

Understanding Equal Sovereignty

Abigail B. Molitor†

Not only do States retain sovereignty under the Constitution, there is also a “fundamental principle of equal sovereignty” among the States.

*Shelby County v Holder*¹

[Equal sovereignty] is a principle of constitutional law of which I had never heard—for the excellent reason that . . . there is no such principle.

Judge Richard Posner²

INTRODUCTION

The Supreme Court recently invoked the principle of “equal sovereignty” in a decision striking down § 4 of the Voting Rights Act of 1965³ (VRA), which required federal preclearance of changes to voting laws in states and counties with a history of voting discrimination.⁴ In that case—*Shelby County v Holder*—an Alabama county sought a declaratory judgment that §§ 4(b) and 5 of the VRA were facially unconstitutional and a permanent injunction against their enforcement.⁵ Finding for Shelby County, the Court cited little case law supporting the principle on which it rested its decision: namely, that the federal government may not single out states for differential treatment. Writing for the majority, Chief Justice John Roberts stated that “a departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage

† BA 2012, University of Iowa; JD Candidate 2015, The University of Chicago Law School.

¹ 133 S Ct 2612, 2623 (2013), quoting *Northwest Austin Municipal Utility District Number One v Holder*, 557 US 193, 203 (2009).

² Richard A. Posner, *The Voting Rights Act Ruling Is about the Conservative Imagination*, The Breakfast Table (Slate June 25, 2013), online at 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 (visited Nov 3, 2014).

³ Pub L No 89-110, 79 Stat 437, codified as amended at 42 USC § 1971 et seq.

⁴ VRA § 4, 79 Stat at 438–39.

⁵ *Shelby County*, 133 S Ct at 2621–22.

is sufficiently related to the problem that it targets.”⁶ The Court determined that § 4 of the VRA was insufficiently related to the current problem of voting discrimination and thus declared it unconstitutional.⁷

Shelby County has drawn significant criticism both for its substantive effect on minority representation in formerly covered states⁸ and for its reliance on the principle of equal sovereignty.⁹ Commentators have also argued that the Court invoked equal sovereignty as a guise for the political motivations behind its decision.¹⁰ This Comment instead takes seriously the Court’s articulation of the equal sovereignty principle and attempts to discover its origins and evolution in American law. Equal sovereignty—as a generally applicable principle—has been invoked in only two recent decisions, both written by Roberts.¹¹ Given the substantial weight that the reference to equal sovereignty bore in *Shelby County*, close examination of the historical, doctrinal, and structural bases of the principle can help to flesh out this sparsely cited legal doctrine. In addition to a thorough analysis of these various bases, ancillary goals of this Comment are to predict when equal sovereignty might be invoked in the future and to identify particular questions that its application might raise. As will be shown, threads of the idea of equal sovereignty

⁶ Id at 2622, quoting *Northwest Austin*, 557 US at 203. See also *Shelby County*, 133 S Ct at 2624 (“[T]he fundamental principle of equal sovereignty remains highly pertinent in assessing [] disparate treatment of States.”).

⁷ *Shelby County*, 133 S Ct at 2631.

⁸ See generally, for example, Nicholas O. Stephanopoulos, *The South after Shelby County*, 2013 S Ct Rev 55. See also Joel Heller, *Shelby County and the End of History*, 44 U Memphis L Rev 357, 376–77 (2013) (arguing that the Court ignored the long history of discrimination in states subject to the VRA’s preclearance obligations and that the “historically acontextual nature of the decision results in a failure to recognize that the past has a lingering effect on the present”).

⁹ See, for example, Eric Posner, *John Roberts’ Opinion on the Voting Rights Act Is Really Lame*, The Breakfast Table (Slate June 25, 2013), online at 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 (visited Nov 3, 2014) (“Roberts is able to cite only the weakest support for this principle—a handful of very old cases that address entirely different matters.”).

¹⁰ See, for example, Posner, *The Voting Rights Act Ruling* (cited in note 2) (“It seems that the court’s regard is not for states’ rights in some abstract sense but for particular policies that a majority of justices strongly favors.”); Emily Bazelon, *John Roberts’ Stealthy Plan to Destroy the Voting Rights Act*, The Breakfast Table (Slate June 25, 2013), online at http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/roberts_and_the_voting_rights_act_the_chief_justice_s_stealthy_plan_to_destroy.html (visited Nov 3, 2014) (“John Roberts is very good at getting what conservatives want while also getting the court off the hook.”).

¹¹ See *Shelby County*, 133 S Ct at 2622–24; *Northwest Austin*, 557 US at 203.

can be seen at several points in American history and in varied areas of legal doctrine. This idea has alternately been known as “the doctrine of the equality of states,” the “equal footing doctrine,” and, most recently, “equal sovereignty.” Tidy analogies prove difficult due to the contested and evolving concept of federalism inherent in considerations of state sovereignty. Although the principle might not be as fundamental as Roberts claimed in *Shelby County*, the idea of equal sovereignty is hardly foreign to American law.

Despite criticism in the popular press,¹² there has been little scholarly discussion of the principle of equal sovereignty.¹³ Indeed, some scholars do not discuss equal sovereignty apart from its application in the equal footing context.¹⁴ The most thorough examination of equal sovereignty traces the principle back to the Supreme Court’s opinion in *Dred Scott v Sandford*¹⁵ and analyzes it solely within the voting-rights context.¹⁶ This Comment is much broader in scope, analyzing the roots of equal sovereignty back to the Founding and across several doctrinal areas.

Specifically, this Comment traces historical debates regarding the nature of the states and their place in the American federal system, and it analyzes several areas of legal doctrine that employ principles similar to those articulated by the Court in *Shelby County*. Part I offers background on the VRA and analyzes the *Shelby County* decision. Part II examines historical, doctrinal, and structural arguments for the principle of equal

¹² See generally, for example, Posner, *The Voting Rights Act Ruling* (cited in note 2); Posner, *John Roberts’ Opinion on the Voting Rights Act* (cited in note 9); Bazelon, *John Roberts’ Stealthy Plan* (cited in note 10).

¹³ See Derek T. Muller, *Judicial Review of Congressional Power before and after Shelby County v. Holder*, 8 Charleston L Rev 287, 310–11 (2014) (“This Article tables the issue of the ‘equal sovereignty’ principle.”); Erwin Chemerinsky, *The Court Affects Each of Us: The Supreme Court Term in Review*, 16 Green Bag 2d 361, 369–70 (2013) (“What is the constitutional basis for the principle of equal sovereignty? [This] question[] was [not] addressed by the Court.”).

¹⁴ See, for example, Ronald D. Rotunda and John E. Nowak, 1 *Treatise on Constitutional Law: Substance and Procedure* § 3.6(a) at 536–39 (West 5th ed 2014) (conflating the equal sovereignty doctrine with the equal footing doctrine, which relates to the admission of new states to the Union). But see Steven D. Schwinn, *The Roberts Court’s Rule on Racial Equality*, 40 Preview 342, 346 (2013) (“Chief Justice Roberts fashioned a new ‘equal sovereignty’ principle that apparently sweeps more broadly.”).

¹⁵ 60 US 393 (1856).

¹⁶ See James Blacksher and Lani Guinier, *Free at Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right to Vote: Shelby County v. Holder*, 8 Harv L & Pol Rev 39, 45–50, 66–68 (2014) (arguing that *Shelby County*’s invocation of equal sovereignty falls within a line of cases that use the principle to limit the scope of the Fourteenth Amendment’s Privileges or Immunities Clause).

sovereignty. This includes a broad discussion of the historical background on the origins of American federalism—as well as subsequent interactions between the federal government and the states—to illustrate the contested and evolving conceptions of federalism that have emerged over time. Next, several areas of legal doctrine that possess characteristics similar to equal sovereignty are examined, including the equal footing doctrine. Structural arguments are also considered as alternate foundations on which to rest the principle. Ultimately, Part II aims to consider several periods of history and areas of law to determine whether additional evidence in support of equal sovereignty can be found, with hopes of filling in the sparse record cited by Roberts in *Shelby County*. Part III then analyzes cases that have applied the principle of equal sovereignty since its recent articulation by the Court. This Part also anticipates, to the extent possible, how the principle of equal sovereignty might be applied going forward.

I. *SHELBY COUNTY* AND EQUAL SOVEREIGNTY

The principle of equal sovereignty has arisen in litigation under the VRA, in which opponents of the law have repeatedly challenged its focus on Southern states. To understand the context in which the Court has applied the equal sovereignty principle, it is necessary to first discuss the VRA and the disparate burdens that it placed on states. The *Shelby County* decision will then be closely examined to present a clear picture of the Court's invocation of equal sovereignty.

A. The Voting Rights Act

Congress passed the VRA in response to the “insidious and pervasive evil” of racial discrimination in voting.¹⁷ The history of racial discrimination in voting regulation in the United States dates back over a century. As part of post–Civil War Reconstruction policy, the Fifteenth Amendment prohibited denial of the right to vote based on race.¹⁸ Pursuant to the Amendment's enforcement clause, Congress made obstruction of the right to vote a crime and

¹⁷ *South Carolina v Katzenbach*, 383 US 301, 309 (1966).

¹⁸ US Const Amend XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”).

provided for federal supervision of the electoral process.¹⁹ However, enforcement of these laws soon waned as Reconstruction drew to a close, and Congress repealed many of the provisions in 1894.²⁰ Simultaneously, many Southern states enacted voting tests intended to disenfranchise African Americans.²¹ Over the next several decades, courts invalidated many of these forms of voting discrimination. However, case-by-case litigation proved ineffective, as states simply enacted new laws, defied court orders, closed registration offices, or froze voting rolls.²² Congress sought to address this continued discrimination with the passage of the VRA in 1965.

The VRA contained a “complex scheme of stringent remedies aimed at areas where voting discrimination ha[d] been most flagrant.”²³ Section 2 specified that “[n]o voting qualification . . . shall be imposed or applied . . . to deny or abridge the right of any citizen of the United States to vote on account of race or color,” and it called for enforcement through the federal courts.²⁴ Section 5 imposed an even stricter requirement that all new voting regulations be reviewed by federal authorities to determine whether the use of such regulations would perpetuate racial discrimination—a process known as “preclearance.”²⁵ The preclearance requirement applied only to certain states and political subdivisions with a history of voting discrimination as specified

¹⁹ See Enforcement Act of 1870 §§ 2–9, 16 Stat 140, 140–42, codified as amended at 18 USC § 241 et seq.

²⁰ Civil Rights Repeal Act, 28 Stat 36 (1894). See also *Katzenbach*, 383 US at 310.

²¹ See *Katzenbach*, 383 US at 310–11. A typical test involved literacy requirements that disproportionately affected African Americans due to the high illiteracy rates within that community. At the same time, grandfather clauses, property qualifications, character tests, and interpretation requirements were employed to “assure that white illiterates would not be deprived of the franchise.” *Id.*

²² See *id.* at 311–14.

²³ *Id.* at 315.

²⁴ VRA § 2, 79 Stat at 437.

²⁵ VRA § 5, 79 Stat at 439. When a jurisdiction subject to § 5 sought to change a voting procedure, the jurisdiction would “institute an action in the United States District Court for the District of Columbia for a declaratory judgment that [the proposed change did] not have the purpose and [would] not have the effect of denying or abridging the right to vote on account of race or color.” VRA § 5, 79 Stat at 439. Alternatively, the proposed change could be enforced absent such a proceeding if the change “has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General [did] not interpose[] an objection within sixty days after such submission.” VRA § 5, 79 Stat at 439. However, “neither the Attorney General’s failure to object nor a declaratory judgment entered under this section [would] bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure.” VRA § 5, 79 Stat at 439.

under a formula laid out in § 4—states and subdivisions located primarily in the South.²⁶ The § 4 formula identified states based on whether the jurisdiction historically used “any test or device” to restrict voting registration and whether less than half of all eligible citizens had registered to vote in 1964.²⁷ The development of the formula later proved contentious, as opponents of the VRA argued that the § 4 criteria were “awkwardly designed” to encompass only Southern states.²⁸ The VRA also included “bail in” and “bail out” provisions, by which states or counties could be brought under or released from the § 5 preclearance requirements.²⁹ This broad expansion of federal authority over the states prompted an almost immediate challenge to the law by states covered under § 4.

The Supreme Court first considered a constitutional challenge to the VRA in 1966 in *South Carolina v Katzenbach*.³⁰ In that case, South Carolina sought an injunction against the VRA’s enforcement.³¹ Writing for the majority, Chief Justice Earl Warren noted that:

The doctrine of the equality of States, invoked by South Carolina, does not bar this approach [of focusing federal regulation on specific states], for that doctrine applies only to the terms upon which States are admitted to the Union,

²⁶ VRA § 4, 79 Stat at 438.

