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IN DEFENSE OF *SHELBY COUNTY*'S PRINCIPLE OF EQUAL STATE SOVEREIGNTY

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In Shelby County v. Holder*, the Supreme Court struck down a key aspect of the Voting Rights Act of 1965 based on "the principle that all States enjoy equal sovereignty." Legal scholars have exhaustively attacked* Shelby County*'s equal sovereignty principle with a surprising degree of unanimity and contempt. These critics argue that the principle is theoretically unworkable, finds no support in the Supreme Court's precedent, is inconsistent with constitutional history, undermines individual rights, and is tainted by its association with slavery and Jim Crow. This Article responds to such criticism by arguing that the principle of equal sovereignty is a coherent and defensible legal doctrine that is deeply rooted in our nation's constitutional history. Properly understood, the doctrine simply ensures that when Congress limits the sovereign power of some of the states in ways that do not apply to others, it has a good reason to do so.*

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After nearly a century of state-sponsored disenfranchisement, the Voting Rights Act of 1965 (VRA)[1] brought meaningful voting rights to millions of minority voters for the first time. The VRA was so successful because, not only did it prohibit state discrimination, but it also required states with a blatant record of black voter suppression to seek federal approval before changing their election laws.[2] In *South Carolina v. Katzenbach*, the Supreme Court initially upheld this preclearance requirement as necessary to address the "exceptional conditions" of widespread disenfranchisement in the covered states.[3] Nearly fifty years later, however, the Court in *Shelby County v. Holder* changed course and held that the formula used to select states for preclearance is unconstitutional.[4] Because the formula had not been updated to account for "current conditions,"[5] the Court stated, Congress had not sufficiently justified taking the "extraordinary and unprecedented"[6] step of violating "the principle that all States enjoy equal sovereignty."[7]

Scholars have attacked the equal sovereignty principle with a surprising degree of unanimity and contempt. Constitutional scholars seem to agree that the equal sovereignty doctrine has "no basis either in constitutional text or in existing constitutional doctrine."[8] The doctrine is also unworkable,

1. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. § 10301 (2012)).

2. *Id.*

3. 383 U.S. 301, 334 (1965).

4. 133 S. Ct. 2612, 2631 (2013).

5. *Id.* at 2629.

6. *Id.* at 2626.

7. *Id.*

8. Joseph Fishkin, *The Dignity of the South*, 123 YALE L.J. ONLINE 175, 177 (2013), http://yalelawjournal.org/forum/the-dignity-of-the-south. Judge Richard Posner, for example, bluntly states, "[T]here is no doctrine of equal sovereignty. The opinion rests on air." Richard

legal scholars contend, because the federal government routinely treats the states unequally.[9] Critics further lament that the doctrine undermines individual rights by "elevat[ing] concern about the equality and dignity of states over the equality and dignity of citizens."[10] Moreover, many scholars argue that equal sovereignty "ignores history" by failing to appreciate "how the Civil War amendments, including the Fifteenth Amendment, changed

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A. Posner, *Supreme Court 2013: The Year in Review: The Voting Rights Act Ruling Is About the Conservative Imagination*, SLATE (June 26, 2013, 12:16 AM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/the_supreme_court_and_the_voting_rights_act_striking_down_the_law_is_all.html; *see also* Jeremy Amar-Dolan, *The Voting Rights Act and the Fifteenth Amendment Standard of Review*, 16 U. PA. J. CONST. L. 1477, 1488 (2014) (asserting that the equal sovereignty principle was "a doctrine which seems to have originated in dicta three years earlier in *Northwest Austin*"); Jon Greenbaum et al., Shelby County v. Holder*: When the Rational Becomes Irrational*, 57 HOW. L.J. 811, 814-15 (2014) (asserting that the doctrine "had been flatly rejected by the Court in *Katzenbach* as having any relevance and finds no support in constitutional jurisprudence prior to 2009"); Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 69 (2013) (arguing that the principle "led the majority to ignore longstanding precedents"); Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1241 (2012) ("[T]he Roberts Court has deferred to state sovereignty in ways that are clearly inconsistent with both the constitutional text and history, as well as with the Court's own precedent."); Nina Totenburg, *Whose Term Was It? A Look Back at the Supreme Court*, NAT'L PUB. RADIO (July 5, 2013, 3:35 AM), http://www.npr.org/2013/07/05/198708325/whose-term-was-it-a-look-back-at-the-supreme-court (quoting Michael McConnell as asserting that the principle is "made up").

9. *See* Greenbaum et al., *supra* note 8, at 849 (arguing that the doctrine is unworkable because "Congress has passed a number of laws that treat different states differently, based on various factors."); Zachary S. Price, *NAMUDNO's Non-Existent Principle of State Equality*, 88 N.Y.U. L. REV. ONLINE 24, 24 (2013), http://www.nyulawreview.org/sites/default/files/NYULawReviewOnline-88-1-Price_0.pdf ("A constitutional requirement that legislation cannot treat states differently would call into question many typical legislative acts."); Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379, 436 (2014) ("In reality, *Shelby County*'s reliance on the principle of state equality is a concept that has very little legitimacy, as Congress often enacts legislation that treats states differently.").

