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# In Defense of the Equal Sovereignty Principle

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## IN DEFENSE OF THE EQUAL SOVEREIGNTY PRINCIPLE

THOMAS B. COLBY†

### ABSTRACT

*The Supreme Court of the United States based its landmark decision in Shelby County v. Holder on the proposition that the Constitution contains “a fundamental principle of equal sovereignty among the States.” For the central holding of a blockbuster constitutional case, that assertion was surprisingly unsupported. The Court simply declared it to be true and made little effort to substantiate it. That naked conclusion prompted savage criticism not only from the left, but also from the right. The consensus critical reaction was epitomized by Judge Richard Posner’s remark that “the court’s invocation of ‘equal sovereignty’ is an indispensable prop of the decision. But . . . there is no doctrine of equal sovereignty. The opinion rests on air.” Critics also worried that, because there are countless federal laws that can be said to treat the states disparately, the Court’s brand-new equal sovereignty principle is, as Justice Ginsburg put it in her strident dissent, “capable of much mischief.” This Article contends that the critics of Shelby County are only half right—and that the Shelby County majority, despite its cursory analysis, is half right too. The critics are correct that the Court seemingly pulled the equal sovereignty principle out of thin air—that it played a little too fast and loose with precedent and failed to wrestle adequately with constitutional text, structure, and history. Nonetheless, this Article concludes—after performing the thorough examination of the traditional sources of constitutional law that was missing from the ipse dixit of Shelby County—that there is indeed a*

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*deep principle of equal sovereignty that runs through the Constitution. In James Madison’s words, the Constitution contemplates “a government of a federal nature, consisting of many coequal sovereigns.” Properly understood, however, the equal sovereignty principle is not a guarantee of state equality in all respects. It guarantees only equal sovereignty—that is, equal capacity for self-government—which makes it more fundamental, but also less expansive, than critics have feared.*

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## INTRODUCTION

In *Shelby County v. Holder*,<sup>1</sup> a sharply divided Supreme Court of the United States struck down a portion of the Voting Rights Act of 1965, as reauthorized in 2006, on the ground that the statute discriminatorily imposed onerous limitations on election-based state lawmaking in some states—the “covered jurisdictions”—but not

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1. *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013).

others.<sup>2</sup> This the Constitution will not tolerate, explained Chief Justice Roberts on behalf of the five-Justice majority, because “[n]ot only do States retain sovereignty under the Constitution, there is also a ‘fundamental principle of *equal* sovereignty’ among the States.”<sup>3</sup>

For the central holding of a blockbuster constitutional case, that assertion was surprisingly unsupported. The Court simply declared it to be true, and made little effort to substantiate it.<sup>4</sup> That naked statement prompted savage criticism not only from the left, but also from the right.<sup>5</sup> Typical of the liberal response were the remarks of David Gans of the Constitutional Accountability Center, who ripped the Court for “[i]gnoring the actual Constitution” by relying on a “principle of equal sovereignty of the states,” despite the fact that “no such principle exists.”<sup>6</sup> “No matter how many times one reads our Constitution,” Gans declared, “the simple fact is that there is no

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2. See *id.* at 2622–28 (striking down the “coverage formula” established by Section 4 of the Voting Rights Act of 1965, 70 Stat. 438, previously codified at 42 U.S.C. § 1973b(b)).

3. *Id.* at 2623 (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)).

4. See Eric Posner, *John Roberts’ Opinion on the Voting Rights Act is Really Lame*, SLATE (June 25, 2013, 1:44 PM), [http://www.slate.com/articles/news\\_and\\_politics/the\\_breakfast\\_table/features/2013/supreme\\_court\\_2013/supreme\\_court\\_on\\_the\\_voting\\_rights\\_act\\_chief\\_justice\\_john\\_roberts\\_struck.html](http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/supreme_court_on_the_voting_rights_act_chief_justice_john_roberts_struck.html) [<http://perma.cc/UH7N-98E4>] (“Yet Roberts is able to cite only the weakest support for this principle—a handful of very old cases that address entirely different matters. None of the usual impressive array of founding authorities show up in his analysis, even though the founding generation took state sovereignty much more seriously than we do today.”).

5. See Edward Cantu, *The Roberts Court and Penumbra Federalism*, 64 CATH. U. L. REV. 271, 310 (2015) (noting that scholars “were virtually unanimous in their rejection of equal sovereignty as a legitimate and controlling aspect of either the Court’s federalism jurisprudence or the meaning of the Constitution as an original matter,” and asserting that, “[a]ccording to a vast majority of commentators, equal sovereignty as a constitutional rule was implausible and the product of rhetorical trickery”); Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2133 n.103 (2015) (“The legal commentariat generally viewed the doctrine as an invention.”).

6. David H. Gans, *In Recent Rulings, Supreme Court Views Constitution’s Promise in Vastly Different Ways*, LOUISVILLE COURIER-J. (July 7, 2013), <https://theconstitution.org/news/recent-rulings-supreme-court-views-constitutions-promises-vastly-different-ways> [<https://perma.cc/GN7Q-KAW3>]; see also Edward Cantu, *The Separation-of-Powers and the Least Dangerous Branch*, 13 GEO. J.L. & PUB. POL’Y 1, 13 (2015) (“[T]he ‘fundamental principle of equal sovereignty’ is clearly not.”); Joseph Fishkin, *The Dignity of the South*, 123 YALE L.J. ONLINE 175, 177 (2013) (“This principle has a nice ring to it. But as a constraint on the federal government’s power to treat states unequally, it has no basis either in constitutional text or in existing constitutional doctrine.”); Jon Greenbaum, Alan Martinson & Sonia Gill, *Shelby County v. Holder: When the Rational Becomes Irrational*, 57 HOW. L.J. 811, 846–54 (2014) (arguing that the equal sovereignty principle is utterly lacking in support); Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713, 714, 733 (2014) (referring to the equal sovereignty principle as “unjustified” and “made up”).

‘Equality of States Clause’ in it. Such an amendment might be on many conservatives’ wish lists, but it is simply not part of the Constitution.”<sup>7</sup> Stanford Law School’s Michael McConnell offered a similar (if less inflammatory) critique from a conservative perspective: “This is a nice idea; it might be on my list of desirable constitutional amendments. But it is not in the Constitution we have.”<sup>8</sup> The consensus critical reaction was epitomized by Judge Richard Posner’s remark that “the court’s invocation of ‘equal sovereignty’ is an indispensable prop of the decision. But . . . there is no doctrine of equal sovereignty. The opinion rests on air.”<sup>9</sup>

In an incredulous dissent, Justice Ginsburg opined that the Court’s brand-new equal sovereignty principle was not only utterly made up, but also “capable of much mischief.”<sup>10</sup> She listed a number of federal statutes that treat the states disparately and thus appear to be imperiled by the Court’s revolutionary new principle. First among them was the Professional and Amateur Sports Protection Act of 1992 (PASPA), which prohibits sports gambling, but exempts Nevada from its scope.<sup>11</sup> As it happens, PASPA was at that moment being challenged in litigation by the state of New Jersey.<sup>12</sup> New Jersey’s case was argued in the Third Circuit just a day after the Supreme Court handed down its decision in *Shelby County*. At the oral argument, the state’s lawyers, including former Solicitor General Theodore Olson, placed heavy weight on *Shelby County*, sensing that its impact could be momentous. But they seemed uncertain of just what to make of it<sup>13</sup>—as did the Third Circuit judges when they ultimately rejected the state’s argument three months later.<sup>14</sup> Because the Supreme Court’s

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7. Gans, *supra* note 6.

8. *Town Hall Debate: McConnell and Rosen on the Voting Rights Act*, YAHOO NEWS (June 25, 2013, 6:45 PM), <http://news.yahoo.com/town-hall-debate-mcconnell-rosen-voting-rights-act-184607340.html> [<http://perma.cc/ZJX2-JYN7>].

9. Richard A. Posner, *The Voting Rights Act Ruling is About the Conservative Imagination*, SLATE (June 26, 2013, 12:16 AM), [http://www.slate.com/articles/news\\_and\\_politics/the\\_breakfast\\_table/features/2013/supreme\\_court\\_2013/the\\_supreme\\_court\\_and\\_the\\_voting\\_rights\\_act\\_striking\\_down\\_the\\_law\\_is\\_all.html](http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/the_supreme_court_and_the_voting_rights_act_striking_down_the_law_is_all.html) [<http://perma.cc/JA46-KY62>].

10. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2649 (2013) (Ginsburg, J., dissenting).

11. *See id.* (citing 28 U.S.C. § 3704 (2012)). For a summary of PASPA and its exemptions, see Thomas B. Colby, *Revitalizing the Forgotten Uniformity Constraint on the Commerce Power*, 91 VA. L. REV. 249, 250–52 (2005).

12. *See NCAA v. Governor of New Jersey*, 730 F.3d 208 (3d Cir. 2013).

13. *See Oral Argument, NCAA*, 730 F.3d 208 (3d Cir. 2013) (Nos. 13-1713, 13-1714 & 12-1715), <http://www.ca3.uscourts.gov/oral-argument-recordings> (select “All Oral Argument Files”; scroll down and select “13-1713, 13-1714 & 13-1715 NCAA et al. v. Gov. of N.J. et al.wma”).

14. *See NCAA*, 730 F.3d at 237–39.

discussion of its new equal sovereignty principle had been so surprisingly undeveloped, it was impossible to say just what the principle meant or what application it should have, and the judges felt obligated to confine it primarily to the narrow context of the Voting Rights Act.<sup>15</sup>

This Article contends that *Shelby County*'s critics are only half right—and that the *Shelby County* majority, despite its cursory analysis, is half right too. The critics are correct that the Court seemingly pulled the equal sovereignty principle out of thin air—that it played a little too fast and loose with precedent and failed to wrestle adequately with constitutional text, structure, and history.<sup>16</sup> Nonetheless, this Article maintains that there is indeed a deep structural principle of equal sovereignty that runs through the Constitution. And, in fact, statutes like PASPA *are* constitutionally questionable<sup>17</sup> (though most of the federal statutes listed by Justice Ginsburg and others as potentially imperiled are not). The Court's critics have therefore misdirected their fire. They would be better advised to focus their criticism on the *Shelby County* Court's conclusion that there was no adequate justification for the Voting Rights Act's deviation from the principle of equal sovereignty—a dubious proposition upon which I express no firm opinion here—rather than on the Court's conclusion that such a principle exists in the first place. That is to say, there is a strong argument that the Voting Rights Act should have survived the heightened scrutiny triggered by its contravention of the principle of equal sovereignty. But the notion that the Constitution does not contain such a principle at all is misguided.

This Article seeks to articulate the constitutional argument—conspicuously missing from the *ipse dixit* of *Shelby County*—in favor of the equal sovereignty principle, and to begin to develop a framework for its operation. At this point in time, as exemplified by

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15. See *id.* at 239 (declaring that “there is nothing in *Shelby County* to indicate that the equal sovereignty principle is meant to apply with the same force outside of the context of ‘sensitive areas of state and local policymaking’” (quoting *Shelby Cty.*, 133 S. Ct. at 2624)).

16. See Katyal & Schmidt, *supra* note 5, at 2136 (arguing that “the Court should not have adopted the equal sovereignty doctrine with so little ventilation”).

17. In 2005, I published an article in the *Virginia Law Review* raising that very possibility. See Colby, *supra* note 11. That article posited a relatively narrow doctrinal rule—that Congress cannot discriminate between the states in its exercise of the commerce power. *Id.* This Article comes at the issue from a different angle, exploring the more fundamental constitutional principle of equal state sovereignty.

the Third Circuit's throw-its-hands-up-in-the-air decision in the PASPA case, no one knows what the equal sovereignty principle means, whether it is legitimately a part of our Constitution, where it comes from, and what effect it has.<sup>18</sup> This Article endeavors to defend, develop, and explain the principle (as well as to sensibly cabin it), and to start to answer those questions.<sup>19</sup>

Part I summarizes and criticizes the Court's inadequate discussion of equal sovereignty in *Shelby County* and sets out a superficially compelling case—grounded in precedent, text, and history—*against* the equal sovereignty principle. Part II drills down further into the sources of constitutional law to undermine that initial case, constructing in its place a more compelling argument—again grounded in precedent, text, and history (but this time more deeply), and also in constitutional structure—in *support* of the principle of equal sovereignty among the states. And finally, Part III briefly sketches out what a better-grounded equal sovereignty principle would look like in practice. Properly understood, the equal sovereignty principle is not a guarantee of state equality in all respects. It guarantees only equal *sovereignty*—equal capacity for self-government—which makes it more fundamental, but much less expansive, than Justice Ginsburg and other critics have feared.

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18. See Erwin Chemerinsky, *The Court Affects Each of Us: The Supreme Court Term in Review*, 16 GREEN BAG 2D 361, 369–70 (2013) (“What part of the Constitution did Section 4(b) violate? What level of scrutiny was the Court using? What is the constitutional basis for the principle of equal sovereignty? None of these questions was addressed by the Court.”); Katyal & Schmidt, *supra* note 5, at 2134 (“The Court’s creation of the equal sovereignty principle . . . raised many more questions than it answered. . . . Where does the equal sovereignty principle come from? Is there a textual hook, or is it just an inference from constitutional structure?”); *id.* at 2136 (noting that “federal courts will have to grapple with the logic and limits of the equal sovereignty principle for a while”). Thus, for instance, a number of public-interest groups and law professors filed an amicus curiae brief in *King v. Burwell* speculating that it might conceivably violate the equal sovereignty principle to read the Affordable Care Act to disallow federal subsidies in states that do not choose to operate their own health insurance exchanges. See Brief of Amici Curiae Jewish Alliance for Law and Social Action (JALSA) et al. in Support of Respondents at 12–35, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114), 2015 WL 350366. Part III of this Article suggests that it would not, insofar as all states are afforded the same sovereign right to establish health insurance exchanges.

19. Shortly before the publication of this Article, I was made aware of another not-yet-published article—written contemporaneously with this one, but only posted online after a draft of this Article had been posted—that seeks to accomplish some of these same objectives, albeit largely on different grounds. See Jeffrey M. Schmitt, *In Defense of Shelby County’s Principle of Equal State Sovereignty*, 68 OKLA. L. REV. (forthcoming 2016).

## I. THE INADEQUACY OF *SHELBY COUNTY* AND THE SUPERFICIALLY COMPELLING CASE AGAINST THE EQUAL SOVEREIGNTY PRINCIPLE

The Supreme Court first floated the idea that the Voting Rights Act might run afoul of some principle of equal sovereignty among the states in dicta in the 2009 case of *Northwest Austin Municipal Utility District Number One v. Holder*,<sup>20</sup> also authored by Chief Justice Roberts. In that case, the Court flagged “serious” constitutional questions surrounding the Voting Rights Act, but concluded that those questions were not squarely raised by the facts of the case.<sup>21</sup> The entirety of the Court’s off-hand discussion of equal sovereignty in *Northwest Austin* consisted of the following three-sentence paragraph:

The [Voting Rights] Act also differentiates between the States, despite our historic tradition that all the States enjoy “equal sovereignty.” *United States v. Louisiana*, 363 U.S. 1, 16 (1960) (citing *Lessee of Pollard v. Hagan*, 3 How. 212, 223 (1845)); see also *Texas v. White*, 7 Wall. 700, 725–726 (1869). Distinctions can be justified in some cases. “The doctrine of the equality of States . . . does not bar . . . remedies for *local* evils which have subsequently appeared.” [*South Carolina v. Katzenbach*, [383 U.S. 301], at 328–329 [(1966)] (emphasis added). But a departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.<sup>22</sup>

When the Court squarely confronted the constitutional issue four years later in *Shelby County*, and directly concluded that the Voting Rights Act’s coverage formula contravenes the constitutional mandate of equal sovereignty, its discussion was no less compact and offhand. Indeed, the Court relied on the above paragraph from *Northwest Austin* as the core authority for its conclusion. Here is the Court’s analysis of the existence of the equal sovereignty principle, in full:

Not only do States retain sovereignty under the Constitution, there is also a “fundamental principle of *equal* sovereignty” among the States. *Northwest Austin*, [557 U.S.], at 203 (emphasis added). Over a hundred years ago, this Court explained that our Nation “was and

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20. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009).

21. *See id.* at 204, 206–11.

22. *Id.* at 203 (alterations in original); see Katyal & Schmidt, *supra* note 5, at 2134 (“The Court’s creation of the equal sovereignty principle was as cursory as it was disruptive . . .”).



is a union of States, equal in power, dignity and authority.” *Coyle v. Smith*, 221 U.S. 559, 567 (1911). Indeed, “the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized.” *Id.* at 580. *Coyle* concerned the admission of new States, and *Katzenbach* rejected the notion that the principle operated as a *bar* on differential treatment outside that context. [*Katzenbach*,] 383 U.S., at 328–329. At the same time, as we made clear in *Northwest Austin*, the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States. [*Northwest Austin*,] 557 U.S., at 203.

The Voting Rights Act departs from these basic principles.<sup>23</sup>

This breezy analysis—making fundamental constitutional law in a few conclusory sentences—combined a troubling misuse of precedent with a surprising failure to make any detailed attempt to ground the equal sovereignty principle in either the Constitution’s text or its history.<sup>24</sup> This Part endeavors to demonstrate that—at first glance, anyway—precedent, text, and history all appear to belie the Court’s naked conclusion.

#### A. Precedent

The *Northwest Austin* Court’s quotation of *South Carolina v. Katzenbach*<sup>25</sup> comes across as practically Orwellian. In *Katzenbach*, the Justices in fact *rejected* the argument that the Voting Rights Act runs afoul of a doctrine of equality among the States, squarely declaring that “that doctrine applies only to the terms upon which States are admitted to the Union.”<sup>26</sup> Yet the *Northwest Austin* Court audaciously quoted that very sentence from *Katzenbach* as primary support for its contrary argument, using an ellipsis to skip over the

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23. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2623–24 (2013) (citing parenthetical and parallel citations omitted).

24. See generally Zachary S. Price, *NAMUDNO’s Non-Existent Principle of State Equality*, 88 N.Y.U. L. REV. ONLINE 24 (2013) (criticizing *Northwest Austin* along these lines and anticipating and condemning the Court’s forthcoming move in *Shelby County*).

25. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

26. *Id.* at 328–29. The full sentence from *Katzenbach* reads as follows: “The doctrine of the equality of States, invoked by South Carolina, does not bar this approach, for that doctrine applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared.” *Id.*

part of *Katzenbach* that renders reliance on that case untenable.<sup>27</sup> That is to say, the Court brazenly quoted *Katzenbach* “as support for the idea that a ‘doctrine of the equality of the states’ exists—concealing the part about how ‘that doctrine applies only to the terms upon which the States are admitted to the Union’ behind a strategically placed ellipsis.”<sup>28</sup>

In *Shelby County*, the Court then took the apparent ruse one step further. The Chief Justice begrudgingly acknowledged (for the first time) that *Katzenbach* had actually limited the applicability of the doctrine of state equality outside of the context of the admission of new states.<sup>29</sup> But he then relied on *Northwest Austin* for the proposition that, nonetheless, “the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of the States.”<sup>30</sup>

This amounted to a double sin. First, the Court tried to minimize the meaning and scope of *Katzenbach* by declaring that *Katzenbach* simply “rejected the notion that the [state-equality] principle operated as a *bar* on differential treatment outside th[e] context” of “the admission of new States.”<sup>31</sup> But *Katzenbach* did not just say that the state-equality doctrine *fails to impose a categorical bar* on all differential treatment of the states outside of the context of admission to the Union. It said that that doctrine has *no effect at all* outside of that context—that it “applies only to the terms upon which States are admitted to the Union.”<sup>32</sup>

Second, having deceptively carved out of *Katzenbach* space for a state-equality doctrine that might operate (short of a categorical bar) outside of the context of the admission of new states, the Court immediately declared that that space had already been filled by *Northwest Austin*: “[A]s we made clear in *Northwest Austin*, the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States.”<sup>33</sup> This sleight-

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27. See Price, *supra* note 24, at 30–31 (“Note the ellipses and added emphasis. The quote in [*Northwest Austin*] omits key phrases from *Katzenbach*, thereby reversing the implication of the quoted passage.”).

28. Fishkin, *supra* note 6, at 177; see also Katyal & Schmidt, *supra* note 5, at 2133.

29. See *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2623–24 (2013) (“*Katzenbach* rejected the notion that the principle operated as a *bar* on differential treatment outside that context.”).

30. *Id.* at 2624.

31. *Id.* at 2623–24.

32. *South Carolina v. Katzenbach*, 383 U.S. 301, 328–29 (1966).

33. *Shelby Cty.*, 133 S. Ct. at 2624.

of-hand simply bootstrapped *Northwest Austin*'s blatant mischaracterization of *Katzenbach* into a brand-new constitutional rule.<sup>34</sup> As Justice Ginsburg bemoaned in her dissent, "the Court ratchet[ed] up what was pure dictum in *Northwest Austin*, attributing breadth to the equal sovereignty principle in flat contradiction of *Katzenbach*."<sup>35</sup> And it did so "with nary an explanation of why it finds *Katzenbach* wrong, let alone any discussion of whether *stare decisis* nonetheless counsels adherence to *Katzenbach*'s ruling on the limited 'significance' of the equal sovereignty principle."<sup>36</sup>

Aside from *Katzenbach*, which in fact had expressly limited the state-equality doctrine to the admission of new states, and *Northwest Austin*, which had patently misread *Katzenbach*, the Court in *Shelby County* and *Northwest Austin* cited only a handful of other cases in support of the equal sovereignty principle. But those cases—*Coyle v. Smith*,<sup>37</sup> *United States v. Louisiana*,<sup>38</sup> and *Pollard's Lessee v. Hagan*<sup>39</sup>—which the Court did not analyze at all, were all decided under the "equal footing doctrine"—the doctrine requiring equality for newly admitted states.<sup>40</sup>

In a recent article in the *New York University Law Review* responding to *Northwest Austin*, Professor Zachary Price makes a compelling argument that the equal footing doctrine is a narrow one that covers new states only and provides no support whatsoever for a

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34. This was an especially egregious sin, given that the *Northwest Austin* Court purported not to reach the constitutional issue. See Katyal & Schmidt, *supra* note 5, at 2134–35 (arguing that by purporting only to flag, rather than decide, the issue in *Northwest Austin*, but then relying on *Northwest Austin* as dispositive in *Shelby County*, "[t]he Court was . . . able to use the avoidance canon to effect and then mask its major doctrinal transformation").

35. *Shelby Cty.*, 133 S. Ct. at 2649 (Ginsburg, J., dissenting); see also Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *State's Rights, Last Rites, and Voting Rights*, 47 CONN. L. REV. 481, 519–21 (2014).

36. *Shelby Cty.*, 133 S. Ct. at 2649 (Ginsburg, J., dissenting); see also *Town Hall Debate: McConnell and Rosen on the Voting Rights Act*, *supra* note 8 (remarks of Michael McConnell) ("I do not believe the Court is rigidly required to comply with all precedent, but I do believe we are entitled to explanation when it does not.").

37. *Coyle v. Smith*, 221 U.S. 559 (1911).

38. *United States v. Louisiana*, 363 U.S. 1 (1960).

39. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845).

40. Actually, the Court cited one other case—*Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869)—which has nothing explicit to say about state equality at all, holding only that the states retain sovereignty under the Constitution and that the Southern states had not lawfully seceded from the Union because our nation is "an indestructible Union, composed of indestructible States." See Price, *supra* note 24, at 32 n.9. The possible relevance of *White* is discussed *infra* note 353.

broader principle of equal sovereignty among existing states.<sup>41</sup> That doctrine, explains Price, is concerned with a specific problem.<sup>42</sup> Because the admission of new states on equal terms with the existing states would water down the power and influence of the existing states in Congress, Congress (composed, of course, entirely of representatives from the existing states) might be tempted to admit new states on less favorable terms instead—giving itself more power over those states than the Constitution gives it over the original states.<sup>43</sup> The equal footing doctrine simply precludes Congress from doing so.<sup>44</sup> In the Supreme Court’s words, it rejects “the contention that any [new] State[s] may be deprived of any of the power constitutionally possessed by other States, as States, by reason of the terms in which the acts admitting them to the Union have been framed.”<sup>45</sup>

The equal footing doctrine provides that, whatever powers are reserved to the states by the Constitution—whatever protections the architecture of constitutional federalism provides to the states—those powers and protections are the same for all states, regardless of when they entered the Union.<sup>46</sup> It is in this respect that new states enter the Union on “equal footing” with existing states. But, argues Price, the “equal footing principle says nothing about whether federal legislation, validly enacted pursuant to Congress’s enumerated powers, must treat states equally. Insofar as Congress could treat the original states unequally, it can do the same to the new states . . . .”<sup>47</sup> And whether Congress could treat the original states unequally is simply not the province of the equal footing doctrine.<sup>48</sup> That doctrine is about discrimination against new states, not about discrimination among existing states. It does not speak to the issue of discrimination among existing states.

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41. See Price, *supra* note 24, at 32–39.

42. *Id.* at 33.

43. *Id.*

44. See *id.* (“[S]uch conditions are enforceable only if Congress could have imposed them on an existing state.”).

45. *Coyle v. Smith*, 221 U.S. 559, 570 (1911).

46. Price, *supra* note 24, at 33–34.

47. *Id.* at 34.

48. See *id.* at 32 (“The equal footing doctrine . . . provides no support for a requirement of equal treatment of states in federal legislation.”).

Price then canvasses the Supreme Court's equal footing cases to elicit ample support for his conclusion.<sup>49</sup> For instance, the Court's most important equal footing decision, *Coyle v. Smith*, held unenforceable a provision in the federal statute admitting Oklahoma to the Union that precluded the new state from moving its state capital.<sup>50</sup> That provision was invalid because Congress could not impose a similar requirement on the existing states.<sup>51</sup> Choosing where to locate a state capital is an exclusive state prerogative—an incident of state sovereignty—that lies beyond the power of the federal government.<sup>52</sup> Congress cannot use an admission statute to burden a new state with a prohibition or obligation “in respect of matters which would otherwise be exclusively within the sphere of state power.”<sup>53</sup> But the *Coyle* Court went on to explain that Congress remains free to impose conditions in admission statutes that “are within the scope of the conceded powers of Congress over the subject.”<sup>54</sup> If the Constitution provides that Congress can regulate in a particular area, then Congress could interfere with the sovereignty of the *existing* states in that area—in which case there is nothing unequal about its interfering with the sovereignty of a *new* state in that area.

