# **COMMENT: The County Supremacy Movement: The Federalism Implications of a 1990sStates' Rights Battle**

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**Text**

**[\*417]**

"The federal government claims ownership of approximately one-third of the nation's land. If the reality of state ownership can be implemented, with public land management at the local level in the interest of local economic, cultural and environmental values, Americans' prosperity will be enhanced, and their God-given rights to life, liberty and the pursuit of happiness will be in much less danger from violation by the federal government than they are today." [[1]](#footnote-2)1

"The success of it would require not merely a factious majority in the legislature, but the concurrence of the courts of justice and of the body of the people." [[2]](#footnote-3)2 **[\*418]**

On Independence Day, 1994, Dick Carver fired "the shot heard round the world" in the contemporary states' rights movement. [[3]](#footnote-4)3 The commissioner of Nye County, Nevada, bulldozed open a closed Forest Service road amid the cheers of armed supporters, driving a Forest Service agent off the road and openly defying federal control of public lands in the West. [[4]](#footnote-5)4 The action, which occurred in aptly-named Jefferson Canyon, was ostensibly authorized by the Nye County resolutions: local ordinances asserting that the federal government does not own the public lands or traditional roads within the state of Nevada. [[5]](#footnote-6)5 This declaration of local sovereignty and defiance of federal authority stands as the most aggressive posture in the County Supremacy movement. This step and the movement as a whole, which supporters claim includes over 300 counties, [[6]](#footnote-7)6 is an aspect of the growing anti-federal animosity on the contemporary political landscape.

The strong local sovereignty stand of Nye County, as well as the road opening, became the subject of a legal battle in Las Vegas District Court when the United States Department of Justice sued the county. The lawsuit sought to invalidate the resolutions and to have the United States' authority over the public**[\*419]** lands reaffirmed. [[7]](#footnote-8)7 Nye County initially indicated that it would vigorously defend the lawsuit, using it as an opportunity to assert the legal theories of the County Supremacy movement. [[8]](#footnote-9)8 Tactics changed, however, and ultimately the district court granted partial summary judgment to the United States and approved a settlement of the litigation on August 28, 1996. [[9]](#footnote-10)9

When the lawsuit was first brought, supporters of Defendant Nye County heralded it as the states' rights "case of the century." [[10]](#footnote-11)10 The action carried tremendously broad implications on such policy questions as management of public lands and inter-governmental cooperation. Although resolution of the lawsuit did not bring any radical changes to these controversial issues, the Nye County case remains significant. It raised fundamental issues of constitutionalism and federalism, and presented perhaps the most aggressive state sovereignty position of the County Supremacy movement before a federal court. Indeed, indicative of the level of concern this case generated, four amicus briefs were filed before the district court, representing 37 different amici. [[11]](#footnote-12)11

The Nye County case continues a debate started over 200 years ago about republicanism and the appropriate federalist structure for America. The legal and policy arguments in the Nye County claim specifically raised issues about the extent of federal power under the Property Clause, [[12]](#footnote-13)12 the limits of this power imposed by the Tenth Amendment's protection of state sovereignty, and the meaning of constitutionally-imposed equality among the states. Defendant Nye County invoked the cloak of anti-federalism [[13]](#footnote-14)13 in trying to assert local sovereignty and to throw off the yoke of "federal colonialism" in the West. [[14]](#footnote-15)14 **[\*420]** The United States, meanwhile, sought to reaffirm the supremacy of federal management power over the western public lands, which implicitly would limit the magnitude of state sovereignty. [[15]](#footnote-16)15

Despite academic attacks on federalism's relevance, [[16]](#footnote-17)16 this case illustrates the fundamental framework's importance, both for its pragmatic effects and its role in constructive dialogue. [[17]](#footnote-18)17 For management of public lands, balancing conservation and development interests is an area where the government has taken a strong national role, to the applause of some and the chagrin of many others. Therefore, a federalism lens is useful in analyzing this area; underlying the policy debates, after all, is the issue of which level of government, or what combination, can and should exert control over the western public lands. The Nye County case further serves as an interesting example of federalism theories in practice, rather than scholarly debate, here pushed to the limits by the legal advocates involved.

In analyzing the federalism implications of the County Supremacy movement, this article is organized into three parts. Part one will explain County Supremacy and its history, contextualizing it in the broader contemporary anti-federalist populism. Part two will detail the recent events in Nye County, which are on the forefront of this county movement. In illustrating this example of the aggressive approach to asserting local sovereignty, this section will also explain the lawsuit brought by the U.S. Department of Justice as a result of the Nye County events. Part three will raise and critically analyze the federalism issues in the Nye County case, including the equal footing doctrine and state sovereignty theories.

I.

The County Supremacy Movement

To supporters, the County Supremacy movement is a grass-roots effort, made up of "all those dirty-hands people who made the world go round." [[18]](#footnote-19)18 Its**[\*421]** aim is to protect property rights and to return governmental power to local authorities. [[19]](#footnote-20)19 Opponents contend the movement is simply a front for mining and logging companies "out to divest the public of its lands." [[20]](#footnote-21)20 Intertwined in the contemporary anti-federalism sweeping the country, this populist uprising, which has come to be called the County Supremacy movement, [[21]](#footnote-22)21 is in many ways simply a nineties reincarnation of the states' rights movement.

The loosely-connected movement, based mostly in the West, emphasizes the importance of local sovereignty and personal property rights, and is driven by anger and frustration at federal intervention in daily life. [[22]](#footnote-23)22 The movement is about asserting control over public lands, but according to movement members, it is also about protecting the Constitution and individual rights. Dick Carver, one of the leaders of the movement, who carries a copy of the Constitution in his shirt pocket, noted, "the issue is not land, the issue is constitutional jurisdiction." [[23]](#footnote-24)23 While County Supremacy overlaps with numerous other conservative political objectives and takes a variety of advocacy approaches, its main theme is apparent: animosity towards the federal government. The movement is grounded in the West's deeply-rooted ethos of rebellious independence, [[24]](#footnote-25)24 and has been tied to increasing incidents of violence throughout the West, including several bombings. [[25]](#footnote-26)25 **[\*422]**

This section will first outline the roots of the County Supremacy movement, and then contextualize this by describing significant related movements and factors in the contemporary populist uprising. Describing these related movements both improves an understanding of County Supremacy and highlights elements which are useful in recognizing the movement's broader significance. Finally, this section will outline the variety of approaches which the County Supremacy movement has employed.

A.

The Roots of County Supremacy

County Supremacy, as a movement unto itself, is a recent development. It emerged in 1993, mainly from the actions of the Nye County Board of Commissioners. [[26]](#footnote-27)26 The ideas and basic legal theories of the movement, however, have their origins in the public lands disputes of the last two decades. The basic tenor of County Supremacy arguments arises from even earlier in American history, recalling the extreme states' rights positions which have pervaded the country's political landscape since its founding.

States' rights as an intellectual position was closely associated with the Anti-Federalists during the constitutional debates. [[27]](#footnote-28)27 They opposed the new Constitution as creating a national government which would encroach on independent state sovereignty. [[28]](#footnote-29)28 While the Federalists carried the day and the Constitution was ratified, states' rights remained a strongly-held belief. This perspective played an important role in the initial policy debates of the nation, such as those over the national bank [[29]](#footnote-30)29 and the extent of the Necessary and Proper Clause, [[30]](#footnote-31)30 and took on a more radicalized nature during the nullification crisis of the 1820s and 1830s and the slavery debates. [[31]](#footnote-32)31 The Civil War, bringing with it the end of slavery and the start of federal reconstruction efforts, signaled the**[\*423]** ascendancy of national power and pushed the states' rights position into the history books.

In the twentieth century, states' rights as a political tool first emerged in opposition to intrusive federal regulation of daily life from 1910 through the twenties. [[32]](#footnote-33)32 More recently, the dogmatic political rallying cry was invoked during the efforts of southern states in opposing civil rights legislation in the fifties. [[33]](#footnote-34)33 The modern understanding of states' rights is consequently tainted by its previous use in defense of institutional racial discrimination. The legacy of states' rights as a political phenomenon thus lends a sense of history to the County Supremacy movement. Whether it also lends a legitimacy or detracts from County Supremacy's respectability depends on one's view of the meaning of states' rights.

The roots of County Supremacy's specific legal and policy positions were primarily planted during the Sagebrush Rebellion of the seventies. The Sagebrush Rebellion, in which western states and industry groups called for the transfer of federal lands to the states, responded to restrictive changes in federal environmental regulations during a time of nationwide economic downturn. [[34]](#footnote-35)34 Pursuing their ownership aims, the rebels elucidated a number of theories which were to re-emerge in the County Supremacy movement, including state ownership of public lands under the equal footing doctrine. [[35]](#footnote-36)35 The Sagebrush Rebellion pushed for federal action and succeeded in garnering national attention. [[36]](#footnote-37)36 But the rebellion achieved only state legislation in Nevada [[37]](#footnote-38)37 and eight other western states, [[38]](#footnote-39)38 which was unenforced and today is seen as merely political statements of discontent. [[39]](#footnote-40)39 One notable event of the rebellion was a bulldozing incident on July 4, 1980, which had striking similarities to the Jefferson Canyon opening. [[40]](#footnote-41)40 Ultimately, the Sagebrush Rebellion accomplished**[\*424]** little of substance, but left behind a legacy of untested legal theories and frustrated insurrection.

In the eighties, a particularly vociferous anti-environmental movement was spawned in Catron County, New Mexico, which also directly contributed to the theoretical origins of County Supremacy. [[41]](#footnote-42)41 The Gila River is located in Catron County, and anti-environmentalism grew partly in response to the special attention paid by federal regulators seeking to protect the river's fragile ecosystem. [[42]](#footnote-43)42 Further, the Forest Service repeatedly reduced grazing on the county's lands and, at one point, stopped timber production, leading to local outrage. [[43]](#footnote-44)43 Responding to local concerns, the Catron County commissioners passed the first "wise use" ordinance in 1991, asserting county supremacy over the federal government in a variety of areas. [[44]](#footnote-45)44 The ordinance was reprinted by the National Federal Lands Conference and offered for sale to other county governments with the exhortation that the plan be adopted "as is," so that counties around the nation could also assert greater sovereignty. [[45]](#footnote-46)45 As with the Sagebrush Rebellion, there has been little action beyond the passage of local ordinances. Estimates of the number of counties which have adopted or considered Catron-style ordinances range between 150 and 500, up to 16 percent of the nation's counties. [[46]](#footnote-47)46

B.

Related Movements and the

Anti-National Sentiment

The County Supremacy movement is not an independent, separately-identifiable political organization, but rather one part of the growing insurrection against the federal government. The significance of the county movement is best understood when placed in context with the other related anti-environmental and anti-regulation movements. Further, as it helps to frame these movements, it is important to recognize the overall anti-national mood, which is particularly**[\*425]** virulent in the contemporary issues of gun control, property rights, and environmentalism.

1.

Wise Use

The Wise Use movement, [[47]](#footnote-48)47 which emerged in 1988, is similar to the County Supremacy movement but concentrates on land use and environmental policy, pursuing libertarian and free market ideals. [[48]](#footnote-49)48 Wise Use is a part of the recent backlash against environmentalism and is funded largely by industry associations and corporate resource-extractors. [[49]](#footnote-50)49 Ron Arnold, a leader of the movement and vice president of the Center for the Defense of Free Enterprise, described the goal of Wise Use as "destroying" the environmental movement. [[50]](#footnote-51)50 The Wise Use movement is also a reincarnation of the Sagebrush Rebellion of the seventies which tried to wrest control over public lands from the federal government in retaliation for increasing environmental regulations. A supporter noted that Wise Use "is a citizens' movement that says we are tired of the federal government shoving its way around without any consideration to local opinion or local culture." [[51]](#footnote-52)51 The campaign advocates for ***oil*** drilling in the Arctic National Wildlife Refuge, increased mining and logging on public lands, and gutting the**[\*426]** Endangered Species Act. [[52]](#footnote-53)52 While Wise Use groups are concentrated in the public-lands states of the West, their activity has been increasing in the Northeast [[53]](#footnote-54)53 and California. [[54]](#footnote-55)54 As with the County Supremacy movement, Wise Use is a broad-based movement, with ties to militant fringe elements [[55]](#footnote-56)55 and established policy makers. [[56]](#footnote-57)56

2.

Property Rights and Takings

The Property Rights and Takings movement, closely tied to both the Wise Use and County Supremacy movements, seeks to protect private property rights and force government compensation when these rights are infringed upon. [[57]](#footnote-58)57 The intellectual underpinnings of the movement, expounded by such conservative academics as Chicago Law Professor Richard Epstein, were brought to bear in the legal arguments and policy debates of the Reagan Revolution. [[58]](#footnote-59)58 These theories are increasingly raised today as another element of battle in the western war against federal intervention, notably by groups such as the Defenders of Property Rights and the Mountain States Legal Foundation. [[59]](#footnote-60)59 On the expansive**[\*427]** western range, these theories take on bizarre proportions: rancher Wayne Hage of Nye County, Nevada, filed a $ 28 million takings claim in the U.S. Court of Claims after federal agents impounded some of his illegally grazing cattle. [[60]](#footnote-61)60 Hage commented, "you can take my boots, my hat, and my ranch, but you have to pay me just compensation." [[61]](#footnote-62)61 Hage and his lawyers argued that a "split estate" on public lands, where ranchers own the "range rights," including water and forage rights, even if the federal government owns the land, provides the basis for this claim. [[62]](#footnote-63)62

3.

Anti-Federal Sentiment

The strong anti-government mood currently sweeping the country provides an important context for understanding the County Supremacy movement. The broadest illustration of this national sentiment is the 1994 elections, which many describe as a particularly vociferous railing against incumbency and the**[\*428]** bureaucratic establishment. [[63]](#footnote-64)63 The politicians who were swept into positions of power by this discontent have worked to restrict federal control, in the name of deregulation and returning power to the states. [[64]](#footnote-65)64 On the public lands front, two bills were proposed in the 104th Congress which would have privatized much of the Bureau of Land Management's holdings. [[65]](#footnote-66)65 Additionally, numerous counties and states across the West have passed resolutions affirming Tenth Amendment restrictions on federal power or otherwise asserting local sovereignty. [[66]](#footnote-67)66 This anti-federal mood is matched, and indeed partially incited, by the recent states' rights trend in the Supreme Court. [[67]](#footnote-68)67

4.

Militias and Extremism

This anti-governmental sentiment has revealed its troubling underside in the emergence of the Militia movement and other extremist groups. [[68]](#footnote-69)68 While there are numerous and diverse right-wing fringe movements, common themes include a paranoid fear of a federal government plot to restrict individual liberties and surrender sovereignty to a U.N. world order, [[69]](#footnote-70)69 and a violent, often racist, **[\*429]** ideology. [[70]](#footnote-71)70 The storming of the Branch Davidian complex in Waco, Texas, the Ruby Ridge stand-off, and the passage of the Brady Bill [[71]](#footnote-72)71 serve as inspirational events to militia members, adding further grist to their government-conspiracy theory mills. The movement has resulted in the increased flouting of America's traditional rule of law, [[72]](#footnote-73)72 a growth in the number of white supremacists**[\*430]** and survivalists, [[73]](#footnote-74)73 and, apparently, the Oklahoma City bombing. [[74]](#footnote-75)74

Dick Carver, commissioner of Nye County and one of the leaders of the County Supremacy movement, insists that his movement has no ties to extremist militias or the recent bombings of Forest Service facilities. "Let me assure you that nobody within our circle would have done anything that stupid," he was reported as saying following a bombing outside Forest Service ranger Guy Pence's home. [[75]](#footnote-76)75 Critics, however, refuse to disassociate the County Supremacy movement from the recent incidents of violence. Nevada Senator Harry Reid publicly blamed the bomb attack on "the ugly underbelly of the County Supremacy movement," [[76]](#footnote-77)76 and the forest ranger noted, "the rhetoric there maybe stirred someone up." [[77]](#footnote-78)77 Indeed, there are apparent similarities between the county movement and the violent extremists: anti-federal animus punctuated by bombings, conspiracy theories, and revolutionary rhetoric. Even those involved in the movement do not deny its attractiveness to extremists. Ed Presley, national director of the County Alliance to Restore the Economy and Environment, noted, "we are in a revolution in this country, with some threat of violence, even though we absolutely don't advocate it." [[78]](#footnote-79)78 Some believe that, particularly with public lands issues and the West's depressed economy, violence is to be expected. Patricia Nelson Limerick, a historian at the University of Colorado, commented, "For many traditional westerners, there is a feeling that this is the last stand for their way of life, and that generates a new level of desperation." [[79]](#footnote-80)79 Karl Hess, Jr., a senior fellow at the Cato Institute, fears a rancher pushed into bankruptcy by federal land rules might turn violent and start shooting, "and God knows what's going to happen then." [[80]](#footnote-81)80

Carver's disavowal of extremism and violence rings somewhat hollow when one considers his other radical statements. When he was told of the violent bombing of the forest ranger's house, Carver did not specifically condemn the**[\*431]** attack, but stated, "I just hope the sheriff's office nabs someone real quick and hangs them from the nearest tree." [[81]](#footnote-82)81 Discussing the movement as a whole and Nye County's participation, Carver, holding his thumb and index finger close together, noted, "We're that close to another revolution." [[82]](#footnote-83)82 In his speeches to extremist conventions around the West, he often talks of Waco, Ruby Ridge, and the increasing governmental tyranny. [[83]](#footnote-84)83 These fringe positions are not held solely by Carver, but by many supporters of the County Supremacy movement and other organizations with overlapping constituencies. The National Federal Lands Conference, an organization that disseminates information in order to promote the movement, included in its October 1994 newsletter a story entitled, "Why There Is a Need for the Militia in America." [[84]](#footnote-85)84 And a federal biologist who met with ranchers in Catron County, New Mexico, to discuss protections for endangered species was told, "If you ever come down to Catron County again, we'll blow your f - - - head off." [[85]](#footnote-86)85 James Catron, an attorney in New Mexico, noted that "the movement in part reflects a nostalgia for a time "when someone causing pain to the community was simply shot.'" [[86]](#footnote-87)86

It is the rebellious and violent rhetoric of the County Supremacy movement which may incite a supporter to violence and bring in those who would gravitate to the fringes. Mary Ann Mauney of the Center for Democratic Renewal, an Atlanta hate group monitoring organization, noted: "People are drawn in under this soft umbrella of anger at the government and soon taken into the more violent part of the movement if they continue to express interest." [[87]](#footnote-88)87 This radicalism also ultimately obscures the movement's more legitimate states' rights arguments. Additionally, however, the extremism is important to consider**[\*432]** in understanding the full implications of the County Supremacy movement, and the potential ramifications of the movement's possible failure.

C.

Approaches of the County Supremacy Movement

County Supremacy, as an amorphous movement, employs a variety of approaches in attempting to achieve its aim of local control over the public domain. These methods were not organized as parts of a grand scheme, but rather arose in reaction to the circumstances that movement activists faced. This section will briefly detail these approaches in order to better highlight the range of the County Supremacy movement.

1.

Custom and Culture Ordinances

The strong anti-environmentalism that emerged in Catron County, New Mexico during the eighties [[88]](#footnote-89)88 led to the proliferation of "wise use" laws as one weapon in the County Supremacy arsenal. [[89]](#footnote-90)89 The Catron County ordinance [[90]](#footnote-91)90 is an example of what has also come to be known as a "custom and culture" ordinance, mandating that land decisions by the federal government be made in consultation with local officials and in accordance with local custom and culture. [[91]](#footnote-92)91 The significance of this requirement, which is to be defined by local officials and often includes priority for logging, mining, and grazing, [[92]](#footnote-93)92 is that it**[\*433]** forces the federal land managers to incorporate a local definition of custom into land use decisions. [[93]](#footnote-94)93 Although the custom and culture approach within the County Supremacy movement is generally passive, [[94]](#footnote-95)94 even this type of ordinance has been challenged in court, recently by a group of environmentalists from Boundary County in northern Idaho. [[95]](#footnote-96)95 The Boundary County wise use ordinance was identical to the Catron County law, and the state district court found it to be unconstitutional under the Supremacy Clause, despite the defendant's claims that it did not mean the ordinance to be effective. [[96]](#footnote-97)96 The legality of this approach by the County Supremacy movement, however, is not as clear as the Boundary County case would suggest. Many challenges to these ordinances are discouraged by the minimal impact of each case, result in settlement [[97]](#footnote-98)97 or encounter problems establishing standing and justiciability. [[98]](#footnote-99)98

2.

Procedural Challenges

Another approach of the County Supremacy movement has been to challenge federal actions in court through "procedural warfare," forcing the government to live up to its own complex and cumbersome regulations. This**[\*434]** approach is exemplified by Douglas County v. Lujan, where a county challenged the Secretary of the Interior's designation of a critical habitat for the northern spotted owl as failing to satisfy certain recording requirements. [[99]](#footnote-100)99 In Douglas County, the court found that a county had standing under the National Environmental Policy Act to challenge injury to its procedural interests and, on the merits, set aside the critical habitat designation. [[100]](#footnote-101)100 While the Ninth Circuit reversed the lower court's decision on the merits, it did agree that the county had standing to challenge the secretary's decision based on the county's procedural injury, [[101]](#footnote-102)101 providing a potentially fertile area for local governments to challenge federal action. This tactic was also employed in another spotted owl case, Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Department of Interior, [[102]](#footnote-103)102 by opponents of designating the Mexican breed of the bird as an endangered species. [[103]](#footnote-104)103

3.

Direct Confrontation

Some in the County Supremacy movement take a more confrontational approach to their assertions of state sovereignty. The events in Nye County are the best known example of this approach and these events will be described in detail in the following section. However, it is important to note that there are others engaged in aggressive defiance of federal power, in part incited by Nye County's stand.

County Commissioner Carver speaks around the West on the Nye County case and his theory of how the federal government lacks ownership rights to public lands. In one instance, he told an audience that "it's time for you not to recognize federal ownership of public lands any longer - you recognize the Constitution and we'll get it back." [[104]](#footnote-105)104 Although a causal connection is not definite, supervisors in Graham County, Arizona, authorized a road opening similar to Carver's in which a bulldozer cleared a path across the then-dry Gila River, raising the ire of environmentalists and land management agents. [[105]](#footnote-106)105 Also, the sheriff in Owyhee County, Idaho, took the dramatic step of revoking local**[\*435]** law enforcement authority from federal agents operating in his county. [[106]](#footnote-107)106

More recently, numerous counties have been re-opening old rights-of-way through federal lands, in an effort to block federal protection efforts. [[107]](#footnote-108)107 These attempts to grade or "brighten up" what are often simply cattle tracks or back-country trails are being undertaken because mechanically built and maintained roads will generally disqualify land from designation as a wilderness area. [[108]](#footnote-109)108 These "road" re-openings have been particularly invigorated by President Bill Clinton's designation of the Grand Staircase Escalante National Monument in Utah. [[109]](#footnote-110)109

II.

The Events in Nye County, Nevada

The commissioners of Nye County are among the leaders of the aggressive, confrontational approach in the Country Supremacy movement. Beginning in 1993, their actions and the ensuing legal battle evidenced the strongest states' rights stand in the movement, and served as the role model for counties and individuals across the West. The events in Nye County also inspired publicity for the County Supremacy movement, including a cover story in Time. [[110]](#footnote-111)110

The legal battle over the county's aggressive sovereignty stance is crucial to the movement. Most of the movement's legal theories were presented before the court in the Nye County case. However, the ultimate settlement of the case did little to resolve the legal disputes. The district court, in March 1996, decided**[\*436]** that the United States has the power and authority to manage the public lands within Nye County and invalidated Nye County Resolution 93-49. [[111]](#footnote-112)111 Then, in August 1996, the court also invalidated sections 321.596 - 321.599 of the Nevada Revised Statutes as violative of the Supremacy Clause, although this issue was ultimately settled without being fully litigated. [[112]](#footnote-113)112 The decisions of the court rejected many of the movement's and Nye County's legal arguments, but essentially only those that had been previously raised and rejected by other courts. The newest and most aggressive state sovereignty and equal footing claims were not fully adjudicated. This fact, coupled with the expressed intention to litigate these issues again in other courts [[113]](#footnote-114)113 and the deliberate ignoring of prior precedent deciding these issues, calls into question the impact of the Nye County decision. It is unlikely to head the movement off at the pass, as the government had hoped, [[114]](#footnote-115)114 or to skew the power balance towards the federal government, as the defendant feared. [[115]](#footnote-116)115 Nor will this resolution spur on the county movement to more confrontational methods, [[116]](#footnote-117)116 although it may lead to increased frustration and alienation. Only time will reveal the case's significance to the movement, which is why detailed analysis of the federalism implications of the Nye County litigation is important. **[\*437]**

A.

The Origins of the Rebellion

The origins of Nye County's rebellion stem both from the people involved and the county's unique situation. Nye is the third largest county in the nation, about the size of New Hampshire and Vermont combined. [[117]](#footnote-118)117 The county's landscape is made up of mountainous terrain, thin valleys, and desert expanses, which characterize Nevada as the nation's most arid state. The federal government claims ownership of 93 percent of the county's land, while the remaining area is in the hands of a mere 20,000 residents. [[118]](#footnote-119)118 Government facilities in Nye County include: the Nevada Test Site, where the military has detonated more than 900 nuclear devices since 1951; Nellis Air Force Bombing and Gunnery Range; [[119]](#footnote-120)119 and the Tonopah Test Range, known to followers of the supernatural as "Area-51," alleged home to the government's collection of UFOs. [[120]](#footnote-121)120 In addition, the Energy Department recently investigated Nye County's Yucca Mountain for the site of the nation's first high-level radioactive waste dump. [[121]](#footnote-122)121 Beyond these encroaching government presences, [[122]](#footnote-123)122 most of the county's residents are engaged to some degree in ranching and logging; on a daily basis, these residents face the onerous federal regulations of the Forest Service, which manages the mountain ranges, and the Bureau of Land Management, which administers the valleys. [[123]](#footnote-124)123 The natural tensions of this type of relationship are exacerbated by the independent character of the people, many of whom grew up in the West or moved there for lower taxes and fewer rules. [[124]](#footnote-125)124 The residents feel they have been colonized by federal bureaucrats and as Trish Rippie, a local real estate agent, tells it, "Just about everybody here would like to see a revolution and have the Federal Government washed away." [[125]](#footnote-126)125

1.

History of Federal Land

Ownership and Control

The land that makes up Nye County was originally part of the vast New Mexico Territories. This domain, which included the modern-day states of Nevada, California, Utah, and parts of Arizona, Colorado, and New Mexico, was**[\*438]** acquired by the United States from Mexico in 1848. [[126]](#footnote-127)126 Along with officially ending the Mexican-American War, the Treaty of Guadalupe Hidalgo authorized the cession of most of the Southwest to the United States at a cost of $ 15 million. [[127]](#footnote-128)127 The land that today makes up Nevada was thus originally owned by the federal government, as is the case with almost all of the United States, except for Texas, Hawaii, and the thirteen colonies. [[128]](#footnote-129)128 The subsequent history of public land ownership, particularly in the West, is a complex field with an enormous body of literature. [[129]](#footnote-130)129 This section will offer a brief summary of this subject as it is important to an understanding of the County Supremacy movement.