²⁷ VRA § 4, 79 Stat at 438:

The provisions of subsection (a) shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964.

²⁸ *Katzenbach*, 383 US at 329. See also *Shelby County*, 133 S Ct at 2628.

²⁹ The bail in provision is found in § 3(c) and applies if “the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred within [a] . . . State or political subdivision.” 42 USC § 1973a(c). The bail out provision is found in § 4(a) and requires states seeking to be bailed out of § 5 requirements to demonstrate that they have not used a discriminatory test or device in the preceding ten years. 42 USC § 1973b.

³⁰ 383 US 301 (1966).

³¹ *Id* at 307. Given that “the questions presented were of urgent concern to the entire country,” the Court invited all the states to contribute amicus curiae briefs. *Id* at 307 & n 2. Some states lent their support to South Carolina and others to the federal government. See *id* at 307 n 2.

and not to the remedies for local evils which have subsequently appeared.³²

Accordingly, the *Katzenbach* Court upheld the VRA as an appropriate means for carrying out the dictates of the Fifteenth Amendment.³³ The Court again upheld the constitutionality of the VRA in *City of Rome v United States*,³⁴ in which the Court elaborated on the changes that the Reconstruction Amendments had worked on the federal system. Specifically, the Court noted that the Reconstruction Amendments overrode principles of federalism “that might otherwise be an obstacle to congressional authority.”³⁵ The Court went on to explain that “[t]hose Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty. Applying this principle, we hold that Congress had the authority to regulate state and local voting through the provisions of the Voting Rights Act.”³⁶ The precise effect of the Reconstruction Amendments will be discussed in Part II.A.2.

Several decades later, the Court revisited the relationship between the VRA and state sovereignty in *Northwest Austin Municipal Utility District Number One v Holder*.³⁷ Chief Justice Roberts characterized this 2009 case as involving “a small utility district raising a big question—the constitutionality of § 5 of the Voting Rights Act.”³⁸ The district sought relief from preclearance obligations under the bail out provision of the VRA, arguing in the alternative that the preclearance provision itself was unconstitutional.³⁹ Noting that the accomplishments of the VRA were “undeniable,” the Court went on to discuss the “substantial federalism costs” imposed by the statute—costs that motivated the Court to express “serious misgivings about the constitutionality

³² Id at 328–29. This portion of the *Katzenbach* opinion proved contentious in *Shelby County*. See Part I.B.

³³ *Katzenbach*, 383 US at 337.

³⁴ 446 US 156 (1980).

³⁵ Id at 179.

³⁶ Id at 179–80. The Court also expressly stated that a prior decision—which created a “traditional governmental functions” test for determining if federal statutes infringed on state sovereignty—did not provide a reason to depart from its ruling in *Katzenbach*. See id at 178–80, citing *National League of Cities v Usery*, 426 US 833, 851–52 (1976).

³⁷ 557 US 193 (2009).

³⁸ Id at 196.

³⁹ Id at 197.

of § 5.”⁴⁰ The Court noted that the VRA differentiated among the states, “despite our historic tradition that all the States enjoy ‘equal sovereignty.’”⁴¹ The Court then articulated a new standard 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.”⁴² This condition appeared to move beyond the Court’s typical standard of “congruence and proportionality” used in cases brought under § 5 of the Fourteenth Amendment, which grants Congress “wide latitude” in crafting legislation to remedy violations of the Fourteenth Amendment.⁴³ Ultimately, the Court declined to address the constitutionality of § 5 of the VRA in *Northwest Austin*, instead holding that the district was eligible to seek bail out under § 4.⁴⁴

B. The *Shelby County* Decision

It was not long before the Court had another chance to examine equal sovereignty in the VRA context. *Shelby County* involved an Alabama county seeking a declaratory judgment that §§ 4(b) and 5 of the VRA were facially unconstitutional.⁴⁵ The district court ruled against the county and upheld the VRA, determining that Congress had sufficient evidence to reauthorize the Act in 2006.⁴⁶ The circuit court affirmed.⁴⁷ The Supreme

⁴⁰ Id at 201–02, citing *Lopez v Monterey County*, 525 US 266, 282 (1999) (quotation marks omitted).

⁴¹ *Northwest Austin*, 557 US at 203, quoting *United States v Louisiana*, 363 US 1, 16 (1960), citing *Pollard’s Lessee v Hagan*, 44 US 212, 223 (1845). See also *Texas v White*, 74 US 700, 725–26 (1869) (examining the constitutional basis of the equal sovereignty doctrine and applying it to decide Texas’s status as a member of the Union).

⁴² *Northwest Austin*, 557 US at 203. One commentator has interpreted the Court’s language to indicate that “heightened scrutiny applies to legislation that treats states unequally.” Zachary S. Price, *NAMUDNO’s Non-existent Principle of State Equality*, 88 NYU L Rev Online 24, 26 (2013).

⁴³ *City of Boerne v Flores*, 521 US 507, 519–20 (1997). The test requires “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end” for statutes enacted under § 5 of the Fourteenth Amendment. Id. See also Price, 88 NYU L Rev Online at 29–30 (cited in note 42) (asserting that the *Northwest Austin* requirement “conflict[s] with substantial and longstanding congressional practice, ha[s] no direct support in the Constitution’s text, and [is] inconsistent with prior lower court case law”).

⁴⁴ See *Northwest Austin*, 557 US at 211. For a description of the VRA’s bail out provision, see note 29 and accompanying text.

⁴⁵ *Shelby County*, 133 S Ct at 2621–22.

⁴⁶ Id at 2622. Congress initially authorized the VRA in 1965 for only five years; however, Congress reauthorized the Act in 1970, 1975, 1982, and 2006. Id at 2620–21.

⁴⁷ Id.

Court granted certiorari to address whether Congress's 2006 reauthorization of the VRA exceeded its authority under the Fourteenth and Fifteenth Amendments.⁴⁸ The case drew significant attention, as it presented "two of the most hotly debated issues in politics as well as constitutional law—race and federalism."⁴⁹

At oral argument, the justices brought up the issue of equal sovereignty. Their dialogue presents insight into differing conceptions of the principle. Addressing the appellant, Justice Anthony Kennedy stated, "I don't know why under the equal footing doctrine it would be proper to just single out States by name, and if that, in effect, is what is being done, that seem[s] to me equally improper."⁵⁰ Justice Antonin Scalia agreed, stating, "I thought the same thing. I thought it's sort of extraordinary to say Congress can just pick out . . . these eight States, it doesn't matter what formula we use . . . that's good enough and that makes it constitutional. I doubt that that's true."⁵¹ Roberts focused this concern for state interests on the legal issue at hand, stating, "[T]he question is whether or not th[e] disparity [in § 2 claims brought in covered jurisdictions] is sufficient to justify the differential treatment under Section 5."⁵²

Other members of the Court articulated a more limited concern for the equal treatment of states. Justice Ruth Bader Ginsburg noted that *Katzenbach* held that "[t]he doctrine of the equality of the States" applied only to situations involving the admission of new states to the Union and was thus inapplicable to the case at hand.⁵³ Justice Sonia Sotomayor expressed doubts as to the practicality and wisdom of a wide application of the principle, stating:

[Y]ou can't be suggesting that [when] the government sees a problem in one or more States and decides it's going to do something . . . like emergency relief . . . that somehow violates the equal footing doctrine. You can't treat States the

⁴⁸ *Shelby County v Holder*, 679 F3d 838 (DC Cir 2012), cert granted 133 S Ct 594 (2012).

⁴⁹ Bill Mears, *Supreme Court to Weigh Divisive Voting Rights Case* (CNN Feb 22, 2013), online at <http://www.cnn.com/2013/02/22/politics/court-voting-rights> (visited Nov 3, 2014).

⁵⁰ Transcript of Oral Argument, *Shelby County v Holder*, No 12-96, *21 (US Feb 27, 2013) (available on Westlaw at 2013 WL 6908203) ("Shelby County Argument Transcript").

⁵¹ *Id.*

⁵² *Id.* at *56.

⁵³ *Id.* at *26.

same because their problems are different, their populations are different, their needs are different.⁵⁴

These exchanges indicate disagreement over how the Court should approach statutes that treat states differently. Kennedy, Scalia, and Roberts appear to start from a capacious concern for the sovereignty of the states, while Ginsburg and Sotomayor focus on nuances in the doctrine and emphasize the impracticality of deferring to state sovereignty in the modern federal state.

This exchange illustrates a divergence in approaches to federalism cases also seen in earlier Court debates. In a 1918 decision on the scope of the Commerce Clause, *Hammer v Dagenhart*,⁵⁵ the Court worked through a detailed analysis, explaining how a national statute regulating goods produced by child labor overstepped the federal power to regulate commerce and intruded on “a purely local matter.”⁵⁶ Dissenting, Justice Oliver Wendell Holmes Jr instead articulated an expansive reading of federal power: “[I]f an act is within the powers specifically conferred upon Congress . . . it is not made any less constitutional because of the indirect effects that it may have.”⁵⁷ In both *Shelby County* and *Hammer*, one side of the Court undertook a technical analysis of doctrine, while the other relied on broad references to the power of either the states or the federal government. It is worth noting that expansive principles appear to be invoked when justices wish to alter the direction of doctrine—for Holmes, to a broader federal power under the Commerce Clause; for Kennedy, Scalia, and Roberts, to greater deference for state sovereignty.⁵⁸ Such expansive reasoning, anchored in appeals to the greater federal structure, has thus been employed to varied—even opposing—ends throughout American case law.

At the outset of its opinion, the *Shelby County* Court noted that the principles underlying *Northwest Austin* would guide its

⁵⁴ Shelby County Argument Transcript at *27.

⁵⁵ 247 US 251 (1918).

⁵⁶ Id at 276.

⁵⁷ Id at 277 (Holmes dissenting).

⁵⁸ It is, however, important to note that Holmes’s dissent in *Hammer* was not the only instance that the Court adopted a broad reading of the Commerce Clause power during this period. See, for example, *Champion v Ames*, 188 US 321, 363–64 (1903) (holding that congressional regulation of the trafficking of lottery tickets is constitutional under the Commerce Clause); *Houston, East and West Texas Railway v United States*, 234 US 342, 351–52 (1914) (allowing federal regulation of intrastate commerce when it is “so related [to interstate commerce] that the government of the one involves the control of the other”).

analysis.⁵⁹ Writing for the Court, Roberts again invoked “the fundamental principle of equal sovereignty”⁶⁰ and noted that, in *Coyle v Smith*,⁶¹ the Court held that the United States is “a union of States, equal in power, dignity and authority.”⁶² Roberts conceded that “*Coyle* concerned the admission of new States” to the Union and that “*Katzenbach* rejected the notion that the principle operated as a *bar* on differential treatment outside that context.”⁶³ However, Roberts went on to note that “[a]t the same time . . . the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States.”⁶⁴ These statements—taken together—are puzzling because the language quoted from *Katzenbach* stood for the opposite proposition in that case: in *Katzenbach*, the Court explained that the equal sovereignty doctrine *did not* apply outside the context of the admission of new states.⁶⁵

Observing that the preclearance requirements applied only to nine states, Roberts took issue with the fact that “[w]hile 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.”⁶⁶ That “the preclearance requirements in one State [might] be unconstitutional in another” seemed to sit uncomfortably with Roberts and, perhaps, casts light on why having a § 4 formula that appropriately reflects current circumstances was so important to him.⁶⁷ While differential treatment had previously been justified by the “blight of racial discrimination in voting,”⁶⁸

⁵⁹ See *Shelby County*, 133 S Ct at 2622.

⁶⁰ Id at 2624.

⁶¹ 221 US 559 (1911).

⁶² *Shelby County*, 133 S Ct at 2623, quoting *Coyle*, 221 US at 567.

⁶³ *Shelby County*, 133 S Ct at 2623–24.

⁶⁴ Id at 2624.

⁶⁵ See Joseph Fishkin, *The Dignity of the South*, 123 Yale L J F 175, 177 (2013).

⁶⁶ *Shelby County*, 133 S Ct at 2624.

⁶⁷ Id at 2627, quoting *Northwest Austin*, 557 US at 203. See also *Georgia v Ashcroft*, 539 US 461, 491 (2003) (Kennedy concurring) (questioning the internal coherence of the VRA). At least one lower court has interpreted equal sovereignty as requiring that all states have the same “legitimate” state interests. See *Texas v Holder*, 888 F Supp 2d 113, 125 (DDC 2012) (“A state interest that is unquestionably legitimate for Indiana—without *any* concrete evidence of a problem—is unquestionably legitimate for Texas as well. As Texas points out, holding otherwise would, notwithstanding section 5’s facial validity, seriously threaten the ‘equal sovereignty’ of states.”). The Supreme Court vacated and remanded the decision in *Texas* in light of its decision in *Shelby County*. See generally *Texas v Holder*, 133 S Ct 2886 (2013).