10. Siegel, *supra* note 8, at 71; *see also* Gilda R. Daniels, *Unfinished Business: Protecting Voting Rights in the Twenty-First Century*, 81 GEO. WASH. L. REV. 1928, 1944 (2013) ("[T]he states' rights argument is misguided—it focuses on harm to the state, rather than on harm to individual voters."). Eric Posner ridicules the doctrine as follows: "Is the idea that when Alabama is on the playground with the other states, they're going to make fun of it because it had to ask its mama for permission before going out to play?" Eric Posner, *Supreme Court 2013: The Year in Review: John Roberts' Opinion on the Voting Rights Act Is Really Lame*, SLATE (June 25, 2013, 1:44 PM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/supreme_court_on_the_voting_rights_act_chief_justice_john_roberts_struck.html.

the state-federal balance of power and the scope of the Tenth Amendment."[11] A few scholars even assert that the doctrine is "based on the jurisprudence of slavery"[12] and "inscribe[s] into the Constitution some of the core constitutional claims . . . of the defeated Confederacy and its apologists."[13] The legal academy seems to agree with Erwin Chemerinsky's assessment that *Shelby County* is "among the worst decisions in recent times."[14]

This Article provides the first academic defense of *Shelby County*'s principle of equal state sovereignty.[15] To summarize, the "principle that all States enjoy equal sovereignty" is deeply rooted in constitutional history and fully supported by the Court's precedent.[16] Not only is the principle therefore older than the Court's slavery jurisprudence, but it was also invoked by abolitionists as well as slavery's defenders. Moreover, when

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11. Richard L. Hasen, Shelby County *and the Illusion Of Minimalism*, 22 WM. & MARY BILL RTS. J. 713, 732 (2014); *see also* Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *State's Rights, Last Rites, and Voting Rights*, 47 CONN. L. REV. 481, 518 (2014) ("It is as if the Reconstruction Amendments never happened."); Fishkin, *supra* note 8, at 192 (arguing that the doctrine is inconsistent with Reconstruction's "radical transformation of the South through federal military and civilian power, with a series of amendments specifically ratifying the use of that federal power to establish the equal citizenship of Southern blacks"); Joel Heller, Shelby County *and the End of History*, 44 U. MEM. L. REV. 357, 371 (2013) ("The Court's decision in *Shelby County* largely ignored the story of race and voting that led to the enactment of the VRA."); Siegel, *supra* note 8, at 71 (arguing that equal sovereignty "effaces the history of the Civil War and the Second Reconstruction"); Posner, *supra* note 10 ("Roberts is able to cite only the weakest support for this principle . . . . [N]one of the usual impressive array of founding authorities show up in his analysis.").

12. James Blacksher & Lani Guinier, *Free at Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right to Vote* Shelby County v. Holder, 8 HARV. L. & POL'Y REV. 39, 61 (2014).

13. Fishkin, *supra* note 8, at 192.

14. ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT 262-64 (2014).

15. Thomas Colby also defends the equal sovereignty principle in an excellent forthcoming article that was written contemporaneously with this. *See* Thomas Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. (forthcoming 2016) [hereinafter Colby, *In Defense*]. Colby advances many of the same arguments and reaches many of the same conclusions as this Article. Colby provides particularly detailed coverage of the supporting precedent and related academic work. This Article nevertheless raises several arguments not mentioned by Colby and often relies on different evidence even when we are in agreement. This Article will identify those differences as they arise.

The only other law review article defending equal sovereignty was written by the lawyers who argued the case on behalf of Shelby County. *See* William S. Consovoy & Thomas R. McCarthy, Shelby County v. Holder*: The Restoration of Constitutional Order*, 2012-2013 CATO SUP. CT. REV. 31.

16. Shelby Cty. v. Holder, 133 S. Ct. 2612, 2618 (2013).

properly limited to equal state *sovereignty*—rather than equal treatment—the principle would not invalidate run-of-the-mill federal legislation or undermine individual rights. In fact, a proper application of equal sovereignty in other contexts, such as the Professional and Amateur Sports Protection Act and the Clean Air Act, demonstrates that the principle is capable of producing defensible results. The equal sovereignty principle simply ensures that when Congress limits the sovereign power of some of the states in ways that do not apply to others, it has a good reason to do so.

Scholars' unwarranted hostility towards the equal sovereignty principle masks the real problem with Chief Justice Roberts' opinion in *Shelby County*. Regardless of whether the equal sovereignty principle can be justified as a matter of constitutional law, it did not compel the Court's conclusion that the preclearance formula of the VRA is unconstitutional. Statutes that violate the equal sovereignty principle are not necessarily invalid; instead, Congress must demonstrate that the statute's limited geographic reach is sufficiently related to the problem the law is addressing. Because the record in *Shelby County* arguably demonstrated more pervasive discrimination in the covered jurisdictions than elsewhere, the Court easily could have held that Congress had a good reason to limit the sovereignty of the covered states. Rather than attacking the existence of the equal sovereignty principle, therefore, legal scholars should instead focus on the Court's questionable application of ambiguous constitutional doctrine to overturn legislation that was passed with overwhelming political support.[17]

This Article proceeds in three parts. Part I provides a brief summary of the Court's decision in *Shelby County* and its doctrine of equal state sovereignty. The remainder of the Article defends the doctrine against the major lines of attack advanced by legal scholars. Part II argues that equal sovereignty, when properly understood, is defensible from the standpoint of constitutional theory and precedent. Part III contends the doctrine is consistent with constitutional history and is not based on the jurisprudence of slavery or Jim Crow.

17. Such a critique is especially powerful in light of the fact that four of the same Justices who joined the Court's opinion in *Shelby County* dissented from the Court's opinion in *Obergefell* because of a perceived lack of deference to the political process. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2611-28 (2015).

I. Shelby County *and the Principle of Equal State Sovereignty*

Although the Fifteenth Amendment was ratified in 1870, its promise to eradicate racial discrimination in voting rights went unrealized for nearly a century. White supremacists kept black voters from the polls through a combination of discriminatory state legislation, discriminatory application of facially neutral state legislation, social and economic pressure, and outright violence.[18] In the rare instances where discriminatory state policies were invalidated, Southern states simply enacted different measures that achieved the same discriminatory results "through unremitting and ingenious defiance of the Constitution."[19] As late as 1964, white voter registration rates exceeded those of African Americans by over fifty percent in the Deep South.[20]

This all changed when Congress passed the Voting Rights Act of 1965.[21] When President Lyndon B. Johnson signed the VRA, he called it "one of the most monumental laws in the entire history of American freedom."[22] Section 2 of the VRA prohibits any "prerequisite to voting or standard, practice, or procedure" that "results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color."[23]

Congress recognized, however, that litigation under section 2 would not produce lasting results if states were free to change their election laws. Congress' solution was section 5, which requires any change in the election laws of certain states with histories of blatant racial discrimination to be approved by a three-judge federal district court in Washington or by the U.S. Attorney General.[24]

Section 4(b) lists the criteria used to select which jurisdictions are subject to federal preclearance. When originally enacted in 1965, the section

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18. *See, e.g.*, MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 28-39 (2004).