Over the first half of the nineteenth century, the United States grew from a country of under 900,000 square miles along the Atlantic seaboard, to a nation of close to three million square miles spanning the continent. [[130]](#footnote-131)130 The creation of new states was highly contentious, and was often sidetracked by the divisive issue of slavery or used for political maneuvering. [[131]](#footnote-132)131 The admission of Ohio in 1803 served as a model for the terms of the new states emerging out of this vast federal domain. [[132]](#footnote-133)132 These states, upon admission, received substantial amounts of federal land for state purposes such as education and transportation. [[133]](#footnote-134)133 The statehood grants took the form of either "in-place" grants of specified sections**[\*439]** of land, or "quantity" grants of a set acreage to be selected by the state. [[134]](#footnote-135)134 While the deviations from the Ohio plan are numerous, the admission of Nevada is a useful illustration.

The Enabling Act, adopted by Congress in 1864, authorized the creation of a state convention in Nevada to apply for admission to the Union on the terms set forth in the Act. [[135]](#footnote-136)135 This legislation specifically granted Nevada an in-place grant of two sections per township for the support of common schools, which was approximately four million acres of land. [[136]](#footnote-137)136 Nevada, however, later gave up this right in exchange for a quantity grant of two million acres, which allowed the state to select more useful land. [[137]](#footnote-138)137 At the time of its admission to the Union, Congress also gave Nevada 12,800 acres for public buildings and 12,280 acres for jails. [[138]](#footnote-139)138 A few years later, Congress gave Nevada over 136,000 acres for a university and a school of mines. [[139]](#footnote-140)139 Additionally, as was the norm, Nevada was given five percent of the receipts from the sale of federal lands within its borders, to be used for road and irrigation improvements. [[140]](#footnote-141)140 A supplemental condition upon Nevada's admission, as with every state after Ohio, was that the state disclaim all further rights to federal lands beyond those granted in the Enabling Act. [[141]](#footnote-142)141

In addition to the substantial grants of federal lands to the states, Congress**[\*440]** disposed of much of the public domain through various grants to settlers. As early as 1790, the federal government granted land to settlers by validating the claims of frontier squatters under a right of preemption. Simultaneously, the government pursued a policy of land sales, which when combined with preemption claims, led to the disposition of much of the public domain. [[142]](#footnote-143)142 Another method of granting federal land to individuals and corporations was "homesteading." Building upon earlier targeted laws, [[143]](#footnote-144)143 the Homestead Act of 1862 allowed claims of up to 160 acres of the public domain for settlers who resided on and cultivated the land, and paid the filing fees. [[144]](#footnote-145)144 The acre limitation was raised to 640 acres by 1912, to allow for larger ranches in the less fertile West. Ultimately, the total federal land disposed of under homesteading laws approached 288 million acres. [[145]](#footnote-146)145 Additionally, close to 190 million acres of the public domain was transferred to veterans or railroad companies, or granted under the timber or desert land laws. [[146]](#footnote-147)146 Of the total area of the United States that was once public domain (1,838 million acres out of 2,312 million total acres), approximately 1,144 million acres were disposed of by the federal government. [[147]](#footnote-148)147 Of the 1,144 million acres, 328 million acres were granted to the states and 816 million acres were granted or sold into private ownership, [[148]](#footnote-149)148 leaving a total public domain of around 650 million acres in 1993. [[149]](#footnote-150)149

Mainly in response to abuses in the disposal system, the federal government retained certain public lands, beginning with areas considered vital for public use, such as salt springs and hot springs. [[150]](#footnote-151)150 Heeding calls for permanent**[\*441]** withdrawal of certain lands of exceptional natural beauty, the federal government created Yellowstone National Park in 1872. [[151]](#footnote-152)151 But it was not until 1891 that a system of federal reservation was established through the Forest Reserve Act, which included a last-minute addition authorizing the president to withdraw forest lands from those available for disposal. [[152]](#footnote-153)152 Of greater significance to the West, the Taylor Grazing Act of 1934 essentially reserved the entire remaining public domain by establishing a system of grazing permits and federal regulation over the rangelands. [[153]](#footnote-154)153 This shift to federal control was prompted by a crisis of overgrazing and a near total absence of state laws governing the range. [[154]](#footnote-155)154 The creation of grazing districts realistically closed the public domain, although it was not until 1976 that the formal policy of the federal government towards the public lands became one of retention. [[155]](#footnote-156)155

The result of this process of disposal and withdrawal is a system of federally owned land that today spans 650 million acres, covering 28.6 percent of the nation's acreage. [[156]](#footnote-157)156 This federal land is incredibly varied in location and typography, as well as character and use. One generalization, however, is both possible and useful in placing current disputes in perspective: the federal lands are not as productive as the privately owned lands. [[157]](#footnote-158)157 This is because the public lands today are what has been left unclaimed and unappropriated from the original public domain. Contemporary federal lands are those which were rejected for homesteading or development by generations of settlers who found more productive land elsewhere. [[158]](#footnote-159)158 The lack of productivity of federal lands stems from both the land's location, often in arid or rugged areas, and the absence of tracts of sufficient size to make economically feasible use of the land. [[159]](#footnote-160)159 In understanding the size of the public domain, it is also significant to note that over a third of this land is in Alaska, and that without the Alaskan public lands, the amount of federally owned land is closer to 18 percent of the**[\*442]** nation. [[160]](#footnote-161)160 The Bureau of Land Management (BLM) is the largest land-owning agency of the government, controlling over 271 million acres, followed by the Forest Service, with 184 million acres. [[161]](#footnote-162)161 Table 1 presents the holdings of the major federal land-owning agencies and bureaus.

[SEE TABLE IN ORIGINAL]

While the public domain is owned by the federal government, individuals are not necessarily excluded and indeed, the government often sells or leases the right to use and exploit resources from these lands through its land management agencies. Around 259 million acres of BLM and Forest Service land is licensed for grazing by 31,000 ranchers (who only represent two percent of the nation's cattle producers). [[162]](#footnote-163)164 The forests are also used by individuals and corporations, as the Forest Service annually sells the right to harvest timber from federal lands. [[163]](#footnote-164)165 In addition, ***oil***, gas, and minerals may be extracted from federal lands under mineral leases or patents. [[164]](#footnote-165)166 Finally, federal lands are used daily for a wide variety of recreational purposes. Measured in terms of user-days, **[\*443]** recreation is the greatest use of the public lands and thus, is also regulated by the federal government. [[165]](#footnote-166)167 The federal government generally charges for these uses; in recent years, the BLM recorded receipts of over $ 1.2 billion, [[166]](#footnote-167)168 and the Forest Service took in over $ 1 billion. [[167]](#footnote-168)169 These receipts go to cover the agencies' expenses, including land maintenance, and substantial percentages are returned to the states. [[168]](#footnote-169)170 It is also important to note in understanding these figures that the majority of this money, over $ 1 billion, derives from leases for ***oil*** and gas exploration on the Outer Continental Shelf. [[169]](#footnote-170)171

Nevada contains the largest percentage of federally owned land of all the states, at close to 83 percent of the state's total acreage. [[170]](#footnote-171)172 The claimed indignity of this figure should be tempered by the fact that the state is the seventh largest in the nation, and 12 million acres of the state are in non-federal hands, which is more than the total area of nine other states. [[171]](#footnote-172)173 Additionally, the reason for such a large federal presence in the state is a combination of factors far from the evil intentions suggested by some in the County Supremacy movement. Upon the admission of Nevada to the Union, the federal government granted the same amount of land to the state as had been granted to other states at the time. [[172]](#footnote-173)174 It was not that the federal government withheld more land in the case of Nevada, but rather that the government was not able to sell or grant much of the public domain in Nevada to individuals. The reason for this is simply that the land in Nevada is mostly arid and remote, and therefore was useless at the time of the major westward expansions. [[173]](#footnote-174)175 In the eastern public lands states, much of the public domain was sold or granted to individuals because it was cultivable and accessible, resulting in low percentages of federal lands. Furthermore, the current high percentage of federal lands in Nevada is due somewhat to the unique withdrawals of significant land for national security purposes. In pursuing land**[\*444]** for military uses, and in particular for nuclear testing, the national government looked for large, remote, and uninhabited tracts of land, of which Nevada had plenty. [[174]](#footnote-175)176 Land for the Nevada Test Site, as well as for other military installations, was thus reserved for military purposes, maintaining the large federal ownership in the state.

The federal lands which are the source of the most controversy in Nevada, and specifically in Nye County, are those administered by the Forest Service and the BLM. [[175]](#footnote-176)177 Disputes arise primarily over the extent of federal control because federal regulations impose burdensome requirements on those who use the public lands, and even on those whose property abuts federal land. [[176]](#footnote-177)178 The complexity of the federal regulations, and the bureaucracy charged with enforcement of these regulations, also give rise to conflict. The public lands are subject to multiple use requirements, and each use is subject to its own set of complex, and often conflicting, regulations. [[177]](#footnote-178)179 Of the agencies which own the public lands, the BLM and Forest Service generally are charged with authority over land management, mineral leasing, land surveying, and granting rights of way across federal lands. [[178]](#footnote-179)180 The Park Service and the Fish and Wildlife Service are responsible for maintaining the national parks and recreation areas, and for protecting and enhancing wildlife. [[179]](#footnote-180)181 **[\*445]**

These federal agencies generally assert either of three levels of control over the public lands: exclusive, concurrent, or proprietorial. Relatively little public land, usually only military enclaves, is held exclusively by the federal government, where the only remaining right of the state is the right to serve criminal and civil process for events which occurred elsewhere. The vast majority of public lands, and almost all of the BLM and Forest Service land, is held by the United States in its proprietorial capacity. In this capacity, the federal government holds title to the land and has the rights associated with a private landowner. Further, the state where pubic lands are located retains certain rights as it would normally over land held privately. For example, the state may enforce its criminal and civil laws on public lands and may even manage hunting, fishing, and water rights on federal property, to the extent that federal law does not preempt. [[180]](#footnote-181)182

However, since the public domain is held by the federal government, which is also the sovereign, these lands are arguably controlled with greater than simply proprietorial rights. Indeed, in Kleppe v. New Mexico, [[181]](#footnote-182)183 the Supreme Court found that the federal power over lands under the Property Clause is far greater than the powers of a normal landlord, although the Court did not define the outer limits of this power. [[182]](#footnote-183)184

The extent of the federal government's power over the public domain is thus open to legal debate, and the issue becomes one of federal preemption. State and local governments do have jurisdiction over the public lands, but only to the extent there is no conflicting federal legislation. [[183]](#footnote-184)185 Land management and land use planning are fields which the federal government has effectively preempted through decades of regulation and, most recently, the Federal Land Exchange Facilitation Act of 1988. [[184]](#footnote-185)186 The federal government primarily took control of this basically local concern because of the shortsighted and destructive private use of the lands, and the failure of state government controls. [[185]](#footnote-186)187 Through federal preemption of land management, local governments thus lack the authority to**[\*446]** decide basic issues about the daily use of the federal lands within their borders. Federal regulations do mandate giving state and local governments a seat at the table where land management decisions are made, [[186]](#footnote-187)188 but the provision of this opportunity and its effectiveness is often disputed. [[187]](#footnote-188)189 The federal government has allowed some state control over issues affecting the public domain, in particular, granting authority for the management of wildlife and water resources. [[188]](#footnote-189)190

While the states may lack control over public lands decisions, Congress compensates the states for the use of these lands in two main ways. First, the lands agencies pay state and local governments a percentage of their receipts for grazing, timber sales, and other uses of federal lands. [[189]](#footnote-190)191 Second, the states receive "payments in lieu of taxes," or "PILTs," intended to compensate local governments for the burden of having tax-immune federal lands. [[190]](#footnote-191)192 Payment is set to approximate the taxes that would be paid if the public lands were in private hands. [[191]](#footnote-192)193 In fiscal year 1994, the eleven western public lands states received $ 75.8 million in PILT payments, and Nevada received $ 6.8 million. [[192]](#footnote-193)194

2.

Dick Carver's Plan

The man behind Nye County's rebellion is Dick Carver, a county commissioner whose family has been ranching in the area for three generations. [[193]](#footnote-194)195 Carver was inspired to action both by his "deep roots" in the issue of public lands, [[194]](#footnote-195)196 and by neighboring rancher Wayne Hage, who declared bankruptcy after years of disputes with the Forest Service over grazing permits. [[195]](#footnote-196)197 Hage reportedly exhorted Carver to "take action now" before the local economy was completely destroyed. [[196]](#footnote-197)198 Carver claims to have had a "political epiphany" in October 1993, when he realized that the state of Nevada**[\*447]** actually owned all of the public lands in Nye County and across the entire state. [[197]](#footnote-198)199 Carver theorized that the state took title to all the public lands when it was admitted to the Union, and further, that the federal government did not even have the constitutional power to own and manage public lands. [[198]](#footnote-199)200 His ideas were attractive to westerners because they meant both that the states, and thus local governments, could control the public lands within their boundaries, and that federal officials would no longer have jurisdiction or power over the land and westerners' livelihoods.

This basic legal theory was not conceived by Carver, however, but derived from earlier sources, including a 1972 book by shepherd-turned-lawyer Clel Georgetta, entitled Golden Fleece in Nevada. [[199]](#footnote-200)201 In this work, Georgetta, a staunch states' rights advocate, reviewed the history of public lands in the West, concluding that the states, not the federal government, owned these lands. [[200]](#footnote-201)202 Georgetta drew support for his theory from congressional debates on the Ordinance of 1787, establishing the Northwest Territories. [[201]](#footnote-202)203 In addition, he cited to a later congressional debate, in which Senator Hendricks of Indiana described America's constitutional structure as a compact with limited, enumerated powers for the central government. [[202]](#footnote-203)204 Hendricks further argued that the power to hold and control public lands was not among those powers granted to the federal government, and that the usurpation of these powers was detrimental to the important principle of dual sovereignty. [[203]](#footnote-204)205 While Georgetta elucidated the theory of state ownership for a modern western audience, it is interesting to note that even he did not advocate litigating the issue because he recognized the theory as a losing argument [[204]](#footnote-205)206 and believed the Supreme Court to be "composed primarily of socialistic-minded collectivists." [[205]](#footnote-206)207 Indeed, the Nevada attorney general recognized the historical roots of this theory in the**[\*448]** Georgetta book, but characterized the legal argument as "virtually folkloric." [[206]](#footnote-207)208

Carver built upon these and other sources in his extensive investigation into ownership of the western public lands and the origins of Nevada statehood. He compiled his research efforts and propounded his theory of why Nevada owns the public lands in a November 1993 letter to the governor of Nevada, the secretaries of the Interior and Agriculture Departments, and the directors of the BLM and the Forest Service. [[207]](#footnote-208)209 Carver concluded that, based upon the state's ownership of these lands, Nye County has cooperative authority to manage all public lands within the county. [[208]](#footnote-209)210 Carver grounded this conclusion in twelve points of interest and a lengthy discussion of the legal issues. Carver's points of interest, in essence, recognized that while the federal government currently manages certain lands in Nevada, it lacks authorization to "own, hold, or exert dominion" over lands, except for the limited purposes outlined in Article I, Section I, Clause 17 of the Constitution. [[209]](#footnote-210)211 Carver also noted the framers' concern with maintaining state sovereignty, and summarized his argument by saying certain public lands which the federal government now manages are actually owned by the state of Nevada under the equal footing doctrine. [[210]](#footnote-211)212

In support of these claims, Carver offered an elaborate, but rudimentary, [[211]](#footnote-212)213 legal discussion of constitutional history and the equal footing doctrine. The premise of Carver's theory is that the United States is a compact between independent sovereign states, which were each admitted to the Union on an "equal footing" with the original states. In his review of public lands ownership, Carver noted that in the pre-constitutional Confederacy, the thirteen colonies, as sovereign entities, took title to all public lands from the Crown. [[212]](#footnote-213)214 From this, he reasoned that Nevada cannot be a free sovereign state, on an equal footing with**[\*449]** the original thirteen states, unless it too owns all public lands within its boundaries. [[213]](#footnote-214)215

Carver also analyzed the federal power to own and manage public lands by interpreting the three references to land in the United States Constitution. Carver adopted a strict interpretation of the Enclave Clause, [[214]](#footnote-215)216 reading this enumerated power as applying only to forts and other national defense facilities. [[215]](#footnote-216)217 Carver similarly interpreted the New States Clause [[216]](#footnote-217)218 and the Property Clause [[217]](#footnote-218)219 as applying only to territorial lands held by the United States prior to a state's admission into the Union. [[218]](#footnote-219)220 The implication of this reading is that federal ownership for the purpose of selling off the public lands was acceptable since these lands were held "in trust" for the future states, but that once new states were created, the federal government has only its Enclave Clause powers to hold land. Given the absence of an express grant of authority to own and manage public lands, Carver used the Tenth Amendment to reason that the states own these lands. [[219]](#footnote-220)221 Carver's broad legal analysis also included a review of Supreme Court precedent which he reads as supporting his theory, a review of the Nevada Statehood Ordinance, [[220]](#footnote-221)222 and an interesting interpretation of the Supremacy Clause. [[221]](#footnote-222)223

Based upon this research by Carver, and actually incorporating his November 1993 letter, the Nye County Board of Commissioners passed two local sovereignty resolutions on December 7, 1993. Resolution 93-48**[\*450]** recognizes that the state of Nevada owns all public lands within the state, explicitly following Carver's reasoning and adopting his theory. [[222]](#footnote-223)224 Resolution 93-49 relies on Resolution 93-48 and declares county ownership of all traditional public roads within the county, excluding established private roads, state highways, and federal interstates. [[223]](#footnote-224)225 The commissioners also threatened legal action against federal officials who might interfere with these resolutions on the ground that they would be acting outside of their authority. [[224]](#footnote-225)226 The resolutions thus embody the most aggressive assertion of local sovereignty in the County Supremacy movement, and thrust Nye County and Dick Carver to the forefront of the movement.

Carver's theory and the Nye County resolutions were disseminated throughout the West, through both informal channels and media publicity. [[225]](#footnote-226)227 In addition, Carver embarked on a speaking tour about his county's position, reportedly addressing audiences in 23 states. [[226]](#footnote-227)228 As a part of this education effort, an organization named the Stewards of the Constitution published a newspaper-style reprint of the resolutions and supporting material, inviting support and making copies available in bulk. [[227]](#footnote-228)229 These efforts to publicize the confrontational states' rights approach of Nye County have led to expressions of interest from the Alaskan lieutenant governor, [[228]](#footnote-229)230 and similar stands in other Nevada and Arizona counties. [[229]](#footnote-230)231

B.

The Road Opening

The assertions of local sovereignty by Nye County did not end at passing resolutions, however, as had been the case with numerous other western counties. [[230]](#footnote-231)232 Dick Carver reportedly wanted even more aggressive action and he convinced his fellow county commissioners to approve the opening of a former**[\*451]** stagecoach trail, known as the Jefferson Canyon Road. [[231]](#footnote-232)233 The county had previously petitioned the Forest Service for approval to re-open the road in the Toiyabe National Forest, which had been washed out. [[232]](#footnote-233)234 The Forest Service informed the county that a survey of the site would need to be completed, but the commissioners did not want to wait. [[233]](#footnote-234)235 Their haste was apparently politically-inspired, as Carver decided to bulldoze open the road on July 4, 1994, following the annual Independence Day cookout. [[234]](#footnote-235)236 The bulldozer was draped with an American flag, the national anthem was sung, and 200 people watched as Carver veered the bulldozer off of the existing right-of-way. [[235]](#footnote-236)237 A Forest Service agent who stepped in front of the machine held a sign telling Carver to stop but was forced to get out of the way. [[236]](#footnote-237)238 Carver insists the agent was never in danger. [[237]](#footnote-238)239 There was, however, the potential danger of a shoot-out inherent in the incident as a large number of the spectators were armed, as was the forest agent. [[238]](#footnote-239)240 Carver recalls worrying that someone would draw a gun and turn the event into a "mini-Waco." [[239]](#footnote-240)241

This event symbolized the county's defiance of federal control and has reached mythic proportions within the county movement, considered a modern-day Boston Tea Party protesting the tyrannical federal government. The road opening, despite, or rather in spite of, the lack of federal approval, was an explicit and flagrant flouting of federal authority in the particularly contentious area of public lands. This symbolic action has served as a model for other defiant actions around the West and caused great concern among federal agents. Carver further angered federal officials by filing a criminal complaint against the Forest Service agent who attempted to stop the road opening, on the basis of interfering with a local official's work. [[240]](#footnote-241)242

C.

The Legal Response

This aggressive defiance was met by a lawsuit filed by the United States Justice Department in Nevada District Court on March 6, 1995. [[241]](#footnote-242)243 The action**[\*452]** sought to have the federal court declare the United States to be the true owner of the western public lands, in order to forestall the controversy over this issue and to end the danger to federal agents. [[242]](#footnote-243)244 The government had been following the County Supremacy movement for some time and decided that this new level of defiance in Nye County could not go unanswered. [[243]](#footnote-244)245 As Assistant Attorney General Peter Coppelman noted, "We picked Nye for one reason only: Nye was actively defying federal authority and creating potentially violent situations, sending letters threatening to arrest federal employees who were simply doing their jobs. We didn't pick Nye. Nye picked us." [[244]](#footnote-245)246 The legal challenge was actually welcomed by Carver and the County Supremacy movement, which saw the litigation as an opportunity to prove their theory that the federal government does not own the public lands. When Carver heard of the lawsuit, he reportedly commented, "Those jackasses in Washington are going to have the surprise of their life." [[245]](#footnote-246)247

The five-count complaint alleged that Nye County challenged federal ownership of the public lands in the county by denying this ownership and interfering with valid federal land management decisions. [[246]](#footnote-247)248 The complaint also alleged that the county, under color of its resolutions and certain Nevada statutes, had threatened federal officials engaged in their statutory duties with criminal prosecution. [[247]](#footnote-248)249 Following an expedited schedule and just over a year of litigation, [[248]](#footnote-249)250 the district court granted the United States partial summary**[\*453]** judgment motion on counts one and four on March 14, 1996. [[249]](#footnote-250)251 The court specifically found that Nye County, by acting on its alleged ownership interest, had challenged the federal government's claim of title to the public lands. [[250]](#footnote-251)252 The court resolved this dispute in favor of the United States, finding Nye County's argument that the government lacked authority under the Property Clause to be completely unsupported by law. [[251]](#footnote-252)253 Additionally, the court invalidated Nye County Resolution 93-49, which claimed ownership of all public roads within the county, as violative of the Supremacy Clause. [[252]](#footnote-253)254 On August 28, 1996, the court entered a stipulated partial judgment for the United States on count two, declaring the Nevada "Sagebrush" statutes, sections 321.596-321.599 of the Nevada Revised Statutes, to be invalid and unenforceable. [[253]](#footnote-254)255 The federal government asserted that these statutes violated the Supremacy Clause since they claimed the state held adverse title to the public lands. [[254]](#footnote-255)256 The court entered partial judgment in favor of the United States on this issue, based on the state's declaration that it did not oppose entry of judgment on this point since it did not want to expend further resources in litigation. [[255]](#footnote-256)257 Nye County took no position on the judgment, "considering it to be a matter only between the United States and the state of Nevada." [[256]](#footnote-257)258 In order to finally resolve the litigation, the parties are reportedly working on a joint framework for improved federal and local interaction. [[257]](#footnote-258)259

This litigation ultimately offered an opportunity both to decide the public lands ownership issue and to test the defense's cutting-edge federalism theories. The opposing conceptions of federalism are put into practice in the Nye County case and brought to bear by the resources of the Justice Department, the special counsel for the defense, and numerous amici curiae. The Department of Justice had eight attorneys on the papers, including Peter Coppleman, deputy assistant attorney general of the Environment and Natural Resources Division, who**[\*454]** argued the summary judgment hearing. [[258]](#footnote-259)260 Nye County was initially represented by the Nye County district attorney, but given the case's size and significance, additional counsel were brought in. Lead counsel for Nye County throughout the lawsuit was Roger Marzulla, a partner at Akin, Gump, Strauss, Hauer & Feld, who was formerly head of the Environment and Natural Resources Division of the Justice Department under President Ronald Reagan. [[259]](#footnote-260)261 Joining Marzulla in defending Nye County was John Wayne Howard, of the Los Angeles-based Individual Rights Foundation, a conservative, non-profit, constitutional litigation firm. [[260]](#footnote-261)262 Nevada Attorney General Frankie Sue Del Papa represented the State of Nevada. [[261]](#footnote-262)263 There were also three amicus briefs filed in support of Nye County's position: one by the Lander County district attorney, [[262]](#footnote-263)264 one jointly by the Eureka and White Pines County district attorneys, [[263]](#footnote-264)265 and one by the Landmark Legal Foundation, on behalf of 33 amici. [[264]](#footnote-265)266 The California Environmental Law Project filed an amicus brief in support of the Justice Department's position. [[265]](#footnote-266)267

The importance of these various groups cannot be underestimated, both in terms of the outcome of the suit and in playing out the important federalism issues. The resources of both sides allowed these issues to be fully raised and aired before the court, as is often not the case when the Justice Department sues a states' rights advocate. Marzulla commented that the Department of Justice must have thought that there were "a bunch of crackpots [in Nye County] and they would squash them to the ground. What they did not plan on was a massive, substantial and competent defense in this case." [[266]](#footnote-267)268 It is the presence of these groups, particularly for the defense, that forced both parties to better elucidate the issues in the case, thereby pushing the limits of federalism in the American system. [[267]](#footnote-268)269 It is to these issues this article now turns. **[\*455]**

III.

Analysis of the Federalism Issues

Federalism courses through the case of United States v. Nye County. [[268]](#footnote-269)270 Litigating the action bears on the appropriate balance between federal and state sovereignty, an issue at the very heart of America's republican system of government. The case also addresses important questions of constitutional interpretation, in particular testing the extent of the Property Clause and the vigor of the Tenth Amendment. These theoretical concepts were explicitly raised by the parties and amici in a number of places, but also run implicitly throughout the legal arguments, and indeed, lie at the heart of the issues decided by the court.

The United States sought a declaratory judgment affirming its ownership of public lands, which it claims is indisputable. [[269]](#footnote-270)271 Both in supporting its position and in countering Nye County's arguments, the United States raised issues about the breadth of federal power under the Constitution and about the proper employment of the principle of dual sovereignty. The defendant, the State of Nevada, did not contest the federal government's ownership of public lands, but requested a limited court order on the federalism issues. [[270]](#footnote-271)272 Nevada's legal arguments raised issues pertaining to the scope of federal power and its interplay with state sovereignty under the Tenth Amendment.