⁶⁸ *Shelby County*, 133 S Ct at 2624, quoting *Katzenbach*, 383 US at 308.

the Court found circumstances in 2013 to be sufficiently changed to render the VRA framework—specifically, the § 4 formula for determining which areas were subject to preclearance—unconstitutional.⁶⁹ Under the test laid out in *Northwest Austin*, the Court retroactively found that the evidence of voting discrimination presented during the 2006 reauthorization of the VRA was insufficient to show that the preclearance requirement was justified by “current needs.”⁷⁰

The principle of equal sovereignty proved to be a point of discord between the majority and the dissent. Ginsburg’s dissent proved consistent with her statements at oral argument and articulated a narrower reading of *Katzenbach*, asserting that “the Court held, in no uncertain terms, that the principle ‘*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.’”⁷¹ She strongly denounced the majority’s approach, stating that “the Court ratchet[ed] up what was pure dictum in [*Northwest Austin*], attributing breadth to the equal sovereignty principle in flat contradiction of *Katzenbach*.”⁷² Finally, she noted that expansion of the principle of equal sovereignty outside of the admission of new states is “capable of much mischief” and outlined several areas in which federal statutes treat states differently.⁷³

In recent years, some commentators have criticized the Roberts Court for adopting a policy of “stealth overruling.” That is, these scholars charge that, in some cases, the Court fails to publicly acknowledge the degree of change that its decisions

⁶⁹ See *Shelby County*, 133 S Ct at 2631.

⁷⁰ Id at 2629. To be precise, the Court in *Shelby County* struck down only § 4 of the VRA. Section 5 technically remains good law, though “it has been rendered a zombie provision.” Stephanopoulos, 2013 S Ct Rev at *56 (cited in note 8). Section 2 also remains good law. See id.

⁷¹ *Shelby County*, 133 S Ct at 2648 (Ginsburg dissenting), citing *Katzenbach*, 383 US at 328–29.

⁷² *Shelby County*, 133 S Ct at 2649 (Ginsburg dissenting).

⁷³ Id (Ginsburg dissenting). The areas Ginsburg mentioned include 28 USC § 3704 (outlawing sports-related gambling schemes, except in states where a gambling scheme was in effect between 1976 and 1990—a category that includes only Nevada); 26 USC § 142(l) (requiring EPA green-building projects in states with certain population criteria); 42 USC § 3796bb (requiring a portion of rural drug-enforcement assistance to be allocated to sparsely populated areas); 42 USC §§ 13925, 13971 (requiring that funding to combat rural domestic violence be allocated to sparsely populated areas); 42 USC § 10136(c)(6) (specifying that Nevada is the only state to receive financial assistance for nuclear-waste disposal under this subsection after December 22, 1987).

work on the doctrine at issue.⁷⁴ This criticism was leveled at the Court's decision in *Shelby County*: observers noted that Roberts had deployed a patient strategy of incrementalism between *Northwest Austin* and *Shelby County*.⁷⁵ Specifically, commentators took issue with Roberts's mention of equal sovereignty in dicta in *Northwest Austin*, which later served as part of the foundation for overturning the VRA in *Shelby County*.⁷⁶ Somewhat similarly, other scholars have characterized the Court's approach to the VRA in *Northwest Austin* as an instance of "anticipatory overruling," in which the Court did not overrule precedent but signaled its intention to do so in the future by announcing its discontent with the preclearance framework.⁷⁷ Ultimately, this anticipated overruling—predicted by Professor Richard Hasen in 2012⁷⁸—was borne out in the Court's 2013 *Shelby County* decision.

To be sure, these cases are not the only instances in which the Court has engaged in stealth overruling. A similar dynamic can be seen in the Court's Commerce Clause jurisprudence—a line of cases also quite relevant to federalism questions.⁷⁹ Beginning with *Gibbons v Ogden*⁸⁰ in 1824, the Court held that the enumeration of the Commerce Clause "presupposes something not enumerated; and that something . . . must be the exclusively internal commerce of a State."⁸¹ Over the next century, the Court's understanding of the federal commerce power expanded

⁷⁴ See, for example, Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to Miranda v. Arizona)*, 99 Georgetown L J 1, 14 (2010) ("The hallmark of stealth overruling is that the Justices are perfectly aware that they are overruling but hide the fact that they are doing so.").

⁷⁵ See, for example, Bazelon, *John Roberts' Stealthy Plan* (cited in note 10); Posner, *The Voting Rights Act Ruling* (cited in note 2).

⁷⁶ See, for example, Bazelon, *John Roberts' Stealthy Plan* (cited in note 10) (arguing that Roberts "makes big steps to the right look like small ones"); Posner, *The Voting Rights Act Ruling* (cited in note 2) (noting that Bazelon's assessment might be "a round-about way of saying that a modest, pedestrian opinion may be more effective than one that, being forthright and candid, thrusts its inadequacies in the reader's eye").

⁷⁷ See, for example, Richard L. Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law*, 61 Emory L J 779, 782–84 (2012).

⁷⁸ See *id.* at 784 ("At the end of the day, the Supreme Court in [*Northwest Austin*] let section 5 of the VRA stand, while signaling strongly that next time around section 5 would not survive constitutional scrutiny in its current form.").

⁷⁹ For a further discussion of the Commerce Clause in relation to equal sovereignty, see notes 193–201 and accompanying text.

⁸⁰ 22 US 1 (1824).

⁸¹ *Id.* at 195.

until, in *Wickard v Filburn*,⁸² the Court stated that, “even if [] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.”⁸³ This expansive view persisted until the emergence of New Federalism⁸⁴ in *United States v Lopez*,⁸⁵ in which the Court drew back on this interpretation and required that the underlying activity being regulated be “commercial.”⁸⁶ The Court did not explicitly overrule earlier doctrine in any of these cases, leaving observers to search for and reflect on the precise scope of the federal commerce power. Similarly, after *Shelby County*, observers are left to ponder the foundation and scope of equal sovereignty. In order to shed light on the issue, this Comment will delve into history, case law, and structural arguments to determine the basis of the equal sovereignty principle.

II. LOCATING EQUAL SOVEREIGNTY

The recent emergence of equal sovereignty has been accompanied by little insight into the nature and scope of the principle. This Part examines whether the principle is supported by the historical record, constitutional doctrine, and structural arguments. It is important to note at the outset that many key concepts in this discussion—most importantly, that of sovereignty—have been subject to contested and evolving meanings across time. Further, the terms used to reference the idea of equal sovereignty have also varied. It has been known as “the doctrine of equality of the states,” the “equal footing doctrine,” and, most recently, “equal sovereignty.” The aim of this Part is to show that an idea similar to that of equal sovereignty has been contemplated in a variety of contexts, albeit with respect to different issues and across different time periods. The following analysis finds some support for a generally applicable principle of equal sovereignty, though not enough to declare the principle “fundamental,” as Chief Justice Roberts did in *Shelby County*.⁸⁷

⁸² 317 US 111 (1942).

⁸³ *Id.* at 125.

⁸⁴ See generally Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 Harv L Rev 2180 (1998) (discussing the “federalist revival” of the Rehnquist Court).

⁸⁵ 514 US 549 (1995).

⁸⁶ *Id.* at 561, 566.

⁸⁷ *Shelby County*, 133 S Ct at 2623.

A. Historical Debates

The terms on which the states interact with the federal government has been a topic of national concern since the beginning of the American republic and the framing of the Constitution. However, the Civil War and the Reconstruction Amendments fundamentally subordinated the states to the federal government, closing off one particular set of arguments about state sovereignty. The continued expansion of federal power through the twentieth century led to a renewed concern for the states and their position in the federal system. This historical analysis evinces a recurring concern for the position of the states in the federal system, at times finding explicit references to an idea of equal sovereignty.

1. The Founding era and the origins of federalism.

The significance of American federalism must be considered against the historical backdrop from which it emerged. How did thirteen distinct colonies come together to form a nation, and what were the terms of this compact? The history of the Founding era illustrates two central debates pertaining to the nature of the states and their sovereignty. First, ratification of the Constitution shifted the basis of sovereignty from the states to the people, fundamentally displacing the state as the constituent unit of government. Second, creation of a federal system split sovereignty in a way that had been previously thought impossible and left the states to negotiate their new—perhaps ancillary—place in the federal system. These debates form the background necessary to understand the modern principle of equal sovereignty.

The North American colonies were first established under royal patents issued by the English Crown.⁸⁸ These patents required that such colonies be of allegiance to the Crown and granted inhabitants “all the priveleges of free denizens and persons native of England.”⁸⁹ Notably, each colony participated in an individual agreement with the Crown, though the English

⁸⁸ See, for example, *Letters Patent to Sir Humfrey Gylberte (1578)*, in Melvin I. Urofsky and Paul Finkelman, eds, *Documents of American Constitutional and Legal History: Volume I, From the Founding to 1896* 3, 4 (Oxford 3d ed 2008) (creating a legal right in all discovered and inhabited “lands, countreys and territories”).

⁸⁹ *Id.*

did attempt to standardize economic regulation across colonies.⁹⁰ As time went on, the colonies began to organize their own local governance structures and increasingly chafed under colonial rule.⁹¹ These tensions ultimately resulted in the American Revolution.⁹² During the war, members of the Continental Congress contemplated the possible forms that independence might take and worked to draft the Articles of Confederation.

The Articles of Confederation, ratified in 1781, explicitly endorsed the sovereignty of the thirteen member states. Article II specified that “[e]ach State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.”⁹³ In creating a weak central institution without the power to pass general laws, the Articles formed “a firm league of friendship”⁹⁴ and “left the states as political equals, each more powerful than the whole.”⁹⁵ During this time, the states explicitly understood themselves to be sovereign—a characteristic that, by definition, made them equal to one another.⁹⁶ However, the Articles of Confederation quickly proved unworkable because they neither conferred a power to tax nor established a central executive body. A convention was therefore called to amend them.⁹⁷ During this time, Americans identified far more strongly with their home states, which were seen as more akin to the modern-day nation-state.⁹⁸ However,

⁹⁰ See Anthony McFarlane, *The British in the Americas: 1480–1815* 202–08 (Longman 1994).

⁹¹ See *id.* at 102 (“[F]or the English trade was the heart of empire, and . . . the colonies were largely left to govern themselves.”).

⁹² For a discussion of the legal status of colonial independence, see David Armitage, *The Declaration of Independence and International Law*, 59 Wm & Mary Q 39, 46, 58 (2002) (noting that the Declaration of Independence was “a speech-act that not only *communicated* the fact of [] independence . . . but by so doing also *performed* the independence it declared”).

⁹³ US Art of Confed, Art II.

⁹⁴ US Art of Confed, Art III.

⁹⁵ Daniel J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664–1830* 203 (Chapel Hill 2005).

⁹⁶ See Alison L. LaCroix, *The Ideological Origins of American Federalism* 12 (Harvard 2010) (noting that, while sovereignty was “a highly contested and fraught concept” during this time, it was generally understood as “a state complete in itself, over which no other state (ecclesiastical or political) could claim authority”).

⁹⁷ See Richard Beeman, *Plain, Honest Men: The Making of the American Constitution* 9 (Random House 2009).

⁹⁸ See *id.* at 8. Indeed, John Adams colorfully expressed his awe at the range of differences among delegates to the Continental Congress, noting that “[t]he Art and Address, of Ambassadors from a dozen belligerent Powers of Europe, nay, of a Conclave of

Americans from all states began discussing the nature of the state and the possibility of a national, as opposed to federal, form of American government.⁹⁹ At the heart of these debates stood questions about sovereignty and how governmental authority should be divided.¹⁰⁰

The most significant change between the Articles of Confederation and the Constitution involved the basis of governmental authority. The Articles drew their authority from an agreement among the thirteen independent and sovereign states.¹⁰¹ However, early in the Constitutional Convention, delegates began to coalesce around the idea of a supreme government drawing its authority from “the people of the nation as a whole.”¹⁰² These delegates believed that a government of the people would require rejection of “the system of equality of state representation” employed under the Articles, and debate over this proposed change crystallized most fully in discussions regarding the legislature.¹⁰³ Large states supported the Virginia Plan, which proposed a bicameral legislature with representatives elected based on state population.¹⁰⁴ Delegates from small states, such as William Paterson of New Jersey, feared that this plan would “undermine the sovereign power of the states.”¹⁰⁵ In response, the New Jersey Plan suggested maintaining the system of equal representation of each state.¹⁰⁶ The differences between the Virginia and New Jersey Plans grew out of divisions between the states based on size, as well as regional differences arising out of

Cardinals at the Election of a Pope . . . would not exceed the Specimens We have seen.” Beeman, *Plain, Honest Men* at 8 (cited in note 97), quoting *Letter from John Adams to Abigail Adams* (Sept 29, 1774), in Lyman H. Butterfield, ed, 1 *The Adams Family Correspondence* 163, 163 (Harvard 1963).

