termination of fossil fuel leases. As noted above, the creation of national monuments is a form of withdrawal power.¹⁵⁹ The statute does not give the President the authority to

¹⁵⁵ See Leshy, *supra* note 9.

¹⁵⁶ U.S. CONST. art. IV, § 3, cl. 2.

¹⁵⁷ Divestiture is reversible only through (1) a consensual sale or gift by the new owner, or (2) the use of eminent domain by the government.

¹⁵⁸ This analysis also provides a basis for distinguishing between federal acquisition of lands, where the Court has never required a clear statutory authorization for acquisition, and divestiture, even though the text of the Property Clause does not provide for such a distinction. See Leshy, *supra* note 21, at 1110 (noting this dichotomy).

¹⁵⁹ *Contra* Yoo & Gaziano, *supra* note 21, at 636 (claiming that monument proclamations are different from withdrawals). For instance, national monuments today protect designated lands from disposal under the Hard Rock Mining Act, a statute that authorizes the creation of at least a limited property right for individuals and entities that undertake mining operations on public lands. See LESHY, *supra* note 31, at 35, 39–40 (noting the history of the Act as a disposal statute and that the definition of withdrawals under FLPMA includes removing lands from the operation of the Mining Act).

undo the creation of national monuments.¹⁶⁰ Similar statutes that give only the power to create, not revoke withdrawals, have been interpreted as not implicitly giving the President the power to revoke withdrawals—where this has been identified as a problem, Congress resolved the situation by amending the statutes to grant revocation powers to the President.¹⁶¹ Identifying an implied revocation power would be a significant expansion of presidential power in tension with congressional primacy under Article IV because it would facilitate the disposal of lands without explicit congressional authorization.¹⁶²

In contrast, executive power to terminate fossil fuel leases leads to a very different conclusion. Leases are both transfers of property rights (like sale), albeit limited in time, as well as contracts. And as contracts, leases necessarily require decision-making by the Executive Branch about how to structure the terms, when to enter into them, and when to terminate them.

¹⁶⁰ There have been presidential actions to diminish national monuments since the enactment of the Antiquities Act but none have been litigated in court, none occurred between President Kennedy and President Trump, and the vast majority of such presidential actions involved minor corrections to monument boundaries or efforts to improve resource protection within the monuments. See Ruple, *supra* note 37. The most substantial revisions were in Glacier Bay, Alaska and Mt. Olympus, Washington, both justified on military grounds. *Id.* at 70–75. Congress has also enacted specific legislation authorizing the modification of particular monuments. *Id.* at 28–30.

¹⁶¹ See James R. Rasband, *Stroke of the Pen, Law of the Land?*, 63 ROCKY MT. MIN. L. INST. 21-1, 21-20 (2017) (making this point); Ruple, *supra* note 37, at 26–29.

¹⁶² Two commentators have argued that there is a general presumption in American constitutional law that when Congress grants authority to the President to take an action, the President has the authority to revoke that action unless Congress has specifically prohibited revocation. Yoo & Gaziano, *supra* note 21, at 639–47. Even if such a general presumption exists, the analysis in this Article indicates that in the context of Article IV and the Property Clause, such a presumption should not apply when it comes to the disposal of property by the Executive. Similarly, these commentators have argued that “Congress is also constitutionally prohibited from delegating a statutory power to the President and then micromanaging the discretion granted.” *Id.* at 646. Again, even assuming this assertion is true in general, the analysis in this Article indicates the limits of this claim in the context of Article IV and the Property Clause. Congressional supremacy with respect to disposal of federal property should allow significant congressional power to constrain executive discretion to act, even where (as discussed *infra*) the President may have default discretion to act in their managerial capacity.

A recent opinion by Chief Justice John Roberts raises the question of whether the Antiquities Act has been used overly broadly by the President to designate new monuments. In a statement accompanying the denial of certiorari in an unsuccessful lawsuit challenging the creation of a marine national monument off the coast of New England, Roberts questioned whether the broad designation of monuments protecting submerged lands and ecosystems was consistent with the Act’s requirement that designations “must be limited to the smallest area compatible with the care and management of the objects to be protected.” *Mass. Lobstermen’s Ass’n v. Raimondo*, No. 20–97, slip op. at 3 (Mar. 22, 2021). Roberts questioned whether the Antiquities Act “has been transformed into a power without any discernible limit to set aside vast and amorphous expanses of terrain above and below the sea.” *Id.* However, a broad understanding of presidential power to designate monuments under the Antiquities Act would be generally consistent with the horizontal federalism framework developed in this Article. The Act is an explicit congressional authorization to the President to designate monuments, and a broad interpretation of presidential power under the Act would be consistent with protecting federal title from being divested improperly.

Thus, they implicate more directly the managerial, interstitial powers of the President and the Executive Branch that are inherent in the implementation of the Property Clause. The Supreme Court has upheld unilateral executive power to terminate contracts, at least absent congressional prohibition or restriction of that power.¹⁶³

There are historical precedents for unilateral executive power in the context of determining the specific terms for contracts involving public lands transactions. President Andrew Jackson required all payments for public lands sales to be made in gold or silver (“specie”) rather than in bank notes.¹⁶⁴ The decision was extremely controversial.¹⁶⁵ The policy had been specifically rejected by Congress a few months before, although Congress had not passed legislation prohibiting presidential action,¹⁶⁶ and one of Jackson’s few congressional supporters on the topic said that Jackson waited until Congress adjourned to issue the policy because of “fear that Congress would counteract it by law.”¹⁶⁷ Multiple leading senators argued that the policy was unconstitutional as infringing on congressional powers under the Property Clause.¹⁶⁸ Eventually the policy was overturned by congressional legislation,¹⁶⁹ and it was never challenged in court. Even with that controversy, however, Jackson’s policy

¹⁶³ *United States v. Corliss Steam-Engine Co.*, 91 U.S. 321, 322 (1875); see Biber & Diamond, *supra* note 41.

¹⁶⁴ See GATES, *supra* note 86, at 175; U.S. SECRETARY OF THE TREASURY, CIRCULAR TO RECEIVERS OF PUBLIC MONEY, AND TO THE DEPOSITE BANKS (July 11, 1836), in THE FINANCIAL REGISTER OF THE UNITED STATES 14–15 (1836) (announcement of the policy by Treasury Department). Because the policy was announced in a Treasury Department Circulate, it is often called the Specie Circular. For additional examples of the Executive Branch flexibly changing payment options or sale terms for public lands sales, see HIBBARD, *supra* note 139, at 212; GATES, *supra* note 86, at 209 (GLO in 1856 temporarily stops land sales to pressure Congress to change the law); *id.* at 558 (GLO sets maximum price for sales in late-nineteenth century); *id.* at 704–05 (War Department changes terms for royalty payments for lead mines in Midwest in early twentieth century).

¹⁶⁵ See Richard H. Timberlake, Jr., *The Specie Circular and Distribution of the Surplus*, 68 J. POL. ECON. 109, 110 (1960); see also Peter L. Rousseau, *Jacksonian Monetary Policy, Specie Flows, and the Panic of 1837*, 62 J. ECON. HIST. 457 (2002) (Jackson pointed to legislation from the 1810s as legal justification for his actions). THOMAS BENTON, I THIRTY YEARS’ VIEW: OR, A HISTORY OF THE WORKING OF THE AMERICAN GOVERNMENT FOR THIRTY YEARS, FROM 1820 TO 1850, at 676–77 (1854) (citing *A Resolution Relative to the More Effectual Collection of the Public Revenue*, 3 Stat. L., 343 (Apr. 30, 1816)).

¹⁶⁶ Timberlake, *supra* note 166, at 110.

¹⁶⁷ THOMAS BENTON, *supra* note 165, at 676.

¹⁶⁸ See, e.g., 24 Cong. Reg. Deb. 93 (Dec. 21, 1836) (speech by Sen. Webster); 24 Cong. Reg. Deb. 375 (Jan. 11, 1837) (remarks by Sen. Calhoun); 24 Cong. Reg. Deb. 369, 372 (Jan. 11, 1837) (remarks by Sen. Clay).

