

UTAH’S TRANSFER OF PUBLIC LANDS ACT: DEMANDING A GIFT OF FEDERAL LANDS

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In 2012, Utah passed the Transfer of Public Lands Act (TPLA), which demands that the United States Congress convey federal public lands to the state by the end of 2014. The TPLA putatively requires Congress to fulfill a promise to dispose of public lands, which the state believes the U.S. made in the Utah Enabling Act. Because many other statehood acts feature language comparable to the Utah Enabling Act’s, the TPLA’s success would likely influence other states to enact similar demands for the transfer of federal land.

This article places the TPLA in historical context, explains how it purports to operate, and analyzes its constitutionality. Particularly, this article refutes the claim that the TPLA is a constitutional way for Utah to compel Congress to fulfill an ostensible promise in the Utah Enabling Act to dispose of public lands. This article reveals that Congress never made such a promise and concludes that the TPLA is unconstitutional.

Introduction.....	2
I. The TPLA’s Historical Context.....	5
A. Early History	5
B. Westward Expansion.....	6
C. Reservation and Conservation.....	8
D. The Fallout: Federal Ownership of Western Lands	9
E. Modern Ferment over Federal Land Management	11
II. The TPLA’s Bold Demand	14
A. The Lands at Issue.....	14
B. The Demand Itself	15
C. Enforcing the TPLA	16
III. Analyzing the TPLA’s Constitutionality	17
A. The TPLA and Utah’s Constitution	17
B. Arguments for the TPLA under the U.S. Constitution.....	18
1. Textual Basis for the TPLA Defense.....	18

2. Historical Basis for the TPLA Defense 20

3. Ostensible Precedential Basis for the TPLA 20

C. Constitutional Doctrines at Issue 21

1. The Property Clause 22

2. The Equal Footing Doctrine 23

3. The Enclave Clause 24

D. The Compact-Based Argument for the TPLA 24

1. Interpreting Federal Grants 25

2. The Text of the Utah Enabling Act 26

a. Section 3 of the Utah Enabling Act 26

b. Section 9 of the Utah Enabling Act 27

c. Contrast Between the Putative Duty to Dispose and Other Unambiguous Grants 27

d. The Utah Enabling Act’s Recognition of the Federal Right to Retain Public Lands 28

e. Reading the Utah Enabling Act as a Whole 29

3. The Utah Enabling Act’s Historical Context 30

a. Illinois and *U.S. v. Gratiot* 30

b. California and Congressional Intent in Disclaimers 31

c. Missouri and *Gibson v. Choteau* 31

d. *Stearns v. Minnesota* 32

e. The Utah Enabling Act in Light of Prior Statehood Acts 32

4. Text and History Together 33

E. The Upshot of Unconstitutionality 33

IV. The TPLA and Politics 34

INTRODUCTION

On March 23, 2012, Utah enacted the Transfer of Public Lands Act (TPLA), which purports to require the United States Congress to convey to the state roughly 30 million acres of federal public land by the end of 2014.¹ The TPLA seems to violate the Constitution’s Supremacy Clause² by demanding that the United States (U.S.) cede lands it now manages under the Property Clause through various federal laws.³ Officials in both

1. H.B. 148, 59th Leg., Reg. Sess. (Utah 2012) (enacted); UTAH CODE §§ 63L-6-101 to -103 (2013).

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

3. E.g., Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701–1787 (2006) (establishing range management policies); National Forest Management Act (NFMA), 16 U.S.C.

the state and federal governments view the TPLA as unconstitutional,⁴ and even Utah Governor Gary Herbert, who signed the TPLA, admits “it’s not a slam dunk.”⁵ However, the TPLA’s proponents have made a case for its constitutionality that federal courts have yet to consider.⁶ The argument is that by retaining public lands, Congress has broken a promise it made in the Utah Enabling Act to dispose of those lands.⁷ Under this view, the TPLA validly demands that Congress fulfill its promise by conveying public lands to the state.⁸

The stakes of the debate are quite high. The U.S. owns roughly two-thirds of Utah⁹ and similar portions of other Western states.¹⁰ If the TPLA succeeds, Utah could gain roughly 30 million acres¹¹ and fossil fuels worth hundreds of billions of dollars.¹² Many federal laws would no longer apply to these lands, giving the state comparatively free reign over their use.¹³

§§ 1601–1687 (2006) (establishing national forest management policies); National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321–4370 (2006) (establishing environmental impact analysis policies).

4. H.B. 148, 59th Leg., Reg. Sess. Legislative Legis. Review Note (Utah 2012), available at <http://le.utah.gov/~2012/bills/hbillint/hb0148.htm> (noting that the TPLA and state enforcement “have a high probability of being found unconstitutional”); See also Matt Canham, *Salazar: Utah Just Playing Politics in Land Fight*, SALT LAKE TRIBUNE (Apr. 25, 2012, 8:13 AM), <http://archive.sltrib.com/article.php?id=20769348&citytype=storyID> (quoting Secretary of the Interior Ken Salazar as describing the TPLA as “political rhetoric” that “defies common sense”).

5. Josh Loftin, *Utah Governor Signs Bill Demanding Federal Lands*, HUFFPOSTPOLITICS (Mar. 23, 2012, 06:36 PM), <http://www.huffingtonpost.com/huff-wires/20120323/us-public-lands-utah/> (quoting Governor Herbert).

6. DONALD J. KOCHAN, A LEGAL OVERVIEW OF UTAH’S H.B. 148 — THE TRANSFER OF PUBLIC LANDS ACT 5 (2013), available at <http://www.fed-soc.org/publications/detail/a-legal-overview-of-utahs-hb-148>.

7. *Id.* at 4; CARRIE ANN DONNELL, SUTHERLAND INST., UTAH’S TRANSFER OF PUBLIC LANDS ACT: A LEGAL CASE FOR LOCALIZING LAND OWNERSHIP 1 (2013), available at <http://endfedaddiction.org/wp-content/uploads/2013/12/PublicLandsLegalAnalysis.pdf>.

8. KOCHAN, *supra* note 6, at 4.

9. GEORGE CAMERON COGGINS, ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 15 (6th ed. 2007).

10. *Id.*

11. KELLY TUCKER, UTAH’S TRANSFER OF PUBLIC LANDS ACT OF 2012: CONTROVERSY AND DISSENT 3 (2013), available at <http://citizensfordixie.org/wp-content/uploads/2013/03/TPLA-2012-Opposing-Position.pdf>.

12. The TPLA demands, among other lands, the Grand Staircase-Escalante National Monument. See *id.* at Appendix C (describing and depicting which lands the TPLA demands). This national monument overlays fossil fuel deposits worth hundreds of billions of dollars. M. LEE ALLISON, A PRELIMINARY ASSESSMENT OF ENERGY AND MINERAL RESOURCES WITHIN THE GRAND STAIRCASE ESCALANTE NATIONAL MONUMENT, UTAH GEOLOGICAL SURVEY, Preface (1997).

13. The National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321–4370 (2006), is one major federal law that would no longer apply. NEPA compels federal agencies to analyze potential environmental impacts and provides for public scrutiny of agency decisions. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348–50 (1989) (interpreting NEPA). Litigation under NEPA often delays or deters proposed uses of federal lands. See, e.g., *Government Delays Preventing Jobs and Economic Growth*, WESTERN ENERGY ALLIANCE, <http://www.westernenergyalliance.org/printpdf/481> (last visited Sept. 12, 2014) (detailing the negative economic effects of government delays associated

Moreover, because other statehood acts use terms similar to the Utah Enabling Act's,¹⁴ other states could also argue that Congress broke promises to dispose of public lands. Although some states rejected this approach in 2012,¹⁵ if the TPLA succeeds, some will likely follow Utah's lead. Indeed, the American Legislative Exchange Council¹⁶ offers model legislation to hasten this domino effect.¹⁷ Thus, the debate over the TPLA is really about the fate of public lands throughout the West.

This article explains that despite the TPLA, federal lands will almost certainly remain in federal hands. Section I places the TPLA in the historical context of an enduring American debate over public lands, in which the federal government has prevailed time and again. Section II explains the TPLA and how it purports to operate. Section III maintains that the TPLA violates both the Utah Constitution and the U.S. Constitution. It discusses how the Property Clause, Enclave Clause, and Equal Footing Doctrine do not allow states to demand federal lands. Section III also employs a settled rule, requiring courts to resolve ambiguities in federal grants in the federal government's favor,¹⁸ in order to refute the state's novel claim that Congress promised to dispose of public lands in the Utah

with NEPA). Eliminating NEPA review, which would promote fossil-fuel drilling and timber harvesting, is likely among the TPLA's goals. *See* UTAH CONSTITUTIONAL DEFENSE COUNCIL, TOWARD A BALANCED PUBLIC LANDS POLICY, A CASE STATEMENT FOR THE H.B. 148: UTAH'S TRANSFER OF PUBLIC LANDS ACT 4-7 (2012) [*hereinafter* CDC], available at <http://utah.gov/ltgovernor/docs/CDC-AGLandsTransferHB148SummaryInteractive.pdf> ("Utah's ability to access and responsibly develop ... resources is often thwarted by federal rules, regulations, processes and management policies.").

14. *E.g.*, Arizona Enabling Act, ch. 310, §§ 20, 27, 36 Stat. 557, 569-73 (1910); Colorado Enabling Act, ch. 139, §§ 4, 12, 18 Stat. 474, 474-76 (1875); Nevada Enabling Act, ch. 36 §§ 4, 10, 13 Stat. 30, 31-32 (1864).

15. *E.g.*, TUCKER, *supra* note 11, at 5 (noting that Arizona Governor Jan Brewer rejected a similar bill in part for failure to articulate a legal or constitutional basis for the demand of public lands).

16. ALEC, AMERICAN LEGISLATIVE EXCH. COUNCIL (ALEC) (2014), <http://www.alec.org/about-alec/> (describing ALEC as a "nonpartisan public-private partnership of America's state legislators, members of the private sector and the general public"); *But see What is ALEC?*, CENTER FOR MEDIA AND DEMOCRACY (last updated Jan. 23, 2014), http://www.alecexposed.org/wiki/What_is_ALEC%3F (describing ALEC as a "pay-to-play operation where corporations buy a seat and vote", and describing ALEC's members as "overwhelmingly conservative republicans").

17. *Resolution Demanding that Congress Convey Title of Federal Public Lands to the States*, ALEC (Jan. 28, 2013), <http://www.alec.org/model-legislation/resolution-demanding-that-congress-convey-title-of-federal-public-lands-to-the-states/>. *See also* Christopher Ketcham, *Public Lands in Jeopardy*, MOAB SUN NEWS (Mar. 5, 2014), http://www.moabsunnews.com/opinion/article_48f0bece-a4dc-11e3-8c4b-0017a43b2370.html (noting that the TPLA's sponsor vetted the bill before ALEC's corporate members before introducing it in the Utah House of Representatives); TUCKER, *supra* note 11, at 5 (noting that bills like the TPLA in Colorado and Arizona were "the result of intensive lobbying and creation of a lands bill template by the American Legislative Exchange Council").

18. *E.g.*, *Caldwell v. United States*, 250 U.S. 14, 20 (1919).

Enabling Act. Section IV describes the politics behind the TPLA and concludes that neither courts nor Congress should find it credible.

I. THE TPLA'S HISTORICAL CONTEXT

The TPLA is the latest outburst in a debate over public lands that has smoldered, with periodic eruptions, since the American Revolution. Congress, since the nation's earliest days, guarded its discretion over public lands carefully and consistently. This section briefly describes the history of public lands law, discussing disposals to repay national debts and encourage westward expansion, reservation and conservation efforts, and modern conflicts over public lands that have set the stage for the TPLA.

A. Early History

Public lands were a national priority after the American Revolution.¹⁹ To repay war debt, seven original states ceded western lands for the federal government to sell.²⁰ The Northwest Ordinance of 1787 arrogated to Congress exclusive control over selling western lands and admitting new states into the union.²¹ Congress thus asserted exclusive power over public lands even before it had express authority to do so.²² At the same time, the Constitutional Convention was drafting the U.S. Constitution,²³ which would give Congress express power to admit states and manage federal lands in the Property Clause.²⁴ The Supreme Court has long read the Property Clause expansively, giving Congress broad power over federal lands.²⁵ The fact that the Property Clause's language was not very

19. PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT, 59 (Joseph Cellini ed. 1979) (noting that "the issues most urgently demanding the attention of the Congress . . . aside from revenue, were Indians and lands").