⁹⁹ See Hulsebosch, *Constituting Empire* at 204 (cited in note 95). Creation of a “federal” government implied that the states would retain some “measure of sovereignty and independence,” whereas a national government implied a more centralized structure. LaCroix, *Ideological Origins* at 26, 124 (cited in note 96).

¹⁰⁰ See LaCroix, *Ideological Origins* at 71–72 (cited in note 96).

¹⁰¹ The relevant language of the Articles states, “The said States hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other.” US Art of Confed, Art III.

¹⁰² Beeman, *Plain, Honest Men* at 105 (cited in note 97).

¹⁰³ *Id* at 108.

¹⁰⁴ See *id* at 88–89.

¹⁰⁵ *Id* at 89. In his notes, Paterson scrawled out the precise basis of his discontent: “objn:—sovereignty is an integral thing.” *Id*.

¹⁰⁶ See Beeman, *Plain, Honest Men* at 160–62 (cited in note 97).

slavery.¹⁰⁷ From a sovereignty perspective, the New Jersey Plan guaranteed state parity in the national legislature, whereas the Virginia Plan introduced gradations in state influence based on population.

Part of the difficulty in reconciling the two plans stemmed from contemporary ideas about the nature of sovereignty. Many of the delegates considered sovereignty to be indivisible.¹⁰⁸ Paterson, in particular, asserted that either the states must possess ultimate sovereign power, or the entire sovereign power must be lodged in the national government.¹⁰⁹ During the Convention, he stated, “If the sovereignty of the States is to be maintained, the Representatives must be drawn immediately from the States, not from the people: and we have no power to vary the idea of equal sovereignty.”¹¹⁰ The indivisibility of sovereignty posed a theoretical roadblock to the delegates because large states insisted on proportional representation, whereas smaller states vowed to maintain equal representation.¹¹¹ Eventually, the delegates compromised, stipulating that representation in the House of Representatives would be apportioned based on population, while representation in the Senate would be equal among states.¹¹² This result combined the ideas animating each plan (government of “the people” and government as a compact among states) into a compromise in order to complete the Constitution. In one delegate’s words, these two ideas, “instead of

¹⁰⁷ See David C. Hendrickson, *Peace Pact: The Lost World of the American Founding* 224–31 (Kansas 2003). Many large states were also slave states, meaning that they would benefit from proportional representation due both to their larger free populations and their ability to utilize the Three-Fifths Clause to include their slave populations in census totals. See Beeman, *Plain, Honest Men* at 155 (cited in note 97) (noting that small states, seeking to protect their own interests, opposed the Three-Fifths Clause).

¹⁰⁸ See John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 Harv L Rev 2003, 2059–60 & n 250 (2009). Indeed, much of the colonial debate regarding a new American government focused on why the proposed government “did not violate contemporary political theory’s proscription of *imperium in imperio*, or a government within a government.” LaCroix, *Ideological Origins* at 133 (cited in note 96).

¹⁰⁹ See Beeman, *Plain, Honest Men* at 160 (cited in note 97).

¹¹⁰ Max Farrand, ed, 1 *The Records of the Federal Convention of 1787* 251 (Yale 1911). Though Paterson uses the phrase “equal sovereignty” here, it is likely that he used it in a context more akin to the equivalent sovereignty of different nation-states, as opposed to the way that the phrase was used in *Shelby County*. See Hendrickson, *Peace Pact* at 257–58 (cited in note 107) (noting that “the colonies launched their experiment less as one people than as free and independent states, with all the rights and powers thereunto pertaining”).

¹¹¹ See Beeman, *Plain, Honest Men* at 171–73 (cited in note 97).

¹¹² See *id.* at 201, 218–25.

being opposed to each other, ought to be combined; that in *one* branch the *people*, ought to be represented; in the *other*, the *States*.”¹¹³ The notion that they *could* be combined was novel. As Professor Alison LaCroix has noted, “The significant innovation of the American federal idea was to authorize the division of sovereignty and to create viable legal categories that could contain multiple sources of governmental power within one overarching system.”¹¹⁴

Within this system of divided sovereignty, the Constitution expressly contemplates equal treatment among the states in several places. Most importantly, equal representation is mandated in the Senate.¹¹⁵ Several constitutional provisions further implicate equal sovereignty by stipulating baseline requirements for states to remain part of the Union, such as the Privileges or Immunities Clause, the Full Faith and Credit Clause, and the guarantee of a republican form of government.¹¹⁶ Article Five, which deals with the process for amending the Constitution, specifies that “no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”¹¹⁷ The Constitution also requires equal treatment of states in terms of sovereign immunity under the Eleventh Amendment, the Tax Uniformity Clause, and the Port Preference Clause.¹¹⁸ It seems clear that, for some purposes, the Founders envisioned the states holding an explicitly equal position within the federal system.

By the end of the Founding period, a fragile consensus had emerged on both questions outlined above. First, the people, not the states, ultimately ratified the Constitution as the source of

¹¹³ Farrand, ed, 1 *The Records of the Federal Convention of 1787* at 461–62 (cited in note 110).

¹¹⁴ Alison L. LaCroix, *Rhetoric and Reality in Early American Legal History: A Reply to Gordon Wood*, 78 U Chi L Rev 733, 733 (2011).

¹¹⁵ See US Const Art I, § 3.

¹¹⁶ See Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L J 1193, 1218–26 & n 153 (1992) (noting that arguments against applying the Full Faith and Credit Clause to the states fail, that the guarantee of a republican form of government imposes an obligation on states, and that the Privileges or Immunities Clause can “be read as meaning that no state shall deny to any person the rights of citizens”); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L J 1385, 1391 (1992) (suggesting that the Privileges or Immunities Clause can be read as requiring states to protect certain “minimum right[s]”).

¹¹⁷ US Const Art V.

¹¹⁸ See Price, 88 NYU L Rev Online at 27–28 (cited in note 42).

governmental authority.¹¹⁹ The drafters of the Constitution believed that a “true constitution . . . could only be created by a sovereign act of the people themselves.”¹²⁰ Therefore, though ratification conventions were organized within each state, they were divorced from the state in an important conceptual sense. Second, ratification of the Constitution endorsed the division of sovereignty between the national and state governments. How this division would play out in practice and the precise position that states held in the federal system would continue to be negotiated in the years to come.

A final word about the drafting of the Constitution may be helpful. One of the central divisions between convention delegates is often framed in terms of small states and large states, but it is crucial to also note the importance of distinctions wrought by slavery.¹²¹ As time progressed, divisions over slavery tested the bounds of the system of divided sovereignty and illustrated the difficulty with which the national government might use force against a particular state. During the Convention, James Madison foresaw this possibility, noting that “[t]he use of force [against] a State, would look more like a declaration of war, than an infliction of punishment, and would probably be considered by the party attacked as a dissolution of all previous compacts by which it might be bound.”¹²² His remarks indicate that, while the Constitution gave “the people” a central role in the national government, loyalty to the state might prove more fundamental for many new Americans.¹²³ As one scholar has

¹¹⁹ For a comprehensive account of the ratification of the Constitution, see generally Pauline Maier, *Ratification: The People Debate the Constitution, 1787–1788* (Simon 2010).

¹²⁰ Beeman, *Plain, Honest Men* at 246 (cited in note 97). The Articles of Confederation, on the other hand, required the legislature of each state to approve changes to the Articles. See US Art of Confed, Art XIII.

¹²¹ See Beeman, *Plain, Honest Men* at 155–57, 182–83 (cited in note 97). But see Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 66–68 (Knopf 1996) (referring to Madison’s theory of faction, and noting that important differences persisted among the large states and their inhabitants, such as divergent religious and economic interests). Interestingly, “Madison’s theory of faction also undercut the claim that the states or their legislatures deserved equal representation, whether as sovereign entities, coordinate governments, or distinct communities.” *Id.* at 67.

¹²² Farrand, ed, 1 *The Records of the Federal Convention of 1787* at 54 (cited in 110). See also Beeman, *Plain, Honest Men* at 121 (cited in note 97).

¹²³ For a similar preference for state institutions over federal ones, see *Hunter v Martin*, 18 Va 1, 58 (1813) (holding that “the appellate power of the Supreme Court of the United States, does not extend to this court, under a sound construction of the constitution of the United States”). The Supreme Court reversed that decision, holding instead that questions of federal law were within its own jurisdiction. *Martin v Hunter’s*

noted, “Sovereignty is a concept, not a formula for governance.”¹²⁴ The creation of a government that divided sovereignty between the people and the states would continue to generate tension in the years to come.

2. Civil War and Reconstruction alterations of the system.

Conflict between the states that culminated in the Civil War exacerbated the conceptual sticking points in the division of sovereignty and forced a more specific delineation of powers between state and national governments. Disagreements over slavery had existed during the Constitutional Convention, though the Founders worked to develop compromises to facilitate passage of the Constitution without resolving the underlying differences.¹²⁵ The primary source of conflict leading to secession of the Southern states involved the existence of slavery in the South and the potential for its expansion into the territories. After the Civil War, the Reconstruction Amendments permanently changed the structural balance of power between the states and the national government, underscoring the authority of the nation over the states. Throughout this period, Northerners and Southerners alike framed arguments in terms of relative equality between states, and examination of this period helps to flesh out the modern conception of equal sovereignty.¹²⁶

Prior to the Civil War, the regulation of slavery was considered to be outside of Congress’s enumerated powers and therefore immune to any federal attempt at abolition.¹²⁷ It was instead the proposed expansion of slavery into the western

Lessee, 14 US 304, 351 (1816) (“[T]he court are [sic] of opinion, that the appellate power of the United States does extend to cases pending in the state courts.”).

¹²⁴ Beeman, *Plain, Honest Men* at 224 (cited in note 97) (noting that “[w]hen the central and state governments find themselves in conflict, representatives of those governments must find a political means of resolving their disagreement or run the risk either of open defiance . . . or [] coerced submission”).

¹²⁵ The most prominent example of this is the Three-Fifths Clause. See US Const Art I, § 2, amended by US Const Amend XIV. Another example is found in the agreement that the federal government would not prohibit the international slave trade until 1808. See US Const Art I, § 9. See also Michael Vorenberg, *Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment* 9 (Cambridge 2001).

¹²⁶ For a thorough account of the history of Reconstruction, see generally Eric Foner, *A Short History of Reconstruction, 1863–1877* (Harper 1990).

¹²⁷ See Vorenberg, *Final Freedom* at 9 (cited in note 125). Despite this view, some groups in this period attempted to use federal power to further extend and entrench slavery through actions like the Fugitive Slave Law of 1850 and the proposed 1860 amendment in support of slavery. See *id.* at 18–22. Still others complained that a “Slave Power had caused the war by perverting democracy and liberty.” *Id.* at 94–95.

territories that became the focal point for conflict.¹²⁸ The Northwest Ordinance of 1787¹²⁹ stated that “[t]here shall be neither slavery nor involuntary servitude in the said territory.”¹³⁰ However, the Northwest Ordinance did allow for the return of fugitive slaves.¹³¹ One reading of the Constitution during this period thus suggested that the Founders intended for slavery to be protected in the states where it existed but prohibited by federal law in any territories that might become future states.¹³² This tension ultimately resulted in the Missouri Compromise of 1820,¹³³ which prohibited slavery in the territory north of the 36° 30’ latitude line, except in the state of Missouri.¹³⁴

The expansion of slavery remained contested and, in 1854, the Kansas-Nebraska Act¹³⁵ effectively repealed the Missouri Compromise by allowing settlers to determine through popular sovereignty whether to establish slavery in new states.¹³⁶ Many Northerners opposed this change, including Abraham Lincoln, who phrased his objections in terms of the electoral advantage

¹²⁸ Though the idea evolved over time, Congress was generally understood to have plenary power over the territories: “Congress . . . exercised the combined sovereign power of the federal government and a state government.” Don E. Fehrenbacher, *Slavery, Law, and Politics: The Dred Scott Case in Historical Perspective* 50, 301 (Oxford 1981).

¹²⁹ An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio, 1 Stat 53 n (a) (1787) (“Northwest Ordinance”).