Defendant Nye County's arguments were replete with federalism issues. Interestingly, though, its legal position shifted over the course of the litigation. Initially, Nye County's legal theory was that title to the public lands in Nevada had passed to the state as an incident to its sovereignty under the equal footing doctrine. [[271]](#footnote-272)273 In addition, Nye County argued that whatever powers the federal government did have to control public lands merely authorized disposal of the land, and the enormous new powers sought in this case constituted an infringement on state sovereignty in violation of the Tenth Amendment. [[272]](#footnote-273)274 In the last round of briefing, however, Nye County changed legal tactics and sought to have the court deny summary judgment for lack of subject matter jurisdiction. [[273]](#footnote-274)275 The federalism issues lurk even within this position as the defendant argued that**[\*456]** granting extensive power to the federal government would deprive the state of authority over its core state functions. [[274]](#footnote-275)276 Nye County offered these federalism theories to challenge both the orthodoxy that the federal government owns the public lands and the expansive relief sought by the United States. While Nye County was the defendant in this case, its attempt to re-assert local sovereignty in defiance of years of precedent was a bold states' rights argument, making that perspective the most interesting to analyze.

The briefs in the Nye County action elucidated the federalism issues, although they are constrained by procedural and strategic concerns. Given the case's importance for the contemporary states' rights movement, the central issues of federalism will be expounded and fully analyzed. The equal footing doctrine, with its impact on the appropriate federal-state balance of power, will be the first of the case's issues to be addressed. The defendant's claims under this doctrine will be explained and then critically analyzed, demonstrating that, while raising serious federalism concerns, these arguments are entirely without legal merit. Next, the defendant's contentions under the state sovereignty rubric, which go to the core of the American federalism model, will be explicated and criticized, concluding that despite raising some salient issues, the defendant's arguments again fall short.

A.

The Equal Footing Doctrine

1.

Nye County's Arguments

The central thesis [[275]](#footnote-276)277 of Nye County's argument was that the federal government does not own the public lands it claims because its title actually passed to each state under the equal footing doctrine. [[276]](#footnote-277)278 That doctrine was asserted as being a doctrine of constitutional law concerning the equality between the states in the federal system. [[277]](#footnote-278)279 The argument also implies the equal footing doctrine is the result of Dick Carver's extensive research efforts, although in fact it was raised before, during the Sagebrush Rebellion and in**[\*457]** Golden Fleece in Nevada. [[278]](#footnote-279)280 Although this was the main argument for Nye County, the theory was not clearly and succinctly explained in any of the defendant's papers, but rather was intertwined with the state sovereignty and limited powers arguments. [[279]](#footnote-280)281

The essential equal footing argument for Nye County was that all states are required to be admitted into the Union and to then exist with the same level of sovereignty held by the original thirteen states. [[280]](#footnote-281)282 Thus, the argument proceeded, the United States' ownership of 83 percent of Nevada's land places the state on an unequal foundation and is unconstitutional. [[281]](#footnote-282)283 The reasoning behind the doctrine's operation in this case drew heavily from the founding of the Constitution and the history surrounding the admission of new states.

The defendant's equal footing argument began with the premise that, prior to the formation of the Union, the states were themselves sovereign entities under the Articles of Confederation. [[282]](#footnote-283)284 As such, following the American Revolution, each state inherited the attributes of sovereignty from the Crown. These incidents of sovereignty, the defendant argued, include title to the land under navigable water and tidelands as well as all unappropriated land. [[283]](#footnote-284)285 Beyond the original states, the argument continued, public lands were owned by the federal government, but only temporarily and in trust for future states. [[284]](#footnote-285)286 In fact, it was the original states that ceded their lands to the government for the purpose of creating new states, which were to have the same level of sovereignty as the original states. [[285]](#footnote-286)287 Following the cession of these western lands, each new state was admitted to the Union on an "equal footing" with the original thirteen, although that exact language was not used until the fourth state's admission act. [[286]](#footnote-287)288

The defendant contended that under this doctrine of equal footing, title to all public lands within the state of Nevada passed to the state when it was admitted**[\*458]** to the Union in 1864. [[287]](#footnote-288)289 Because of this constitutional requirement, the defendant argued for the invalidity of the Disclaimer Ordinance, a law passed by the territorial government as a condition for admission which required that the people of Nevada forgo all rights and title to the public lands within the state. [[288]](#footnote-289)290 The defendant further noted that the fact that Congress had to coerce a disclaimer of ownership illustrates its recognition that title would have passed to the states upon their admission to the Union. [[289]](#footnote-290)291

The defendant generally grounded its discussion of equal footing in the seminal case of Pollard v. Hagan, where the Court faced a dispute over whether the United States or Alabama owned the land under the navigable waters in the state. [[290]](#footnote-291)292 The Court accepted Alabama's argument that ownership of these areas had passed to the state upon its admission to the Union, for to hold otherwise would, "deny that Alabama has been admitted into the union on an equal footing with the original states." [[291]](#footnote-292)293 The defendant also noted that the Pollard Court found the United States held the land that made up Alabama merely as a trustee for the future state. [[292]](#footnote-293)294

While early cases such as Pollard and Shively v. Bowlby [[293]](#footnote-294)295 employed the equal footing doctrine with respect to lands under navigable waters, the defendant argued that Coyle v. Smith [[294]](#footnote-295)296 broadened the theory to cover all rights and incidents of sovereignty which were held by the original thirteen states. [[295]](#footnote-296)297 The Coyle Court reviewed the admission of new states to the Union in determining the constitutionality of Congress mandating the state capitol's location. [[296]](#footnote-297)298 The Court found that a state is defined by the powers of the original states which adopted the Constitution, and that each state must be an unconditional and entire member of the Union. [[297]](#footnote-298)299 The Court noted: ""This Union' was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself." [[298]](#footnote-299)300 The defendant thus cited Coyle to contend that the United States could not condition entry to the Union on any requirement**[\*459]** which had not been applied to the original states. [[299]](#footnote-300)301 The defendant further argued that the case means Congress cannot require a condition for admission which it could not require of an existing state under its enumerated powers. [[300]](#footnote-301)302 The Court succinctly noted the implications of its holding:

The plain deduction from this case is that when a new state is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original states, and that such powers may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts, or stipulations embraced in the act under which the new state came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission. [[301]](#footnote-302)303

The defendant supported its use of equal footing today by noting the Supreme Court's more recent usage of that doctrine, such as in Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., a 1977 case which quoted Pollard with approval. [[302]](#footnote-303)304 Further, the defendant argued, the equal footing doctrine was recently extended to include land under lake beds in Utah Division of State Lands v. United States. [[303]](#footnote-304)305 That case dealt with ownership of the land under Lake Utah, which was contested by the state and the federal government. The Court held that, under the equal footing doctrine and absent an express reservation, title to the land under the lake had passed to the State of Utah, as an incident of sovereignty. [[304]](#footnote-305)306

While the defendant did acknowledge that challenging federal ownership to dry lands under the equal footing doctrine was a case of first impression for the federal courts, [[305]](#footnote-306)307 it argued that extending the doctrine was appropriate in this case for a number of reasons. First, the defendant argued that no case actually limits the equal footing doctrine only to submerged lands, and that the trend of the decisions is to extend the doctrine beyond submerged lands. [[306]](#footnote-307)308 The defendant specifically noted that in Phillips Petroleum Co. v. Mississippi, [[307]](#footnote-308)309 the Court applied the equal footing doctrine to lands which were not underlying**[\*460]** navigable water, and that this provides evidence that the doctrine extends beyond submerged waters. [[308]](#footnote-309)310 Second, the defendant cited to Justice Catron's dissent in Pollard, which suggested the equal footing doctrine was applicable to "uplands." [[309]](#footnote-310)311 And finally, amici cited to a recent district court opinion for the proposition that over 150 years of precedent can be overturned despite the potential disruptive effect. [[310]](#footnote-311)312

2.

Critique of the Equal Footing Doctrine

The equal footing theories in this case hold the potential for broad-reaching effects on contemporary conceptions of federalism. Addressing the equal footing issues requires delving into the appropriate state-federal relationship in our system of governance and looking into differences between the original thirteen and the later-admitted states. If Nye County's theories were ultimately to prevail, the doctrine could be the basis for a re-assertion of state sovereignty across the nation, potentially serving as a severe brake upon federal power, and fundamentally altering the state-federal power balance. Federal control over Forest Service lands and other public lands could be halted and this would clearly lead to a dramatic alteration in responsibility for protection of public lands as the County Supremacy movement aims to privatize land and encourage development. [[311]](#footnote-312)313 Indeed, the Justice Department attorney made a "parade of horribles" argument about the consequences for national parks and other federal lands in countering the defendant's interpretation of the equal footing doctrine. [[312]](#footnote-313)314 While it is not clear what the impact on public lands would be if equal footing was read as the defendant contended, the potential for further protracted litigation over title claims is obvious.

The analysis below, incorporating the plaintiff's arguments, [[313]](#footnote-314)315 will review**[\*461]** the relevant cases and critique the defendant's equal footing argument on both a doctrinal and a normative level. The equal footing doctrine will be shown to be inapplicable to the present context as its proper use is in preserving political equality, not even-handed land ownership. More fundamentally, equal footing is an outdated legal concept which, while of some relevance to land underlying waterways, offers a feeble rationale for the transfer of millions of acres of federal lands.

a.

Normative Critique

The equal footing doctrine clearly does not limit federal power over public lands because the doctrine, properly understood, requires only political equality between the states. There is no mention of equal footing in the Constitution; [[314]](#footnote-315)316 the term was derived from the Northwest Ordinance of 1789 [[315]](#footnote-316)317 and first used in 1796 in admitting Tennessee into the Union "on an equal footing with original states in all respects whatever." [[316]](#footnote-317)318 The courts have since interpreted these words, which appear in every subsequent state enabling act, to refer to political rights and sovereignty and explicitly not to economic diversity. In an early case concerning the city of Chicago's authority to control draw bridges, the Supreme Court clarified that the equal footing doctrine requires only that all states have "equality of constitutional right and power." [[317]](#footnote-318)319 On similar reasoning, the Court in Stearns v. Minnesota imposed a constitutional restriction on the state's power to tax certain public lands. [[318]](#footnote-319)320 The Court noted that its decision did not violate the equal footing doctrine because that doctrine "forbids any agreement … limiting or qualifying political rights and obligations," and does not apply to compacts "in reference to property," as those do not involve a question of equality of status. [[319]](#footnote-320)321 The Court has since consistently held that the doctrine ensures that "each state shares "those attributes essential to its equality in dignity**[\*462]** and power with other states.'" [[320]](#footnote-321)322 The reasoning behind this doctrine is both preserving new states' ability to exercise all of its powers under the Constitution and preventing Congress from enlarging its own authority by imposing conditions on new states' sovereignty. [[321]](#footnote-322)323

At the time when new states were being admitted into the Union, equal footing was an important legal concept. The doctrine served as both a guide and a check on the methods employed to admit new states. The process of achieving statehood generally consisted of two steps. Initially, Congress passed an enabling act which authorized the formation of a territorial government to organize a state governing structure and to apply for statehood. [[322]](#footnote-323)324 The actual application included a proposed state constitution; once Congress approved this, the President would proclaim the state a member of the Union. [[323]](#footnote-324)325 Due to the required approvals, Congress was in a unique position to demand concessions from state applicants and to potentially alter the political rights and powers of new states. [[324]](#footnote-325)326 At the time, there was significant concern that territorial competition and rampant land speculation would lead Congress to impose obligations upon new states which would result in their political disadvantage compared to the original states. [[325]](#footnote-326)327 **[\*463]**

The equal footing doctrine was thus a useful judicial tool in policing congressional admission of new states, but the doctrine should remain constrained to that context. It was primarily relevant to assess whether the constitutional rights and political obligations of new states were equal to those of already-admitted states, with the objective of preserving political equality throughout the nation. Since the process of admitting new states and determining their respective political powers is long finished, the equal footing doctrine has lost much of its pertinence. Equal footing's genesis as a judicially-created doctrine, not drawn directly from a constitutional provision, further suggests the doctrine's application to a particular set of historical facts and its consequent lack of strength today. So while equal footing, properly understood, was an important legal theory to preserve political equality for new states at the time of their admission to the Union, it is of little relevance in contemporary jurisprudence where issues of intra-state political status are rarely raised.

The equal footing doctrine's particular legal birth and historical usage indicates its purpose in maintaining equal constitutional rights and powers between the states. [[326]](#footnote-327)328 The doctrine does not apply to economic diversity and there is no principled basis for employing the theory to mandate equality in land holdings between the states. Supreme Court rulings have consistently recognized that inequality in property ownership is a historical fact and not an issue of rights to which equal footing logically applies. For example, the Court in United States v. Texas specifically acknowledged great diversity between the states and distinguished equal footing with respect to rights, where this doctrine applied, and equality of economic resources or land ownership, where it did not. [[327]](#footnote-328)329 Following a review of the Court's equal footing jurisprudence, the Texas Court was explicit:

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. Some had special agreements with the Federal Government governing property within their borders. The requirement of equal footing was designed not to wipe out these diversities but to create parity as respects political standing and sovereignty. [[328]](#footnote-329)330

The Court has rightly followed the distinction between equal footing's usefulness in terms of political rights' questions and the doctrine's irrelevance regarding land issues. There is no legal or logical justification for demanding**[\*464]** equality of physical resources among the states and, indeed, there are compelling policy rationales to support some inequality.

By constitutional decree, the courts are not legislative bodies, but merely agents to enforce constitutionally-protected rights. [[329]](#footnote-330)331 The court's role in adjudicating differences between states is consequently limited to ensuring political equality in the admission of new states. It is the province of the federal legislature to determine the size of new states, where their borders lie, and other factors which ultimately effect the relative differences in economic or property resources of a state. Disparities between states in land ownership are particularly poorly-suited for judicial resolution because they result from these legislative decisions and other historical peculiarities. The fact that the federal government owns much more land in Nevada than in other states is the result of congressional policy, combined with immigration patterns and typographic conditions. [[330]](#footnote-331)332 Congress granted essentially the same amount of land to Nevada as it had to other states at the time, and it stood ready to sell or grant the federal lands to settlers. [[331]](#footnote-332)333 But these settlers never came in large numbers to Nevada, as it had relatively little in the way of usable land for farming or ranching. [[332]](#footnote-333)334 The vast holdings of federal land in Nevada today are more the result of rugged mountains and vast deserts than of a congressional goal to make the state a second-class citizen. Nevada's admission to the Union, as with every other state, was predominately a political choice, based on the number of people seeking statehood and their organizational skills, the appropriate jurisdictional boundaries, and the political will of Congress. The extensive federal land ownership in Nevada is the simple historical outcome of a complex web of political, historical, and economic trends, none of which are amenable to judicial inquiry because they do not touch on the political rights of the state or its citizens.

Further, arguments that gross disparities in land ownership, as in Nevada where the federal government still owns 83 percent of the state's land area, [[333]](#footnote-334)335 somehow violate the equal footing doctrine are not well reasoned despite their facial appeal. Uneven property ownership statistics are relevant only regarding who owns the lands within a state, be it a private individual or the federal government, but do not implicate comparative political rights. Federal ownership does not affect a state's republican form of government or its citizens' right to vote or freedom to practice religion. Federal ownership is not pertinent to the political rights and obligations of states on a legally-cognizable level unless the ownership reaches a point of interference with state autonomy. **[\*465]** At that point, however, the issue is more appropriately addressed on state sovereignty grounds, as it will be below, [[334]](#footnote-335)336 because that area of jurisprudence is directly on point. The equal footing doctrine, on the other hand, is only tangentially related and is an outdated and feeble theory in any event.

There are additional policy reasons in favor of unequal land holdings, which can serve as after-the-fact justifications for this historical result. The process of admitting new states was dependent on the population and the organization of the territories. In terms of protecting and providing for the political rights of territory residents, it was more important to pursue statehood based upon when the population was ready, even if the result was uneven state size and eventual inequalities in land holdings. Within this process, it also appears more important to preserve established local political boundaries than to be concerned with creating equal-sized states or compensating for differences in land demand. Further, sensitive natural resources are located in particular geographic areas and the importance of protecting these resources outweighs any efficiency benefits of even land distribution. [[335]](#footnote-336)337 Finally, the national government has significant national security interests in having large and remote tracts of land reserved for testing and military maneuvers, which would be impossible if equality in lands were required.

b.

Doctrinal Critique

The equal footing doctrine does have minor significance in disputes between federal and state land claims, a significance that County Supremacy supporters tend to blow out of proportion. [[336]](#footnote-337)338 The doctrine's relevance to land ownership is, however, restricted in its application to certain submerged lands for historical reasons. Today, the doctrine has no force with respect to public lands; it is only preserved as a historic relic in a narrow class of cases. Reviewing the original reasoning behind the equal footing cases helps to explain the inapplicability of the doctrine to public lands today. **[\*466]**

Under English common law, the King held title to lands which were subject to the ebb and flow of the tides since these lands could not be improved, yet were important for commerce and navigation. [[337]](#footnote-338)339 Following the American Revolution, the original thirteen states gained the Crown's sovereignty rights and thereafter held title to the tidelands. [[338]](#footnote-339)340 The Supreme Court subsequently held in Shively v. Bowlby that all states admitted later would have this same right, as an aspect of sovereignty. [[339]](#footnote-340)341 The Court extended the doctrine during the 1800s to apply to inland navigable waters which were not subject to the ebb and flow of the tides. [[340]](#footnote-341)342 In rationalizing this extension, the Court looked to the original justification for government title to the tidelands, which was to preserve public use of the waters. [[341]](#footnote-342)343 The Court found that the same reasoning applied to inland navigable waterways and noted that under English common law, tidelands and navigable waterways were synonymous because that country did not have any waterways which were not affected by the tides. [[342]](#footnote-343)344 Thus, what may appear to some as a broadening of the doctrine was in actuality the same principle rationally applied to the factual particularities of the United States.

This narrow application of equal footing to the land underlying navigable waters in new states is based on a localized conception of the public trust doctrine - relevant at the time it was established, but without meaning in today's highly-regulated public lands context. As new states were carved out of the public domain, title to which the federal government had obtained by conquest and purchase, the states received only those lands granted to them by the United States. [[343]](#footnote-344)345 However, under a public trust theory, the lands under navigable waters were treated differently: title was transferred upon a state's admission to the Union because these lands were considered a fundamental aspect of a state's sovereignty. [[344]](#footnote-345)346 The public trust doctrine served as a limitation, essentially a trust obligation, on states' management of the submerged lands. [[345]](#footnote-346)347

The reason for allocating the responsibility for maintaining the open use of**[\*467]** waterways to the local government was as much convenience and necessity, as it was a reasoned decision that local government would be better at the task. In the mid-nineteenth century, when this doctrine was created, it was not expected that the federal government would have a role in preserving waterways. [[346]](#footnote-347)348 As it was simply assumed that local governments would better care for the submerged lands, this responsibility gained status as an important part of state sovereignty. This is no longer valid reasoning today, as the federal government has both the capacity and the experience to protect local interests in a resource, as is evidenced - notwithstanding some critics - by the vast environmental regulatory scheme. The idea that only the state government could hold land in the public trust may have been valid in the 1800s, but it is not in the 20th century. This equal footing exception, granting states the land underlying navigable waters, is thus a historical relic. Today, with the federal government just as competent as the state in maintaining open waterways, this exception is preserved merely by the strength of stare decisis. Continuity's sake and estoppel theories provide further justification for maintaining this submerged lands doctrine, but the tenuous nature of the theory indicates its lack of force with respect to dry lands.

The relevant cases follow this reasoning, that the submerged lands equal footing exception is to be confined to its particularities and not used to apply equal footing to the public lands. The defendant in the Nye County case asserted that language in Pollard provides support for extending the equal footing doctrine to dry lands. [[347]](#footnote-348)349 The defendant's papers quoted extensively from Pollard, which addressed the federal government's right to hold lands underlying navigable waters in Alabama. In the passages proffered by the defendant, the Court noted that the power of the federal government over the public lands as property was to cease as new states were admitted, and that this passing of title would render "the municipal sovereignty of the new States … complete … and they, and the original states, will be upon an equal footing, in all respects whatever." [[348]](#footnote-349)350 However, these legal postulations in Pollard are clearly dicta, as the plaintiff correctly pointed out to the court. [[349]](#footnote-350)351 The Pollard case dealt only**[\*468]** with rights to the shore of a river between the high and low water marks, [[350]](#footnote-351)352 and the passages quoted by the defendant are not germane to the case's outcome or reasoning. Furthermore, commentators have noted that the language of this passage is extremely ambiguous, [[351]](#footnote-352)353 and elsewhere in the opinion, when explaining that title to rivers "passes with a transfer of sovereignty" because "rivers must be kept open" and "are not land, which may be sold," the Court specifically distinguished public lands, for which title does not pass since they are only "proprietary rights." [[352]](#footnote-353)354

Beyond the questionable meaning of this language, it is clear that the case's precedential value has been weakened by subsequent Supreme Court decisions. The Court in 1931 revisited the equal footing doctrine in United States v. Utah, a case where the United States sought to quiet title to parts of the beds of the Colorado, Green, and San Juan Rivers. [[353]](#footnote-354)355 The dispute involved the navigability of the waterways and the Court appointed a special master to determine this issue at the time of Utah's admission into the Union, the findings of which the Court accepted. [[354]](#footnote-355)356 In its opinion, the Court reiterated the equal footing doctrine and noted:

In accordance with the constitutional principle of the equality of states, the title to the beds of rivers within Utah passed to that state when it was admitted to the Union, if the rivers were then navigable; and, if they were not then navigable, the title to the river beds remained in the United States. [[355]](#footnote-356)357

This holding and restatement of the law undercuts the proposition that the equal footing doctrine mandates passing title to uplands, because the Court allowed the federal government to retain title to the land under those waterways which were not navigable.

In 1977, the Court in Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., again faced an equal footing issue in a dispute over title to land underlying the Williamette River, parts of which had not been part of the river when Oregon was admitted to the Union. [[356]](#footnote-357)358 Amici contended that this case illustrates the continued vitality of the Pollard language because the Court**[\*469]** quoted Pollard with approval. [[357]](#footnote-358)359 It is clear, however, that Corvallis Sand & Gravel is only citing Pollard for the rule that "the State receives absolute title to the beds of navigable waterways within its boundaries upon admission to the Union...." [[358]](#footnote-359)360 Further, the Court in Corvallis Sand & Gravel specifically noted that title to riparian fast lands did not pass to the states under the equal footing doctrine. [[359]](#footnote-360)361

A more recent case accepting a state's title claim under equal footing is important to note because, while the Court employs the equal footing doctrine, it makes clear that this does not apply to dry lands. The case of Utah Division of State Lands v. United States arose in 1987 out of a federal lease for ***oil*** and gas drilling on lands underlying Utah Lake, a navigable body of water. [[360]](#footnote-361)362 The state brought suit, contending that under equal footing, it was the rightful owner of the lakebed. [[361]](#footnote-362)363 The district court and court of appeals rejected this argument, affirming federal ownership of the lands. [[362]](#footnote-363)364 In a 5-4 decision, however, the Supreme Court found that the state did own the lands under Utah Lake because title had passed to the state upon its admission under equal footing. [[363]](#footnote-364)365 The issue in the case was not specifically the applicability of the equal footing doctrine, but rather the validity of a congressional reservation of the lake as a reservoir. [[364]](#footnote-365)366

Justice O'Connor wrote the Court's opinion which began with a historical review of equal footing, going back to its roots in English common law. [[365]](#footnote-366)367 O'Connor noted that, while states did receive title to the land underlying navigable waters through equal footing, the broad dictum in Pollard suggesting that the federal government could not reserve title to itself, went too far. [[366]](#footnote-367)368 The Court found that this dicta was subsequently disavowed and that the federal government could defeat the passing of title, although it must do so explicitly. [[367]](#footnote-368)369 The central issue in Utah Division of State Lands was whether the lake had been reserved for the federal government by virtue of its selection as a reservoir in 1889, under an authorizing act [[368]](#footnote-369)370 which was later repealed. [[369]](#footnote-370)371 The Court**[\*470]** concluded that this reservation was not clear enough to overcome the presumption that title to the land under navigable water had passed to the states. [[370]](#footnote-371)372 Therefore, this case, while finding for the state in its title dispute, provides no support for extending the equal footing doctrine to drylands. [[371]](#footnote-372)373

In addition to not extending equal footing beyond navigable waterways and tidelands, the Supreme Court has consistently narrowed its Pollard holding since that decision. The Court has found the equal footing doctrine to be inapplicable to offshore lands, [[372]](#footnote-373)374 to certain lands underlying non-navigable waters, [[373]](#footnote-374)375 and to riparian uplands. [[374]](#footnote-375)376 The Court also affirmed the right of the federal government to reserve property and water for its own use, despite the equal footing doctrine. In Arizona v. California, the Court rejected Arizona's arguments that equal footing prevented the federal government from reserving water from the Colorado River and from imposing a comprehensive allocation scheme among the three adjoining states. [[375]](#footnote-376)377 The Court noted, in discussing Pollard and its progeny:

They … cannot be accepted as limiting the broad powers of the United States to regulate navigable waters under the Commerce Clause and to regulate government lands under Art. IV, 3, of the Constitution. We have no doubt about the power of the United States under these clauses to reserve water rights for its reservations and its property. [[376]](#footnote-377)378

Further, the Court in Coyle v. Smith, which found that Congress could not interfere with a state's sovereignty by mandating the location of the state capitol, noted that "care and disposition of the public lands" was an example of legislation that was within Congress' powers. [[377]](#footnote-378)379 The cases also clearly contradict the defendant's assertion that, since the King owned all unimproved**[\*471]** lands under English common law, the equal footing doctrine should be applicable to drylands as well as navigable waters. [[378]](#footnote-379)380 In fact, the Crown only owned the lands under tidal areas; the defendant is simply wrong about this historical fact. [[379]](#footnote-380)381 While the consequences of this distinction may appear odd, that does not make it unconstitutional. [[380]](#footnote-381)382

Thus, it is clear that acceptance of Nye County's position on the equal footing argument would require a court to directly contradict over 150 years of precedent. Amici even acknowledged this in their brief, [[381]](#footnote-382)383 but incredibly did not offer an argument to justify this divergence from the tradition of stare decisis. Rather, the defendant simply asserted that there is no reason not to extend the equal footing doctrine to all public lands. [[382]](#footnote-383)384 The defendant's failure to provide a persuasive reason for extending the doctrine is fatal to its position, especially given the serious implications that such an extension would have for title to lands across the West, including military areas, national parks, and even private lands, tracing title back to a government grant.