20. COGGINS ET AL., *supra* note 9, at 54–55. The remaining original states lacked western lands. *Id.*

21. *Id.* at 55, 67; GATES, *supra* note 19, at 69–71 (describing congressional debate about the weaknesses of a prior land ordinance).

22. The Articles of Confederation gave Congress no express authority over western lands or the admission of new states. GATES, *supra* note 19, at 72

23. *Id.* at 74 (noting that Congress, sitting in New York, passed the Northwest Ordinance "[w]hile the Convention was drafting the Constitution in Philadelphia").

24. U.S. CONST. art. VI, § 3, cl. 2.

25. *E.g.*, *Kleppe v. New Mexico*, 426 U.S. 529, 539–40 (1976) (embracing an "expansive reading" of the Property Clause that gives Congress "the powers both of a proprietor and of a legislature over the public domain," and relying for this holding on a lineage of cases dating back to 1840).

controversial,²⁶ while debate raged about other enumerated powers,²⁷ suggests that the Framers indeed intended such broad congressional power.

Congress used its Property Clause power to affirm the Northwest Ordinance²⁸ and admit new “public land” states, starting with Ohio in 1802.²⁹ While granting new states lands for specific purposes, Congress generally required most states to disclaim any right to federal lands,³⁰ thus guarding its power over remaining lands.³¹

B. Westward Expansion

By 1850, the U.S. had acquired vast territories from foreign nations, which would eventually become the lower 48 states.³² Congress sold and granted much of this territory to pay off national debt and encourage settlement.³³ During the 1800s, Congress sold land on increasingly generous terms,³⁴ allowed preemption and homesteading,³⁵ gave arid land to irrigators,³⁶ and granted huge swaths of land for railroads.³⁷ Congress also granted states lands for various purposes.³⁸ By 1905, Congress had

26. GATES, *supra* note 19, at 74 (noting that only Maryland dissented from the Property Clause’s final language and that Maryland’s goal was *greater* U.S. control over public lands and statehood terms).

27. Scott W. Reed, *The County Supremacy Movement: Mendacious Myth Marketing*, 30 IDAHO L. REV. 525, 535–40 (1994) (describing debates over the balance of power between Congress and the States and calls for the type of local control the Articles of Confederation had envisioned).

28. COGGINS ET AL., *supra* note 9, at 67 (“One of the first acts of Congress under the new Constitution was to reconfirm and extend the provisions of the Northwest Ordinance of 1787.”).

29. GATES, *supra* note 19, at 74, 288–313. Ohio was the first “public land state,” not the first new state. *Id.*

30. *Id.* Interestingly, Congress did not require such a disclaimer from Ohio, the first state, “perhaps because Congress thought the limitations in the Northwest Ordinance sufficiently binding.” *Id.* at 74.

31. John D. Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics and Federal Lands*, 14 U.C. DAVIS L. REV. 317, 324–25 (1980) (“[I]n agreeing to admit states, Congress wanted, bargained for and received final say over the lands retained in federal ownership.”).

32. COGGINS ET AL., *supra* note 9, at 55–58; GATES, *supra* note 19, at 76 (depicting the territories as originally acquired, along with dates of acquisition).

33. See COGGINS ET AL., *supra* note 9, at 103 (noting that Congress began disposing of public lands “[a]fter some years of inconclusive debate over whether revenue-raising or settlement was . . . more important”).

34. *Id.* (describing statutory extensions of credit and reductions in price).

35. Preemption allowed squatters to buy land they had occupied for low prices, while homesteading allowed prospective settlers to acquire land for free based on actual occupation and cultivation. *Id.* at 103–06.

36. *Id.* at 105–06.

37. *Id.* at 113–17.

38. *E.g., id.* at 97–101 (describing common statehood act grants to fund schools and internal improvements and to establish land grant colleges); GATES, *supra* note 19, at 321–36 (discussing the Swamp Land Acts, which granted swamps for states to develop, but which were also prone to fraud, abuse, and controversy).

disposed of roughly two-thirds of federal lands,³⁹ giving far more to private parties than to states.⁴⁰ Thus, disposal of lands was the most conspicuous feature of nineteenth century public lands policy.

However, this era was not a mad dash to dispose of land at all costs. Instead, Congress often debated public land management⁴¹ and sometimes chose policies that frustrated states by retaining lands. For example, between 1828 and 1833, five states protested federal land ownership, unsuccessfully arguing that Congress lacked power to manage lands within a state after statehood.⁴² Although Congress chiefly debated which states should profit from land sales,⁴³ it also rejected a plan to sell all public lands to states at low prices.⁴⁴ Senator Daniel Webster defended federal discretion over public lands, arguing that Congress “has always felt itself bound, in regard to sale and settlement, to exercise its own best judgment, and not to transfer the discretion to others.”⁴⁵ Using that discretion, Congress often favored disposal, but on its own terms.

Federal discretion over public lands would prove important in fighting abuse of disposal statutes and preserving vital natural resources. Abuse of disposal policies was common.⁴⁶ For example, the Desert Land Act of 1877, which promoted Western settlement by selling land to irrigators at low prices, was so prone to abuse that little of the land that passed into private hands was ever actually irrigated.⁴⁷ Similarly, homesteading and

39. GATES, *supra* note 19, at 502 (noting that in 1905 the U.S. retained roughly 450 million acres out of the roughly 1.5 billion acres, excluding Alaska, that it had once held).

40. COGGINS ET AL., *supra* note 9, at 102 (“[T]he federal government disposed of far more land to private parties [than into state ownership] in order to spur economic and social development of the nation.”).

41. See e.g., GATES, *supra* note 19, at 10–11 (quoting Senator Robert Y. Hayne of South Carolina in an 1829 debate as saying that the “question [of public lands] that is pressed upon us in so many ways; that intrudes in such a variety of shapes; involving so deeply the feelings and interests of a large portion of the Union; insinuating itself into almost every question of public policy, and tinging the whole course of our legislation cannot be put aside or laid asleep”).

42. Leshy, *supra* note 31, at 320 (describing arguments by Alabama, Illinois, Indiana, Louisiana, and Missouri and noting that these states did not raise these arguments in court, but in petitions to Congress).

43. GATES, *supra* note 19, at 11–13 (describing the desires of Eastern states to see revenues from land sales).

44. *Id.* at 11. (describing a proposal from South Carolina Senator Robert Y. Hayne to sell lands for prices recovering only the costs of surveying land and preparing it for sale).

45. 6 REG. DEB. 37 (1830).

46. COGGINS ET AL., *supra* note 9, at 102 (“Disdain for legal requirements bred widespread lawlessness.”); *Id.* at 104 (describing Eastern congressmen criticizing “Westerners for being greedy, lawless, disloyal land-grabbers”); GATES, *supra* note 19, at 326 (noting that state selections of swamp lands were based on records that were “defective, far from complete, and in many instances fraudulent”).

47. COGGINS ET AL., *supra* note 9, at 106 (noting that “[s]ome people received patents after hauling a can of water to the claim and swearing irrigation had achieved” and that “[v]ery little land ever became irrigated”).

preemption laws provided the dishonest with chances to deforest lands without paying for timber.⁴⁸

Congress responded to widespread abuse of disposal policies by gradually asserting greater federal control over public lands. For example, Congress reserved timber resources for the Navy as early as 1817⁴⁹ and often allowed the President to withdraw land from various disposal policies.⁵⁰ In the arid West, abuse and failure of the Desert Land Act became clear by 1888.⁵¹ However, it took Congress until 1902 to devise federally controlled irrigation projects to facilitate Western settlement.⁵²

C. Reservation and Conservation

Congress asserted steadily more control over public lands throughout the nineteenth century. Disposal statutes allowed executive withdrawals from various disposal policies in 1830, 1841, and 1853.⁵³ By 1910, the executive had withdrawn or reserved land at least 252 times.⁵⁴ Notably, Congress in 1891 authorized the President to reserve forested land regardless of its commercial value.⁵⁵ Within three years, two presidents reserved more than 17 million acres, and over the next 16 years, presidents reserved 80% of today's national forests.⁵⁶ Between 1832 and 1900, Congress also reserved more than three million acres in national parks.⁵⁷

Congress soon provided for management of federal land, passing an Organic Act for national forests in 1897⁵⁸ and another for national parks in 1916.⁵⁹ In 1934, Congress enacted the Taylor Grazing Act, which governed the range.⁶⁰ The Supreme Court has noted that by leasing instead of granting grazing land, the Taylor Grazing Act effectively "locked up all of

48. *Id.* at 105.

49. GATES, *supra* note 19, at 533–34. Sadly, this particular reservation effort was "a failure on a 'colossal scale.'" *Id.* at 534.

50. *Grisar v. McDowell*, 73 U.S. 363, 381 (1867) ("The authority of the President in this respect is recognized in numerous acts of Congress[,] including two Preemption Acts and the system of surveying land for disposal in California).

51. COGGINS ET AL., *supra* note 9, at 107. As early as 1878, Congress received a warning about the need to adapt policies to suit the arid West from John Wesley Powell's *Report on the Land of the Arid Regions of the United States*. *Id.* However, John Wesley Powell was not heeded for many years. *Id.*

52. *Id.* at 108.

53. *Grisar*, 73 U.S. at 381.

54. *United States v. Midwest Oil*, 236 U.S. 459, 471 (1915).

55. COGGINS ET AL., *supra* note 9, at 124.

56. GATES, *supra* note 19, at 567–68.

57. *Id.* at 566–67 (describing the earliest National Parks).

58. COGGINS ET AL., *supra* note 9, at 125–26.

59. 16 U.S.C. §§ 1–460 (2006).

60. COGGINS ET AL., *supra* note 9, at 138.

the federal lands in the Western States pending further [federal] action.”⁶¹ Thus, by 1934, large-scale disposals of public lands were largely over.

The U.S. does, however, continue to dispose of public lands, chiefly through land exchanges that consolidate its holdings, but also through land sales.⁶² The U.S. sells mostly range rather than forest lands,⁶³ but the Bureau of Land Management's (BLM) records of land disposals are far from straightforward.⁶⁴

D. The Fallout: Federal Ownership of Western Lands

Land ownership patterns in the lower 48 states reflect these policies.⁶⁵ Today, the U.S. owns much of the 11 states west of the 100th Meridian, but only small portions of the eastern states.⁶⁶ The reason for the division is simple. Federal policies that disposed of land to encourage settlement were much more successful in the well-watered East than in the arid West.⁶⁷ In the dry, rugged West, settlers typically took title to land along rivers or streams and grazed sheep or cattle on huge ranches of mostly arid land.⁶⁸ Congress tried to promote settlement first by granting land to irrigators and

61. *Andrus v. Utah*, 446 U.S. 500, 519 (1980).

62. *COGGINS ET AL.*, *supra* note 9, at 447–53.

63. *See Sale of Forest Service Lands*, U.S. FOREST SERVICE (Feb. 5, 2008), <http://www.fs.fed.us/land/staff/disposal.shtml> (describing legal limits on sales of land in National Forests).

64. In response to a request for information on land disposals in Utah since the passage of the Federal Land Policy and Management Act (FLPMA) in 1976, a BLM representative offered two databases with dramatically different information. E-mail from Joy Wehking, Utah State Office Real Estate Specialist, Bureau of Land Management, to author (Feb. 18, 2014) (on file with author). One database indicated disposal of roughly 1.2 million acres, but the second indicated disposal of only roughly 175,000 acres. *Id.* BLM also issues Annual Reports, which are available online, but which date back only to 1996 and do not provide information about land disposals in individual states. *See Annual Reports*, BUREAU OF LAND MANAGEMENT (last updated Apr. 24, 2012), http://www.blm.gov/wo/st/en/res/Direct_Links_to_Publications/ann_rpt_and_pls.html. In sum, BLM records do not offer a clear picture of how much land the agency has disposed of since the passage of FLPMA in 1976.

65. This paper does not address land ownership in Alaska, because that state is in many ways a special case. *See e.g.*, *COGGINS ET AL.*, *supra* note 9, at 28–29 (discussing the special case of Alaska).

66. *Id.* at 14–15.

67. *See id.* at 15–16 (comparing the amount of public lands in eastern and western states); *See also* Leshy, *supra* note 31, at 343–44 (“The principal reason that the federal government has retained more than 87% of the land in [Nevada] is not because the federal government refused to open its lands for development. Rather, relatively little land was homesteaded or otherwise reclaimed and cultivated to qualify for post-statehood federal land grants, because of outright lack of water or the prohibitive cost of bringing it to the land.”).