From this, Price concludes that the equal footing doctrine—the only actual authority relied upon by the *Northwest Austin* and *Shelby County* decisions to support the equal sovereignty principle—in fact provides no support for that principle at all.<sup>55</sup> The doctrine establishes only that if Congress could not impose a burden on an existing state, it cannot impose it on a new state. It has nothing whatsoever to say about whether Congress can discriminate among the existing states.

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49. *See id.* at 34–38.

50. *Coyle v. Smith*, 221 U.S. 559, 579 (1911).

51. *See id.* at 565 (“That one of the original thirteen States could now be shorn of [the powers to locate and change its state capital] by an act of Congress would not be for a moment entertained.”).

52. *Id.*

53. *Id.* at 568.

54. *Id.*; *see also id.* at 574:

It may well happen that Congress should embrace in an enactment introducing a new State into the Union legislation intended as a regulation of commerce among the States, or with Indian tribes situated within the limits of such new State, or regulations touching the sole care and disposition of the public lands or reservations therein, which might be upheld as legislation within the sphere of the plain power of Congress.

55. *See Price, supra* note 24, at 38 (“In sum, the equal footing doctrine provides no support for a general requirement that federal legislation treat states equally.”).

### B. Text

If the Court's treatment of precedent in establishing the equal sovereignty principle was rushed and seemingly less than completely sincere, its treatment of the Constitution's text was nonexistent. Nowhere in the Court's terse discussions of equal sovereignty in *Northwest Austin* and *Shelby County* does it so much as mention a single provision of the constitutional text.

That absence is, of course, damning on its own; if there were a provision of the Constitution that actually supported the Court's holding, surely the Court would have cited it. But the omission may be even more egregious than that. In fact, even a cursory examination of the constitutional text—an examination that the Court conspicuously did not perform—seems to reveal not only that there is no *explicit* constitutional principle of state equality, but also that there can be no such principle *implicit* in the Constitution either. That is to say, the text is not just damning in its silence; it affirmatively cuts against the Court's conclusion.

Textually, the Constitution *does* explicitly mandate the equal treatment of the states, but only in several particular respects. Under the Tax Uniformity Clause, for instance, “all Duties, Imposts, and Excises [imposed by Congress] shall be uniform throughout the United States.”<sup>56</sup> Likewise, the Naturalization and Bankruptcy Clauses empower Congress to “establish [a] uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States.”<sup>57</sup> And the Port Preference Clause provides that “[n]o Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another.”<sup>58</sup> The existence of these narrow and specific textual demands for state equality strongly implies the absence of an unwritten, general equality mandate.<sup>59</sup> It would make little sense for a

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56. U.S. CONST. art. I, § 8, cl. 1.

57. *Id.* cl. 4.

58. *Id.* § 9, cl. 6.

59. See Price, *supra* note 24, at 27 (“The text of the Constitution, moreover, implies the absence of a general principle of state equality by mandating some forms of equal treatment but not others.”); *id.* at 28 (arguing that “at least in the absence of some compelling reason to infer a constitutional principle of state equality, the specificity of guarantees such as the Tax Uniformity Clause and the Port Preference Clause suggests that no general rule otherwise guards states against unequal treatment in federal legislation”); *Town Hall Debate: McConnell and Rosen on the Voting Rights*, *supra* note 8 (remarks of Michael McConnell):

Constitution that implicitly requires equality among the states across the board to contain a handful of particular and limited explicit state-equality provisions.

### C. History

The Court's treatment of history resembled its treatment of text—in that it, too, was nonexistent. And just as with the text, a cursory examination of the history that the Court ignored seems quite damning.

To begin with, even the narrow (and seemingly inapplicable, in any event) equal footing doctrine is historically dubious. At the Constitutional Convention, the Framers affirmatively rejected a provision that would have required all new states to be admitted on equal footing with the existing states.<sup>60</sup> Although James Madison and others supported that provision,<sup>61</sup> it was removed from the Constitution on the motion of Gouverneur Morris,<sup>62</sup> who later explained that his intention in striking the provision was to allow for Congress, when admitting new states, “to govern them as provinces and allow them no voice in our counsels.”<sup>63</sup> So, in fact, the history shows that the equal footing doctrine was *intentionally left out of* the Constitution.

It is true that the equal footing doctrine nonetheless enjoys a long historical pedigree in the sense that Congress (or the president)

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More importantly, this “fundamental principle” is not to be found in the constitutional text. There are specific provisions requiring equal treatment of states, such as the one prohibiting any “Preference . . . by any Regulation of Commerce or Revenue to the Ports of one State over those of another,” or the one stating that bankruptcy laws must be “uniform”—or even the neglected requirement of the Spending Clause that money may be expended only for the “general” welfare, as opposed to the sort of local projects Congress now feels free to fund. But there is no generalized equal protection clause for the states.

60. See 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 492 (Jonathan Elliot ed., J.B. Lippincott & Co. 2d ed. 1891) [hereinafter ELLIOT'S DEBATES] (summarizing the debate over the motion to strike a proposed clause providing that “the new states shall be admitted on the same terms as the original states”).

61. See *id.* (“Mr. Madison opposed the motion; insisting that the Western States neither would, nor ought to, submit to a union which degraded them from an equal rank with the other states. . . . Mr. Sherman was against the motion, and for fixing an equality of privileges by the Constitution.”).

62. See *id.* at 492–93.

63. William A. Dunning, *Are the States Equal Under the Constitution?*, 3 POL. SCI. Q. 425, 437 (1888) (quoting an 1803 letter from Morris); see also 5 ELLIOT'S DEBATES, *supra* note 60, at 492 (“Mr. Langdon was in favor of the motion. He did not know but circumstances might arise which would render it inconvenient to admit new states on terms of equality.”).

has always promised equality to the new states in their formal admission resolutions,<sup>64</sup> and the Supreme Court has formally condoned the doctrine for well over a century.<sup>65</sup> But it would seem that peeling back the façade of this historical pedigree reveals nothing of substance underneath. Actual historical practice, rather than the empty formality of abstract legislative and judicial proclamations, reveals routine discrimination against new states throughout history.<sup>66</sup> In the very same enactments in which it has always offered *pro forma* promises of equal footing, Congress has explicitly imposed all sorts of obligations on new states that it has not—and often could not—impose on existing states: from bans on polygamy to mandates for Prohibition, jury-trial rights, and open public schools.<sup>67</sup> Congress may have claimed to be admitting the new states on equal footing, but what it actually did belies what it disingenuously said. In the words of one historian who has exhaustively canvassed the historical record,

“[T]he history of the use of conditions [imposed by Congress on new states]—used unequally against states that are perceived as different or disloyal, in areas far removed from the enumerated federal powers of Article I, and to subordinate states to an overarching federal system—raises questions about the historical grounding for the Court’s legal conclusions [about the equal footing doctrine].”<sup>68</sup>

In addition, if we turn to history for insight on the real question at issue—whether Congress can discriminate among *existing* states, rather than against new states—we see a similar story. Congress has a long track record of discriminating among the existing states in a wide variety of respects.<sup>69</sup> Congressional budgetary “earmarks” benefit certain states, and not others.<sup>70</sup> Congress uses its power over federal property to benefit some states—by, for instance, establishing jobs-

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64. See Peter S. Onuf, *New State Equality: The Ambiguous History of a Constitutional Principle*, 18 *PUBLIUS* 53, 54–55 (1988).

65. See *infra* Part II.A.

66. See Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 *AM. J. LEGAL HIST.* 119, 120 (2004) (“Of the thirty-seven states admitted to the Union since the adoption of the Constitution (plus the eleven Southern states readmitted after the Civil War), almost all of them have had some sort of condition imposed on them when they were admitted.”); Onuf, *supra* note 64, at 55 (“Yet new states were not in fact equal to old states.”).

67. See Biber, *supra* note 66, at 130–31; Onuf, *supra* note 64, at 55; *infra* note 114.

68. Biber, *supra* note 66, at 124.

69. See Colby, *supra* note 11, at 327–34, 341–46; Price, *supra* note 24, at 28–29.

70. See Price, *supra* note 24, at 28.



providing military bases—and to burden others—such as sticking Nevada with most of the nation’s high-level nuclear waste.<sup>71</sup> Congress sets differing agricultural quotas for the various states.<sup>72</sup> Congress sometimes enacts pilot programs that operate only in some states, as a means of testing particular federal initiatives.<sup>73</sup> Congress has enacted regulatory laws that apply in some states, but not others,<sup>74</sup> has exempted some states from certain federal regulatory obligations,<sup>75</sup> has “grandfathered” some states from certain federal regulatory requirements,<sup>76</sup> and has even allowed some states the leeway to enact their own regulatory programs, while denying that leeway to other states.<sup>77</sup> In the words of one historian, “[t]he conclusion from all the historical facts seems to be that at no time since the formation of the present constitution have all the states of the Union been in the enjoyment of equal powers under the laws of Congress.”<sup>78</sup>

In sum, the history, like the text and the caselaw, seems not to support the equal sovereignty principle at all.

## II. THE CASE FOR THE EQUAL SOVEREIGNTY PRINCIPLE

The preceding Part sets out what, at first glance, seems to be a potent—perhaps even devastating—argument against the equal sovereignty principle: the Court’s new doctrine apparently lacks any grounding in precedent, text, or history. But this Part digs deeper into all three of those inquiries, with an emphasis on constitutional structure as well. In so doing, it seeks to establish that there is, in fact, something to the equal sovereignty principle—something substantial and important. The lack of a clear textual mandate is far less significant than it might first appear, and both the history and the caselaw, along with the underlying structure of our constitutional system, actually provide powerful support for a constitutional commitment to equal sovereignty.<sup>79</sup>

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71. See Colby, *supra* note 11, at 334 n.305.

72. See *id.* at 346.

73. See Price, *supra* note 24, at 28 & n.23.

74. See Colby, *supra* note 11, at 346.

75. See *id.* at 341.

76. See *id.* at 341–42.

77. See *id.* at 343–45; Price, *supra* note 24, at 29.

78. Dunning, *supra* note 63, at 452.

79. Aside from its express support for some measure of structural reasoning, this Article is intentionally agnostic as to the proper method of constitutional interpretation. What follows will, I believe, establish that nearly all of the traditional modalities of constitutional argument,

### A. *The Equal Footing Doctrine*

Perhaps the best place to start is with the equal footing doctrine—both because it touches directly on text, history, structure, and precedent, and because it was the equal footing cases upon which the *Shelby County* Court purported to rely. As noted above, it is true that the equal footing doctrine has dubious originalist credentials, insofar as the Framers chose not to include it within the constitutional text.<sup>80</sup> But we should be careful not to make too much of that omission. Gouverneur Morris, who made the motion to strike the provision, later explained that he, personally, was motivated by a desire to admit future states on less compelling terms: “I always thought that, when we should acquire Canada and Louisiana it would be proper to govern them as provinces, and allow them no voice in our councils.”<sup>81</sup> But Morris did not express that view clearly to his fellow delegates, precisely because he did not think that they would agree: “In wording the third section of the fourth article, I went so far as circumstances would permit to establish the exclusion. Candor obliges me to add my belief, that, had it been more pointedly expressed, a strong opposition would have been made.”<sup>82</sup> The most that can be comfortably said about the framing history, then, is that the Framers chose not to resolve the equal footing issue explicitly at the Convention.<sup>83</sup>

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see PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12–13 (1982), cut in favor of the existence of a flexible and sensibly cabined equal sovereignty principle. Thus, one need not take sides in the interpretive debates to agree with the conclusions presented here.

80. *See supra* Part I.C.

81. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 404 (Max Farrand ed., 1911) (1803 letter from Gouverneur Morris to Henry W. Livingston).

82. *Id.*

83. *See* Valerie J.M. Brader, *Congress’ Pet: Why the Clean Air Act’s Favoritism of California Is Unconstitutional Under the Equal Footing Doctrine*, 13 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 119, 132 (2007) (“Even Morris admitted that many other founders would not have agreed with his interpretation, and the debates make it clear that a contentious issue was essentially resolved with compromise language that had as its chief asset room for ambiguity.”). Admittedly, the Framers did, in one particular respect, textually preserve greater sovereignty for old states than for new ones, at least temporarily. The ninth section of Article I provides that the “Migration or Importation of such Persons as any of the States *now existing* shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight.” U.S. CONST. art. 1, § 9, cl.1 (emphasis added). This clause “implicitly allowed Congress to ban transatlantic slave imports to new states even before 1808.” AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 275 (2005). This was as much of a concession as the antislavery forces could obtain without scaring the deep Southern states away from the Convention. 2 ELLIOT’S DEBATES, *supra* note 60, at 452 (James Wilson in the Pennsylvania ratifying convention):

1. *The Equal Footing Pedigree.* The equal footing doctrine may not have been explicitly woven into the constitutional text, but it nonetheless has a long and unbroken statutory pedigree. At the very same time that the Philadelphia Convention was punting on the issue of equality for new states, the Continental Congress in New York was crafting the Northwest Ordinance,<sup>84</sup> which explicitly required that any new states carved from the Northwest Territories must enter the Union “on an equal footing” with the original states.<sup>85</sup> Virtually every admission statute in our nation’s history has followed the lead of the Northwest Ordinance.<sup>86</sup> Time and time again, new states have been

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[I]t was all that could be obtained. I am sorry it was no more; but from this I think there is reason to hope, that yet a few years, and it will be prohibited altogether; and in the mean time, the *new* states which are to be formed will be under *the control* of Congress in this particular, and slaves will never be introduced amongst them.

; *id.* at 115 (General William Heath in the Massachusetts ratifying convention) (“The federal Convention went as far as they could. The migration or importation, &c., is confined to the states now *existing only*; new states cannot claim it.”). As Professor Gillian Metzger has noted, the inclusion of this “provision could signal either that the Framers accepted that new states might have lesser powers, or (by operation of the *expressio unius* maxim) that in all other regards the states were to be equal.” Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1518 n.210 (2007). Professor Akhil Amar argues in favor of the latter interpretation:

True, the words “equal footing” did not appear [in the Constitution]. Yet this idea shone through in the document’s general structure and in many of its specific rules. Apart from [the 1808 Clause], the Constitution nowhere distinguished between the original states and later ones. . . . Gouverneur Morris later bragged about how he had successfully blocked a specific guarantee of equal footing; but regardless of the outcome of this textual battle, Morris had lost the structural war. The original thirteen states would have no privileged place within America’s New World order.

AMAR, *supra*, at 274–75.

84. See Jack N. Rakove, *Ambiguous Achievement: The Northwest Ordinance, in NORTHWEST ORDINANCE: ESSAYS ON ITS FORMULATION, PROVISIONS AND LEGACY* 14–15 (Frederick D. Williams ed., 1988).

85. An Act to Provide for the Government of the Territory North-West of the River Ohio, art. V, ch. 8, 1 Stat. 50, 53 n.a (1789) (incorporating the original Northwest Ordinance under the newly ratified Constitution). The Northwest Ordinance was first enacted by the Continental Congress. After the ratification of the Constitution, the first Congress voted to keep the ordinance in effect under the new government. See Brader, *supra* note 83, at 133. (Although the First and Second Continental Congress and the Congress of the Confederation were the nation’s legislative bodies before the U.S. Constitution went into effect, this Article refers to both of these legislatures as the Continental Congress to reduce confusion.)

86. See Onuf, *supra* note 64, at 54 (“[The Northwest Ordinance] was extended directly or by implication to other territories. Every state was admitted—whether by act or joint resolution of Congress or by presidential proclamation—with an express declaration of equality.”).

explicitly “admitted into the Union on an equal footing with the original States in all respects whatsoever.”<sup>87</sup>

The equal footing doctrine has a long judicial pedigree as well.<sup>88</sup> The Supreme Court has recognized and enforced it since the 1830s.<sup>89</sup> Early on, the Court was unclear about whether the doctrine was simply a statutory one—dictated by the new states’ admission statutes—or whether it contained a constitutional component (notwithstanding the Constitution’s textual silence on the matter).<sup>90</sup> But in 1845, the Court made clear that the doctrine is of constitutional dimension. The Justices declared that a statutory provision seeking to admit a new state on unequal terms—with an unequal “municipal right of sovereignty”—would be “void and inoperative.”<sup>91</sup> Since then, the Court has repeatedly emphasized the constitutional nature of the equal footing guarantee.<sup>92</sup> As the Court put it in 1857, “[c]learly Congress could exact of the new State the surrender of no attribute inherent in her character as a sovereign independent State, or indispensable to her equality with her sister States, necessarily implied and guarant[e]d by the very nature of the Federal compact.”<sup>93</sup>

Over the last 180 or so years, the Court has applied the equal footing doctrine in a number of contexts, many of which touch directly on the mandate of equal sovereignty among states. In *Permoli v. Municipality No. 1 of New Orleans*,<sup>94</sup> for instance, the

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87. *E.g.*, An Act to Enable the People of Wisconsin Territory to Form a Constitution and State Government, and for the Admission of Such State Into the Union, ch. 89, 9 Stat. 56, 56 (1846).

88. *See* *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195 (1987) (“The equal footing doctrine is deeply rooted in history . . .”).

89. *See* Brader, *supra* note 83, at 136–37 (discussing the early cases).

90. *See* Price, *supra* note 24, at 33 n.48 (citing *Mayor of New Orleans v. De Armas*, 34 U.S. (9 Pet.) 224, 235–36 (1835)).

91. *Pollard’s Lessee v. Hagan*, 44 U.S. (3 How.) 212, 223 (1845); *see also* *Mayor of Mobile v. Eslava*, 41 U.S. (16 Pet.) 234, 258–59 (1842) (Catron, J., concurring) (stating that new states have “equal capacities of self-government with the old states, and equal benefits under the constitution of the United States”).

92. *See, e.g.*, *Ward v. Race Horse*, 163 U.S. 504, 511 (1896) (“[T]he language of the act admitting Wyoming into the Union, which recognized her coequal rights, was merely declaratory of the general rule.”); *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 434 (1892) (“[T]he equality prescribed would have existed if it had not been thus stipulated.”); *Escanaba & Lake Mich. Trans. Co. v. City of Chicago*, 107 U.S. 678, 688–89 (1883) (“[Illinois] was admitted, *and could be admitted*, only on the same footing with [the original states].” (emphasis added)).

93. *Withers v. Buckley*, 61 U.S. (20 How.) 84, 93 (1857).

94. *Permoli v. Mun. No. 1 of New Orleans*, 44 U.S. (3 How.) 589 (1845).

Court rejected the notion that Congress could force Louisiana to protect religious liberty rights. Although prior to the Fourteenth Amendment “[t]he Constitution [made] no provision for protecting the citizens of the respective states in their religious liberties,” Louisiana’s enabling act—the federal statute allowing it to become a state—required it to protect religious freedom as a condition of statehood.<sup>95</sup> The Court held that the enabling act had no effect once Louisiana was admitted to the Union. Congress could require the state to include a particular provision in the state constitution as a condition of admission—because until that point, Louisiana was just a territory without equal sovereignty rights—but once Louisiana gained admission to the Union, Congress lost control over the contents of its law and its state constitution.<sup>96</sup> Louisiana was free to amend its constitution to remove a provision whose inclusion Congress had previously mandated as a condition of statehood.

Similarly, in *Coyle v. Smith*, discussed briefly above,<sup>97</sup> the Court held unconstitutional Congress’s attempt to limit Oklahoma’s ability to move its state capital. Oklahoma’s enabling act of 1906 required the new state to keep its capital in Guthrie at least until 1913.<sup>98</sup> But in 1910, the state legislature enacted a law to move the capital to Oklahoma City.<sup>99</sup> The Supreme Court held that the state was free to do so, notwithstanding the contrary provision in its enabling act. “The power to locate its own seat of government and to determine when and how it shall be changed from one place to another . . . are essentially and peculiarly state powers.”<sup>100</sup> The notion that “one of the original thirteen States could now be shorn of such powers by an act of Congress would not be for a moment entertained.”<sup>101</sup> Because a new state cannot “be placed upon a plane of inequality with its sister States in the Union,” the restriction in the enabling act was unconstitutional.<sup>102</sup>

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95. *Id.* at 609.

96. *See id.* at 610.

97. *See supra* Part I.A.

98. *See* Oklahoma Enabling Act, ch. 3335, § 2, 34 Stat. 267, 268–69 (1906).

99. *See* *Coyle v. Smith*, 221 U.S. 559, 563–64 (1911).

100. *Id.* at 565.

101. *Id.*

102. *Id.*

2. *Equal Footing and Congressional Power.* These and other cases emphasize that the equal footing doctrine mandates that Congress cannot impose a burden on a new state, in the state's enabling act, that it would not be able to impose upon an existing state. A corollary of that proposition, however, is that if the burden imposed by the enabling act is one that Congress could also impose on an original state—because it falls within the scope of a power delegated to the federal government by the Constitution—then Congress does not violate the Constitution by imposing it on the new state. This is a point that the cases have emphasized as well.<sup>103</sup>

This could suggest one of two things. First, it could suggest that the states have a residual degree of sovereignty protected by the enumerated-powers doctrine and recognized by the Tenth Amendment.<sup>104</sup> What the equal footing doctrine does is simply establish that new states have that same residuum of sovereignty. So whenever Congress is acting within a legitimate sphere of federal power, rather than in a sphere exclusively reserved to the states under the Tenth Amendment, the equal footing doctrine does not come into play at all. As such, that doctrine does not tell us anything about

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103. See, e.g., *id.* at 573:

[W]hen a new State is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original States, and . . . 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.

; see also *id.* at 574 (“It may well happen that Congress should embrace in an enactment introducing a new State into the Union legislation intended as a regulation of commerce among the States . . . which might be upheld as legislation within the sphere of the plain power of Congress.”); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 229 (1845):

By the 8th section of the 1st article of the Constitution, power is granted to Congress “to regulate commerce with foreign nations, and among the several states.” If, in the exercise of this power, Congress can impose the same restrictions upon the original states, in relation to their navigable waters, as are imposed, by this article of the compact, on the state of Alabama, then this article is a mere regulation of commerce among the several states, according to the Constitution, and, therefore, as binding on the other states as Alabama.

In *United States v. Sandoval*, 231 U.S. 28 (1913), the Court upheld a provision of the New Mexico enabling act that prohibited introducing alcohol into Indian country on the ground that the Constitution gives Congress the power to regulate commerce with the Indian tribes, as well as an unenumerated power to “exercis[e] a fostering care and protection over all dependent Indian communities,” *id.* at 45–46, and “[b]eing a legitimate exercise of that power, the legislation in question does not . . . disturb the principle of equality among the States,” *id.* at 49.

104. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

whether Congress can discriminate (in terms of respecting sovereignty) between the states in the course of exercising its legitimate powers; if Congress could discriminate among the original states, then it can discriminate among the new ones too. Whether Congress could or could not discriminate among the existing states when legislating within its legitimate spheres of influence is a question utterly distinct from, and completely unaffected by, the equal footing doctrine. Equal footing is about discrimination against new states only. This is Professor Price's view.<sup>105</sup>

These cases could also mean something different, however. The statements about how burdens imposed on new states are valid if they could have been enacted pursuant to a legitimate federal power might mean simply that the equal footing doctrine does not grant new states any *greater* protection from federal regulation—any greater degree of sovereignty—than the Constitution gives to the original states. In other words, they might simply be an expression of equal sovereignty. At no point do these cases come out and say that Congress is free to enact *discriminatory, unequal* burdens on the sovereignty of the new states, so long as it is exercising a legitimate federal power. Rather, the cases might be suggesting that Congress could *not* do so. The cases could be saying that Congress cannot admit a new state without making it the sovereign equal of the other states, not simply because of a narrow equality principle governing the admission of new states, but rather because of a broad, generalized principle of equal state sovereignty. On this view, the equal footing doctrine is just a particular, concrete aspect of a broader and deeper principle. No state, new or old, can have more or less sovereignty than the other states. New states are admitted into the Union on these terms, with the understanding that they, just like the existing states, will now and always be on equal footing and have equal sovereignty with all of the other states. And that means that Congress cannot, even when

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105. See *supra* Part I.A. It is also Justice Ginsburg's. See *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2649 (2013) (Ginsburg, J., dissenting) (chastising the majority for its "unprecedented extension of the equal sovereignty principle outside its proper domain—the admission of new States"). Going one step further, one could read these cases not to be *irrelevant* to the question of Congress's ability to discriminate among existing states in exercising its legitimate powers, but instead to affirmatively *support* the view that Congress can do so. See Greenbaum et al., *supra* note 6, at 848 (reading *Coyle* to say that "Congress can enact laws affecting states differently at admission where its powers would allow it to do so in any event," and declaring that, "[i]mplicit in this, of course, is the notion that Congress may enact legislation that affects different states differently").

exercising one of its legitimate powers, enact legislation that treats any of the states (new or old) as unequal sovereigns.

It is true that the equal footing cases all involve the admission of new states, because those are the circumstances in which Congress is most tempted to try to make second-class citizens of particular states. And those are the circumstances in which Congress is most able to do so—when the states being discriminated against do not yet have representation in the Congress doing the discriminating. But that does not mean that the true nature of the principle at play is necessarily the narrower concept, rather than the broader one.

Indeed, when we stop to think about it, the broader concept seems far more intuitive. To say that the new states must be admitted on equal footing with the old states would seem to imply, almost by necessity, that the old states are already on equal footing with each other.<sup>106</sup> What else could it mean? If new states must be on equal footing with old states, but old states are not on equal footing with each other, then to require that new states be admitted on equal footing with old states is to say that new states need *not* be on equal footing with the other states—which would be gibberish.

In addition, Madison's notes from the Constitutional Convention summarizing the discussion that led to the decision not to include the equal footing doctrine explicitly in the constitutional text make it plainly evident that the Framers were assuming that the original states were all on equal footing.<sup>107</sup> The issue was simply whether to

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106. See *United States v. Louisiana*, 363 U.S. 1, 77 (1960) (noting that the “concept of equal footing” involves the “political sovereignty guaranteed equally to all States”); *Pollard's Lessee*, 44 U.S. at 224 (noting that “the municipal sovereignty of the new states will be complete, throughout their respective borders, and they, and the original states, will be upon an equal footing, in all respects whatever”); cf. DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801*, at 104 (1997) (“[Under the Northwest Ordinance,] the new states were to be admitted ‘on an equal footing’ with the old; *there would be no second-class members of the Union*. Vital as it was to harmonious relations, the equal footing doctrine was later found implicit in the Philadelphia Constitution; the Ordinance was its source and its inspiration.” (emphasis added) (footnotes omitted)).