¹⁶⁹ Congress passed a resolution disapproving of the Circular in 1837 but Jackson refused to sign the resolution before he left office, and it took almost two more years for Congress to pass legislation overturning the policy. Rousseau, *supra* note 165, at 478; Repeal of the Specie Circular, 5 Stat. 310 (May 31, 1838).

appropriately reflects the type of managerial decision-making that likely should be within the power of the President, absent specific congressional direction.¹⁷⁰

The revocation of fossil fuel leases also does not raise the same issues as withdrawal revocations, because the revocation of leases does not open lands up to disposal in the way that withdrawal revocations do.¹⁷¹ Revocations of leases are a form of protecting public lands against disposal, something that the courts have identified as within the powers of the Executive Branch's authority as "guardian of the people" and consistent with *Midwest Oil*.¹⁷² Thus, revocations do not trigger the same judicial concerns about unilateral executive disposal of federal lands and are more available to presidential discretion.

B. Preemption

As discussed in Part I, some commentators have questioned the preemptive power of congressional legislation under the Property Clause. There is no basis in the text of the Constitution for considering actions under the Property Clause to have less legal authority than actions under any other clause empowering Congress to act.¹⁷³

The text of the Clause authorizes Congress to enact "needful rules and regulations," and some scholars have argued that "needful" is limited to the implementation of other enumerated powers of the Constitution, drawing an analogy to the Necessary and Proper Clause.¹⁷⁴ But rules and regulations are forms of legislation,¹⁷⁵ and interpreting them differently from other

¹⁷⁰ Jackson justified the Circular on the grounds of prevention of fraud and speculation on the public lands, arguments that are consistent with a managerial justification for presidential action. Andrew Jackson, Eighth Annual Message to Congress (Dec. 5, 1836) (transcript available at <https://millercenter.org/the-presidency/presidential-speeches/december-5-1836-eighth-annual-message-congress>). Whether the 1816 legislation granted discretion to the President to act, prohibited presidential action, or simply did not speak to the matter was never litigated in court.

¹⁷¹ See Britton-Purdy, *supra* note 38, at 945–48 (describing a "presumption against presidential privatization").

¹⁷² See *United States ex rel. McLennan v. Wilbur*, 283 U.S. 414, 419 (1931) (upholding the discretion of the Secretary of the Interior to refuse to issue prospecting licenses for oil and gas development).

¹⁷³ See Appel, *supra* note 21, at 10 ("The Property Clause's unconditional wording resembles that of other broadly interpreted clauses, such as the power over immigration, patents, or foreign relations."); Goble, *supra* note 21, at 498–99; Gaetke, *Refuting*, *supra* note 21, at 635–36 n.129 ("Surely no language of the Constitution itself supports the assertion that the article IV power is inferior to other congressional powers.")

¹⁷⁴ Natelson, *supra* note 21, at 350, 363–65 (emphasis omitted); Brodie, *supra* note 21, at 710–11.

¹⁷⁵ *But see* *United States v. Midwest Oil*, 236 U.S. 459, 474 (1915) ("[T]he land laws are not of a legislative character in the highest sense of the term (art. 4, § 3), 'but savor somewhat of mere rules prescribed by an owner of property for its disposal.'"). However, in the same opinion the Court recognizes that Congress has "legislative power over the public domain." *Id.*

congressional powers would seem to downgrade the Property Clause as a lesser enumerated power, for which there is no basis in the structure or text of the Constitution. Moreover, the separate authorization in the Clause for Congress to “dispose” of the public lands, under contemporary late eighteenth century definitions of the word, could broadly include a wide range of management that could cover current congressional legislation under the Clause.¹⁷⁶ Nor is there any evidence from the debates in the Convention or the ratification that would limit the power of Property Clause legislation. While there is contradictory language in Supreme Court case law over the years about the preemptive power of Property Clause legislation, much of the language is dicta¹⁷⁷ and the most recent case law uniformly supports preemption.¹⁷⁸

¹⁷⁶ Leshy, *supra* note 9. For a scholar arguing that even congressional action pursuant to “disposal” does not necessarily provide preemptive power, see Engdahl, *supra* note 21, at 367 (limiting preemption under the disposal language to matters within the enumerated powers of Article I).

¹⁷⁷ See *Kleppe v. New Mexico*, 426 U.S. 529, 538–39 (1976); see also Leshy, *supra* note 9, at 527–30, 534–50 (summarizing the relevant case law); Appel, *supra* note 21, at 10–11, 32–33, 56–73 (discussing the relevant case law); Gaetke, *Refuting*, *supra* note 21, at 638–51 (discussing the relevant case law). The scholarship arguing against preemptive power under the Property Clause relies heavily on dicta in nineteenth century cases. See, e.g., Engdahl, *supra* note 21, at 293–96, 298–99, 303 (citing and discussing case law); Leshy, *supra* note 9 (making this point); Goble, *supra* note 21, at 509.

¹⁷⁸ See, e.g., *Kleppe*, 426 U.S. at 536–38. For scholars supporting the idea that federal power is preemptive, see Gaetke, *Congressional Discretion*, *supra* note 21, at 386–87; Leshy, *supra* note 9.

Jeffrey Schmitt has argued that congressional debates in the first half of the nineteenth century show a consensus that the Property Clause did not give the federal government general preemptive power within a state, but only limited preemptive power to protect federal land ownership and disposal. Schmitt, *Limiting the Property Clause*, *supra* note 21, at 158–64. However, most of the examples drawn on by Schmitt have limited value because of their ambiguity. Schmitt relies on the lack of objection to the possibility of federal sovereignty around the time of ratification, *id.* at 157, and notes that disputes over federal jurisdiction over its lands focused on limitations on state power to interfere with federal land disposal, *id.* at 158–59. Of course, given the primacy of disposal in federal land policy at the time, this focus is understandable. Other examples drawn on by Schmitt are ambiguous as to whether they refer to general federal jurisdiction over territories or the more limited federal jurisdiction over its lands. See, e.g., *id.* at 159–60 (quoting debates over Tennessee’s jurisdiction over federal lands where the arguments are that granting Tennessee jurisdiction as a state does not necessarily give it ownership over federal lands). Some quotes recognize that states have jurisdiction over federal lands as a default matter, see, e.g., *id.* at 165 (quoting statements that under equal state sovereignty, western states can legislate over federal lands with the same powers as eastern states)—which is consistent with a preemptive power for the Property Clause, as preemption of state law only occurs with congressional legislation and preemption applies equally to all states. There are some examples of statements in Congress that directly address broad preemptive congressional powers and are inconsistent with other contemporary statements with significant weight, including early Supreme Court case law. See, e.g., *United States v. Gratiot*, 39 U.S. 526, 538–39 (1840) (upholding the lease of federal land within the borders of a state).

Congress can obtain exclusive jurisdiction over federal property under the Enclave Clause of Article I. U.S. CONST. art. I, § 8, cl. 17. Some commentators have argued that the existence of the Enclave Clause must mean that federal power under the Property Clause does not preempt state power, at the risk of making the Enclave Clause redundant. See Schmitt, *Limiting the Property Clause*, *supra* note 21; Patterson, *supra* note 21, at 60; Engdahl, *supra* note 21, at 296; Hardwicke et al., *supra* note 21, at 418–20. That argument, however,

Alternatively, some commentators have argued that the Clause involves “proprietary” legislative powers that cannot support preemption. There is substantial Supreme Court case law drawing on proprietorship as support for congressional power under the Clause.¹⁷⁹ But there is also case law (often language in the same cases) stating that Congress has legislative or regulatory power under the Clause in addition to its proprietary powers.¹⁸⁰ The Court has never endorsed the “proprietary/legislative” distinction as a reason to limit congressional preemptive power under the Clause and has never clearly separated the two powers either.