While the defendant is correct that government title to public lands has never been challenged under the equal footing doctrine, at least at the circuit court level, that is presumably because no one ever thought to argue such a weak position. There is no case law supporting this argument [[383]](#footnote-384)385 and, indeed on this record, the defendant lacks even a good faith argument for extension of the law. Judicial interpretation and logical application of the equal footing doctrine make clear that it is primarily used in disputes over political rights and obligations, and is inapplicable, except for an unique class of cases, to issues of land inequality. **[\*472]** Furthermore, while this theory was relevant at the time new states were being admitted to the Union, it has faded into the history books. Equal footing is not the robust constitutional theory necessary to support the defendant's radical position of transferring title for the public domain to the states.

B.

State Sovereignty

1.

Nye County's Argument

While equal footing is essentially an argument that limits federal power to hold lands, an alternative argument - made by the defendant in Nye County and more generally by supporters of the County Supremacy movement - contends that the federal government is in violation of the Tenth Amendment by continuing to control public lands without proper authority. [[384]](#footnote-385)386 This argument is essentially an assertion of state sovereignty and is proffered in two distinct forms. The starting point of the theory is that the federal government lacks the constitutional authority to own the public lands. The defendant, under the state sovereignty rubric, contended that indefinite federal holding of public lands constitutes an ultra vires act in violation of the Tenth Amendment. [[385]](#footnote-386)387 The defendant further argued that allowing the federal government to own portions of a state, especially in the egregious case of Nevada, is a fundamental violation of the Tenth Amendment's protection of state sovereignty. [[386]](#footnote-387)388 The state sovereignty argument is in some ways simply an extension of the equal footing argument that Nevada's political rights are unconstitutionally restricted. Federal ownership of public lands, which on its face does not touch on political rights, would reach a legally-cognizable level for equal footing only if it interferes with state autonomy. The analysis of state sovereignty below will thus also address this extension of the equal footing theory.

A fundamental premise of the defendant's position was that the American system of government established a central government with limited and enumerated powers. Any power not specifically granted to the federal government is reserved for the states through the Tenth Amendment, reflecting the framers' unique theory of dual sovereignty. [[387]](#footnote-388)389 The defendant also attempted to interweave language from the Articles of Confederation, with its heightened**[\*473]** protection of states' rights, as an equally fundamental piece to our system of government. [[388]](#footnote-389)390

The defendant contended that, looking back to the Constitution as one must to find authorization for federal power, there is no grant of power to own or control public lands. [[389]](#footnote-390)391 Reviewing the three places where the Constitution mentioned land, the defendant found the New States and Property Clauses apply only to territorial land held in trust for future states. [[390]](#footnote-391)392 the defendant thus argued that the Enclave Clause authorizes federal ownership of lands, but that it specifically applies only to a particular type of land, such as forts, dockyards, and post offices. [[391]](#footnote-392)393 The defendant would concede ownership of the various post offices in Nye County, as well as the Tonopah federal building, but that is as much as it believed the federal government was allowed to own. [[392]](#footnote-393)394 The defendant further contended that judicial interpretations which seem to allow federal ownership, in reality apply only to territorial lands. Federal power, therefore, ceases when these lands become states. Nye County argued that, to be faithful to the Constitution, the Court must affirm states' ownership of all land other than post offices and similar facilities since the federal government was not granted the authority to own or manage public lands, and the Tenth Amendment reserves these ungranted powers. [[393]](#footnote-394)395 The defendant further urged that the federal government's usurpation of this unauthorized power is a flagrant violation of the Tenth Amendment principle of dual sovereignty. [[394]](#footnote-395)396

In reaching this conclusion, the defendant cited recent Supreme Court cases which reaffirm the principle that the federal government's powers are not limitless. Even in Garcia v. San Antonio Metropolitan Transit Authority, [[395]](#footnote-396)397 a case an amicus describes as "seriously undermining" the Tenth Amendment, [[396]](#footnote-397)398 the Court acknowledged the existence of "limits on the Federal Government's power to interfere with state functions...." [[397]](#footnote-398)399 The defendant further asserted**[\*474]** that the Court, in New York v. United States [[398]](#footnote-399)400 and United States v. Lopez, [[399]](#footnote-400)401 reaffirmed its defense of states' rights in the modern age. Thus, particularly under this contemporary view of states' rights, affirming federal ownership and control over the western public lands would interfere with state sovereignty and severely trench on the Tenth Amendment by overstepping the federal government's constitutional powers.

The defendant's argument continued that the federal government has violated the Tenth Amendment by taking over the public lands because, in doing so, it has interfered with state and county core functions. [[400]](#footnote-401)402 The framers intended that local governments be responsible for local affairs, which in Justice Powell's words, typically include "fire protection, police protection, sanitation, and public health[,] … activities that epitomize the concerns of local, democratic self-government." [[401]](#footnote-402)403 The defendant asserted that by owning and controlling most of the land in the state of Nevada, the federal government was unconstitutionally inhibiting the state from exercising its rights protected under the Tenth Amendment. [[402]](#footnote-403)404 Amicus ***Kern*** County noted: "Granting the United States' motion [for summary judgment] would simply prevent any meaningful control by the citizens of Nye County and the State of Nevada over their local interests, essentially disestablish them in their role as a dual sovereign, and create a virtually nationally directed system of government in Nevada." [[403]](#footnote-404)405 Amici further asserted that this interference is a form of legislative commandeering which is prohibited under New York v. United States. [[404]](#footnote-405)406 While not specifically proffering all these points, the defendant's state sovereignty argument is the strongest of its positions, as it holds the potential to invalidate federal action even in the face of authorization under the Property Clause.

2.

Critique of State Sovereignty

a.

Federal Power Under the Property Clause

Upon a simple reading of the Constitution, as the defendant noted, one cannot locate an enumerated power allowing the federal government to own and control public lands. [[405]](#footnote-406)407 This originalist approach, however, ignores the Supreme Court's clear and irrefutable interpretations that the United States has this**[\*475]** power. Failing to acknowledge these opinions ignores the ongoing process of organic constitutional interpretation. As Chief Justice Marshall noted in McCulloch v. Maryland, "This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." [[406]](#footnote-407)408 On a more fundamental level, it is important for federal power over its land holdings to be expansive, perhaps even limitless, in order to properly care for these lands and preserve their vitality for the public of today and of the future. While there may be persuasive arguments for some restrictions on this power, that is ultimately a political issue which should not be resolved judicially under a state sovereignty analysis.

The Property Clause, on its face, grants the power to hold and dispose of public land. [[407]](#footnote-408)409 The Supreme Court has consistently interpreted this language as a plenary grant of power to Congress since the nation's birth. For example, the Court in United States v. Gratiot heard an argument that the federal government lacked the authority to lease mining rights within Illinois because its constitutionally-granted powers were only for disposal of lands. [[408]](#footnote-409)410 The Court rejected this argument and broadly construed federal authority under the Property Clause by holding that "congress has the same power over [territory] as over any other property belonging to the United States; and this power is vested in congress without limitation...." [[409]](#footnote-410)411 The Court further noted that Illinois "surely cannot claim a right to the public lands within her limits." [[410]](#footnote-411)412

Subsequent Supreme Court decisions have consistently affirmed the broad powers of the federal government over public lands. In a variety of contexts, the Court has recognized that the federal government has the authority to own public land and has all the rights of a normal property owner, including the ability to retain land indefinitely. [[411]](#footnote-412)413 In Camfield v. United States, the Court noted:

While the lands in question are all within the State of Colorado, the Government has, with respect to its own lands, the rights of an ordinary proprietor, to maintain its possession and to prosecute trespassers. It may deal**[\*476]** with such land precisely as a private individual may deal with his farming property. It may sell or withhold them from sale. [[412]](#footnote-413)414

The Court has also recognized broad federal powers in upholding reservations and withdrawals of land, even when they contradicted previous congressional grants to the state. [[413]](#footnote-414)415

In 1911, the Court faced a case with striking similarities to the Nye County situation and, again, it unambiguously affirmed the broad powers of Congress. In Light v. United States, Defendant Fred Light was a rancher who set his cattle out to graze in Colorado's Holy Cross Forest Reserve without authorization. [[414]](#footnote-415)416 Light countered the intentional trespass action brought by the United States by arguing that, under the Constitution, the federal government could not reserve large areas of a state without the state's consent. [[415]](#footnote-416)417 The Court categorically rejected this argument in its finding for the United States. [[416]](#footnote-417)418 In reviewing the law on the extent of congressional authority, the Court noted that it had already established broad federal powers over public lands. [[417]](#footnote-418)419 The Court further found that, while the limits of the Property Clause had not been defined, it was clear that this grant at least gave the federal government control over its property. [[418]](#footnote-419)420 The Court noted:

All the public lands of the nation are held in trust for the people of the whole country… And it is not for the courts to say how that trust shall be administered. That is for Congress to determine. The courts cannot compel it to set aside the lands for settlement; or to suffer them to be used for agricultural or grazing purposes; nor interfere when, in the exercise of its discretion, Congress establishes a forest reserve for what it decides to be national and public purposes… These are rights incident to proprietorship, to say nothing of the power of the United States as a sovereign over the property belonging to it. [[419]](#footnote-420)421

Thus, the Light Court again strongly affirmed the authority of the federal**[\*477]** government to own and control public lands in whatever way Congress decides is in the national interest.

The Court has also more recently reaffirmed the expansive powers of Congress under the Property Clause. In the 1976 case, Kleppe v. New Mexico, the Court faced the issue of whether the enactment of the Wild Free-Roaming Horses and Burros Act exceeded congressional powers. [[420]](#footnote-421)422 The purpose of the Act, passed in 1971, was the protection and preservation of wild horses and burros, which were seen as important symbols of the West. [[421]](#footnote-422)423 This Act went beyond the management of public lands and indeed encroached upon the area of wildlife regulation, traditionally a state concern. [[422]](#footnote-423)424 Yet the Court upheld the Act, primarily because of the broad powers of Congress under the Property Clause. [[423]](#footnote-424)425 The Court rejected appellee's narrow interpretation of this Clause - interestingly, even that reading conceded the power to retain lands. [[424]](#footnote-425)426 The Court reiterated its expansive reading of the Property Clause and concluded that congressional power over lands has no limits. [[425]](#footnote-426)427 In so ruling, the Court noted, "In short, Congress exercises the powers both of a proprietor and of a legislature over the public domain." [[426]](#footnote-427)428

Thus, from the initial interpretations to the recent reiterations, [[427]](#footnote-428)429 the Court has been exceedingly clear: under the Property Clause, Congress may sell or hold the lands it controls with virtually no limits on its discretion. These public lands are held in trust for the people of the entire nation, not simply for the citizens of the state in which the land resides or for future states, as Nye County contended. As such, Congress may exercise its broad powers in pursuit of the national interests on behalf of all citizens, in whatever way it sees fit. In Alabama v. Texas, the Court noted:

The U.S. holds resources and territory in trust for its citizens in one sense, but not in the sense that a private trustee holds for a cestui que trust. The responsibility of Congress is to utilize the assets that come into its hands as a sovereign in the way that it decides is best for the future of the Nation. [[428]](#footnote-429)430

**[\*478]** Therefore, Congress is free to decide to retain its public lands as it did in 1976, when it passed the Federal Land Policy and Management Act. [[429]](#footnote-430)431 Based on the weight of authority, an ultra vires argument that the federal government is exercising powers beyond its authority, is without merit.

On a deeper level, however, there are significant justifications to support the federal government's ownership of and control over the public lands. Since America's founding, the federal government has planned for the future success of the nation through the public lands it purchased or acquired. [[430]](#footnote-431)432 Policy questions concerning disposal and use of the vast federal domain were among the most pressing issues at the nation's birth. [[431]](#footnote-432)433 The federal government pursued the collective interests of the nation in using the public lands to encourage settlement, finance the country's war debt, and compensate war veterans. [[432]](#footnote-433)434 Because the issues surrounding the public domain were vitally important to the future growth and security of the nation, decisions were coordinated on a federal level. [[433]](#footnote-434)435

Initially, this national control was also partly for convenience, as the outlying public-lands areas were unorganized or merely established as territories, and only the federal government had the proper management resources. [[434]](#footnote-435)436 However, even with the creation of state governments, the federal government retained decisional authority over these important lands issues, taking a long-term, national perspective and avoiding local or private management which might run counter to the collective benefit. [[435]](#footnote-436)437 Many of the major increases in federal control over the public domain were in response to problems from private exploitation of the lands. For example, in the 1880s, the fear that the then-used "cut-and-run" timber cultivation methods would exhaust the country's lumber supply led to the reservation of public lands for national forests. [[436]](#footnote-437)438 The "closing" of the American frontier around the same time heightened the nation's concern for preservation of, or at least control over, the public domain. [[437]](#footnote-438)439 In**[\*479]** order to carry out these important governmental objectives in the manner best suited for the nation, the federal power over these lands had to be significant, encompassing the authority to hold the lands, sell them, or otherwise dispose of the property.

These same rationales for federal ownership and control over the public lands apply today, perhaps with even greater strength as land resources diminish. Much of the federal land, such as national parks and forest reserves, remain important ecological and environmental resources for which national preservation is crucial. To effectuate this management, broad authority to act in the public interest is still essential and justifies the near-plenary grant of power the courts have allowed Congress. While a national perspective may no longer be essential for all the public lands, the decision about which lands may be released to local control or sale is ultimately a political question, not one of constitutional interpretation. Congress declared its intention to retain all public land in 1976 [[438]](#footnote-439)440 and any reversals of this policy should come from the legislature, not the judiciary.

b.

State Sovereignty Under the Tenth Amendment

Despite the breadth of federal power derived from Supreme Court interpretations of the Property Clause, the Tenth Amendment of the Constitution may independently prohibit Congress from owning and controlling public lands. Nye County and other supporters of the County Supremacy movement promote this states' rights argument in two distinct, but similar, forms. First, the Tenth Amendment prevents federal action in areas which Congress is not authorized to act. [[439]](#footnote-440)441 Second, the Tenth Amendment protects core state functions in its role as guardian of dual sovereignty. [[440]](#footnote-441)442 Of all of the defendant's positions, these Tenth Amendment arguments are at least grounded in theories which, while not established, hold some sway in the Supreme Court. Once again, however, this states' rights position is unpersuasive as the state sovereignty claim is illusory.

The defendant, as justification for its state sovereignty position, read the Tenth Amendment as an affirmative grant of state power against the national government, [[441]](#footnote-442)443 but this position fails to account for decades of Supreme Court interpretation. A proper construction of the Tenth Amendment recognizes the Supreme Court's reading of what powers are granted to Congress. The standard, although not universal, interpretation of the Tenth Amendment is that it does not**[\*480]** grant affirmative power to the states. [[442]](#footnote-443)444 The Amendment was commonly thought of as a political ploy intended to placate Anti-Federalists when passed, [[443]](#footnote-444)445 and as stating merely a "truism that all is retained which has not been surrendered." [[444]](#footnote-445)446 This generally-accepted interpretation, that the Tenth Amendment was a substantively meaningless addition to the Constitution, resulted in the amendment's relative obscurity during a period of unchecked expansion of federal powers. [[445]](#footnote-446)447

In the past two decades, however, this orthodoxy has been challenged, as the Tenth Amendment and state sovereignty became the newest judicial hot topic. This modern evolution began in 1976, when the Court in National League of Cities v. Usery took the bold move of invalidating amendments to the Fair Labor Standards Act, which were to be applied to the states as employers. [[446]](#footnote-447)448 Congress had justified this legislation under its Commerce Clause powers but the Court, in a controversial 5-4 opinion, found that there were limits to this power which Congress had over-stepped. [[447]](#footnote-448)449 This limit was encountered when congressional legislation interfered with a state's sovereignty. [[448]](#footnote-449)450 The Court found that Congress had improperly interfered by imposing minimum wage and maximum hour provisions on state employees. [[449]](#footnote-450)451 What is striking about this case is that it was the first occasion in our nation's history that the Court exercised "an outright override," by invalidating an Act which was otherwise within congressional authority, rather than determining that it exceeded**[\*481]** constitutional authority. [[450]](#footnote-451)452 The Court's reasoning, while ambiguous and later questioned, was at least partly grounded in the Tenth Amendment; the Court even went so far as to note this protection of state sovereignty to be "an express declaration … in the Tenth Amendment." [[451]](#footnote-452)453 This statement by the Court placed greater emphasis on the Tenth Amendment as an affirmative protector of state sovereignty, but this extreme position was the source of much debate. [[452]](#footnote-453)454

Only nine years later, the Court dramatically reversed its holding in National League of Cities in another 5-4 decision, Garcia v. San Antonio Metropolitan Transit Authority, with the pivotal Justice Blackmun switching camps. [[453]](#footnote-454)455 The issue in Garcia, close to that in National League of Cities, was whether federal labor regulations were applicable to the local, municipally-owned, transportation authority. [[454]](#footnote-455)456 The Court found that the congressional regulation did not negatively impact state sovereignty, in direct contradiction to the holding in National League of Cities. [[455]](#footnote-456)457 In its reasoning, the Court even discarded the "traditional governmental function" standard of National League of Cities as unworkable [[456]](#footnote-457)458 and contrary to principles of federalism. [[457]](#footnote-458)459 The approach adopted by the Garcia Court, viewing federalism in terms of process rather than result, and relying heavily on the political system to restrict federal expansion, has also engendered criticism. [[458]](#footnote-459)460 In terms of the Tenth Amendment, this approach restricts the role of the courts in using the amendment as a limit on the exercise of federal power. While the Garcia Court recognized the independence of state sovereignty in some contexts, implicit in its holding is a movement away from the Tenth Amendment as a textual source for this protection.

In New York v. United States, the Court further clarified its interpretation of the Tenth Amendment. [[459]](#footnote-460)461 The Court addressed challenges to three provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 under the**[\*482]** Tenth Amendment and the Guarantee Clause. [[460]](#footnote-461)462 The Act created incentives and ultimately sanctions to encourage states to establish disposal sites for radioactive waste; the validity of these provisions was the issue in the case. [[461]](#footnote-462)463 Justice O'Connor, speaking for the Court, upheld the main parts of the Act but invalidated the "take title" provision, as an example of unconstitutional legislative commandeering. [[462]](#footnote-463)464

Despite the apparent differences between New York and Garcia, implicit in O'Connor's holding is a reiteration of the Court's earlier reduced reliance on the Tenth Amendment as a protector of state sovereignty. The New York Court found that while the Tenth Amendment does restrain federal power, this limit does not emanate from the text of the amendment, which the Court affirmed is simply "a tautology." [[463]](#footnote-464)465 Rather, the amendment confirms the principle of dual sovereignty which federal courts must protect by determining if federal actions infringe upon an incident of state sovereignty. New York thus represents another definitive step away from the National League of Cities's anachronistic reliance on the text of the Tenth Amendment. As New York makes clear, however, this step does not ring the death knell for federalism; it merely shifts the focus of protecting states' rights away from the Tenth Amendment and towards the "tacit postulates" of state sovereignty. [[464]](#footnote-465)466

There are currently two competing frameworks used by the Supreme Court to address this issue. The first, which appears to hold sway (albeit with a narrow margin), is the "Original Powers" theory. This conception defines state sovereignty by what powers the state originally held at the founding of the nation and which were not divested through the Constitution. To follow this theory, the only embodiment of states' rights in the Constitution is the Guarantee Clause and state sovereignty is essentially a hollow constitutional doctrine. While noting that the Constitution itself does not protect particular areas of state sovereignty, supporters of the theory do recognize the importance of preserving sovereignty, as long as the means of this protection is the political process. [[465]](#footnote-466)467 **[\*483]** The "Original Powers" definition of state sovereignty was clearly illuminated by Justice Blackmun in Garcia, [[466]](#footnote-467)468 although the ideas date back to Chief Justice Marshall in McCulloch v. Maryland [[467]](#footnote-468)469 and were recently implied in U.S. Term Limits v. Thornton. [[468]](#footnote-469)470

An alternative framework which the Court has used to address fundamental state functions is the "Essential Sovereignty" theory. This method of identifying core elements of state sovereignty starts with the premise that states are independent sovereign entities which retain all the incidents of sovereignty that are not explicitly given to the central government by the Constitution. Through this framework, the Tenth Amendment is given strength and federal power is implicitly restrained from interfering with the wide-ranging conception of state functions. The "Essential Sovereignty" theory, although the term is not employed by its advocates, is explained in Justice O'Connor's opinion in New York, [[469]](#footnote-470)471 and in the Garcia [[470]](#footnote-471)472 and Thornton dissents. [[471]](#footnote-472)473 Understanding these competing abstract theories is helpful in establishing a framework for addressing state sovereignty, but the application to particular sets of facts still involves inquiry into actual state functions - a task that can often be corrupted by other political concerns. [[472]](#footnote-473)474

Returning to the Nye County case, the defendant made the claim that federal ownership of the public lands interferes with fundamental incidents of the county's sovereignty. [[473]](#footnote-474)475 This argument holds some appeal, particularly in the extreme case of Nye County, where the federal government claims ownership and control over 93 percent of the county's land. [[474]](#footnote-475)476 After all, how could a county even be a sovereign governmental entity when it can only own 7 percent of its land? This question, however, misstates the issue; it is not who owns the land, between the local and federal governments, but how the issues of control are managed. The federal government owns the public domain merely in lieu of**[\*484]** private land-owners who never claimed the land when it was being disposed of. [[475]](#footnote-476)477 The situation in Nevada, in terms of ownership, is no different than in states where most of the land was granted to individuals and is now in private hands: local governments do not own much land. This fact is, at bottom, irrelevant to the sovereignty issue because as long as the federal government has the authority to own the land, it is in the same position as any land owner.

Where the sovereignty issue might be significant is in the convergence of the local government's normal powers over the land within its boundaries and the breadth of federal control over its lands. Framed as such, the issue is no longer a legal question of state sovereignty, but a policy question concerning the proper sharing of authority. The premise of this issue is that local control over the public domain extends as far as it has not been legally preempted. Unfortunately for the County Supremacy movement's position, the federal government has clearly preempted most basic land planning and management functions regarding the public lands [[476]](#footnote-477)478 and is authorized to do so. Congress' ownership and control of these lands is supported by a long line of Supreme Court cases interpreting the Property Clause, and justified by the necessity of serving the important public value of conservation.

Ultimately, the Nye County situation is not a question of whether the federal government is infringing on traditional elements of state sovereignty. The federal government clearly limits the functioning of local government to the extent that counties do not have final land use decision-making powers over most of their land. The Nevada state and county governments admittedly cannot make the broad residential and commercial development choices that most local governmental entities have within their power, but only because a higher level of government has the power to make these choices. This restriction arises through federal preemption of an area of law which it was the explicit intention of Congress, as it has been throughout the history of the West, to control. In pursuing the interests of the whole nation, Congress must have the authority to make management decisions, whether for disposal or retention, over the vast domain of federal lands. Local governments may participate in federal land planning and management decisions, as indeed they should, but ultimately in order to effectuate national interests in conservation, Congress must have final control. Nye County may be unhappy with this situation, and it may even be rightly frustrated by federal bureaucratic restrictions on its ability to participate, but this dispute, at its core, is a political controversy. Nye County's proper avenue for redress is petitioning the federal government, not prosecuting an illusory state sovereignty claim. [[477]](#footnote-478)479 **[\*485]**

Furthermore, the defendant's argument in this context is legally baseless because violations of state sovereignty are generally only heard when the federal government is seeking to acquire new powers which trench on state sovereignty, such as the ability to force state regulation of hazardous wastes. [[478]](#footnote-479)480 In the present case, the exercise of federal power in controlling the public lands is not new but established, and has been acted upon since the beginning of the nation. [[479]](#footnote-480)481 The defendant's use of a state sovereignty argument is poorly reasoned in this situation where Congress is not seeking new powers, but rather defending its well-established authority against attack. The Tenth Amendment and state sovereignty arguments may be useful to prevent Congress from excessively usurping state powers, but cannot be used to challenge this return to the status quo. In addition, the legislative commandeering argument is entirely misplaced as the federal government has not coerced state action, but replaced it by preempting local control over federal lands.

Finally, the courts have already addressed some of the issues raised by Nye County and rejected the state sovereignty arguments. In Kleppe v. New Mexico, the Wild Free-Roaming Horses and Burros Act was held constitutional against a similar state sovereignty attack. [[480]](#footnote-481)482 The Supreme Court found that the breadth of congressional power under the Property Clause permitted the legislation and preempted contrary state law. [[481]](#footnote-482)483 Further, the Act did not grant exclusive jurisdiction to federal officials so states could enforce their civil and criminal laws according to their own sovereign preferences. [[482]](#footnote-483)484 The Court noted:

In short, these cases do not support appellees' claim that upholding the Act would sanction an impermissible intrusion upon state sovereignty. The Act does not establish exclusive federal jurisdiction over the public lands in New Mexico; it merely overrides the New Mexico Estray Law insofar as it attempts to regulate federally protected animals. And that is but the necessary consequence of valid legislation under the Property Clause. [[483]](#footnote-484)485

Analysis of the defendant's state sovereignty claim thus does not depend on**[\*486]** the Supreme Court's competing federalism frameworks. Stripped to its essence, the claim is a dispute over management decisions pertaining to the public lands, rather than an issue of trammeled elements of a state's sovereignty. As such, the defendant's claim under the Tenth Amendment principles of dual sovereignty is an illusory political question, not fit for judicial resolution. This reasoning comports with the Garcia process-oriented view of federalism, which, notwithstanding indications to the contrary, [[484]](#footnote-485)486 would control and leave ultimate determination of the federalism implications of the Nye County case to the political arena.

IV.