19. South Carolina v. Katzenbach, 383 U.S. 301, 301 (1966). The Court's decision in *Guinn v. United States*, 238 U.S. 347 (1915), striking down grandfather clauses, for example, "had no impact on black disfranchisement" because other devices like literacy tests and poll taxes could be applied in a discriminatory manner to "nullify black suffrage." KLARMAN, *supra* note 18, at 85.

20. Charles & Fuentes-Rohwer, *supra* note 11, at 493.

21. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. § 10301 (2012)).

22. Gerhard Peters & John T. Woolley, *Lyndon B. Johnson: Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act*, AM. PRESIDENCY PROJECT (Aug. 6, 1965), http://www.presidency.ucsb.edu/ws/?pid=27140.

23. Voting Rights Act of 1965 § 10302(a).

24. *Id.* § 10304(a).

captured any state or subdivision that used any "test or device" to determine eligibility for voting and had less than fifty percent of the eligible population vote in the 1964 election.[25] In 1970 and 1975, Congress reauthorized section 4(b) using the same coverage formula.[26] Any state or locality that used any test or device and had less than fifty percent voter turnout as of 1964, 1968, or 1972 was therefore covered under section 4(b). Congress again reauthorized the VRA in 1982 and, most recently in 2006, extending its coverage for an additional twenty-five years.[27] Congress, however, did not change the selection criteria of section 4(b). Instead, a state or jurisdiction could "bail out" of coverage if certain conditions were met, such as a lack of successful section 2 lawsuits brought against it within the past ten years.[28] As of 2006, each of the covered states—Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia—was therefore subjected to federal preclearance based on data that had not been updated in more than thirty years.[29]

In 2006, a local utility district in Texas filed a lawsuit seeking a declaration that it was exempt from preclearance under section 4(a) and arguing that section 5's preclearance requirement was unconstitutional.[30] The lower courts rejected the district's claims on the grounds that only a state or political subdivision could take advantage of the VRA's bailout provisions.[31] In *Northwest Austin Municipal Utility District Number One v. Holder* (*NAMUDNO*), however, the Supreme Court reversed and held that a utility district is eligible for bailout.[32] Although the case was decided on narrow statutory grounds, Chief Justice Roberts's opinion asserted that the VRA's preclearance system raised serious constitutional questions.[33] The Chief Justice asserted that section 5 "imposes substantial 'federalism costs'" because it "differentiates between the States, despite our historic tradition that all the States enjoy 'equal sovereignty.'"[34] He further stated

25. *Id.* § 10303(b).

26. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400; 52 U.S.C. § 10303(b).

27. 52 U.S.C. § 10303(a)(7)-(8).

28. *See* Shelby Cty. v. Holder, 133 S. Ct. 2612, 2620 (2013).

29. *See id.* at 2617. A number of jurisdictions in North Carolina, California, Florida, Michigan, New York, and South Dakota were also covered. *Id.* at 2620.

30. Nw. Austin Mun. Util. Dist. No. One v. Mukasey, 573 F. Supp. 2d 221, 230 (D.D.C. 2008).

31. *Id.* at 283.

32. Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 211 (2009).

33. *Id.* at 204.

34. *Id.* at 202-03 (citation omitted).

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."[35] Because "[t]hings have changed in the South," the Chief Justice questioned whether the preclearance regime remained sufficiently related to voting rights in the covered jurisdictions.[36] The Court, however, declined to reach the applicable standard of review for future challenges to the VRA.[37]

After seeing the Court question the constitutionality of the VRA's preclearance regime, Shelby County, Alabama, brought suit seeking a declaration that sections 4(b) and 5 were unconstitutional and an injunction against their enforcement.[38] The lower courts upheld section 5 and found that Congress had sufficiently justified the coverage formula of section 4(b) because the record demonstrated that discrimination was concentrated in those jurisdictions given the number of successful lawsuits brought under section 2 and the deterrent effect of section 5.[39] In *Shelby County*, the Supreme Court reversed and held section 4(b) unconstitutional.

The Court began its analysis by stressing that the Constitution preserves the sovereignty of the states as an integral component of our system of government. "Not only do States retain sovereignty under the Constitution," the Court asserted, but "there is also a 'fundamental principle of *equal* sovereignty' among the States."[40] The Court stressed that "the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States."[41] More specifically, the Court stated that any "disparate geographic coverage" of a law that limits state sovereignty "must be 'sufficiently related to the problem that it targets.'"[42]

The Court held that "the Voting Rights Act sharply departs from these basic principles."[43] According to the Court, federal preclearance was an "extraordinary departure from the traditional course of relations between

35. *Id.* at 203.

36. *Id.* at 202.

37. *Id.* at 204 ("That question has been extensively briefed in this case, but we need not resolve it. The Act's preclearance requirements and its coverage formula raise serious constitutional questions under either test.").

38. Shelby Cty. v. Holder, 133 S. Ct. 2612, 2621-22 (2013).

39. Shelby Cty. v. Holder, 679 F.3d 848, 857-58 (D.C. Cir. 2012).

40. *Shelby Cty.*, 133 S. Ct. at 2623 (quoting *Nw. Austin*, 557 U.S. at 203).

41. *Id.* at 2624.

42. *Id.* at 2627 (quoting *Nw. Austin*, 557 U.S. at 204).

43. *Id.* at 2624.

the States and the Federal Government"[44] because "States must beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own."[45] As a result, "While one State waits months or years and expends funds to implement a validly enacted law, its neighbor can typically put the same law into effect immediately, through the normal legislative process."[46] Section 4(b) therefore violated the equal sovereignty principle.