107. See Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 288 (1992) (noting that, even if the Framers did not agree on whether new states needed to be admitted on equal footing, “there is no evidence that any of the [original] thirteen were to be less than equal”); see also 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 81, at 469 (1825 letter from William Steele to Jonathan Steele recounting the words of Jonathan Dayton, Convention delegate from New Jersey) (explaining that when the Convention initially resolved to have proportional representation in the Senate, the small-state delegates met and issued an ultimatum to the Convention that, if that decision were not overturned, “and the smaller states



extend that same privilege to new states. Madison, who opposed the motion to strike the equal footing language, explained that *no states* “would, nor ought to, submit to a union which degraded them from an equal rank with the other states.”<sup>108</sup> Hugh Williamson, who supported the motion, disagreed on the merits, but explicitly shared the underlying assumption: “Mr. Williamson was for leaving the legislature free. The existing small states enjoy an equality now, and for that reason are admitted to it in the Senate. This reason is not applicable to new Western States.”<sup>109</sup>

Once we accept—as I think we must—that the equal footing doctrine exists, has long been understood to be of constitutional dimension, and implicitly necessitates the proposition that *all* states are on equal footing, then the only way to avoid the fundamental constitutional principle of equal sovereignty among the states is to say that, although all states (old and new) are on equal footing, that does not mean that they enjoy equal sovereignty—that equal footing entails some form of state equality that is distinct from, and somehow less than, equal sovereignty. But that is simply not consistent with historical practice. The equal footing doctrine has always been understood to include—indeed, to consist primarily of—a guarantee of equal sovereignty. The mandate has always been for the new states to be admitted “upon an equal footing with the 13 Original States, having the same rights of freedom, sovereignty, and Independence as the said States.”<sup>110</sup> The Supreme Court has routinely reiterated that equal footing is about an equal “municipal right of sovereignty”<sup>111</sup>—“equal capacities of self-government.”<sup>112</sup> In short, as the Supreme Court has made clear, “[t]he ‘equal footing’ [doctrine] has long been held to refer to political rights and to sovereignty.”<sup>113</sup>

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put upon an *equal footing* with the largest,” the small-state delegates would walk out of the Convention).

108. 5 ELLIOT’S DEBATES, *supra* note 60, at 492.

109. *Id.* (emphasis omitted).

110. 30 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 249 (John C. Fitzpatrick ed., 1934) (May 10, 1786) (reporting the work of the committee tasked with developing a plan for governing the western territories).

111. *Pollard’s Lessee*, 44 U.S. at 223.

112. *Mayor of Mobile v. Eslava*, 41 U.S. (16 Pet.) 234, 259 (1842) (Catron, J., concurring) (“This is the extent of the guarantee.”); *see also* *Coyle v. Smith*, 221 U.S. 559, 573 (1911) (declaring that “when a new State is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original States”).

113. *United States v. Texas*, 339 U.S. 707, 716 (1950).

So then we are left only with the possibility that even though all states are on equal footing, and thus must have equal sovereignty, that principle is nonetheless not offended by acts of Congress that discriminate between states by affording some states greater sovereignty than others, *so long as Congress is acting pursuant to one of its legitimate powers*. This is the most charitable interpretation of the narrow view of the equal footing cases. It reads those cases in dual sovereignty, Tenth Amendment terms to say only that the basic federal–state balance is the same for the new states as it is for the old states. Congress cannot regulate or limit the sovereignty of the new states except in areas in which it is constitutionally empowered to act vis-à-vis *all* of the states. It is in this limited respect that the new states possess the same degree of sovereignty as do the original states; since Congress cannot limit New York or Virginia’s ability to move its state capital, it cannot limit Oklahoma’s ability either. But when Congress exercises one of its legitimate powers—acts within one of its legitimate spheres—it is free to afford more sovereignty to Oklahoma or New York than it affords to Virginia. If Congress could burden all of the states, then it can burden only some of them, or just one of them.

But the fundamental problem with this narrow conception of the equal footing doctrine—that it guarantees new states the same sovereignty as the original states in the limited sense of confining Congress to the same pool of powers to act over them, but has nothing to say about whether Congress can discriminate between states (old or new) in exercising its legitimate constitutional powers—is that it seems ultimately pointless. Why would we care whether the new states are on equal footing with the old states if Congress is free to discriminate among any and all states? If Congress is already free to discriminate against whatever states it wants, then telling the new states that they are on equal footing with the old states does not really help them; it does not protect them from discrimination. And in that case, the doctrine seems irrelevant.

To be fair, this is overstating the point. The narrow view of the equal footing doctrine does not render the doctrine entirely irrelevant. Confining Congress only to its lawful powers when it seeks to regulate new states undoubtedly affords important protections to those states. And this was especially true before the New Deal, when the sphere of legitimate federal authority was understood to be substantially smaller than it is today. Many of the permanent limitations that Congress attempted to impose upon new states over

the years were in fact unconstitutional under even the narrow understanding of equal footing—from limitations on polygamy and alcohol consumption, to English language mandates, to requirements for religious toleration and open public schools—because Congress was, at the time, not considered to have any authority in those areas.<sup>114</sup> But, according to the narrow view, when Congress is legislating pursuant to a legitimate federal power, equal footing does not come into play, and discrimination is perfectly constitutional. The Constitution does not guarantee equal sovereignty to the states.

3. *Equal Footing Is Grounded in Equal Sovereignty.* But that is not what the Supreme Court seems to have had in mind in the equal footing cases. That is not what it seems to have meant when it noted that conditions imposed on new states would be valid if they could be imposed pursuant to a legitimate federal power. Although the facts and holdings of the equal footing cases are generally consistent with

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114. See Biber, *supra* note 66, at 130–31 (listing conditions imposed by Congress). Most of these limitations never gave rise to litigation. But some did, and were struck down. See, e.g., *Coyle*, 221 U.S. at 568 (striking down Congress’s attempt to preclude Oklahoma from moving its state capital); *Bolln v. Nebraska*, 176 U.S. 83, 87–89 (1900) (upholding a provision of the Nebraska Constitution that permitted prosecution of felonies on the basis of information, despite a provision in the state’s enabling act that arguably required the use of grand juries); *Permoli v. Mun. No. 1 of New Orleans*, 44 U.S. (3 How.) 589, 609–10 (1845) (holding that it would violate the equal footing doctrine for Congress to mandate that Louisiana must protect religious liberties after statehood); *Potter v. Murray City*, 760 F.2d 1065, 1068 (10th Cir. 1985) (discussing *Coyle* and assuming arguendo that Congress’s attempt to permanently preclude Utah from adopting polygamy was unconstitutional, but noting that Utah has never sought to introduce polygamy since becoming a state); *Williams v. Hert*, 110 F. 166, 169 (C.C.D. Ind. 1901) (holding that an attempt by Congress in a new state’s enabling act to guarantee criminal procedure rights in the state’s courts that must “forever remain unalterable” violates the equal footing doctrine). The fact that Congress imposed so many of these conditions, while simultaneously paying lip service to the equal footing guarantee, should not be taken as evidence that such conditions are constitutional, especially given the fact that judges slapped them down when the conditions were tested in court. It should be viewed, instead, as evidence that the members of those Congresses, “like other politicians, could raise constitutional ideals one day and turn their backs on them the next.” *Lee v. Weisman*, 505 U.S. 577, 626 (1992) (Souter, J., concurring). Keith Whittington explains,

Such decisions did not stop Congress from using its statehood enabling acts (and comparable bills) to make declarations about what the future states could “never” do, but it was now widely understood as it had not been before that such declarations had no legal force. They were symbolic and hortatory. The courts would not enforce the supremacy of federal law in such cases.

Keith E. Whittington, *Judicial Review of Congress Before the Civil War*, 97 GEO. L.J. 1257, 1315 (2009). In any event, since the critics of the equal sovereignty principle accept the equal footing doctrine (at least when narrowly construed), and seek only to confine it to the admission of new states, the existence of these conditions on new state admissions undermines their interpretation as much as it undermines mine.

either view of the doctrine, the reasoning and rhetoric of the cases clearly express the broader view: Congress is obligated to respect a core constitutional principle that all states are entitled to equal sovereignty.

Take *Coyle v. Smith*. In explaining the equal footing doctrine, the *Coyle* Court noted that there is no express equality requirement in the provision of Article IV that provides that “new States may be admitted by the Congress into this Union.”<sup>115</sup> “But what is this power?” asked the Court.<sup>116</sup> “It is not to admit political organizations which are less or greater, or different in dignity or power, from those political entities which constitute the Union.”<sup>117</sup> To the contrary, “[t]he power is to admit ‘new States into *this* Union.’”<sup>118</sup> “‘This Union,’” the Court explained, “was and is a union of States, equal in power, dignity and authority.”<sup>119</sup> The Court continued, “To maintain otherwise would be to say that the Union, through the power of Congress to admit new States, might come to be a union of States unequal in power.”<sup>120</sup> And that would violate the Constitution, which contemplates—indeed necessitates—a union of equal sovereigns. Thus, Congress may not “by the imposition of conditions in an enabling act, deprive a new State of any of those attributes essential to its equality in dignity and power with other States.”<sup>121</sup>

In other words, the Court was saying that the equal footing doctrine is not just an unmoored doctrine about the permissible terms of admission for new states. It is instead a specific manifestation of a general principle of state sovereign equality that is “necessarily implied and guarant[e]d by the very nature of the Federal compact.”<sup>122</sup> As one federal court put it in the late nineteenth century,

“[t]he doctrine that new states must be admitted . . . on an ‘equal footing’ with the old ones does not rest on any express provision of the constitution . . . but on what is considered . . . to be the general

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115. *Coyle*, 221 U.S. at 566 (quoting U.S. CONST. art. IV, § 3).

116. *Id.*

117. *Id.*

118. *Id.* at 567.

119. *Id.*

120. *Id.*

121. *Id.* at 568, 570.

122. *Withers v. Buckley*, 61 U.S. (20 How.) 84, 93 (1857).

character and purpose of the union of the states . . . —a union of political equals.”<sup>123</sup>

Or, in the Supreme Court’s words, the “perfect equality” of all “members of the Confederacy” with regard to their “attributes as . . . independent sovereign Government[s]” “follow[s] from the very nature and objects of the Confederacy, [and] from the language of the Constitution.”<sup>124</sup> As such, the equal sovereignty principle, upon which the equal footing doctrine is based, is not limited to the admission of new states. Rather, “[e]quality of constitutional right and power is the condition of all the States of the Union, old and new.”<sup>125</sup> “There can be no distinction between the several States of the Union in the character of the jurisdiction, sovereignty and dominion which they may possess and exercise over persons and subjects within their respective limits.”<sup>126</sup>

The cases are thus expressly grounded in the broad view of the equal footing doctrine, not the narrow one. They articulate an understanding of the equal footing doctrine that is premised on—and necessitates the existence of—the equal sovereignty principle.<sup>127</sup> They stand for the proposition that Congress, regardless of the power that it seeks to exercise, is constrained to respect the constitutionally mandated sovereign equality of all of the states.

And it is this broad view that better accords with the structure of constitutional federalism. The narrow view seems to be implicitly (if unintentionally) premised on an unduly cramped understanding of the nature of state sovereignty in our federal system. It seems to assume that state sovereignty exists only in those areas protected by the Tenth Amendment—only in those spheres in which the federal government is disempowered from acting. If that were true, then limiting the federal government to its legitimate spheres when admitting new states would be sufficient to vindicate the lofty vision of equal state sovereignty forcefully advanced in the equal footing cases.

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123. *Case v. Toftus*, 39 F. 730, 732 (C.C.D. Or. 1889).

124. *Withers*, 61 U.S. at 92.

125. *Escanaba & Lake Mich. Trans. Co. v. City of Chicago*, 107 U.S. 678, 689 (1882).

126. *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 434 (1892).

127. *See PPL Mont., LLC v. Montana*, 132 S. Ct. 1215, 1227 (2012) (noting, essentially, that “the basis for the equal footing doctrine” is the “principle” that all of “the States in the Union are coequal sovereigns under the Constitution”).

But it is not the case that the states are sovereign only in the areas in which they possess *exclusive* sovereignty under the Tenth Amendment. There are, instead, many areas in which the states and the federal government possess concurrent sovereignty.<sup>128</sup> As Alexander Hamilton explained in the *Federalist Papers*, because “the plan of the Convention aims only at a partial union or consolidation, the State Governments . . . clearly retain all the rights of sovereignty which they before had and which were not . . . *exclusively* delegated to the United States.”<sup>129</sup> “The necessity of a concurrent jurisdiction in certain cases results from the division of the sovereign power,” Hamilton expounded.<sup>130</sup> Thus, “the rule that all authorities, of which the States are not explicitly divested in favour of the Union, remain with them in full vigour, is not only a theoretical consequence of that division, but is clearly admitted by the whole tenor of the . . . constitution.”<sup>131</sup>

Of course, the Supremacy Clause<sup>132</sup> gives Congress the greater, ultimate authority in those areas of concurrent sovereignty, in the sense that Congress gets the final word. But the states retain genuine sovereignty within those spheres nonetheless.<sup>133</sup> And so, federal laws in those areas implicate and infringe state sovereignty, even though they do not generally violate the Constitution.<sup>134</sup> Thus, for instance,

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128. See, e.g., *Gilman v. City of Philadelphia*, 70 U.S. (3 Wall.) 713, 727 (1865) (noting that sometimes “the power to regulate commerce may be exercised by the States”); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 425 (1819) (“That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths which have never been denied.”).

129. THE FEDERALIST NO. 32, at 200 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

130. *Id.* at 203.

131. *Id.*

132. U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

133. *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) (“[U]nder our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause.”); *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 669–70 (1981) (“It has long been recognized that, ‘in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it.’” (quoting *S. Pac. Co. v. Arizona*, 325 U.S. 761, 767 (1945))).

134. See *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 290 (1981) (“Although such congressional enactments obviously curtail or prohibit the States’ prerogatives

the Supreme Court has long employed a presumption against preemption that is explicitly grounded in respect for the constitutionally significant sovereignty of the states in areas of concurrent authority.<sup>135</sup> As the Court has noted,

because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action. In all pre-emption cases, and particularly in those in which Congress has “legislated in a field which the States have traditionally occupied,” we “start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”<sup>136</sup>

Once we appreciate that federalism recognizes and respects state sovereignty even in areas in which Congress is empowered to act, it becomes clear that, in order to vindicate the passionate assertion in the equal footing cases that “[t]here can be no distinction between the several States of the Union in the character of the jurisdiction, sovereignty and dominion which they may possess and exercise over persons and subjects within their respective limits,”<sup>137</sup> Congress cannot be allowed to use its legitimate powers in a way that affords more sovereign authority to some states than to others. In the words of the Supreme Court at the turn of the twentieth century,

[T]he whole Federal system is based upon the fundamental principle of the equality of the States under the Constitution. The idea that one State is debarred [by Congress], while the others are granted, the privilege of amending their organic laws to conform to the wishes of their inhabitants, is so repugnant to the theory of their equality under the Constitution that it cannot be entertained.<sup>138</sup>

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to make legislative choices respecting subjects the States may consider important, the Supremacy Clause permits no other result.”).

135. See, e.g., *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 533 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (noting the “principles of federalism and respect for state sovereignty that underlie the Court’s reluctance to find pre-emption”).

136. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (citations omitted) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); see also *id.* (“That approach is consistent with . . . federalism concerns . . .”).

137. *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 434 (1892).

138. *Bolln v. Nebraska*, 176 U.S. 83, 89 (1900).

4. *Equal Footing Even When Congress Is Exercising a Legitimate Federal Power.* Perhaps there are those who doubt—despite the unambiguous rhetoric—that the Court in the equal footing cases was really employing the broader conception of state sovereign equality. To placate those doubters, we would presumably need an equal footing case involving a situation in which Congress discriminated against a new state in an area of concurrent authority, where Congress is generally empowered to act with regard to all states. In other words, we would need a situation in which Congress limited the sovereignty of a new state, but did not do so for the other states, even though it could, if it so desired, have done so for all of the states through the exercise of one of its legitimate powers. A situation like that would squarely tee up the question whether the equal footing doctrine gets at a deeper principle of state sovereign equality, or just establishes that the dual sovereignty system and the Tenth Amendment apply to new states. But those situations were few and far between in the nineteenth and early twentieth centuries—the time period in which the Union was expanding and the Court was deciding the major equal footing cases—because the scope of legitimate federal power was understood to be much more limited then.

Consider the hot-button question of whether it was unconstitutional for Congress to admit new states on the condition that those states permanently ban slavery. In 1819 and 1820, during the build-up to the Missouri Compromise, Congress fiercely debated imposing such a condition on Missouri. That prospect raised equal footing concerns because “if Missouri was required to renounce slavery it would be deprived of the right to resolve the issue for itself as other states could; it would not have the same sovereign rights that other states enjoyed.”<sup>139</sup> Those congressional debates recognized that there could be no reasonable objection to conditioning admission to the Union on the new state’s compliance with a mandate that Congress had the independent constitutional authority to impose.<sup>140</sup> But the question whether Congress, in exercising its legitimate powers, has the constitutional authority to impose a sovereignty-curtailing mandate on a new state without also imposing it on the other states was not presented, because it was generally understood at

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139. DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS, THE JEFFERSONIANS 1801–1829*, at 243 (2001).

140. *See id.* at 238; *id.* at 239 (“Everyone seemed to agree that what Congress could prescribe by ordinary legislation it could make a condition of statehood.”).



that time that Congress's legitimate powers were not expansive enough to encompass abolishing slavery in the states at all.<sup>141</sup> Thus, even on the narrow conception of equal footing, imposing such a condition on Missouri would have been unconstitutional.<sup>142</sup>

But, as it happens, there is a line of equal footing cases that provides substantial insight—those involving the free navigation of waterways.<sup>143</sup> The Supreme Court has held since the days of John Marshall—that is to say, even before judicial recognition of the equal footing doctrine—that the power to regulate intrastate navigable waters that connect to the interstate waterway system is a concurrent power, shared by the federal government and the states.<sup>144</sup> Rivers “constitute navigable waters of the United States . . . when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries.”<sup>145</sup> Both the states and the Congress have the sovereign authority to regulate those waterways, but in the event of conflicting regulations, the federal law will trump pursuant to the Supremacy Clause.<sup>146</sup>

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141. See, e.g., Declaration of the Anti-Slavery Convention (Dec. 4, 1833), in PROCEEDINGS OF THE ANTI-SLAVERY CONVENTION, ASSEMBLED AT PHILADELPHIA, DEC. 1833, at 15 (New York, Door & Butterfield 1833) (“We fully and unanimously recognize the sovereignty of each State, to legislate exclusively on the subject of slavery which is tolerated within its limits; we concede that Congress, *under the present national compact*, has no right to interfere with any of the slave States, in relation to this momentous subject.”); Paul Finkelman, *Lincoln, Emancipation, and the Limits of Constitutional Change*, 9 SUP. CT. REV. 349, 354 (2008) (“In 1860 a claim of federal power to end slavery in the states was simply unthinkable for someone like Lincoln, who took law and constitutionalism seriously.”).

142. See *Strader v. Graham*, 51 U.S. (10 How.) 82, 93–94 (1850); CURRIE, *supra* note 139, at 244–45; Onuf, *supra* note 64, at 62 & n.19. *But see* John C. Eastman, *Re-evaluating the Privileges or Immunities Clause*, 6 CHAP. L. REV. 123, 129–33 (2003) (advocating an even narrower conception of equal footing based on the fact that the Northwest Ordinance purported to permanently ban slavery from new states while at the same time guaranteeing their admission on equal footing).

143. See *Sands v. Manistee River Improvement Co.*, 123 U.S. 288, 293 (1887); *Cardwell v. Am. River Bridge Co.*, 113 U.S. 205, 208 (1885); *Escanaba & Lake Mich. Trans. Co. v. City of Chicago*, 107 U.S. 678, 688 (1883); *Withers v. Buckley*, 61 U.S. (20 How.) 84, 88–89 (1857); *Huse v. Glover*, 15 F. 292, 293 (C.C.N.D. Ill. 1883) (Harlan, J.).

144. See *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 252 (1829) (Marshall, C.J.).

145. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870).

146. See *Willson*, 27 U.S. at 252; *see also* *Gilman v. City of Philadelphia*, 70 U.S. (3 Wall.) 713, 729 (1865) (“The States have always exercised this power, and from the nature and objects of the two systems of government they must always continue to exercise it, subject, however, in all cases, to the paramount authority of Congress, whenever the power of the States shall be exerted within the sphere of the commercial power which belongs to the nation.”).

In *Escanaba & Lake Michigan Trans. Co. v. City of Chicago*,<sup>147</sup> the Supreme Court heard a case filed by a company that operated steamships in interstate commerce on Lake Michigan and various connecting waterways. The City of Chicago, acting under a grant of authority from the State of Illinois, constructed several drawbridges over the Chicago River. The plaintiff shipping company sought to compel the City to take down those bridges, as their frequent closings impeded shipping along the river.<sup>148</sup> The company noted that the Acts of Congress enabling the creation of and admitting the State of Illinois mandated that the navigable waters of the new state, including the Chicago River, “shall be common highways and forever free.”<sup>149</sup> Thus, argued the company, the bridges were erected in violation of federal law.<sup>150</sup>

In rejecting that argument, the Supreme Court began by observing that the “Chicago River and its branches must . . . be deemed navigable waters of the United States, over which Congress under its commercial power may exercise control.”<sup>151</sup> But, at the same time, “the States have full power to regulate within their limits matters of internal police,” which “power embraces the construction of . . . bridges.”<sup>152</sup> Invoking the Supremacy Clause, the Court explained that “[i]f the power of the State and that of the Federal government come in conflict, the latter must control and the former yield.”<sup>153</sup> “But until Congress acts on the subject, the power of the State over bridges across its navigable streams is plenary.”<sup>154</sup>

The Court then considered and dismissed the shipping company’s argument that Congress *had* acted on the subject—by requiring in the state’s enabling act that navigation of the Chicago River be “forever free.”<sup>155</sup> The Court held that that limitation “could not control the authority and powers of the State after her admission,” because “[o]n her admission she at once became entitled

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147. *Escanaba & Lake Mich. Trans. Co. v. City of Chicago*, 107 U.S. 678 (1883).

148. *Id.* at 679.

149. *Id.* at 688 (quoting the Northwest Ordinance, 1 Stat. 50 (1789)).

150. *Id.* at 682.

151. *Id.* at 683.

152. *Id.*

153. *Id.*

154. *Id.* (noting that this doctrine was approved by *Gilman v. City of Philadelphia*, 70 U.S. (2 Wall.) 713, 729 (1865), and *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 252 (1829)).

155. *Id.* at 688.

to and possessed of all the rights of dominion and sovereignty which belonged to the original States. She was admitted, and could be admitted, only on the same footing with them.”<sup>156</sup> The power to regulate navigable waters within the state’s boundaries—although subject to the superior authority of Congress—was nonetheless within the “inherent sovereignty” of the state.<sup>157</sup> It was within Congress’s power to regulate navigable rivers, but Congress could not use that power to grant Illinois less sovereign authority to regulate her rivers than other states have to regulate theirs.<sup>158</sup>

Here we have a situation in which Congress imposed a condition on a newly admitted state that it *could have*—but did not—impose on the existing states pursuant to one of its enumerated powers (in this case, the commerce power). And yet the Court still invoked the equal footing doctrine and still struck the condition down. Not on the ground that all limitations on a state in its enabling act have no effect after statehood; to the contrary, this line of cases recognizes the aforementioned principle that a limitation imposed in an enabling act remains in effect if it can be justified as a valid exercise of Congress’s legitimate powers.<sup>159</sup> But this provision, by denying the equal sovereignty of the states, was not a valid exercise of Congress’s commerce power.<sup>160</sup>

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156. *Id.* at 688–89. The Court went on to hold in the alternative that, in any event, the acts of the City of Chicago did not contravene the language of the state’s enabling act. *See id.* at 689–91.

157. Brief for Appellee at 3, 10, *Escanaba*, 107 U.S. 678 (No. 1057) (quoting *Barney v. Keokuk*, 94 U.S. (4 Otto) 324, 338 (1876)).

158. *See Escanaba*, 107 U.S. at 689 (“Equality of constitutional right and power is the condition of all the States of the Union, old and new. Illinois, therefore, . . . could . . . exercise the same power over rivers within her limits that Delaware exercised over Black Bird Creek, and Pennsylvania over the Schuylkill River.”).

159. *See Econ. Light & Power Co. v. United States*, 256 U.S. 113, 120–21 (1921) (noting that “so far as [the Northwest Ordinance] established public rights of highway in navigable waters capable of bearing commerce from State to State, it did not regulate internal affairs alone, and was no more capable of repeal by one of the States than any other regulation of interstate commerce enacted by the Congress”); *Willamette Iron Bridge Co. v. Hatch*, 125 U.S. 1, 9–10 (1888) (“In admitting some of the new States, [a free navigation clause] has been inserted in the law . . . ; and it has been supposed that in this new form of enactment it might be regarded as a regulation of commerce, which Congress has the right to impose.”).

The first case that *Escanaba* cited for the proposition that Illinois must be able to exercise the same power over rivers within her limits as Delaware and Pennsylvania may exercise over their rivers was *Pollard’s Lessee v. Hagan*, in which the Court had explained that provisions in state enabling acts restricting the state’s authority over navigable waters are constitutional if they are valid exercises of the commerce power. *See Escanaba*, 107 U.S. at 689 (citing *Pollard’s Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845)).

160. *See Econ. Light*, 256 U.S. at 121 (noting that Congress generally has the power to regulate navigable waters, and observing that the rules governing navigable rivers set down in

This line of cases emphasizes that the power of a state to regulate the navigable waters within its boundaries is one of its “necessary attributes as an independent sovereign Government.”<sup>161</sup> Thus, when infringing this attribute of state sovereignty, Congress cannot “inhibit or diminish [a state’s] perfect equality with the other members of the Confederacy.”<sup>162</sup> “[A]mong the incidents of that equality, is the right to make improvements in the rivers, water-courses, and highways, situated within the State.”<sup>163</sup> The Court later explained that the “principle which underlies [this branch of] the equal footing doctrine . . . is that navigable waters uniquely implicate [state] sovereign interests”<sup>164</sup>—notwithstanding the fact that Congress is also empowered to regulate those waters (and indeed, its regulations take precedence).<sup>165</sup>

This indicates that the equal footing doctrine is not just a principle that establishes that new states, like the original states, are sovereign in those spheres in which the Constitution does not empower the Congress to act. The doctrine does not just provide that the Tenth Amendment applies to new states as much as it does to the old states. It also establishes that, even when Congress operates within its legitimate spheres of authority, it cannot limit or remove the sovereignty of *some* states, but not others. Congress can effectively remove the sovereignty of *all* states over their navigable waters through preemption.<sup>166</sup> And it can override a state’s decision to

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the Northwest Ordinance and the state enabling acts that were struck down in the *Escanaba* line of cases would have remained in effect after statehood and would have trumped contrary state laws if they had been valid exercises of the commerce power).