Conclusion

The County Supremacy movement is the newest, and most dangerous, chapter in the American states' rights movement, which traces its historical lineage back to the founding of our nation. The theoretical construct of this perspective, that "local is better" in avoiding the tyranny of centralization, began benignly enough. During the Constitutional Convention, the Anti-Federalists' driving purpose was to ensure state sovereignty, but their attacks took the form of generally well-reasoned debate. [[485]](#footnote-486)487 The states' rights perspective re-emerged at different times in our country's history, each time with increased virulence. During the nineteenth century this doctrine was invoked by John Calhoun's bold advocacy of nullification and the theory, in its defense of slavery, almost led to the destruction of the Union. [[486]](#footnote-487)488 In more recent history, extremist states' rights arguments were deployed in an attempt to legitimize anti-integration efforts in the South. [[487]](#footnote-488)489

The current reincarnation of states' rights activism on the western range has become even more dangerous and irrational. Ostensibly advocating increased local input in land management decisions, the movement's misleading rhetoric and virulent anti-federalism only heightens the contemporary atmosphere of insurrection. Across the West, people are ignoring federal land policies, refusing to pay taxes, and openly defying federal authority. [[488]](#footnote-489)490 Underlying this uprising**[\*487]** is an environment of violence on the range, evidenced by the increased activity of the militias, as well as bombings and repeated threats to federal officials. [[489]](#footnote-490)491 This intimidation is not taken idly; federal officials have curtailed their enforcement efforts as a consequence. [[490]](#footnote-491)492 Additionally, the movement's goals, if carried out, could lead to the destruction of much of the national parks and public lands, national treasures held for all Americans. What legitimate theoretical and policy positions may lie beneath the movement are obscured by paranoia and parochialism, what Harry Scheiber has termed the "xenophobic factor." [[491]](#footnote-492)493 As Alexander Hamilton noted in The Federalist No. 16, the courts have a role in adjudicating federal-state disputes and it is only with both the courts' and the people's assent that a state challenge to federal authority may succeed. [[492]](#footnote-493)494

The Nye County case came before the federal district court as an example of the most aggressive state sovereignty position within the County Supremacy movement. The litigation thus had the potential to serve as a reality check for the movement and its legal theories. While resolution of the lawsuit can by no means be termed a victory for the movement, despite the contentions of some, the effect for County Supremacy is hardly certain. The court in the Nye County case rejected some of the county's arguments, but also did not reach many of the theories asserting local sovereignty. However, as this article illustrates, Nye County's legal arguments are completely without merit, and this conclusion should be widely disseminated. The equal footing doctrine is an inapplicable and outdated legal theory that does not support the argument that the states own the public domain. The defendant's position ignores over a century of contradictory precedent and on the record, appears sanctionable. The defendant's arguments under the rubric of state sovereignty are similarly baseless. It is clear that the federal government has the power, "limitless" power at that, to own and manage the public lands. The defendant's contentions that this power trenches on state sovereignty, in violation of the Tenth Amendment, also fail because the federal government is not seeking new and intrusive control, but merely hopes to have their rightful and non-exclusive authority reaffirmed. The repudiation of the legal theories underlying County Supremacy by the**[\*488]** Nevada district court has the potential to extinguish this latest flare-up of states' rights.

Within this irrational and menacing movement, however, there is disturbing potential for the court's decision and its meaning to be ignored. This outcome seems possible, even with the high quality of legal assistance in this case, given the blatant disregard for the growth and movement of the law already shown by the defendant and its supporters. Advocates of County Supremacy have steadfastly maintained their constitutional absolutism and originalist interpretation, avoiding a large number of directly contradictory cases; thus, this resolution of the Nye County case may be similarly disregarded. [[493]](#footnote-494)495 The most troubling implication from this possibility is the potential for further alienation, and even possibly violence, from the movement. County Supremacy is already tied to fringe elements who have allegedly engaged in violent bombings, and the decision might be seen as further proof of the conspiracy theory which is used to justify vigilante acts. As former Interior Secretary James Watt remarked, "If the troubles from environmentalists cannot be solved in the jury box or at the ballot box, perhaps the cartridge box should be used." [[494]](#footnote-495)496

As the courts may not be successful in arresting the growth of this disturbing state sovereignty insurrection, the responsibility should be placed on the public. This article serves as a first attempt to reveal County Supremacy as the dangerous and fraudulent movement that it is. This conclusion points out a further project in which the United States must engage: demystifying the fiction of states' rights. This article, however, can only begin this effort by suggesting some ideas which stem from the Nye County situation.

In the particular area of dispute in Nye County, ownership and management of public lands, national power is an essential benefit. Protection of the environment is a policy issue which affects all Americans and requires a long-term, broad-view perspective, rather than the parochial lens of the resource users, who after all, would only protect the land if acting irrationally. [[495]](#footnote-496)497 This country's growth, both in terms of size and diversity of interest, must also be acknowledged, as it invalidates one of the anti-federalist's theoretical premises, namely the theory of the small republic. [[496]](#footnote-497)498

Along with recognizing where this country stands today in terms of federalism, two persistent states' rights myths must be exposed. First, the Tenth**[\*489]** Amendment should be acknowledged as an inconsequential tautology; and second, the elusive concept of "framers' intent" should not be admitted as sacred oracle. While the historical literature on the Tenth Amendment is not conclusive, the current interpretation of the amendment properly sees it as embodying an important principle of constitutionalism but not as an affirmative grant of power to the states. It is similarly important to recognize that the framers, while outstanding political theorists, were mere mortal products of their time and not above criticism. Further, The Federalist Papers, from which the framers' vision is attempted to be divined, may be used, but not without acknowledging it as the piece of advocacy that it is.

Finally, it is interesting to note that conflicts between federal and state governments like the Nye County situation were pre-saged by the framers, who remarked, "The people of each State would be apt to feel a stronger bias towards their local governments than towards the government of the Union; unless the force of that principle should be destroyed by a much better administration of the latter." [[497]](#footnote-498)499 There is certainly evidence today that, in Hamilton's terminology, the federal government, more so than the states, has won the affections of the nation's people with regard to preserving the country's natural resources. This point must be expounded in looking toward the future of American federalism.

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1. 1 Nevada County Commissioner Dick Carver Challenges Federal Ownership of Public Lands, Stewards of the Const., 1994, at 1 (on file with Gonz. L. Rev.) [hereinafter Stewards]. [↑](#footnote-ref-2)
2. 2 The Federalist No. 16, at 155 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (discussing state resistance to national governmental action). [↑](#footnote-ref-3)
3. 3 Erik Larson, Unrest in the West, Time, Oct. 23, 1995, at 55. [↑](#footnote-ref-4)
4. 4 Id. at 52. [↑](#footnote-ref-5)
5. 5 Nye County, Nev. Res. 93-48 (Dec. 7, 1993); Nye County, Nev. Res. 93-49 (Dec. 7, 1993). [↑](#footnote-ref-6)
6. 6 The National Federal Lands Conference, a Bountiful, Utah group dedicated to the county movement, estimates that over 300 counties across the nation have asserted some amount of local sovereignty. Larson, supra note 3, at 54. [↑](#footnote-ref-7)
7. 7 See Complaint, United States v. Nye County, 920 F. Supp. 1108 (D. Nev. 1996) (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-8)
8. 8 See Tom Kenworthy, U.S. Enters Range War, Suing Nevada County, Wash. Post, Mar. 9, 1995, at A03. [↑](#footnote-ref-9)
9. 9 See Stipulation for Entry of Partial J., Nye County (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-10)
10. 10 Nancie Marzulla, of Defenders of Property Rights, quoted in Rhonda Bodfield, Arizona Joins Nev. County in State Sovereignty Fight, Tucson Citizen, Dec. 20, 1995, at 5D. Marzulla, whose husband is Roger Marzulla, Nye County's attorney, at the time was preparing an intervention motion on behalf of the State of Arizona in the Nye County case. Id. The State of Arizona has since decided not to attempt to intervene. Federal Fight in Arizona Called Off, Las Vegas Rev.-J., Jan. 26, 1996, at 10B. [↑](#footnote-ref-11)
11. 11 See discussion of amicus briefs infra notes 263-66 and accompanying text. [↑](#footnote-ref-12)
12. 12 U.S. Const. art. IV, 3, cl. 2. [↑](#footnote-ref-13)
13. 13 In modern terminology, supporters of Nye County would call themselves Federalists, but the language of federalism, as with its meaning, is often confused. For a good review of the original Federalists' clever name change and its implications, see Jackson Turner Main, The Antifederalists viii-xii (1961). [↑](#footnote-ref-14)
14. 14 John Howard, of the Individual Rights Foundation, noted: "What is revolutionary is that the U.S. government is entitled to have federal colonies all over the West." Warren Bates, Nye County Lawsuit Hits the Courtroom, Las Vegas Rev.-J., July 29, 1995, at 1B. Commissioner Dick Carver similarly noted that the county's mission is "to end apartheid in the West." Gary Andrew Pools, Hold It! This Land Is My Land!; Led by Commissioner Dick Carver, Nevada's Nye County Is Now Ground Zero in the West's War Against the U.S. Government, L.A. Times Mag., Dec. 3, 1995, at 28. [↑](#footnote-ref-15)
15. 15 Lois Schiffer, Assistant Attorney General for Environment and Natural Resources, noted that the lawsuit "should send a message, loud and clear, that the United States does indeed own and manage federal lands." Kenworthy, supra note 8, at A03. [↑](#footnote-ref-16)
16. 16 See, e.g., Edward L. Rubin and Malcolm Freeley, Federalism: Some Notes on a National Neurosis, 41 U.C.L.A. L. Rev. 903, 950 (1994) (describing federalism as "a neurosis, a dysfunctional belief to which we cling despite its irrelevance to present circumstances"). [↑](#footnote-ref-17)
17. 17 For an excellent exposition of why federalism matters, see David L. Shapiro, Federalism: A Dialogue (1995). [↑](#footnote-ref-18)
18. 18 Rita Kaley, Chair of the Oregon Lands Coalition, quoted in Brad Knickerbocker, Sagebrush Rebels Take on Uncle Sam, Christian Sci. Monitor, Jan. 3, 1996, at 10. The Oregon Lands Coalition is a network which represents farmers, ranchers, miners, loggers, and recreationalists. Id. [↑](#footnote-ref-19)
19. 19 Dick Carver noted that the movement's goal is "to bring the power of the government back to the people. America is tired of being governed by bureaucrats who are not elected but appointed. They think they have more power than God and are untouchable." Defiant Nevada County Challenges U.S., Ariz. Republic, Apr. 6, 1995, at A3. [↑](#footnote-ref-20)
20. 20 Interior Secretary Bruce Babbitt, quoted in Charles McCoy, Cattle Prod: Catron County, N.M., Leads a Nasty Revolt Over Eco-Protection, Wall St. J., Jan. 3, 1995, at 1. [↑](#footnote-ref-21)
21. 21 The movement is most often called the County Supremacy movement, but has also been termed Sagebrush Rebellion II, see Sagebrush Rebellion II: Who Should Control the Wild West?, Sacramento Bee, Dec. 3, 1995, at F03 (referencing Who Should Run the West?, Economist, Nov. 4, 1995); the home rule movement, see Bradley Inman, Property Rights: A Grass-Roots Rebellion, San Diego Union-Trib., Oct. 15, 1995, at H6; the county sovereignty movement, see David Brotherton, Beyond Nye County; Western Lawmakers Push To Acquire BLM Land, Las Vegas Rev.-J., Nov. 26, 1995, at 1L; and the county movement, see McCoy, supra note 20, at 1. [↑](#footnote-ref-22)
22. 22 See Pools, supra note 14, at 28. [↑](#footnote-ref-23)
23. 23 Knickerbocker, supra note 18, at 11. [↑](#footnote-ref-24)
24. 24 See George Cameron Coggins, Overcoming the Unfortunate Legacies of Western Public Land Law, 29 Land & Water L. Rev. 381 (1993). [↑](#footnote-ref-25)
25. 25 On March 30, 1995, a bomb exploded outside the U.S. Forest Ranger's station in Carson City, Nevada, and on August 4, 1995, Ranger Gary Pence's van was destroyed and his house was damaged by a bomb. See Barry Siegel, A Lone Ranger; U.S. Forest Service Ranger Guy Pence is a Persistent and Passionate Defender of Public Lands. Is That Why Someone Bombed His Office and His Home?, L.A. Times Mag., Nov. 26, 1995, at 20. These bombings caused significant damage, but no injuries, despite the fact that Pence's wife and daughters were home at the time of the bombing. Id. While no one has claimed responsibility for the bombings and the authorities have no leads, Nevada Senator Harry Reid blamed the attacks on "extremist elements" in the County Supremacy movement. Sandra Chereb, Extremists Blamed in Van Bombing, Chi. Sun-Times, Aug. 6, 1995, at 22. See also David Helvarg, Open Hostilities: National Park Personnel Are Increasingly Targeted by the Wise Use Movement's Campaign of Violence, Nat'l Parks, Sept. 19, 1996, at 36. [↑](#footnote-ref-26)
26. 26 See infra notes 224-26 and accompanying text. [↑](#footnote-ref-27)
27. 27 See generally 1 Herbert J. Storing, The Complete Anti-Federalist 10-11 (1981). A fundamental principle behind the Anti-Federalist attack on the Constitution was that a republican form of government would fail in the United States because the country was too large and it was thought that "only a small republic could maintain the voluntary attachment of the people and a voluntary obedience to its laws, make government responsible to the people, and inculcate the people with republican virtue." Forrest McDonald, Novus Ordo Seclorum 285 (1985). [↑](#footnote-ref-28)
28. 28 See Main, supra note 13, at 119-42. [↑](#footnote-ref-29)
29. 29 See generally Bray Hammond, Banks and Politics in America 89-171 (1957). [↑](#footnote-ref-30)
30. 30 See generally Samuel Beer, To Make A Nation: The Rediscovery of American Federalism (1993). [↑](#footnote-ref-31)
31. 31 See generally Merrill D. Peterson, The Great Triumvirate: Webster, Clay and Calhoun (1987). [↑](#footnote-ref-32)
32. 32 See Arthur M. Schlesinger, New Viewpoints in American History 240-42 (1922); Archibald E. Stevenson, States' Rights and National Prohibition 121-33 (1927). [↑](#footnote-ref-33)
33. 33 See generally David F. Goldfield, Black, White, and Southern 63-86 (1990); James Jackson Kilpatrick, The Southern Case for School Segregation (1962). [↑](#footnote-ref-34)
34. 34 For an interesting reconstruction of the issues and events from the Sagebrush Rebels' perspective, see R. McGreggor Cawley, Federal Lands, Western Anger (1993). [↑](#footnote-ref-35)
35. 35 Id. at 94-101. [↑](#footnote-ref-36)
36. 36 In his successful 1980 campaign for the presidency, Ronald Reagan declared himself a Sagebrush Rebel. See Ed Vogel, Ranchers' Conservation Lauded, Las Vegas Rev.-J., Oct. 5, 1992, at 1B. [↑](#footnote-ref-37)
37. 37 Nev. Rev. Stat. Ann. 321.596 - 321.599 (Michie 1995). [↑](#footnote-ref-38)
38. 38 Arizona, Colorado, Hawaii, Idaho, New Mexico, Utah, Washington, and Wyoming also passed similar Sagebrush Rebellion laws. See A. Costandina Titus, The Nevada "Sagebrush Rebellion" Act: A Question of Constitutionality, 23 Ariz. L. Rev. 263, 264 n.5 (1981); John D. Leshy, Unraveling the Sagebrush Rebellion, 14 U.C. Davis L. Rev. 317, 317 n.2 (1980). [↑](#footnote-ref-39)
39. 39 See generally Titus, supra note 38; Leshy, supra note 38. [↑](#footnote-ref-40)
40. 40 See Cawley, supra note 34, at 5-9. [↑](#footnote-ref-41)
41. 41 See McCoy, supra note 20, at 1. [↑](#footnote-ref-42)
42. 42 See McCoy, supra note 20, at 1. [↑](#footnote-ref-43)
43. 43 See McCoy, supra note 20, at 1. [↑](#footnote-ref-44)
44. 44 Catron County, N.M. Ordinance 004-91 (May 21, 1991) (repealed by Catron County, N.M. Ordinance No. 003-92 (Oct. 6, 1992)), cited in Andrea Hungerford, "Custom and Culture' Ordinances: Not a Wise Move for the Wise Use Movement, 8 Tul. Envtl. L.J. 457, 503 (1995). See infra notes 88-98 and accompanying text. [↑](#footnote-ref-45)
45. 45 Anita P. Miller, All is Not Quiet on the Western Front, 25 Urb. Law. 827, 828 (1993) (citing telephone interview with Frank DeMarco, Sesque County, California County Attorney, by Anita Miller (Jan. 11, 1993)). [↑](#footnote-ref-46)
46. 46 Stephanie L. Witt and Leslie R. Alm, County Government and the Public Lands: A Review of the County Supremacy Movement in Four Western States, in Public Lands Management in the West: Citizens, Interest Groups and Values (Brent S. Steel ed., 1997). [↑](#footnote-ref-47)
47. 47 The term "Wise Use" was ironically, albeit intentionally, adopted from the words of Gifford Pinchot, the first U.S. Forest Service chief, who coined the term conservation as "the wise use of resources." See Thomas A. Lewis, Cloaked in a Wise Disguise, in Let the People Judge: Wise Use and the Private Property Rights Movement 16 (John Echeverria & Raymond Booth Eby eds., 1995). For a thorough examination of the emergence of Wise Use and its founder, Ron Arnold, see Tarso Ramos, Wise Use in the West, in Lewis, supra, at 82-108. [↑](#footnote-ref-48)
48. 48 In particular, Wise Use opposes federal regulation of public lands, rejecting the classic justification for governmental correction of a rational market failure. See Garrett Hardin, The Tragedy of the Commons, 162 Sci. 1243, 1244 (1968). Hardin illustrated the need for imposed regulation of grazing on public lands by analyzing the problem in terms of positive political theory:

    The tragedy of the commons develops in this way. Picture a pasture open to all. It is to be expected that each herdsman will try to keep as many cattle as possible on the commons… Adding together the component partial utilities, the rational herdsman concludes that the only sensible course for him to pursue is to add another animal to his herd. And another; and another… But this is the conclusion reached by each and every rational herdsman sharing a commons. Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit - in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons.

    Id. at 1243. [↑](#footnote-ref-49)
49. 49 Lewis, supra note 47, at 14-20. [↑](#footnote-ref-50)
50. 50 Mary Corey, "Wise Use' Advocates Take On Environmentalists, Baltimore Evening Sun, Apr. 29, 1992, at 1B. The Center for the Defense of Free Enterprise is based in Bellevue, Washington, and is headed by Alan Gottlieb, a "well-known direct-mail fund-raiser for a variety of right-wing causes." Ramos, supra note 47, at 87. [↑](#footnote-ref-51)
51. 51 Scott Kessler, Medoc County, California planning director, quoted in Inman, supra note 21, at H6. [↑](#footnote-ref-52)
52. 52 Corey, supra note 50. Ron Arnold commented, "if people believe that there are endangered species, or, if it matters if there are, then they should put up their own money to save them." Bill Lambrecht, Land-Rights Groups Gain Forum Striving to Counter Environmentalists, Movement Seeks "Wise Use,' St. Louis Post-Dispatch, Sept. 7, 1992, at 1B. [↑](#footnote-ref-53)
53. 53 See Scott Allen, "Wise Use' Groups Move to Counter Environmentalists, Boston Globe, Oct. 20, 1992, at 1. [↑](#footnote-ref-54)
54. 54 See Inman, supra note 21, at H6. [↑](#footnote-ref-55)
55. 55 Wise Use advocates call environmentalists "Eco-Fascists," and their movement "the third great wave of messianism to hit the planet, after Christianity and Marxism-Leninism." Allen, supra note 53. Supporters of the John Birch Society and Lyndon LaRouche have reportedly been active at Wise Use meetings. See Allen, supra note 53. [↑](#footnote-ref-56)
56. 56 Elizabeth Dole, while campaigning, assured an audience at a Wise Use Conference in Portland, Oregon, that "Western voices would be heard in a Dole White House." Hal Bernton, Western Coalition Wields Power, Portland Oregonian, Jan. 7, 1996, at B1. [↑](#footnote-ref-57)
57. 57 See generally Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain (1985). [↑](#footnote-ref-58)
58. 58 See Charles Fried, Order and Law: Arguing the Reagan Revolution - A First Hand Account 183 (1991).

    Attorney General Meese and his young advisors … had a specific, aggressive, and, it seemed to me, quite radical project in mind: to use the Takings Clause of the Fifth Amendment as a severe brake upon federal and state regulation of business and property. The grand plan was to make government pay compensation as for a taking of property every time its regulations impinged too severely on a property right… If the government labored under so severe an obligation there would be, to say the least, much less regulation.

    Id. [↑](#footnote-ref-59)
59. 59 Defenders of Property Rights is a Washington D.C.-based legal advocacy organization headed by Nancie Marzulla and dedicated to preserving private property rights. See Marzulla, supra note 10, at 3. Mountain States Legal Foundation was founded in 1977 by Joseph Coors and James Watt, and recently represented the non-minority contractor in Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995). See Kristina Lindgren, Sagebrush Lawyers Rein in the Feds, L.A. Times, Nov. 29, 1995, at 5. [↑](#footnote-ref-60)
60. 60 Hage v. United States, 35 Fed. Cl. 147, 1996 U.S. Claims Lexis 30 (1996). See also Miller, supra note 45. Hage claimed that the federal agency controlled his grazing access so closely that he was driven out of business, while the Forest Service counters that he repeatedly broke agency regulations and mistreated the range. Miller, supra note 45, at 836. On March 8, 1996, the court partially granted and partially denied Defendant United States' motion for summary judgment. Specifically, the court ruled that Hage's grazing permit was a license, not a contract, such that its breach does not give rise to a contractual cause of action and remedy for damages. See Hage, 1996 U.S. Claims LEXIS at \*55-\*66. The court also granted summary judgment to the defendant on the issue of whether the government's suspension and cancellation of Hage's grazing permit was a taking because the court found that Plaintiff had no property interest in the public range or the grazing permit. Id. at \*69-\*79. The court found more weight in Hage's assertion of a property interest in certain ditch rights-of-way, and the water and forage in certain allotments of public land. Id. The defendant's motion for summary judgment on the taking claims in regard to these rights was denied, id. at \*79-\*96, and the court ordered an evidentiary hearing to determine the existence of the property rights claimed. Id. at \*111. The court further ordered a hearing on whether the government's impoundment and sale of Hage's cattle constituted a taking, id. at \*96-\*105, and ordered trial on Plaintiff's claim for compensation for range improvements he made. Id. at \*105-\*111. The state of Nevada and various environmental groups are also participating in this case as amici, although their motions to intervene as of right were denied. See Hage v. United States, 35 Fed. Cl. 737, 1996 U.S. Claims LEXIS 103 (1996). [↑](#footnote-ref-61)
61. 61 Knickerbocker, supra note 18, at 10. [↑](#footnote-ref-62)
62. 62 See Wayne Hage, Storm Over Rangelands: Private Rights in Federal Lands (1994). It is interesting to note that many books in this contentious area, as is the case with Hage's book, are either self-published or published by an interested advocacy organization. See id., published by Free Enterprise Press, a division of the Center of the Defense of Free Enterprise; Let the People Judge, supra note 47 (published by Island Press, a nonprofit environmental press); Private Rights and Public Lands (Philip N. Truluck ed., 1983) (published by the Heritage Foundation). [↑](#footnote-ref-63)
63. 63 See Gerald F. Seib and John Harwood, Shift in Power, Wall St. J., Nov. 9, 1994, at A1; Edward Walsh, Alienated Voters Went Heavily for GOP, Phoenix Gazette, Nov. 9, 1994, at A7. [↑](#footnote-ref-64)
64. 64 See Janet Hook, The Long March to a Revolution, L.A. Times, Apr. 7, 1995, at 1; Melissa Healy, House Approves Bill to Give Landowners Relief Regulations, L.A. Times, Mar. 4, 1995, at 1. Republican Representative Helen Chenoweth of Idaho is the most radical conservative of the new crop of lawmakers. See Claire Martin, Her Own Private Idaho, Denver Post, Jan. 21, 1996, at 14. She has been called the "poster child" for the militia movement and her legislative agenda includes limiting U.S. citizenship to American-born people and mandating that federal agents receive permission from local sheriffs before acting. Id. She has claimed that the white, Anglo-Saxon male is an endangered species and has served Idaho sockeye salmon, an endangered species, at fundraisers. Id. [↑](#footnote-ref-65)
65. 65 See Richard Lacayo, This Land Is Whose Land?, Time, Oct. 23, 1995, at 68; Valerie Richardson, On Western Range, BLM Is Hated Federal Regulator, Wash. Times, Oct. 15, 1995, at A1. [↑](#footnote-ref-66)
66. 66 See Paul Brinkley-Rogers and Steve Yozwiak, Boiling Point on the Range Reform Triggering Rebellion, Ariz. Republic, Dec. 17, 1995, at H1. [↑](#footnote-ref-67)
67. 67 See, e.g., New York v. United States, 504 U.S. 144 (1992) (declaring part of the Low-Level Radioactive Waste Policy Act unconstitutional as beyond Congress' enumerated powers and inconsistent with the Tenth Amendment); United States v. Lopez, 115 S. Ct. 1624 (1995) (holding the Gun-Free School Zones Act of 1990 invalid for exceeding Congress' commerce clause authority); United States Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1875 (1995) (Thomas, J., dissenting) (arguing that because the Constitution is silent on eligibility requirements for congressional candidates, it does not bar state term limits laws). [↑](#footnote-ref-68)
68. 68 For a comprehensive treatment of the American militia movement and right-wing extremists, see Kenneth S. Stern, A Force Upon the Plain: The American Militia Movement and the Politics of Hate (1996). [↑](#footnote-ref-69)
69. 69 Perhaps this concept is not held only by the fringe, see The Contract With America 109 (Ed Gillespie and Bob Schellhas eds., 1994). "The Clinton administration appears to salute the day when American men and women will fight, and die, "in the service' of the United Nations." Id. [↑](#footnote-ref-70)
70. 70 See Jill Smolowe, Enemies of the State: America's "Patriots' Have a Tough List of Demands, Keep Your Hands Off My Land, My Wallet - and My Guns, Time, May 8, 1995, at 58. [↑](#footnote-ref-71)
71. 71 Scott Wheeler, of the U.S. Patriot Network, noted, "There's a real fear that once the Second Amendment is abridged, the First [Amendment] … will be the next to go." Id. [↑](#footnote-ref-72)
72. 72 In a disturbing trend, "freemen" are conducting "citizens' courts" or "common law courts" across the nation. These mock judicial proceedings refuse to recognize state or federal law, and even conduct their own court sessions, "dismissing" charges, placing "liens," or "indicting" public officials, and, in one instance, even taking out a murder contract on a municipal court judge in Montana. See T. C. Brown, Justice, Militia Style: In Common-Law Courts, Outlaw Juries Mete Out "Soft Terror' and the Government is Always Guilty, Playboy, Sept. 1, 1996, at 62.

    This concept has taken on Texas-sized proportions in the Lone Star State where leaders of the "Republic of Texas" - a group which claims that Texas was unlawfully annexed and is being held as a captive nation - won a judgment in their own "common law court" for $ 93 trillion against the federal government, the International Monetary Fund, and the Holy See of the Catholic Church. See Sam Howe Verhovek, Serious Face on a Texas Independence Group, N.Y. Times, Jan. 24, 1997, at A2; Thomas Edwards, State Ends Republic's Quest to Use Rotunda, San Antonio Express-News, Jan. 3, 1997, at 1A; Julia Prodis, Texas' Past Independence Provides Group With Inspiration for Future Court, L.A. Times, June 2, 1996, at A14.

    Local governments are beginning to fight back against what public officials term "paper terrorism," the filing of fraudulent liens by the "courts." In Pima County, Arizona, three men were convicted of participating in a criminal syndicate and filing fraudulent liens after they filed liens against property owned by the police officer who stopped one of the men for driving without a license. See Bill Morlin, Mean, Lien Legal Machine, Spokesman Rev., Dec. 29, 1996, at H6. Thirteen men in Lincoln County, Missouri, were convicted for filing a false $ 10.8 million lien against a judge to get him to dismiss a speeding case. See Colleen Bradford, Jury Convicts 15 "Common Law' Advocates, St. Louis Post-Dispatch, Dec. 13, 1996, at 01C; Colleen Bradford, "Who's on Trial?' Ask Backers of 15 Awaiting Decision, St. Louis Post-Dispatch, Dec. 13, 1996, at C01. In addition, a number of states have passed legislation aimed at the filing of fraudulent liens. See Angie Cannon, Common Criminals, Salt Lake City Trib., May 24, 1996, at A1.