Because it violated equal sovereignty, the Court analyzed whether this inequality was "sufficiently related" to the problems addressed by the VRA. The Court stated that, although the coverage formula was constitutional when enacted, "[n]early 50 years later, things have changed dramatically."[47] The Court explained:

> Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned nationwide for over 40 years. And voter registration and turnout numbers in the covered States have risen dramatically in the years since. Racial disparity in those numbers was compelling evidence justifying the preclearance remedy and the coverage formula. There is no longer such a disparity.[48]

The Court further emphasized, "Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. It cannot rely simply on the past."[49] The Court thus held that section 4(b) was unconstitutional under the equal sovereignty principle because it was not "sufficiently related" to the current problem of racial discrimination in voting.

The Court, however, did not clearly indicate how the equal sovereignty principle should apply in future cases.[50] Under *Shelby County*, any

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44. *Id.* at 2631 (quoting Presley v. Etowah Cty. Comm'n, 502 U.S. 491, 500-01 (1992)).
45. *Id.* at 2624.
46. *Id.*
47. *Id.* at 2625.
48. *Id.* at 2627-28 (internal citations omitted).
49. *Id.* at 2629.
50. *See* Amar-Dolan, *supra* note 8, at 1479 ("In its decision in *Shelby County*, however, the Court avoided the question of the standard of review applicable to Fifteenth Amendment legislation."); Tolson, *supra* note 9, at 387 ("*Shelby County* . . . provided little guidance regarding the appropriate standard of review . . . ."). Colby does not attempt to pinpoint the standard of review used in the doctrine.

"disparate geographic coverage" of a law that limits state sovereignty "must be 'sufficiently related to the problem that it targets.'"[51] But what exactly does this mean? At some points in the opinion, the Court uses language that suggests Congress needs only a rational basis to pass a law that unequally limits state sovereignty.[52] Some scholars, however, contend that, because Congress had a rational basis to renew section 4(b), the Court actually applied heightened scrutiny.[53]

As in *NAMUNDO*, Chief Justice Roberts probably meant to reserve the standard-of-review issue for another day. *Shelby County*'s "sufficiently related to" language does not correspond to any known standard of review. Moreover, *City of Boerne v. Flores*,[54] which announced the "congruence and proportionality" standard for the Fourteenth Amendment, is not even cited in the Court's opinion. As Richard Hasen contends, "[I]t is impossible to believe" that the Chief Justice's failure to identify the appropriate standard of review "was an oversight."[55]

To avoid deciding the standard-of-review issue, Chief Justice Roberts must have thought that, as he suggested in *NAMUNDO*, "[t]he Act's preclearance requirements and its coverage formula raise serious constitutional questions under either test."[56] The equal sovereignty doctrine allowed the Court to reach this conclusion. The Court found that, because the VRA violated the equal sovereignty doctrine, Congress needed a rational basis, not just for preclearance, but also for drawing distinctions between the covered states and the rest of the country.[57] The Court held that, because the section 4(b) formula was based on outdated data,[58] Congress had not given a rational basis for selecting the covered states for a

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51. *Shelby Cty.*, 133 S. Ct. at 2627 (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 204 (2009)).

52. *See, e.g.*, *id.* at 2630-31 ("It would have been irrational for Congress to distinguish between States in such a fundamental way based on 40-year-old data . . . .").

53. *See* Charles & Fuentes-Rohwer, *supra* note 11, at 513; Jon Greenbaum et al., *supra* note 8, at, 840-43; Samuel Spital, *A Doctrine of Sameness, Not Federalism: How the Supreme Court's Application of "Equal Sovereignty" Principle in* Shelby County v. Holder *Undermines Core Constitutional Values*, 34 N. ILL. U. L. REV. 561, 577 (2014).

54. 521 U.S. 507 (1997).

55. Hasen, *supra* note 11, at 727.

56. *Nw. Austin*, 557 U.S. at 204.

57. Congress clearly had a rational basis to think that preclearance would prevent discrimination in voting. And, under rational basis review, the government "may take one step at a time" and leave the rest of the problem for another day. *See* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955). Without the equal sovereignty principle in play, therefore, preclearance should have survived rational basis review.

58. Shelby Cty. v. Holder, 133 S. Ct. 2612, 2625 (2013).

preclearance regime that interfered with their sovereign power to pass new election laws. By failing to clearly identify the standard of review, however, the Court left the door open to announce in the future that laws violating equal sovereignty should be subjected to heightened scrutiny.

II. Constitutional Theory, Doctrine, and Policy

Scholars have vigorously attacked the equal sovereignty doctrine as theoretically unworkable, unsupported by constitutional text or precedent, and undesirable as a matter of policy. This Section responds to each of these criticisms in turn.

A. Theory

In her dissenting opinion in *Shelby County*, Justice Ginsburg pointed out that "[f]ederal statutes that treat States disparately are hardly novelties."[59] In support, she provided the following string citation:

> *See, e.g.*, 28 U.S.C. § 3704 (no State may operate or permit a sports-related gambling scheme, unless that State conducted such a scheme "at any time during the period beginning January 1, 1976, and ending August 31, 1990"); . . . 42 U.S.C. § 3796bb (at least 50 percent of rural drug enforcement assistance funding must be allocated to States with "a population density of fifty-two or fewer persons per square mile or a State in which the largest county has fewer than one hundred and fifty thousand people, based on the decennial census of 1990 through fiscal year 1997"); §§ 13925, 13971 (similar population criteria for funding to combat rural domestic violence); § 10136 (specifying rules applicable to Nevada's Yucca Mountain nuclear waste site, and providing that "[n]o State, other than the State of Nevada, may receive financial assistance under this subsection after December 22, 1987").[60]

Justice Ginsburg then asked, "Do such provisions remain safe given the Court's expansion of equal sovereignty's sway?"[61] Many legal scholars have accepted this argument at face value.[62] Erwin Chemerinsky, for example, asserts that the equal sovereignty principle is unworkable because

59. *Id.* at 2649 (Ginsburg, J., dissenting).
60. *Id.*
61. *Id.*
62. *See* sources cited *supra* note 7.

