In my previous blog post, I discussed how the location of the Property Clause in Article IV can help answer key debates about congressional versus executive power under the Clause, as well as federal versus state power under the Clause. Here I want to draw on the principles I developed in the prior blog post: the role of the Clause in resolving interstate disputes and advancing horizontal federalism, and the relative primacy of congressional versus executive power under the Clause, to help answer some of the important legal questions under the Clause. (Again, I'm summarizing the main points of this article just out in the Emory Law Journal.)

What is the proper balance of congressional versus executive power under the Clause? Does the President have the power to unilaterally shrink or terminate National Monuments that preceding Presidents have created? Does the President have the unilateral power to end existing or future leases of federal lands for oil and gas development? In both cases the statutory text is silent as to Presidential power, requiring us to resort to some sort of default assumption about congressional versus executive power.

As I summarized in the prior blog post, the position of the Clause in Article IV implies congressional primacy in implementing the Clause. That would imply Presidents do not have the power to either eliminate National Monuments unilaterally or end fossil fuel leasing unilaterally. But on the other hand, the exigencies of managing federal public lands, with thousands of day-to-day management decisions that are far beyond the capacity of a legislature to specify ex ante in legislation, necessarily also implies some residual power for the President to manage without explicit congressional authorization.

Reconciling that tension requires understanding what is the more important decision. Eliminating or shrinking a National Monument opens the door to the transfer (through sale or lease) of federal public lands – a fundamental change in land ownership that is difficult to reverse. Indeed, courts have long held that explicit congressional authorization should be required for the transfer of federal lands by the executive. Moreover, to the extent that the creation of the Clause was intended to ensure that the federal government is a neutral party owning and managing the federal public lands, having Congress (as representative of the states) make that decision is more consonant with the principles of horizontal federalism.

In contrast, leasing federal lands for oil and gas is also a form of transfer of ownership rights. Ending those leases (either current or future ones) retains land in

federal ownership, allowing Congress the power to determine what to do with the land. Unilateral presidential power to end those leases is consistent with protecting congressional authority over the ownership of federal public lands. In other words, a horizontal federalist understanding of the Property Clause supports a principle of protecting federal title from transfer without affirmative congressional authorization.

What about the balance between state versus federal power? Can Congress preempt state laws on federal lands, even beyond the powers Congress already has under Article I? And is federal landownership within the borders of states constitutional?

A horizontal federalism perspective, by emphasizing state-to-state relations, might seem to cut against federal preemption of state law. But the historical context of the Clause in Article IV cuts strongly in the other direction. The Clause was part of a solution to interstate land disputes that involved both ownership and sovereignty. The federal government was brought in as a neutral party to both own and manage those lands, separate from any one state's control. Congressional power to legislate to protect federal lands, and to ensure appropriate management, is an inherent part of the role of the Clause in horizontal federalism. Preemption necessarily follows. If federal public lands could be controlled by state legislation that superseded federal power, that would leave the federal government at the mercy of the states, in conflict with the principle that federal ownership is supposed to avoid state disputes.

A more fundamental challenge to federal public lands is a claim that the lands must be transferred to the states when they are admitted. These arguments generally draw off the concept of the judicially-created "equal footing" doctrine, which sets limits on the extent to which Congress can treat states unequally. For instance, under current caselaw Congress cannot impose conditions on states that it admits to the Union that exceed any constitutional powers Congress might already have. The argument for transferring land from the federal government to the states is that states (like Nevada) that have large areas owned by the federal government are not equal to states (like New York) with very little land owned by the federal government.

Horizontal federalism probably can support a limited version of the equal footing doctrine, in which Congress cannot use its admissions powers to permanently limit the political status of a state, at least without drawing on other powers Congress

might already have (such as the Commerce Clause). And indeed, that is how the Supreme Court's caselaw has mostly understood the "equal footing" doctrine. But horizontal federalism wouldn't support a strong version of the doctrine that required transfer of federal lands to the states. Again, the purpose of the Clause in Article IV was to provide the federal government as a neutral party managing and owning the public lands. Mandatory transfer of federal lands to the states would be in deep tension with that purpose.

I've focused on some key disputes in federal public lands law to explain the importance of understanding the role of Article IV in interpreting the Property Clause. But there are a range of additional issues that my interpretive approach can help inform – issues such as Presidential power to appoint executive officials in territories (like Puerto Rico), for instance. I discuss some of these additional issues briefly at the end of my article as examples of the potential scope of drawing on Article IV as an interpretive tool in American constitutional law.