161. *Withers v. Buckley*, 61 U.S. (20 How.) 84, 92 (1857).

162. *Id.*

163. *Id.* at 93.

164. *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 284 (1997).

165. *Cf. Martin v. Waddell’s Lessee*, 41 U.S. (16 Pet.) 367, 410 (1842) (“[W]hen the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters . . . subject only to the rights since surrendered by the constitution to the general government.”); *Palmer v. Cuyahoga Cty.*, 18 F. Cas. 1026, 1027 (C.C.D. Ohio 1843) (No. 10,688) (“A state, by virtue of its sovereignty may exercise certain rights over its navigable waters, subject, however, to the paramount power in congress to regulate commerce among the several states.”).

166. *See Econ. Light & Power Co. v. United States*, 256 U.S. 113, 121 (1921) (upholding, under *Escanaba*, a federal law regulating all of the navigable waters of the United States); *Lake Shore & Mich. S. Ry. v. Ohio*, 165 U.S. 365, 366 (1897) (recognizing the power “of Congress to deprive the several States of all authority to control and regulate any and every structure over all navigable streams”); *Gilman v. City of Philadelphia*, 70 U.S. (3 Wall.) 713, 731 (1865) (“[Congress] may regulate all bridges over navigable waters . . . .”); *Navigable Waters—Power of a State and of the U.S.—Bridges*, 20 Op. Att’y Gen. 101 (1891).

allow, or not allow, a particular bridge in a particular location.<sup>167</sup> What Congress cannot do is what it allegedly tried to do to Illinois: preclude only one state (or several states) from building any bridges—categorically, statewide—while allowing other states to do so.<sup>168</sup> That

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167. See *Cardwell v. Am. Bridge Co.*, 113 U.S. 205, 209 (1885) (“When Congress acts directly with reference to the bridges authorized by the State, its will must control so far as may be necessary to secure the free navigation of the streams.”); *Escanaba & Lake Mich. Trans. Co. v. City of Chicago*, 107 U.S. 678, 687–88 (1883) (noting that while state and local authorities can decide whether to erect bridges over navigable streams located entirely in one state, “Congress [has] the power at all times to interfere and supersede their authority whenever they act arbitrarily and to the injury of commerce”). It is true that such a regulation of commerce would apply in only one state, not nationwide, and would limit that state’s sovereignty in the minimal sense that the state would no longer be able to make a decision about whether or not to place a bridge at that particular location. But the Constitution limits the sovereignty of all fifty states to that same minimal degree, by empowering Congress to have the final say on all of these individual, one-off, localized matters. See *Dunning*, *supra* note 63, at 443 (“[I]t is idle to seek for inequality among the states in this particular. Congress controls the Hudson and the Susquehanna to precisely the same extent that it does the Missouri and the Arkansas.”).

168. This principle comes through most clearly when examining the cases that immediately followed *Escanaba—Cardwell* and *Willamette*—which involved provisions in the admission acts of California and Oregon, respectively, that were materially identical to the one struck down in *Escanaba*. Prior to the Supreme Court’s *Escanaba* decision, the lower court in *Hatch* had held that the Oregon admission-act provision was a controlling congressional regulation of commerce that precluded the state from constructing bridges over navigable rivers. See *Hatch v. Wallamet Iron Bridge Co.*, 6 F. 326, 337–38 (C.C.D. Or. 1881).

After the Supreme Court’s decision in *Escanaba*, another lower court in the same circuit was asked to rule in *Cardwell* on the identical California admission-act provision. The court noted that the case was “clearly within the rule as laid down” in *Hatch*, and considered whether *Escanaba* effectively “overrules the principle announced” in *Hatch*. *Cardwell v. Am. River Bridge Co.*, 19 F. 562, 562 (C.C.D. Cal. 1884). The judge noted that “there is language in the [*Escanaba*] opinion that favors that view,” and he was “by no means certain” whether the Supreme Court “intend[ed] to go as far as its broadest language indicates.” *Id.* The judge further explained that his own view was that the California admission act was a valid regulation of commerce, and that *Escanaba* could perhaps be distinguished on the ground that the Illinois admission act had not directly guaranteed free navigation in the same way that the California act did (but rather had simply cross-referenced the Northwest Ordinance, which was held to be no longer valid after statehood). See *id.* at 563–65. The judge did “not understand it to be held, or intimated,” in *Escanaba* “that Congress cannot, by legislation in the interest of interstate commerce, take control of any one, or all, of the navigable waters, either of Illinois, Delaware, or Pennsylvania. Only it has not yet done so.” *Id.* at 565. Indeed, he said, his own view was that Congress “might take control, generally, of all the navigable waters of any particular state, without reference to the waters of other states,” without “affect[ing] the ‘constitutional right or power,’ or the equality, of the states.” *Id.* Still, in light of the broad language to the contrary in *Escanaba*, he decided to treat *Escanaba* as binding, but urged the Supreme Court to distinguish it on appeal. See *id.* at 566–67.

Shortly thereafter, the lower court in *Hatch* was asked to reconsider its ruling in light of *Escanaba*. In that instance, the judge flat-out rejected what he considered to be dicta in *Escanaba*, and “respectfully submit[ted]” that the free navigation provision in the Northwest Ordinance “was a valid commercial regulation” and was “still in force in Illinois.” *Wallamet Iron Bridge Co. v. Hatch*, 19 F. 347, 359 (C.C.D. Or. 1884). In any event, he concluded,

would eviscerate Illinois's core sovereignty—"her powers as a government"—in an impermissibly discriminatory manner, depriving her of equal sovereignty with her peers.<sup>169</sup>

This principle is not just about new states. It is about *all* states. It is about the nature of statehood and the nature of the Union. On this point, the *Escanaba* Court was quite clear: "Equality of constitutional right and power is the condition of all the States of the Union, old and new."<sup>170</sup>

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*Escanaba* could be distinguished on the same grounds suggested by the circuit court in *Cardwell*. See *id.* at 351 (rejecting as "without a shadow of foundation in either reason or authority" the argument that "if Congress has the power to regulate the navigation of the Wallamet river, as a navigable water of the United States, it cannot do so by a special act . . . applicable alone to the waters of Oregon, but only by a general law, which shall operate uniformly upon all such waters in the United States"). This argument could not possibly be true, said the judge, because Congress has often regulated specific bridges or rivers. See *id.* at 351–52.

Both cases were then appealed to the Supreme Court. The Court decided *Cardwell* first. Counsel for the bridge company explained that, of course, Congress can regulate specific bridges or rivers. But the broad provision in the California admission act did "not [just] say such and such a stream . . . may be bridged." Brief and Points of the Appellee at 10, *Cardwell v. Am. River Bridge Co.*, 113 U.S. 205 (1885) (No. 855).

On the contrary, it [was] a general and sweeping prohibition of all such regulation by the State, and an assumption by Congress of the sole and exclusive right with respect to California, to initiate and enact laws of a class which, in the States generally, may be enacted by their respective Legislatures, and enforced until Congress steps in and supersedes the action of the State.

*Id.* *Escanaba* and *Withers*, argued counsel, squarely held that this "would have the effect of depriving the State of its equal rights under the Constitution." *Id.* at 11. The Supreme Court agreed, holding that *Escanaba* was directly controlling and could not be distinguished, and that the state admission act therefore violated the equal footing doctrine. See *Cardwell*, 113 U.S. at 211–12.

After the Supreme Court's decision in *Cardwell*, counsel for the appellant in *Hatch*, in lieu of crafting an argument in his brief, chose simply to rely on the *Cardwell* decision as "so far a controlling authority in this, that it is not deemed either necessary or proper to take the time of the Court in discussing it." Statement at 12, *Willamette Iron Bridge Co. v. Hatch*, 125 U.S. 1 (1888) (No. 80). The Court indeed reversed, but did not discuss the issue, instead deciding on the different ground (offered as an alternative ground in many of the prior cases, *e.g.*, *supra* note 156) that it was immaterial whether or not the admitting-act provision remained in effect because, properly construed, that provision did not apply to bridges and other physical obstructions, but rather prohibited only tolls and duties. See *Willamette*, 125 U.S. at 9–12.

169. *Escanaba*, 107 U.S. at 688; *cf.* *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 433, 435 (1855) (acknowledging that federally erected bridges in one state can end up diverting traffic to other states and, indeed, that "[t]here are many acts of congress passed in the exercise of this power to regulate commerce" that end up "operat[ing] to the prejudice of the ports in a neighboring State"—such as the "improvement of rivers and harbors" and "the erection of light-houses"—but explaining that those acts do not run afoul of the Port Preference Clause, because "what is forbidden is, not discrimination between individual ports within the same or different States, but discrimination between States").

170. *Escanaba*, 107 U.S. at 689.

Thus, as future-Justice Sotomayor recognized in her law-review note, the “equal footing doctrine ultimately rests on concepts of federalism: the United States is a ‘union of political equals.’”<sup>171</sup> It is true that the doctrine itself applies by its terms only to the admission of new states. But it is a doctrinal reflection of a broader constitutional mandate. It is not just a shallow, freestanding precept covering only the admission of new states, but rather a specific manifestation of a deep, fundamental, and general principle that “the Constitution guarantees sovereign equality to the states”—all of them.<sup>172</sup> Put differently, the equal footing doctrine itself may be a narrow rule about the particular terms on which new members can be admitted to the club, but it is grounded in and dependent upon a broader understanding of the very nature of the club itself. The equal footing cases are clearly and explicitly premised on the notion that equal sovereignty among all states is inherent in the very notion of our union of states. Indeed, the Supreme Court closed its opinion in *Coyle v. Smith*—the leading equal footing case—with this observation: “[T]he constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution.”<sup>173</sup>

As such, *South Carolina v. Katzenbach* was technically correct in asserting that the “doctrine of the equality of States” that was established in *Coyle* and the other equal footing cases—that is to say, *the equal footing doctrine*—doctrinally “applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared.”<sup>174</sup> But the explicit

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171. Sonia Sotomayor, Note, *Statehood and the Equal Footing Doctrine: The Case for Puerto Rican Seabed Rights*, 88 YALE L.J. 825, 835 (1979) (quoting *Case v. Toftus*, 39 F. 730, 732 (C.C.D. Or. 1889)).

172. *Id.* at 839.

173. *Coyle v. Smith*, 221 U.S. 559, 580 (1911).

174. *South Carolina v. Katzenbach*, 383 U.S. 301, 328–29 (1966) (citing *Coyle*, 221 U.S. 559). *Katzenbach* may have meant to declare that not only the equal footing doctrine, but also the entire notion of equal sovereignty, applies only to the admission of new states. See *id.* (“The doctrine of the equality of States, invoked by *South Carolina*, does not bar this approach, for that doctrine applies only to the terms upon which States are admitted to the Union . . . .” (emphasis added)). In its brief, *South Carolina* invoked a broad principle of equal sovereignty. See Brief of the Plaintiff at 13–15, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (No. 22). If *Katzenbach* did indeed declare that broader principle to be limited to new states only, “that declaration was,” in Professor Laurence Tribe’s words, “a quite gratuitous dictum,” 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-13, at 915 n.17 (3d ed. 2000)—one that I believe to have been mistaken. Indeed, if that is what the *Katzenbach* Court was

rationale behind the equal footing cases was broader. And for that reason, those cases indicate that Justice Ginsburg was mistaken in declaring in her *Shelby County* dissent that the “proper domain” of the “*equal sovereignty principle*” is limited only to “the admission of new States.”<sup>175</sup>

### B. *Additional Precedent and History*

The Court did not pull this vision of equal sovereignty—of which the equal footing doctrine is only a particular manifestation—out of thin air, either in *Shelby County* or in the earlier equal footing cases just discussed. Rather, as Professor Gillian Metzger has recognized, this notion was “[l]ong a staple of nineteenth-century political discourse.”<sup>176</sup> On the Senate floor in 1820, for instance, Senator William Pinkney of Maryland forcefully argued that the “Union” established by the Constitution is a “confederation of States equal in sovereignty. . . . It is an equal Union between parties equally sovereign.”<sup>177</sup> Four years later, Representative John Holmes of Massachusetts echoed that

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saying, then it was every bit as guilty as the *Shelby County* Court of ruling by naked fiat, in disregard of precedent, history, and constitutional structure.

175. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2649 (2013) (Ginsburg, J., dissenting) (emphasis added).

176. Metzger, *supra* note 83, at 1517.

177. 35 ANNALS OF CONG. 397 (1820) (statement of Sen. Pinkney); *see also, e.g.*, 34 ANNALS OF CONG. 1230 (1819) (statement of Rep. McLane) (“It is of the very essence of our Government, that all the States composing the Union should have equal sovereignty. It is the great principle on which the Union reposes—the germ of its duration.”); Letter from President James Monroe to Spencer Roane (Feb. 15, 1820), in DANIEL C. GILMAN, JAMES MONROE 149 (1898) (“[A]ll the states composing our Union, *new as well as the old*, must have equal rights, ceding to the general government an equal share of power, and retaining to themselves the like . . . .” (emphasis added)); James K. Polk, *Harbours and Rivers*, 8 GREEN BAG 2D 81, 93 (2004) (reproducing a draft veto message prepared by President Polk in 1848, which declared that “[t]he equality of the States, as separate communities and distinct sovereignties, is one of the corner stones of our political fabric”). In the nineteenth century, members of Congress frequently articulated the argument, later picked up by the Supreme Court in the equal footing cases just discussed, that Article IV’s provision for admitting “new States” into “this Union” implicitly guarantees equal footing, because, in this country, the “States” all have the same sovereign power, and to allow otherwise would create a different union from “this Union.” *See, e.g.*, CONG. GLOBE, 41st Cong., 2d Sess. 639 (1870) (statement of Sen. Trumbull) (“The States which formed this Union were coequal States. . . . Congress has authority to admit new States into the Union. Into what Union? A Union of coequal States. There is no authority to admit States into any other Union. . . . You have a different Union if you have a Union of unequal States.”); 35 ANNALS OF CONG. 321 (1820) (statement of Sen. Barbour); *id.* at 397 (1820) (statement of Sen. Pinkney) (arguing that if a new state is admitted with less sovereignty than the others, “it is not into the original Union that it comes. For it is a different sort of Union. The first was a Union *inter pares*: This is a Union between *disparates*, between giants and a dwarf,



[t]he original States, which formed the Constitution, were equally sovereign and independent. Each gave up an equal portion of power to the United States, and consequently what was retained must be equal. Equality of power is essential to the existence of a State. It cannot have less than the rest, and when it has, it ceases to be a State. Nothing is so essential to the harmony and perpetuity of the Union as this equality.<sup>178</sup>

And the equal sovereignty principle has a long judicial pedigree as well—even apart from the equal footing cases. The Supreme Court has repeatedly emphasized “the structure of our Nation as a union of States, each possessing equal sovereign powers.”<sup>179</sup> “One cardinal rule, underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest.”<sup>180</sup> It has long been a “standard federalism axiom that all states are equal in value as quasi-sovereigns.”<sup>181</sup>

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between power and feebleness, between full proportioned sovereignties and a miserable image of power”); *id.* at 1080–81 (1820) (statement of Rep. Hardin) (“[W]hat is meant by the word Union? Is it not the . . . agreement between the States . . . which is called the Constitution? . . . If Congress makes Missouri surrender any portion of her sovereignty that was not surrendered by the old States, how can she be a party to the original agreement . . . ?”); CURRIE, *supra* note 139, at 243.

178. 41 ANNALS OF CONG. 547 (1824) (statement of Rep. Holmes).

179. *Underwriters Nat’l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass’n*, 455 U.S. 691, 704 (1982).

180. *Kansas v. Colorado*, 206 U.S. 46, 97 (1907); *see also* *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (noting that the law of personal jurisdiction is based in part on the states’ “status as coequal sovereigns in a federal system”); *Wisconsin v. Michigan*, 295 U.S. 455, 462 (1935) (noting the “rule that the States stand on an equal level or plane under our constitutional system”); *Spooner v. McConnell*, 22 F. Cas. 939, 943 (C.C.D. Ohio 1838) (No. 13,245) (“[T]he states are equal. Equal in rank, equal in their powers of sovereignty . . . .”); *United States v. Williams*, 28 F. Cas. 647, 656 (C.C.D.C. 1833) (No. 16,711) (noting “the principle of equality among sovereign states”); Viet D. Dinh, *First Impressions: A Tribute to Justice Sandra Day O’Connor*, 21 SETON HALL LEGIS. J. 3, 3–4 (1997) (declaring that “the United States remains a sovereign union of equally sovereign states” (quoting Sandra Day O’Connor, *Federalism: Problems and Prospects of a Constitutional Value*, Speech to the Woodrow Wilson Center (June 11, 1992))).

181. David A. Dana, *Democratizing the Law of Federal Preemption*, 102 NW. U. L. REV. 507, 512–13 (2008). I would be remiss in ignoring the possibility that support for the equal sovereignty principle might also be found in the deplorable antiprecedent of *Dred Scott v. Sandford*, 60 U.S. 393 (1857). *See generally* James Blacksher & Lani Guinier, *Free at Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right to Vote*, 8 HARV. L. & POL’Y REV. 39 (2014). But I do not believe that the *Dred Scott* case should be thought of as “the origin” of the equal sovereignty principle—the principle’s origins in fact long predate *Dred Scott*—or that a possible connection to *Dred Scott* necessarily taints the principle with a uniquely “racially discriminatory pedigree.” *Id.* at 39, 42. To begin with, as Akhil Amar has explained, *Dred Scott* was a “preposterous ruling” based on an “extravagant anticongressional theory of state equality.” Akhil Reed Amar, *The Lawfulness of Section 5—and thus of Section 5*,

This axiom was born of history. There was an “attention to general Equality that governed the deliberations of [the Constitutional] Convention.”<sup>182</sup> A pervasive theme in those deliberations was the obsession, on the part of some of the Framers, with equal sovereignty—an obsession that comes through most clearly in the Convention’s most fundamental and drawn-out debates: those concerning the question whether representation in the Congress should be proportional to population or equal for each state.<sup>183</sup> As every school child learns, the large states demanded proportional representation, whereas the small states insisted on equal representation. The impasse nearly derailed the Convention, before agreement was ultimately reached on the Connecticut Compromise,

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126 HARV. L. REV. F. 109, 118 (2013) (explaining the convoluted theory); see also Alfred L. Brophy, Note, *Let Us Go Back and Stand Upon the Constitution: Federal-State Relations in Scott v. Sandford*, 90 COLUM. L. REV. 192, 204–05, 208–11 (1990) (detailing Chief Justice Taney’s state-equality theory in *Dred Scott*, and tracing its origins to radical antebellum Southern constitutional theory). *Dred Scott* was not actually grounded in the principle of equal sovereignty that is defended in this Article. What is more, the entire notion of American federalism has always—from the framing, through the Civil War and Jim Crow, right up to the present day—been heavily entwined with slavery and racism. See Guy-Uriel Charles, *Dissent, Diversity, and Democracy: Heather Gerken and the Contingent Imperative of Minority Rule*, 48 TULSA L. REV. 493, 502 (2013) (“[I]t is high time for federalism scholars to confront and conquer federalism’s racist history. Race is the big African elephant in the room that federalism scholarship and doctrine have essentially tried to ignore.”). Virtually every federalism doctrine and principle can trace its origins in substantial part to efforts by the Southern states to perpetuate slavery and racial injustice. Equal sovereignty is admittedly no exception; much of the rhetoric in its favor in the eighteenth and nineteenth centuries was directly tied up with reprehensible Southern efforts to avoid federally imposed racial justice. As Senator Sumner once said, “Equality of States on the lips of slave-masters was natural, for it was a plausible defense against the approaches of Freedom.” CONG. GLOBE, 40th Cong., 2d Sess. 3025 (1868) (statement of Sen. Sumner). But the equal sovereignty principle was neither uniquely nor exclusively born of racist purposes. The possible similarities between *Shelby County* and *Dred Scott* are important factors to consider in evaluating whether the *Shelby County* Court misapplied the equal sovereignty principle (as *Dred Scott* surely did, to the extent that it was invoking that principle at all), but they do not, in my view, discredit the existence of the principle itself.

182. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 81, at 149 (remarks of Convention delegate James McHenry to the Maryland House of Delegates).

183. See Michael J. Teter, *Equality Among Equals: Is the Senate Cloture Rule Unconstitutional?*, 94 MARQ. L. REV. 547, 574 (2010) (“The delegates who supported state parity in the Senate believed that the new national government represented the states, not individuals, and that . . . those states required an ‘equality of voices.’ The underlying fear . . . was that proportional representation in the upper chamber would erode the equal sovereignty each state possessed.” (footnotes omitted)).

granting proportional representation in the House of Representatives and equal representation in the Senate.<sup>184</sup>

Throughout that long drama, the notion of equal sovereignty consistently held center stage. Indeed, as Madison once noted, even before the framing of the Constitution—back when the terms of the Articles of Confederation were still being hammered out—the founding generation faced a difficult challenge in trying to determine an appropriate “rule of suffrage among parties unequal in size, but equal in sovereignty.”<sup>185</sup> That remark reveals an important truth. The delegates to the Constitutional Convention vehemently disagreed about which form of representation was more fair and appropriate, but they did not disagree as to the antecedent assumption that the states were to possess equal sovereignty. As Gunning Bedford of Delaware put it at the Convention, “That all the states at present are equally sovereign and independent, has been asserted from every quarter of this house.”<sup>186</sup>

The small-state delegates—those who insisted upon equal representation—were most vocal. In the words of William Patterson of New Jersey, the primary architect of the New Jersey Plan, which centered around equal representation, “[a] confederacy supposes sovereignty in the members composing it, and sovereignty supposes equality.”<sup>187</sup> Patterson noted that “it cannot be denied that all the states stand on the footing of equal sovereignty.”<sup>188</sup> Indeed, he was of the view that the very notion of state sovereignty necessarily entails a principle of *equal* state sovereignty: “If the sovereignty of the states is to be maintained, . . . we have no power to vary the idea of equal sovereignty.”<sup>189</sup> To Patterson, proportional representation was squarely inconsistent with that principle. He wrote that “every State in the Union as a State possesses an equal Right to, and Share of, Sovereignty,” but proportional representation would mean that

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184. See *id.* For an argument that this traditional story may fail to fully capture the true nature of the compromise, see Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1357–67 (2001).

185. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 81, at 542 (undated preface to Madison’s notes from the Convention).

186. 1 ELLIOT’S DEBATES, *supra* note 60, at 471.

187. 5 *id.* at 176.

188. *Id.* at 194.

189. *Id.*

“some of the States of the Union will possess a greater Share of Sovereignty . . . than others.”<sup>190</sup>

The colorful Luther Martin of Maryland agreed “that an equal vote in each state” was an essential “right of sovereignty.”<sup>191</sup> He gave a ponderous oration to the Convention seeking to establish “that the states, like individuals, were, in a state of nature; equally sovereign and free.”<sup>192</sup> As Madison recounted it,

[i]n order to prove that individuals in a state of nature are equally free and independent, [Martin] read passages from Locke, Vattel, Lord Somers, Priestly. To prove that the case is the same with states, till they surrender their equal sovereignty, he read other passages in Locke, and Vattel, and also Rutherford.<sup>193</sup>

Returning then to the issue of proportional representation, Martin insisted “that the states, being equal, cannot treat or confederate so as to give up an equality of votes, without giving up their liberty.”<sup>194</sup> He held steadfast to the view that proportional representation was a nonstarter, because “no modifications whatever could reconcile the smaller states to the least diminution of their equal sovereignty.”<sup>195</sup>

The supporters of proportional representation did not share the small-state representatives’ obsession with equal sovereignty. Indeed, many of them did not share an obsession with state sovereignty at all. Rufus King of Massachusetts, for instance, argued that the states already did not “possess the peculiar features of sovereignty”; “[t]hey could not make war, nor peace, nor alliances, nor treaties.”<sup>196</sup> And

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190. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 81, at 613 (Patterson’s notes on his New Jersey Plan).

191. 5 ELLIOT’S DEBATES, *supra* note 60, at 248.

192. *Id.*

193. *Id.*

194. *Id.* at 248–49.

195. *Id.* at 270; *see also* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 81, at 491 (statement of Mr. Bedford) (“[The states] must continue if not perfectly, yet equally sovereign [sic],” because “an inequality of power will . . . result from an inequality of votes. Give the opportunity, and ambition will not fail to abuse it. The whole history of mankind proves it.”); *Notes of Rufus King in the Federal Convention of 1787*, THE AVALON PROJECT, [http://avalon.law.yale.edu/18th\\_century/king.asp](http://avalon.law.yale.edu/18th_century/king.asp) [<http://perma.cc/25CZ-FB57>] (Rufus King’s notes from the Convention, summarizing the remarks of Charles Pinkney of South Carolina) (“If Representatives be apportioned among the States in the Ratio of numbers . . . the States will be unequal, and their sovereignty will be degraded.”).

196. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 81, at 323 (statement of Mr. King); *see also* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 65 (1996).

Hamilton took the position that the states should be abolished altogether, or at least relegated to the status of “subordinate jurisdictions.”<sup>197</sup> Madison’s stance was, in effect, not much different.<sup>198</sup>

In their view, sovereignty rested always with the people—not with the states *or* the federal government. The people chose to grant certain sovereign *powers* to each of those governments, but the states were never the locus of the sovereignty itself.<sup>199</sup> And it was not the rights of the states that mattered; it was the rights of the people. As James Wilson put it, “Can we forget for whom we are forming a Government? Is it for *men*, or for the imaginary beings called States? . . . We talk of States, till we forget what they are composed of.”<sup>200</sup> The goal of the Convention was to ensure “that every man in America was secured in all his rights,” and it would be foolish “to sacrifice this substantial good to the phantom of *State* sovereignty.”<sup>201</sup>

Still, the large-state delegates did not disagree that whatever sovereign powers and prerogatives the states possessed, they possessed them equally, and would continue to do so under the

197. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 81, at 323 (statement of Mr. Hamilton).

198. See RAKOVE, *supra* note 196, at 169 (“Only by abolishing the states altogether could Madison have moved to alter the structure of the Union more radically.”). Even at the turn of the nineteenth century, many Federalists still hoped to do away with state sovereignty altogether. See PETER ONUF & NICHOLAS ONUF, FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTIONS 1776–1814, at 179–80 (1993) (“[Federalists] questioned . . . that—even in the absence of European interference—the union itself could survive unless those egregious baubles of sovereignty, those pestiferous incitements to demagogy, the State Governments were more adequately controlled, if not abolished.” (citation and quotation marks omitted)).