In addition, as laid out in Part II.A, any distinction between proprietary and legislative powers for Property Clause purposes is in sharp tension with the purpose of including the Property Clause in the Constitution, which was to resolve jurisdictional (not just ownership) disputes over the western land claims.¹⁸¹ Resolution of those land claims involved not only disputes over

overlooks the fact that federal power under the Enclave Clause is exclusive of any state power, while under the Property Clause it is concurrent with state power, an important distinction. See *Kleppe*, 426 U.S. at 542–43; see also *Leshy*, *supra* note 9, at 514–16 (noting this argument); Appel, *supra* note 21, at 4 n.15 (noting this argument); *Goble*, *supra* note 21, at 500 (arguing that just because the Enclave Clause “completely preempts state law” does not mean Article IV has “no preemptive power”). Of course, these default rules can be contracted around by the state and federal government through agreements as to what powers the state will cede to the federal government when the state consents to a federal enclave, through federal adoption of state laws in governing an enclave or in federal use of blanket preemption on federal lands outside enclaves. See *Schmitt*, *Limiting the Property Clause*, *supra* note 21, at 153–54 (noting this possibility and arguing that it means that the distinction between concurrent and exclusive powers between the Property and Enclave Clauses is not relevant). However, the default rules do matter because they set the terms by which negotiations or subsequent legislation must occur. Thus, a Property Clause with preemptive power is not redundant with the Enclave Clause.

¹⁷⁹ *Camfield v. United States*, 167 U.S. 518, 525 (1897) (upholding federal law on ground that it prevented government property from nuisances); *United States v. Grimaud*, 220 U.S. 506, 516 (1911) (upholding delegation by Congress to land management agency because “an owner may delegate to his principal agent the right to employ subordinates, giving to them a limited discretion”); *Light v. United States*, 220 U.S. 523, 536 (1911) (“But ‘the nation is an owner, and has made Congress the principal agent to dispose of its property.’”).

¹⁸⁰ *Camfield*, 167 U.S. at 525–26 (upholding congressional power to regulate private property adjoining federal lands to protect federal lands while acknowledging that “[t]he general government doubtless has a power over its own property analogous to the police power of the several States”); *Grimaud*, 220 U.S. at 516 (upholding Forest Service regulations on the grounds that they are less significant than municipal ordinances); *Kleppe*, 426 U.S. at 536–37 (rejecting claims that Congress’s power is limited to making rules regarding the use and protection of federal property); *Schulenberg v. Harriman*, 88 U.S. 44, 62 (1874) (holding that rules that apply to private property transactions do not necessarily apply to federal land grants) (“A legislative grant operates as a law as well as a transfer of the property, and has such force as the intent of the legislature requires.”).

¹⁸¹ See *supra* Part II.A; see also *Gaetke*, *Refuting*, *supra* note 21, at 624 n.50 (“The unlanded states feared that the landed states would dominate the national government if they were permitted to create daughter states in the western lands.”); Appel, *supra* note 21, at 21 (noting Maryland’s position that jurisdiction, not just title, over western land claims should be ceded to the United States because of concerns that the new states would otherwise be “loyal lackeys to their parents”); *id.* at 24–25 (noting that legislation adopted by the Continental Congress gave Congress control over ceded western lands, effectively adopting the Maryland position); *Goble*,

propriatorship, but also disputes over sovereignty. The federal government was to be owner and sovereign of the ceded lands to ensure that those lands would be formed into new states that were separate and independent from the existing states. The federal government never simply played a role as landowner—as demonstrated (if nothing else) by the role played by the federal government as sovereign for the territories before admission as states.

Nor would this federal role as proprietor and neutral sovereign disappear when the federal land is included within a newly admitted state. During the 1770s and 1780s, disputes over land ownership and sovereignty were necessarily within existing states, as there were only states, not territories, at the time. For instance, disputes over land ownership and sovereignty in the area that is now Vermont included at least three claimants—New Hampshire, New York, and the unrecognized state of Vermont—two of which were members of the Articles of Confederation.¹⁸² A fight over land ownership and sovereignty occurred in the Wyoming Valley within the borders of Pennsylvania between claimants under Connecticut and Pennsylvania grants.¹⁸³ Resolution of these disputes necessarily involved the U.S. government,¹⁸⁴ and a fear that these disputes might prompt

supra note 21, at 523 (arguing that in the debates in the 1780s over the western land claims, “the primary issue was determining who would make the specific decisions” about how to manage those lands and noting “[t]he compromise was the determination that the decision would be made on a federal, instead of a state basis. Henceforth, the western lands would be held for the common good with no particular state’s citizens to be preferred”). Appel makes the point most clearly:

[S]tate power over the lands ceded to the United States would have allowed the ceding states to have more power than the states without such land claims. Collectively, the states could trust only the United States to properly govern and serve as a neutral arbiter of the western lands. Therefore, as first set forth in the constitutional convention, the United States was not merely a proprietor over its property; it had the powers of a sovereign.

Appel, *supra* note 21, at 29–30.

¹⁸² For a thorough history of the jurisdictional conflicts over what became Vermont between New York, New Hampshire, and those who sought to create a separate state of Vermont, see ONUF, ORIGINS, *supra* note 71, 103–48.

¹⁸³ See *id.* at 49–75 (providing an overview of the dispute); *id.* at 8–11 (noting how Connecticut in 1775 sent armed troops into Pennsylvania to enforce its claims to be able to grant lands in the Wyoming Valley, and how Connecticut settlers defied Pennsylvania state authority). The legal aspects of the Wyoming dispute were resolved by a trial set up under the Articles in 1781, though conflict on the ground continued afterwards. *Id.* at 19–20, 58–59. A similar dispute existed between Virginian settlers in southwestern Pennsylvania and the Pennsylvania government, which was resolved by an agreement between Virginia and Pennsylvania in 1779. *Id.* at 49–74.

¹⁸⁴ A trial under the Articles resolved the Wyoming dispute. Negotiation facilitated by Congress between New York and Vermont, and congressional recognition of Vermont as a state, resolved the Vermont dispute; observers also noted that any alternative that did not recognize Vermont would require either the use of force by the Continental Congress to subdue the Vermonters, or the possibility of combined military action by New York and New Hampshire against the Vermonters, raising the specter of interstate conflict. *Id.* at 114–15, 123.

interstate conflict and dissolution of the United States was a major motivator for the Constitution.¹⁸⁵

This history leads to another reason why the preemptive power of federal legislation with respect to federal land under the Property Clause would not end even after the admission of a state. The dispute over the western land claims was also a claim by the landless states that those western lands reflected the shared sacrifice of all the colonies that had fought for independence. The decision to transfer ownership and sovereignty of those lands to the federal government can be understood as a victory for that perspective—that the federal government was the repository of the lands on behalf of the states.

This language identifying the United States as a trustee for the states (and, more broadly, for the people as a whole) in its ownership of those public lands has a long and rich history in American law and politics. The Supreme Court has drawn on this language regularly in its case law upholding federal power over the public lands.¹⁸⁶ For instance, in *Camfield v. United States*, the Court upheld the application of a federal law beyond the property border to private land adjoining the federal lands.¹⁸⁷ The Court rejected arguments that this would improperly undermine state sovereignty because the federal government required the power to protect its lands against states, including the state where the land was located, in order to protect the interests of the broader American public: “A different rule would place the public domain of the United States completely at the mercy of state legislatures.”¹⁸⁸ If the United States did not exercise this power to protect its lands, then it “would be recreant to its duties as trustee for the people of the United States to permit any individual or private corporation to monopolize them for private gain.”¹⁸⁹

C. *Equal Footing and Equal Sovereignty*

The last question is whether the power of Congress with respect to federal lands should be limited within states because it would undermine the sovereignty

¹⁸⁵ Hamilton drew on the conflict over the Wyoming Valley and Vermont as a reason for ratification of the Constitution. THE FEDERALIST NO. 7, at 60, 61–62 (Alexander Hamilton) (Clinton Rossiter ed. 1961); see also ONUF, ORIGINS, *supra* note 71, at 149–53 (noting the role that these disputes played in motivating a sense of “political crisis” in the lead up to the Constitutional Convention); *id.* at 154 (“Most Americans agreed that the solution to ‘competitions and encroachments’ among the states, ‘whether in commerce or territory,’ was to strengthen the central government.”).

¹⁸⁶ See *supra* note 120.

¹⁸⁷ 167 U.S. 518, 528 (1897).

¹⁸⁸ *Id.* at 526.