68. George Cameron Coggins, ET AL., *The Law of Public Rangeland Management I: The Extent and Distribution of Federal Power*, 12 ENVTL. L. 535, 542–43 (1981–1982) [hereinafter *Rangeland Management*].

later by subsidizing federal irrigation projects.⁶⁹ Still, the range (the largest part of the federal lands) remained mostly empty.⁷⁰ In short, the U.S. now owns much of the West because it was too dry to settle.

Utah is a good example. The U.S. acquired the Utah Territory from Mexico in the Treaty of Guadalupe Hidalgo in 1848.⁷¹ In 1849, Mormon settlers petitioned the U.S. to admit the new state of Deseret, but Congress rejected this petition.⁷² Although Congress acted partly to oppose polygamy, one reason Deseret could not become a state was that it contained too few settlers, despite the fact that it would have been larger than the current states of Utah and Nevada combined.⁷³ Utah would not become a state until 1896,⁷⁴ near the end of most major disposal policies.

Today, the U.S. owns 64.5% of Utah,⁷⁵ mostly because the State's geography and climate stymied disposal policies. In fact, most federal public lands in Utah are arid lands left unclaimed under disposal policies.⁷⁶ Federal policies to sell or grant lands to defray debt and encourage settlement did not work well in Utah because few people wanted to buy or settle the land. In fact, Congress gave Utah an unprecedented grant at statehood of lands for "permanent water reserves for irrigation" in order to promote settlement.⁷⁷ Nevertheless, most lands in Utah never passed from federal ownership. Contrary to common claims that the federal government obtained these lands at Utah statehood,⁷⁸ the U.S. has owned those lands

69. COGGINS ET AL., *supra* note 9, at 106–09.

70. *Rangeland Management*, *supra* note 68, at 542.

71. COGGINS ET AL., *supra* note 9, at 56–57.

72. Linda Thatcher, *Struggle for Statehood Chronology*, UTAH HISTORY TO GO, http://historytogo.utah.gov/utah_chapters/statehood_and_the_progressive_era/struggleforstatehoodchronology.html (last visited Aug. 30, 2014).

73. *Id.*

74. *Id.*

75. COGGINS ET AL., *supra* note 9, at 15.

76. *Rangeland Management*, *supra* note 68, at 541 (describing rangelands as "barren lands left after all interested parties, including the government, had taken the lands they wanted"). Today, the BLM controls roughly 23 million of 34 million acres of public lands in Utah, or roughly two-thirds of the public lands in the state. See *In The Spotlight*, BUREAU OF LAND MANAGEMENT, <http://www.blm.gov/ut/st/en.html> (last updated Aug. 14, 2014); COGGINS ET AL., *supra* note 9, at 15.

77. Utah Enabling Act, 28 Stat. 107 (1894); GATES, *supra* note 19, at 314.

78. E.g., KOCHAN, *supra* note 6, at 4 (describing Utah's argument about promises made "at statehood when the federal government obtained the lands"); DONNELL, *supra* note 7, at 1 (characterizing the TPLA as demanding that the U.S. give lands "back to the state") (emphasis added); Spencer Driscoll, *Utah's Enabling Act and Congress's Enclave Clause Authority: Federalism Implications of a Renewed State Sovereignty Movement*, 2012 BYU L. REV. 999, 1001 (2012) (claiming wrongly that the Utah Enabling Act "effectively transferred title of state land to the federal government").

since acquiring them from Mexico,⁷⁹ mostly because they were too dry and rugged to settle.

E. Modern Ferment over Federal Land Management

The fact that federal ownership of western lands is more a product of geography than politics has not stopped western states from decrying the ostensible tyranny of federal control over public lands.⁸⁰ Critics often focus on the Federal Land Policy and Management Act of 1976 (FLPMA), in which Congress proclaimed “the policy of the United States that the public lands be retained in federal ownership . . . unless . . . disposal of a particular parcel will serve the national interest.”⁸¹ These critics often claim that FLPMA was a sea change in federal policy,⁸² even though Congress had long since reserved and regulated public lands under other laws.⁸³

The “Sagebrush Rebellion” of the 1970s and 1980s, for example, challenged federal control of public lands and claimed the lands for states. In 1976, New Mexico argued that Congress lacked power to protect wildlife on public lands.⁸⁴ But the Supreme Court decisively rejected this idea, noting that it had never found any limit to congressional power under the Property Clause and holding that “Congress exercises the powers both of a proprietor and of a legislature over the public domain.”⁸⁵ Still, this result did not stop several western states from passing laws several years later

79. See *United States v. Gardner*, 107 F.3d 1314, 1318 (9th Cir. 1997) (holding the same for public lands in Nevada).

80. See, e.g., *Rangeland Management*, *supra* note 68, at 541 (“That the United States owns almost half of the land in the eleven western states is a statistic used often to support the proposition that the West is held in federal bondage, unable to develop and use its resources.”).

81. 43 U.S.C. § 1701(a) (2006).

82. See e.g., H.R.J. Res. 3, 6, 59th Leg., Reg. Sess. (Utah 2012) (arguing that “FLPMA . . . unilaterally altered [Congress’s] duty in 1976 to extinguish title to all public lands within Utah’s borders by committing to a policy of retention” of public lands); KOCHAN, *supra* note 6, at 8 (noting that “federal retention of public lands . . . critically culminat[ed] in [FLPMA]”); Leshy, *supra* note 31, at 341 (“If a single development may be said to have triggered the [Sagebrush] rebellion, in fact, it is Congress’ enactment of [FLPMA].”).

83. See *supra* § II(C) (describing federal conservation and reservation efforts). In fact, the U.S. characterized federal policies in terms that strongly resemble FLPMA when arguing before the Supreme Court in 1840. See *United States v. Gratiot*, 39 U.S. 526, 530 (1840) (Attorney General Gilpin stating that throughout U.S. history “disposition consisted, either in selling [lands] when no further reason for reserving them existed”).

84. *Kleppe*, 426 U.S. at 536; Paul Conable, *Equal Footing, County Supremacy, and the Western Public Lands*, 26 ENVTL. L. 1263, 1276–78 (1996) (discussing *Kleppe* in greater detail).

85. *Kleppe*, 426 U.S. at 539–40.

claiming ownership of federal lands.⁸⁶ Legal arguments for these laws later failed in court.⁸⁷

The Sagebrush Rebellion was more successful, however, as a political movement. Ronald Reagan declared himself a Sagebrush Rebel in his successful 1980 presidential campaign,⁸⁸ which is unsurprising for a man who said that “government is the problem.”⁸⁹ Both Reagan and the Rebellion tapped into national frustration with federal power.⁹⁰ However, President Reagan’s later defenses of federal land ownership against Rebels’ claims⁹¹ show that the rebellion was more political theater than true rebellion.

In contrast, the County Supremacy movement of the 1990s much more dramatically pursued local control over federal lands.⁹² The movement’s most famous incident followed a resolution from Nye County, Nevada that claimed ownership of public lands.⁹³ A county commissioner drove a bulldozer into a national forest to grade a road he insisted was county property.⁹⁴ He brandished the Constitution as he steered his bulldozer around a Forest Service agent who stood in his path.⁹⁵ His son sang the national anthem, and hundreds of onlookers cheered, some waving guns.⁹⁶ Shortly after the bulldozer stunt, the U.S. sued Nye County and Nevada to resolve who owned the national forest.⁹⁷ The district court ruled that under the Property Clause, the U.S. has “a broad power to regulate land . . . [that] necessarily includes the power to own the regulated public lands.”⁹⁸ The court reasoned that “the entire weight of the Supreme Court’s decisions

86. COGGINS ET AL., *supra* note 9, at 77. Shortly after Nevada passed this law, “state officials hurried to Washington” to ensure that the state would continue to receive payments from federally owned lands. *Id.*

87. Technically, these state laws were not at issue because the courts never reached the merits of the laws themselves. *See Nevada ex rel. Nev. State Bd. of Agric. v. United States*, 699 F.2d 486, 487–88 (9th Cir. 1983). However, federal courts later rejected substantially similar arguments. *See Gardner*, 107 F.3d at 1318 (rejecting arguments that the U.S. lacks authority to retain land for its own purposes and rejecting arguments based on the Equal Footing Doctrine); *See also infra* § III(D).

88. COGGINS ET AL., *supra* note 9, at 76–77.

89. Ronald Reagan, Inaugural Address, (Jan. 20, 1981), *available at* <http://www.presidency.ucsb.edu/ws/?pid=43130>.

90. Leshy, *supra* note 31, at 343.

91. COGGINS ET AL., *supra* note 9, at 77.

92. Robert L. Glicksman, *Fear and Loathing on the Federal Lands*, 45 U. KAN. L. REV. 647, 648–49 (1996). At times, the County Supremacy movement strayed beyond drama into outright violence. Violent incidents included an attempted shooting of a Forest Service biologist, the beating of the children of Forest Service employees, and several bombings. *Id.*

93. *United States v. Nye Cnty., Nev.*, 920 F. Supp. 1108, 1111 (D. Nev. 1996).

94. *Id.*

95. *Id.* at 1112.

96. Glicksman, *supra* note 92, at 647–48.

97. *Nye Cnty.*, 920 F. Supp. at 1111.

98. *Id.* at 1117.

requires a finding that title to the federal public lands . . . did not pass to the State of Nevada upon statehood pursuant to the Equal Footing Doctrine.”⁹⁹ In short, the U.S. owned the public lands; the State and County did not.

Neither the County nor the State appealed,¹⁰⁰ but the Ninth Circuit confronted similar arguments a year later in a case involving a claim to vested grazing rights in a national forest.¹⁰¹ After a wildfire, the Forest Service closed the area for reseeding.¹⁰² Ranchers grazed cattle there anyway and received a fine, which they refused to pay.¹⁰³ The federal government sued, and the ranchers argued that the U.S. lacked power to own public lands, which they asserted were actually state property.¹⁰⁴ The Ninth Circuit held that the U.S. has owned public lands in Nevada since acquiring them from Mexico, and that no part of the Constitution required lands to pass to Nevada at statehood.¹⁰⁵ These cases sounded the County Supremacy movement's death knell.

Utah has recently resurrected arguments from both the County Supremacy movement and the Sagebrush Rebellion, with the same basic goal of local ownership and control of federal lands. In 2010, Utah passed a law allowing it to take federal lands through eminent domain.¹⁰⁶ Some legal arguments in support of this law, and the TPLA, resemble claims from both older movements.¹⁰⁷ Moreover, the TPLA's backers resort to the same type of populist rhetoric the prior two movements used.¹⁰⁸ Just as Senator Orrin Hatch once likened a federal land manager to the Sheriff of Nottingham,¹⁰⁹ Utah Representative Ken Ivory, who wrote and sponsored the TPLA, recently likened the federal government to a “feudal landlord” and a “land

99. *Id.*

100. Conable, *supra* note 84, at 1265.

101. *Gardner*, 107 F.3d at 1316–20.

102. *Id.*

103. *Id.*

104. *Id.* at 1316–17.

105. *Id.* at 1319–20 (“as the United States has held title to the unappropriated public lands in Nevada since Mexico ceded the land to the United States in 1848, the land is the property of the United States”); *See also infra* § III(D) (describing the Equal Footing Doctrine in greater detail).

106. UTAH CODE § 78B-6-503.5 (2012).

107. For example, all of the movements attempted to invoke the Equal Footing Doctrine. *E.g.*, *Nye Cnty.*, 920 F.Supp. at 1117; *KOCHAN*, *supra* note 6, at 24–27; *Leshy*, *supra* note 31, at 319–20.

108. *See, e.g.*, Shaun McKinnon & Yvonne Wingett Sanchez, *Arizona Lawmakers Push to Take Over Federal Land*, AZCENTRAL.COM (Mar. 25, 2012), <http://www.azcentral.com/news/politics/articles/2012/03/23/20120323arizona-federal-land-takeover.html> (quoting Utah State Representative Ken Ivory, drafter and chief proponent for the TPLA, as saying “Utah will show the nation what it means to be self-reliant”).

109. *COGGINS ET AL.*, *supra* note 9, at 76.

baron.”¹¹⁰ The TPLA thus evokes the same “strong sense of *déjà vu*” that Professor Leshy expressed about the Sagebrush Rebellion,¹¹¹ as both echo prior efforts to wrest control over federal lands.