199. See ONUF & ONUF, *supra* note 198, at 85–86, 131; RAKOVE, *supra* note 196, at 190 (discussing the writings of James Wilson). In this regard, the Framers may not really have viewed themselves as “split[ting] the atom of sovereignty.” *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

200. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 81, at 483; see also *id.* at 199 (statement of Mr. Franklin) (“The Interest of a State is made up of the interests of its individual members. If they are not injured, the State is not injured.”); RAKOVE, *supra* note 196, at 67. Madison elaborated in the Federalist Papers,

Was . . . the American revolution effected, . . . was the precious blood of thousands spilt . . . not that the people of America should enjoy peace, liberty, and safety; but that the Governments of the individual States . . . might enjoy a certain extent of power, and be arrayed with certain dignities and attributes of sovereignty? . . . [A]s far as the sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be, let the former be sacrificed to the latter.

THE FEDERALIST NO. 45, *supra* note 129, at 309 (James Madison).

201. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 81, at 489 (statement of Mr. King).

Constitution.<sup>202</sup> They disagreed instead with the insistence that equal representation was necessary for equal sovereignty. So long as each state ceded the same authority to the federal government, the states would retain equal sovereignty, regardless of the measure of representation. Hugh Williamson of North Carolina, for instance, expressed the view “that, if any political truth could be grounded on mathematical demonstration, it was, that if the states were equally sovereign now, and parted with equal proportions of sovereignty, that they would remain equally sovereign.”<sup>203</sup> Similarly, Madison asserted that it is fallacious to argue “from the equality of the sovereign states” that any compact that they enter into—even one “by which an authority was created paramount to the parties, and making laws for the government of them”—must necessarily afford them equal voting rights.<sup>204</sup> To the same effect is *Federalist 22*, in which Hamilton labeled as “[s]ophistry” and “logical legerdemain” the argument that a “right of equal suffrage” necessarily follows from the principle “that sovereigns are equal.”<sup>205</sup> Indeed, since the people, not the states, are the true locus of sovereignty, the large-state delegates felt that concerns for equality counseled *against* giving equal representation to states with very unequal populations.<sup>206</sup>

The ultimate compromise may not have been entirely pleasing to anyone—compromises rarely are—but it effectuated both visions of equal sovereignty, one for each congressional chamber. The idea was that, in Madison’s words, “[t]he Senate will represent the States in their political capacity, the other House will represent the people of

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202. See, e.g., Letter of James Madison to Unknown (Mar. 1836), in 9 THE WRITINGS OF JAMES MADISON 607, 608 (Gaillard Hunt ed., 1910):

It is well known that the equality of the States in the Federal Senate was a compromise between the larger, & the smaller states, the former claiming a proportional representation in both branches of the Legislature, as due to their superior population; the latter, an equality in both, as a safeguard to the reserved sovereignty of the States, *an object which obtained the concurrence of members from the larger States.*

(emphasis added).

203. 5 ELLIOT’S DEBATES, *supra* note 60, at 250.

204. *Id.*

205. THE FEDERALIST NO. 22, at 138–39 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

206. See, e.g., 5 ELLIOT’S DEBATES, *supra* note 60, at 258 (statement of Alexander Hamilton) (“But as states are a collection of individual men, which ought we to respect most, the rights of the people composing them, or of the artificial beings resulting from the composition? Nothing could be more preposterous or absurd than to sacrifice the former to the latter.”).

the States in their individual capacity.”<sup>207</sup> In each case, equal sovereignty prevailed; just as the people were to have equal sovereignty in their individual capacity,<sup>208</sup> “the States in their political capacity” were to be equally sovereign. Writing as “Fabius” during the ratification debates, Federalist John Dickinson, a Convention delegate from Delaware, explained that “[i]n the senate the sovereignties of the several states will be equally represented; in the house of representatives, the people of the whole union will be equally represented.”<sup>209</sup> Those who felt that equal representation was necessary for equal state sovereignty got their wish with the Senate; those who felt that equal state sovereignty would be preserved by federalism even with proportional representation (which would better respect the equality of the people) got their wish with the House. In any case, as Madison explained at the Virginia ratifying convention, the Constitution—compromises and all—created “a government of a federal nature, consisting of many coequal sovereignties.”<sup>210</sup>

### C. *Text and Structure*

Now, at last, we come to the constitutional text. It is true that there is no clause in the Constitution that explicitly articulates an equal sovereignty principle. But we must be careful not to assign too

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207. 1 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776–1826, at 499 (James Morton Smith ed., 1st ed. 1995) (Oct. 24, 1787, letter from Madison to Jefferson); *see also* Sanders v. Sanders, 376 U.S. 1, 13 (1964) (“[I]n one branch the *people*, ought to be represented; in the *other*, the *States*.” (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 81, at 462 (remarks of William Samuel Johnson of Connecticut))); Max Farrand, *Popular Election of Senators*, 2 YALE REV. 234, 239 (1913) (“There was undoubtedly a feeling in the Convention that . . . the lower house represented the people of the States in their individual capacity, while the Senate represented the States in their political capacity.”).

208. *Cf.* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 471–72 (1793) (Jay, C.J.) (“[A]t the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country . . . [T]he citizens of America are equal as fellow citizens, and as joint tenants in the sovereignty.”).

209. 17 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 180, 182 (John P. Kaminski & Gaspare J. Saladino eds., 1981) (emphasis omitted).

210. 3 ELLIOT’S DEBATES, *supra* note 60, at 381; *see also* Letter of James Madison to Spencer Roane (June 29, 1821), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON, 1816–1828, at 222, 223 (1865) (arguing that, without Supreme Court review of state court judgments, “the State governments would not stand all in the same relation to the General Government, some retaining more, others less, of sovereignty, and the vital principle of equality, which cements their Union, thus gradually be deprived of its virtue”).

much weight to that fact.<sup>211</sup> When it comes to fundamental principles of constitutional federalism, a lack of specific textual support is actually par for the course. As Professor John Manning has noted, “[i]n recent years, the Supreme Court has embraced a freestanding federalism that is not tied to any particular clause of the Constitution.”<sup>212</sup> Consider, as a particularly striking example, *Printz v. United States*,<sup>213</sup> in which the Court looked to history, structure, and precedent to find a constitutional limit on federal power despite its open admission that there was “no constitutional text speaking to th[e] precise question.”<sup>214</sup> This is by no means an entirely recent phenomenon, either. The Court has been enforcing federalism principles lacking a clear textual foundation ever since Chief Justice

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211. To be sure, the textual argument against the equal sovereignty principle is not simply that the principle finds no explicit basis in the constitutional text. It is that the text affirmatively cuts against an equal sovereignty doctrine, insofar as the Constitution enumerates a number of narrow and specific guarantees of state equality, thus implying the absence of a broad and general guarantee. See *supra* Part I.B. But this argument is less compelling than it might first appear. For one thing, as I have sought to demonstrate in great detail elsewhere, the fact that the Constitution explicitly requires Congress to legislate uniformly among the states only pursuant to some powers, but not others (including, in particular, the uniquely significant commerce power), is more of an accident of drafting history than a conscious choice on the part of the Framers or a significant structural feature of the Constitution. See Colby, *supra* note 11, at 266–88. More importantly, this argument misconstrues the nature of the equal sovereignty principle. As discussed *infra* Part III, the equal sovereignty principle is not a generalized principle of state equality in all respects, or a generalized mandate that Congress must treat the states equally in every regard—thus rendering the specific constitutional guarantees of certain forms of uniformity and state equality redundant. Rather, it guarantees only a specific kind of state equality—equal *sovereignty*—that is conceptually and functionally distinct from the enumerated equality norms.

212. John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2004 (2009); see also John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 4, 31–32 (2014) [hereinafter Manning, *Foreword*].

213. *Printz v. United States*, 521 U.S. 898 (1997).

214. *Id.* at 905; see also, e.g., *Alden v. Maine*, 527 U.S. 706, 730 (1999) (“This separate and distinct structural principle is not directly related to the scope of the judicial power established by Article III, but inheres in the system of federalism established by the Constitution.”); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996):

Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms[:] . . . first, that each State is a sovereign entity in our federal system; and second, that [i]t is inherent in the nature of sovereignty not to be amendable to the suit of an individual without its consent.

(citations omitted).



Marshall's iconic decision in *McCulloch v. Maryland*,<sup>215</sup> if not before that.<sup>216</sup> Recall Marshall's colorful words from *McCulloch*: “*There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds.*”<sup>217</sup>

This method of interpretation was best described and defended by Professor Charles Black nearly a half-century ago. Black argued in favor of sometimes determining constitutional meaning not from specific text, but rather from “the method of inference from the structures and relationships created by the constitution.”<sup>218</sup> The Court, he said, should at times rely on reasoning “sounding in the structure of federal union, and in the relation of federal to state governments,” even when it “can point to no particular text as its authority.”<sup>219</sup> Black noted that, although this genre of reasoning is often rejected or ignored in our legal culture, it has carried great weight in some areas of constitutional law—federalism in particular, as exemplified by *McCulloch*.<sup>220</sup> Black explained that the Court's reasoning in that case on the question whether Maryland could tax the Bank of the United States was “essentially structural,” relying on “the warranted relational properties between the national government and the government of the states, with the structural corollaries of national supremacy—and, at one point, of the mode of formation of the Union.”<sup>221</sup>

Here was the heart of Chief Justice Marshall's reasoning in *McCulloch*:

This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution

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215. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 425–37 (1819) (holding, despite the lack of explicit constitutional text, that states may not tax an instrumentality of the federal government).

216. See Gillian E. Metzger, *The Constitutional Legitimacy of Freestanding Federalism*, 122 HARV. L. REV. F. 98, 102–03 (2009) (explaining that before *McCulloch*, “several justices [on the Court] invoked constitutional purposes and general arguments about the nature of state sovereignty” in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)).

217. *McCulloch*, 17 U.S. (5 Wheat.) at 426 (emphasis added).

218. CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 7–8 (1969).

219. *Id.* at 11.

220. See *id.* at 13–15.

221. *Id.* at 15.

and laws of the respective States, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1st. that a power to create implies a power to preserve. 2nd. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve. 3d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme.<sup>222</sup>

The structuralism of this argument is obvious. Text was largely beside the point—again, there was “no express provision for the case”<sup>223</sup>—except perhaps as a secondary hook upon which to attach the structural conclusion. Black explained, “You can root the result, if you want to (and Marshall sometimes may seem to be doing this) in the supremacy clause of Article VI, but that seems not a very satisfying rationale, for Article VI declares the supremacy of whatever the national law may turn out to be, and does not purport to give content to that law.”<sup>224</sup> Rather, “[i]n this, perhaps the greatest of our constitutional cases, judgment is reached not fundamentally on the basis of that kind of textual exegesis which we tend to regard as normal, but on the basis of reasoning from the total structure which the text has created.”<sup>225</sup>

Let us now return to the question of equal sovereignty, with this method in mind. To be sure, the constitutional text is far from self-evidently conclusive here. But, as just noted, neither was the textual support for *McCulloch*,<sup>226</sup> or, for that matter, for *Marbury v. Madison*<sup>227</sup>—which also famously relied primarily on abstract

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222. *McCulloch*, 17 U.S.(4 Wheat.) at 426.

223. *Id.*

224. BLACK, *supra* note 218, at 15.

225. *Id.* Black also pointed to *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1868), which struck down a state law imposing a tax on every person exiting the state, and explicitly rejected the notion that the decision needed to be grounded in any particular constitutional text. *See* BLACK, *supra* note 218, at 15–17. Black further explained that the Supreme Court’s early Dormant Commerce Clause cases are best understood and defended as reasoning from constitutional structure, rather than from the flimsy textual hook of the Commerce Clause itself. *See id.* at 19–22.

226. *See Metzger, supra* note 216, at 102 (noting *McCulloch*’s “derivation of federal immunity from state taxes, relying not on any specific textual provision but instead on the general principle of federal supremacy and the representative differences between federal and state governments”).

227. *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137 (1803).

structural reasoning, anchored only loosely to various textual hooks that did little work on their own.<sup>228</sup> When it comes to ascertaining principles of constitutional structure—and of federalism in particular—the Court often focuses primarily on the institutional design of the constitutional system as a whole (informed by history), and looks to the text not for concrete and free-standing answers, but rather for textual hints that help us to understand and buttress the core structure of the constitutional system.

That mode of reasoning supports the equal sovereignty principle. Indeed, leaving aside for a moment the unique history and nature of the American experience, equal sovereignty is an essential, implicit structural component of virtually *any* federalist system of government. Scholars of comparative federalism have often observed that “[o]ne of the characteristics of federalism is its aspiration and purpose simultaneously to generate and maintain both unity and diversity.”<sup>229</sup> Federalism “is from its roots a means to accommodate diversity as a legitimate element in the polity.”<sup>230</sup> A federalist system is “an institutionalization of the compromise” between the centripetal forces that pull toward greater centralization—the desire for economic efficiency, security, and the like—and the centrifugal forces demanding recognition and accommodation of diversity among the member states.<sup>231</sup> Such a system divides sovereignty between the central and the regional governments, allowing efficient centralization while simultaneously accommodating diversity by respecting the rights of the regional governments to establish their own laws within their own spheres of influence.

But granting certain powers to the central government—even when limited only to those areas in which the demands for centralization predominate—poses a substantial risk in a community characterized by regional diversity. With diversity often comes

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228. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 6 (1962) (arguing that Chief Justice Marshall in *Marbury* provided “merely a hint” of textual support for judicial review, and that “nothing more explicit will be found”).

229. DANIEL J. ELAZAR, *EXPLORING FEDERALISM* 64 (1987); see *id.* at 274 n.23 (collecting sources).

230. *Id.* at 66.

231. William S. Livingston, *A Note on the Nature of Federalism*, in *AMERICAN FEDERALISM IN PERSPECTIVE* 33, 42 (Aaron Wildavsky, ed. 1967).

animosity,<sup>232</sup> and there is an ever-present danger that the central government, even when it operates only within its legitimate spheres, will be controlled by certain regional factions who will use its powers to discriminate against and minimize the authority of the other regional factions. Allowing that to happen would be inconsistent with the very purpose of the federation: generating unity while respecting diversity. It would contravene efforts to achieve unity, and it would fail to respect the integrity and the diverse cultures of the weaker regional states. For a federalist system to function effectively and consistently with its overarching goals, then, the central government must be compelled to respect and treat all member states—regardless of their differences—as legitimate equal sovereigns. Thus, as scholars of both domestic and comparative federalism have recognized for decades, an antidiscrimination norm is inherent in the very notion of a federalist system. Sovereign equality of the member states is presumptively<sup>233</sup> an essential, inherent structural feature of federalism itself.<sup>234</sup> (Again, as the framers of the American Constitution

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232. Cf. Larry May, *How is Humanity Harmed by Genocide?*, 10 INT'L LEGAL THEORY 1, 17 (2004) (“Humans in their diversity must overcome the animosity that diversity inspires in order to attain the promised equality.”).

233. Some scholars have noted—pointing to the situation of Canada and Quebec as an example—that perhaps, when some regional states are extremely different from all of the others, a federalist system could be structured in a way that gives greater sovereign powers to those states than to others in order to protect their unique diversity. See Jaime Lluch, *The Constitutional and Political Recognition of Stateless Nations in Canada and the United States*, 47 REVISTA JURÍDICA UNIVERSIDAD INTERAMERICANA P.R. 549, 552–55 (2013) (explaining that Quebec was given substantial powers to “guarantee[] its ability to make decisions in key areas, without being overwhelmed by the larger society,” thereby convincing Quebec to join Canada). Those scholars recognize, however, that the United States does not present such a situation. Whereas, in the United States, “federalism is a conception of political federalism that assumes the essential equality of the states and a relatively homogeneous country, Canadian federalism is different, partly because of the distinctiveness of Quebec.” *Id.* at 554 (quoting SAMUEL LA SELVA, *THE MORAL FOUNDATIONS OF CANADIAN FEDERALISM: PARADOXES, ACHIEVEMENTS, AND THE TRAGEDIES OF NATIONHOOD* 131 (1996)); cf. GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815*, at 39, 48 (2009) (noting that, although America at the time of the framing was much more ethnically diverse than most European nations, it nonetheless was distinctive in its common language and comparatively homogenous culture).

234. See, e.g., Arthur W. Macmahon, *The Problems of Federalism: A Survey*, in FEDERALISM: MATURE AND EMERGENT 3, 5 (Arthur W. Macmahon ed. 1955) (“A further essential is the equality of the constituent states, absolute as to legal status . . . .”); José Julián Álvarez González, *The Empire Strikes Out: Congressional Ruminations on the Citizenship Status of Puerto Ricans*, 27 HARV. J. ON LEGIS. 309, 334–35 (1990) (“Federalism presupposes that states exist on equal standing before the national government, and that government has an obligation to treat such states as equals.”); Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 235, 366 (2003) (“Federalism must start with a premise

recognized, equal representative voting power is not essential to equal sovereignty. But equal sovereignty is essential to federalism.<sup>235</sup>)

If it is essential to federalism itself, then of course equal sovereignty must be an inherent structural principle of the federalist system set out in the American Constitution. And indeed it is, as the cases and history discussed above make clear.<sup>236</sup> The very nature of our constitutional compact is one in which the states stand as equal sovereigns. Again, the equal sovereignty principle “does not rest on any express provision of the constitution . . . but on what is considered . . . to be the general character and purpose of the union of the states . . . —a union of political equals.”<sup>237</sup> And because our federalist system recognizes that the states retain genuine sovereignty in vast areas in which Congress is empowered to act, our commitment to the “perfect equality” of all of “members of the Confederacy” with regard to their “attributes as . . . independent sovereign

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of formal equality among states—not because they are in fact equal, but because no other genuinely federal principle is plausible.”); Bereket Habte Selassie, *Self-Determination in Principle and Practice: The Ethiopian-Eritrean Experience*, 29 COLUM. HUM. RTS. L. REV. 91, 115 (1997) (noting “an essential principle of federalism (i.e., equality among the component parts of the federation”); cf. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 28, 1961, 12 BVerfGE 205 (Ger.), [http://www.utexas.edu/law/academics/centers/transnational/work\\_new/german/case.php?id=652](http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=652) [<http://perma.cc/X3YT-9TNP>] (“In the Federal Republic of Germany, all states have the same constitutional status; they are States that are entitled to equal treatment in transactions with the Federation.”); CHESTER JAMES ANTEAU, STATES’ RIGHTS UNDER FEDERAL CONSTITUTIONS § 7.04 (1984) (“Constitutions in federal societies are replete with a variety of provisions that guarantee equality of the states or prohibit discrimination against the member states.”); GEOFFREY SAWER, MODERN FEDERALISM 14, 16 (1969) (listing “Guarantees against Centre discrimination in dealings with Regions” as among the standard features of federalist systems worldwide that have been derived from the American system). This principle is sometimes referred to as (or is understood to be contained within a broader principle that is sometimes referred to as) the principle of “[f]ederal fairness,” SAWER, *supra*, at 16, or “federal comity,” EDWARD MCWHINNEY, COMPARATIVE FEDERALISM: STATES’ RIGHTS AND NATIONAL POWER 78–89 (1962).

There are, of course, many different theories of federalism—chief among them “dual federalism,” “cooperative federalism,” and “dynamic federalism.” See ANTHONY J. BELLIA, JR., FEDERALISM 183–224 (2011). But this Article’s argument does not depend on which of those theories the reader prefers. Equal sovereignty is inherent in all of them.

235. Cf. Christoph Schönberger, *Lisbon in Karlsruhe: Maastricht’s Epigones at Sea*, 10 GERMAN L.J. 1201, 1215 (2009) (arguing that a system that gives small states disproportionately large but not fully equal representation is consistent with basic principles of federalism, as “federal comity [entails] an effort to accommodate the statehood of *all* Member States. A federal Union of States always requires that the big states take into due consideration the interests of smaller States”).

236. See *supra* Part II.A–B.

237. *Case v. Toftus*, 39 F. 730, 732 (C.C.D. Or. 1889).

[g]overnment[s]”<sup>238</sup> must necessarily preclude Congress from overriding that sovereignty unequally.<sup>239</sup>

The equal sovereignty principle has always been understood to be essential to the harmony of the nation—as the foregoing cases and history amply demonstrate. As far back as the 1790s, Republican pamphleteer Joel Barlow sought to describe to the Europeans how, here in America, “[t]he principle of equality guaranteed harmonious union.”<sup>240</sup> In his *Advice to the Privileged Orders*, first published in 1792, Barlow explained that, “[a]mong the several states, the governments are all equal in their force, and the people are all equal in their rights.”<sup>241</sup> Barlow’s argument was that, “[j]ust as the state constitutions secured individual rights, the federal Constitution secured the rights of states; these states—as self-governing republics guaranteed against internal subversion and external assault—were much more comprehensively, substantially, and enduringly ‘equal’ than the states of Europe could ever hope to be.”<sup>242</sup>

The sovereign equality of the American states may well have exceeded that of the European nations, but it was nonetheless drawn from European notions of international law. In the Declaration of Independence, the American colonies freed themselves from British control and declared themselves to be “Free and Independent States.”<sup>243</sup> As the Supreme Court has observed, “[w]hen independence was achieved, the precepts to be obeyed . . . were those of international law.”<sup>244</sup> Under the law of nations, all free states were

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238. *Withers v. Buckley*, 61 U.S. (20 How.) 84, 92 (1857).

239. See *supra* notes 128–69 and accompanying text; *infra* note 264.

240. ONUF & ONUF, *supra* note 198, at 141 & n.48.

241. Joel Barlow, *Advice to the Privileged Orders*, in *THE POLITICAL WRITINGS OF JOEL BARLOW* 3, 67 (1796).

242. ONUF & ONUF, *supra* note 198, at 142.

243. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776); see also ARTICLES OF CONFEDERATION of 1781, art. II (“Each State retains its Sovereignty, freedom and independence . . .”). To be sure, not all of the Framers were of the view that the states were truly “free and independent” of each other as a result of the Declaration. To Wilson, Hamilton, and other Federalists, the states declared their independence jointly, and had never—even before the Articles of Confederation and the Constitution—individually possessed all of the attributes of national sovereignty. See RAKOVE, *supra* note 196, at 163–68 (“For Wilson and later nationalists, the idea that the states and nation emerged simultaneously, or that only a national act . . . could give the states political identity, suggested that the rights they retained were not absolute.”); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 81, at 324 (indicating that Wilson and Hamilton ascribed to the view that the States “were independent, not *Individually* but *Unitedly*”).

244. *New Jersey v. Delaware*, 291 U.S. 361, 378 (1934).

entitled to the “perfect equality and absolute independence of sovereigns.”<sup>245</sup> When the states subsequently joined together under the Constitution, they gave up some of that “absolute independence of sovereigns,” but they manifested no desire to give up their “perfect equality”<sup>246</sup> as well.

That equality was not spelled out in so many words in the Constitution. It was, rather, a background assumption on which the Constitution was drafted.<sup>247</sup> As Senator Pinkney put it, discussing in

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245. The Schooner *Ex. v. McFaddon*, 11 U.S. (7 Cranch.) 116, 137 (1812); see EDWIN DEWITT DICKINSON, *THE EQUALITY OF STATES IN INTERNATIONAL LAW* 114–15, 120 (1920) (“States are equal in the law of nations.”); Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1328 (1996) (stating that “[u]nder the law of nations, such ‘Free and Independent States’ are entitled to the ‘perfect equality and absolute independence of sovereigns’”); see also U.N. Charter art. 2, ¶ 1 (“The Organization is based on the principle of the sovereign equality of all its Members.”).

246. See Clark, *supra* note 245, at 1328 (illustrating that “[a]lthough the states necessarily compromised their ‘absolute independence’ by uniting under the Constitution, it does not follow that they forfeited their ‘absolute equality’”). As one Member of Congress later expounded,

[a]t the Declaration of Independence, all the States were left perfectly equal and sovereign. When the Articles of Confederation were formed, they were still equal and sovereign, too, except so far as powers were surrendered in those articles. When these articles were dissolved by the Federal Constitution, they were still equal and sovereign in every respect, where powers were not surrendered by that instrument.

35 ANNALS OF CONG. 1258 (1820) (statement of Rep. Anderson). Professor Thomas Lee has explained that “the Founders understood the States as sovereign entities bound together in an interdependent coexistence very much like the community of nations, and they therefore frequently consulted international law and political theory to craft rules conducive to a peaceful and mutually respectful coexistence.” Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 NW. U. L. REV. 1027, 1031 (2002). Lee argues that “the sovereign equality of the States” was one of the international law principles that the Framers made a “purposive decision to incorporate into the Constitution”—rather than to jettison. *Id.* at 1028; cf. Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1, 80–82 (2003) (suggesting that the Supreme Court’s recent state sovereign immunity cases can be understood as incorporating, from international law, notions of state sovereign equality).

247. Other scholars have made this same observation, albeit without offering substantial support or elaboration. See Clark, *supra* note 245, at 1328 (“[T]he Constitution proceeds on the assumption that the states are coequal sovereigns within the federal union.”); Laycock, *supra* note 107, at 288 (“The Constitution assumes, without ever quite saying so, that the several states are of equal authority.”); James R. Pielemeier, *Why We Should Worry About Full Faith and Credit to Laws*, 60 S. CAL. L. REV. 1299, 1325 (1987) (“A major premise underlying American federalism and our traditional concern for interstate autonomy is that the states are equal sovereigns.”).

The notion of equal sovereignty might be seen as a “constitutional backdrop,” as Stephen Sachs has helpfully used that phrase. See Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1816 (2012) (explaining that “constitutional ‘backdrops’” are “rules of law that aren’t derivable from the Constitution’s text, but instead are left unaltered by the text, and in fact are protected by the text from various kinds of legal change”).

1820 the question whether Congress could abolish slavery in Missouri alone, “the Constitution recognises” the “natural equality of States, . . . not only because it does not deny them, but presumes them to remain as they exist by the law of nature and nations.”<sup>248</sup> “Inequality in the sovereignty of States,” explained Senator Pinkney, “is unnatural, and repugnant to all the principles of that law. Hence we find it laid down by the text-writers on public law, that ‘Nature has established a perfect equality of rights between independent nations.’”<sup>249</sup> Here, Senator Pinkney was quoting Emer de Vattel, whose treatise, as Professor Thomas Lee has explained, “was the most popular and widely available tract of its kind in late eighteenth-century America,” and was “one of the most influential legal treatises in American constitutional law.”<sup>250</sup> “[T]he conceptualization of state sovereignty in Vattel’s work” had a substantial impact on the Framers’ shaping and understanding of our federalist system.<sup>251</sup>

Vattel argued forcefully that equal sovereignty is a natural trait of all states:<sup>252</sup>

Since men are naturally equal, and a perfect equality prevails in their rights and obligations, as equally proceeding from nature,—nations composed of men, and considered as so many free persons living together in a state of nature, are naturally equal, and inherit from nature the same obligations and rights. Power or weakness does not in this respect produce any difference. A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom.<sup>253</sup>

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248. 35 ANNALS OF CONG. 400 (1820) (statement of Sen. Pinkney).