¹⁸⁹ *Id.* at 524.

of those states in violation of the equal footing doctrine.¹⁹⁰ The implication of the equal footing argument is that after admission of a state either congressional power must be limited or public lands should be divested from the federal government.¹⁹¹ The argument sometimes builds off a claim that the “dispose” language of the Property Clause creates a mandatory duty for the federal government to divest itself of its ownership interests when a state is admitted to the Union.¹⁹²

But divestment of federal land ownership in admitted states would in fact contradict the role that the federal government is supposed to play under a horizontal federalism understanding of the Property Clause. In addition, a horizontal federalism understanding of the Property Clause does not restrict congressional power to impose differential requirements on states once they have been admitted to the Union. As noted above, the equal footing doctrine was rejected as a textual matter by the Constitutional Convention.¹⁹³ A weak version

¹⁹⁰ See, e.g., Engdahl, *supra* note 21, at 294; Hardwicke et al., *supra* note 21, at 419, 431 (stating that “the framers did not intend that the Federal Government should become a proprietor of revenue-bearing lands within the states” and calling such ownership a “constitutional monstrosity” that undermines state sovereignty).

¹⁹¹ See, e.g., Patterson, *supra* note 21, at 47–48; Hardwicke et al., *supra* note 21, at 419. In the political arena, these arguments were the basis of the Sagebrush Rebellion of the 1980s, the County Supremacy movement of the 1990s, and the Land Transfer movement of the 2010s, all of which called for transfer of some or all federal land to state or local control. For an overview of these movements, see Leshy, *supra* note 9. For the equal footing arguments made by counsel for Utah as part of its land transfer claims in the 2010s, see HOWARD ET AL., *supra* note 8, at 55–99.

The equal footing arguments can be seen as the foundation for all criticisms of preemptive federal power under the Property Clause. See Leshy, *supra* note 9, at 507; Goble, *supra* note 21, at 497 (“[T]he classic doctrine thus resolves into an equal footing argument.”). One scholar has explicitly argued that the federal government can retain property ownership within states without having preemptive power. Schmitt, *Limiting the Property Clause*, *supra* note 21.

¹⁹² See, e.g., Natelson, *supra* note 21, at 350, 363–65. Utah’s claims to ownership of federal lands within its borders relied in part on claims that the Enabling Act admitting Utah to the Union constituted a promise that federal lands within Utah would eventually be sold or given away. KOCHAN, A LEGAL OVERVIEW, *supra* note 8, at 12–16; HOWARD ET AL., *supra* note 8, at 99–113; Kochan, “Duty to Dispose,” *supra* note 8, at 1150–67. The statutory interpretation claims based on the Utah Enabling Act are thoroughly rebutted elsewhere. See Leshy, *supra* note 9, at 553–58. These statutory interpretation arguments require rejecting interpretations of the Clause that give broad power to the federal and government. Kochan, “Duty to Dispose,” *supra* note 8, at 1167. They are also closely related to claims that there is an obligation for the federal government to dispose of its lands within admitted states because the purpose of the cession of lands to the federal government by the landed original states in the 1780s and 1790s was to advance the creation of new states. See KOCHAN, A LEGAL OVERVIEW, *supra* note 8, at 17–18, 24–27 (relying on a claim about historical expectations around the land cessions to support Utah’s position, and also noting that the equal footing theory both supports the statutory interpretation claim as well as providing an additional argument); HOWARD ET AL., *supra* note 8, at 99–113 (arguing the same); Kochan, “Duty to Dispose,” *supra* note 8, at 1160–67, 1182–88 (arguing the same). As discussed earlier, while the land cessions were intended to advance the creation of new states, they were also intended to advance the role of the federal government as a neutral arbiter among states in managing the lands, including after states were admitted to the Union.

¹⁹³ See *supra* Part II.A.

of equal footing focused on political rights would be consistent with a horizontal federalism conception of Article IV, but a broad version is not required by the text, the historical context of the Property and Admission Clauses, or a horizontal federalism conception of Article IV. As such, the equal footing theory neither provides an argument against preemption of state law under the Property Clause nor requires divestiture of federal land holdings within states.

First, the text of the Property Clause cuts against divestiture. As noted in the prior section, the text grants Congress the power to both dispose and enact needful rules and regulations.¹⁹⁴ Implicit divestiture of public lands to newly admitted states—where the congressional acts admitting the new states explicitly required those states to disclaim any claims to those federal lands¹⁹⁵—would be deeply inconsistent with congressional supremacy under the Clause.

Second, the historical context for the Property and Admission Clauses outlined in Part II.A makes clear that the purpose of the Property Clause was to grant the federal government the authority to manage and exercise sovereignty over the public lands, creating a strong federal role to mediate between the conflicts among the states over the western land claims. As developed in the prior section, the federal government was needed as a neutral arbiter for the public lands even after the admission of the states, both to resolve conflicts and as the owner or trustee of the lands for the other states.¹⁹⁶ Divestiture of federal lands within new states would hinder the role that the federal government could play in managing and controlling the lands on behalf of *all* states to mediate the potential for conflict between the states over those lands. The mediating role of the federal government is important regardless of whether the federal public lands are within a territory or a state—contestation over land grants existed even within the original thirteen states.¹⁹⁷ And without preemption, federal power as mediator and manager of the lands could be undermined by a hostile state government.¹⁹⁸

Likewise, divestiture would benefit a newly admitted state at the expense of the other states that had contributed to and supported the efforts to acquire those lands, undermining the federal government's role as trustee for *all* the states.

¹⁹⁴ See *supra* note 69 and accompanying text.

¹⁹⁵ Biber, *supra* note 75, at 130–31 tbl.1.

¹⁹⁶ See *supra* Part III.B.

¹⁹⁷ See *supra* notes 182–85 and accompanying text.

¹⁹⁸ See *Camfield v. United States*, 167 U.S. 518, 526 (1897) (“A different rule would place the public domain of the United States completely at the mercy of state legislation.”).

Divestiture would end that mediating role. John Leshy has previously articulated the point:

[T]here is no credible evidence that the founders intended to put the national government under any legal obligation to divest itself of ownership of all the public lands, whether to new states or anyone else. Indeed, such an objective would have made no sense to the politically savvy founders. There is no question that they, and the states they hailed from, regarded these lands as being bought with their “blood and treasure,” and they expected these lands to be used for the “common benefit” of the entire nation. Thus, they were very unlikely to support relinquishing all control over them to new states.¹⁹⁹

Leshy also notes the long history of federal retention of lands within admitted states from the establishment of the United States to achieve a range of purposes.²⁰⁰

At the heart of most of the arguments for divestiture is a claim that the equal footing doctrine requires divestiture. Despite the rejection of an explicit equal footing requirement at the Constitutional Convention, the Supreme Court has articulated an equal footing doctrine—though that doctrine, as described in Part I, has been limited to a very specific range of issues, including ownership of submerged lands on the date of statehood and the location of a state’s capital.²⁰¹ None of the leading equal footing cases involve the management or divestment of terrestrial public lands.²⁰²

¹⁹⁹ Leshy, *supra* note 9, at 511; *see Goble, supra* note 21, at 506 (“The [argument for divestiture] confuses factual equality (the presence or absence of federal lands) with political equality (the authority of the states over article IV lands). So long as all states have the same authority over article IV lands within their borders, the equal footing doctrine is not offended.”); Gaetke, *Refuting, supra* note 21, at 643.

²⁰⁰ *See Leshy, supra* note 9, at 518–19. Leshy also notes that arguments that federal lands should be divested to newly admitted western states was broadly rejected in the first half of the eighteenth century, including by James Madison. *Id.* at 523–27. Given the public debates and the settled understanding, one can plausibly conclude that the constitutional question has been settled. William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 13–21 (2019).

²⁰¹ *Coyle v. Smith*, 221 U.S. 559, 579 (1911); *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 230 (1845).