¹³⁰ Northwest Ordinance Art VI, 1 Stat at 53 n (a).

¹³¹ See Northwest Ordinance Art VI, 1 Stat at 53 n (a).

¹³² See Vorenberg, *Final Freedom* at 14 (cited in note 125). Interestingly, after secession, some argued that the former Southern states had taken on qualities of the territories, meaning that the federal government could then require renunciation of slavery as a condition of readmission to the Union. See *id.* at 41. Additionally, some scholars argue that the Founders intended for slavery to die out, but that the invention of the cotton gin led instead to the expansion of slavery. See, for example, Rebecca E. Zietlow, *The Ideological Origins of the Thirteenth Amendment*, 49 Houston L Rev 393, 421 (2012).

¹³³ An Act to Authorize the People of the Missouri Territory to Form a Constitution and State Government, and for the Admission of Such State into the Union on an Equal Footing with the Original States, and to Prohibit Slavery in Certain Territories, 3 Stat 545 (1820) (“Missouri Compromise”).

¹³⁴ See Fehrenbacher, *Slavery, Law, and Politics* at 52–55 (cited in note 128).

¹³⁵ An Act to Organize the Territories of Nebraska and Kansas (Kansas-Nebraska Act), 10 Stat 277 (1854).

¹³⁶ Many argue that *Dred Scott* had already effectively invalidated the Missouri Compromise. See, for example, Fehrenbacher, *Slavery, Law, and Politics* at 174–75 (cited in note 128). Chief Justice Roger Taney’s opinion in *Dred Scott* held that the federal government lacked the power to prohibit slavery in the territories. *Dred Scott*, 60 US at 447–48 (“A power [] in the General Government to obtain and hold colonies and dependent territories, over which they might legislate without restriction, would be inconsistent with its own existence in its present form.”). See also Blacksher and Guinier, 8 Harv L & Pol Rev at 45–50 (cited in note 16) (discussing the Court’s application of the equal sovereignty doctrine in *Dred Scott*).

that slavery conferred on voters in slave states.¹³⁷ By this rationale, allowing voters to choose whether to be a slave state or a free state was analogous to a decision to weight their votes more or less as compared to the nation as a whole. Lincoln asserted that “it is an absolute truth, without an exception, that there is no voter in any slave State, but who has more legal power in the government, than any voter in any free State.”¹³⁸ He also noted that slave states held twenty additional representatives through the workings of the Three-Fifths Clause.¹³⁹ Lincoln’s comments appear to protest the inequality of representation of voters under the federal system of apportioning representatives—a critique built on a conception of a government of the people. However, within a system of divided sovereignty, his remarks also bear on the relative position of states in the federal system. The reduced influence of voters in free states led directly to the reduced power of free states themselves.

Other aspects of the debate over slavery centered on conceptions of state sovereignty and “the Union.” Unionists took seriously the Constitution’s purpose of establishing “a more perfect Union.”¹⁴⁰ For many Unionists, this meant that adherence to national laws, even bad ones, was paramount; citizens’ devotion to the law should verge on a sort of “political religion.”¹⁴¹ Others took a different tack. As early as 1828, Vice President John Calhoun proposed the idea of nullification, by which a state could invalidate a federal law to protect its interests against a hostile majority.¹⁴² Calhoun’s home state—South Carolina—soon attempted to apply the idea of nullification to declare certain federal

¹³⁷ See Abraham Lincoln, *This Question of Slavery Extension*, in Richard N. Current, ed., *The Political Thought of Abraham Lincoln* 67, 76–77 (Macmillan 1967) (delivering a speech on the Kansas-Nebraska Act of 1854).

¹³⁸ *Id.* at 77.

¹³⁹ See *id.*

¹⁴⁰ US Const Preamble.

¹⁴¹ Abraham Lincoln, *The Perpetuation of Our Political Institutions*, in Current, ed., *The Political Thought of Abraham Lincoln* 11, 17 (cited in note 137) (emphasis omitted). Lincoln noted that bad laws should be repealed as soon as possible, but, “while they continue in force, for the sake of example, they should be religiously observed.” *Id.* For further background on Lincoln’s statements on slavery and the Union, see Elizabeth R. Varon, *Disunion! The Coming of the American Civil War, 1789–1859* 280–83 (Chapel Hill 2008).

¹⁴² See John C. Calhoun, *South Carolina Exposition (1828)*, in Urofsky and Finkelman, eds., *Documents of American Constitutional and Legal History* 262, 262 (cited in note 88). It is important to note that Calhoun viewed nullification as a power contained within the Constitution to be used to facilitate compromise between states and preserve the Union. See Varon, *Disunion* at 87–89 (cited in note 141).

tariffs void, alleging that they preferred Northern manufacturing over Southern agricultural interests.¹⁴³ This idea was reminiscent of early constitutional debates insofar as Calhoun asserted that the Union was composed of a compact of states, each retaining its sovereignty.¹⁴⁴ In some sense, the very idea of nullification minimized the division of sovereignty that had taken place at the Founding. The ability of states to nullify federal laws presumed that the state was the paramount actor in the federal system, rather than “the people” as specified by the Constitution.¹⁴⁵

Interestingly, one of the justifications behind the drafting of the Constitution was to prevent states from disadvantaging other states,¹⁴⁶ whereas South Carolina argued in the nullification debates that the national government was acting in ways similarly detrimental to its state interest. States had begun to shift from concerns of protecting themselves from other states to defending against impositions by the federal government.¹⁴⁷ These debates over slavery and nullification illustrate two broader issues that Americans faced during this time. First, how exactly the constitutional division of sovereignty would play out remained an open question and underlined the conflicts over whether the national government could impose tariffs or regulate slavery in the states. Second, individuals across the political spectrum phrased arguments in terms of the relative equality of states: Lincoln in discussing representation in the national legislature, and Calhoun in his advocacy of nullification. Both men can be regarded as concerned with an imbalance among the states, as exhibited by national policies favoring some states over others.

Tensions rose until South Carolina ultimately seceded in response to Lincoln’s election in 1860, followed by the other Southern states. After four years of war, the Union claimed victory over the Confederate States and initiated a policy of Reconstruction.

¹⁴³ See *South Carolina Ordinance of Nullification (1832)*, in Urofsky and Finkelman, eds, *Documents of American Constitutional and Legal History* 271, 271–74 (cited in note 88).

¹⁴⁴ See Calhoun, *South Carolina Exposition* at 262 (cited in note 142).

¹⁴⁵ See note 119 and accompanying text.

¹⁴⁶ See Beeman, *Plain, Honest Men* at 15 (cited in note 97).

¹⁴⁷ Two things must be noted here. First, fear of an overpowerful central government was not new but had been a significant part of the constitutional debate. See notes 101–18 and accompanying text. Second, though nullification formally pitted a state against the national government, in another sense it more likely posed a state against a group of other states (perhaps a region) acting collectively in the national legislature. See notes 142–43 and accompanying text.

Some scholars have argued that the Civil War had an inherent effect on the nation's federalist structure. One scholar noted in particular that:

[T]he War itself had worked a decisive structural change in the balance of federal and state sovereignty, one that entailed "the sweeping invasion by national legislation of the region hitherto deemed sacred to state rights." . . . This change would have occurred even if the Reconstruction Amendments had never existed. It was an outcome of the War itself.¹⁴⁸

Whatever fundamental transformation the war brought, the Reconstruction Amendments codified the changes. The Thirteenth Amendment abolished slavery and indentured servitude.¹⁴⁹ The Fourteenth Amendment extended national and state citizenship to "[a]ll persons born or naturalized in the United States."¹⁵⁰ It further mandated that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.¹⁵¹

Lastly, Congress passed the Fifteenth Amendment, which prohibited denial of the right to vote "on account of race, color, or previous condition of servitude."¹⁵² Reconstruction provides an interesting counterexample to the principle of equal sovereignty

¹⁴⁸ Fishkin, 123 Yale L J F at 185 (cited in note 65), quoting William A. Dunning, *Are the States Equal under the Constitution?*, 3 Polit Sci Q 425, 425 (1888). See also Richard A. Primus, *The Riddle of Hiram Revels*, 119 Harv L Rev 1680, 1709 (2006) ("[W]e can understand the Civil War and Reconstruction as having nullified aspects of the prior legal order that harmed African Americans. It would be extravagant to claim that events of the 1860s erased *all* of that previous system."). See also Bruce Ackerman, *We the People: Foundations* 42 (Belknap 1991) (claiming that post-Civil War constitutional amendments "profoundly transformed preexisting constitutional principles").

¹⁴⁹ See US Const Amend XIII, § 1. For a detailed account of the origins, passage, and effect of the Thirteenth Amendment, see generally Vorenberg, *Final Freedom* (cited in note 125).

¹⁵⁰ US Const Amend XIV, § 1. For a history of the Fourteenth Amendment, see generally Gerard N. Magliocca, *American Founding Son: John Bingham and the Invention of the Fourteenth Amendment* (New York 2013).

¹⁵¹ US Const Amend XIV, § 1. See also Amar, 101 Yale L J at 1218–26 (cited in note 116) (interpreting the text of the Fourteenth Amendment line by line); Harrison, 101 Yale L J at 1391–96 (cited in note 116) (outlining various competing interpretations of the Fourteenth Amendment).

¹⁵² US Const Amend XV, § 1.

insofar as the federal government required Southern states to abolish slavery in their new constitutions but did not impose a similar requirement on Northern states.¹⁵³

While each of these amendments broke new ground, their enforcement clauses worked fundamental structural changes on American government. Each of the amendments was backed by a clause establishing Congress's power to enforce the amendment by "appropriate legislation."¹⁵⁴ These enforcement clauses signaled a vast expansion of federal power over the states.¹⁵⁵ In fact, passage of the Enforcement Act¹⁵⁶ pushed the national government "to the outer limits of constitutional change" by "making violence infringing civil and political rights a federal crime punishable by the national state."¹⁵⁷ However, the Court soon limited the scope of the Fourteenth Amendment in the *Civil Rights Cases*,¹⁵⁸ which declared the Civil Rights Act of 1875¹⁵⁹ unconstitutional and circumscribed application of the Fourteenth Amendment to state, as opposed to private, action.¹⁶⁰

The Reconstruction era drastically changed the way that Americans thought about federalism. In an 1888 article, Professor William Dunning described Union victory as foreclosing prewar arguments that state sovereignty worked to limit federal power.¹⁶¹ Dunning and his adherents contended that Reconstruction was

¹⁵³ See Vorenburg, *Final Freedom* at 222–33 (cited in note 125). Though the federal government made ratification of the Thirteenth Amendment a condition of readmission to the Union, the Southern states conditioned their ratification on interpretations of the Amendment that made it largely ineffectual. See *id.* See also Heller, 44 U Memphis L Rev at 382 n 123 (cited in note 8).

¹⁵⁴ US Const Amend XIII, § 2; US Const Amend XIV, § 5; US Const Amend XV, § 2.

¹⁵⁵ See Foner, *A Short History of Reconstruction* at 195 (cited in note 126).

¹⁵⁶ Enforcement Act of 1870, 16 Stat 140, codified as amended at 18 USC § 241 et seq.

¹⁵⁷ Foner, *A Short History of Reconstruction* at 195 (cited in note 126). For an example of this effect, see the discussion of the enforcement of the Fifteenth Amendment in Part I.A.

¹⁵⁸ 109 US 3 (1883).

¹⁵⁹ An Act to Protect All Citizens in Their Civil and Legal Rights, 18 Stat 335 (1875) ("Civil Rights Act of 1875").

¹⁶⁰ *Civil Rights Cases*, 109 US at 11–12, 26.

¹⁶¹ See Dunning, 3 Polit Sci Q at 425 (cited in note 148). See also Fishkin, 123 Yale L J F at 184 (cited in note 65). While Dunning's interpretation was the dominant theory of Reconstruction through the late nineteenth and early twentieth centuries, his work has since been repudiated by modern historians as mischaracterizing the role of freedmen in Reconstruction. See, for example, Thomas J. Brown, *Reconstructions: New Perspectives on the Postbellum United States* 3–4 (Oxford 2006). Dunning's account was criticized even earlier by W.E.B. Du Bois. See W.E.B. Du Bois, *Black Reconstruction in America: Toward a History of the Part Which Black Folk Played in the Attempt to Reconstruct Democracy in America, 1860–1880* 641–43 (Transaction 2013) (originally published 1935) (describing Dunning's position and characterizing it as a "frontal attack on Reconstruction").

an attempt by Radical Republicans to consolidate power over the South through the extension of black suffrage and an invasion of Northern carpetbaggers.¹⁶² Dunning viewed the Civil War as an undeniable triumph of the federal government and starkly asserted that “[n]o argument based . . . upon the principle of state-sovereignty can ever again be tolerated in the arena of constitutional debate.”¹⁶³ Following a survey of federal and state relations, he concluded 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.”¹⁶⁴ Thus, Dunning touched on both questions raised above. First, he viewed the Civil War as conclusive evidence that the states were subordinate to the national government—a question previously left open by the division of sovereignty at the Constitutional Convention. Second, Dunning found the legal basis for a principle of equality among states to be weak—a theory that could “only be galvanized into life by a powerful act of judicial construction”—however, Dunning also found that the powers that the states “do exercise are everywhere substantially the same.”¹⁶⁵ 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.