249. *Id.* (quoting Emer de Vattel); see EMER DE VATTEL, *THE LAW OF NATIONS* bk. 2, ch. 111, § 36 (London ed. 1797) (1758) (“[N]ature has established a perfect equality of rights between independent nations. Consequently none can naturally lay claim to any superior prerogative: for, whatever privileges any one of them derives from freedom and sovereignty, the others equally derive the same from the same source.”).

250. Lee, *supra* note 246, at 1061; see also *id.* at 1061–67 (recounting Vattel’s influence on the Framers).

251. *Id.* at 1064–65.

252. Vattel “uses the words ‘State’ and ‘nation’ interchangeably.” Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court’s Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819, 832 (1999).

253. VATTEL, *supra* note 249, prelim. § 18. Vattel specifically noted that “several sovereign and independent states may unite themselves together by a perpetual confederacy” into a “federal republic” “without ceasing to be, each individually, a perfect state.” *Id.* bk. 1, ch. 1, § 10.



This was the backdrop understanding against which the Framers had operated.<sup>254</sup> Without expressly saying so, explained Senator Pinkney, the “Constitution of the United States proceeds upon the truth of this doctrine. It takes the States as it finds them, *free and sovereign alike by nature*. . . . It diminishes the individual sovereignty of each, and transfers, what it subtracts, to the Government which it creates: it takes from all alike, and leaves them relatively to each other equal in sovereign power.”<sup>255</sup>

If we are looking for textual clues, then, we might flip the burden of proof and begin with the dog that did not bark.<sup>256</sup> Given the historical background, we might reasonably expect that, if the Framers had meant to disturb the fundamental notion of equal sovereignty that prevailed in the law of nations and consumed the delegates at the Convention, they would have done so explicitly. But they did not. As Professor Douglas Laycock has noted, “[e]very reference to state authority is to the states generically; no provision gives more authority to some states than to others.”<sup>257</sup>

If we are nonetheless going to demand affirmative textual “hooks”—hints in the text to buttress and validate the background structural principle—we need look no further than the preamble. “We the People of the United States, in order to form a more perfect Union, . . . do ordain and establish this Constitution for the United States of America.”<sup>258</sup> The very notion of a “union” would seem implicitly to suggest the equality of the member states.<sup>259</sup> It is, of course, true (as Professor David Currie has observed) that “unions of unequal states are surely conceivable.”<sup>260</sup> But, especially in light of the historical context in which the Constitution was drafted, “a more *perfect* Union” must be a union of equals.<sup>261</sup>

254. Recall that Luther Martin quoted these same passages from Vattel in calling for equal sovereignty at the Convention. *See supra* notes 192–95 and accompanying text.

255. 35 ANNALS OF CONG. 400 (1820) (statement of Sen. Pinkney).

256. *Cf.* Chisom v. Roemer, 501 U.S. 380, 396 n.23 (1991) (“Congress’[s] silence in this regard can be likened to the dog that did not bark.” (citing Sir Arthur Conan Doyle, *Silver Blaze*, in 1 THE COMPLETE SHERLOCK HOLMES 335 (1927))).

257. Laycock, *supra* note 107, at 288.

258. U.S. CONST. pmb1.

259. *See* Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 507 (2008) (observing that “the equality norm may have some implicit textual foundation in the Constitution’s vision of a ‘Union’”); *see also supra* Part II.A; *supra* note 177.

260. CURRIE, *supra* note 139, at 243. Those unions would probably not, however, establish federalist systems of government.

261. As one early nineteenth century representative put it,

On top of that, not only do the states enjoy equal representation in the Senate,<sup>262</sup> but the Constitution purports to insulate that equality permanently from the possibility of amendment.<sup>263</sup> This speaks directly to a deep constitutional commitment to equal sovereignty among the states.<sup>264</sup>

[a] principal object of the Constitution was ‘to form a more perfect union.’ The parties made an equal surrender of sovereignty, and retained equal powers in the Federal Government. The sovereignty ceded is equally operative upon every State. The powers exercised by the several States, in Congress, are equal—in the Senate, in numbers; in the House, in strength.

35 ANNALS OF CONG. 975 (1820) (statement of Rep. Holmes).

262. See U.S. CONST. art. I, § 3, cl. 1.

263. See *id.* art. V (“[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate [through constitutional amendment].”).

264. See 29 ANNALS OF CONG. 600 (1816) (statement of Rep. Wright) (“The Senate represented the sovereignty of the States; and the sovereignty of the States, like all sovereignties, are equal, and, of course, correctly equally represented.”); THE FEDERALIST NO. 39, at 255 (James Madison) (Jacob E. Cooke ed., 1961) (“The Senate . . . will derive its powers from the States, as political and co-equal societies; and these will be represented on the principle of equality in the Senate . . . .”); *id.* NO. 43, at 296 (James Madison) (noting in a discussion of Article V that “[t]he exception in favour of the equality of suffrage in the Senate was probably meant as a palladium to the residuary sovereignty of the States, implied and secured by that principle of representation in one branch of the Legislature; and was probably insisted on by the States particularly attached to that equality”); RAKOVE, *supra* note 196, at 170 (“After July 16, no one could deny that the Senate was intended to embody the equal sovereignty of the states . . . .”); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 173, § 691 (Boston, Hilliard, Gray & Co. 1833) (noting that, in the Senate, “each state in its political capacity is represented upon a footing of perfect equality, like a congress of sovereigns”); *id.* at 178, § 696 (noting that the Senate is “fixed upon an absolute equality, as the representative of state sovereignty”); 2 ELLIOT’S DEBATES, *supra* note 60, at 46 (statement of Fisher Ames at the Massachusetts ratifying convention) (“The senators [in their equal numbers] represent the sovereignty of the states . . . .” (emphasis omitted)); *id.* at 47 (statement of Rufus King at the Massachusetts convention) (“[T]he Senate preserved the equality of the states . . . .”); *id.* at 319 (statement of Alexander Hamilton at the New York convention) (admitting that “the equal vote in the Senate was given to secure the rights of the states” (emphasis omitted)); 4 *id.* at 125 (statement of James Iredell at the North Carolina convention) (“[T]he great caution of giving the states an equality of suffrage in making treaties, was for the express purpose of taking care of [state] sovereignty.”); 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 81, at 371 (Mar. 30, 1796, Message from President Washington to the House of Representatives on Jay’s Treaty) (asserting, “[h]aving been a member of the General Convention, and knowing the principles on which the Constitution was formed,” that “the sovereignty and political safety of the smaller States were deemed essentially to depend” on equal suffrage in the Senate); Clark, *supra* note 245, at 1328; Erbsen, *supra* note 259, at 507–08; Metzger, *supra* note 83, at 1518.

Of course, as a result of the Connecticut Compromise, the states do not have equal representation in the House of Representatives. See U.S. CONST. art. I, § 2; *id.* amend. XIV, § 2. But the fact of permanent equality in the Senate, along with the history recounted above, see *supra* Part II.B, demonstrates that the compromise was not intended or understood to undermine the sovereign equality of the states. As one former House representative observed,

Finally, perhaps textual support for striking down laws that violate the equal sovereignty principle can be found in the Necessary and Proper Clause<sup>265</sup>—in particular in its propriety requirement. The Supreme Court has previously established that “a law is not proper for carrying into Execution” a federal power within the meaning of that clause “when it violates a constitutional principle of state sovereignty”—even if that principle is not otherwise expressly enumerated in the constitutional text.<sup>266</sup> On that reasoning, a law that

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[t]he sovereignty of each State was solemnly guarantied [sic] by the Constitution, and as each State, whether great or small, was equally sovereign and independent, each State is equally represented in the Senate of the United States; each State sends two members; and this is the federative feature in our Constitution; but the House of Representatives was intended as the immediate representation of the people of the United States.

17 ANNALS OF CONG. 911 (1807) (statement of Rep. Key).

Further support for the notion that this constitutional commitment to equal sovereignty should be understood to limit Congress’s ability to exercise its legitimate powers in a way that unequally curtails state sovereignty can be found in Benjamin Franklin’s proposed compromise regarding the method of representation in the Congress. To resolve the impasse between the small and large states, *see supra* Part II.B, Franklin initially proposed full proportional representation in the House, but that the Senate’s voting rules should vary according to the nature of the action being taken. Generally, the Senate should vote by proportional representation (apportioned not strictly by population, but rather by the amount of money that each state contributes to the federal treasury), but “in all cases or questions wherein the Sovereignty of individual States may be affected, or whereby their authority over their own Citizens may be diminished, or the authority of the General Government within the several States augmented, each State shall have equal suffrage” in the Senate. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 81, at 489. This was a highly impractical suggestion, CHARLES WARREN, THE MAKING OF THE CONSTITUTION 257 (2d ed. 1937), and it went nowhere; the impasse was eventually resolved instead by the Connecticut Compromise, *see supra* Part II.B, in which Franklin also played a role, *see* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 81, at 526. But Franklin’s proposal nonetheless illustrates that the guarantee of equal representation in the Senate was tied up with concerns about Congress’s ability to use its delegated powers to infringe upon state sovereignty, perhaps in a discriminatory manner. That is to say, the equal sovereignty that many of the Framers were committed to protecting was the states’ “authority over their own Citizens” and the “authority of the General Government within the several States,” *id.* at 489, and the Framers were committed to protecting that equal sovereignty from the acts of Congress.

265. U.S. CONST. art. I, § 8 (“The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).

266. *Gonzales v. Raich*, 545 U.S. 1, 39 (2005) (Scalia, J., concurring) (emphasis and brackets omitted) (citing *Printz v. United States*, 521 U.S. 898, 923–24 (1997)); *see also* Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 322–23 (1993) (hypothesizing that principles of state sovereignty embodied in the Necessary and Proper clause may limit Congress’s authority). *But see* J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581, 638–40 (questioning the validity of this interpretation of the clause); Manning,

violates the equal sovereignty principle is not consistent with the Necessary and Proper Clause.<sup>267</sup>

This last is surely something of a flimsy textual hook, as it is ultimately circular. It does not so much give us a textual indication of what the unwritten structural principles of federalism are as it gives us a textual anchor for reading those structural principles—whenever we find them elsewhere—into the constitutional text.<sup>268</sup>

And it is therefore highly manipulable.<sup>269</sup> An injudicious judge might strike down a law that is otherwise consistent with the Constitution on the ground that it contravenes the judge’s own, personal view of the appropriate—the “proper”—federal–state balance, and is therefore, according to the judge, beyond the scope of the Necessary and Proper Clause.

This is a serious concern, to be sure. And it is one that extends more broadly—not just to the manipulability of abstract textual hooks like “proper,” but also to the entire use of nontextual, structural reasoning of the type championed by Charles Black and

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*Foreword*, *supra* note 212, at 32, 48–67 (noting that “the Court treats the ‘propriety’ requirement of the Necessary and Proper Clause as a textual hook for the assertion of broad *judicial* power to judge the appropriateness of legislatively prescribed means” and criticizing this practice).

267. Other textual hooks might include (1) the requirement in the Effects Clause of Article IV, section 1, that Congress act pursuant to “general laws,” *see Metzger*, *supra* note 83, at 1494, 1518; (2) the provision of Article II, section 1 that provides that, in the event that no candidate for President receives a majority of the electoral vote, the House of Representatives shall choose the President from the top five vote-getters, but “the Votes shall be taken by States, the Representation from each State having one Vote,” U.S. CONST. art. II, § 1; *see also* Letter from James Madison to George Hay (Aug. 23, 1823), *in* 9 THE WRITINGS OF JAMES MADISON, *supra* note 202, at 148–49 (noting that this provision was “an accommodation to the anxiety of the smaller States for their sovereign equality”); (3) the use throughout the Constitution of the word “State,” which at the time of the framing was understood to refer to an independent government with the attributes of sovereignty cataloged by Vattel and other writers, *see* Rappaport, *supra* note 252, at 830–34; (4) and the Full Faith and Credit Clause of Article IV, section 10, *see* Robert A. Sedler, *Constitutional Limitations on Choice of Law: The Perspective of Constitutional Generalism*, 10 HOFSTRA L. REV. 59, 98 (1981) (“[T]he broad, organic purpose of the full faith and credit clause is to promote equality among the states and respect for the sovereignty of each state in the federal system . . .”). For an argument that the Eleventh Amendment is also a textual reflection of the principle of equal sovereignty among the states, *see* Lee, *supra* note 246 at 1032–40.

268. *Cf. supra* note 224 and accompanying text (noting that the same can be said of the textual hook in *McCulloch*).

269. *See* Manning, *Foreword*, *supra* note 212, at 54–57 (noting that, “[b]ecause neither [federalism nor separation of powers] provides firm answers in the abstract, the particulars of each almost invariably require the creation, rather than the excavation, of constitutional meaning,” and explaining that the Necessary and Proper Clause in particular “unquestionably delegates interpretive lawmaking discretion”).

employed here. Professor Michael Dorf has argued that, despite its strong appeal, Charles Black-style structural reasoning is underutilized in constitutional theory precisely because, “a constitutional regime still haunted by the ghost of *Lochner* and fearful, by turns, of both politically conservative and politically liberal overreaching by the judiciary, inference from institutional structures appears to be too open-ended a methodology” when compared to arguments grounded more clearly in the language of the document itself.<sup>270</sup>

The point is well taken. This is not the place to attempt a full-throated defense of structural reasoning in constitutional law.<sup>271</sup> I will instead offer two very brief observations. First, for better or for worse, this type of reasoning is already commonplace in federalism cases. Whatever normative view one takes about what *should be* the proper method of constitutional interpretation in the federalism arena, the fact remains that the equal sovereignty principle fits well within the currently prevailing structuralist methodology for crafting federalism doctrine.<sup>272</sup> Second, to admit that this type of reasoning is susceptible to manipulation is not to suggest that any particular application of it is necessarily invalid. The validity of a particular structural decision depends on the strength of the historical evidence and structural arguments upon which it is based. I am personally inclined to believe that some of the Supreme Court’s recent,

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270. Michael C. Dorf, *Interpretive Holism and the Structural Method or How Charles Black Might Have Thought About Campaign Finance Reform and Congressional Timidity*, 92 GEO. L.J. 833, 838 (2004) (referring to *Lochner v. New York*, 298 U.S. 45 (1905)).

271. For a thoughtful defense of Professor Black’s approach, see Metzger, *supra* note 216, at 103–05; see also Bradford R. Clark, *Translating Federalism: A Structural Approach*, 66 GEO. WASH. L. REV. 1161, 1161 (1998) (defending Black’s approach not as a means of ignoring or contravening the text, but rather as a means “to determine the specific import of the constitutional text by reference to the constitutional structure”). In short, structural reasoning has the benefits of practicality, functionalism, and common sense. As Black explains, some things just have to be true of the Constitution for it to fulfill its functions effectively, regardless of whether those things are spelled out in the text. See BLACK, *supra* note 218, at 12 (“Could a state make it a crime to file suit in a federal court? Could a state provide that lifelong disqualification from voting or holding property was to result from even a short service in the United States Army?”). Structural reasoning allows us to focus on “the practicalities and proprieties of the thing, without getting out dictionaries whose entries will not really respond to the question we are putting, or scanning utterances, contemporary with the text, of persons who did not really face the question we are asking.” *Id.* at 22–23.

272. Indeed, as Professor Metzger explains, categorically rejecting this type of structural reasoning would have a serious destabilizing effect and would call into question the legitimacy of a huge body of constitutional doctrine, both in federalism cases and elsewhere in the constitutional corpus juris. Metzger, *supra* note 216, at 103–05.

nontextual federalism decisions were wrongly decided, precisely because I do not find the historical evidence and structural arguments upon which they are based to be sufficiently compelling.<sup>273</sup> But, in my view, the structure, history, and precedent discussed here make equal sovereignty a very different case.

### III. THE BASIC CONTOURS OF THE EQUAL SOVEREIGNTY DOCTRINE

Critics of the Court's invocation of equal sovereignty, including Justice Ginsburg in her *Shelby County* dissent, have emphasized—to suggest either that the equal sovereignty principle is utterly revolutionary, or that it cannot possibly be right—that Congress routinely discriminates among the states. “Federal statutes that treat States disparately,” observes Justice Ginsburg, “are hardly novelties. Do such provisions remain safe given the Court's expansion of equal sovereignty's sway?”<sup>274</sup> Condemning the *Shelby County* decision, Professor Eric Posner opines that, “[i]n fact, the federal government doesn't treat states equally and couldn't possibly. Nearly all laws affect different states differently. . . . So whatever explains the court's decision today, the putative principle of equal sovereignty can't be it.”<sup>275</sup>

But these arguments are too crude. A more refined understanding of equal sovereignty demonstrates that the vast majority of congressional discrimination among the states—including the vast majority of legislation flagged by critics—does not run afoul of the Constitution.

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273. See *Alden v. Maine*, 527 U.S. 706, 760–814 (1999) (Souter, J., dissenting) (criticizing the majority opinion not for employing the wrong methodology, but rather for drawing the wrong conclusions from history and structure); *Printz v. United States*, 521 U.S. 898, 970–76 (1997) (Souter, J., dissenting) (same).

274. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2649 (Ginsburg, J., dissenting) (citations omitted).

275. Posner, *supra* note 4; see also, e.g., Price, *supra* note 24, at 28–29 (“Congress routinely enacts legislation that presumes only a rational basis is necessary for unequal treatment of states. . . . Courts have never before considered such legislation suspect.”); cf. Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 71 (2013) (“[O]ne could marvel at the Court's willingness to treat differentiation among states, in this context, as an affront, without ever explaining how it is different from the other contexts in which Congress differentiates among states.”).

A. *What Equal Sovereignty Is Not*

To be sure, the Framers were deeply concerned that Congress might use its delegated powers to discriminate among the states.<sup>276</sup> “The fears and jealousies among the states and the apprehensions that the general legislature might discriminate in favor of one state or region to the economic detriment of another were among the most strident themes of the Convention.”<sup>277</sup> The equal sovereignty principle must be understood in light of those fears.

Yet the Framers fully realized that perfect equality of federal legislation is not possible. At the very least, even laws that are drafted in facially nondiscriminatory terms will almost always have a greater impact on some states than others. For instance, at the Constitutional Convention, the Southern delegates—whose states had no ship-building industry—feared that, once the federal government was vested with the power to regulate commerce, the Northern states would force through Congress a bill (similar to those that had already been enacted in some Northern states) requiring all American imports and exports to be carried in American-made ships. Such a law would have greatly enhanced the Northern ship-building industry at the expense of Southern exports to foreign nations.<sup>278</sup> But it was well understood that it would be constitutional. Indeed, some Anti-Federalists opposed ratification for just this reason. Luther Martin, for instance, lamented to the Maryland legislature that Congress was empowered to enact taxes and regulations that would have a disparate effect on certain states:

[T]hough there is a provision that all duties, imposts, and excises, shall be uniform,—that is, to be laid to the same amount on the same articles in each state,—yet this will not prevent Congress from having it in their power to cause them to fall very unequally, and much heavier on some states than on others, because these duties may be laid on articles but little or not at all used in some states, and of absolute necessity for the use and consumption of others; in which case, the first would pay little or no part of the revenue arising therefrom, while the whole, or nearly the whole, of it would be paid

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276. This point is discussed in detail in Colby, *supra* note 11, at 266–88.

277. Judith Schenck Koffler, *The Bankruptcy Clause and Exemption Laws: A Reexamination of the Doctrine of Geographic Uniformity*, 58 N.Y.U. L. REV. 22, 37–38 (1983).

278. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 81, at 450–53 (reflecting widespread agreement that such a law would benefit the North at the expense of the South); WARREN, *supra* note 264, at 579–80 (same).

by the last, to wit, the states which use and consume the articles on which the imposts and excises are laid.<sup>279</sup>

But the Constitution was ratified anyway, with a full understanding that it was unavoidable that many acts of Congress would be discriminatory in effect. As the Supreme Court observed in the nineteenth century, in rejecting an argument that Congress had impermissibly discriminated between states, “[p]erfect uniformity and perfect equality of taxation [and regulation], in all the aspects in which the human mind can view it, is a baseless dream.”<sup>280</sup>

The equal sovereignty principle thus does not categorically preclude Congress from “treat[ing] States disparately”<sup>281</sup> in any manner whatsoever; it does not foreclose “all laws [that] affect different states differently.”<sup>282</sup> It is a guarantee of equal *sovereignty*, not of equal treatment in all respects. Of course, “[s]overeignty” is a term used in many senses and is much abused.<sup>283</sup> But, as the foregoing makes clear, when they are discussing the equal sovereignty principle, judges and politicians (including the Framers) are using the term in its dictionary sense, to refer to a state’s “independent authority and . . . right to govern itself.”<sup>284</sup> *Black’s Law Dictionary* defines “state sovereignty” as the “right of a state to self-government.”<sup>285</sup> Thus, “[t]he true constitutional equality between the states only extends to the right of each, under the constitution, to have and enjoy the same measure of local or self-government, and to be admitted to an equal participation in the maintenance, administration, and conduct of the common or national government.”<sup>286</sup> Far from being a sweeping mandate for across-the-board state equality, the equal sovereignty principle is nothing more than “the truism that the Union under the Constitution is essentially

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279. 1 ELLIOT’S DEBATES, *supra* note 60, at 369.

280. The Head Money Cases, 112 U.S. 580, 595 (1884).

281. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2649 (2013) (Ginsburg, J., dissenting).

282. Posner, *supra* note 4.

283. *Boumediene v. Bush*, 553 U.S. 723, 754 (2008) (quoting 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 206 cmt. b (1986)); *see generally* John Hilla, *The Literary Effect of Sovereignty in International Law*, 14 WIDENER L. REV. 77 (2008) (reviewing the variety of conceptual and linguistic meanings that have attached to “sovereignty”).

284. *Sovereignty*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/sovereignty> [<http://perma.cc/9MTP-T3WC>].

285. *State Sovereignty*, BLACK’S LAW DICTIONARY (9th ed. 2009) (indicating that this definition dates back to the eighteenth century).

286. *Case v. Toftus*, 39 F. 730, 732 (C.C.D. Or. 1889).



one of States equal in local governmental power.”<sup>287</sup> And so, unequal or discriminatory federal laws implicate the equal sovereignty principle only when they grant more regulatory authority or capacity for self-government to some states than to others (or allow some states a greater role than others in the federal government).

The equal sovereignty principle is therefore not undermined by, nor does it threaten, federal laws that are drafted in general, nongeographic terms, but have a disparate impact on some states.<sup>288</sup> Such laws treat the states as equal sovereigns; they just end up affecting some states more than others.<sup>289</sup> To the extent that such a law undermines state sovereignty, all states have the same decreased sovereign rights over its subject matter, even if the reduction in sovereignty ends up mattering much more to some states than to others.<sup>290</sup>

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287. *Virginia v. West Virginia*, 246 U.S. 565, 593 (1918).

288. As the Supreme Court has observed,

[t]he “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. . . . Area, location, geology, and latitude have created great diversity in the economic aspects of the several States. The requirement of equal footing was designed not to wipe out those diversities but to create parity as respects political standing and sovereignty.

*United States v. Texas*, 339 U.S. 707, 716 (1950) (citations omitted). A law of this sort could implicate equal sovereignty only if a disadvantaged state “was deprived of any right to participate in the national political process or . . . was singled out in a way that left it politically isolated and powerless.” *South Carolina v. Baker*, 485 U.S. 505, 512–13 (1988).

289. *Cf. The Head Money Cases*, 112 U.S. 580, 594 (1884) (“Is the tax on tobacco void, because in many of the States no tobacco is raised or manufactured? . . . The tax is uniform when it operates with the same force and effect in every place where the subject of it is found.”).

290. As such, Professor Posner does not undermine the equal sovereignty principle by pointing out that “[d]isaster-relief laws benefit disaster-prone states at the expense of disaster-free states. Pollution-control laws burden industrial states. Progressive taxes burden states where the rich are concentrated.” Posner, *supra* note 4; *see also id.* (“Indeed, Section 2 of the Voting Rights Act will continue to burden states with substantial minority populations relative to other states, just because you can’t discriminate against a minority population that doesn’t exist.”). Nor does Professor Price when he notes that “benefits formulas may result in unequal distribution of funds, depending on where eligible beneficiaries (whether individuals, school districts, foundations, or other parties) reside.” Price, *supra* note 24, at 28 (discussing 20 U.S.C. § 1411 (2006) (special education funding); 23 U.S.C. § 104 (2006) (highway funding); 42 U.S.C. § 1396d (2006) (medical assistance benefit formulas)).

The same can be said of Justice Stevens’s assertion that the Three-Fifths Clause of Article I, section 2—which ended up giving the Southern states more voting power in the House of Representatives than they would have had if slaves had not been counted in apportionment at all—“created a basic inequality between the slave states and the free states” that “contradict[s] the notion that the ‘fundamental principle of equal sovereignty among the States’ is a part of our unwritten Constitution.” John Paul Stevens, *The Court and the Right to Vote: A Dissent*, N.Y. REV. OF BOOKS, 37 (Aug. 15, 2013) (reviewing GARY MAY, BENDING TOWARD

The same is true of federal spending. The fact that the federal government spends money in ways that benefit some states more than others does not implicate the equal sovereignty principle.<sup>291</sup> The Supreme Court has long held that federal spending does not infringe upon state sovereignty unless it amounts to “coercion” or “compulsion” of the state governments that effectively removes their agency as independent sovereigns.<sup>292</sup> Giving money to one state but

JUSTICE: THE VOTING RIGHTS ACT AND THE TRANSFORMATION OF AMERICAN DEMOCRACY (2013)). Under the Three-Fifths Clause, all states retained the same sovereign right to implement slavery (and thus increase their populations for apportionment purposes), even though the South chose to rely much more on slavery than did the North. Indeed, although slavery was much more widespread in the South, it persisted in all but one Northern state at the time of the framing, and the slaves in the Northern states, just like in their Southern counterparts, were counted as three-fifths persons in the early congressional apportionments. See Charles M. Biles, Congressional Apportionment Based on the 1790 Census 6–9 (Mar. 2015) (unpublished manuscript), [http://media.wix.com/ugd/9ae4b0\\_6cec7ab68b6141809555aecfc33f20e8.pdf](http://media.wix.com/ugd/9ae4b0_6cec7ab68b6141809555aecfc33f20e8.pdf) [<http://perma.cc/8W8J-ECWP>].