²⁰² *See Coyle*, 221 U.S. at 562 (discussing the location of the state capital); *Shelby County v. Holder*, 570 U.S. 529, 534–35 (2013) (discussing the Voting Rights Act). The Supreme Court has held that the equal footing doctrine requires transfer to a state upon its admission ownership of lands submerged between navigable waters at the time of admission. *Pollard*, 44 U.S. at 230. The Court has explicitly rejected extending that reasoning to dry land. *Scott v. Lattig*, 227 U.S. 229, 244 (1913); *Texas v. Louisiana*, 410 U.S. 702, 713 (1973); *Arizona v. California*, 373 U.S. 546, 597–98 (1963). The importance of navigation on waterways in a pre-industrial economy provides a strong basis for special treatment of lands submerged under navigable waterways. For scholars analyzing the case law and concluding that it does not require divestiture of federal lands within state borders, *see, e.g., Leshy, supra* note 9, at 560–61; Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207, 1216–18 (2016). For case law rejecting equal footing challenges to federal land retention, *see, e.g.,*

How does a horizontal federalism understanding of Article IV shape our understanding of the equal footing doctrine?²⁰³ On the one hand, to the extent Article IV is understood to emphasize an agreement among the states at the Constitutional Convention as to how to manage interstate relations between the existing states, Article IV could support a rejection of the equal footing doctrine as not grounded in the text of the Constitution. This is a vision of Article IV as an agreement between the existing states at the expense of new states, the vision of delegates such as Governour Morris.²⁰⁴

On the other hand, to the extent Article IV is better understood as a horizontal federalism agreement among all the states—present and future—rather than an extra-textual equal footing doctrine makes more sense. A key driver for the development of the Constitution was the resolution of western land claims in a way that was equitable among the landed and landless states, and in a way that would also ensure western settlers were loyal to the United States. An equal footing doctrine would have reduced the risk that some new states would be subservient to some or all the existing states, and equally situated new states would be more likely to inspire loyalty by future settlers. Given the drafting history and historical context of Article IV,²⁰⁵ some notion of an equal footing doctrine seems plausible as the alternative, despite the explicit rejection of the provision in the Convention. In addition, the equality principle for states in the Senate (entrenched in Article V) would support an equal footing doctrine, albeit perhaps a narrow one focused on political rights.²⁰⁶ Finally, the Northwest Ordinance, enacted in 1787 as the Constitution Convention was just convening and which provided for governance and eventual statehood of the federal territories northwest of the Ohio River, guaranteed equal footing for states

Stearns v. Minnesota, 179 U.S. 223, 242–45 (1900) (upholding conditional land grants to states); United States v. Gardner, 107 F.3d 1314, 1318–19 (9th Cir. 1997).

²⁰³ It is important to keep in mind the distinction between the separation-of-powers and federalism implications of a horizontal federalism understanding of Article IV for the Property Clause. The separation-of-powers implication of horizontal federalism emphasizes the primacy of Congress in implementing the Clause, since Congress is a representative of the states. That is distinct, however, from the power of the federal government vis-à-vis states. Congress, even as a representative of the states, is still a component of the federal government. Thus, it is entirely consistent to recognize the primacy of Congress under horizontal federalism while still recognizing a robust federal role under the Clause vis-à-vis the states.

²⁰⁴ See *supra* notes 83–85 and accompanying text.

²⁰⁵ See *supra* Parts II.A & II.B.

²⁰⁶ See Zachary Price, *NAMUDNO's Non-Existent Principle of State Equality*, 87 N.Y.U. L. REV. ONLINE 24, 27–28 (2014) (noting these provisions); Litman, *supra* note 202, at 1230. The existence of specific provisions of the Constitution that mandate state equality might also be taken to imply that other forms of inequality are not prohibited by the Constitution. Leshy, *supra* note 9, at 510; Litman, *supra* note 202, at 1230–32.

admitted pursuant to its provisions—the framers of the Constitution were surely aware of the Ordinance, and the first Congress quickly reenacted it.²⁰⁷

But much of the evidence for an equal footing doctrine also supports a narrow version of the doctrine—one focused on political rights and sovereignty rather than a broader vision of economic equality. This latter, broader vision is the basis for the claim that federal land ownership within states (which is heavily concentrated in the western United States) is unequal because it diminishes the power of states with large concentrations of federal land ownership. However, while the Northwest Ordinance guaranteed equal footing for newly admitted states, it also required those states to abide by a range of restrictive conditions—including the protection of religious liberty, the prohibition of slavery, and a disclaimer of ownership or taxation power over federal lands within their borders.²⁰⁸ Almost every congressional statute admitting a new state has required that state to disclaim ownership of federal lands, respect federal power over relations with Indian tribes, and abide by a range of additional intrusive conditions.²⁰⁹ This history weighs in favor of limiting any equal footing doctrine to political sovereignty, consistent with existing case law applying the doctrine.²¹⁰ Thus, the Supreme Court has rejected claims that “Congress cannot

²⁰⁷ *An Ordinance for the Government of the Territory of the United States North West of the River Ohio*, *supra* note 76, at 342; An Act to Provide for the Government of the Territory Northwest of the River Ohio, art. V, ch. 8, 1 Stat. 50, 53 (1789). The Court has drawn on the Northwest Ordinance as evidence of the intent of the framers. See *Reynolds v. Sims*, 377 U.S. 533, 573 (1964) (citing the Ordinance as example of the framers requiring territorial legislatures to be apportioned equally by population, and that equal apportionment is therefore mandated by the equal protection clause). For scholars drawing on the Ordinance to advance versions of an equal footing or equal sovereignty doctrine, see Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. 1087, 1104–05 (2016) (citing equal footing language in most state admission acts); Landever, *supra* note 21, at 563.

²⁰⁸ *An Ordinance for the Government of the Territory of the United States North West of the River Ohio*, *supra* note 76, at 340–43; see also Leshy, *supra* note 9, at 508–09 (stating the Ordinance’s “understanding of ‘equality’ in its reference to ‘equal footing’ was ‘narrowly defined.’ It referred to political status, and not to other subjects like economic or resource equality, or equality as respects U.S. landholdings”); Goble, *supra* note 21, at 506 n.46 (noting that the equal footing language in Ordinance “seems limited to political instead of economic equality. [A] view . . . supported by other provisions of the clause that forbid new states from interfering with the disposition of federal land”); Litman, *supra* note 202, at 1235–36 (making similar points including Ordinance restriction on new states being able to allow slavery or religious discrimination).

²⁰⁹ Biber, *supra* note 75, at 130–31 tbl.1.

²¹⁰ The Supreme Court stated the following in *United States v. Texas*, 339 U.S. 707 (1950):

The “equal footing” clause has long been held to refer to political rights and to sovereignty. It does not, of course, include economic stature or standing. There has never been equality among the States in that sense. Some States when they entered the Union had within their boundaries tracts of land belonging to the Federal Government; others were sovereigns of their soil.

Id. at 716 (citations omitted); see also *United States v. Gardner*, 107 F.3d 1314, 1319 (9th Cir. 1997) (making a similar point).

constitutionally withdraw large bodies of land from settlement without the consent of the state where it is located” and stated that the United States can “withhold or reserve the land . . . indefinitely.”²¹¹

Nor would this narrow notion of the equal footing doctrine support restricting the preemptive power of the federal government under the Property Clause. Federal preemptive power over federal lands does not alter the ability of a state to enact its own laws that apply on non-federal lands, which is in many ways the core feature of state sovereignty. And while states with more federal lands within their borders have more lands that are covered by the potential preemptive power of the Property Clause, that inequality is replicated in a whole host of substantive areas where federal power is present. As noted by other scholars, the fact that New York is a center for the financial industry, such that federal securities regulation has a heavier preemptive effect in that state, is not a violation of the equal footing doctrine.²¹² Similarly, the fact that a coastal state has a greater interaction with federally-managed waters and submerged lands is not a violation of the equal footing doctrine.²¹³

A separate question is the extent to which the equal footing doctrine should be expanded into an equal sovereignty doctrine, as articulated by the Supreme Court in *Shelby County v. Holder*.²¹⁴ The equal footing case law before *Shelby County* had exclusively focused on the ability of Congress to use admissions conditions to constrain state decision-making after admission of the state.²¹⁵ *Shelby County* extended that case law to laws passed under other congressional power besides the Admissions Clause, legislation applicable to currently admitted states.²¹⁶ The Court overturned a provision of the Voting Rights Act that required preapproval of changes to voting laws in certain states on the grounds that the law improperly undermined the equal sovereignty of those states.²¹⁷

Again, a horizontal federalism understanding of Article IV could be understood as supporting this extension to an equal sovereignty doctrine. One

²¹¹ *Light v. United States*, 220 U.S. 523, 535–36 (1911).