However, the TPLA presents an argument that distinguishes it from the older movements. Rather than directly claiming federal lands, the TPLA instead requires that Congress give federal lands to Utah.¹¹² The TPLA’s premise is that the Utah Enabling Act constitutes a binding, but broken congressional promise to dispose of federal lands.¹¹³

II. THE TPLA’S BOLD DEMAND

The TPLA is simple but bold, demanding that the U.S. convey “public lands” to the State by the end of 2014.¹¹⁴ The TPLA, however, does not seek all federal lands in Utah, instead picking and choosing among them. This section explains the TPLA’s demand and Utah’s likely strategies for enforcing it.

A. *The Lands at Issue*

The TPLA defines which lands Utah demands from the U.S. with some specificity. Indeed, the longest part of the TPLA is its definition of “public lands,” which lists each area it excludes.¹¹⁵ Predictably, the statute excludes state and private lands and state school reservations.¹¹⁶ It also excludes the following federal lands: all national parks,¹¹⁷ all existing national wilderness areas,¹¹⁸ lands the U.S. acquired for the military,¹¹⁹ federal buildings in Utah towns,¹²⁰ tribal lands,¹²¹ and most national monuments.¹²²

110. Mori Kessler, ‘Where’s the Line?’ *Ivory’s Crusade to Return Public Lands to the States*, ST. GEORGE NEWS (May 3, 2012), <http://www.stgeorgeutah.com/news/archive/2012/05/03/wheres-the-line-ivorys-crusade-to-return-public-lands-to-the-states/#.UxfKuPSwlhU> (quoting Rep. Ivory).

111. Leshy, *supra* note 31, at 343.

112. KOCHAN, *supra* note 6, at 11–16.

113. *Id.*

114. UTAH CODE § 63L-6-103 (2012).

115. *Id.* § 63L-6-102(3).

116. *Id.* § 63L-6-102(3)(a)–(c).

117. *Id.* § 63L-6-102(3)(e); See *Utah National Parks*, UTAH.COM (2013), <http://www.utah.com/nationalparks/> (listing national parks in Utah, all of which appear in the TPLA’s exclusions).

118. *Id.* § 63L-6-102(3)(h); *Designated Wilderness Areas in Utah*, VISITUTAH, <http://www.visitutah.com/parks-monuments/wilderness-areas/> (last visited Sept. 3, 2014) (listing designated wilderness areas in Utah, all of which appear in the TPLA’s exclusions).

119. UTAH CODE § 63L-6-102(3)(i) (2012); see also *id.* § 63L-1-201, 203 (ceding jurisdiction over such lands); *Id.* §§ 63L-1-201, 203 (2012).

120. *Id.* § 63L-6-102(3)(j).

The TPLA does demand the Grand Staircase-Escalante National Monument,¹²³ which is notable for two reasons. First, this national monument overlays fossil fuels worth hundreds of billions of dollars,¹²⁴ the exploitation of which seems to be among the TPLA's main goals.¹²⁵ Second, demanding this national monument, which Utah counties unsuccessfully challenged in 2004,¹²⁶ shows how the TPLA rehashes old battles.¹²⁷

Claiming the Grand Staircase Escalante National Monument, however, pales in comparison to the demand for lands managed by the BLM, Forest Service (FS), and Fish and Wildlife Service (FWS).¹²⁸ In Utah, these agencies manage more than 30 million acres, mostly in BLM lands.¹²⁹ Accounting for its exemptions, the TPLA aims to take control of over roughly 60% of Utah.¹³⁰

B. The Demand Itself

The TPLA's demand is as remarkable as the vast amount of land at issue. Although the TPLA requires the U.S. to convey lands to Utah, it does not require the state to pay fair market value—or any value at all. The TPLA simply requires Congress to “extinguish title” to the lands and “transfer title” to the state.¹³¹ Utah would pay only if it were later to sell the lands.¹³² Then, Utah would pay the U.S. 95% of net proceeds and deposit

121. *Id.* § 63L-6-102(3)(k).

122. *Id.* § 63L-6-102(3)(f).

123. *Id.*

124. Allison, *supra* note 12, at Preface.

125. See Ken Ivory, *Here is Why Utah Should Acquire its Federal Lands*, DESERET NEWS (Mar. 11, 2012), <http://www.deseretnews.com/article/765558273/Here-is-why-Utah-should-acquire-its-federal-lands.html?pg=all> (arguing that North Dakota, which is experiencing a fossil fuel boom, is economically better off because it controls a greater portion of lands within its borders); Leonard Gilroy, *Pursuing Fiscal Self Reliance in Utah*, THE REASON FOUNDATION (Nov. 27, 2013), <http://reason.org/news/show/utah-fiscal-self-reliance> (quoting Rep. Ivory making the same argument and noting that Utah has “trillions in mineral value locked up that could be used to close that \$2.6 billion gap in our education funding”).

126. Utah Ass'n of Cntys. v. Bush, 316 F. Supp. 2d 1176, 1200 (D. Utah 2004).

127. In addition to challenging the Monument's formation, Utah also sought and gained compensation for school trust lands in the monument. TUCKER, *supra* note 11, at 4.

128. See UTAH CODE § 63L-6-102(3) (2012) (failing to exempt these lands). The TPLA does not demand Wilderness Areas managed by these agencies. See *supra* note 118 and accompanying text.

129. Bureau of Land Management, *In the Spotlight* (2014), <http://www.blm.gov/ut/st/en.html>.

130. TUCKER, *supra* note 11, at 3–4.

131. UTAH CODE § 63L-6-103(1) (2012).

132. *Id.* at § 63L-6-103(2).

5% into the state's school fund,¹³³ which putatively mirrors the Utah Enabling Act.¹³⁴ If the state instead leased the land or its minerals, it would pay nothing.

This demand for a gift of federal lands is remarkable for three reasons. First, it would shift the historic congressional discretion over public lands to the state. Second, it also exceeds the state's own eminent domain law by essentially requesting a gift instead of offering just compensation.¹³⁵ Third, because the TPLA does not require Utah to sell lands, the U.S. and Utah's schools may never see any money as a result.

C. Enforcing the TPLA

Congress has until the end of 2014 to comply with the TPLA,¹³⁶ which it is unlikely to do.¹³⁷ Utah has authorized its attorney general to sue the United States to force federal action.¹³⁸ Although the Utah attorney general does not have to file such a suit,¹³⁹ Utah has appropriated four million dollars for "public lands litigation"¹⁴⁰ suggesting an attempt at enforcement is likely. Utah has two enforcement options. Utah will not likely use its

133. *Id.* at § 63L-6-103(2), (3). The TPLA defines "net proceeds" as "the proceeds from the sale of public lands, after subtracting expenses incident to the sale of the public lands." *Id.* § 63L-6-102(2).

134. *See* Utah Enabling Act, 28 Stat. 107 (1894); KOCHAN, *supra* note 6, at 7 ("[T]he division of the proceeds will replicate the same division and school trust commitment that would exist according to the terms of the Utah Enabling Act had (and as if) the United States had sold the property itself.").

135. *See* UTAH CODE § 78B-6-503.5 (2012) ("property which may be taken under this part includes property possessed by the federal government unless the property was acquired by the federal government with the consent of the Legislature and in accordance with" the Enclave Clause of the U.S. Constitution). Eminent domain requires just compensation. U.S. CONST. amend. XIV, § 1.

136. UTAH CODE § 63L-6-103(1) (2012).

137. Both upcoming midterm elections and general congressional paralysis make it unlikely that Congress will take up such a controversial issue. THE TIMES EDITORIAL BD., *Do-Nothing Congress II: It's Not a Compliment*, LOS ANGELES TIMES, Dec. 26, 2013, available at <http://articles.latimes.com/2013/dec/26/opinion/la-ed-congress-worst-ever-20131226>.

138. UTAH CODE ANN. § 63L-6-103(1) (LexisNexis 2012) (authorizing the Utah Attorney General "to enforce the Utah Enabling Act").

139. The Utah House of Representatives passed a bill requiring the Attorney General to file such a suit. H.B. 91, 59th Leg., Reg. Sess. (Utah 2012). However, the Utah Senate rejected it. *See H.B. 91 Substitute, Utah Enabling Act Litigation*, UTAH STATE LEGISLATURE, (Mar. 8, 2012), <http://le.utah.gov/~2012/htmdoc/hbillhtm/HB0091S01.htm> (noting under "Bill Status" that the bill was sent to a House file for defeated bills).

140. *See* LYLE W. HILLYARD & MELVIN R. BROWN, UTAH LEG., 2012–2013 APPROPRIATIONS REPORT, 74, 84 (Utah Leg. 2012) (noting that the legislature appropriated \$1 million and that the Governor appropriated \$2 million); LYLE W. HILLYARD & MELVIN R. BROWN, UTAH LEG., 2013–2014 APPROPRIATIONS REPORT 84, 94, 209, (2013) (noting that the legislature appropriated \$2.5 million to the Public Lands Policy Coordination Office and that the Governor appropriated another \$1 million for public lands litigation).

eminent domain law to take federal lands,¹⁴¹ because that would require payment, while the TPLA would not. Utah will more likely ask a federal court for a declaratory judgment that the Utah Enabling Act required Congress to dispose of federal lands within the state. Of course, this remedy begs the question as to whether the TPLA itself is constitutional.

III. ANALYZING THE TPLA'S CONSTITUTIONALITY

The TPLA is almost certainly unconstitutional because its demand for federal land conflicts with congressional authority under the Property Clause to retain and manage public lands.¹⁴² Under the Supremacy Clause, federal law wins.¹⁴³ Challenges of federal ownership and management of public land have failed repeatedly.¹⁴⁴ The TPLA's only distinction is the claim that by retaining public lands, Congress has broken a promise that it ostensibly made in the Utah Enabling Act to dispose of those lands.¹⁴⁵ Of course, the U.S. still sells land in Utah, meaning that the TPLA's defense should actually decry the laggardly pace of disposal. That argument would still fail because Congress has exclusive power under the Property Clause to set the pace of disposal.¹⁴⁶ Nevertheless, the TPLA's defenders actually ignore ongoing land sales to simply argue that the U.S. has retained land in violation of a promise to dispose of it.¹⁴⁷ Their argument is doomed to fail.

A. The TPLA and Utah's Constitution

The TPLA likely violates the Utah Constitution. The Utah Enabling Act required a disclaimer of any right to public lands,¹⁴⁸ which the Utah Constitution in turn made.¹⁴⁹ Notably, the Enabling Act required the State to make this disclaimer "irrevocable without the consent of the United States and the people of [the] State."¹⁵⁰ The Utah Constitution's disclaimer

141. UTAH CODE § 78B-6-503.5 (2012).

142. See U.S. CONST. art. IV, §3, cl. 2; *Kleppe*, 426 U.S. at 543.

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

144. E.g., *Kleppe*, 426 U.S. at 539–44; *Gardner*, 107 F.3d at 1317–20; See also *infra* Pt. III(B) (discussing Property Clause precedents in greater detail).

145. E.g., KOCHAN, *supra* note 6, at 11–18.

146. E.g., *Gibson v. Choteau*, 80 U.S. 92, 99 (1871) ("Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring [federal] property.").

147. See e.g., H.R.J. Res. 3, 6, 59th Leg., Reg. Sess. (Utah 2012) (arguing that "FLPMA . . . unilaterally altered [Congress's] duty in 1976 to extinguish title to all public lands within Utah's borders by committing to a policy of retention" of public lands).

148. Utah Enabling Act, 28 Stat. 108 (1894).

149. UTAH CONST. art. 3.

150. Utah Enabling Act, 28 Stat. 108 (1894).

thus cannot be modified without amending the Constitution.¹⁵¹ Despite this constitutional impediment, Utah enacted the TPLA as if it were like any other law.¹⁵² But the TPLA violates Section 3 of the Enabling Act because it demands that Congress give Utah public lands, meaning that the TPLA has the same effect as a direct claim to lands.¹⁵³ Consequently, the TPLA violates the Utah Constitution.

B. Arguments for the TPLA Under the U.S. Constitution

Although few published articles analyze the TPLA,¹⁵⁴ the Utah House of Representatives passed a joint resolution that explains the TPLA's basis.¹⁵⁵ Additionally, three recent papers have rallied to its defense.¹⁵⁶ This section describes these arguments, focusing on Professor Donald Kochan's paper for the Federalist Society, which offered the most thorough reasoning.¹⁵⁷ Professor Kochan offered a three-pillared argument based on the Utah Enabling Act's text, U.S. history, and Supreme Court precedent.