    The "common law courts" are reportedly active in dozens of states. See Mark Potok, Officials Fear Actions of Extremists' "Citizens Courts', Seattle Times, Sept. 17, 1995, at A4 (noting activity of "citizens' courts" in Oklahoma, Colorado, and Montana); Randy Ludlow, They Take Law Into Their Own Hands; Ohio Judges Fight "Common Law Court,' Cincinnati Post, Dec. 7, 1995, at 1A (Ohio); Frank Santiago, Oelwein Bank Case Clogs by "Court,' Des Moines Reg., Sept. 10, 1995, at 1 (Iowa); Debbie Salamone, 3 Men Guilty in Tax Scheme, Orlando Sentinel, Jan. 7, 1996, at B1 (Fla.); Kate Thomas, Chilling Effect: Is Group Harassing Houston Judges? Nat'l L.J., Dec. 2, 1996, at A5 (Tex.); Rob Eure, Common Law Courts Assert Legal Basis in God-Given Rights, Portland Oregonian, May 23, 1996, at A14 (Or.); Sarah Hanson, Disgruntled Citizens Turn to Common Law Court, Indianapolis Star, July 29, 1996, at B01 (Ind.). [↑](#footnote-ref-73)
73. 73 Bo Gritz, a former Progressive Party presidential candidate and decorated Green Beret, founded one of many "Christian Covenant" communities in northern Idaho. See Charles Etlinger, Federal Action Led to Militias' Birth, Gritz Says, Idaho Statesman, Oct. 18, 1995; Serge F. Kovaleski, A Show of Strength for Militia Movement, Wash. Post, Sept. 24, 1995, at A6. [↑](#footnote-ref-74)
74. 74 See Susan Sward, The Bullies' Pulpit, S.F. Chron., May 21, 1995, at 327. [↑](#footnote-ref-75)
75. 75 Siegel, supra note 25. An advocacy group, Public Employees for Environmental Responsibility (PEER), has catalogued 58 incidents of violence against public employees, including two arsons, five assaults, and six instances of shots being fired at federal agents. See Reno Is Urged to Probe Threats Against Workers, L.A. Times, Aug. 13, 1996, at A20. PEER even filed a lawsuit against a group of ranchers over one of the assaults. See Steve Yozwiak, Ranchers Face Lawsuit, Ariz. Republic, June 4, 1996, at A1. [↑](#footnote-ref-76)
76. 76 Chereb, supra note 25. [↑](#footnote-ref-77)
77. 77 Siegel, supra note 25. [↑](#footnote-ref-78)
78. 78 Rupert Cornwell, Range War Heading for Supreme Court, Indep. (London), June 29, 1995, at 14. [↑](#footnote-ref-79)
79. 79 McCoy, supra note 20, at 1. [↑](#footnote-ref-80)
80. 80 Larson, supra note 3, at 66. [↑](#footnote-ref-81)
81. 81 Siegel, supra note 25. [↑](#footnote-ref-82)
82. 82 Tom Kenworthy, Angry Ranchers Across the West See Grounds for an Insurrection, Wash. Post, Feb. 21, 1995, at A3. [↑](#footnote-ref-83)
83. 83 Larson, supra note 3, at 66. Carver has also expressed concern about being monitored by government agents and, in a "48 Hours" appearance, he claimed that the government has placed microchips in $ 100 bills. Pools, supra note 14. [↑](#footnote-ref-84)
84. 84 Stern, supra note 68, at 127. The newsletter stated the reason for the militia was "to overthrow the men who pervert the Constitution." Stern, supra note 68, at 127. National Federal Lands Conference newsletters have also included stories about a U.N. plot to create a new world order. See Peter Huck, War on the Range, Guardian (London), Nov. 22, 1995, at T6. [↑](#footnote-ref-85)
85. 85 McCoy, supra note 20, at 1. [↑](#footnote-ref-86)
86. 86 McCoy, supra note 20, at 4. [↑](#footnote-ref-87)
87. 87 Smolowe, supra note 70, at 62. Ken Toole of the Montana Human Rights Network also described the whole anti-federal movement as being, "like a funnel moving through space. At the front end, it's picking up lots and lots of people by hitting on issues that have wide appeal, like gun control and environmental restrictions, which enrage many people here out West. Then you go a little bit further into the funnel, and it's about ideology, about the oppressiveness of the federal government. Then, further in, you get into the belief systems … the anti-Semitic conspiracy. Finally, at the narrowest end of the funnel, you've drawn in the hard core, where you get someone like Tim McVeigh popping out." Stern, supra note 68, at 107. [↑](#footnote-ref-88)
88. 88 See supra notes 41-46 and accompanying text. [↑](#footnote-ref-89)
89. 89 See, e.g., Walla Walla County, Wash., Ordinance No. 219, 19.04.010 (Dec. 21, 1993); Lake County, Or., Ordinance No. 24, 1.0 (Aug. 19, 1992); Boundary County, Idaho, Ordinance No. 92-2, 3 (Aug. 3, 1992); Lincoln County, N.M., Ordinance No. 91-7 (Jan. 14, 1992), cited in Hungerford, supra note 44, at 503. [↑](#footnote-ref-90)
90. 90 Catron County, N.M., Ordinance No. 004-91 (May 21, 1991) (repealed by Catron County, N.M., Ordinance No. 003-92 (Oct. 6, 1992)), cited in Hungerford, supra note 44, at 503. [↑](#footnote-ref-91)
91. 91 Id. ("Before federal and state land agencies can change land use, adverse impact studies on uses shall be conducted and mitigation measures adopted with concurrence from Catron County. Adverse impact studies shall address community stability [and] local custom and culture...." (quoted in Hungerford, supra note 44, at 503 n.31)); Boundary County, Idaho, Ordinance No. 92-2, 2 ("All federal and state agencies shall comply with the Boundary County Land Use Policy Plan and coordinate with the County Commission for the purpose of planning and managing federal and state lands within the geographic boundaries of Boundary County, Idaho.") (quoted in Hungerford, supra note 44, at 503 n.24). [↑](#footnote-ref-92)
92. 92 See, e.g., Catron County, N.M., Ordinance No. 004-91 at 3-4 ("We declare that all natural resource decisions affecting Catron County shall be guided by the principles of protecting private property rights, protecting local custom and culture, maintaining traditional economic structures through self-determination, and opening new economic opportunities through reliance on free markets.") (quoted in Hungerford, supra note 44, at 503 n.16); Lincoln County, N.M., Ordinance No. 91-7 at 2 ("The nature and intent of Lincoln County government land use planning is to protect the custom and culture of County citizens through protection of private property rights and private rights in public lands … to ensure self-determination by local communities and individuals.") (quoted in Hungerford, supra note 44, at 503 n.16). [↑](#footnote-ref-93)
93. 93 See Scott W. Reed, The County Supremacy Movement: Mendacious Myth Marketing, 30 Idaho L. Rev. 525, 548-49 (1993/1994). [↑](#footnote-ref-94)
94. 94 At one time, however, the Catron County sheriff threatened to arrest Forest Service agents. McCoy, supra note 20, at 4. This caused the U.S. Attorney to respond with her own threat to arrest anyone who interfered with federal employees carrying out their duties. McCoy, supra note 20, at 4. Recently, however, the county seems to have become more aggressive, mandating gun-ownership for all households and requiring environmentalists to register with the county. McCoy, supra note 20, at 4. [↑](#footnote-ref-95)
95. 95 See Craig Welch, High Court Hears Arguments on "Wise Use,' Spokesman-Rev., Apr. 6, 1995, at B1. [↑](#footnote-ref-96)
96. 96 Boundary Backpackers v. Boundary County, No. CV 93-9955, 1994 WL 189642 (D. Idaho 1994). This decision was upheld by the Idaho Supreme Court on March 18, 1996. See Kevin Keating, Idaho High Court Halts "Wise Use' Movement, Spokesman-Rev., Mar. 19, 1996, at A1. [↑](#footnote-ref-97)
97. 97 Two cases brought by Lincoln County, New Mexico, challenging a Bureau of Land Management (BLM) land exchange, would have tested the enforceability of this type of land use plan. See Miller, supra note 45, at 827. However, the cases were settled in 1993 after the new county commissioners decided not to continue prosecution. See Miller, supra note 45, at 827. [↑](#footnote-ref-98)
98. 98 A case brought by the Washington Wilderness Coalition, challenging the constitutionality of local sovereignty ordinances in Walla Walla and Columbia Counties, was dismissed on March 8, 1995, for lack of standing and nonjusticiability, as the court found the ordinances had not been enforced. Washington Wilderness Coalition v. Walla Walla County, No. CS-94-312-AAM (E.D. Wash. 1995) (on file with Gonz. L. Rev.). The Ninth Circuit affirmed this decision on January 19, 1996. 1996 U.S. App. Lexis 1780. The court of appeals ruled that the district court was correct in finding that the coalition lacked either direct or representational standing because the group had "failed to demonstrate an actual or threatened injury to itself or its members." Id. [↑](#footnote-ref-99)
99. 99 810 F. Supp. 1470 (D. Or. 1992). [↑](#footnote-ref-100)
100. 100 Id. at 1484-85. [↑](#footnote-ref-101)
101. 101 Douglas County v. Babbitt, 48 F.3d 1495 (9th Cir. 1995). [↑](#footnote-ref-102)
102. 102 100 F.3d 837 (10th Cir. 1996) (reversing order of district court denying wildlife photographer's motion to intervene). [↑](#footnote-ref-103)
103. 103 See id. at 838-39; see also Marianne Lavelle, "Wise-Use' Movement Grows, Nat'l L.J., June 5, 1995, at A1. [↑](#footnote-ref-104)
104. 104 Lane Mills, Carver Hits Feds on Land Ownership, Montrose Daily Press, Sept. 17, 1994, in Stewards, supra note 1. [↑](#footnote-ref-105)
105. 105 See Graham County Bulldozes Rare Fish's Habitat, Ariz. Daily Star, Apr. 23, 1995, at 7B. [↑](#footnote-ref-106)
106. 106 See Betsy Z. Russell, Sheriff Tells Feds to Get Out of Town, Spokesman-Rev., July 10, 1995, at A1; Valerie Richardson, No-Nonsense Idaho Sheriff Tells Federal Law Officers to Steer Clear, Wash. Times, Aug. 27, 1995, at A1. [↑](#footnote-ref-107)
107. 107 John H. Cushman, Jr., In the Utah Wilderness, A Question of Definitions, N.Y. Times, Jan. 28, 1997, at A12. [↑](#footnote-ref-108)
108. 108 Tom Kenworthy, Blazing Utah Trails to Block a Washington Monument, Wash. Post, Nov. 30, 1996, at A01. There are also numerous disputes across the West concerning what are known as RS 2477 rights-of-way. See Cushman, supra note 107. An 1866 statute ensured that miners and ranchers would have certain access rights over federal land, and although the Federal Land Policy and Management Act repealed this law, it recognized all right of way claims existing at that time. See Cushman, supra note 107. The disputes today commonly concern whether there was a valid RS 2477 claim in 1976 to trails across public land. See Cushman, supra note 107. [↑](#footnote-ref-109)
109. 109 Tom Kenworthy, President Considers Carving National Monument Out of Utah Land, Wash. Post, Sept. 7, 1996, at A03. [↑](#footnote-ref-110)
110. 110 Larson, supra note 3, at 52-54. Aside from this national exposure, most media attention for Nye County and the County Supremacy movement has been in western papers. See, e.g., Warren Bates, Nye Uses Federal Cash for Lawsuit Against U.S., Las Vegas Rev.-J., Sept. 26, 1995, at 1B; Warren Bates, Nye Changes Strategy in Lands Lawsuit, Las Vegas Rev.-J., Nov. 23, 1995, at 3B. However, the movement did capture the attention of the international press, which published a few stories, all of them misinformed. See, e.g., Rupert Cornwell, Range War Heading for Supreme Court, Indep. (London), June 29, 1995, at 14; Karen Lowe, Westerners in Showdown with Federal Government Over Land, Agence Fr.-Presse, Jan. 3, 1996. [↑](#footnote-ref-111)
111. 111 United States v. Nye County, 920 F. Supp. 1108 (D. Nev. 1996). [↑](#footnote-ref-112)
112. 112 Stipulation for Entry of Partial J., Nye County (No. CV-S-95-00232-LDG-(RJJ)). The State of Nevada did not oppose entry of judgment against it on this point because of its understanding of established precedent and desire not to expend further resources on the litigation. Id. at 2. Nye County took no position on the judgment, "considering it to be a matter only between the United States and the State of Nevada." Id. [↑](#footnote-ref-113)
113. 113 Carver maintains his belief that the federal government still does not lawfully own the public lands and that one day a court, possibly the U.S. Supreme Court, will agree with him. See Michelle DeArmond, Rancher Can Claim Small Victories in Battle for Nevada's Public Lands, San Diego Union-Trib., Nov. 11, 1996, at A3; Dave Palermo, Ruling Uproots Sagebrush Rebellion, Las Vegas Rev.-J., Sept. 7, 1996, at 1B. [↑](#footnote-ref-114)
114. 114 See Charles McCoy, U.S. Sues Nevada County Aiming to End Revolt Over the Control of Public Land, Wall St. J., Mar. 9, 1995, at B14. [↑](#footnote-ref-115)
115. 115 The defendant noted in its papers: "A judgment for the United States … would not only result in the largest land grab in history, but would destroy Nevada's potential for sovereignty and political equality with its sister states." Defendant's Reply Memo. In Supp. of Def.'s Cross-Mot. for Summ. J. on Counts I and IV of the Compl., Nye County, (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-116)
116. 116 At oral argument on July 29, 1995, Justice Department attorney Peter Coppelman predicted that were the county to prevail, national parks, forests, and military bases would cease to exist and millions of individuals' title to land or federal patents would be called into question. Bates, supra note 14, at 1B. See also Brief of the California Environmental Law Project as Amicus Curiae at 7-9, United States v. Nye County, 920 F. Supp. 1108 (D. Nev. 1996) (No. CV-S-95-00232-LDG- (RJJ)). [↑](#footnote-ref-117)
117. 117 Larson, supra note 3, at 56. [↑](#footnote-ref-118)
118. 118 Larson, supra note 3, at 56. [↑](#footnote-ref-119)
119. 119 Pools, supra note 14, at 28. [↑](#footnote-ref-120)
120. 120 Curtis Peebles, Watch the Skies! A Chronicle of the Flying Saucer Myth 281 (1994). [↑](#footnote-ref-121)
121. 121 Larson, supra note 3, at 56. [↑](#footnote-ref-122)
122. 122 Soldiers regularly conduct war games at the Air Force range, leading to frequent sonic booms and jet overflights. Pools, supra note 14, at 28. [↑](#footnote-ref-123)
123. 123 Larson, supra note 3, at 56. [↑](#footnote-ref-124)
124. 124 Larson, supra note 3, at 56. [↑](#footnote-ref-125)
125. 125 Larson, supra note 3, at 56. [↑](#footnote-ref-126)
126. 126 See United States Dept. of Commerce, Statistical Abstract of the United States 226 (1995) [hereinafter Statistical Abstract]. [↑](#footnote-ref-127)
127. 127 Treaty of Peace, Friendship, Limits, and Settlement, Feb. 2, 1848, U.S. - Mex., art. VIII, 9 Stat. 922. This treaty is commonly referred to as the Treaty of Guadalupe Hidalgo because it was signed in the Villa de Guadalupe Hidalgo. Id. [↑](#footnote-ref-128)
128. 128 Great Britain initially granted the land that became the thirteen colonies and the states received title to this land following the Revolutionary War. Both Texas and Hawaii were independent sovereigns prior to their admission to the Union, so they were never a part of the federal domain. Additionally, Native Americans, as original residents, had competing ownership claims to the country's lands, but these were eliminated by conquest. See Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823) (finding that conquered Indians had lost possession and were therefore incapable of transferring title). [↑](#footnote-ref-129)
129. 129 The most comprehensive treatment of this area is Paul W. Gates, The History of Public Land Law Development (1968), which was commissioned by the Congressional Public Land Law Review Commission in 1968. For more modern and critical analyses of federal lands issues, see Federal Lands Policy (Phillip O. Foss ed., 1987); Marion Clawson, The Federal Lands Revisited (1983); Rethinking the Federal Lands (Sterling Brubaker ed., 1984). [↑](#footnote-ref-130)
130. 130 Statistical Abstract, supra note 126, at 226 n.362. The subsequent acquisition of Alaska (1867) and Hawaii (1898) brought the United States' total land area up to its present level of 3,536,288 square miles. Statistical Abstract, supra note 126, at 226. [↑](#footnote-ref-131)
131. 131 Nevada was rushed to statehood before obtaining the requisite population of 60,000 by the Republican-controlled Congress, which wanted another Republican state before the 1864 election; Nevada was admitted just in time to have its votes included in the tally. Gates, supra note 129, at 310. [↑](#footnote-ref-132)
132. 132 Ohio was the first state to be created out of the public domain. Gates, supra note 129, at 288-91. [↑](#footnote-ref-133)
133. 133 Clawson, supra note 129, at 185-88. [↑](#footnote-ref-134)
134. 134 If the in-place sections had already been granted or were otherwise unavailable, states had the right to select "in lieu" lands; up to 700,000 acres of these indemnity selections are still pending today and the issue continues to be the subject of litigation. See, e.g., Andrus v. Utah, 446 U.S. 500, reh'g denied, 448 U.S. 907 (1980) (acknowledging the Secretary of Interior's discretion to reject "in lieu" selections which are of grossly disparate value). In Andrus, Utah attempted to select valuable land in an ***oil*** field as a substitute for its school grant. Id. [↑](#footnote-ref-135)
135. 135 13 Stat. 30 (1864). [↑](#footnote-ref-136)
136. 136 Gates, supra note 129, at 311. "In-place" grants were made according to the rectangular survey method, which was adopted, at the suggestion of Thomas Jefferson, for the entire nation west of Ohio as a measurement standard for land titles. Clawson, supra note 129, at 20. This survey system formed square mile lots or "sections," and contained 640 acres each; these, in turn, were further subdivided. Clawson, supra note 129, at 20. As was typical, Nevada was granted sections 16 and 36 of each township for the benefit of its schools, which meant that the land could either be sold to generate revenue for education or could be used as a school site. Id. [↑](#footnote-ref-137)
137. 137 Gates, supra note 129, at 311. The reason behind this decision was that many of the school-grant sections were unsurveyed, remote, and worthless, and the state hoped to select lands which could be made productive. Gates, supra note 129, at 311. There was opposition in the House to this compromise as it was feared that giving the state a choice would leave the federal government with only valueless land. Gates, supra note 129, at 311. It appears that this concern was justified as the public lands today are generally less productive than lands held privately. See infra notes 157-59 and accompanying text. [↑](#footnote-ref-138)
138. 138 Gates, supra note 129, at 309. [↑](#footnote-ref-139)
139. 139 Gates, supra note 129, at 310. [↑](#footnote-ref-140)
140. 140 Gates, supra note 129, at 309. [↑](#footnote-ref-141)
141. 141 Clawson, supra note 129, at 186. [↑](#footnote-ref-142)
142. 142 The sales were meant to raise revenue to reduce the war debt, but owing to extremely lenient credit terms and a high default rate, not much money was raised. Clawson, supra note 129, at 21; World Almanac 502 (1995). [↑](#footnote-ref-143)
143. 143 In 1842, for example, Congress granted free land to settlers in Florida to encourage quick settlement and to deter Indian attacks. Clawson, supra note 129, at 21. [↑](#footnote-ref-144)
144. 144 12 Stat. 392, 43 U.S.C. 161-302 (1994) (repealed 1976). See generally Gates, supra note 129, at 394. [↑](#footnote-ref-145)
145. 145 Clawson, supra note 129, at 21-23. [↑](#footnote-ref-146)
146. 146 World Almanac 502 (1995). Veterans received land grants as bounties for their military service, often in place of monetary compensation. See, e.g., Bounty Land Act of 1850, Pub. L. No. 87-558, 9 Stat. 520. A variety of timber and desert laws allowed claims to land that was otherwise unusable provided that the claimant either planted trees or irrigated the land. See, e.g., Desert Land Act of 1877 (codified at 43 U.S.C. 321-339 (1994)). [↑](#footnote-ref-147)
147. 147 Clawson, supra note 129, at 26 tbl. 2-2. [↑](#footnote-ref-148)
148. 148 Clawson, supra note 129, at 26 tbl. 2-2. The disposal of such a vast amount of federal lands to individuals was unfortunately marred by rampant fraud and sporadic violence. See Paul W. Gates, The Federal Lands - Why We Retained Them, in Rethinking the Federal Lands, supra note 129, at 43. [↑](#footnote-ref-149)
149. 149 United States General Services Administration, Inventory Report on Real Property Owned by the United States Throughout the World tbl. 4 (1995) [hereinafter Inventory Report]. The totals do not add up because the figures for disposal are as of 1980, whereas the total area of the public domain is as of September 30, 1993. [↑](#footnote-ref-150)
150. 150 Clawson, supra note 129, at 27. [↑](#footnote-ref-151)
151. 151 Act of March 1, 1872, 17 Stat. 32. [↑](#footnote-ref-152)
152. 152 Clawson, supra note 129, at 28-29. [↑](#footnote-ref-153)
153. 153 43 U.S.C. 315-316 (1994). See Gates, supra note 129, at 610-22. [↑](#footnote-ref-154)
154. 154 Clawson, supra note 129, at 30-31. For a case highlighting the problematic absence of federal regulation on the range as compared to forest lands, see Omaechevarria v. Idaho, 246 U.S. 343 (1918), where the Court affirmed an Idaho law excluding sheep-grazing near cattle. [↑](#footnote-ref-155)
155. 155 In 1976, the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. 1701-1784, was passed, repealing many of the complex regulations governing public lands and replacing them with more general legislation. FLPMA propounded, for the first time officially, the concept of permanent federal ownership of all public lands unless the national interest should dictate disposal. [↑](#footnote-ref-156)
156. 156 Inventory Report, supra note 149, at tbl. 4. [↑](#footnote-ref-157)
157. 157 See generally Perry R. Hagenstein, The Federal Lands Today - Uses and Limits, in Rethinking the Federal Lands, supra note 129, at 82. [↑](#footnote-ref-158)
158. 158 Hagenstein, supra note 157, at 82. [↑](#footnote-ref-159)
159. 159 Hagenstein, supra note 157, at 82-83. [↑](#footnote-ref-160)
160. 160 Inventory Report, supra note 149, at tbl. 4. [↑](#footnote-ref-161)
161. 161 Inventory Report, supra note 149, at tbl. 7. [↑](#footnote-ref-162)
162. 164 Inventory Report, supra note 149, at tbl. 7. [↑](#footnote-ref-163)
163. 165 In 1993, 4.8 billion board-feet of timber was harvested from Forest Service land, yielding $ 885 million in revenues. Forest Service Annual Report 162 (1995). [↑](#footnote-ref-164)
164. 166 Initially, most mining law was state law; but with the rapid expansion of the mining industry, as well as the federal government's competing interest in using or preserving the resource, a vast web of federal regulations emerged. See generally Coggins, supra note 24. Today, mining claims on federal lands can still be patented, but the more common approach is for developers to obtain leases to explore for and extract minerals either on the public lands or on the off-shore Outer Continental Shelf. See generally Coggins, supra note 24. [↑](#footnote-ref-165)
165. 167 See generally, Coggins, supra note 24. [↑](#footnote-ref-166)
166. 168 Managing the Public Lands: Annual Report of the Department of Interior Bureau of Land Management 41 (1994) [hereinafter BLM Annual Report]. [↑](#footnote-ref-167)
167. 169 Forest Service Annual Report 162 (1995). [↑](#footnote-ref-168)
168. 170 For example, the receipts for grazing fees are split between a range improvement fund (50%), a BLM general fund (37.5% or 25%), and the states and counties (12.5% or 25%). Generally, half of the receipts from mineral leases and permits on the public domain (not including the Outer Continental Shelf) go to the states and counties. Clawson, supra note 105, at 172-75 tbl. 6-1. [↑](#footnote-ref-169)
169. 171 Clawson, supra note 129, at A-12, 292. [↑](#footnote-ref-170)
170. 172 Inventory Report, supra note 149, at 30. [↑](#footnote-ref-171)
171. 173 Inventory Report, supra note 149, at 30. [↑](#footnote-ref-172)
172. 174 Gates, supra note 129, at 309-10. In fact, Nevada was given more land under the schools grant (two sections) than many of the states which had been previously admitted, which received one section. Gates, supra note 129, at 309-10. [↑](#footnote-ref-173)
173. 175 James W. Hulse, The Silver State: Nevada's Heritage Reinterpreted 3 (1991). Indeed, Nevada was often seen simply as an inhospitable obstacle to immigrants on their way to the promised land of California. See id. [↑](#footnote-ref-174)
174. 176 A. Constandina Titus, Bombs in the Backyard: Atomic Testing and American Politics 55-57 (1986) (noting that the Nye County site was selected due to its remoteness, the amount of available land, and the fact that it was already under exclusive federal control as an air force bombing range). [↑](#footnote-ref-175)
175. 177 Larson, supra note 3, at 56. [↑](#footnote-ref-176)
176. 178 Clawson, supra note 129, at 11. See also Camfield v. United States, 167 U.S. 518 (1897) (affirming the validity of federal regulation of fences built on private land adjoining public land); United States v. Alford, 274 U.S. 264 (1927) (finding federal law prohibiting leaving unextinguished fires "in or near" a public forest to be constitutional because, even if activity being regulated occurred on private land, it imperiled publicly owned forests); Minnesota v. Block, 660 F.2d 1240 (8th Cir. 1981) (noting that Congress may regulate conduct off federal land that interferes with the designated purpose of that land). See generally Joseph L. Sax, Helpless Giants: The National Parks and the Regulation of Private Lands, 75 Mich. L. Rev. 239 (1976). [↑](#footnote-ref-177)