²¹² *Leshy*, *supra* note 9, at 564.

²¹³ *See Goble*, *supra* note 21, at 506–07. For a contrary, broad, and unsupported claim as to the scope of the equal footing doctrine, see HOWARD ET AL., *supra* note 8, at 77 (“The Equal Footing Doctrine requires that each State be admitted on an equal footing with the original thirteen in every way.”).

²¹⁴ *Shelby County v. Holder*, 570 U.S. 529, 544 (2013). Legal counsel for Utah has argued that the equal sovereignty doctrine also supports divestiture of federal lands to admitted states, though the argument is essentially the same as an equal footing claim. HOWARD ET AL., *supra* note 8, at 55–72.

²¹⁵ *See Biber*, *supra* note 75, at 175–84.

²¹⁶ *Shelby County*, 570 U.S. at 545–50.

²¹⁷ *Id.* at 544–45.

could build on the debates during the drafting and ratification of the Constitution about the need to ensure that western states would not be subordinate to the original states and argue this history implies that the original states (and so all states, newly admitted or not) should be treated as equals.²¹⁸ However, the horizontal federalism of Article IV also recognizes the role of Congress as the representative of states and the ability of states to use their equal representation in the Senate to protect their interests.²¹⁹

Territories or other entities seeking admission by Congress—a decision purely in the discretion of the states currently in the Union—do not have the protection of congressional representation available to them. To protect these more vulnerable entities, an equal footing doctrine prevents Congress from using its Admissions Clause powers to extend congressional powers beyond what Congress has vis-à-vis current states. Indeed, all the existing equal footing cases can be understood as limiting the power of Congress to leverage its Admissions Clause to impose permanent constraints on the political power of new states.²²⁰ For instance, *Coyle v. Smith*²²¹ involved an admissions act that constrained a state’s ability to move its capital, which the Court held was an “essential and peculiarly state power[]”²²²—a power that would not otherwise be within Congress’s control. *Bolln v. Nebraska*²²³ rejected an argument that a state enabling act provision required the state to adopt the Bill of Rights into the state constitution because Congress had no power to require any state to incorporate the Bill of Rights.

Finally, there are cases that have held that admissions act provisions that required newly admitted states to keep navigable waterways as “common highways and forever free” without any tax did not prevent states from

²¹⁸ The state-to-state relationships implicit in the horizontal federalism of Article IV could be analogized to international law, which some scholars have argued implies equality among the states. Colby, *supra* note 207, at 1139–40. However, international legal scholars influential in the Founding period, such as Vattel, emphasized the possibility of sovereign states with greatly variable levels of power and sovereignty vis-à-vis each other, even if they had formal equality in the international legal system. See Seth Davis, Eric Biber & Elena Kempf, *Persisting Sovereignities*, U. PA. L. REV. (forthcoming 2022) (on file with author) (describing the concept of dependent sovereignty in international law); see also Litman, *supra* note 202, at 1240–41 (noting the issue).

²¹⁹ Price, *supra* note 206, at 27 (“While it is conceivable that a majority of states in Congress could routinely gang up on a single state or a minority group of states, the Constitution provides states with substantial means of political self-defense.”); Litman, *supra* note 202, at 1265–66.

²²⁰ See Litman, *supra* note 202, at 1211, 1220–21, 1225–28 (stating that state admissions cases use equal sovereignty to develop two limits on Congress’s power to admit states: “(1) Congress may only impose laws . . . that fall within its delegated powers, and (2) Congress may not enact laws . . . that interfere with spheres in which the states are sovereign or autonomous”).

²²¹ 221 U.S. 559 (1911).

²²² *Id.* at 565.

²²³ 176 U.S. 83, 87–88, 90–91 (1900).

constructing bridges that obstructed free navigation where there was no separate congressional law prohibiting bridge construction.²²⁴ Some of these cases analyze the relevant admission act language narrowly,²²⁵ while others use broader language about state equality.²²⁶ However, they all build on a nineteenth century principle of constitutional law that states had primary authority over bridge and canal construction unless Congress acted as a default standard of constitutional power. As such, the Court can be perceived as reluctant to conclude that Congress used its admissions power to leverage a permanent restriction on one state's authority in bridge and canal construction, rather than finding Congress unable to restrict a state's authority relative to other states.²²⁷

A broader version of the equal footing or equal sovereignty doctrine that expands beyond restricting congressional leverage of Admissions Clause powers is, therefore, neither required by a horizontal federalism understanding of Article IV nor supported by the relevant case law.²²⁸

IV. EXTENSIONS

The analysis in this Article has focused on how a horizontal federalism understanding of Article IV can shape our interpretation and application of the Property Clause. But there are additional interpretive problems specific to the Property Clause that a horizontal federalism understanding of Article IV might help resolve. This Part tentatively addresses two: (1) the application of the Appointments Clause to federal officials under Article IV, and (2) the power of Congress to use non-Article III courts to resolve disputes under Article IV. In both situations, a horizontal federalism understanding of Article IV indicates that Congress may have greater powers to structure both the Executive and Judicial Branches in the context of Article IV than it might have otherwise.

²²⁴ Colby, *supra* note 207, at 1106–08, 1113–14, 1118–22 (citation omitted) (the leading scholarly article on the topic). For the case law on the topic, see generally *Escanaba v. City of Chicago*, 107 U.S. 678 (1883); *Withers v. Buckley*, 61 U.S. 84 (1857); *Cardwell v. Am. River Bridge Co.*, 113 U.S. 205 (1885); *Willamette Iron Bridge Co. v. Hatch*, 125 U.S. 1 (1888).

²²⁵ See, e.g., *Cardwell*, 113 U.S. at 212.

²²⁶ See, e.g., *Escanaba*, 107 U.S. at 688–89.

²²⁷ Language in some of the case law can be understood broadly, with strong wording about the essential nature of equality across all states. Colby, *supra* note 207, at 1106–08, 1113–14, 1118–22. A horizontal federalism version of Article IV would be skeptical of this broad interpretation of the case law.

²²⁸ *Contra* HOWARD ET AL., *supra* note 8, at 122–23 (arguing that the placement of the Property Clause in Article IV implies that Congress has limited powers under the Clause and that there cannot be long-term federal land ownership under the Clause within an admitted state). As noted above, while a horizontal federalism understanding of Article IV might emphasize congressional power vis-à-vis the Executive, it does not minimize federal power where it is granted by the text. Indeed, a horizontal federalism conception of Article would emphasize the power that Congress has as representative of the states.

A. *The Appointments Clause*

The question of how the Appointments Clause applies to federal officials exercising Article IV powers recently arose in the Supreme Court's consideration of a challenge to the composition of the fiscal review board that Congress created to address the Puerto Rican debt crisis.²²⁹ The board was composed of members appointed by the President without Senate confirmation, in tension with the Appointments Clause requirement that "Officers of the United States" be presidentially nominated and Senate confirmed. Because Puerto Rico is a territory rather than a state, Congress can exercise broad powers with respect to Puerto Rico under the Property Clause.²³⁰ The Court upheld the method of appointing members of the fiscal review board on the grounds that the Appointments Clause does not apply to territorial officials who deal primarily with "local" issues, as opposed to "national" issues. The Court reasoned that even though the Appointments Clause does apply to Article IV, Article IV officials who address "local" issues are not officers of the United States who require presidential appointment and Senate confirmation.²³¹ Instead, they constitute "inferior Officers" who can be appointed solely by the President, as provided for by the Appointments Clause.

Here, the Court perhaps reached the right result through incorrect reasoning. As Justice Thomas noted in his concurrence, the border between "local" and "national" is not based in any text of the Constitution, nor is it one that is easily applied in the context of federal lands or territories.²³² For instance, the fiscal review board was authorized to participate in bankruptcy proceedings in federal court, arguably a "national" question. The better approach, as Justice Thomas noted, may be to recognize that Article IV provides a different framework for considering these kinds of structural questions and authorizes different approaches to appointment of territorial officials.²³³

²²⁹ *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv.*, 140 S. Ct. 1649 (2020).