"if such a constitutional rule exists, countless federal laws, especially spending programs, are constitutionally vulnerable, because they treat some states differently from others."[63]

Of course, the federal government *treats* the states differently all the time. When the federal government provides funding for Medicaid, for example, Florida receives more than Utah.[64] And when Congress spends money on the military, states with large military installations and production facilities, such as Virginia, get a larger economic boost than other states, like Rhode Island, that lack such facilities.[65] In fact, given the size of California's population and economy, most federal legislation has a disproportionately larger effect in that state. Any constitutional principle that limits the federal government's ability to treat the states differently would seriously undermine federal power.

The equal sovereignty principle, however, does not require the federal government to treat the states equally. *Black's Law Dictionary* defines the term "sovereignty" as "[s]upreme dominion, authority, or rule" or "the supreme political authority of an independent state."[66] The Court in *Shelby County* clearly had this definition in mind. When justifying the equal sovereignty principle, the Court explained that "States retain broad autonomy in structuring their governments and pursuing legislative objectives."[67] The Court further stated that "our Nation 'was and is a union of States, equal in power, dignity and authority.'"[68] Rather than requiring the federal government to *treat* the states equally, the equal sovereignty principle means only that the states should be equal in political authority. Stated another way, the equal sovereignty principle is violated only when Congress limits the political power of a state in way that does not apply to all other states.

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63. *See* CHEMERINSKY, *supra* note 14, at 262.

64. Not only does Florida receive more money due to its larger population, but the median age of Floridians is much higher than citizens of Utah. *See Median Age, by State*, USA TODAY (June 10, 2010, 6:16 PM), http://usatoday30.usatoday.com/news/nation/census/median-age-by-state.htm.

65. *See* Robert Levinson et al., *Bloomberg Government Study: Impact of Defense Spending: A State by State Study*, BLOOMBERG GOV'T (Nov. 17, 2011), at 1, 51, 58, http://www.ct.gov/ecd/Lib/ecd/futures/6._bloomberg_defense_spending.pdf.

66. *Sovereignty*, BLACK'S LAW DICTIONARY (9th ed. 2009). Furthermore, "state sovereignty" is defined as "[t]he right of a STATE to self-government; the supreme authority exercised by each STATE." *State Sovereignty*, BLACK'S LAW DICTIONARY (9th ed. 2009).

67. Shelby Cty. v. Holder, 133 S. Ct. 2612, 2623 (2013).

68. *Id.* (quoting Coyle v. Smith, 221 U.S. 559, 567 (1911)).

Most of the examples cited by Justice Ginsburg and Chemerinsky are therefore inapposite. When the federal government decides to locate a federal building in one state, it neither advances nor inhibits that state's political power. Similarly, when Congress appropriates funds to the states for Medicaid based on the number of low-income and elderly residents in each state, it does not limit or enhance any state's political power. Although California's power has been enhanced as a practical matter, because the federal funds can be used to further California's regulatory goals, the money does not actually increase California's sovereign power to regulate. In other words, the scope of regulations that California could enact—its formal legal power—is not affected by federal appropriations. Properly conceived, the equal sovereignty principle applies to very few federal statutes.

The Supreme Court's other federalism jurisprudence helps to ensure that Congress will pass few such laws. In *New York v. United States*, the Supreme Court held that Congress cannot commandeer a state legislature and force a state to pass legislation.[69] Because a federal law that commandeered the state legislature would necessarily limit the sovereign power of that state, any commandeering law that operated unequally among the states would violate the equal sovereignty principle. *New York*, however, eliminates this concern by prohibiting all commandeering. The Court in *National Federation of Independent Business v. Sebelius* similarly held that Congress cannot impose coercive conditions on federal funds given to the states.[70] As a result of these cases, Congress cannot use its enumerated powers to single out any particular state and limit its sovereign power to regulate internal affairs by forcing the state to enact any particular regulation.

The only category of federal legislation that violates the equal sovereignty principle, therefore, is legislation that prohibits some states—but not others—from passing certain types of regulations. Such federal laws are exceedingly rare. Of course, sections 4(b) and 5 of the VRA fall into this category, as they limit a group of southern states' ability to

69. 505 U.S. 144, 178 (1992). In *New York*, the Court struck down a federal statute that forced the states to take title to nuclear waste or indemnify private actors for any damages arising from the possession of nuclear waste. *Id.* at 188.

70. 132 S. Ct. 2566, 2607-08 (2012). In *Sebelius*, the Court held that Congress could not condition all of a state's federal funding for Medicaid on the state's expansion of Medicaid to previously ineligible individuals. *Id.* Because federal funding for Medicaid amounted to approximately twenty percent of the average state's budget, the Court found that the states did not have a meaningful choice. *Id.* at 2604.

regulate elections. Other statutes include the Professional and Amateur Sports Protection Act (PASPA), which permits only Nevada to legalize sports betting,[71] and the Clean Air Act, which permits only California to regulate fuels and motor vehicle construction.[72] These statutes violate the equal sovereignty principle by limiting the sovereign power of only forty-nine states. Stated differently, Congress has given Nevada and California the power to enact regulations that the other states cannot pass, thereby resulting in unequal sovereignty.[73] Because the equal sovereignty principle, when properly understood, would apply to relatively few federal statutes, the popular criticism that it would invalidate too much federal legislation is misplaced.[74]

B. Text and Precedent

Constitutional law scholars also seem to agree that the equal sovereignty principle has "no basis either in constitutional text or in existing constitutional doctrine."[75] These scholars, however, have again greatly exaggerated the argument against equal sovereignty. Although the principle of equal state sovereignty is not explicitly stated in the Constitution's text or required by the holding of any preexisting case, it is entirely consistent with, and perhaps even supported by, both sources.

First, scholars should not expect the text of the Constitution to include an explicit acknowledgement of the equal sovereignty principle.[76] In the

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71. 28 U.S.C § 3704 (2012); *see also* Joshua Winneker et al., *Sports Gambling and the Expanded Sovereignty Doctrine*, 13 VA. SPORTS & ENT. L.J. 38, 38-39 (2013).