3. Twentieth-century expansion of federal power.

Federal power continued to expand throughout the beginning of the twentieth century, and this period again saw many questions about the relative power of the national government and the states collectively. Perhaps most well known, the New Deal inaugurated a proliferation of federal-works projects and

¹⁶² See Fishkin, 123 Yale L J F at 183 (cited in 65).

¹⁶³ Dunning, 3 Polit Sci Q at 425 (cited in note 148). In retrospect, this assessment appears overstated, given the resurgence in consideration of states’ powers in recent years. See Sotirios A. Barber, *The Fallacies of States’ Rights* 24–29 (Harvard 2013). See also *National League of Cities v Usery*, 426 US 833, 852 (1976) (holding that the Commerce Clause did not authorize Congress to legislate “in areas of traditional governmental functions”), overruled by *Garcia v San Antonio Metropolitan Transit Authority*, 469 US 528 (1985). Even in Dunning’s own time, the federal courts upheld states’ rights over Reconstruction guarantees in important instances. See, for example, *Civil Rights Cases*, 109 US at 25 (voiding legislation that would have required the states to provide equal accommodations to all); *Plessy v Ferguson*, 163 US 537, 550–52 (1896) (upholding a segregationist state statute).

¹⁶⁴ Dunning, 3 Polit Sci Q at 452 (cited in note 148).

¹⁶⁵ *Id.* at 452–53.

an expansion of federal agencies.¹⁶⁶ More importantly for state sovereignty, the Court's interpretation of the Commerce Clause expanded to encompass activities with a "close and substantial relation" to interstate commerce.¹⁶⁷ Interpretations of the Reconstruction Amendments also indirectly contributed to the expansion of the federal commerce power. Because the Court in the *Civil Rights Cases* held that the Fourteenth Amendment did not apply to private action, twentieth-century civil rights advocates turned instead to the Commerce Clause as a vehicle through which to achieve their ends. In *Heart of Atlanta Motel v United States*¹⁶⁸ and *Katzenbach v McClung*,¹⁶⁹ the Court deferred to Congress's assessment of the effect of racial discrimination on commerce, indicating that the activity being regulated did not need to relate to the ultimate goal of regulation.¹⁷⁰ Civil rights advocates also promoted their cause under the enforcement clause of the Fourteenth Amendment.¹⁷¹

However, at the end of the century, the Court began to exhibit increased consideration for states, leading to talk "of federalism's revival."¹⁷² In *Lopez*, the Court distinguished between the "truly national" and the "truly local," disavowing the idea of a federal police power.¹⁷³ Somewhat counterintuitively, and more closely related to equal sovereignty, the Court in *United States v Morrison*¹⁷⁴ struck down the civil remedy provision of the Violence

¹⁶⁶ See Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 Stan L Rev 1189, 1243–53 (1986).

¹⁶⁷ *National Labor Relations Board v Jones & Laughlin Steel Corp*, 301 US 1, 37 (1937) ("[I]f [intrastate activities] have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."). See also *Wickard*, 317 US at 127–28 (holding that activity may be regulated if, in the aggregate, it affects interstate commerce).

¹⁶⁸ 379 US 241 (1964).

¹⁶⁹ 379 US 294 (1964).

¹⁷⁰ See *id.* at 303–04 ("[W]here we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end."). See also *Heart of Atlanta Motel*, 379 US at 261–62 ("How obstructions in commerce may be removed—what means are to be employed—is within the sound and exclusive discretion of the Congress.").

¹⁷¹ See, for example, *Katzenbach v Morgan*, 384 US 641, 646–47 (1966) (allowing Congress to determine the need for legislation under § 5 of the Fourteenth Amendment).

¹⁷² Jackson, 111 Harv L Rev at 2213 (cited in note 84).

¹⁷³ *Lopez*, 514 US at 567–68.

¹⁷⁴ 529 US 598 (2000).

Against Women Act¹⁷⁵ (VAWA), arguably because it *did not* treat states differently.¹⁷⁶ The Court noted that it had held in *Katzbach* that Congress appropriately tailored the VRA to the problem of voting discrimination but found fault with VAWA because “it applie[d] uniformly throughout the Nation,” despite congressional findings “indicat[ing] that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States.”¹⁷⁷ *Morrison* appears, at first glance, to contradict equal sovereignty—VAWA failed despite treating all states the same, whereas the VRA failed because it attempted to tailor coverage.

However, these cases might be reconciled under the exception found in *Northwest Austin*—namely, that a violation of equal sovereignty must be “justified by current needs.”¹⁷⁸ Under this reading, certain states—those with particularly terrible discrimination against victims of gender-motivated crimes or against minority voters—should be covered by the relevant statutes. Given that federal legislation in these circumstances was “justified,”¹⁷⁹ the problem in both cases was that the statutes were overly broad in their coverage and therefore unconstitutional. It is not that the Court foreclosed an equal sovereignty principle in *Morrison*, but rather that the Court found VAWA to be insufficiently tailored to meet the problem of preventing violence against women, similar to how the Court in *Shelby County* found the VRA to be insufficiently focused on areas with current voter discrimination. Thus, *Morrison* introduces nuance regarding how one might think about equal sovereignty but does not repudiate the principle.

* * *

This historical analysis provides background necessary to understand equal sovereignty. At the Founding, the transfer of governmental authority from the states to the people and the division of sovereignty among levels of government were two fundamental

¹⁷⁵ Violent Crime Control and Law Enforcement Act of 1994, title IV, Pub L No 103-322, 108 Stat 1796, 1902–55.

¹⁷⁶ See *Morrison*, 529 US at 626–27.

¹⁷⁷ *Id* at 626.

¹⁷⁸ *Northwest Austin*, 557 US at 203.

¹⁷⁹ Assuming, of course, that these statutes fit within the existing doctrinal requirements of the Commerce Clause (in the case of *Morrison*) or § 5 of the Fourteenth Amendment (in the case of *Shelby County*).

theoretical shifts, the consequences of which played out over subsequent decades. The Civil War and Reconstruction settled the expansion of federal power over the states, and this period also saw arguments framed in terms of equality among states. But whether the Constitution required that states be treated equally remained an open question during this period. The twentieth century ushered in continued expansion of federal power, though the Court later exhibited increased concern for state sovereignty. As the foregoing has demonstrated, questions of federalism have historically focused more on the relationship between the federal government and the states collectively; however, concern for the equality of individual states has been contemplated at multiple points in American history.

B. Doctrinal Threads

Prior to the invocation of equal sovereignty in *Shelby County*, federal courts made reference to a similar idea—requiring that the federal government treat states equally—in other areas of law. Part II.A.1 outlined where the Constitution explicitly contemplates states as equals, and Part I.A discussed equal sovereignty in the voting-rights context. This Section considers additional areas of law bearing on equal sovereignty. The closest analogue is the equal footing doctrine, which governs the admission of new states to the Union. This doctrine proves important, as it was implicated in all the case law cited in support of equal sovereignty in *Shelby County*. Further, Justice Ginsburg’s dissent did not recognize a distinction between equal sovereignty and the equal footing doctrine, necessitating a close analysis of this area of law.¹⁸⁰ This Section also analyzes an underlying justification for the application of both the Commerce Clause and the Dormant Commerce Clause—namely, that federal power should be used to prevent unfair advantages or protectionist policies among the states. Finally, this Section briefly examines equal sovereignty in Tenth Amendment and sovereign immunity cases.

1. The equal footing doctrine.

The equal footing doctrine is based in Article IV of the Constitution, which allows for the admission of new states to the

¹⁸⁰ See Part I.B.

Union.¹⁸¹ The Northwest Ordinance further required that “whenever any of the said States [of the Northwest Territory] shall have sixty thousand free inhabitants therein, such State shall be admitted . . . into the Congress of the United States, on an equal footing with the original States, in all respects whatever.”¹⁸² In *Pollard’s Lessee v Hagan*¹⁸³ in 1845, the Supreme Court interpreted this language to mean that new states “com[e] in with equal sovereign rights” and possess rights over their territory “as an incident of state sovereignty.”¹⁸⁴ In the 1911 case of *Coyle*, the Court connected the equal footing doctrine to federalism with expansive language, noting that “[t]his Union’ was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself.”¹⁸⁵ The Court then underscored the principle, stating that “the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized.”¹⁸⁶

Over a century later, in *United States v Texas*,¹⁸⁷ the Court clarified that the equal footing doctrine applies to political rights and questions of sovereignty but does not include economic issues because “[t]here has never been equality among the States in that sense.”¹⁸⁸ Elaborating, the Court noted that “[a]rea, 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.”¹⁸⁹ A comparison can be drawn here to the regulation of “States qua

¹⁸¹ See US Const Art IV, § 3:

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

But see generally Vasan Kesavan and Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 Cal L Rev 291 (2002) (considering the possibility that the creation of West Virginia was unconstitutional under Article IV of the Constitution because it broke off from the existing state of Virginia).

¹⁸² Northwest Ordinance Art V, 1 Stat at 53 n (a).

¹⁸³ 44 US 212 (1845).

¹⁸⁴ *Id* at 231.

¹⁸⁵ *Coyle*, 221 US at 567.

¹⁸⁶ *Id* at 580.

¹⁸⁷ 339 US 707 (1950).

¹⁸⁸ *Id* at 716.

¹⁸⁹ *Id*.

States” in the Commerce Clause context.¹⁹⁰ However, while the Court has prohibited the federal government from interfering with states as states under the commerce power, the equal footing doctrine instead has charged the federal government with guaranteeing each new state a uniform launch into the realm of statehood.

Both courts and scholars have asserted that the equal footing doctrine applies only to the admission of states, specifically excluding regulation by the federal government after admission.¹⁹¹ Indeed, “Congress may exercise its constitutional power of legislation over a particular subject matter in such a way as to bind all states alike, although in actual operation the effect of such action is mainly or exclusively confined to the newly admitted state, without thereby impairing that state’s equality.”¹⁹² Thus, on its face, the equal footing doctrine—as traditionally understood—appears to bear more on how a state achieves sovereign status than on what sovereignty might later entail.

2. The Commerce Clause.

Legislation under the Commerce Clause often impacts states differently.¹⁹³ The Commerce Clause authorizes Congress “to regulate Commerce with foreign Nations, and among the

¹⁹⁰ *National League of Cities*, 426 US at 847. Regulation of “States *qua* States” includes areas in which the federal government attempts to regulate states’ abilities to carry out basic governmental functions. *Id.*

¹⁹¹ See, for example, *Shelby County*, 133 S Ct at 2648 (Ginsburg dissenting); *Katzenbach*, 383 US at 328–29; Louis Touton, Note, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 Colum L Rev 817, 834 (1980) (“It is important to note that the equal footing doctrine does not require the federal government to treat every state equally. Rather, the doctrine only guarantees states equal authority within the federal system.”); Price, 88 NYU L Rev Online at 34 (cited in note 42) (“The equal footing principle says nothing about whether federal legislation, validly enacted pursuant to Congress’s enumerated powers, must treat states equally.”). Interestingly, in *Dred Scott*, Chief Justice Taney appears to have applied a similar framework in order to argue that the federal government was obligated to treat citizens of the territories on the “same footing” as citizens of the states. *Dred Scott*, 60 US at 450–51.

¹⁹² States, 81A *Corpus Juris Secundum* § 8 (West 2013). However, if *Morrison* is seen as fitting into a longer line of equal sovereignty cases, then *Morrison* may introduce a limitation on this traditionally broad conception of Congress’s power in cases in which legislation appears to be facially neutral toward states. See notes 174–79 and accompanying text.