177. 179 Specifically, the public lands which are not designated for special uses, such as national parks and monuments, are used for timber harvesting, grazing, mineral development, outdoor recreation, watershed protection, and wildlife management. Hagenstein, supra note 157, at 83-92. The Department of Agriculture's Forest Service administers national forest resource allocation pursuant to the Forest and Rangeland Renewable Resources Planning Act (codified at 16 U.S.C. 1600-1687 (1994)); the Bureau of Land Management, within the Interior Department, manages the range lands under the Federal Land Policy and Management Act (codified at 43 U.S.C. 1701-1784 (1994)); the Fish and Wildlife Service administers the National Wildlife Refuge System pursuant to the National Wildlife Refuge System Act (codified at 16 U.S.C. 668dd (1994)); the Park Service manages recreation and preservation lands under the Antiquities Act (codified at 16 U.S.C. 431-33 (1994)) and the Wilderness Act (codified at 16 U.S.C. 1131-36 (1994)). See generally Coggins, supra note 24, at 382 n.4. [↑](#footnote-ref-178)
178. 180 See 43 U.S.C. 1701-1784 (1994). [↑](#footnote-ref-179)
179. 181 See 16 U.S.C. 431-433 (1994); id. 1131-1136 (1994); id. 668dd (1994). [↑](#footnote-ref-180)
180. 182 Hagenstein, supra note 157, at 97. See generally David E. Engdahl, State and Federal Power Over Federal Property, 18 Ariz. L. Rev. 283 (1976). Of course, the areas of real dispute, where states would have the power but for express preemption by federal law, are over land use planning and environmental restrictions. See Federal Land Policy and Management Act (codified at 43 U.S.C. 1701-1784 (1994)); National Environmental Policy Act (codified at 43 U.S.C. 4321-4370 (1994)). Congress has also exempted the federal government through sovereign immunity, although allowing limited waiver, from state adverse possession and quiet title laws. See Color of Title Act (codified at 43 U.S.C. 1068-1068b (1994)); Quiet Title Act (codified at 28 U.S.C. 2409a, 1346(f), 1402(d) (1994)). [↑](#footnote-ref-181)
181. 183 426 U.S. 529 (1976). [↑](#footnote-ref-182)
182. 184 Id. at 539-40. [↑](#footnote-ref-183)
183. 185 See id. [↑](#footnote-ref-184)
184. 186 43 U.S.C. 1701-1784 (1994). [↑](#footnote-ref-185)
185. 187 See generally Gates, supra note 129, at 35-60. [↑](#footnote-ref-186)
186. 188 See 43 U.S.C. 1712(f) (1994); id. 1610.4 (1996); 16 U.S.C. 1604 (1994); 36 C.F.R. 219.7(a) (1996); 40 C.F.R. 1506.(2)(b) (1996). [↑](#footnote-ref-187)
187. 189 See generally Larson, supra note 3, at 56. [↑](#footnote-ref-188)
188. 190 Hagenstein, supra note 157, at 97. [↑](#footnote-ref-189)
189. 191 See generally Gates, supra note 129, at 15-32. [↑](#footnote-ref-190)
190. 192 See Payments in Lieu of Taxes Act of 1976 (codified at 31 U.S.C. 6901-6907 (1994)); see also Hagenstein, supra note 157, at 100-103. [↑](#footnote-ref-191)
191. 193 Hagenstein, supra note 157, at 100-01. [↑](#footnote-ref-192)
192. 194 United States Department of Interior, Bureau of Land Management, Payments in Lieu of Taxes 1-2 (1995). These payments are out of a total of $ 99.3 million in PILT payments. Id. [↑](#footnote-ref-193)
193. 195 Pools, supra note 14, at 28. [↑](#footnote-ref-194)
194. 196 Letter from Dick Carver, Nye County Commissioner, Nev., to Robert Miller, Governor of the State of Nev., et. al. (Nov. 5, 1993) (on file with Gonz. L. Rev.) [hereinafter Carver Letter]. [↑](#footnote-ref-195)
195. 197 Larson, supra note 3, at 66. [↑](#footnote-ref-196)
196. 198 Larson, supra note 3, at 64. Hage also urged Carver to study the Catron County, N.M., Wise Use ordinance. [↑](#footnote-ref-197)
197. 199 Larson, supra note 3, at 66. [↑](#footnote-ref-198)
198. 200 Carver Letter, supra note 196. [↑](#footnote-ref-199)
199. 201 Clel Georgetta, Golden Fleece in Nevada (1972). In Carver's Letter, supra note 196, he quotes extensively and liberally from Clel Georgetta's book. See id. An earlier, uncited, source, with an argument along the same lines, is C. Perry Patterson, The Relation of the Federal Government to the Territories and States in Landholding, 28 Tex. L. Rev. 43 (1949). [↑](#footnote-ref-200)
200. 202 See Georgetta, supra note 201. The book is actually a history of the evolution and importance of sheepherding in Nevada, going into extreme detail about different breeds of sheep, the sheep empires of the state, and the author's own diary entries while he was herding his flock. See Georgetta, supra note 201. Chapter Ten, however, entitled "A Breach of Trust," outlines Georgetta's theory that the state owns all public lands under the equal footing doctrine. See Georgetta, supra note 201, at 149-70. [↑](#footnote-ref-201)
201. 203 Georgetta, supra note 201, at 154-55. [↑](#footnote-ref-202)
202. 204 Georgetta, supra note 201, at 155. [↑](#footnote-ref-203)
203. 205 Georgetta, supra note 201, at 155. [↑](#footnote-ref-204)
204. 206 Georgetta, supra note 201, at 169. [↑](#footnote-ref-205)
205. 207 Georgetta, supra note 201, at 271. [↑](#footnote-ref-206)
206. 208 State of Nev.'s Opp'n to United States' Renewed Mot. for Partial Summ. J. at 3, United States v. Nye County, 920 F. Supp. 1108 (D. Nev. 1996) (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-207)
207. 209 Carver Letter, supra note 196, at 1. [↑](#footnote-ref-208)
208. 210 Carver Letter, supra note 196, at 6. [↑](#footnote-ref-209)
209. 211 Carver Letter, supra note 196, at 2-3. [↑](#footnote-ref-210)
210. 212 Carver Letter, supra note 196, at 6-26. Carver also noted in the points of interest the Nevada Revised Statutes which limit federal jurisdiction over public lands, N.R.S. 328.075(2); some quotes from a 1956 Attorney General's Report, to the effect that the federal government should not be controlling so much land, see Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States, Jurisdiction Over Federal Areas Within the States 70 (1956); and the split estate theory, advanced by rancher Wayne Hage, see Hage, supra note 62, at 3-4. [↑](#footnote-ref-211)
211. 213 Throughout the legal discussion, Carver made bald assertions without authoritative support. Where he did cite authority on constitutional history, it was to two obscure and questionable sources; regarding the Constitution itself, Carver cited to the World Book Encyclopedia. However, as he is untrained in legal method, his efforts are fairly impressive. [↑](#footnote-ref-212)
212. 214 Carver Letter, supra note 196, at 6. [↑](#footnote-ref-213)
213. 215 Carver Letter, supra note 196, at 16. In support of this assertion, Carver cited to Articles II and IV of the Articles of Confederation, which prohibited the central government from depriving a state of territory. Carver maintained that the Articles of Confederation are still a binding document under Article IV, 1 of the Constitution. [↑](#footnote-ref-214)
214. 216 U.S. Const. art. IV, 8, cl. 17. [↑](#footnote-ref-215)
215. 217 Carver Letter, supra note 196, at 11-12. [↑](#footnote-ref-216)
216. 218 U.S. Const. art. IV, 3, cl. 1. [↑](#footnote-ref-217)
217. 219 U.S. Const. art. IV, 3, cl. 2. [↑](#footnote-ref-218)
218. 220 Carver Letter, supra note 196, at 13-14. [↑](#footnote-ref-219)
219. 221 Carver Letter, supra note 196, at 15. [↑](#footnote-ref-220)
220. 222 Carver Letter, supra note 196, at 15. [↑](#footnote-ref-221)
221. 223 Carver Letter, supra note 196, at 17-18. Carver found that the Supreme Court not only guards against state invasions of federal power, but also against federal intervention in areas of state authority, or federal attempts to exercise exclusive control over areas of concurrent jurisdiction. Carver Letter, supra note 196, at 8-9. He rationalized this conclusion by reading the clause as primarily prohibiting "usurpation" of power in either direction, and confining the supremacy of congressional legislation to his narrowly defined delegated powers. Carver Letter, supra note 196, at 8-9. In asserting this interpretation, Carver cited W. Cleon Skousen, The Making of America 657-58 (1985), which is a text on the meaning of the Constitution, apparently intended for a high school audience. Skousen presents a strict originalist interpretation of the Constitution and distills the document into 286 principles, each creating a right. See id. The publisher, the National Center for Constitutional Studies, "was created in order to revive and popularize these original American concepts [of the framers] in all of their initial brilliance and vitality." Id. at ix. [↑](#footnote-ref-222)
222. 224 Nye County, Nev. Res. 93-48 (Dec. 7, 1993). [↑](#footnote-ref-223)
223. 225 Nye County, Nev. Res. 93-49 (Dec. 7, 1993). [↑](#footnote-ref-224)
224. 226 See Letter from Nye County Board of Commissioners (June 7, 1994) [on file with Gonz. L. Rev.]; Letter from Richard Carver to David R. Grider (June 9, 1994) [on file with Gonz. L. Rev.]. [↑](#footnote-ref-225)
225. 227 See, e.g., Clint Peck, Who Owns Public Lands In Nevada?, W. Beef Producer, Mar. 3, 1994, at 1. [↑](#footnote-ref-226)
226. 228 Larson, supra note 3, at 52. [↑](#footnote-ref-227)
227. 229 See Stewards, supra note 1. The unnamed author of the reprint notes, "This compilation of significant public documents related to the public lands issue and Carver's actions is published in the hope that, armed with factual information, individual citizens and citizen-action groups will be motivated to share it with their local county officials." Stewards, supra note 1, at 1. [↑](#footnote-ref-228)
228. 230 Letter from Lieutenant Governor John Coghill to Dick Carver (Mar. 15, 1994), in Stewards, supra note 1, at 1. [↑](#footnote-ref-229)
229. 231 See Brinkley-Rogers, supra note 66, at H1; Ariz. Republic, supra note 19, at A3. [↑](#footnote-ref-230)
230. 232 See supra notes 26-46 and accompanying text. [↑](#footnote-ref-231)
231. 233 See Pools, supra note 14, at 66. [↑](#footnote-ref-232)
232. 234 Statement of Undisputed Material Facts at 5, United States v. Nye County, 920 F. Supp. 1108 (D. Nev. 1996) (No. CV-S-95-00232-LDG-(RJJ)) [hereinafter Statement of Facts]. [↑](#footnote-ref-233)
233. 235 Larson, supra note 3, at 66. [↑](#footnote-ref-234)
234. 236 Pools, supra note 14. [↑](#footnote-ref-235)
235. 237 Larson, supra note 3, at 66. [↑](#footnote-ref-236)
236. 238 Larson, supra note 3, at 52. [↑](#footnote-ref-237)
237. 239 Larson, supra note 3, at 66. [↑](#footnote-ref-238)
238. 240 Larson, supra note 3, at 52. [↑](#footnote-ref-239)
239. 241 Larson, supra note 3, at 52. [↑](#footnote-ref-240)
240. 242 See Statement of Facts, supra note 234, at 5. [↑](#footnote-ref-241)
241. 243 Complaint, United States v. Nye County, 920 F. Supp. 1108 (D. Nev. 1996) (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-242)
242. 244 Id. [↑](#footnote-ref-243)
243. 245 Kenworthy, supra note 8, at A03. [↑](#footnote-ref-244)
244. 246 Larson, supra note 3, at 66. [↑](#footnote-ref-245)
245. 247 Pools, supra note 14. [↑](#footnote-ref-246)
246. 248 Complaint at 8-13, Nye County (No. CV-S-95-00232-LDG-(RJJ)). Count I was for a declaratory judgment confirming federal ownership and resolving the cloud over the government's title created by the Nye County resolutions. Id. Count II was for a declaratory judgment that Resolution 93-48 and certain Nevada laws were preempted by federal land management policy through the Supremacy Clause. Id. Count III was for a declaratory judgment that Resolution 93-48 violated the "Disclaimer" Ordinance of the Nevada Constitution, which disclaimed all rights to public lands within Nevada. Id. Count IV was for a declaratory judgment that Resolution 93-49 was preempted because it interfered with federal management of Forest Service lands. Id. Count V sought injunctive relief against the county's alleged interference with federal officials and threatened criminal prosecution. Id. [↑](#footnote-ref-247)
247. 249 Complaint at 8-13, Nye County (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-248)
248. 250 In an effort to streamline the case, so as to reach a quick resolution of the important issues, the parties agreed in June 1995 to move to summary judgment on Counts I and IV, the declaratory judgment of ownership of public lands, and the preemption of Resolution 93-49, pertaining to public roads. The parties entered into a stipulation of undisputed facts, exchanged briefs, and presented oral arguments on the summary judgment motion on July 28, 1995. Following a dispute over whether the State of Nevada asserted ownership over the public lands, the court allowed Nevada to be added as a defendant and the complaint was amended on September 28, 1995. Defendant State's Answer and brief opposing summary judgment raised the ire of the states' rights advocates by admitting that the Nye County resolutions were invalid and praying for a court order affirming federal ownership of the public lands, but acknowledging the "legitimate concurrent authority and legitimate expectancies of the state in the state lands." [↑](#footnote-ref-249)
249. 251 United States v. Nye County, 920 F. Supp. 1108 (D. Nev. 1996) (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-250)
250. 252 Id. at 1112. [↑](#footnote-ref-251)
251. 253 Id. at 1117. [↑](#footnote-ref-252)
252. 254 Id. at 1120. [↑](#footnote-ref-253)
253. 255 Stipulation for Entry of Partial J. at 2, Nye County (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-254)
254. 256 Id. [↑](#footnote-ref-255)
255. 257 Id. Carver criticized the state's position in this regard, arguing that the state attorney general lacked the power to overturn its own state's laws. See Ruling May Rub Out Sagebrush Rebellion As Judge Says Movement is Unconstitutional, Salt Lake Trib., Sept. 7, 1996, at A8. [↑](#footnote-ref-256)
256. 258 Stipulation for Entry of Partial J. at 2, Nye County (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-257)
257. 259 Michelle DeArmond, Nye County Closer to Resolving Land Suit, Las Vegas Rev.-J., Oct. 2, 1996, at 2B. [↑](#footnote-ref-258)
258. 260 See Bates, supra note 14, at 1B. [↑](#footnote-ref-259)
259. 261 See Pools, supra note 14. [↑](#footnote-ref-260)
260. 262 See Bates, supra note 14. [↑](#footnote-ref-261)
261. 263 See Answer, Nye County (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-262)
262. 264 Lander County's Amicus Curiae Br. in Resp. to Pl.'s Renewed Mot. for Partial Summ. J. [sic] on Counts I and IV of the First Amended Complaint, Nye County (No. CV-S-95-00232-LDG-(RJJ)) [hereinafter Lander Brief]. [↑](#footnote-ref-263)
263. 265 Amici Curiae, Eureka and White Pine Counties', Points and Authorities in Supp. of Def. Nye County's Mot. and in Opp'n to Pl., United States of America's Mot. for Partial Summ. J., Nye County (No. CV-S-95-00232-LDG-(RJJ)) [hereinafter Eureka Brief]. [↑](#footnote-ref-264)
264. 266 Brief Amicus Curiae of ***Kern*** County, California, et al., Nye County (No. CV-S-95-00232-LDG-(RJJ)) [hereinafter ***Kern*** Brief]. [↑](#footnote-ref-265)
265. 267 Brief of the California Environmental Law Project as Amicus Curiae, Nye County (No. CV-S-95-00232-LDG-(RJJ)) [hereinafter California Brief]. [↑](#footnote-ref-266)
266. 268 Larson, supra note 3, at 52. [↑](#footnote-ref-267)
267. 269 These attorneys and legal advocacy centers are important to recognize in understanding how the "process" of federalism really works. See Larry Kramer, Understanding Federalism, 47 Vand. L. Rev. 1485, 1489-91 (1994); Andrzej Rapaczynski, From Sovereignty to Process: The Jurisprudence of Federalism after Garcia, 1985 Sup. Ct. Rev. 341, 364-65. [↑](#footnote-ref-268)
268. 270 920 F. Supp. 1108 (D. Nev. 1996) (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-269)
269. 271 See Memorandum of Points and Authorities in Supp. of Pl's Renewed Mot. for Partial Summ. J. on Counts I and IV of the First Am. Compl. at 18-25, Nye County (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-270)
270. 272 See Answer, Nye County (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-271)
271. 273 Defendant's Reply Memo. in Supp. of Def.'s Cross Mot. for Summ. J. on Counts I and IV of the Compl. at 8-11, Nye County (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-272)
272. 274 Id. at 13-17. [↑](#footnote-ref-273)
273. 275 Memorandum of Def. Nye County in Opp'n to Pl.'s Renewed Mot. for Partial and State of [sic] Summ. J. on Counts I and IV of the First Am. Compl. at 1, Nye County (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-274)
274. 276 Id. at 19-22. [↑](#footnote-ref-275)
275. 277 The equal footing doctrine was the premise of Nye County's federal defiance and the initial legal theory proffered in the case. See Carver Letter, supra note 196. While Defendant Nye County has seemingly reduced its reliance on the doctrine (the most recent brief includes a mere one page, cursory discussion of the issue), amici remain strong proponents of the theory. See supra notes 269-74 and accompanying text. [↑](#footnote-ref-276)
276. 278 See Carver Letter, supra note 196. [↑](#footnote-ref-277)
277. 279 Supporters claim the doctrine is implied from Article IV, 3-4, see Eureka Brief, Nye County (No. CV-S-95-00232-LDG-(RJJ)), but it would be an overstatement to say that equal footing is generally recognized as a doctrine of constitutional law, as it is not even mentioned by Laurence H. Tribe, American Constitutional Law (1988) or Encyclopedia of the American Constitution (Leonard W. Levy, et. al. eds., 1986). [↑](#footnote-ref-278)
278. 280 Cawley, supra note 34; Georgetta, supra note 201. [↑](#footnote-ref-279)
279. 281 The best articulation of the equal footing argument can be found in Reply Memo. of Points and Authorities in Supp. of Pl.'s Am. Mot. for Partial Summ. J. on Counts I and IV of the Compl. and in Opp'n to Def.'s Cross-Mot. for Summ. J. on Counts I and IV at 3-14, Nye County (No. CV-S-95-00232-LDG-(RJJ)); Eureka Brief, Nye County (No. CV-S-95-00232-LDG-(RJJ)); Carver Letter, supra note 196. [↑](#footnote-ref-280)
280. 282 See Memorandum of Def. Nye County in Opp'n to Pl.'s Renewed Mot. for Partial and State of [sic] Summ. J. on Counts I and IV of the Am. Compl. at 5-7, Nye County (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-281)
281. 283 See generally Carver Letter, supra note 196. [↑](#footnote-ref-282)
282. 284 See Eureka Brief at 3-5, Nye County (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-283)
283. 285 See Eureka Brief at 3-5, Nye County (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-284)
284. 286 See Defendant's Reply Memo. in Supp. of Def.'s Cross-Mot. for Summ. J. on Counts I and IV of the Compl. at 14-17, Nye County (No. CV-S-95-00232-LDG-(RJJ)); Carver Letter, supra note 196; Eureka Brief at 5-11, Nye County (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-285)
285. 287 See Carver Letter, supra note 196. [↑](#footnote-ref-286)
286. 288 See Coyle v. Smith, 221 U.S. 559, 566-67 (1911). [↑](#footnote-ref-287)
287. 289 See Defendant's Reply Memo. in Supp. of Def.'s Cross-Mot. for Summ. J. on Counts I and IV of the Compl. at 6, Nye County (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-288)
288. 290 See Carver Letter, supra note 196. [↑](#footnote-ref-289)
289. 291 See Op. Lander County Dist. Atty. (Apr. 20, 1994) in Stewards, supra note 1, at 2. [↑](#footnote-ref-290)
290. 292 44 U.S. 212 (1845). [↑](#footnote-ref-291)
291. 293 Id. at 228-29. [↑](#footnote-ref-292)
292. 294 Id. at 222-23. [↑](#footnote-ref-293)
293. 295 152 U.S. 1 (1894). [↑](#footnote-ref-294)
294. 296 221 U.S. 559 (1911). Note that this case is occasionally cited as Coyle v. Oklahoma. [↑](#footnote-ref-295)
295. 297 See Defendant's Reply Memo. in Supp. of Def.'s Cross-Mot. for Summ. J. on Counts I and IV of the Compl. at 8-9, Nye County (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-296)
296. 298 Coyle, 221 U.S. at 565-68. [↑](#footnote-ref-297)
297. 299 Id. at 566-67. [↑](#footnote-ref-298)
298. 300 Id. at 567. [↑](#footnote-ref-299)
299. 301 See Defendant's Reply Memo. in Supp. of Def.'s Cross-Mot. for Summ. J. on Counts I and IV of the Compl. at 9, Nye County (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-300)
300. 302 See Eureka Brief at 11, Nye County (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-301)
301. 303 Coyle, 221 U.S. at 573 (emphasis in original). [↑](#footnote-ref-302)
302. 304 429 U.S. 363 (1977). See Eureka Brief at 8, Nye County (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-303)
303. 305 482 U.S. 193 (1987). [↑](#footnote-ref-304)
304. 306 Utah Div. of State Lands, 482 U.S. at 202. [↑](#footnote-ref-305)
305. 307 See Defendant's Reply Memo. in Supp. of Def.'s Cross-Mot. for Summ. J. on Counts I and IV of the Compl. at 6-7, Nye County (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-306)
306. 308 See id. at 9-11. [↑](#footnote-ref-307)
307. 309 484 U.S. 469, reh'g denied, 486 U.S. 1018 (1988). [↑](#footnote-ref-308)
308. 310 Defendant's Reply Memo. in Supp. of Def.'s Cross-Mot. for Summ. J. on Counts I and IV of the Compl. at 10, Nye County (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-309)
309. 311 See Eureka Brief at 8-9, Nye County (No. CV-S-95-00232-LDG-(RJJ)). In their papers, however, amici failed to explain that it is the dissent to which they are citing. [↑](#footnote-ref-310)
310. 312 See Eureka Brief at 26-28, Nye County (No. CV-S-95-00232-LDG-(RJJ)) (citing Cayuga Indian Nation of N.Y. v. Cuomo, 771 F. Supp. 19 (N.D. N.Y. 1991)). [↑](#footnote-ref-311)
311. 313 Carver commented that, when the county got control over the lands, it would "encourage ranching, mining and recreation." Mills, supra note 104. [↑](#footnote-ref-312)
312. 314 See Reply Memo. of Points and Authorities In Supp. of Pl.'s Am. Mot. for Partial Summ. J. on Counts I and IV of the Compl. and In Opp'n to Def. Cross-Mot. for Summ. J. on Counts I and IV at 3-4, Nye County (No. CV-S-95-00232-LDG-(RJJ)). The Department of Defense also opposed the attempts at local sovereignty out of concern for the impact on its military installations in the West. See Brotherton, supra note 21. Defendant adamantly contested that these consequences could result from its position. See Defendant's Reply Memo. in Supp. of Def.'s Cross-Mot. for Summ. J. on Counts I and IV of the Compl. at 7-8, Nye County (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-313)
313. 315 For the most succinct exposition of the plaintiff's rebuttal argument on equal footing, see Memorandum of Points and Authorities in Supp. of Pl.'s Renewed Mot. for Partial Summ. J. on Counts I and IV of the First Am. Compl. at 28-39, Nye County (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-314)
314. 316 Although the term is derived from the New States Clause, Article IV, 3, cl. 1, equal footing appears not to have been the purpose of that clause. Max Farrand, 2 The Records of the Federal Convention of 1789 454-69 (1937). At the Constitutional Convention, a proposed article providing that "new States be admitted on the same terms with the original States" was rejected and the main discussion concerned whether new states should have the same proportional representation. Id. However, it is clear that political equality for all states in the country was a main goal of the nation-building process. Id. [↑](#footnote-ref-315)
315. 317 Act of Aug. 7, 1789, ch. 8, 1 Stat. 50. [↑](#footnote-ref-316)
316. 318 Francis Newton Thorpe, 6 The Federal and State Constitutions 3414 (1906). [↑](#footnote-ref-317)
317. 319 Escanaba and Lake Mich. Transp. Co. v. Chicago, 107 U.S. 678, 689 (1883). [↑](#footnote-ref-318)
318. 320 179 U.S. 223 (1900) (striking down a Minnesota tax on railway land which had been granted by the federal government to the state as trustee for the development of a rail line). [↑](#footnote-ref-319)
319. 321 Id. at 245. [↑](#footnote-ref-320)
320. 322 Nevada v. Watkins, 914 F.2d 1545, 1554 (9th Cir. 1990), cert. denied, 449 U.S. 906 (1991), reh'g denied, 501 U.S. 1225 (1991) (quoting Coyle v. Smith, 221 U.S. 559, 568 (1911)). [↑](#footnote-ref-321)
321. 323 See Coyle, 221 U.S. at 567. [↑](#footnote-ref-322)
322. 324 See generally Gates, supra note 129, at 285-315. [↑](#footnote-ref-323)
323. 325 See generally Gates, supra note 129, at 285-315. Originally part of the Utah Territory, most of the land of present-day Nevada was formally organized into the Nevada Territory in March, 1861. Hulse, supra note 175, at 79-84. The Territorial government was headed by James Nye of New York and a constitution was prepared in 1863. Hulse, supra note 175, at 79-84. State voters, however, rejected this constitution primarily because the mining interests did not support the provision that taxed mining property in the same way as other property. Hulse, supra note 175, at 79-84. In 1864, with considerable pressure from Congress which had passed an enabling act, the state convention drafted another constitution. Hulse, supra note 175, at 79-84. Voters approved this one mainly because it exempted mining property from taxation, and on October 31, 1864, President Lincoln declared Nevada a state. Hulse, supra note 175, at 79-84. [↑](#footnote-ref-324)
324. 326 For example, the Nevada enabling act provided that the state, among other things, must have a republican government, must disclaim all rights to the public lands, must not interfere with the U.S.'s disposal of its lands, must not tax federal property, must provide for a system of public education, must not have slavery or involuntary servitude, and should provide for "perfect toleration of religious sentiment." Gates, supra note 129, at 308-12. [↑](#footnote-ref-325)
325. 327 For example, in Coyle v. Smith, 221 U.S. 559 (1911), Congress conditioned the admission of Oklahoma to the Union on a promise that it would keep the state capital in Guthrie until 1913. Subsequently, the state passed a law providing for the removal of its capital to Oklahoma City and a Guthrie property owner sued. Id. at 574. In Coyle, the Court found that the congressionally-imposed condition violated the equal footing doctrine as it diminished the state's political rights with respect to the original states mainly because it would have been unconstitutional to impose the location of a state capital on one of the original states. Id. [↑](#footnote-ref-326)