72. Clean Air Act, 42 U.S.C. §§ 7401-7431 (2012); *see also* Valerie J. M. Brader, *Congress' Pet: Why the Clean Air Act's Favoritism of California Is Unconstitutional Under the Equal Footing Doctrine*, 13 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 119, 119 (2007).

73. *See supra* Part II.D (discussing these statutes in more detail).

74. Other examples include the Internet Tax Freedom Act, Pub. L. No. 105-277, 112 Stat. 2681-719 (1998), and 29 U.S.C. § 1144(b)(5) (2000) (exempting Hawaii from the full scope of ERISA preemption). While such statutes do exist, the equal sovereignty doctrine would not cripple the federal government, as its critics seem to maintain.

75. Fishkin, *supra note 8, at* 177; *see also, e.g.*, Greenbaum, *supra* note 6, at 846-47 ("[N]othing in the text of the Constitution suggests, let alone dictates, that the federal government must treat states equally in legislative enactments."); Spital, *supra* note 53, at 562 ("*Shelby County* represents a radical departure from precedent."); sources cited *supra* note 11.

76. Relying on the "equal treatment" provisions discussed below, Price argues that the text "implies the absence of a general principle of state equality by mandating some forms of equal treatment but not others." Price, *supra* note 9, at 27. He further asserts that "the specificity of guarantees such as the Tax Uniformity Clause and the Port Preference Clause suggests that no general rule otherwise guards states against unequal treatment in federal

Constitution, the people delegated power to the federal government and imposed some limitations on state power. The Constitution, therefore, does not create the states or grant them their sovereign power. As Hamilton asserted in Federalist No. 32, after Ratification, "The State governments would clearly *retain* all the rights of sovereignty which they *before had*, and which were not, by that act, EXCLUSIVELY delegated to the United States."[77] Because the states existed prior to Ratification, it is not surprising that the framers omitted any mention of equal state sovereignty. Moreover, as discussed below, the very structure of the text supports the equal sovereignty of the states.

Second, while a number of clauses require equal treatment,[78] several provisions also implicitly recognize the equal sovereignty of the states.

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legislation." *Id.* at 28. Price therefore is invoking the canon of *expressio unius est exclusio alterius*, which means, "[T]o express or include one thing implies the exclusion of the other . . . ." *Expressio unius est exclusio alterius*, BLACK'S LAW DICTIONARY (9th ed. 2009). Price's argument makes sense, however, only because he incorrectly posits that the equal sovereignty principle requires Congress to treat the states equally. It is true that the Uniformity and Port Preference Clauses command Congress to *treat* the states equally. These clauses, however, do not require Congress to respect the equal *sovereignty* of the states. For example, although a law imposing a higher tax on goods exported from New York than other states would violate an equal *treatment* rule, such a federal law would not implicate the *sovereign power* of New York. Price's canon of construction— to express or include one thing implies the exclusion of the other—is therefore inapplicable.

77. THE FEDERALIST AND ANTI-FEDERALIST PAPERS: DEBATES THAT MADE AMERICA 72 (Createspace Independent Pub., 2010) (Federalist 32).

78. The Uniformity Clause provides that "all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. CONST. art. I, § 8. According to the Supreme Court, "There was concern that the National Government would use its power over commerce to the disadvantage of particular States." United States v. Ptasynski, 462 U.S. 74, 81 (1983). As Justice Story explained in his Commentaries on the Constitution, the Uniformity Clause was therefore designed "to cut off all undue preferences of one state over another in the regulation of subjects affecting their common interests." *Id.* (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 479 (Thomas M. Cooley ed., 1873)). Other provisions serve the same purpose. Section 9, Clause 4, which prohibits direct taxes unless in proportion to the Census, prevents Congress from taxing the people of one state more than the people of another. U.S. CONST. art. I, § 9, cl. 4. Moreover, Section 9, Clause 5 states "[n]o Tax or Duty shall be laid on Articles exported from any State." *Id.* art. I, § 9, cl. 5. And finally, Section 9, Clause 6 prohibits Congress from giving preference "to the Ports of one State over those of another." *Id.* art. I, § 9, cl. 6. Each of these provisions seeks to preserve the equality of the states by preventing Congress from disproportionately burdening any particular state.

Moreover, Professor Colby has advanced a sophisticated argument for imputing a uniformity requirement into the Commerce Clause. *See* Thomas B. Colby, *Revitalizing the Forgotten Uniformity Constraint on the Commerce Power*, 91 VA. L. REV. 249 (2005). Colby asserts

Article IV's Full Faith and Credit Clause requires each state to give equal respect to the "public Acts, Records, and judicial Proceedings of every other State."[79] This Clause, therefore, recognizes the equal sovereign power of each state to decide cases and regulate conduct within its jurisdiction.[80] Article I also recognizes equal sovereignty by providing for equal representation in the Senate,[81] the one branch of government where the states played a role in creating national law.[82] Similarly, Articles V and VII give each state equal say in the ratification of the Constitution and its amendments.[83] Scholars have also argued that the framers intended for the Guarantee Clause of Article IV to prohibit federal interference with state sovereignty over local affairs.[84] And, although the Constitution does contain several limitations on state sovereignty,[85] these provisions equally limit the sovereign power of each state. In sum, although the equal sovereignty doctrine is not explicitly stated in the text, the Constitution arguably operates with equal sovereignty as a background assumption.

Even if it is consistent with the text, critics still insist the Court created the equal sovereignty principle from whole cloth in *NAMUNDO* and *Shelby County*. In her dissenting opinion in *Shelby County*, Justice Ginsburg contends that the precedent relied on by the Court narrowly holds only that

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that the framers viewed these powers as interconnected and that the text omits a uniformity requirement only because of a last minute change from the Committee of Style that was not meant to change the meaning of the text. *Id.* at 275-76. Colby contends that, because the scope of Congress's commerce power has expanded dramatically, the scope of the uniformity requirement should be expanded as well. *Id.* at 312.

