

January 22, 2016

Memorandum

To: Concerned Citizens of Harney County

From: Michael C. Blumm, Jeffrey Bain Scholar & Professor of Law, Lewis and Clark Law School

Re: KrisAnne Hall and her constitutional interpretations

Rob Bovett of the Association of Oregon Counties asked me to comment on Ms. Hall's interpretation of the Constitution's Property Clause and provided me with a video of her unprecedented and badly reasoned interpretation of the U.S. Constitution and the role of judicial review in American law. I am happy to oblige because I fear the consequences if well-intentioned citizens of Harney County are misled by Ms. Hall and her primitive view of the U.S. Constitution and of the American legal system. A self-proclaimed constitutional lawyer who apparently reads no judicial case law, or who completely ignores it, should not inspire any citizen's trust.

I have taught Public Lands Law for over thirty years and have, in the past, also taught Constitutional Law. I've published well over 100 law review articles and a number of books, including three casebooks that are read in American law school classes. So far as I can tell, Ms. Hall has never written an article appearing in a law journal, although she's produced plenty of what seem to be blog posts. Perhaps her crowded speaking schedule keeps her from finding the time to do the thinking required for serious legal publication.

I have read Professor Suzanne Smith's critique of Ms. Hall's attempt at textual interpretation of the Property and Enclave Clauses of the Constitution and wish to associate myself with Professor Smith's conclusions about Ms. Hall's utter misreading of the text of the Constitution. Professor Smith's criticisms are completely apt. Ms. Hall's interpretation of the text of the Constitution has never been adopted by the Supreme Court, nor any other appellate court of which I am aware, during the last 225+ years. Her interpretation seems to be a fabric of her imagination, not the result of serious legal analysis based on centuries of judicial analysis of the constitutional text.

Professor Smith explained the fallacies of Ms. Hall's reading of the constitutional text. I want to explain how Ms. Hall ignores the long-settled interpretation of the constitutional basis of the federal government's authority to own public lands. In fact, Ms. Hall seems to deny the legitimacy of judicial review of the Constitution at all. Judicial review of the constitutionality of statutes has been a bedrock principle of American law since Chief Justice John Marshall's 1803 decision in *Marbury v. Madison*, a case almost all students studying American Constitutional Law read. Apparently, Ms. Hall missed that class, for what she suggests is not only a challenge to the legitimacy of the *Marbury* principle but to the Supreme Court's role in interpreting the Constitution, a foundational principle of American jurisprudence. She appears to want the citizens of Harney County to be the guinea pigs in her experiment to tear down two centuries of settled judicial precedent. My recommendation is to ignore her legal interpretations. Following

them could prove quite costly to her followers (although of course she herself would incur no liability).

There are, it is true, many contested interpretations of the Constitution. The Supreme Court hears numerous such cases each year and often breaks new constitutional ground with its interpretations. But the Court hardly ever completely reverses prior precedent, and the Court's interpretations of the Property Clause have been consistent for 175 years. There's virtually no chance that the Court would choose to overturn this long line of binding authority.

Since 1840, the Court has consistently ruled that the Property Clause (Article IV, section 3, clause 2) gives the government expansive authority to hold and manage public lands. In the 1840 case, *U.S. v. Gratiot*, the Court decided that the federal government didn't have to give its lands away; it could instead just lease the minerals, retaining its land ownership. Fifty years later, in 1890, in *Camfield v. U.S.*, the Court upheld federal authority to regulate actions on nonfederal lands that affected adjacent federal lands. In that case, the Court enjoined a private landowner from maintaining a fence on his private lands that in effect enclosed public lands. The Court stated that the federal government had the authority to decide whether to sell public lands or withhold them from sale as public interest dictated.

Some twenty years later, in 1911, in *Light v. U.S.*, the Court refused to allow a Colorado rancher to graze his cattle on federal public land without a federal permit, even though his grazing was consistent with state law, because the federal government was a "trustee" of the public's lands. Six years after that, in the 1917 decision of *Utah Power and Light v. U.S.*, the Court applied similar reasoning in deciding that a power company had no right to build a dam on federal lands without federal permission. Nearly a half-century later, in its 1976 decision of *Kleppe v. New Mexico*, the Court rejected the state's claim that it could assert superior title to wild horses protected under the federal Wild Horses Act, upholding federal authority to control the taking of wildlife on (and, indeed, off) federal lands as well as control grazing on the federal lands themselves.

In all of these decisions—and several others—the Supreme Court described federal control of public lands and associated resources as "without limitations" and rejected state claims to authorize private action inconsistent with federal rules. Just this month, the Ninth Circuit Court of Appeals (with jurisdiction over Harney County) threw out a claim of a rancher with a state water right for his livestock, who argued he had a right to have his cattle use federal land to access his water right. The court reiterated the rule of other courts that the existence of state water rights does not affect federal discretion to manage public lands. In short, plenary federal authority under the Property Clause is about as settled a principle of constitutional law as exists. Those who challenge it do so at their own risk.

In the video I saw, Ms. Hall suggested that the equal footing doctrine might be relied upon by those claiming state or county sovereignty to provide some sort of exception or safe harbor from federal liability. This argument has been tried and found wanting in the past. The Supreme Court, in its 1963 decision of *Arizona v. California*, clearly limited the equal footing doctrine—under which states received an implicit grant of the lands underlying navigable waters at the time

of statehood—to submerged navigable riverbeds. The states' only post-statehood means of obtaining title to federal lands that are not submerged is through express federal grants. Equal footing simply has no applicability to the claims currently being made by the militants occupying Malheur National Wildlife Refuge.

The federal government might choose someday to gift the public's federal lands to a state or a county, but that is a discretionary, political act—there is simply no law, constitutional or otherwise, demanding that it do so, despite what ideologues like Ms. Hall may contend.

Ms. Hall may be a passionate advocate. But her views on the Constitution and state sovereignty have no basis in constitutional law, except perhaps to those who fought and lost the Civil War. Her suggestion that the Supreme Court lacks authority to interpret the text of the Constitution is not merely inconsistent with the foundational decision of *Marbury v. Madison*, it was specifically rejected by a unanimous Court when Arkansas challenged a court desegregation order in 1958. In *Cooper v. Aaron*, the Court resoundingly rejected that states' rights challenge, forcefully stating that while the Court might not be infallible, its interpretations of the Constitution are binding on the states—and, indeed, the other branches of government.

Those who claim to be for constitutional government, like Ms. Hall and the occupying militants, must be referring to a different constitution and a different legal system than that which I've studied and taught for the last forty years. Following them would be, in my opinion, reckless for the citizens of Harney County. I urge you to avoid the time, trouble, expense, and liability of doing so.