1. Textual Basis for the TPLA Defense

The first pillar that the TPLA's defense rests on is a reading of the Utah Enabling Act's text. The gist of the claim is that the Enabling Act's text

151. UTAH CONST. art. XXIII, § 1.

152. See *H.B. 148: Transfer of Public Lands Act and Related Study* (Ivory, K.), UTAH STATE LEGISLATURE, <http://le.utah.gov/~2012/status/hbillsta/hb0148.htm> (last visited Sept. 3, 2014) (describing the passage of the TPLA).

153. Leshy, *supra* note 31, at 335–36 (making a similar argument regarding Nevada's attempt to claim federal lands during the Sagebrush Rebellion).

154. See KOCHAN, *supra* note 6, at 9–10 (noting that “there has not yet been much independent legal analysis published on the TPLA”). Searching major legal databases HeinOnline, LexisNexis, and Westlaw yielded one article, which focused on the Enclave Clause. See Driscoll, *supra* note 78, at 1014–32 (discussing the Enabling Act in passing and erroneously).

155. H.R.J. Res. 3, 6, 59th Leg., Reg. Sess. (Utah 2012).

156. CDC, *supra* note 13, at 3 (praising the TPLA's “bold action”); KOCHAN, *supra* note 6, at 28 (“At a minimum, the legal arguments in favor of the TPLA are serious”); DONNELL, *supra* note 7, at 1 (“The Transfer of Public Lands is a constitutional demand by the state.”).

157. The CDC paper argues that the TPLA is good public policy without much legal analysis. CDC, *supra* note 13, at 4 (“[T]he larger and more significant question is whether the shift from disposal to permanent federal retention of a large portion of public lands in the Western States is good public policy.”). The claim is that the U.S. manages public lands poorly and that Utah would do better. *Id.* at 4–5. Donnell's paper mostly repeats Professor Kochan's arguments with less detail. It adds only two weak claims. First, it argues that like any state law, the TPLA enjoys a presumption of constitutionality. DONNELL, *supra* note 7, at 1. However, the Supreme Court has made clear that “federal legislation necessarily overrides conflicting state laws under the Supremacy Clause.” *Kleppe*, 426 U.S. at 543. That paper also argues that the TPLA does not actually conflict with any particular provision of a federal statute. DONNELL, *supra* note 7, at 5. However, the demand for federal lands conflicts with Congress's whole scheme of owning and managing public lands.

shows that both the U.S. and Utah intended the law to bind Congress to dispose of public lands in the State,¹⁵⁸ which Congress has not done.¹⁵⁹

To arrive at this reading, Professor Kochan first interpreted Section 3 of the Enabling Act, which required Utah to “forever disclaim all right and title to . . . public lands,” as functioning very differently from how its plain language suggests.¹⁶⁰ Professor Kochan maintained that Section 3 limits this disclaimer by stating that the U.S. will retain jurisdiction over federal public lands in the state only “until the title thereto shall have been extinguished.”¹⁶¹ He maintained that the disclaimer’s purpose was to facilitate disposals by giving the U.S. clear title to lands it would later sell or grant.¹⁶² In other words, Professor Kochan read Section 3 to facilitate disposal and to create a duty to dispose by suggesting that U.S. jurisdiction would eventually end.¹⁶³

Second, Professor Kochan argued that the federal duty to dispose of public lands becomes clear when reading Section 3 in context. According to Professor Kochan, in Section 9 of the Enabling Act, Congress agreed to a duty to dispose of public lands.¹⁶⁴ Section 9’s basic purpose is to support Utah schools by providing five percent of the proceeds from later sales for state schools.¹⁶⁵ Professor Kochan argued that this purpose “means that the State is . . . relying upon . . . disposal.”¹⁶⁶ He emphasized Section 9’s description of public lands, “which *shall* be sold by the United States” after Utah’s admission,¹⁶⁷ arguing that “[t]his commanding language indicates that disposal was not only anticipated but demanded and expected as a condition of the agreement.”¹⁶⁸ Similarly, he contended Utah may receive the benefit of the Enabling Act’s bargain “only if it can impose a duty to dispose” of public lands.¹⁶⁹ The first pillar of the TPLA’s defense thus rests on an interpretation of Sections 3 and 9 of the Utah Enabling Act.

158. KOCHAN, *supra* note 6, at 10–18; DONNELL, *supra* note 7, at 1–2. The CDC paper raises this argument also, but only in passing and without any detailed analysis. CDC, *supra* note 13, at 4.

159. KOCHAN, *supra* note 6, at 10.

160. See COGGINS ET AL., *supra* note 9, at 15 (noting that the U.S. owns roughly 64% of Utah).

161. Utah Enabling Act, 28 Stat. 108 (1894); KOCHAN, *supra* note 6, at 12.

162. KOCHAN, *supra* note 6, at 12–13.

163. *Id.*

164. *Id.* at 13–14.

165. Utah Enabling Act, 28 Stat. 108 (1894).

166. KOCHAN, *supra* note 6, at 13 (emphasis removed).

167. Utah Enabling Act, 28 Stat. 110 (1894) (emphasis removed); KOCHAN, *supra* note 6, at 13–14 (emphasizing “shall be sold” in bold, italic font).

168. KOCHAN, *supra* note 6, at 14.

169. *Id.* at 15 (emphasis removed).

2. Historical Basis for the TPLA Defense

The second pillar of the TPLA's defense rests on nineteenth century U.S. history. Professor Kochan argued that Utah and the U.S. entered into the Enabling Act "against a backdrop of an ethic of disposal . . . [which] informed the expectations of the parties and is relevant in interpretation."¹⁷⁰ Particularly, Professor Kochan pointed to a congressional resolution from 1780 stating that public lands "shall be disposed of for the common benefit of the United States . . . under such regulations as" Congress may impose.¹⁷¹ Professor Kochan relied heavily on a statement that President Andrew Jackson made when pocket vetoing a bill that would have used land sale proceeds for general purposes, which, according to Professor Kochan, showed a belief that the U.S. was obligated to eventually cede all public lands to the states.¹⁷² These historical events form the second pillar of the TPLA's defense.

3. Ostensible Precedential Basis for the TPLA

The third pillar of the TPLA's defense emphasized certain Supreme Court precedents while downplaying others. The TPLA's defense relied heavily on the Equal Footing Doctrine, as it appeared in *Pollard v. Hagen*.¹⁷³ The Equal Footing Doctrine holds that new states must have the same sovereignty as the original 13.¹⁷⁴ In *Pollard*, the Supreme Court ruled that because ownership of lands under navigable waters was part of the original states' sovereignty, title to tidelands in Mobile Bay passed to Alabama at statehood.¹⁷⁵ Although the Court has since confined *Pollard* to submerged lands,¹⁷⁶ *Pollard* used broad language that suggested to

170. *Id.* at 16.

171. *Id.*

172. *Id.* at 17–18 (quoting President Andrew Jackson: "[i]t cannot be supposed the compacts intended that the United States should retain forever a title to lands within the States which are of no value, and no doubt is entertained that the general interest would be best promoted by surrendering such lands to the States.").

173. 44 U.S. 212, 222 (1845).

174. *Coyle v. Smith*, 221 U.S. 559, 573 (1911) ("[W]hen a new State is admitted into the Union, it is so admitted with all the powers and sovereignty which pertain to the original States, and . . . 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.").

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

176. *Arizona v. California*, 373 U.S. 546, 597–98 (1963) (limiting *Pollard* as "involv[ing] only the shores of and lands beneath navigable waters"); *Gardner*, 107 F.3d at 1316 ("The Supreme Court has declined to extend the Equal Footing Doctrine to lands other than those underneath navigable waters or waters affected by the ebb and flow of the tides.").

Professor Kochan that the U.S. may own land only to benefit new states.¹⁷⁷ The TPLA's supporters cite this language for the proposition that the U.S. cannot retain, but must dispose of public lands.¹⁷⁸

Professor Kochan also attempted to downplay the Supreme Court's broad reading of the Property Clause, noting that the Supreme Court has never resolved whether the Property Clause allows Congress to disregard a statutory obligation to dispose of lands.¹⁷⁹ He then purported to distinguish precedents and to dismiss unfavorable language as dicta. For example, he interpreted the Supreme Court's famous statement in *United States v. Gratiot* that congressional power under the Property Clause is "without limitation"¹⁸⁰ as "valueless" dicta,¹⁸¹ asserting that *Gratiot* holds narrowly that "property rights created prior to statehood could not be upset by a new state."¹⁸² Similarly, Professor Kochan construed *Kleppe*, which resolved a conflict between state and federal wildlife laws in favor of the U.S.,¹⁸³ as "simply [holding] that *while* the federal government is an owner, states have a type of 'duty of non-interference' with federally controlled lands."¹⁸⁴ He made the same argument about *Gibson v. Choteau*.¹⁸⁵ He also argued that several other cases held merely that states can neither authorize trespasses nor impose easements on federal land, and that the U.S. may expel trespassers.¹⁸⁶

C. Constitutional Doctrines at Issue

Professor Kochan's view of Supreme Court precedents was deeply misguided. This section explains why by examining Property Clause precedents and the Equal Footing Doctrine. It also explains why the

177. *Pollard*, 44 U.S. at 212 ("[T]he United States never held any municipal sovereignty, jurisdiction or right of soil in and for the new territory. . . except for temporary purposes"); KOCHAN, *supra* note 6, at 25.

178. KOCHAN, *supra* note 6, at 25; DONNELL, *supra* note 7, at 3.

179. KOCHAN, *supra* note 6, at 24.

180. *United States v. Gratiot*, 39 U.S. 526, 537 (1840).

181. KOCHAN, *supra* note 6, at 20.

182. *Id.*

183. *Kleppe*, 426 U.S. at 540–41; *See also* Conable, *supra* note 84, at 1276–78 (discussing *Kleppe* in greater detail).

184. KOCHAN, *supra* note 6, at 20.

185. *Id.* at 21 (arguing that "*Gibson* demonstrates that a state may not interfere with U.S. ownership or interfere with disposal"); *See also infra* Pt. III(C)(3)(c) (discussing *Gibson* in greater detail).

186. KOCHAN, *supra* note 6, at 22–23 (construing *Shannon v. United States*, 160 F. 870, 874 (9th Cir. 1908); *Utah Power & Light Co. v. United States*, 230 F. 328, 339 (8th Cir. 1915); *Light v. United States*, 220 U.S. 523, 536 (1911)).

Enclave Clause is irrelevant to the TPLA's legality, despite some argument to the contrary.¹⁸⁷

1. The Property Clause

The Constitution's Property Clause empowers Congress to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."¹⁸⁸ The Supreme Court has read the Property Clause broadly in an unbroken line of cases, never finding any limit to congressional power over public lands.¹⁸⁹ The Court has made clear that the U.S. may own and regulate federal lands¹⁹⁰ and that state laws may not conflict with federal law.¹⁹¹ This law has been settled since at least 1840.¹⁹²

Professor Kochan's effort to downplay the Supreme Court's broad view of the Property Clause will prove fruitless. Even if Professor Kochan were correct to construe precedents narrowly, some of the narrow holdings he described would remain fatal to the TPLA. For example, even if *Gratiot* held only that "property rights created prior to statehood could not be upset by a new state,"¹⁹³ that holding would bar Utah from demanding lands the

187. One argument for the relevance of the Enclave Clause is that Utah law allows assertion of eminent domain over any federal land not obtained under that Clause. UTAH CODE § 78B-6-503.5 (2012); *See also* 160 Cong. Rec. S319 (daily ed. Jan. 14, 2014) (statement of Senator Mike Lee linking the Enclave Clause to putatively inequitable federal ownership of land in Western States and praising Ken Ivory's efforts to enact the TPLA); *See also* Driscoll, *supra*, note 78, at 1013 ("Utah must centrally assert that the federal government's control of the contested lands is invalid, since it has neither obtained the land through the Enclave Clause nor claimed it through the exercise of eminent domain.").

188. U.S. CONST. art. IV, §3, cl. 2.

189. *Kleppe*, 426 U.S. at 539 (noting that "while the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved, we have repeatedly observed that the power over the public land thus entrusted to Congress is without limitation" and citing seven cases dating back to 1840); *Leshy*, *supra* note 31, at 337 ("In none of these cases was there substantial disagreement by the Court on the extent of federal power, which the Court has consistently characterized as broadly as it has ever described any constitutional power.").