¹⁹³ Similarly, one of the constitutional requirements for equal treatment of the states—the Port Preference Clause—has been determined to allow “facially nondiscriminatory law that has incidental, disparate effects on the ports of one or more states.” *Thomson Multimedia Inc v United States*, 340 F3d 1355, 1364 (Fed Cir 2003).

several States, and with the Indian Tribes.”¹⁹⁴ Early in the twentieth century, the Court noted that “[m]any causes may coöperate to give one state, by reason of local laws or conditions, an economic advantage over others” and further stated that “[t]he commerce clause was not intended to give to Congress a general authority to equalize such conditions.”¹⁹⁵ However, as time went on, the Court construed Congress’s power under the Commerce Clause more broadly and allowed statutes governing activities further removed from the traditional conception of commerce. Among those statutes held constitutional during this period were regulations aimed at prohibiting business practices deemed to give some states an unfair advantage over others.¹⁹⁶ What differentiates the Court’s approach in the Commerce Clause context is that the Court has held valid congressional regulation that treats states differently for the *purpose* of ensuring a more equal balance among the states. While the equal footing cases observe that “[t]here has never been equality among the States in [an economic] sense,”¹⁹⁷ some Commerce Clause cases attempt to create a (minor) semblance of equality by treating states in an arguably disparate manner.¹⁹⁸

A similar impulse seems to lie behind the Court’s approach to the Dormant Commerce Clause, which prohibits states from engaging in regulation that discriminates against interstate commerce, particularly when such regulations benefit in-state interests at the expense of out-of-state interests.¹⁹⁹ Unlike the typical Commerce Clause cases that deal with federal regulation,

¹⁹⁴ US Const Art I, § 8, cl 3.

¹⁹⁵ *Hammer*, 247 US at 273. See also *Houston, East & West Texas Railway Co v United States*, 234 US 342, 351 (1914) (allowing Congress to regulate intrastate activity with a “close and substantial relation” to interstate commerce to maintain nationwide commerce on “fair terms”).

¹⁹⁶ See, for example, *United States v Darby*, 312 US 100, 114 (1941), citing *Gibbons v Ogden*, 22 US (9 Wheat) 1, 196 (1824) (noting that the power of Congress over interstate commerce “is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution”). Notably, *Darby* overruled *Hammer* in allowing federal regulation of employment conditions as incident to interstate commerce. See *Darby*, 312 US at 116–17.

¹⁹⁷ *Texas*, 339 US at 716.

¹⁹⁸ Though Congress may regulate working conditions to avoid unfair competition in interstate commerce, this conclusion is necessarily limited. First, it is unclear how important the moral dimension of regulation of child labor was in *Darby*. See *Darby*, 312 US at 110–14. Second, it seems unlikely that Congress would go much further in attempting to achieve economic equality.

¹⁹⁹ See Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum L Rev 1689, 1698–99 (1984).

these cases involve the Court refusing to give federal sanction to state regulations that disparately impact other states engaged in interstate commerce.²⁰⁰ In both of these areas, the Commerce Clause jurisprudence might have set an outer limit—or, alternatively, created a level playing field—beyond which states may not be treated differently through either federal legislation or protectionist state statutes. Though these lines of cases are undoubtedly distinct from equal sovereignty as articulated by Chief Justice Roberts in *Shelby County*, one might read them as stemming from a similar impulse—namely, that the states should be treated equally barring a compelling reason to the contrary.²⁰¹

3. The Tenth Amendment.

Professor Zachary Price has asserted that the equal sovereignty principle could be based in cases discussing Tenth Amendment limits to congressional authority over state activity.²⁰² The Tenth Amendment provides that 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.”²⁰³ Price points to two decisions in particular, *South Carolina v. Baker*²⁰⁴ and *Garcia v. San Antonio Metropolitan Transit Authority*,²⁰⁵ which assert that the constitutional protections of the states are structural—rather than substantive—and are found in the national political process.²⁰⁶ He notes that *Baker* left open the possibility that “some extraordinary defects in the national political process might render congressional regulation of state activities invalid under the Tenth Amendment.”²⁰⁷ Price asserts that *Shelby County* was unlikely to fall within this exception but notes that the exception remains.²⁰⁸ The negative inference

²⁰⁰ See, for example, *Hunt v. Washington State Apple Advertising Commission*, 432 US 333, 352–54 (1977) (holding unconstitutional a state statute that prohibited display of any other state’s food-grading system).

²⁰¹ Though, in the Commerce Clause context, this motivation seems to be framed in terms of ensuring that states have an equal opportunity to compete in the national economy.

²⁰² See Price, 88 NYU L Rev Online at 39 (cited in note 42).

²⁰³ US Const Amend X.

²⁰⁴ 485 US 505 (1988).

²⁰⁵ 469 US 528 (1985).

²⁰⁶ See Price, 88 NYU L Rev Online at 39 (cited in note 42).

²⁰⁷ *Id.*, quoting *Baker*, 485 US at 512.

²⁰⁸ See Price, 88 NYU L Rev Online at 39 (cited in note 42) (stating that “it seems doubtful that any breakdown in the political process with respect to [§ 5 of the VRA] was sufficiently extreme to fall within the *Garcia/Baker* exception”).

of this argument might lead to the conclusion that congressional action that treats states unequally is valid if produced by a legitimate political process. It thus theoretically leaves open the possibility for an equal sovereignty principle to apply in a narrow set of cases in which the political process breaks down to an impermissible degree. However, it seems unlikely that such a case would be justiciable, as it is difficult to imagine a standard by which the Court might assess the legitimacy of a political process.²⁰⁹

4. Sovereign immunity.

An idea similar to equal sovereignty is also found in cases dealing with state sovereign immunity. The Eleventh Amendment limits the power of the federal judiciary to entertain suits against states.²¹⁰ State sovereign immunity is an outgrowth of the divided sovereignty inherent in American federalism—a way of ensuring protection of a fundamental aspect of state sovereignty.²¹¹ The Court has held this right to be among those required for states to be on an “equal footing” with other states in the Union.²¹² Professor Timothy Zick contends that the right to sovereign immunity is like the individual right of equality: a “status-based right” that may be harmed by failure to treat states comparably to others occupying a similar status.²¹³ Zick identifies “the Court’s increasing tendency to anthropomorphize the states,” thus allowing states to claim the attendant rights of personhood²¹⁴—most importantly, for this Comment’s purposes, the right of equality. If one adopts this view, then “rights” such

²⁰⁹ See *Vieth v Jubelirer*, 541 US 267, 281 (2004) (holding that the Court had “no judicially discernable and manageable standards” to determine the political question presented); *League of United Latin American Citizens v Perry*, 548 US 399, 414–15 (2006). The political-question doctrine “refers to subject matter that the Court deems to be inappropriate for judicial review,” and one criteria of this doctrine includes “a lack of judicially discoverable and manageable standards” for resolving a case. Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 130–32 (Wolters Kluwer 4th ed 2011).

²¹⁰ See Timothy Zick, *Statehood as the New Personhood: The Discovery of Fundamental “States’ Rights,”* 46 Wm & Mary L Rev 213, 260 (2004). This immunity has been interpreted to be much broader than is stated in the Constitution and has been partially based in structural considerations. See *id.* at 262.

²¹¹ See *id.*

²¹² *Alden v Maine*, 527 US 706, 713 (1999).

²¹³ Zick, 46 Wm & Mary L Rev at 265 (cited in note 210). Zick discusses the equality of states as sovereigns compared to other sovereigns, such as the national government—an inquiry slightly distinct from that presented in *Shelby County*. See *id.* at 266.

²¹⁴ *Id.* at 224, 226–30.

as state sovereign immunity might be seen to stem in part from a similar concern for the equality of the states.

In an interesting parallel to equal sovereignty, the Supreme Court has held that Congress may subject states to private suits only “if there is ‘compelling evidence’ that the States were required to surrender this power to Congress pursuant to the constitutional design.”²¹⁵ Such a showing has proven to be quite rare; as of 2004, there was not a single instance of a compelling interest that subjected states to suit.²¹⁶ While this exception to sovereign immunity can be read as an issue of constitutional design, it can also be viewed as similar to *Northwest Austin’s* assertion that equal sovereignty may be violated but only if justified by current needs. In both instances, protections of the states are to be strictly observed absent extreme circumstances requiring deviation.²¹⁷

* * *

This survey of the doctrine indicates that a motivation similar to equal sovereignty also animates other areas of law. The equal footing doctrine constitutes the closest parallel and, to some extent, the question of equal sovereignty might simply be the question whether the Court is now attempting to apply the equal footing doctrine beyond its traditional realm. However, similar impulses can be seen in Commerce Clause cases that attempt to level the playing field between states. Tenth Amendment and state sovereign immunity cases may also be comparable with their attendant emphasis on structural considerations. Indeed, it is to the structure of government that many have turned to define the sovereignty of states, and to which this Comment turns next.

C. Structural Arguments

Both scholars and judges have asserted that states can defend their interests through structural avenues embedded in the federal system, such as the requirement that states receive an equal number of senators and guaranteed representation in the

²¹⁵ *Alden*, 527 US at 731, quoting *Blatchford v Native Village of Noatak*, 501 US 775, 781 (1991).

²¹⁶ See Zick, 46 Wm & Mary L Rev at 262–63 (cited in note 210).

²¹⁷ See *id.* Further, *Shelby County* can be read as raising the bar in determining what circumstances justify federal intervention in voting regulations.

House of Representatives.²¹⁸ However, this structural argument is typically focused on “restraining new intrusions by the center on the domain of the states.”²¹⁹ As such, it bears on the interaction between the federal government and the states as a monolithic group and addresses violations of state sovereignty, rather than questions of the relative sovereignty of and among states. This structural argument does not address the situation in which a majority of states—through their representatives in Congress—pass federal regulations that unequally impact one or more states. This is a slightly different question, and it is here that the principle laid out in *Northwest Austin* and *Shelby County* applies.

This Comment has already presented examples of structural arguments bearing on equal sovereignty. In laying out the framework of American government, the Constitution expressly contemplated the states as equal in several realms: equal representation in the Senate; baseline requirements such as the Privileges and Immunities Clause, the Full Faith and Credit Clause, and the Guarantee Clause; Article V’s prohibition on an involuntary reduction in state representation; state sovereign immunity; the Tax Uniformity Clause; and the Port Preference Clause.²²⁰ These parts of the Constitution—some more than others—may be read as forming a sort of default position of state equality within the federal system. Further, some have read the Tenth Amendment as providing a sort of structural avenue by which states might protect their interests.²²¹

From a historical perspective, the Three-Fifths Clause in particular embodied a structural compromise to bridge disagreements over slavery.²²² Ultimately, this arrangement broke down over the issue of slavery’s expansion into the territories, as illustrated in Lincoln’s Peoria speech.²²³ These structural

²¹⁸ See, for example, Price, 88 NYU L Rev Online at 27 (cited in note 42), citing Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum L Rev 543, 546 (1954).

²¹⁹ Wechsler, 54 Colum L Rev at 558 (cited in note 218).

²²⁰ See Part II.A.1.

²²¹ See Part II.B.3.

²²² It is important to note that the three-fifths outcome was not inevitable. The convention discussed other options in 1787, such as full accounting or no accounting for slaves in the national legislature. See Beeman, *Plain, Honest Men* at 204–15 (cited in note 97).

²²³ See 2 *The Collected Works of Abraham Lincoln* 278 (Rutgers 1953). Similar concerns about relative representation have arisen elsewhere in constitutional law. See, for

arguments implicate equal sovereignty because the increased influence of some states directly results in the dilution of the others' influence.²²⁴ Similarly, a status-based understanding of state sovereign immunity can be seen in this light insofar as one member of the grouping of states may be treated differently from the rest.²²⁵ These types of regulations seem to bear less on the core political functions of states and more on the relative position of states in the structure of government. This has not been the traditional realm of structural arguments, which focus on the relationship between states as a group and the federal government, and therefore it presents an interesting set of questions to work through.

Viewing equal sovereignty in light of the federal structure might also lead one to reconsider the idea of "cooperative federalism."²²⁶ This theory posits that states cooperate with the federal government to achieve a policy that a majority of states prefer but cannot achieve due to collective action or holdout problems.²²⁷ Most instances of cooperative federalism are unlikely to pose a problem because most congressional legislation does not single out certain states for disparate treatment. However, in some cases, cooperative federalism might allow a group of states to lobby the federal government for a regulation that violates equal sovereignty. Here, one might worry about a group or region of states cooperating with the federal government to subject another state, or group of states, to disparate burdens.²²⁸ This is a situation unaccounted for by structural or political process arguments and it presents a potential justification for enforcement of an equal sovereignty principle. As this Section indicates, consideration of equal sovereignty lends interesting nuance to traditional

example, *McCulloch v Maryland*, 17 US 316, 436 (1819) (prohibiting Maryland from burdening the country as a whole by taxing the Bank of the United States).

²²⁴ See Mark A. Graber, *Dred Scott and the Problem of Constitutional Evil* 106–09 (Cambridge 2006). See also notes 136–39 and accompanying text.