²³⁰ *See* U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.").

²³¹ *Fin. Oversight Bd.*, 140 S. Ct. at 1651.

²³² *See id.* at 1671 (Thomas, J., concurring). The Court noted, in considering a case about the relative powers of the U.S. Attorney General (appointed by the President) as opposed to the Territorial Attorney General (appointed by the territorial governor), that "[s]trictly speaking, there is no sovereignty in a Territory of the United States but that of the United States itself. Crimes committed therein are committed against the government and dignity of the United States." *Snow v. United States*, 85 U.S. 317, 321 (1873).

²³³ *Fin. Oversight Bd.*, 140 S. Ct. at 1671 (Thomas, J., concurring) (noting that the key question is whether Board "perform[s] ongoing statutory duties under only Article IV"). Thomas's opinion is ambiguous as to whether he would limit his principle simply to officials acting under the Property Clause governing territories or to officials acting under any Article IV power. Giving Congress this kind of leeway will not necessarily result

Recognizing a different framework for territorial governance is all the more important because the workaround developed by the Court in the Puerto Rican fiscal review board case—categorizing territorial officials as “inferior Officers” who do not require Senate confirmation—still leaves fundamental constitutional problems for the management of territories. Self-governing U.S. territories have territorial officials who are elected by the voters of those territories—members of territorial legislatures and governors.²³⁴ Even if these officials are considered “inferior Officers,” the Constitution only allows them to be appointed by the President, the courts, or the “Heads of Departments.”²³⁵ None of those categories cover elected officials. Thus, application of the Appointments Clause to territorial elected officials might wipe out self-governance for the territories.²³⁶

Such a result is not just normatively undesirable—it is also inconsistent with long historical practice. The Northwest Ordinance provided for election of territorial legislatures once certain population thresholds had been met.²³⁷ The framers were very aware of the Northwest Ordinance at the time of the framing and reenacted it quickly after adoption of the Constitution—including the provisions for elected territorial legislatures.²³⁸ Congress repeatedly continued to provide for elected territorial legislatures over the history of territorial governance in the United States, and generally expanded the powers of these legislatures over time.²³⁹

A horizontal federalism understanding of Article IV—one that emphasizes congressional power to control governance relationships in federal territories and public lands—would similarly support such self-governance arrangements,

in legislative aggrandizement at the expense of the President—in the PROMESA case, the fiscal review board was appointed by the President without Senate approval. *Id.* at 1654.

²³⁴ See LAWSON & SEIDMAN, *supra* note 22, at 132–33; JACK ERICSON EBLEN, *THE FIRST AND SECOND UNITED STATES EMPIRES: GOVERNORS AND TERRITORIAL GOVERNMENT 1784-1912*, at 157–58, 166–69 (1968).

²³⁵ U.S. CONST. art. II, § 2.

²³⁶ For scholars noting this potential outcome and attempting to articulate work-around mechanisms that would allow for territorial elected officials and legislatures consistent with the Appointments Clause, see LAWSON & SEIDMAN, *supra* note 22, at 133–38.

²³⁷ See *Ordinance for the Government of the Territory of the United States North West of the River Ohio*, *supra* note 76, at 335–38.

²³⁸ An Act to Provide for the Government of the Territory Northwest of the River Ohio, art. V, ch. 8, 1 Stat. 50, 53 (1789); see also *Fin. Oversight Bd.*, 140 S. Ct. at 1668–69 (Thomas, J., concurring) (emphasizing this history and the importance of the reenactment of the Northwest Ordinance by the First Congress).

²³⁹ See *Clinton v. Englebrecht*, 80 U.S. 434, 441 (1871) (providing an overview of the history); Onuf, *Territories and Statehood*, *supra* note 71, at 1290–92 (noting how Congress provided for increasing self-government in territories as European-American population increased); EBLEN, *supra* note 234, at 52–86, 138–170; *id.* at 205 (noting an increased dominance of territorial legislatures with respect to governors as the nineteenth century proceeded). Early in the history of the territories, “[g]ubernatorial rule proved to be ideologically suspect and administratively disastrous.” Onuf, *Territories and Statehood*, *supra* note 71, at 1297.

should Congress seek to pursue them. Due to congressional primacy in Article IV, Congress has leeway to manage and govern the territories and public lands as the representative of the states. This leeway exists even if such governance requires alternative appointment mechanisms other than those identified in the Appointments Clause.

B. *The Courts*

Similarly, congressional primacy in the context of Article IV would support giving Congress greater leeway in determining the structure of the courts in the context of territories and federal public lands, and even authorize alternative methods dispute resolution beyond Article III courts. Again, this is consistent with historical practice.

In the context of territorial governments, the Supreme Court has long upheld the use of non-Article III courts where judges are appointed by territorial governors without Senate confirmation or lifetime tenure—including the resolution of disputes that might otherwise be heard by an Article III court.²⁴⁰ While the Court has given various justifications for this approach—including the temporary nature of territorial governments requiring flexibility in staffing,²⁴¹ the fact that Congress stands in the shoes of a state government with respect to territories,²⁴² and unspecified “practical considerations”²⁴³—this congressional power over the courts is consistent with a horizontal federalism perspective of congressional primacy in Article IV.

Likewise, in the context of structuring dispute resolution with respect to federal public lands, as with territories, the courts have upheld the use of non-Article III courts to resolve disputes over land ownership or claims of who

²⁴⁰ See, e.g., *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. 511, 546 (1828); *Benner v. Porter*, 50 U.S. 235, 245 (1850) (holding that territorial courts need not be Article III courts, but once a territory is admitted as a state, its federal courts must be organized under Article III); *Gov’t of the Canal Zone v. Scott*, 502 F.2d 566, 570–71 (5th Cir. 1974); *O’Donoghue v. United States*, 289 U.S. 516, 535 (1933); *Balzac v. People of Porto Rico*, 258 U.S. 298, 312 (1922); *Ex parte Bakelite Corp.*, 279 U.S. 438, 458–59 (1929); *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64 (1982); see also STORY, *supra* note 71, at 597 (§ 1325); LAWSON & SEIDMAN, *supra* note 22, at 146–50 (noting case law and its current relevance, and arguing the case law is wrongly decided); cf. *Palmore v. United States*, 411 U.S. 389, 419–20 (1973) (upholding non-Article III courts in Washington, D.C. under the District Clause, art. I, § 8, cl. 17, and explicitly connecting them to congressional power under the Property Clause). For the proposition that these courts can hear cases within the scope of Article III, see *Clinton*, 80 U.S. at 447; *Glidden Co. v. Zdanok*, 370 U.S. 530, 545 (1962).

²⁴¹ *O’Donoghue*, 289 U.S. at 536 (“A sufficient foundation for these decisions in respect of the territorial courts is to be found in the transitory character of the territorial governments.”); *Glidden*, 370 U.S. at 545–46.

²⁴² *N. Pipeline Const.*, 458 U.S. at 64.

²⁴³ *Palmore*, 411 U.S. at 403–04.

should receive federal public lands.²⁴⁴ Congress has delegated this work on occasion to agencies, territorial governors, specially convened commissions, and non-Article III territorial courts.²⁴⁵

Congressional power under Article IV over dispute resolution does not, however, mean that there is no role for courts—at least, so long as Congress has provided for judicial review.²⁴⁶ It is true that in the first half of the nineteenth century, federal courts took a very hands-off approach to lawsuits against executive officials who implemented the public lands laws,²⁴⁷ but this is not due to any reluctance by courts to hear claims in the public lands context, specifically. Instead, it reflects congressional statutes that did not explicitly allow for judicial review of agency decisions, nineteenth century limitations on the remedies available in lawsuits against the government, and the opportunity for dissatisfied parties to seek relief through Congress, which often passed legislation to resolve disputes between claimants and the federal government.²⁴⁸

²⁴⁴ See, e.g., *Standard Oil Co. of Cal. v. United States*, 107 F.2d 402, 409–10 (9th Cir. 1939); *Grisar v. McDowell*, 73 U.S. 363, 379 (1867); *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1855); *Williams v. United States*, 289 U.S. 553, 565 (1933).