190. *Kleppe*, 426 U.S. at 540 ("Congress exercises the powers both of a proprietor and of a legislature over the public domain."); *Light*, 220 U.S. at 536; *Utah Power & Light Co.*, 243 U.S. at 405 ("[T]he inclusion within a state of lands of the United States does not take from Congress the power to control their occupancy and use . . . and to prescribe the conditions upon which others may obtain rights in them A different rule . . . would place the public domain of the United States completely at the mercy of state legislation.") (internal quotations and citations omitted).

191. *Kleppe*, 426 U.S. at 543 ("where . . . state laws conflict with . . . legislation passed pursuant to the Property Clause, the law is clear: The state laws must recede."); *Gibson v. Choteau*, 80 U.S. 92, 99 (1871) ("No state legislation can interfere with this right [to regulate under the Property Clause] or embarrass its exercise.").

192. *Gratiot*, 39 U.S. at 537.

193. KOCHAN, *supra* note 6, at 20.

U.S. has owned since long before statehood.¹⁹⁴ More fundamentally, Professor Kochan is unwise to dismiss as “valueless” a century of Supreme Court reasoning.¹⁹⁵ In fact, the Supreme Court’s approach to the Property Clause is important: instead of narrowly upholding individual laws, the Court routinely states that the Property Clause power is “without limits.”¹⁹⁶ There is no reason to believe that the Supreme Court meant anything other than what it plainly and repeatedly stated. Finally, the Court has held that *stare decisis* “has peculiar force and relevance” in property disputes between the U.S. and the states, partly because a great deal of commerce relies on settled law.¹⁹⁷ Thus, the attempt to downplay Property Clause precedents will likely fail.

2. The Equal Footing Doctrine

Invocation of the Equal Footing Doctrine in defense of the TPLA will prove equally unavailing. The Equal Footing Doctrine’s application to property is limited to submerged lands.¹⁹⁸ Apart from these lands, the Equal Footing Doctrine applies only to political rights, guaranteeing states equal sovereignty.¹⁹⁹ The Supreme Court has held that property ownership is not a question of sovereignty under the Equal Footing Doctrine,²⁰⁰ nor is the fact that federal land management affects western states more than eastern states.²⁰¹ Given this weight of authority, as well as the importance of

194. Similarly, even if *Kleppe* held only that states have a duty of non-interference with federal lands, as Professor Kochan argued, *supra* note 6, at 20, that holding would still prevent Utah from interfering with federal lands by demanding that Congress give them to the state.

195. KOCHAN, *supra* note 6, at 20.

196. *E.g.*, *Kleppe*, 426 U.S. at 539.

197. *United States v. Maine*, 420 U.S. 515, 528 (1975) (“We are quite sure that it would be inappropriate to disturb our prior cases, major legislation, and many years of commercial activity by calling into question, at this date, the constitutional premise of prior decisions.”).

198. *Scott v. Lattig*, 227 U.S. 229, 244 (1913) (holding that an island that existed at Idaho statehood “was fast dry land, and therefore remained the property of the United States and subject to disposal under its laws”); *Arizona*, 373 U.S. at 597–98.

199. *United States v. Texas*, 339 U.S. 707, 716 (1950) (“The ‘equal footing’ clause has long been held to refer to political rights and to sovereignty. It does not, of course, include economic stature or standing. There has never been equality among the States in that sense. Some States when they entered the Union had within their boundaries tracts of land belonging to the Federal Government; others were sovereigns of their soil. 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.”).

200. *Stearns v. Minnesota*, 179 U.S. 223, 245 (1900) (“[A] state admitted into the Union enters therein in full equality with all the others, and such equality may forbid any agreement or compact limiting or qualifying political rights and obligations; whereas, on the other hand, a mere agreement in reference to property involves no questions of equality or status.”).

201. *In re Kan. Indians*, 72 U.S. 737, 757 (1866); *United States v. 43 Gallons of Whiskey*, 93 U.S. 188, 197 (1876) (both holding that federal laws regulating tribes were constitutional despite the fact that not all states contain tribal reservations); *see also* Conable, *supra* note 84, at 1285 (“The

precedent in property disputes,²⁰² no court will uphold the TPLA under the Equal Footing Doctrine.²⁰³

3. The Enclave Clause

The Constitution's Enclave Clause is also unlikely to aid the TPLA. The Enclave Clause allows the U.S. to purchase lands from states with their consent.²⁰⁴ However, because the U.S. acquired most public lands from foreign nations,²⁰⁵ it holds very little land under the Enclave Clause.²⁰⁶ The fact that the U.S. did not acquire lands in Utah with the state's consent has played a role in criticisms of federal lands that led to the TPLA.²⁰⁷ In fact, Utah law allows use of eminent domain over federal lands not obtained under the Enclave Clause.²⁰⁸ However, the Enclave Clause cannot support the TPLA for a very simple reason. The Enclave Clause applies to lands that states once owned, but Utah has never owned the lands at issue under the TPLA. Instead, the U.S. has owned those lands since long before Utah statehood.²⁰⁹ Thus, the Enclave Clause, like the Property Clause and the Equal Footing Doctrine, cannot support the TPLA.

D. The Compact-Based Argument for the TPLA

The TPLA's defenders did, however, raise a superficially credible argument for its constitutionality: that Congress broke a promise in the Utah Enabling Act by failing to dispose of public lands.²¹⁰ However, this argument must fail because it utterly relies on the false notion that the Utah Enabling Act included a promise to dispose of federal lands.

Supreme Court has held . . . that state sovereignty is not compromised when a law affects one group of states more than another.”)

202. *Maine*, 420 U.S. at 527–28.

203. *See Gardner*, 107 F.3d at 1317–20; *Nye Cnty.*, 920 F. Supp. at 1111–17 (rejecting similar arguments about the Equal Footing Doctrine).

204. U.S. CONST. art. I, § 8, cl. 17.

205. *COGGINS ET AL.*, *supra* note 9, at 55–58.

206. *Id.* at 147 (noting that the U.S. owns only about 6% of federal lands under the Enclave Clause).

207. 160 Cong. Rec. S319 (daily ed. Jan. 14, 2014) (statement of Senator Lee); *See also* Driscoll, *supra* note 78, at 1013 (“Utah must centrally assert that the federal government’s control of the contested lands is invalid, since it has neither obtained the land through the Enclave Clause nor claimed it through the exercise of eminent domain.”).

208. UTAH CODE § 78B-6-503.5 (2012).

209. *See Gardner*, 107 F.3d at 1317–20; *Nye Cnty.*, 920 F.Supp. at 1114–17 (making similar findings regarding public lands in Nevada).

210. *E.g.*, *Kochan*, *supra* note 6, at 10–16.

1. Interpreting Federal Grants

Courts must interpret federal grants in the federal government's favor. The Supreme Court stated in 1919 that "nothing passes but what is conveyed in clear and explicit language—inferences being resolved not against but for the government."²¹¹ Although federal grants in statehood acts bind both states and the U.S.,²¹² the Court has consistently resolved ambiguities in such grants in the federal government's favor.²¹³ This has been a "settled" interpretive rule since at least 1859.²¹⁴ Moreover, the Court has held that "the rules which govern in the interpretation of legislative grants . . . apply as well to grants of lands to States."²¹⁵ Thus, any federal court interpreting the Utah Enabling Act must resolve statutory ambiguities in the federal government's favor.

This interpretive rule means the TPLA's defenders must show that the Utah Enabling Act unambiguously obligates Congress to dispose of public lands. If a court finds the Act ambiguous, it must resolve ambiguities in the federal government's favor by finding that it imposes no duty to dispose of public lands. A great weakness of Professor Kochan's reading of the Enabling Act is that he ignored this canon of construction for federal grants.²¹⁶ However, because this canon was "settled" before Utah statehood,²¹⁷ Utah itself likely knew that a duty to dispose must be clearly stated. In fact, Utah did negotiate for other, unambiguous land grants,²¹⁸ suggesting it knew this rule.

211. *Caldwell v. United States*, 250 U.S. 14, 20 (1919) (noting also that "statutes granting privileges or relinquishing rights are to be strictly construed").

212. *Stearns*, 179 U.S. at 244 (holding it "evident" that the Minnesota statehood act "made a compact between the United States and the state"); *Andrus*, 446 U.S. at 519 (noting that a school land grant in the Utah Enabling Act "was a 'solemn agreement' which in some ways may be analogized to a contract between private parties").

213. *Stearns*, 179 U.S. at 250 (noting that "provisions [of statehood acts] are not to be construed narrowly or technically, but as expressing a consent on the part of the state." to the terms proposed by Congress) (emphasis added); *Dubuque & P.R. Co. v. Litchfield*, 64 U.S. 66, 88 (1859) ("All grants of this description are strictly construed against the grantees; nothing passes but what is conveyed in clear and explicit language; and as the rights here claimed are derived entirely from the act of Congress, the donation stands on the same footing of a grant by the public to a private company, the terms of which must be plainly expressed in the statute; and if not thus expressed, they cannot be implied.").

214. *Dubuque & P.R. Co.*, 64 U.S. at 88 (describing this canon as "a settled rule of construction"); *Wis. Cent. R.R. Co. v. United States*, 164 U.S. 190, 202 (1896).

215. *Leavenworth v. United States*, 92 U.S. 733, 739–40 (1875).

216. See KOCHAN, *supra* note 6, at 16–17 (applying ordinary principles of contract interpretation).

217. *Dubuque & P.R. Co.*, 64 U.S. at 88.

218. *E.g.*, Utah Enabling Act, § 6, 28 Stat. 107, 109 (1894) (making a specific grant of school lands).

2. The Text of the Utah Enabling Act

The Utah Enabling Act's text does not clearly obligate the U.S. to dispose of public lands. In fact, the Enabling Act's more natural reading is that Congress granted only lands clearly and expressly described. This Section first discusses the disclaimer of rights to public lands in Section 3. Second, it explains why Section 9's dedication of five percent of later land sale proceeds to state schools did not obligate the federal government to sell lands. Third, it contrasts the putative duty to dispose of public lands to the Enabling Act's unambiguous land grants. Fourth, it notes that the Enabling Act in several sections acknowledged the federal government's power to retain lands. Finally, the section concludes by arguing that when read as a whole, the Utah Enabling Act does not impose on Congress any duty to dispose of public lands.

a. Section 3 of the Utah Enabling Act

Section 3 of the Enabling Act required Utah to "forever disclaim all right and title to the unappropriated public lands" within its borders,²¹⁹ which Utah did in its Constitution.²²⁰ This language unambiguously disavowed any right of Utah to claim federal lands. Professor Kochan, however, maintained that Section 3 embodied an expectation that the U.S. would dispose of public lands by allowing U.S. jurisdiction only "*until* the title thereto *shall have been extinguished*."²²¹ This reading, however, fits quite poorly with the fact that Utah, in the very same section, "*forever*" disclaimed its right to public lands.²²² The more natural reading is simply that the U.S. was to retain discretion over disposal of the lands. Indeed, in *Stearns v. Minnesota*, the Supreme Court interpreted a similar clause in Minnesota's statehood act to mean that "the full control of the disposition of the lands of the United States should be free from state action."²²³ Thus, a federal court would likely read the Utah Enabling Act's disclaimer to prohibit the state from interfering with federal lands.

219. *Id.* § 3.

220. UTAH CONST. art. 3.

221. Utah Enabling Act, § 3, 28 Stat. 108 (1894) (emphasis added); *See also* KOCHAN, *supra* note 6, at 12.

222. Utah Enabling Act § 3, 28 Stat. at 108 (emphasis added); UTAH CONST. art. 3.; Utah Enabling Act, § 3, 28 Stat. 108 (1894) (emphasis added).