291. Most of the statutes that Justice Ginsburg listed as potentially imperiled in her *Shelby County* dissent fall into this category:

26 U.S.C. § 142(l) (EPA required to locate green building project in a State meeting specified population criteria); 42 U.S.C. § 3796bb (at least 50 percent of rural drug enforcement assistance funding must be allocated to States with “a population density of fifty-two or fewer persons per square mile or a State in which the largest county has fewer than one hundred and fifty thousand people, based on the decennial census of 1990 through fiscal year 1997”); §§ 13925, 13971 (similar population criteria for funding to combat rural domestic violence); § 10136 (specifying rules applicable to Nevada’s Yucca Mountain nuclear waste site, and providing that “[n]o State, other than the State of Nevada, may receive financial assistance under this subsection after December 22, 1987”).

*Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2649 (2013) (Ginsburg, J., dissenting). So do many of the laws that Professor Price cites to undermine the equal sovereignty principle. Price refers to “notorious congressional ‘earmarks’—line items funding particular parties or projects—that litter annual appropriations bills and single out particular entities, localities, or even states for federal largesse.” Price, *supra* note 24, at 28. Price notes in particular the Water Resources Development Act of 2007 (which appropriates funds for various specified navigation-related projects), the appropriation of funds for the Washington Metropolitan Area Transit Authority in the Consolidated and Further Continuing Appropriations Act of 2012, and the Disaster Relief Appropriations Act of 2012 (which appropriates funds for repairs on the Mississippi River and its tributaries). *Id.* at 28 n.22. Price further adds that “Congress sometimes establishes pilot projects that test particular federal initiatives in one state or several states before imposing them on the nation as a whole” and provides as examples

42 U.S.C. § 280g-6 (Supp. V 2012) (authorizing the Secretary of Health and Human Services to select “at least 3 states” for pilot projects relating to chronic kidney disease); Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, div. A, tit. VII, § 727, 125 Stat. 552, 585 (2011) (funding a pilot project to test reforestation techniques in Gulf Coast areas); tit. III, 125 Stat. at 567 (appropriating funds “to conduct a demonstration” regarding certain public housing programs).

*Id.* at 128 & n.23.

292. See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2601–03 (2012) (“Congress may use its spending power to create incentives for States to act in accordance with federal policies. But when ‘pressure turns into compulsion,’ . . . the legislation runs contrary to

not another—or spending money in one state but not another—is a form of discrimination, but not one that directly impedes the regulatory authority or sovereign autonomy of the state that got the short end of the stick.<sup>293</sup>

In seeking to discredit the equal sovereignty principle, Professor Price notes the prevalence of federal laws that burden or reward the states unequally in various ways, such as those just mentioned, and explains that “[c]ourts have never before considered such legislation suspect.”<sup>294</sup> Price continues,

In perhaps the most thorough consideration of the issue to date, the D.C. Circuit rejected arguments that the location of the federal

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our system of federalism.” (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)); *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (“Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion.’” (quoting *Steward Mach. Co.*, 301 U.S. at 590)). For that reason, discriminatory conditions imposed on federal funds do not violate the equal sovereignty principle unless the conditions are unduly coercive. Accordingly, despite Professor Price’s contrary suggestion, the equal sovereignty principle is not undermined by, or inconsistent with, the Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55 § 211, 125 Stat. 552, 695 (2011), which exempts “[a] public housing agency or such other entity that administers Federal housing assistance for the Housing Authority of the county of Los Angeles, California, the States of Alaska, Iowa, and Mississippi” from the requirement that such entities must generally include a resident on their respective governing bodies, Price, *supra* note 24, at 29 n.26.

293. It is no doubt true that there can be indirect, attenuated effects on equal sovereignty both from facially neutral federal laws that have a disparate impact and from unequal federal spending. For instance, a federal tax on individuals or activities that hits some states extremely hard, while leaving others virtually untouched—such as a tax on corn farming or oil production—can limit the burdened states’ practical ability to raise their own state taxes. (People only have so much money and will only tolerate a certain combined federal and state tax burden.) That reality, in turn, limits the burdened states’ practical ability to fund government initiatives relative to their peers, which, in a sense, limits the comparative extent to which they can realistically exercise their sovereign authority. Likewise, lavish federal spending for, say, infrastructure improvements in some states but not others can functionally require the other states to raise the money for the same ends themselves, through state taxes, which effectively limits their ability to raise funds to pursue other governmental initiatives—which, in turn, limits the amount of sovereign power that they can in practice exercise relative to the other states. But no court has ever suggested that such laws violate the equal sovereignty principle. Nor could they. Since all federal laws are discriminatory in effect, *see Colby*, *supra* note 11, at 329 (“For better or for worse, disparate impact of this sort is an unavoidable consequence of nationwide regulation in a diverse country.”), and it is often impossible for Congress to spend money in an entirely equal manner, *see id.* at 332–33 (“[T]his type of ‘discrimination,’ however unfortunate and however contrary to the spirit of the Convention, is simply unavoidable . . .”), if the equal sovereignty principle extended that far, it would mean the end of the federal government. But the principle does not, of course, extend that far; it is concerned instead only with direct, categorical restrictions on state sovereignty.

294. Price, *supra* note 24, at 29.

nuclear waste facility in Nevada violated a constitutional principle of state equal treatment. Although Nevada argued that the facility's selection violated a constitutional requirement that federal legislation treat states equally, the D.C. Circuit found 'no basis in the Constitution' for Nevada's argument.<sup>295</sup>

But the D.C. Circuit was absolutely correct to reject Nevada's assertion that there is a generalized "'equal treatment' requirement" that runs throughout the Constitution.<sup>296</sup> There is not. There is, instead, a limited principle of equal sovereignty. The law at issue in the D.C. Circuit case was enacted pursuant to the Property Clause.<sup>297</sup> Congress was simply choosing what use to make of some property that the federal government owns in Nevada; it was not interfering with the state's powers of self-government. As the D.C. Circuit correctly noted, "while the designation of Yucca as a repository may impose a burden on Nevada, it does not infringe upon state sovereign interests" in a way that implicates the structure of constitutional federalism.<sup>298</sup>

Even laws that explicitly regulate unevenly between the states in geographic terms do not necessarily implicate the equal sovereignty principle. Congress might well regulate individuals in different states in a discriminatory manner—even explicitly along state lines—without raising equal sovereignty concerns.<sup>299</sup> Regulating individuals differently in different states implicates the equal sovereignty principle only when it has the effect—in conjunction with the Supremacy Clause—of limiting the sovereign authority of some states, but not others. So, for instance, a federal law that prescribes a greater punishment for counterfeiting United States currency in State

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295. *Id.* (footnote omitted) (quoting *Nuclear Energy Inst. v. EPA*, 373 F.3d 1251, 1305 (D.C. Cir. 2004)).

296. *Nuclear Energy Inst.*, 373 F.3d at 1305.

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

298. *Nuclear Energy Inst.*, 373 F.3d at 1306.

299. To be sure, such discrimination would often be unconstitutional if Congress were exercising a power upon which the Constitution imposes a uniformity constraint. For instance, the Constitution empowers Congress to "establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4. Creating an easier path to citizenship in Massachusetts, or more stringent rules for discharging debt in the South, would be unconstitutional not because of the equal sovereignty principle, but rather because of the uniformity constraint imposed on Congress's exercise of those powers. For an argument that such a constraint is also implicitly contained within the commerce power, see Colby, *supra* note 11, at 301–46.

A than in State B, or that sets a higher price for stamps in State A than in State B, does not implicate equal sovereignty because it does not unequally affect the states' sovereign authority to govern.

*B. What Equal Sovereignty Is*

But equal sovereignty *would be* implicated by a federal law that provided that State A is permitted to regulate in a particular area, but State B is not.<sup>300</sup> Such a law would discriminatorily regulate the states directly, in their exercise of their sovereign authority. And equal sovereignty would also be implicated by a federal law that regulated individuals, rather than the states themselves, but applied only in State A, and not in State B—if the federal law had the preemptive effect of precluding State A, but not State B, from regulating in the area. Imagine, for instance, a federal law prohibiting bullfighting in Texas. Such a law would operate directly upon individuals—those who wish to conduct bull fights—rather than the states. But it would have an immediate impact upon the sovereign regulatory authority of the State of Texas, relative to its peers. By operation of the Supremacy Clause, the federal law would preempt any attempt by Texas to exercise its sovereign authority to enact legislation permitting or regulating bullfighting. But since the federal law would not apply outside of Texas, the other forty-nine states would be free to regulate bullfighting as they saw fit. Texas would be denied its equal sovereignty.<sup>301</sup>

Once we understand the limited nature of the equal sovereignty principle, we can see that most of the federal laws identified by Justice Ginsburg as imperiled by the equal sovereignty principle are not, in fact, threatened at all.<sup>302</sup> But one of the laws that she invokes does indeed fit the bill: the Professional and Amateur Sports Protection Act of 1992<sup>303</sup>—discussed in the Introduction to this Article—which prohibits sports gambling, but exempts Nevada from

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300. Cf. 29 U.S.C. § 1144(b)(5) (2012) (exempting Hawaii's prepaid health plan law from the scope of ERISA preemption).

301. As explained above, federal preemption implicates state sovereignty, but not in a way that generally runs afoul of the Constitution. Geographically discriminatory preemption, however, *does* violate a fundamental principle of federalism. See *supra* Part II.A (discussing the equal footing principle).

302. See *supra* notes 290–98 and accompanying text.

303. Professional and Amateur Sports Protection Act of 1992, Pub. L. 102-559, 106 Stat. 4227 (codified at 28 U.S.C. §§ 3701–3704).

its scope.<sup>304</sup> PASPA “does not merely regulate private conduct; it curtails the regulatory and revenue-raising authority of the states. It precludes non-exempted states from legalizing sports gambling . . . . Nevada may derive enormous financial benefits from casino sports book betting, but other states may not.”<sup>305</sup> As such, PASPA contravenes the principle of equal state sovereignty.<sup>306</sup>

Professor Price identifies another federal law that raises genuine equal sovereignty concerns: the Clean Air Act, which “permits one state (California) to establish its own more stringent motor vehicle emissions and engine design standards while requiring other states to follow either California’s standards or standards established by the federal government.”<sup>307</sup>

The fact that we can identify, at most, only a handful of current federal laws that do not afford equal sovereignty to the states suggests that the equal sovereignty principle is not actually “capable of [as] much mischief” as Justice Ginsburg initially feared.<sup>308</sup> It also dispels the assertion that the sheer volume of federal laws that violate it indicates that the principle cannot possibly be valid.

What is more, the simple fact that a law raises equal sovereignty concerns does not render it automatically unconstitutional, just as the mere fact that a law discriminates between people on the basis of a suspect classification does not necessarily mean that it is invalid under the Equal Protection Clause. Like most other constitutional principles, equal sovereignty is not absolute.<sup>309</sup> A federal statute that contravenes the equal sovereignty principle should simply trigger

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304. See *id.* § 3704; *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2649 (2013) (Ginsburg, J., dissenting); see also Price, *supra* note 24, at 29 nn.26–27 (arguing that PASPA’s existence undermines the equal sovereignty principle). A more complete discussion of PASPA’s exemptions can be found in Colby, *supra* note 11, at 250 n.3.

305. Colby, *supra* note 11, at 250–51.

306. See Justin Willis McKithen, Note, *Playing Favorites: Congress’s Denial of Equal Sovereignty to the States in the Professional and Amateur Sports Protection Act*, 49 GA. L. REV. 539, 560–62 (2015) (arguing that PASPA violates the equal sovereignty principle).

307. Price, *supra* note 24, at 29. Price argues that courts “have rejected challenges to the Clean Air Act provisions granting special regulatory powers only to California.” *Id.* at 29 n.27 (citing, for this proposition, *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031 (9th Cir. 2007); *Ass’n of Int’l Auto. Mfrs., Inc. v. Comm’r, Mass. Dep’t of Envtl. Prot.*, 208 F.3d 1 (1st Cir. 2000); *Am. Auto. Mfrs. Ass’n v. Cahill*, 152 F.3d 196 (2d Cir. 1998); *Virginia v. EPA*, 108 F.3d 1397 (D.C. Cir. 1997)). But none of those cases directly addressed or upheld the discrimination between states.

308. *Shelby Cty.*, 133 S. Ct. at 2649 (Ginsburg, J., dissenting).

309. See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (“Distinctions can be justified in some cases.”).

some form of heightened scrutiny, requiring the federal government to justify the disparate treatment. The Supreme Court expressed that understanding in *Northwest Austin* when it announced that “a departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.”<sup>310</sup> The Court has yet to spell out the exact contours of that inquiry; those will have to be worked out in detail over time. But, however the test is ultimately structured, at base, it will require Congress to provide a strong justification for treating the states as unequal sovereigns.<sup>311</sup>

In the case of PASPA, it is highly questionable whether such a justification can be found. Even Congress admitted that the problem that the law addresses is national in scope.<sup>312</sup> The only possible justification for treating the states differently is a desire to “grandfather” existing state laws that had relied to a substantial degree on the lack of contrary federal regulation.<sup>313</sup> Whether that is a sufficient justification for permanently favoring some states over

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310. *Id.*; see also *Shelby Cty.*, 133 S. Ct. at 2624 (“At the same time, as we made clear in *Northwest Austin*, the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States.”).

311. The Supreme Court has already developed a body of caselaw addressing similar concerns in the somewhat analogous context of the Tax Uniformity Clause and the Bankruptcy Clause, both of which require Congress to legislate uniformly among the states. See Colby, *supra* note 11, at 335–40 (analyzing the cases). Those cases are not as clear and consistent as one might hope, but in essence they establish the proposition that “Congress is empowered to tackle geographically isolated problems, but . . . federal laws must apply uniformly wherever those problems are presented.” *Id.* at 336; see also *The Regional Rail Reorganization Act Cases*, 419 U.S. 102, 159 (1974) (“The uniformity provision does not deny Congress the power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems.”).

312. See S. REP. NO. 102-248, at 5 (1991), as reprinted in 1992 U.S.C.C.A.N. 3553, 3556 (“Sports gambling is a national problem.”).

313. See *id.* at 8 (“Neither has the committee any desire to threaten the economy of Nevada, which over many decades has come to depend on legalized private gambling, including sports gambling, as an essential industry, or to prohibit lawful sports gambling schemes in other States that were in operation when the legislation was introduced.”). Other examples of federal statutes that trigger equal sovereignty concerns by grandfathering existing state laws include the Internet Tax Freedom Act, Pub. L. No. 105-277, 112 Stat. 2681-719 (1998) (codified at 47 U.S.C. § 151), which precludes all state taxes on Internet access, but exempts those state taxes already in place when the statute was enacted. The Privacy Act of 1974, Pub. L. 93-579, 88 Stat. 1896 (1974) (codified at 5 U.S.C. § 55a), which precludes the states from requiring individuals to disclose their social security numbers to receive a government benefit or to exercise a right, but exempts those states that already required disclosure as a condition of voting, provides another example. See *McKay v. Thompson*, 226 F.3d 752, 755 (6th Cir. 2000).

others in their ability to regulate an important subject is, at the very least, a dubious proposition.<sup>314</sup>

The Clean Air Act should trigger a similar analysis. It too is a “grandfather” law.<sup>315</sup> It generally prohibits the states from enacting their own motor vehicle emissions standards, but provides that the Environmental Protection Agency can waive preemption for states that regulated auto emissions prior to March 30, 1966.<sup>316</sup> Congress was well aware that only California meets that condition.<sup>317</sup> Unlike PASPA, the Clean Air Act does not simply allow California to leave in place its preexisting regulations; it empowers California—and only California—to continue to promulgate new emissions standards. California alone is granted, in the words of one House Report, “the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare.”<sup>318</sup> This is a classic example of unequal sovereignty. The question is whether California’s situation in relation to the problem of air pollution is sufficiently unique to justify the disparate treatment.<sup>319</sup>

It is not my intent here to answer such questions. My object is only to identify them, and to note that there will be, no doubt, situations in which federal laws that afford more (or less) sovereignty to some states than others will still be constitutional. This is yet another reason why the equal sovereignty principle is less revolutionary than critics have suggested. And it is yet another reason why the existence of the equal sovereignty principle is not fatally undermined by the litany of unequal federal statutes identified by critics.<sup>320</sup>

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314. See Colby, *supra* note 11, at 342–43.

315. See *id.* at 343–45.

316. See 42 U.S.C. § 7543(a)–(b) (2012).

317. See Brader, *supra* note 83, at 121.

318. H.R. REP. NO. 95-294, at 301–02 (1977), as reprinted in 1977 U.S.C.C.A.N. 1077, 1380–81.

319. See Ann E. Carlson, *Federalism, Preemption, and Greenhouse Gas Emissions*, 37 U.C. DAVIS L. REV. 281, 314 (“The prospect of fifty separate standards for automobiles is untenable. But California has unique air pollution problems and an economy large enough to support separate standards.”); *id.* at 311 (noting that California “is probably unique in the country in the amount of expertise and sophistication it has developed in the regulation of auto emissions”); Rachel L. Chanin, Note, *California’s Authority to Regulate Mobile Source Greenhouse Gas Emissions*, 58 N.Y.U. ANN. SURV. AM. L. 699, 713–21 (2003) (explaining California’s unique air pollution problems and Congress’s reasons for affording special leeway to that state).

320. Most of those statutes, as noted above, do not even trigger equal sovereignty concerns at all. But even those that do might well still be constitutional. For instance, Professor Price identifies “[a] statute from the early years of the Republic [which] granted jurisdiction over



It is at this stage of the inquiry—whether the “departure from the fundamental principle of equal sovereignty” is justified by the fact that the “statute’s disparate geographic coverage is sufficiently related to the problem that it targets”<sup>321</sup>—that the critics of *Shelby County* should focus their objections.<sup>322</sup> The Court concluded that, although the coverage formula used to determine which states were subject to the statute’s onerous restrictions on election lawmaking was justified in 1965, when the Voting Rights Act was first enacted, that formula was no longer justified in 2006, when the law was reauthorized.<sup>323</sup> Because the coverage formula continued to be “based on decades-old data and eradicated practices,” including the past use of “literacy tests” that “have been banned nationwide for over 40 years,” and on disparities in minority “voter registration and turnout in the 1960s and early 1970s” that no longer persisted, the Court found that the 2006 reauthorization statute’s disparate geographic coverage was not sufficiently related to the problem of twenty-first-century racial discrimination in voting that it targeted.<sup>324</sup> But, as Justice Ginsburg explained, Congress, prior to the 2006 reauthorization, held extensive hearings, amassed voluminous evidence, and made specific findings that racial discrimination in voting remains a serious and widespread problem in the covered

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certain federal revenue offenses only to specified state courts in New York and Pennsylvania.” Price, *supra* note 24, at 29 n.26. It may well be that that “statute’s disparate geographic coverage [was] sufficiently related to the problem that it targets.” *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009). The statute empowered state courts only in frontier counties that were uniquely and impractically far from the nearest federal courts:

[The legislative] committee further observe [sic], that the revenue districts on the northern frontier are at a distance of between three and four hundred miles of the place of residence of the district judges and of the district courts; that any petitioners from those districts would be forced to travel from six to eight hundred miles with their evidences [sic], in order to avail themselves of the benefits contemplated by the law; that the persons who are liable to infringe the laws of the United States, on account of their local situation, are generally poor, or in very moderate circumstances; that they have not the ability to bear the expenses of so long a journey.

15 ANNALS OF CONG. 330–31 (Jan. 1806) (statement of Rep. Saily).

321. *Nw. Austin*, 557 U.S. at 203.

322. The Voting Rights Act clearly implicates equal sovereignty because the covered “[s]tates [alone] must beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own.” *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2624 (2013). “While one State waits months or years and expends funds to implement a validly enacted law, its neighbor can typically put the same law into effect immediately, through the normal legislative process.” *Id.*

323. *See id.* at 2627–28.

324. *Id.*; *see also id.* at 2629 (“Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. It cannot rely simply on the past.”).

jurisdictions.<sup>325</sup> Whether Congress’s evidence was good enough to justify the continued use of the old coverage formula, rather than a fresh formula crafted anew to address current conditions,<sup>326</sup> is a hard question about the past and present state of racial discrimination in voting across the country—one that is made even more complicated by the fact that it is difficult to tell whether improved conditions in the covered jurisdictions today are the *result* of the continuing operation of the Voting Rights Act, as opposed to evidence that the act is no longer needed.<sup>327</sup> This is not an issue that I will tackle here. My point is only that one can accept the equal sovereignty principle while still believing that *Shelby County* was wrongly decided.

### C. *Equal Sovereignty and the Reconstruction Amendments*

Indeed, there is a strong argument—the possibility of which was ignored by the *Shelby County* majority—that the courts should be more forgiving of violations of the equal sovereignty principle in the context of federal civil-rights laws, like the Voting Rights Act, that were enacted pursuant to the Reconstruction amendments. As Professor Mark Graber explains, “One of the most remarkable features of Chief Justice Roberts’ opinion . . . in *Shelby County* . . . is the almost complete absence of any reference to the Thirteenth, Fourteenth, and Fifteenth Amendments, the Civil War, or anything that happened during Reconstruction.”<sup>328</sup> The Court’s opinion reads as though “the Civil War and Reconstruction never occurred or, as

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325. *See id.* at 2635–36, 2639–44 (Ginsburg, J., dissenting); *see also* Ellen D. Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982, Final Report of the Voting Rights Initiative, University of Michigan Law School*, 39 U. MICH. J.L. REFORM 643, 650–52 (2005) (seeking to demonstrate that the coverage formula accurately identifies the jurisdictions in which racial discrimination remains most prevalent).

326. *Cf.* Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 208 (2007) (suggesting that “the coverage formula . . . is both overinclusive and underinclusive of jurisdictions of concern with respect to their record of minority voting rights violations” and that, “[a]t least in the abstract, . . . it is difficult to defend a formula which, for example, covers counties in Michigan and New Hampshire, but does not cover the counties in Ohio and Florida with the most notorious voting rights violations in recent elections” (footnote omitted)).

327. *See Shelby Cty.*, 133 S. Ct. at 2638 (Ginsburg, J., dissenting) (“If the statute was working, there would be less evidence of discrimination, so opponents might argue that Congress should not be allowed to renew the statute.”).

328. Mark Graber, *The Missing Amendments*, BALKINIZATION (June 25, 2013, 11:00 AM), <http://balkin.blogspot.com/2013/06/the-missing-amendments.html> [<http://perma.cc/2D7L-D8BH>].

the Dunning School maintained, they were blots on American constitutionalism that ought to be erased.”<sup>329</sup>

But, of course, the Civil War and Reconstruction did happen. And they did work profound changes in American constitutionalism.<sup>330</sup> One might take a very expansive view of that change, opining that it effectively eradicated the notion of state sovereignty altogether,<sup>331</sup> but of course the Supreme Court has never countenanced that suggestion,<sup>332</sup> and certainly not of late. More productively, one might argue that, although the Reconstruction amendments did not annihilate state sovereignty altogether, they did work significant alterations to the structure of federalism, one of which was the total elimination of the structural principle of equal

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329. *Id.* The Dunning School was a school of historical thought founded at Columbia University by historian William Dunning and political scientist and law professor John W. Burgess. See Fishkin, *supra* note 6, at 183–84. The Dunning School perpetuated a twisted narrative pursuant to which the Radical Republicans in Congress, consumed by a vicious passion for revenge, forced oppressive and tyrannical misrule upon a victimized Southern people (whose just cause was simply state sovereignty, rather than white supremacy). See *id.*

330. See Hasen, *supra* note 6, at 732 (“[C]onspicuously absent from the majority opinion is any real appreciation of how the Civil War amendments, including the Fifteenth Amendment, changed the state-federal balance of power and the scope of the Tenth Amendment.”); Katyal & Schmidt, *supra* note 5, at 2134 (“If [the equal sovereignty principle] is a structural inference, how can it be squared with the Reconstruction Amendments, which had specifically authorized massive (and unequal) federal intrusions into the States to protect the rights of newly freed slaves?”).

331. See Dunning, *supra* note 63, at 425 (“No argument based in any particular upon the principle of state-sovereignty can ever again be tolerated in the arena of constitutional debate. Our fundamental law must always henceforth be viewed as the expression of a nation’s will.”).

332. Beginning with *The Slaughterhouse Cases*, 83 U.S. 36 (1872), the Court has generally insisted that the Reconstruction amendments were not “so great a departure from the structure and spirit of our institutions,” did not “degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character,” and did not “radically change[] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people.” See *id.* at 78. As an historical matter, I am not unsympathetic to the argument that the Court has it wrong. Cf. Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 NW. U. L. REV. 1627, 1644–52 (2013) (detailing the extent to which the Southern states, which were forced at gunpoint to ratify the Fourteenth Amendment, viewed it as radically reworking the very nature of the American system of government and utterly destroying the institution of state sovereignty). But cf. ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–77, at 242 (1988) (explaining that moderate Republicans generally “did not believe the legitimate rights of the states had been destroyed, or the traditional principles of federalism eradicated,” as a result of the Civil War); *id.* at 259 (explaining that, in framing the Fourteenth Amendment, “few Republicans wished to break completely with the principles of federalism”).

sovereignty among the states.<sup>333</sup> After all, the rebel states' readmission to the Union after the war was conditioned on their capitulating to a mandate that they could never amend their state constitutions so as to abridge the right of black suffrage.<sup>334</sup> As this occurred two years prior to the ratification of the Fifteenth Amendment, the sovereignty of the Southern states was thereby restricted in a way that the sovereignty of the Northern states was not. And this was a particularly egregious disparity, in light of the fact that most of the Northern states did not, in fact, grant voting rights to blacks at the time.<sup>335</sup> One might read these events—in conjunction with the many other (deserved) indignities visited uniquely upon the South after the war—as indicating that the equal sovereignty principle simply did not survive the reshaping of federalism during Reconstruction.<sup>336</sup>

But that seems a bridge too far, for a number of reasons. First, most of the equal footing cases—with their aggressive enforcement of equal sovereignty for newly admitted states, and their unambiguous rhetoric of equal sovereignty for all states—were decided after Reconstruction.<sup>337</sup> Second, Congress had been recalcitrantly trying to impose on newly admitted states conditions that are inconsistent with the equal sovereignty principle since long before the Civil War.<sup>338</sup> Congress's failure to respect that principle (or the equal footing doctrine) in admitting (or readmitting) states during and after the war does not seem to have been dictated or facilitated by a paradigm shift

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333. Indeed, Professor Dunning himself, the namesake of the Dunning School, authored an article in 1888 suggesting that recent Congressional activity had rendered the notion of equal sovereignty “finally defunct,” though he suggested that it could be revived by the courts. *See* Dunning, *supra* note 63, at 452; Fishkin, *supra* note 6, at 184.