79. U.S. CONST. art. IV, § 1.

80. *See generally* Jeffrey M. Schmitt, *A Historical Reassessment of Full Faith and Credit*, 20 GEO. MASON L. REV. 485 (2013).

81. U.S. CONST. art. I, § 3; *see also* THE FEDERALIST NO. 62, at 314 (James Madison) (Ian Shapiro ed., 2009) ("[T]he equal vote allowed to each State [in the Senate] is at once a constitutional recognition of the portion of the sovereignty remaining in the individual States . . . .").

82. State equality is further reinforced by the fact that, prior to the Seventeenth Amendment, senators were chosen directly by the state governments. U.S. CONST. amend. XVII. Unequal representation in the House does not undermine this point, since the House was seen as the voice of the people rather than the states. *See* THE FEDERALIST NO. 62, *supra* note 81, at 314 (Madison) ("No law or resolution can now be passed without the concurrence, first, of a majority of the people [in the House], and then, of a majority of the States [in the Senate.]").

83. U.S. CONST. arts. V, VII.

84. *See* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988); *see also* DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 111 (1995).

85. U.S. CONST. art. I.

Congress cannot limit the sovereignty of a state as a condition of its admission to the Union.[86] Justice Ginsburg further asserts that, not only is the equal sovereignty principle unsupported by precedent, but that its application beyond the context of the admission of new states is "in flat contradiction with *Katzenbach*."[87] Legal scholars agree with Justice Ginsburg's assessment wholeheartedly.[88]

Despite this consensus, the cases cited by the majority are entirely consistent with the equal sovereignty principle.[89] Justice Ginsburg is correct to say that, other than *Katzenbach*, the precedent cited by the majority involves limits on state sovereignty that Congress attempted to place on states as a condition of admission to the Union. The narrow holdings of these cases thus arguably support her interpretation. The language and reasoning actually used in these cases, however, strongly supports *Shelby County*'s broader application.

Pollard v. Hagan is the earliest case cited by the Court in *Shelby County*.[90] *Pollard* arose from a dispute over land in Alabama that was situated within the tidal zone of the Mobile River.[91] The plaintiff in *Pollard* sought to eject the defendant based on a grant of title from Congress made in 1836.[92] The federal government's power to dispose of the land was in turn derived from Georgia, which had ceded its claims to present-day Alabama in 1802 for the purpose of creating a new state.[93] The Court ultimately held that, although Congress had authority while Alabama was a territory,[94] Congress lost this power when Alabama became a state in 1819.

The *Pollard* Court based its decision on what has become known as the "equal footing doctrine." The Court explained, "When Alabama was admitted into the union, *on an equal footing with the original states*, she

86. Shelby Cty. v. Holder, 133 S. Ct. 2612, 2649 (2013).

87. *Id.*

88. *See, e.g.*, Siegel, *supra* note 8, at 70 ("[E]arlier cases on the Reconstruction Amendments described this principle as limited to controlling admission of states to the Union . . . ."); *see also* other sources cited *supra* note 6.

89. Colby's forthcoming work and this Article are also largely in agreement with respect to the import of precedent. One difference of note, however, is that while Colby does not stake out a position on whether *Shelby County* is consistent with *Katzenbach*, *see* Colby, *In Defense*, *supra* note 15, at note 159, this Article provides an argument for reading the two cases together.

90. Pollard v. Hagan, 44 U.S. 212 (1845).

91. *Id.* at 219-20.

92. *Id.*

93. *Id.* at 222.

94. *Id.* at 222-23; U.S. CONST. art. IV, § 3, cl. 2.

succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession . . . ."[95] The Court reasoned that, at the time of the Revolution, the sovereign power of the states included "the absolute right to all their navigable waters, and the soils under them for their own common use . . . ."[96] Because Alabama inherited such sovereign power when it became a state, Congress's attempt to convey the land after Alabama's statehood was void.[97]

For the Court in *Pollard*, the "equal footing doctrine" went hand in hand with a basic principle of equal state sovereignty. The Court explained as follows:

> Alabama is . . . entitled to the *sovereignty* and jurisdiction over all the territory within her limits, subject to the common law, *to the same extent* that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine, is to deny that Alabama has been admitted into the union on an *equal footing* with the original states . . . .[98]

The Court applied *Pollard*'s equal footing doctrine in a number of subsequent decisions. In *Withers v. Buckley*,[99] the Court used the equal footing doctrine to uphold a Mississippi law that provided for the development of canals that changed the course of rivers within the state.[100] The plaintiff, who lost use of the river as a result, brought suit claiming the state law conflicted with the federal law providing for Mississippi's admission as a state.[101] This federal law stipulated that "the Mississippi river, and the navigable rivers leading into the same, shall be common highways, and forever free, as well to the inhabitants of Mississippi as to other citizens of the United States."[102] The Court ultimately held that the federal law "could have no effect to restrict the new State in any of its necessary attributes as an independent sovereign Government, nor to inhibit or diminish its perfect equality with the other members of the Confederacy

95. *Pollard*, 44 U.S. at 223 (emphasis added). The Court similarly stated, "The right of Alabama and every other new state to exercise all the powers of government, which belong to and may be exercised by the original states of the union, must be admitted, and remain unquestioned . . . ." *Id.* at 224.

96. *Id.* at 229.

97. *Id.*

98. *Id.* at 228-29 (emphasis added).

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

100. *Id.* at 87-88.

101. *Id.* at 88.

102. *Id.*

with which it was to be associated."[103] The Court therefore upheld the Mississippi internal improvement law on the basis that Congress lacked the power to place restrictions on the sovereign power of Mississippi that were not applicable to other states. The Court asserted that its "conclusions follow from the very nature and objects of the Confederacy, from the language of the Constitution adopted by the States, and from the rule of interpretation pronounced by this court in the case of *Pollard's Lessee v. Hogan*."[104] In this passage, the Court is arguably indicating that the Constitution requires all of the states—new and old alike—to have equal sovereignty so that they can fulfill their roles in our federalist system.