²²⁵ See notes 210–17 and accompanying text.

²²⁶ Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 Colum L Rev 459, 461–62 (2012) (describing cooperative federalism as the mode of federalism by which states are charged by Congress to administer federal law).

²²⁷ The drafters of the Constitution also recognized this potential problem and it informed their debate. See generally James Madison, *Vices of the Political System of the United States*, Founders Online (Apr 1787), online at <http://founders.archives.gov/documents/Madison/01-09-02-0187> (visited Nov 3, 2014) (arguing that a stronger federal government was needed to combat collective action problems among the states).

²²⁸ As some scholars have noted, public-choice analysis undoubtedly has relevance to this topic. See generally, for example, Robert D. Cooter and Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 Stan L Rev 115 (2010).

structural arguments, which should be considered by courts applying the principle in the future.

* * *

As this Part indicates, some support for a principle of equal sovereignty can be found by analyzing the historical record and varied areas of legal doctrine. Further, the principle presents a series of interesting insights for traditional structural analyses of government. However, this examination does not turn up enough support to identify equal sovereignty as a fundamental doctrine of American law—the claim made by the majority in *Shelby County*.²²⁹ Given that equal sovereignty thus holds an ambiguous status in constitutional law, it is helpful to look to other courts that have since applied the principle to determine whether their treatment of equal sovereignty can shed light on its future import.

III. APPLYING EQUAL SOVEREIGNTY

As the previous Part demonstrated, a principle of equal sovereignty did not emerge out of the blue in *Northwest Austin* and *Shelby County*, though neither was it a fundamental doctrine of constitutional law. This Part examines cases in which the principle of equal sovereignty has been invoked since its recent articulation by the Court and discusses how subsequent courts have understood the principle. This Part then turns toward synthesis and considers the settings in which equal sovereignty might be invoked in the future. An understanding of history and legal doctrine, and a consideration of the federal structure, are assembled to present a comprehensive depiction of equal sovereignty as it currently stands.

A. Equal Sovereignty in Recent Case Law

Following *Northwest Austin*, equal sovereignty first arose in the procedural context. *Roe v Michelin North America*²³⁰ involved a dispute over the amount in controversy necessary for removal to federal court in a wrongful-death case.²³¹ Alabama is the only state to allow discretionary punitive damages in wrongful-death

²²⁹ See *Shelby County*, 133 S Ct at 2623.

²³⁰ 637 F Supp 2d 995 (MD Ala 2009).

²³¹ *Id* at 997.

actions, which makes determination of damages difficult until settlement or trial.²³² Therefore, a narrow reading of the requirement that a defendant show an amount in controversy exceeding \$75,000²³³ would make Alabama wrongful-death cases “for the most part” unremovable.²³⁴ The district court in *Roe* applied the equal sovereignty principle, determining that “[u]nless unavoidable, Alabama’s wrongful-death cases should not be so singularly shutout and thus treated differently from the other 49 States’ wrongful-death cases.”²³⁵ Ultimately, the district court found, on its own accord, that it was “not only ‘readily deducible’ and ‘clear’ that this case involves more (and, indeed, much more) than \$75,000, it is nearly impossible to conclude otherwise.”²³⁶ Therefore, the court held the case to be removable on grounds somewhat apart from its invocation of equal sovereignty.

Since *Shelby County*, only one court has issued an opinion dealing with equal sovereignty. In *National Collegiate Athletic Association v New Jersey*²³⁷ (“NCAA”), the state of New Jersey attempted to license gambling on professional and amateur sports and, in response, a conglomerate of sports leagues sued alleging that the proposed law violated the federal Professional and Amateur Sports Protection Act²³⁸ (PASPA). Before the Third Circuit, counsel for New Jersey argued that PASPA exceeded Congress’s Commerce Clause powers and further violated the equal sovereignty of the states by allocating preferential treatment to Nevada, the only state allowed to maintain state-sponsored sports gambling.²³⁹ The Third Circuit declined to apply equal sovereignty for five reasons, articulating a limited conception of the principle. First, the court held that congressional regulation under the Commerce Clause, “unlike other powers of Congress, . . . does not require geographic uniformity.”²⁴⁰ Second, the court held that equal sovereignty did not apply in this context, noting that “local evils appear to be but *one* of the types of cases in which a departure from the equal sovereignty principle

²³² Id at 1000.

²³³ See 12 USC § 1332(a).

²³⁴ *Roe*, 637 F Supp 2d at 1000.

²³⁵ Id.

²³⁶ Id at 998.

²³⁷ 730 F3d 208 (3d Cir 2013), cert denied 134 S Ct 2866 (2014).

²³⁸ 28 USC § 3701 et seq. See also *NCAA*, 730 F3d at 214.

²³⁹ See *NCAA*, 730 F3d at 237.

²⁴⁰ Id at 238, quoting *Morgan v Virginia*, 328 US 373, 388 (1946) (Frankfurter concurring).

is permitted.”²⁴¹ Third, the court noted that nothing in *Shelby County* mandated an application of the principle outside the “sensitive areas of state and local policymaking” of election law.²⁴² Fourth, assuming that the equal sovereignty principle did apply to Commerce Clause legislation, the court found PASPA to be properly tailored to its purpose of preventing “the spread of state-sanctioned sports gambling.”²⁴³ Finally, the court distinguished the VRA’s practice of singling out states for disfavored treatment from PASPA’s practice of giving one state preferential treatment.²⁴⁴

These cases offer a few additional, and perhaps contradictory, insights to further delineate the principle of equal sovereignty. First, the application of equal sovereignty in *Roe* indicates that the principle might be applied even more widely than anticipated. Undoubtedly, invocation of equal sovereignty in the procedural context appears to stretch the concept even further than Chief Justice Roberts’s extension of the principle to voting-rights cases. However, the *NCAA* court appeared to prohibit consideration of equal sovereignty in relation to the Commerce Clause.²⁴⁵ This seemingly limits the application of the principle and forecloses discussion of equal sovereignty in an area of law that has traditionally hosted significant debates regarding federalism.²⁴⁶ Second, the *NCAA* court’s different treatment of preferential regulations—as opposed to ones that disfavor states—appears to be a distinction without a difference. Whether a state is given preferential treatment or subjected to disfavored status, either approach would appear to violate equal sovereignty at a basic level. These recent cases thus continue to raise questions regarding the scope and application of equal sovereignty.

B. Equal Sovereignty Going Forward

It is important to note that there are only two Supreme Court cases that discuss equal sovereignty as a general principle: *Northwest Austin* and *Shelby County*. These opinions, both involving challenges to the VRA’s preclearance requirement and both written by Roberts, derive all their citations in support of

²⁴¹ *NCAA*, 730 F3d at 239.

²⁴² *Id.*, quoting *Shelby County*, 133 S Ct at 2624.

²⁴³ *NCAA*, 730 F3d at 239 (emphasis omitted).

²⁴⁴ See *id.*

²⁴⁵ See note 241 and accompanying text.

²⁴⁶ See notes 79–86 and accompanying text.

the principle from the equal footing doctrine.²⁴⁷ The divergence between Roberts's majority opinion and Justice Ginsburg's dissent may simply boil down to a disagreement over whether the equal footing doctrine can or should be expanded beyond the admission of new states, a setting in which both justices agree that the principle applies. Undoubtedly, the Court maintains the ability to adjust, expand, or overrule doctrine, and the justices often disagree as to what the proper outcome of a case might be. However, it is still useful to synthesize historical and doctrinal arguments to present a picture of what a constitutional principle of equal sovereignty might look like going forward.

The idea of treating states equally is most thoroughly discussed in the equal footing cases. Beginning here, the principle is unlikely to apply when the federal government treats states differently in economic contexts for two reasons: First, the equal footing doctrine does not apply to such instances, as that doctrine concerns only the sovereign and political status of states.²⁴⁸ Second, Congress is separately understood to have expansive power to regulate the states and facilitate the flow of interstate commerce under its enumerated powers.²⁴⁹ From these basic assumptions, further extrapolations are possible. Analogizing to the Commerce Clause cases, perhaps the principle of equal sovereignty might not apply in cases involving any of Congress's enumerated powers, and perhaps it might apply with most force in instances in which federal regulation touches on the powers reserved to the states. Indeed, election law is often considered to be within the realm of the states, making the appearance of the equal sovereignty principle in the VRA context consistent with this conclusion.²⁵⁰

It might also be reasonable to assume that the principle of equal sovereignty is restricted to instances involving the core political and civil functions of the states—cases in which it appears as though the federal government is somehow disparately impacting

²⁴⁷ See *Northwest Austin*, 557 US at 203; *Shelby County*, 133 S Ct at 2623.

²⁴⁸ See *Texas*, 339 US at 716.

²⁴⁹ See Parts II.A.3, II.B.2.

²⁵⁰ See US Const, Art I, § 4 ("The Times, Places and Manner of holding elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."). However, Professor Franita Tolson argues that the states' power over election law is best understood as an exercise of state autonomy, not state sovereignty. See generally Franita Tolson, *Reinventing Sovereignty? Federalism as a Constraint on the Voting Rights Act*, 65 Vand L Rev 1195 (2012).

states as states.²⁵¹ From this perspective, the emergence of equal sovereignty under the VRA again seems understandable. Federal regulation under the VRA falls within a consistent narrative dating back to the Reconstruction Amendments and the ideas about states' rights that are characteristic of that era. Here, it seems that the principle of equal sovereignty emerged from a longstanding contest between the constitutional guarantees granted to "the people" by the Reconstruction Amendments and a robust conception of states in the federal system.²⁵²

One particularly perplexing aspect of the doctrine is the apparent "justification" exception outlined in *Northwest Austin*, which asserts that violations of equal sovereignty "must be justified by current needs."²⁵³ Since *Northwest Austin* was decided on other grounds, *Shelby County* is the only case to apply this exception. There, the Court concluded that reauthorization of the VRA in 2006 was not justified by the contemporary problems of voting discrimination.²⁵⁴ The Court gave little further guidance as to what might justify a divergence from equal sovereignty, though it did indicate that the degree of voting discrimination that prompted the original passage of the VRA would suffice.²⁵⁵ In any event, the justification exception introduces a doctrinal wrinkle to the rational-basis review that the Court typically grants to congressional action and may implicate separation-of-powers and institutional-competence concerns.

What is known about equal sovereignty prompts a series of questions about what is yet unknown. Does the principle speak more to facial neutrality or equality of outcome? The analysis above touches on both—*Shelby County* might be read as requiring neutral regulation, whereas the equal footing doctrine, the Dormant Commerce Clause, and the Guarantee Clause appear to require federal action to ensure equal status among the states. The principle also presents questions relevant to the Tenth Amendment. For example, is equal sovereignty an affirmation of the position of the states or a restriction on the power

²⁵¹ See Part II.B.1.

²⁵² Professor Bruce Ackerman's "constitutional moments" theory views constitutional law as an attempt to synthesize competing promises made during the Founding, Reconstruction, and the New Deal. See Bruce Ackerman, *We the People: Transformations* 3–5 (Harvard 1998). See also Geoffrey R. Stone, et al, *Constitutional Law* 24 (Aspen 7th ed 2013).

²⁵³ *Northwest Austin*, 557 US at 203.

²⁵⁴ See *Shelby County*, 133 S Ct at 2624–28.

²⁵⁵ See *Northwest Austin*, 557 US at 199.

of the federal government? As noted above, the answer to this question likely depends on the context and one's view of the relevant legal doctrine.²⁵⁶ Finally, does the principle apply only to regulation that disadvantages states, or also to action that favors one state over others? The doctrine provides little direction, though one court found these situations to be qualitatively different.²⁵⁷

CONCLUSION

The principle of equal sovereignty poses difficult questions lying at the core of American federalism. Historical and doctrinal analysis of these questions proves challenging because the concepts of sovereignty and statehood are contested and have evolved across time and throughout several doctrinal areas. It is easy to see why critics of *Shelby County* accused the Court of inventing the principle to achieve political ends—equal sovereignty, as formulated by Chief Justice Roberts, had not been articulated as such before. Undoubtedly, the Court in *Northwest Austin* and *Shelby County* overstated the fundamental nature of this principle. However, questions about the power of the states, compared to each other and the national government, have existed since the drafting of the Constitution. Yet these historical and legal debates have not coalesced into a central tenet of American constitutional law. Given the vigorous disagreement within the Court in *Shelby County*, the future will likely bring further consideration of the contested equality of the states.

²⁵⁶ For a discussion of *Hammer*, see Part I.B.

²⁵⁷ For a discussion of *NCAA*, see Part III.A.