326. 328 See Escanaba & Lake Mich. Transp. Co. v. City of Chicago, 107 U.S. 678, 689 (1882). [↑](#footnote-ref-327)
327. 329 339 U.S. 707, 716, reh'g denied, 340 U.S. 907 (1950). [↑](#footnote-ref-328)
328. 330 Id. at 716. [↑](#footnote-ref-329)
329. 331 See U.S. Const. art. III; Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). [↑](#footnote-ref-330)
330. 332 See supra text accompanying notes 172-76. [↑](#footnote-ref-331)
331. 333 See supra text accompanying notes 172-76. [↑](#footnote-ref-332)
332. 334 See supra text accompanying notes 172-76. [↑](#footnote-ref-333)
333. 335 Statistical Abstract, supra note 126, at 227 n.364. [↑](#footnote-ref-334)
334. 336 See infra part III.B. [↑](#footnote-ref-335)
335. 337 There appears to be broad support for the policy choice of protecting the public lands. A 1996 Roper Starch poll reportedly found that 73 percent of Americans felt that government regulation of the environment had not gone far enough or had achieved about the right balance. See Poll Shows Environment Gender Gap, Harrisburg Patriot, Dec. 16, 1996, at B16. Further, 62 percent of the public reportedly supports the idea of a constitutional amendment to protect the environment. See American Political Network, Greenwire, Oct. 10, 1996. See generally George Cameron Coggins and Doris K. Nagel, "Nothing Beside Remains': The Legal Legacy of James G. Watt's Tenure as Secretary of the Interior on Federal Land Law and Policy, 17 B.C. Envtl. Aff. L. Rev. 473 (1990). [↑](#footnote-ref-336)
336. 338 See Carver Letter, supra note 196; Eureka Brief, United States v. Nye County, 920 F. Supp. 1108 (D. Nev. 1996) (No. CV-S-95-00232-LDG-(RJJ)); Defendant's Reply Memo. in Supp. of Def.'s Cross-Mot. for Summ. J. on Counts I and IV of the Compl., Nye County (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-337)
337. 339 See Shively v. Bowlby, 152 U.S. 1, 57 (1894). [↑](#footnote-ref-338)
338. 340 Id. See also Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 584 (1823). [↑](#footnote-ref-339)
339. 341 Shively, 152 U.S. at 57-58. [↑](#footnote-ref-340)
340. 342 See, e.g., Barney v. Keokuk, 94 U.S. 324, 338 (1877); Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 435-37 (1892). [↑](#footnote-ref-341)
341. 343 Shively, 152 U.S. at 57. [↑](#footnote-ref-342)
342. 344 Illinois Cent. R.R., 146 U.S. at 435-36. The Court noted that the English distinction between tidelands and waterways had been repudiated in The Genesee Chief, 53 U.S. (12 How.) 443, 455 (1851). [↑](#footnote-ref-343)
343. 345 See supra part II.A.1. [↑](#footnote-ref-344)
344. 346 See Pollard v. Hagen, 44 U.S. (3 How.) 212, 216 (1845); Illinois Cent. R.R., 146 U.S. at 436. [↑](#footnote-ref-345)
345. 347 See Joseph L. Sax, The Public Trust Doctrine in Natural Resources Law: Effective Judicial Introduction, 68 Mich. L. Rev. 471, 477 (1970). [↑](#footnote-ref-346)
346. 348 See generally Coggins, supra note 24. [↑](#footnote-ref-347)
347. 349 See also Eureka Brief at 8, United States v. Nye County, 920 F. Supp. 1108 (D. Nev. 1996) (No. CV-S-95-00232-LDG-(RJJ)). "Clearly, both the majority and the dissent recognized that the Pollard decision would, in the future, determine ownership of the public lands, the "fast' lands, the dry uplands." Eureka Brief, Nye County (No. CV-S-95-00232-LDG-(RJJ)). The amici seem to view this case as of paramount importance as their brief quotes six full paragraphs directly from Pollard. Eureka Brief at 6-8, Nye County (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-348)
348. 350 Pollard v. Hagen, 44 U.S. (3 How.) 212 (1845). [↑](#footnote-ref-349)
349. 351 See Memorandum of Points and Authorities in Supp. of Pl.'s Renewed Mot. for Partial Summ. J. on Counts I and IV of the First Am. Compl. at 35 n.21, Nye County (No. CV-S-95-00232-LDG-(RJJ)); California Brief at 30, Nye County (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-350)
350. 352 The Court stated the issue: "Had the United States any title to land covered by navigable water, after the admission of Alabama into the union?" Pollard, 44 U.S. at 215. [↑](#footnote-ref-351)
351. 353 See John Hanna, Equal Footing in the Admission of States, 3 Baylor L. Rev. 519, 531-32 (1951) (noting that it "is by no means certain … [that the Court meant that] equality of the states demanded that they be equal in respect to land-holding by the nation...."). [↑](#footnote-ref-352)
352. 354 See Pollard, 44 U.S. at 216. [↑](#footnote-ref-353)
353. 355 283 U.S. 64 (1931). [↑](#footnote-ref-354)
354. 356 Id. at 72-75. [↑](#footnote-ref-355)
355. 357 Id. at 75. [↑](#footnote-ref-356)
356. 358 429 U.S. 363 (1977). [↑](#footnote-ref-357)
357. 359 Eureka Brief at 8, Nye County (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-358)
358. 360 Corvallis Sand & Gravel, 429 U.S. at 372. [↑](#footnote-ref-359)
359. 361 Id. at 376. [↑](#footnote-ref-360)
360. 362 482 U.S. 193 (1987). [↑](#footnote-ref-361)
361. 363 Id. at 193. [↑](#footnote-ref-362)
362. 364 See 624 F. Supp. 622 (D. Utah 1983) (entering summary judgment quieting title in United States to lakebed); 780 F.2d 1515 (10th Cir. 1985) (affirming lower court judgment). [↑](#footnote-ref-363)
363. 365 Utah Div. of State Lands, 482 U.S. at 209. [↑](#footnote-ref-364)
364. 366 Id. at 200-201. [↑](#footnote-ref-365)
365. 367 Id. at 195-97. [↑](#footnote-ref-366)
366. 368 Id. at 196-97. [↑](#footnote-ref-367)
367. 369 Id. at 196-98. [↑](#footnote-ref-368)
368. 370 Sundry Appropriations Act of 1888, 25 Stat. 505 (1888), cited in Utah Div. of State Lands, 482 U.S. at 198. [↑](#footnote-ref-369)
369. 371 Sundry Appropriations Act of 1890, 26 Stat. 371 (1888), cited in Utah Div. of State Lands, 482 U.S. at 199. [↑](#footnote-ref-370)
370. 372 Utah Div. of State Lands, 482 U.S. at 201. The dissent differed only on this issue, believing that Congress had clearly expressed its intent to withhold this land, which it had broad powers to do. Id. at 219. [↑](#footnote-ref-371)
371. 373 See also Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 476 (1988) (reaffirming that the equal footing doctrine applies to both land under navigable waterways and coastal tidelands). [↑](#footnote-ref-372)
372. 374 United States v. California, 332 U.S. 19 (1947) (holding that the United States, rather than California, held title to submerged lands between the low-water mark of the coast and the three-mile limit). [↑](#footnote-ref-373)
373. 375 United States v. Oregon, 295 U.S. 1, 29 (1935) (affirming title of United States to lands underlying non-navigable water along the meander line, in part because possession was asserted by virtue of designation of the lands as a bird reservation). [↑](#footnote-ref-374)
374. 376 Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977). [↑](#footnote-ref-375)
375. 377 373 U.S. 546, 597-98 (1963), amended by 383 U.S. 268 (1966). [↑](#footnote-ref-376)
376. 378 Id. [↑](#footnote-ref-377)
377. 379 221 U.S. 559, 574 (1911). [↑](#footnote-ref-378)
378. 380 See Eureka Brief at 4-5, United States v. Nye County, 920 F. Supp. 1108 (D. Nev. 1996) (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-379)
379. 381 See Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367 (1847) (articulating the theory of state sovereign ownership of submerged lands); Shively v. Bowlby, 152 U.S. 1, 57 (1894) (explaining that the theory is based on preserving public access to waterways for navigation and commerce). [↑](#footnote-ref-380)
380. 382 See Robert Clark, 1 Waters and Water Rights 250-51 (1st ed. 1967) (noting that while the federal government owns virtually all the land in some western states, those states did receive title to "ribbons of land" under navigable waterways, as "ridiculous" as it may seem). [↑](#footnote-ref-381)
381. 383 Eureka Brief at 26, Nye County (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-382)
382. 384 Id. at 29. [↑](#footnote-ref-383)
383. 385 The Nevada District Court even recently rejected similar arguments based on the equal footing doctrine in United States v. Gardner, No. CV-N-95-328-DWH, 1995 WL 603508 at \*6 (D. Nev. Oct. 2, 1995). In that case, the Forest Service sought a permanent injunction to stop illegal grazing on public lands by Cliff Gardner, a Nye County rancher and neighbor of Dick Carver. Id. at \*7. The Forest Service had previously revoked Gardner's grazing permit due to two years of unauthorized grazing and failure to pay a $ 4,000 penalty. Id. On the Forest Service's summary judgment motion, the court found for the government, completely rejecting Gardner's claim that the state, rather than the federal government, owned the range under the equal footing doctrine. Id. The court noted that the equal footing doctrine applied only to political rights and sovereignty and did not extend to uplands. Id. The Ninth Circuit affirmed this decision on the papers. United States v. Gardner, No. 95-17042, 1997 WL 76243 (9th Cir. 1997). [↑](#footnote-ref-384)
384. 386 See Memorandum of Def. Nye County in Opp'n to Pl.'s Renewed Mot. for Partial and State of [sic] Summ. J. on Counts I and IV of the First Am. Compl. at 10-17, Nye County (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-385)
385. 387 See Eureka Brief at 12, Nye County (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-386)
386. 388 Although the defendant does not actually hinge its argument on a Tenth Amendment violation, this is implicit in its dual sovereignty argument. See Memorandum of Def. Nye County in Opp'n to Pl.'s Renewed Mot. for Partial and State of [sic] Summ. J. on Counts I and IV of the First Am. Compl. at 10-17, Nye County (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-387)
387. 389 See ***Kern*** Brief at 5, Nye County (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-388)
388. 390 Indeed, the defendant even argued, although not in court, that the Articles of Confederation are still binding upon the country. Carver Letter, supra note 196, at 7. [↑](#footnote-ref-389)
389. 391 See Carver Letter, supra note 196, at 10-13. [↑](#footnote-ref-390)
390. 392 See Memorandum of Def. Nye County in Opp'n to Pl.'s Renewed Mot. for Partial and State of [sic] Summ. J. on Counts I and IV of the First Am. Compl. at 10-11, Nye County (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-391)
391. 393 Carver Letter, supra note 196, at 12. [↑](#footnote-ref-392)
392. 394 See Mills, supra note 104. [↑](#footnote-ref-393)
393. 395 See ***Kern*** Brief at 5, Nye County (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-394)
394. 396 See Memorandum of Def. Nye County in Opp'n to Pl.'s Renewed Mot. for Partial and State of [sic] Summ. J. on Counts I and IV of the First Am. Compl. at 10-16, Nye County (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-395)
395. 397 469 U.S. 528 (1985). [↑](#footnote-ref-396)
396. 398 ***Kern*** Brief at 6-7, Nye County (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-397)
397. 399 Garcia, 469 U.S. at 547. [↑](#footnote-ref-398)
398. 400 505 U.S. 144 (1992). [↑](#footnote-ref-399)
399. 401 115 S. Ct. 1624 (1995). [↑](#footnote-ref-400)
400. 402 See ***Kern*** Brief at 8-10, Nye County (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-401)
401. 403 Garcia, 469 U.S. at 575 (Powell , J., dissenting). [↑](#footnote-ref-402)
402. 404 See ***Kern*** Brief at 8-10, Nye County (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-403)
403. 405 ***Kern*** Brief at 10, Nye County (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-404)
404. 406 505 U.S. 144 (1992). [↑](#footnote-ref-405)
405. 407 See Carver Letter, supra note 196, at 2, 10-13. [↑](#footnote-ref-406)
406. 408 17 U.S. (4 Wheat.) 316, 415 (1819) (emphasis in original). [↑](#footnote-ref-407)
407. 409 Article IV, 3, cl. 2 of the Constitution states: "The Congress shall have the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States...." [↑](#footnote-ref-408)
408. 410 39 U.S. (14 Pet.) 526, 532 (1840). [↑](#footnote-ref-409)
409. 411 Id. at 537. [↑](#footnote-ref-410)
410. 412 Id. at 538. [↑](#footnote-ref-411)
411. 413 See, e.g., Gibson v. Chouteau, 80 U.S. (13 Wall.) 92, 99 (1871) (holding that no state can interfere with Congress' limitless power to dispose of land as it sees fit); Stearns v. Minnesota, 179 U.S. 223 (1900) (finding that since Congress can withhold public lands indefinitely, it can also exclude lands from taxation). See also Butte City Water Co. v. Baker, 196 U.S. 119, 126 (1905). "The nation is an owner, and has made Congress the principal agent to dispose of its property… Congress is the body to which is given the power to determine the conditions upon which the public lands shall be disposed of." Id. at 126. [↑](#footnote-ref-412)
412. 414 167 U.S. 518, 524 (1897). [↑](#footnote-ref-413)
413. 415 See, e.g., United States v. Midwest ***Oil*** Co., 236 U.S. 459 (1915) (upholding executive withdrawal of public lands from ***oil*** drilling even after Congress had opened lands for such use); Heydenfelt v. Daney Gold and Silver Mining Co., 93 U.S. 634 (1876) (finding miner's patent from United States superior to that of defendant who received patent from state and argued that lands had transferred to the state upon admission to the Union). [↑](#footnote-ref-414)
414. 416 220 U.S. 523, 524-25 (1911). [↑](#footnote-ref-415)
415. 417 Id. at 535-36. [↑](#footnote-ref-416)
416. 418 Id. at 536-37. [↑](#footnote-ref-417)
417. 419 Id. at 536. [↑](#footnote-ref-418)
418. 420 Id. at 536-37. [↑](#footnote-ref-419)
419. 421 Light, 220 U.S. at 537. [↑](#footnote-ref-420)
420. 422 426 U.S. 529 (1976). [↑](#footnote-ref-421)
421. 423 Id. at 535-36. [↑](#footnote-ref-422)
422. 424 Id. at 545. [↑](#footnote-ref-423)
423. 425 Id. at 539-41. [↑](#footnote-ref-424)
424. 426 Id. at 536-37. [↑](#footnote-ref-425)
425. 427 Kleppe, 426 U.S. at 539. "The power over the public land thus entrusted to Congress [by the Property Clause] is without limitations." See United States v. San Francisco, 310 U.S. 16, 29 (1940). [↑](#footnote-ref-426)
426. 428 Kleppe, 426 U.S. at 540. [↑](#footnote-ref-427)
427. 429 See, e.g., United States v. Vogler, 859 F.2d 638 (9th Cir. 1988), cert. denied, 488 U.S. 1006 (1989) (rejecting an Alaskan miner's arguments that the government has no constitutional power to create national parks or regulate his access under the Constitution). [↑](#footnote-ref-428)
428. 430 347 U.S. 272, 277 (1954). [↑](#footnote-ref-429)
429. 431 43 U.S.C. 1701-1784 (1994). [↑](#footnote-ref-430)
430. 432 See supra part II.A.1. [↑](#footnote-ref-431)
431. 433 See Gates, supra note 129, at 75-86. [↑](#footnote-ref-432)
432. 434 See supra notes 142-44. [↑](#footnote-ref-433)
433. 435 See Gates, supra note 129, at 75-86. [↑](#footnote-ref-434)
434. 436 See Scott W. Hardt, Federal Land Management in the Twenty-First Century: From Wise Use to Wise Stewardship, 18 Harv. Envtl. L. Rev. 345, 350-59 (1994); see also Bruce Babbitt, Federalism and the Environment: An Intergovernmental Perspective of the Sagebrush Rebellion, 12 Envtl. L. 847, 849-50 (1982) (arguing that in the eighties, the states were incapable of managing even the state-held public lands). [↑](#footnote-ref-435)
435. 437 Hardt, supra note 436, at 350-59; Babbitt, supra note 436, at 849-50. [↑](#footnote-ref-436)
436. 438 See Gates, supra note 129, at 563. [↑](#footnote-ref-437)
437. 439 See Frederick Jackson Turner, The Significance of the Frontier in American History (1893); see also Patricia Nelson Limerick, Legacy of Conquest: The Unbroken Past of the American West (1987). [↑](#footnote-ref-438)
438. 440 See Federal Land Policy and Management Act (codified at 43 U.S.C. 1701-1784 (1994)). [↑](#footnote-ref-439)
439. 441 See ***Kern*** Brief at 5-8, United States v. Nye County, 920 F. Supp. 1108 (D. Nev. 1996) (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-440)
440. 442 ***Kern*** Brief at 8-10, Nye County (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-441)
441. 443 See Carver Letter supra note 196, at 15. [↑](#footnote-ref-442)
442. 444 See Tribe, supra note 279, at 379. [↑](#footnote-ref-443)
443. 445 Alpheus Thomas Mason, The States Rights Debate: Antifederalists and the Constitution 5 (1964). [↑](#footnote-ref-444)
444. 446 United States v. Darby, 312 U.S. 100, 124 (1941). [↑](#footnote-ref-445)
445. 447 See generally Library of Congress, The Constitution of the United States of America: Analysis and Interpretation (1964) (noting that through 1972, the Tenth Amendment had no practical force); Charles L. Black, Jr., On Worrying About the Constitution, 55 U. Colo. L. Rev. 469 (1984). [↑](#footnote-ref-446)
446. 448 426 U.S. 833 (1976). [↑](#footnote-ref-447)
447. 449 See, e.g., Sotirios Barber, National League of Cities v. Usery: New Meaning for the Tenth Amendment? 1976 Sup. Ct. Rev. 161. Justice Blackmun cast the deciding vote in the case, although his opinion evidences an agonized and unconvinced decision. See National League of Cities, 426 U.S. at 856. [↑](#footnote-ref-448)
448. 450 The Court developed a three-part test to determine if congressional action infringes upon state sovereignty, which was subsequently clarified in Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264, 287-88 (1981). As Tribe characterized the test, "In order to succeed, a claim … had to establish that the challenged law regulated the "States as States," addressed matters that are "indisputably "attributes of state sovereignty,'" and directly impaired the ability of states "to structure integral operations in areas of traditional governmental functions." Tribe, supra note 279, at 389. The test also included an additional mitigating factor that sufficient national interest might justify an infringement of state sovereignty. See National League of Cities, 426 U.S. at 852-53, 856. This test engendered significant judicial confusion and academic controversy. [↑](#footnote-ref-449)
449. 451 National League of Cities, 426 U.S. at 852. [↑](#footnote-ref-450)
450. 452 Tribe, supra note 279, at 386. [↑](#footnote-ref-451)
451. 453 National League of Cities, 426 U.S. at 842. [↑](#footnote-ref-452)
452. 454 See Barber, supra note 449; Bernard Schwartz, National League of Cities v. Usery - The Commerce Power and State Sovereignty Redivivus, 46 Fordham L. Rev. 1115 (1978). [↑](#footnote-ref-453)
453. 455 469 U.S. 528 (1985). [↑](#footnote-ref-454)
454. 456 Id. at 530. [↑](#footnote-ref-455)
455. 457 Id. at 555. [↑](#footnote-ref-456)
456. 458 See, e.g., Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742 (1982). In Federal Energy Regulatory Commission, the Court found that the Public Utilities Regulatory Policies Act of 1978 did not violate state sovereignty in violation of the Tenth Amendment, even though the Act detailed procedures for state officials to follow. Id. at 775-97 (O'Connor, J., dissenting) (rejecting the majority's Tenth Amendment analysis). [↑](#footnote-ref-457)
457. 459 Garcia, 469 U.S. at 546-47. [↑](#footnote-ref-458)
458. 460 See, e.g., William Van Alstyne, The Second Death of Federalism, 83 Mich. L. Rev. 1709 (1985); Martin Redish and Karen Drizin, Constitutional Federalism & Judicial Review: The Role of Textual Analysis, 62 N.Y.U. L. Rev. 1 (1987). [↑](#footnote-ref-459)
459. 461 505 U.S. 144 (1992). [↑](#footnote-ref-460)
460. 462 Id. at 154. [↑](#footnote-ref-461)
461. 463 Id. at 151-54. [↑](#footnote-ref-462)
462. 464 Id. at 174-77. The take title provision - meant as a severe incentive for states to create plans for the disposal of their radioactive waste - provided that any state that was unable to create such a plan by a certain date must take title and possession of the waste or be liable to the owner or generator of the waste for failing to do so. See id. at 153-54. [↑](#footnote-ref-463)
463. 465 New York, 505 U.S. at 157. [↑](#footnote-ref-464)
464. 466 Tribe draws on Justice Rhenquist's thinking to elucidate a constitutionally-implied principle of state sovereignty, which is embodied not in the text of the Constitution, but in the structural assumptions and implied principles - or tacit postulates - of the document as a whole. Tribe, supra note 279, at 379-80. "When the Constitution is ambiguous or silent on a particular issue, this Court has often relied on notions of a constitutional plan - the implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter...." See Nevada v. Hall, 440 U.S. 410, 433 (1977) (Rhenquist, J., dissenting). [↑](#footnote-ref-465)
465. 467 See Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 550-52 (1985). [↑](#footnote-ref-466)
466. 468 See id. at 549. [↑](#footnote-ref-467)
467. 469 17 U.S. (4 Wheat.) 316 (1819). Justice Marshall noted that an "original right to tax" congressionally-chartered corporations "never existed, and the question whether it has been surrendered, cannot arise." Id. at 430. [↑](#footnote-ref-468)
468. 470 115 S. Ct. 1842, 1854-56 (1995). [↑](#footnote-ref-469)
469. 471 505 U.S. 144 (1992). [↑](#footnote-ref-470)
470. 472 469 U.S. 528, 580-83 (1985) (Powell, J., dissenting). [↑](#footnote-ref-471)
471. 473 115 S. Ct. at 1875-78 (Thomas, J., dissenting). [↑](#footnote-ref-472)
472. 474 For evidence that Supreme Court justices' conception and utilization of federalism is steered by their substantive agendas, see Kalman, Abe Fortas and Strategic Federalism in Law and Politics, in Federalism in the Judicial Mind: Essays on American Constitutional Law and Politics 109 (Harry Scheiber ed., 1992); Post, Justice Brennan and Federalism, in Federalism: Studies in History, Law, and Policy 37 (Harry Scheiber ed., 1988). [↑](#footnote-ref-473)
473. 475 See ***Kern*** Brief at 8-10, United States v. Nye County, 920 F. Supp. 1108 (D. Nev. 1996) (No. CV-S-95-00232-LDG-(RJJ)). [↑](#footnote-ref-474)
474. 476 See Larson, supra note 3. [↑](#footnote-ref-475)
475. 477 See supra part II.A.1. [↑](#footnote-ref-476)
476. 478 See Federal Land Policy and Management Act (codified at 43 U.S.C. 1701-1784 (1994)). [↑](#footnote-ref-477)
477. 479 Nye County also forwarded a claim under the Guarantee Clause that, by virtue of federal control over the lands in Nye County, its citizens are denied accountable representation since they cannot act on local concerns. See ***Kern*** Brief at 11-13, Nye County (No. CV-S-95-00232-LDG-(RJJ)). This claim is not worthy of further exploration because the Court has not adjudicated a Guarantee Clause claim in approximately 150 years since these claims were held to be non-justiciable political questions in Luther v. Borden, 48 U.S. (7 How.) 1 (1849) (deferring to Congress the decision of which of two rival governments in Rhode Island was legitimate). [↑](#footnote-ref-478)
478. 480 See New York v. United States, 505 U.S. 144 (1992). [↑](#footnote-ref-479)
479. 481 See, e.g., Homestead Act of 1862 (codified at 43 U.S.C. 161-302 (1994)); Taylor Grazing Act (codified at 43 U.S.C. 315 (1994)). [↑](#footnote-ref-480)
480. 482 426 U.S. 529 (1976). [↑](#footnote-ref-481)
481. 483 Id. at 543. [↑](#footnote-ref-482)
482. 484 Id. [↑](#footnote-ref-483)
483. 485 Id. at 545. [↑](#footnote-ref-484)
484. 486 See United States v. Lopez, 115 S. Ct. 1624, 1639 (1995) (Kennedy, J., concurring) (recognizing the importance of maintaining governmental accountability and noting that "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far"). [↑](#footnote-ref-485)
485. 487 See generally 1 Herbert J. Storing, The Complete Anti-Federalist (1981). [↑](#footnote-ref-486)
486. 488 See Bernard Schwartz, From Confederation to Nation 83-106 (1973). [↑](#footnote-ref-487)
487. 489 See Samuel H. Beer, To Make a Nation: The Rediscovery of American Federalism 18-20 (1993). [↑](#footnote-ref-488)
488. 490 In September 1994, a Nevada state legislator joined a group of ranchers in a "fencing party" in Ruby Valley, Nevada, where they fenced off a spring located on federal land and claimed it for the state, in defiance of a judge's order. See Jane Hunter, County Supremacy Movement Defies Federal Government in West, Inter Press Serv., Jan. 10, 1996. [↑](#footnote-ref-489)
489. 491 See supra notes 68-74 and accompanying text. [↑](#footnote-ref-490)
490. 492 Ann Morgan, Nevada state director of the BLM, noted: "We can't protect the resource because we are afraid our employees will be shot." Kenworthy, supra note 8; see also Hugh Dellios, Bombings Step Up Tension Out West, Chi. Trib., Jan. 14, 1996, at 3. [↑](#footnote-ref-491)
491. 493 Harry N. Scheiber, Xenophobia and Parochialism in the History of American Legal Process: From the Jackson Era to the Sagebrush Rebellion, 23 Wm. & Mary L. Rev. 625 (1982) (noting that particularism, and even paranoia, may color policy debates and dialogues on law and thus generally influence policy choices and the legal process). [↑](#footnote-ref-492)
492. 494 The Federalist No. 16, at 155 (Alexander Hamilton) (Isaac Kramnick ed., 1987). [↑](#footnote-ref-493)
493. 495 Indeed, since the decision, county supremacy supporters put forward a ballot initiative - that passed with 56 percent of Nevada voters - which amends the state constitution to remove the state disclaimer of rights over the public lands. See Michelle DeArmond, Vote for Public Lands Ballot Cheers Sagebrush Rebellion Supporters, Las Vegas Rev.-J., Nov. 8, 1996, at 4B. [↑](#footnote-ref-494)
494. 496 Eve Pell, Stop the Greens: Business Fights Back by Hook or by Crook, in Let the People Judge, supra note 47, at 21-26. [↑](#footnote-ref-495)
495. 497 See supra note 48 and accompanying text. [↑](#footnote-ref-496)
496. 498 See Paul Peterson, Antifederalist Thought in Contemporary American Politics, in Antifederalism: The Legacy of George Mason 113 (Josephine F. Pacheco ed., 1992). [↑](#footnote-ref-497)
497. 499 The Federalist No. 17, at 157 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (emphasis added). [↑](#footnote-ref-498)