334. Biber, *supra* note 66, at 143–44.

335. *See* AMAR, *supra* note 83, at 374 (“In 1865, only a handful of Northern states allowed blacks to vote.”); FONER, *supra* note 332, at 447 (“[T]he Northern states during Reconstruction actually abridged the right to vote more extensively than the Southern.”).

336. *See* Vik Kanwar, *A Fugitive from the Camp of the Conquerors: The Revival of Equal Sovereignty Doctrine in Shelby County v. Holder*, 17 BERKELEY J. AFR.-AM. L. & POL'Y 272, 288 (2015) (stating that the equal sovereignty principle “definitively ended at the time of Reconstruction”). Joseph Fishkin elaborates,

To remember what actually happened between 1861 and 1870 is to remember a shattered nation reconstructed on new foundations, where the terms of readmission of the conquered South were based, fundamentally, not on principles of equal sovereignty, but on military conquest, surrender, and occupation. It is to remember a series of amendments that remade the . . . constitutional order on new terms far less amenable to claims of either the sovereign dignity or the equality of the Southern states.

Fishkin, *supra* note 6, at 179–80 (footnote omitted).

337. *See supra* Part II.A.

338. *See supra* Part I.C; *supra* note 114.

during Reconstruction. Third, Republican leaders argued during Reconstruction that it was permissible to mandate suffrage for Southern blacks, even while Northern blacks could not vote, because blacks were only a tiny percentage of the population in the North, but were a huge percentage of the population (in some states, a majority) in the South.<sup>339</sup> Thus, in the South, but not in the North, racial discrimination in the franchise effectively established a nonrepublican form of government. And the Constitution not only *allows* Congress to act in those circumstances, but affirmatively *obligates* Congress to ensure that all states maintain a republican form of government.<sup>340</sup> Whatever one thinks about the strength of that argument, it was offered as a justification for a particular incident of unequal sovereignty, rather than a claim of an unfettered right to discriminate.

In addition, there were many in Congress, including some of the leading Republicans who voted for the acts of Southern readmission, who viewed the conditions imposed as inconsistent with the essential principle of equal sovereignty<sup>341</sup> and fully expected that the courts

339. See AMAR, *supra* note 83, at 374–76.

340. See U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government . . . .”); Amar, *supra* note 181, at 112–13 (“At a certain point, states with abysmal track records could be deemed unrepublican within the meaning of Article IV, and Congress had broad powers to enforce that Article’s promise of republican government . . . .”).

341. Recounting the views of the Judiciary Committee, Senator Trumbull explained,

I did not believe this could be a Union of unequal States. I believe that when a State is entitled to representation in this Union, and becomes one of the States of the Union, it is a full and complete State, with all the rights in all respects of every other State. I want the State of Mississippi here as a full-grown State. I want its representatives to stand up in the Congress of the United States as the representatives of a coequal State of the Union, and not of an inferior and subordinate State, or a State with conditions imposed upon it not imposed upon the other States of the Union.

CONG. GLOBE, 41st Cong., 2d Sess. 1174 (1870) (statement of Sen. Trumbull); see also CONG. GLOBE, 40th Cong., 2d Sess. 2211 (1868) (statement of Rep. Bingham) (“I oppose this, because . . . there is nothing in the Constitution of the country that authorizes it.”); CONG. GLOBE, 40th Cong., 2d Sess. 2739 (1868) (statement of Sen. Johnson) (arguing that, although there are no “express terms to be found in the Constitution declaring the equality of the States,” it is nonetheless “clear, beyond all reasonable doubt” from structure and history that the states retain equal sovereignty, and asserting that the conditions regarding the franchise imposed on the Southern states cannot be squared with that constitutional mandate). For examples of fiery speeches by Democrats opposing these conditions on equal sovereignty grounds, see, for instance, CONG. GLOBE, 40th Cong., 2d Sess. 2927–28 (1868) (statement of Sen. Saulsbury); CONG. GLOBE, 40th Cong., 2d Sess. 2606 (1868) (statement of Sen. Buckalew) (insisting on the paramount need to “maintain as a settled, as an invaluable principle, that each State, under the legislation of Congress, shall stand the peer and equal of every other”); CONG. GLOBE, 40th Cong., 2d Sess. 2195 (1868) (statement of Sen. Kerr) (arguing that these conditions will “admit into the Union a State inferior in most vital powers to her sister States. The great bond and

would therefore never treat them as valid.<sup>342</sup> Indeed, that is, in part, why we have the Fifteenth Amendment. Imposing permanent suffrage for blacks as a condition for readmitting the Southern states initially allowed Congress to ensure perpetual voting equality in the South without having to impose the same mandate on the North.<sup>343</sup> “If there had been no doubt as to the validity and unalterable character of such a condition,” one historian has explained, “it would have made the Fifteenth Amendment . . . unnecessary. The fear was freely expressed, however, that the theory of the equality of the States was

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precious principle of equality, of equal statehood in the Union, is broken, is rejected, and a hateful Union of unequal members is to be established”); *id.* at 2196 (noting “the essential principles of the equality of State governments, of equal self-government, which have always characterized the legislation of the country”). For an example of a radical Republican passionately rejecting the notion of equal sovereignty, see CONG. GLOBE, 40th Cong., 2d Sess. 3025 (1868) (statement of Sen. Sumner) (“The song of State Rights has for its constant refrain the asserted *Equality of the States*. Is it not strange that words so constantly employed, as a cover for pretensions against Human Rights, cannot be found in the Constitution?”).

342. Senator Trumbull further explained,

The States of this Union must be equal in all their rights as members of the Federal Union, or you cannot preserve it. Such is the Constitution; such is the language of the acts by which new States have been admitted; and though I have voted for the admission of States here with conditions imposed I have done it because I was in favor of the admission of the States, and a majority of the Senate insisted upon imposing the conditions which, in my opinion, were of no validity whatever.

CONG. GLOBE, 40th Cong., 2d Sess. 2699–700 (1868) (statement of Sen. Trumbull); *see also id.* at 640 (“I am so anxious to see Virginia and all these States restored that I am willing to vote for the bill when the Senate put conditions on over my vote if I think those conditions are inoperative . . .”); *id.* (“I shall be compelled to vote for the motion, because I regarded it as a condition that cannot be enforced.”); CONG. GLOBE, 41st Cong., 2d Sess. 493 (1870) (statement of Rep. Bingham) (declaring that, should the provision imposing conditions be enacted, the Constitution would render it “as void as the paper on which it is printed”); *id.* (“Even on such conditions, I say let the State come in, and let those who have undertaken to put fetters upon her in violation of the Constitution stand responsible for that impotent endeavor. I wash my hands of it.”); CONG. GLOBE, 41st Cong., 2d Sess. 514–16 (1870) (statement of Sen. Fowler) (championing the equal sovereignty principle and then declaring that “these conditions have not even the form or the sanction or the respectability or the appearance of law; they can never be enforced; they are worthless in every respect”); *cf.* CONG. GLOBE, 40th Cong., 2d Sess., 2700 (1868) (statement of Sen. Henderson) (indicating his agreement that the imposed condition was unconstitutional, but refusing to vote for the bill because of the possibility that “the Supreme Court may say that it is not a provision inimical or hostile to the Constitution; that it does not contravene the Constitution, and that therefore we may constitutionally impose it. The Senator from Illinois [Trumbull] may be right, but he may be wrong.”).

343. JOHN MABRY MATHEWS, LEGISLATIVE AND JUDICIAL HISTORY OF THE FIFTEENTH AMENDMENT 17–18 (1909); *Republican Party Platform of 1868 (May 20, 1868)*, THE AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=29622> [<http://perma.cc/5QVQ-ZX62>] (“The guaranty by Congress of equal suffrage to all loyal men at the South was demanded by every consideration of public safety, of gratitude, and of justice, and must be maintained; while the question of suffrage in all the loyal States properly belongs to the people of those States.”).

too deeply rooted in our constitutional system ever to make the observance of such a condition practically enforceable.”<sup>344</sup> Thus, the Reconstruction Congress pursued the Fifteenth Amendment, which—importantly—did not seek to de-constitutionalize the equal sovereignty principle, but rather sought to solve the suffrage problem according to that principle, by prohibiting racial discrimination in voting nationwide.<sup>345</sup>

Indeed, it was likely not possible to resolve the issue by amending the Constitution to explicitly de-constitutionalize the equal sovereignty principle. Due to the strictures of Article V, the Constitution could not be amended without the support of some of the Southern states.<sup>346</sup> It is difficult to believe that any of them would have gone along voluntarily, and forced ratification at gunpoint—the method employed for the Fourteenth Amendment<sup>347</sup>—was no longer

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344. MATHEWS, *supra* note 343, at 18; *see also id.* at 20 (noting that, once Radical Reconstruction would come to an end, “the only remaining security for negro suffrage in the South lay in the extent to which fundamental conditions of readmission had rendered the reconstruction constitutions [of the Southern states] unalterable in respect to suffrage. Confidence in the validity of these conditions was now perceptibly on the wane”); CONG. GLOBE 40th Cong., 2d Sess. 2666 (1868) (Sen. Conkling) (“[I]t will hardly do for the Congress of the United States to make a blank motion . . . confessedly . . . in violation of the Constitution of the United States. . . . We all know that inwrought with the genius of our Government, imbedded in our organism, written in the Constitution again and again, is the equality of the States in all the attributes attaching to States as such.”); 1 ROGER FOSTER, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 53, at 331 & n.9 (1895) (noting that the Supreme Court’s equal footing decisions in cases like *Permoli v. New Orleans*, 44 U.S. 589 (1845), and *Withers v. Buckley*, 61 U.S. (20 How.) 84 (1857)—discussed *supra* Part II.A—rendered these conditions “inoperative upon the power of those States to amend their constitutions so as to restrict the right of suffrage”); Whittington, *supra* note 114, at 1315 (noting that the Supreme Court’s antebellum equal footing “decisions did not stop Congress from using its statehood enabling acts (and comparable bills) to make declarations about what the future states could ‘never’ do, but it was now widely understood . . . that such declarations had no legal force. They were symbolic and hortatory. The courts would not enforce the supremacy of federal law in such cases”); Editorial, *Amending the Constitution*, N.Y. TRIB., Dec. 1, 1868, at 4 (endorsing the Fifteenth Amendment because the uncertainty about Congress’s powers “can best be set at rest by a Constitutional Amendment”).

345. *See* CONG. GLOBE, 40th Cong., 3d Sess. App. 101–02 (1869) (statement of Rep. Hamilton) (arguing in support of the Fifteenth Amendment on the ground that “[e]quality of the States, their ‘equal footing’ in their relations to the General Government, must . . . be maintained,” and asserting, “[o]ur ears are still ringing with cry from the [Democratic Party] . . . that ‘universal suffrage was forced upon the South.’ I acknowledge the fact, and I shall never rest, God helping me, until it is forced upon the North in the same way!”); MATHEWS, *supra* note 343, at 18–19.

346. *See* Colby, *supra* note 332, at 1643–44 (noting that “a mere ten states voting no would have been enough to defeat” an amendment and there were “eleven former Confederate states”).

347. *See id. passim.*

an option, as most of the Southern states had already been readmitted and military rule had ended. What is more, even the Northern Republicans were embarrassed about having violated the equal sovereignty principle. As James G. Blaine, a House Republican from Maine who soon became Speaker of the House, recalls,

[t]he evasive and disreputable position in regard to suffrage, taken by the National Republican Convention that nominated General Grant in 1868, was keenly felt and appreciated by the members of the party when subjected to popular discussion. There was something so obviously unfair and unmanly in the proposition to impose negro suffrage on the Southern States by National power, and at the same time leave the Northern States free to decide the question for themselves, that the Republicans became heartily ashamed of it long before the political canvass had closed. When Congress assembled, immediately after the election of General Grant, there was found to be a common desire and a common purpose among Republicans to correct the unfortunate position in which the party had been placed by the National Convention; and to that end it was resolved that suffrage, as between the races, should by organic law be made impartial in all the States of the Union—<sup>348</sup> North as well as South.

After all, as Representative John Bingham—perhaps the Reconstruction Era’s most influential congressional Republican<sup>349</sup>—explained in the course of denouncing attempts to limit the Southern states’ sovereignty, “equality of men *and States* before the law, was the watchword, the central, informing, vital thought of the Republican party.”<sup>350</sup>

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348. 2 JAMES G. BLAINE, TWENTY YEARS OF CONGRESS 412–13 (1886).

349. See GERARD N. MAGLIOCCA, AMERICAN FOUNDING SON: JOHN BINGHAM AND THE INVENTION OF THE FOURTEENTH AMENDMENT 1–2 (2013).

350. CONG. GLOBE, 41st Cong., 2d Sess. 493 (1870) (statement of Rep. Bingham) (emphasis added); see Schmitt, *supra* note 19. A similar sentiment was offered by Gideon Welles, President Lincoln’s Secretary of the Navy:

Where is the authority for Congress . . . to prescribe new conditions to one of the . . . States . . . ? Where is the authority for the President or Congress to deprive her of rights reserved and guaranteed to all, — to dictate her local policy, — these restrictive conditions being new, not a part of the Federal compact or known to the Constitution. The States must have equal political rights or the government cannot stand on the basis of 1789. . . . The Federal Government has no warrant to impose conditions on any of the States to which all are not subjected . . .

1 DIARY OF GIDEON WELLES 411, 414 (1911) (Aug. 22, 1863).



Finally, the notion that the Southern states “reentered the Union” during Reconstruction<sup>351</sup>—and did so upon terms affording them less sovereignty than the other states—does not accord with the official story. The official story was that the Southern states did not have to be readmitted into the Union, because they never left it in the first place. All along, the North’s fundamental theory of the war was that the Southern states had never lawfully seceded.<sup>352</sup> The North claimed that the entire purpose of the war had been “to preserve the Union with all the dignity, *equality*, and rights of the several States unimpaired.”<sup>353</sup>

In sum, as a leading historian of Reconstruction has explained, if the Civil War created the national state and Reconstruction added the idea of a national citizenry whose common rights no state could abridge, most Republicans still believed the states retained rights beyond the scope of federal intervention, and expected the relatively

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351. Fishkin, *supra* note 6, at 179.

352. See 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 113–14 (1998). The Northerners refused to seat the Southern representatives in Congress until such time as the Southern states formed republican governments that satisfied the Congress. But they treated the Southern states as part of the Union the entire time, and therefore included them within the denominator in calculating when the Reconstruction amendments had been ratified by the necessary three-fourths of the states and therefore became part of the Constitution. See *id.*; Colby, *supra* note 332, at 1682.

353. CONG. GLOBE, 37th Cong., 1st Sess. 222 (1861) (emphasis added); see also WELLES, *supra* note 350, at 414:

We are testing the strength and inviolability of a written constitution. To impose conditions on the States which are in rebellion is allowable on no other premise than that they actually seceded and left the Union. Now, while it is admitted and we all know that a majority of the people in certain States have rebelled and made war on the central government, none of us recognize or admit the right or principle of secession. People—individuals—have rebelled but the States are sovereignties, not corporations, and they still belong to and are a part of the Union. We can imprison, punish, hang the Rebels by law and constitutional warrant, but where is the authority or power to chastise a State, or to change its political status, deprive it of political rights and sovereignty which other States possess?

; see also *id.* at 415 (“The constitutional relations of the States have not been changed by the Rebellion, but the personal condition of every Rebel is affected. The two are not identical. The rights of the States are unimpaired; the rights of those who have participated in the Rebellion may have been forfeited.”). This may explain the relevance of the *Northwest Austin* Court’s citation of *Texas v. White*, 74 U.S. (7 Wall.) 700 (1869), in support of the equal sovereignty principle. See *supra* note 40. *White* held that the Southern states had never lawfully seceded from the Union because ours is “an indestructible Union, composed of indestructible States.” 74 U.S. at 725. Since, at its core, “[t]his Union’ was and is a union of States, equal in power, dignity and authority,” *Coyle v. Smith*, 221 U.S. 559, 567 (1911); see also *supra* note 177, the fact that the Union was held in 1869 to be “indestructible” suggests that nothing that happened during or after the Civil War could change its fundamental character as a union of equal sovereigns.

rapid return of the Southern states as equal members of the Union.<sup>354</sup>

Still, the fact remains that the Reconstruction Congress believed that the Southern states were still states, and yet at times self-consciously afforded them less sovereignty than it afforded to the Northern states.<sup>355</sup> (Indeed, Congress afforded them *no sovereignty rights at all* during the initial phase of Radical Reconstruction, disbanding their governments and placing them under temporary military rule.<sup>356</sup>) This is surely significant—not as an outright repudiation of the constitutional commitment to equal sovereignty, but rather as an indication that slavery, attempted secession, the Black Codes, and the many other racist sins of the South sometimes justified targeted departures from that general commitment.

It was in this arena—civil rights—that Reconstruction worked profound changes in American federalism. Reconstruction probably did not radically alter the basic architecture of federalism generally, including the inherent structural principle of equal state sovereignty,<sup>357</sup> but it did bring about a sea change in the federal–state balance in one particular regard: the ability of the federal government to protect the fundamental rights of the people from state infringement.<sup>358</sup> And it was in service of this goal that the Reconstruction Congress both felt the need to create new federal powers and felt entitled, under the circumstances, to sometimes limit

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354. FONER, *supra* note 332, at 277; *see also* AMAR, *supra* note 83, at 379 (noting that even those Republicans, in the minority of their party, who were inclined not to count the rebel states in the Article V denominator “proposed to nurse the South back into republican health, much as predecessor Congresses had weaned young territories into proper states to be thereafter admitted *on equal footing*” (emphasis added)).

355. For instance, some Southern states were precluded, as a condition for reseating their representatives, from ever amending their state constitutions to abridge the right to hold office or the right to access to an education. FONER, *supra* note 332, at 452.

356. *See* Act of Mar. 2, 1867, 14 Stat. 428; Colby, *supra* note 332, at 1652–53.

357. *Cf.* Abigail B. Molitor, Comment, *Understanding Equal Sovereignty*, 81 U. CHI. L. REV. 1839, 1865 (2014) (“By the close of the Reconstruction era, most Americans agreed that the states held a position subordinate to the national government; nonetheless, the question of what exactly that position was or whether all states held it equally remained open.”).

358. *See, e.g.*, 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 82 (1991) (arguing that the constitutional transformation of Reconstruction was a “quantum leap . . . in nationalizing the protection of individual rights against state abridgment”; the “question was no longer whether state sovereignty was more important than individual rights, but which individual rights were sufficiently fundamental to warrant national protection”); FONER, *supra* note 332, at 259 (explaining that Republicans viewed the Fourteenth Amendment as not radically altering the principles of federalism, but rather as empowering the federal government only when the states failed to protect individual rights).

the sovereignty of only the Southern states. Recall that, with the Connecticut Compromise, the framers of the original Constitution intended to preserve both the equal sovereignty of the states and the equal sovereignty of the people.<sup>359</sup> Reconstruction can be viewed as altering the federalist system to prioritize, to some degree, the latter goal over the former.<sup>360</sup> Thus, the history supports a claim that Congress should be afforded greater leeway to bend the equal sovereignty principle when it is acting pursuant to its Thirteenth, Fourteenth, and Fifteenth Amendment enforcement powers.<sup>361</sup>

And recent caselaw supports that claim as well. In defining Congress's enforcement powers under those amendments, the Supreme Court has repeatedly emphasized that geographic tailoring renders a law *more* likely to be upheld, rather than less.<sup>362</sup> In *City of Boerne v. Flores*,<sup>363</sup> for instance, the Court, in partially striking down the Religious Freedom Restoration Act of 1994 (RFRA), declared that the national

reach and scope of RFRA distinguish it from other measures passed under Congress'[s] enforcement power, even in the area of voting rights. In *South Carolina v. Katzenbach*, the challenged provisions were confined to those regions of the country where voting discrimination had been most flagrant . . . . [L]imitations of this kind tend to ensure Congress'[s] means are proportionate to ends legitimate under § 5 [of the Fourteenth Amendment].<sup>364</sup>

Similarly, in *United States v. Morrison*,<sup>365</sup> the Court refused to uphold the Violence Against Women Act of 1994 (VAWA) under

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359. See *supra* Part III.B.

360. Cf. *supra* notes 199–201 and accompanying text (noting the views of many Federalists that individual rights were more important than state sovereignty).

361. Cf. Amar, *supra* note 181, at 114 (“This general history of the Fourteenth and Fifteenth Amendments . . . supports broad congressional power to administer strong and even selective medicine to individual states with poor democratic track records—the exact sort of medicine employed by . . . the Voting Rights Act.”); *id.* at 118 (arguing that, even after Reconstruction, disparate treatment of the states can violate “proper principles of federalism and state equality,” but that “Congress can properly require . . . states with especially sorry democratic track records to meet the proper standards tailor-made to address the unique historical lapses in these specific jurisdictions”).

362. See Greenbaum et al., *supra* note 6, at 850 (noting several cases in which the Supreme Court “appears to have viewed the limited geographic scope [of a law] as a virtue of Section 5, not a vice”).

363. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

364. *Id.* at 532–33.

365. *United States v. Morrison*, 529 U.S. 598 (2000).

Congress's power to enforce the Fourteenth Amendment, in part because the law "applies uniformly throughout the Nation," even though "Congress'[s] findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States."<sup>366</sup> "By contrast," the Court explained, "in *South Carolina v. Katzenbach*, the remedy was directed only to those States in which Congress found that there had been discrimination. For these reasons, we conclude that Congress'[s] power under § 5 does not extend to the enactment of [VAWA]."<sup>367</sup>

There is a way in which the combination of these cases and *Shelby County* seems perverse and hypocritical. These opinions were crafted by the very same bloc of Justices who formed the majority in *Shelby County*.<sup>368</sup> Yet in tandem, they seem to create a no-win situation for civil-rights laws. If the law applies nationwide, it is not sufficiently targeted to be permissible under the Reconstruction amendments, but if the law is geographically targeted, it violates the principle of equal sovereignty among the states.

But there is, I believe, a way to reconcile the equal sovereignty principle with the earlier cases. Geographic tailoring of the type that denies equal sovereignty is generally prohibited by the Constitution, for all of the reasons discussed in this Article. But when Congress acts to enforce the Reconstruction amendments, such tailoring is not only permissible, it is arguably *preferable*.<sup>369</sup> The new federal powers established by those amendments are strong medicine, and strong medicine should be applied topically only where needed; these

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366. *Id.* at 626.

367. *Id.* at 626–27 (citations omitted).

368. *See, e.g., Tennessee v. Lane*, 541 U.S. 509, 564 (2004) (Scalia, J., dissenting) ("I would not . . . abandon the requirement that Congress may impose prophylactic § 5 legislation only upon those particular States in which there has been an identified history of relevant constitutional violations."); *Nev. Dept. of Human Res. v. Hibbs*, 538 U.S. 721, 741–42 (2003) (Scalia, J., dissenting):

There is no guilt by association, enabling the sovereignty of one State to be abridged under § 5 of the Fourteenth Amendment because of violations by another State, or by most other States, or even by 49 other States. . . . Congress has sometimes displayed awareness of this self-evident limitation. That is presumably why the most sweeping provisions of the Voting Rights Act of 1965 . . . were restricted to States "with a demonstrable history of intentional racial discrimination in voting."

(citations omitted) (quoting *City of Rome v. United States*, 446 U.S. 156, 177 (1980)).

369. *See City of Boerne*, 521 U.S. at 533 ("This is not to say, of course that § 5 legislation requires . . . geographic restrictions . . . . Where, however, a congressional enactment pervasively prohibits constitutional state action in an effort to remedy or to prevent unconstitutional state action, limitations of this kind tend to ensure Congress's means are proportionate to ends legitimate under § 5.").

powers often call for a certain amount of unequal sovereignty. Still, precisely because it runs counter to a fundamental principle of constitutional structure—a principle that Congress sought to preserve when it enacted the Reconstruction amendments—Congress’s ability to use those powers unequally is circumscribed. Congress might be expected to pass geographically targeted legislation, but it is also expected (indeed obligated) to be able to justify its decision to draw the geographic lines in the way that it did. The yardstick for measuring whether Congress has adequately done so—the standard of scrutiny to which the courts should subject Congress’s line drawing—should be less rigorous in these contexts than in others. To obligate Congress to discriminate when it exercises these powers and then turn around and treat its enactments as presumptively invalid because of their discriminatory nature would make little sense, and would effectively gut essential federal powers—powers that were obtained the hard way, through a bloody Civil War in which more than 600,000 Americans lost their lives.<sup>370</sup> But, because of the importance of equal sovereignty to the structure of the Constitution—even as modified by the Civil War—more than a mere rational basis should be required.<sup>371</sup>

#### CONCLUSION

The Supreme Court’s opinion in *Shelby County v. Holder* is far from perfect. But its faults do not include its declaration that “[n]ot only do States retain sovereignty under the Constitution, there is also a fundamental principle of equal sovereignty among the States.”<sup>372</sup> That assertion has been much disparaged. But it is not novel. And it is correct. In the words of James Madison, it is constitutionally “impossible for Congress,” whether it is dealing with “new or old

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370. See JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 854 (1988).

371. It seems quite possible that the Court in *Shelby County*, in failing to acknowledge the distinctiveness of the Reconstruction powers, ended up employing an unduly stringent standard, and that the Voting Rights Act’s coverage formula, despite its imperfections, should have survived the proper (more forgiving) scrutiny. But again, resolving those questions necessitates an inquiry into the state of racial discrimination around the country that is beyond the scope of this Article.

372. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2623 (2013) (citations and emphasis omitted).

members of the Union, to vary the political equality of the States.”<sup>373</sup>  
As the Supreme Court itself explained more than a century ago,

the whole Federal system is based upon the fundamental principle of the [sovereign] equality of the States under the Constitution. The idea that one State is debarred, while the others are granted, the privilege of amending their organic laws to conform to the wishes of their inhabitants, is so repugnant to the theory of their equality under the Constitution, that it cannot be entertained . . . .<sup>374</sup>

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373. CONG. GLOBE, 30th Cong., 1st Sess. App. 65 (1848) (letter of Nov. 16, 1820, from Madison to Monroe).

374. *Bolln v. Nebraska*, 176 U.S. 83, 89 (1900).