223. *Stearns*, 179 U.S. at 250 ("Whether Congress should sell or donate; what terms it should impose upon the sale or donation; what arrangements it should make for securing title to the beneficiaries—were all matters withdrawn from state interference by the terms of the enabling act and the Constitution.").

b. Section 9 of the Utah Enabling Act

Section 9 of the Utah Enabling Act provided that if the U.S. sold public lands in Utah, it would contribute five percent of proceeds to fund State schools.²²⁴ Professor Kochan relied on Section 9's description of "public lands . . . which shall be sold"²²⁵ to argue that the section embodied a duty to dispose of public lands.²²⁶ However, the more natural reading of Section 9's language—"which shall be sold"—is that it simply identified the lands at issue. In other words, Section 9 obligated the U.S. to pay five percent of the proceeds from land sales *after statehood*, but not from sales when Utah was a territory, nor from grants in the Enabling Act itself. At most, this phrase is ambiguous.²²⁷ A court would resolve the ambiguity in favor of the U.S. by determining that Section 9 did not obligate Congress to dispose of federal lands in the state.

c. Contrast Between the Putative Duty to Dispose and Other Unambiguous Grants

The ostensible duty to dispose of public lands that the TPLA's defenders found in Sections 3 and 9 of the Utah Enabling Act²²⁸ stands in stark contrast to the Enabling Act's actual grants. Where Congress intended to make a grant, it used clear terms. For example, Section 6 grants the State "sections numbered two, sixteen, thirty-two, and thirty-six in every township . . . for the support of public schools,"²²⁹ clearly identifying both the granted lands and the grant's purpose. Section 6 also detailed which lands Utah could choose if the U.S. had already disposed of lands it promised to grant, and Section 13 subjected state choices to the Secretary of the Interior's approval.²³⁰ Sections 7, 8, and 12 were also quite specific

224. Utah Enabling Act, 28 Stat. 110 (1894).

225. *Id.* § 12.

226. KOCHAN, *supra* note 6, at 14.

227. Although courts have often found that the word "shall" imposes an obligation, it is not always so. Recent amendments to the Federal Rules of Civil Procedure sought to eliminate "shall" utterly because of its ambiguity. See Edward H. Cooper, *Restyling the Civil Rules: Clarity Without Change*, 79 NOTRE DAME L. REV. 1761, 1766, 1776–79 (2004) ("Ambiguity nowhere presents a more pervasive problem than arises from 'shall.'"); BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 939–40 (2d. ed. 1995). Thus, a federal court would be well within reason to find "shall" ambiguous in Section 9.

228. KOCHAN, *supra* note 6, at 13.

229. Utah Enabling Act, § 6, 28 Stat. 109 (1894).

230. *Id.* §§ 6, 13.

about the extent and purpose of grants.²³¹ These detailed terms show that Congress knew how to make unambiguous land grants.

That the Utah Enabling Act did not expressly describe a congressional duty to dispose of public lands is telling. Examples of other, more clearly expressed grants from Congress suggest that if it had intended to oblige the U.S. to dispose of public lands, it would have made that duty similarly clear, rather than leaving it implicit in the ambiguities of Sections 3 and 9. In fact, when Congress intended a grant, it wrote that grant in its own statutory section.²³² Congress would not likely have concealed an obligation as important as the duty to dispose of all public lands in statutory sections that have other distinct purposes.²³³ It is also unlikely that Congress would have expressly acknowledged the federal right to reserve public lands, but the next section shows it did so repeatedly.

d. The Utah Enabling Act's Recognition of the Federal Right to Retain Public Lands

The Utah Enabling Act recognizes federal authority to retain public lands in several provisions. Both Sections 3 and 6 expressly contemplate federal reservations.²³⁴ Thus, the Enabling Act's drafters knew the U.S. could indefinitely reserve land for any purpose. If Congress intended the Utah Enabling Act to oblige the U.S. to dispose of lands, it would not likely have provided for reservations. The more natural reading is that Congress was maintaining a prerogative to retain and manage public lands as it saw fit.²³⁵

Section 12 is both the strongest and the most overlooked²³⁶ evidence that the Utah Enabling Act recognizes a federal right to retain lands. Section 12 states that "Utah shall not be entitled to any further or other

231. Section 7 granted 100 sections of land for public buildings, Section 8 specified a grant of lands for state universities, and Section 12 gave a series of grants for various purposes, including an unprecedented grant of half a million acres for water reservations for irrigation. *Id.* at §§ 7, 8, 12; *See also* GATES, *supra* note 19, at 314 (noting that Congress had never before given such a grant for irrigation).

232. Utah Enabling Act §§ 6, 7, 8, 12, 28 Stat. at 109–110.

233. *See id.* § 3 (requiring important guarantees from the new state, including a constitution "republican in form," a ban on polygamous marriages, and—as relevant here—a permanent disclaimer of state rights to federal public lands); *Id.* § 9 (providing that later federal land sales would partially fund state schools).

234. *Id.* § 3 (prohibiting state taxation of lands "which may hereafter be . . . reserved for [federal] use"); *Id.* § 6 (granting the state four sections of each township, but not lands in "reservations of any character").

235. *See supra* Pt. I (describing how Congress consistently preserved its power over public lands).

236. In fact, neither the TPLA nor any of its defenders discuss Section 12 at all.

grants of land for any purpose than as expressly provided in this Act.”²³⁷ The TPLA obliquely follows this limitation by purporting to benefit Utah schools, which was Section 9’s purpose.²³⁸ But the TPLA does not actually follow Section 9’s purpose. Section 9 put public lands in federal control before sale,²³⁹ but the TPLA would put the lands in state control.²⁴⁰ Thus, the TPLA would give the State a massive grant of 30 million acres that neither the Utah Enabling Act, nor any other statehood act, ever envisioned.²⁴¹ That outcome would defy Section 12’s plain meaning.

Section 12 also shows that Section 9 did not require Congress to sell lands. In fact, if Section 9 had required the U.S. to sell all federal lands in Utah, it would have been meaningless for Congress to write Section 12; if the U.S. were obligated to sell all its lands, it could not have retained land from which to give “further or other grants.”²⁴² Thus, Section 12 is strong evidence that Congress made no promise in the Utah Enabling Act to sell public lands, but instead envisioned a system of federal land ownership.

e. Reading the Utah Enabling Act as a Whole

The same natural reading of the Utah Enabling Act, guarding the congressional prerogative over public lands, emerges when reading the Act in its entirety. The TPLA’s defenders correctly insist that a proper interpretation of the Enabling Act must consider its full context.²⁴³ However, the most natural reading of the entire Act is that it preserved the congressional prerogative over public lands rather than imposing a duty to dispose of them. The Enabling Act not only required Utah to disclaim any right to public lands,²⁴⁴ it also stated that Utah would not be entitled to any further grants²⁴⁵ and allowed the U.S. to reserve lands for any purpose.²⁴⁶ Where the Act allowed Utah to choose lands, it subjected that choice to federal approval.²⁴⁷ And where the Act gave Utah lands, it used very

237. Utah Enabling Act, 28 Stat. 110 (1894).

238. KOCHAN, *supra* note 6, at 7 (“[T]he division of the proceeds will replicate the same division and school trust commitment that would exist according to the terms of the Utah Enabling Act had (and as if) the United States had sold the property itself.”).

239. Utah Enabling Act, 28 Stat. 110 (1894).

240. UTAH CODE § 63L-6-103(3) (2012).

241. GATES, *supra* note 19, at 288–313 (describing terms and grants in various statehood acts).

242. Utah Enabling Act, 28 Stat. 110 (1894).

243. *E.g.*, KOCHAN, *supra* note 6, at 12–13.

244. Utah Enabling Act, § 3, 28 Stat. 108 (1894).

245. *Id.* § 12.

246. *Id.* §§ 3, 6.

247. *Id.* § 13.

specific terms.²⁴⁸ Against these many provisions guarding federal ownership of public lands, the TPLA's defenders offer only snippets of text in Sections 3 and 9 to suggest a duty to dispose of public lands.²⁴⁹ Thus, reading the Enabling Act as a whole, the notion that it created a federal duty to dispose of public lands strains credulity.

3. The Utah Enabling Act's Historical Context

The Utah Enabling Act's historical context confirms that Congress intended to preserve its prerogative over public lands, not to impose a duty to dispose of them. Section I of this paper described how Congress historically guarded that prerogative. This section argues that prior statehood acts, in particular, suggest that the Enabling Act's drafters did not intend it to obligate Congress to dispose of lands.

a. Illinois and *United States v. Gratiot*

In 1818, the U.S. created the State of Illinois from the Northwest Territory.²⁵⁰ The Northwest Ordinance, which regulated the Northwest Territory, disclaimed state rights to public lands.²⁵¹ In a dispute over federal power to lease minerals in Illinois after statehood, the Supreme Court noted in *United States v. Gratiot* that "disposal must be left to the discretion of Congress," and that "Illinois . . . surely cannot claim a right to the public lands within her limits."²⁵² The Supreme Court made this statement despite the Illinois Statehood Act referencing lands "which shall be sold by Congress" without a disclaimer of rights to public lands.²⁵³ Thus, the Court rejected the proposition that a state could claim federal lands even where an enabling act did not expressly disclaim rights to public lands. *A fortiori*, Utah, which did forever disclaim "all right and title to public lands,"²⁵⁴ cannot demand public lands now. The Supreme Court decided *Gratiot* more than 50 years before Utah's statehood, suggesting that Utah knew well that it would not be entitled to public lands.

248. *Id.* §§ 6, 7, 8, 10, 12.

249. *See* KOCHAN, *supra* note 6, at 12–13 (basing his argument on the phrase "until the title thereto shall have been extinguished" in Section 3 and the phrase "which shall be sold" in Section 9).

250. GATES, *supra* note 19, at 292–93.

251. COGGINS ET AL., *supra* note 9, at 67.

252. 39 U.S. at 538.

253. Illinois Statehood Act, ch. 67, 3 Stat. 428 (1818).

254. Utah Enabling Act, § 3, 28 Stat. 108 (1894).

b. California and Congressional Intent in Disclaimers

In 1850, the United States granted California statehood with a disclaimer of rights to public lands, much like the Utah Enabling Act's.²⁵⁵ Congress required a disclaimer after considering that the new state might try to assume ownership of public lands within its borders.²⁵⁶ That Congress required a disclaimer after considering the loss of public lands strongly suggests it intended disclaimers to retain lands in federal control.

c. Missouri and *Gibson v. Choteau*

Missouri's history is relevant because of *Gibson v. Choteau*, which in 1871 pit a landowner with title descending from the U.S. against an adverse possessor under Missouri law.²⁵⁷ The facts of the case were complex,²⁵⁸ but the Supreme Court's holding was simple: Missouri adverse possession law could not apply because it would frustrate congressional power over disposal of lands.²⁵⁹ The Court held that Congress has "the absolute right" to dispose of lands as it sees fit and that "[n]o state legislation can interfere with this right."²⁶⁰ The Court relied in part on the fact that several statehood acts, including Missouri's, featured disclaimers of state rights to public lands.²⁶¹ The Court decided *Gibson* more than 20 years before Utah's statehood.²⁶² Thus, Congress and Utah likely knew the Court would read Section 3's disclaimer of public lands to place those lands beyond the control of state legislation.²⁶³

255. See generally, GATES, *supra* note 19, at 301–04.

256. *Id.*

257. *Gibson*, 80 U.S. at 103.

258. See *id.* at 93–96 (describing many links in the land's chain of title).

259. *Id.* at 104.

260. *Id.* at 99 ("With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No State legislation can interfere with this right or embarrass its exercise . . .").

261. *Id.* ("[T]o prevent the possibility of any attempted interference with [the absolute congressional right to dispose of lands], a provision has been usually inserted in the compacts by which new States have been admitted into the Union, that such interference with the primary disposal of the soil of the United States shall never be made.").

262. See *id.* at 93.

263. The Utah legislature was certainly aware of this case, which appeared prominently in a critical review note appended to the legislation. H.B. 148, 59th Leg., Reg. Sess. Legis. Review Note (Utah 2012).

d. *Stearns v. Minnesota*

In 1900, the Court again made clear its approach to disclaimers of public lands in *Stearns v. Minnesota*, which involved taxation of railroad lands.²⁶⁴ The U.S. granted Minnesota lands in trust for railroad construction.²⁶⁵ As trustee, Minnesota granted land to the railroad with specific terms for taxation.²⁶⁶ Later, the State wanted to change the tax system, and the railroad objected.²⁶⁷ The Court decided that Minnesota could not alter taxation terms it had set forth as a federal trustee, because that alteration would frustrate absolute congressional power over disposal of trust lands.²⁶⁸ Relying partly on a disclaimer of rights to public lands in the Minnesota Enabling Act, which it declared to be a “full reservation of power in Congress,” the Court held that “[t]hese provisions are not to be construed narrowly or technically, but as expressing a consent on the part of the state . . . that the full control of the disposition of the lands of the United States should be free from state action.”²⁶⁹ *Stearns v. Minnesota* suggests that a court would likewise interpret the Utah Enabling Act to place federal lands in exclusive federal control.

e. The Utah Enabling Act in Light of Prior Statehood Acts

Utah was the 45th state, which suggests that interpretation of prior statehood acts can illuminate the Utah Enabling Act’s meaning. The chief relevant similarity to prior statehood acts is Section 3’s disclaimer of rights to public lands. Many prior statehood acts contain similar disclaimers.²⁷⁰ The fact that the careful negotiation of statehood acts²⁷¹ nearly always yielded such disclaimers shows that Congress never intended to promise disposal of public lands. The Utah Enabling Act’s disclaimer—very similar to those the Supreme Court interpreted in *Gibson* and *Stearns*—shows that Congress intended to put public lands fully in federal control.