²⁴⁵ See GREGORY ABLAVSKY, *FEDERAL GROUND: GOVERNING PROPERTY AND VIOLENCE IN THE FIRST U.S. TERRITORIES* 203 (Paul Brand et al. eds., 2021) (noting the use of commissions to resolve land claims disputes in the early republic); LESHY, *supra* note 71, at 31–40; *id.* at 62–72 (noting a commission created by Congress to resolve lead land lease claims in Missouri); MASHAW, *supra* note 110, at 88 (noting that in 1829 there was “a system of administrative land claims commissioners whose adjudicatory output rivaled that of the judiciary”); *id.* at 123 (stating the creation of administrative processes in the 1790s was a response to the conclusion that “territorial courts could not make decisions on all of these [foreign land] claims”); *id.* at 128–29 (describing overall history); *id.* at 254–56 (noting large scale administrative review in public land context in late nineteenth century); WHITE, *supra* note 131, at 516–18 (noting the large administrative process for adjudicating land claims in early nineteenth century, with broad discretion given to the agencies); ROHRBOUGH, *supra* note 29, at 33–36 (noting that in 1803 Republicans started to create a Board of Commissions to resolve foreign and other title claims in Louisiana and other territories).

²⁴⁶ U.S. CONST. amends. V, XIV. In addition, other provisions of the Constitution, such as the Due Process Clause under the Fifth and Fourteenth Amendments, might require judicial review of certain kinds of disputes.

²⁴⁷ MASHAW, *supra* note 110, at 245; Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197, 216–17 (1991). Ann Woolhandler argues that in the public lands context, this was driven in part by a desire to avoid undermining reliance interests and stability in land title. *Id.* at 234 (“The Court’s deference to long-standing constructions of statutes by the executive seems to have been similarly influenced by the need for reliability in land patents to avoid obstructions on the sale and use of land.”); see also *Wright v. Rosenberg*, 121 U.S. 488, 500–01 (1887) (rejecting challenges to factual decisions by the land office and noting that the patent granting land should be “conclusive as against any collateral attacks[.] . . . an invaluable muniment of title, and a source of quiet and peace to its possessor”).

²⁴⁸ MASHAW, *supra* note 110, at 136–37; Woolhandler, *supra* note 247, at 235, 235 n.192 (noting the lack of explicit statutory review provisions in land patent statutes may have encouraged less searching judicial review in that context, compared to invention patents where the statutes did have review provisions); see also *United States v. Arredondo*, 31 U.S. 691, 711, 729 (1832) (denying to hear dispute over a Spanish land grant because Congress had not provided for judicial review); *Astiazaran v. Santa Rita Land & Mining Co.*, 148 U.S. 80, 81–82 (1893) (“[T]he duty of providing the mode of securing these rights and of fulfilling the obligations imposed

Indeed, once courts took different attitudes towards the possibility of relief against the federal government, courts began to seriously review agency interpretations of public lands statutes and overturned those interpretations where they were unwarranted.²⁴⁹

Accordingly, while others have argued that there is no room for judicial review of executive branch implementation of Property Clause powers because of the “proprietary” nature of the clause,²⁵⁰ such arguments are inconsistent with historical practice and undermine the horizontal federalism of Article IV by preventing Congress from establishing enforcement mechanisms for executive compliance with congressional enactments

CONCLUSION

Article IV can be understood as an important Article on its own in our constitutional structure—one focused on horizontal federalism or building state-to-state relationships to create a stronger Union. This understanding of Article IV helps resolve thorny disputes over the Property Clause, perhaps the most important Clause within the Article. It more clearly delineates the border between congressional and executive power in implementing the Clause,

upon the United States by the treaties belonged to the political department of the government; and congress might either itself discharge that duty, or delegate it to the judicial department.”)

²⁴⁹ See Woolhandler, *supra* note 247, at 219–20 (describing the expansion of judicial review of public land decisions); see also *Wright*, 121 U.S. at 519–20 (holding that jurisdictional challenges to land office decisions can include claims that the land office had no power to transfer property to an adverse claimant). For examples of judicial rejection of agency legal interpretations in the public lands context, see *Lindsey v. Hawes*, 67 U.S. 554, 562–63 (1862); *United States v. Union Pac. Ry. Co.*, 148 U.S. 562, 569 (1893); *Dubuque & Pac. R.R. Co. v. Litchfield*, 64 U.S. 66, 89 (1859); *Hewitt v. Schultz*, 180 U.S. 139, 156 (1901) (“Of course, if the ruling of [the land office] was plainly erroneous, it would be the duty of the court to give effect to the will of Congress . . .”); *Burfenning v. Chi., St. Paul, Minneapolis & Omaha Ry. Co.*, 163 U.S. 321, 323 (1896); MASHAW, *supra* note 110, at 246–48 (arguing it was in public lands that the first development of modern judicial review of agency decision-making occurred); Scalia, *supra* note 114, at 884 (stating “by the end of the century [public lands litigation against the federal government] attained what might today be termed habeas corpus proportions”); *id.* at 890 (by turn of the twentieth century “there had been hundreds of cases in the federal courts seeking mandamus or injunction against land-office officials”). Courts generally did not review fact-finding by public land agencies in the nineteenth century. See, e.g., *Standard Oil*, 107 F.2d at 410–11; *Barden v. N. Pac. R.R. Co.*, 154 U.S. 288, 326–27 (1894); *Gardner v. Bonestell*, 180 U.S. 362, 369–70 (1901); *Johnson v. Drew*, 171 U.S. 93, 99 (1898); *Burfenning*, 163 U.S. at 323. For an exception, see *Lindsey*, 67 U.S. at 558. And even for judicial review of agency legal interpretations, there was often judicial deference, particularly when the agency interpretation was longstanding. See, e.g., *Kansas City, Lawrence & S. Kan. R.R. Co. v. Brewster*, 118 U.S. 682, 687, 695 (1886); *United States v. Lytle*, 26 F. Cas. 1037, 1039–40 (C.C.D. Ohio 1849).

²⁵⁰ See Sorenson, *supra* note 22, at 801 (arguing that the proprietary nature of land management excludes judicial review of public land decisions). Sorenson’s conclusion is in tension with hundreds of court decisions overturning executive branch decisions regarding public lands. For an example of a case overturning a federal executive decision, see *Fund for Animals v. Norton*, 294 F. Supp. 2d 92 (D.D.C. 2003).

highlighting the importance of protecting congressional primacy in determining whether to dispose of federal property. This understanding provides a strong constitutional foundation for federal preemption of state law and strong constitutional arguments against divestment of federal land ownership within new states. It also helps articulate why, even if Congress must admit new states on an equal footing with existing states, Congress is not required to treat states equally after they have been admitted.

This Article focused on the implications of a horizontal federalism understanding of Article IV for the Property Clause. But a horizontal federalism understanding could provide insights into interpreting other clauses in Article IV as well. For instance, there have long been disputes about whether the Guarantee Clause, in which the United States “shall guarantee to every State . . . a Republican form of government,” protects individual rights or addresses the structure of a state’s government, and about whether the Clause is judicially enforceable.²⁵¹ A horizontal federalism perspective might emphasize congressional primacy in resolving interstate disputes, and it might also emphasize the role of the Guarantee Clause as a key component of advancing interstate comity, which might lean towards interpreting the Clause as focused on governmental structure. Alternatively, interstate comity might also be advanced by protecting the rights of individuals across state lines, regardless of where they move or live. Providing more detailed analysis on this question and other questions related to other sections of Article IV is a promising line of inquiry for future research.

²⁵¹ U.S. CONST. art. IV, § 4. Compare Anya J. Stein, *The Guarantee Clause in the States: Structural Protections for Minority Rights and Necessary Limits on the Initiative Power*, 37 HASTINGS CONST. L.Q. 343, 344–46 (2010) (arguing for judicial enforcement of individual rights pursuant to the Guarantee Clause), and Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 868 (1994) (arguing the same), with Williams, *supra* note 23, at 677–79 (arguing no judicial capacity to enforce individual rights), and Ann Althouse, *Time for the Federal Courts to Enforce the Guarantee Clause?—A Response to Professor Chemerinsky*, 65 U. COLO. L. REV. 881, 881–83 (1994) (arguing the same).