264. 179 U.S. at 231.

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.* at 253.

269. *Id.* at 250.

270. GATES, *supra* note 19, at 288–313 (noting that Alabama, Arkansas, Idaho, Iowa, Kansas, Michigan, Montana, Nevada, North Dakota, Oregon, South Dakota, Washington, and Wyoming all disclaimed rights to public lands); *See also* Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119, 131 (2004).

271. GATES, *supra* note 19, at 317. (describing “complicated and lengthy political disputes”).

Moreover, the differences between the Utah Enabling Act and prior statehood acts suggest that Congress struck a deliberate bargain that did not include a duty to dispose of public lands. Congress gave Utah more land than it had given prior states: other states had received two sections in each township for school lands, but Utah received four.²⁷² Further, Congress gave Utah an unprecedented grant of half a million acres for “permanent water reserves for irrigation.”²⁷³ That Utah negotiated for and received these more generous terms suggests it knew how to bargain for clear land grants. That it did not receive a clear congressional promise to dispose of public lands suggests that when drafting the Utah Enabling Act, Congress never intended to make one.

4. Text and History Together

Considering the whole of the Utah Enabling Act’s text and historical context, the most natural reading is that the Act never obligated Congress to dispose of federal lands. Quite the contrary, it followed the regular pattern of statehood acts by expressly preserving exclusive federal power over public lands. The argument that the Utah Enabling Act imposed a duty to dispose of public lands ignores fundamental rules about how courts interpret federal land grants. The TPLA’s defense resolved ambiguities to favor the State rather than the federal government. It relied on a strained reading of a few sections of the Utah Enabling Act while ignoring the plain meaning of most. No court is likely to be persuaded. The far more likely outcome is that a federal court would find that the Enabling Act never obligated Congress to dispose of federal public lands in Utah.

E. The Upshot of Unconstitutionality

In the absence of a congressional duty to dispose of public lands, the TPLA is almost certainly unconstitutional. The claim that Congress had broken a promise in the Utah Enabling Act was the only credible argument for constitutionality, but that argument is far too weak to succeed. Professor Kochan’s argument that Utah may receive the benefit of the Enabling Act’s bargain only by enforcing a federal duty to dispose of lands ignores the fact that Utah already received the benefits of that bargain. Benefits include more generous land grants than any prior state had received,²⁷⁴ as well as

272. *Id.* at 314.

273. *Id.*

274. *See supra* Pt. III(D)(3)(e).

concurrent jurisdiction over federal public lands.²⁷⁵ Similarly, the argument that Utah is reliant on land sales to fund its schools ignores the fact that the state has many other options for school funding.²⁷⁶ The TPLA broadly purports to dictate which lands Congress must dispose of, and when. The Property Clause, however, grants Congress primary power over federal lands,²⁷⁷ and the Supremacy Clause puts the decisions Congress makes beyond state interference.²⁷⁸ Thus, the TPLA is beyond Utah's power.

IV. THE TPLA AND POLITICS

The near certainty that the TPLA is unconstitutional raises the question as to why Utah would pass it and appropriate millions of dollars to enforce it. The answer is that, like prior efforts to take over federal lands, the TPLA is more about politics than law.²⁷⁹ In Utah, the TPLA woos the popular Tea Party, which criticizes the federal government generally and federal land ownership particularly.²⁸⁰ Governor Gary Herbert faced a Tea Party challenger in 2012²⁸¹ and may have signed the TPLA to prevent a challenge in 2016. Ken Ivory, the TPLA's sponsor, won his Utah House seat in 2010 promising to fight the federal government.²⁸² Mike Lee won his U.S. Senate seat championing eminent domain over federal lands.²⁸³ Mr. Ivory may have set his sights on federal office as well.

Certainly, the TPLA aims to provoke federal reaction. Indeed, it demands a congressional land grant. But even Governor Herbert acknowledges that another goal is simply to provoke discussion of federal

275. See *Kleppe*, 426 U.S. at 543 ("Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory.")

276. See *The Facts About HB 148: Unconstitutional, Bad Public Policy and Won't Help Utah Schools*, SOUTHERN UTAH WILDERNESS ALLIANCE (Mar. 23, 2012), <http://suwa.org/the-facts-about-hb-148-unconstitutional-bad-public-policy-and-wont-help-utah-schools/> (noting that Utah has low taxes on fossil fuels and that raising those taxes could solve the state's school funding problem).

277. E.g., *Kleppe*, 426 U.S. at 543.

278. *Id.*

279. See *supra* Pt. I(D) (describing the Sagebrush Rebellion and County Supremacy movement).

280. See Rocky Barker, *Tea Party Groups Support Transfer of Federal Lands*, IDAHO STATESMAN (Dec. 5, 2013), <http://www.idahostatesman.com/2013/12/05/2909000/tea-party-groups-support-transfer.html>.

281. Donald W. Meyers, *Utah tea party founder Kirkham takes on Herbert*, THE SALT LAKE TRIBUNE (Jan. 18, 2012), <http://www.sltrib.com/sltrib/politics/53324974-90/kirkham-herbert-utah-state.html.csp>.

282. *Federalism All-Star: Utah Representative Ken Ivory*, FEDERALISM IN ACTION (Jan. 17, 2014), <http://www.federalisminaction.com/2014/01/federalism-star-utah-representative-ken-ivory/>.

283. Phil Taylor, *U.S. not 'Sovereign' over Federal Lands, Utah GOP Senate Candidate says*, E&E PUBLISHING (July 1, 2010), <http://www.eenews.net/stories/92806>; *About Mike*, Mike Lee U.S. Senate, <http://www.leeforsenate.com/about-mike> (last visited Sept. 4, 2014).

land ownership in the West.²⁸⁴ This goal is much more attainable than receiving federal lands. In fact, because the TPLA will very likely fail in court, Utah's only chance at gaining control over public lands is through Congress.

In the past, states have gained control of public lands from Congress where legal actions have failed. Five states that argued against federal control of public lands between 1828 and 1833 gained those lands by petitioning Congress, not through legal action.²⁸⁵ Utah seemingly learned this lesson by 1934, when its Governor admitted to Congress that the State's claim to public lands was "equitably true," while "not legally true."²⁸⁶ More recent history can remind Utah that its recourse is through Congress, not the courts. In 1953, after the Supreme Court held that the U.S., rather than states, owned the continental shelf within three miles of shore, Congress granted the states that area.²⁸⁷ And while the Sagebrush Rebellion failed in court, it did increase local influence over federal land use decisions.²⁸⁸ The TPLA may also fail in court but achieve some of its goals in Congress.

But Congress should not bow to the TPLA's bluster. In addition to being unconstitutional, the TPLA is also a bad idea. It would regress U.S. public lands policy to the archaic view that lands are primarily sources of revenue, leaving public lands vulnerable to the same overuse that led Congress to manage them in the first place.²⁸⁹ Although the TPLA's backers claim it would fix problems from underfunded schools to forest fires,²⁹⁰ the TPLA would more likely harm both the economy and the environment. Utah is putatively pursuing public lands to raise tax revenue,²⁹¹ but the TPLA would actually eliminate revenue. The U.S. pays

284. Loftin, *supra* note 5 (quoting Gov. Herbert saying the TPLA is "the first step in a long journey").

285. Leshy, *supra* note 31, at 320.

286. *Id.* at 320–21 (quoting Utah Governor Dern in a 1934 congressional hearing).

287. *United States v. California*, 332 U.S. 19, 38–39 (1947) (holding that "California is not the owner of the three-mile marginal belt along its coast, [but] that the Federal Government" is); 43 U.S.C. §§1301–1315 (2002) (giving states title to the three-mile marginal belts along their coasts).

288. Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179, 194 (2005) ("Though the Sagebrush Rebellion failed to transfer federal public land . . . to states or commodity users, it did prompt more state cooperative involvement in federal land administration.").

289. *See supra* Pt. I(B)–(C) (describing how Congress responded to abuse of disposal policies through increased federal control of public lands).

290. CDC, *supra* note 13, at 4–5.

291. *See* Paul Oelerich, *Switchback- Utah House Bill 148- Good Or Bad For Outdoor Recreation?*, UTAH ADVENTURE JOURNAL (Sept. 5, 2012), <http://utahadvjournal.com/index.php/switchback-utah-house-bill-148-good-or-bad-for-outdoor-recreation> (quoting Gov. Herbert on fossil fuel riches waiting to be tapped); *See also supra* note 125 and accompanying text (describing Utah's pursuit of revenue).

states a portion of revenues from many activities on federal lands and compensates states for their inability to tax public lands through payments in lieu of taxes.²⁹² The whole nation subsidizes Utah's tourism industry by paying to preserve public lands.²⁹³ These benefits from federal lands are likely greater than revenues Utah could raise directly.²⁹⁴ Thus, far from bolstering revenues, the TPLA would likely harm the State's economy.

The TPLA would also harm the environment. The most likely way for Utah to raise revenue is to open public lands to extractive uses: mining, logging, and most notably fossil fuel extraction.²⁹⁵ In fact, Utah will likely have to promote extractive uses on a large scale. Managing public lands in Utah costs the U.S. hundreds of millions of dollars each year.²⁹⁶ Without the U.S. to pay the bill, raising that much money—and further revenues—will require widespread exploitation of public lands.²⁹⁷ Drilling for oil and gas under the Grand Staircase Escalante National Monument is a particularly likely outcome.²⁹⁸ By creating an incentive for the State to allow exploitation of public lands on a broad scale, the TPLA would likely damage Utah's environment.

The TPLA also subverts critical principles of federal land management. Although federal land management is far from perfect,²⁹⁹ it is a system that the Constitution designed,³⁰⁰ and that the American conservation movement has championed for over a century.³⁰¹ A vast amount of economic activity relies on federal control, and a shift to state control would be very

292. See Tucker, *supra* note 11, at 5.

293. *E.g.*, *id.* at 6 (“the federal government [in 2012] set aside \$55 million for fire suppression in Utah”).

294. See *id.* at 5–6 (noting that Utah would have difficulty raising enough money to manage the lands and that indirect benefits of federal lands, which would be lost under the TPLA, “total well over \$1 billion”).

295. Land sales would not raise general state revenues, because the TPLA requires 95% of proceeds to go to the United States, while devoting the remaining 5% to state schools. UTAH CODE § 63L-6-103(2) (2012). Thus, to raise revenues, the state would have to open the land to lucrative uses, likely through leases.

296. TUCKER, *supra* note 11, at 4.

297. See Oelerich, *supra* note 283 (quoting the executive director of the Southern Utah Wilderness Alliance as saying that the TPLA would require the state “to lease to the drillers the best of Utah's backcountry—and a lot of it, every year”).

298. *Id.*

299. *E.g.*, John M. Broder, *Undervalued Coal Leases Seen as Costing Taxpayers*, N. Y. TIMES, Jun. 11, 2013, at A19 (describing how the BLM “improperly appl[ied] its own rules for assessing the fair market value of minerals beneath federally owned lands, shortchanging the government and providing a bonanza for a handful of large coal companies”).

300. U.S. CONST. art. IV, §3, cl. 2.

301. See, *e.g.*, Robert B. Keiter, *Public Lands and Law Reform: Putting Theory, Policy, and Practice in Perspective*, 2005 UTAH L. REV. 1127, 1165–68 (2005) (describing the roots of national preservation efforts in the efforts of such individuals as John Muir in the early nineteenth century).

disruptive.³⁰² Most importantly, giving public lands to states would ignore the stake that all U.S. citizens have in public lands. As the Supreme Court explained in 1911, the United States holds public lands “in trust for the people of the whole country.”³⁰³ Congress should not violate that trust by passing 30 million acres of land out of federal control, as Utah demands. Indeed, the TPLA’s demand for federal lands would disrupt the economy, degrade the environment, and disregard the Constitution. Neither the courts nor Congress should pay the TPLA any heed.

302. See e.g., *Maine*, 420 U.S. at 527–28.

303. *Light*, 220 U.S. at 537.