Escanaba & Lake Michigan Transp. Co. v. City of Chicago[105] presented the Court with a nearly identical issue. The plaintiff sought to enjoin the City of Chicago's regulation of drawbridges based on the federal legislation admitting Illinois as a state.[106] This federal law included a requirement that "[t]he navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between them, shall be common highways and forever free . . . ."[107] The Court upheld the Chicago regulation by reasoning that "[o]n [Illinois'] admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original states. She was admitted, and could be admitted, only on the same footing with them."[108] The Court further stated, "Equality of constitutional right and power is the condition of all the States of the Union, old and new."[109] Although the Court again struck down federal limitations imposed prior to statehood, it strongly implied that the doctrine was based on a more fundamental principle of equal state power.

Ward v. Race Horse also acknowledges the equal sovereignty of the states.[110] Prior to the admission of Wyoming, the United States entered into a treaty that guaranteed hunting rights to the Bannock Indians.[111] The Court held that "the [hunting] privilege conferred and the act of admission [of Wyoming as a state], are irreconcilable in the sense that the two under no

103. *Id.* at 92.
104. *Id.* (citation omitted).
105. 107 U.S. 678 (1883).
106. *Id.* at 682.
107. *Id.* at 688.
108. *Id.* at 688-89.
109. *Id.* at 689.
110. 163 U.S. 504, 507 (1896).
111. *Id.* at 507-08.

reasonable hypothesis can be construed as coexisting."[112] The Court reasoned as follows:

> The power of all the States to regulate the killing of game within their borders will not be gainsaid, yet, if the treaty applies to the unoccupied land of the United States in the State of Wyoming, that State would be bereft of such power, since every isolated piece of land belonging to the United States as a private owner, so long as it continued to be unoccupied land, would be exempt in this regard from the authority of the State. Wyoming, then, will have been admitted into the Union, not as an equal member, but as one shorn of a legislative power vested in all the other States of the Union, a power resulting from the fact of statehood and incident to its plenary existence.[113]

The Court continued to explain that Wyoming could not be "stripped by implication and deduction of an essential attribute of its governmental existence."[114] Essentially, the Court held that, after statehood, Wyoming's sovereign power to regulate its own territory must be equal to that of all other states.

The connection between the equal footing doctrine and the principle of equal state sovereignty was made most explicit in *Coyle v. Smith*.[115] In *Coyle*, the plaintiff argued that an Oklahoma act moving the state capital conflicted with Congress's enabling act, which specifically required the state to locate its capital in Guthrie until 1913 and prohibited the state from funding the construction of buildings in any new capital city.[116] The Court held that the federal restriction on Oklahoma's sovereign power to move its capital violated the equal footing doctrine and therefore upheld the Oklahoma law.[117]

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112. *Id.* at 514.

113. *Id.*

114. *Id.* at 516.

115. 221 U.S. 559 (1911). Long before *Shelby County* was decided, Shapiro asserted that, in *Coyle*, "The Court stressed the importance of equality among the states . . . ." SHAPIRO, *supra* note 84, at 65. He further contended that "*Coyle* fairly stands for the proposition that distinctions among states (and not merely those relating to terms of admission) must be warranted by a clear grant of congressional authority and by an adequate basis for the distinctions drawn." *Id.*

116. *Coyle*, 221 U.S. at 563.

117. *Id.* at 579.

The Court in *Coyle* justified its application of the equal footing doctrine with the need to preserve the equal sovereignty of the states. The Court explained as follows:

> "This 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. To maintain otherwise would be to say that the Union, through the power of Congress to admit new States, might come to be a union of States unequal in power, as including States whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission. Thus it would result, first, that the powers of Congress would not be defined by the Constitution alone, but in respect to new States, enlarged or restricted by the conditions imposed upon new States by its own legislation admitting them into the Union; and, second, that such new States might not exercise all of the powers which had not been delegated by the Constitution, but only such as had not been further bargained away as conditions of admission.[118]

For the Court, a union of states that possessed unequal power was unthinkable. The Court concluded its opinion by stating, "To this we may add that the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution."[119] Although scholars cite cases like *Coyle* as narrowly holding only that Congress cannot permanently limit the sovereignty of a state as a condition of admission, the Court's reasoning clearly applies beyond the context of the admission of new states.

Even if precedent such as *Coyle* supports equal sovereignty, many scholars nevertheless vigorously assert that *Katzenbach* rejected the principle.[120] There is no doubt that equal sovereignty was squarely at issue in the case, as South Carolina argued that the VRA was unconstitutional

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118. *Id.* at 567.

119. *Id.* at 580.

120. *See, e.g.*, Greenbaum, *supra* note 8, at 814-15 (asserting that the doctrine "had been flatly rejected by the Court in *Katzenbach* as having any relevance").

because preclearance violated the equal sovereignty of the states.[121] The Court rejected this argument, however, stating, "The doctrine of the equality of States, invoked by South Carolina, does not bar this approach, for that doctrine applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared."[122] According to Justice Ginsburg and others, this passage means that the equal sovereignty principle does not apply to Congressional legislation passed after a state's admission to the Union.[123]

Although *Katzenbach* can plausibly be interpreted as rejecting the equal sovereignty principle, another interpretation is equally plausible. *Katzenbach* holds that the equal sovereignty principle does not apply to "remedies for *local* evils which have subsequently appeared."[124] Rather than cabin the principle to the admission of new states, this language could simply mean that Congress may violate the equal sovereignty principle when needed to address *local* problems within particular states. Such an interpretation is perfectly consistent with the doctrine announced in *Shelby County*: Congress may unequally limit state sovereignty when doing so is "sufficiently related" to the problem it is addressing. Under such a reading, *Katzenbach* does not foreclose expansion of *Coyle*'s equal footing doctrine to legislation passed after a state's admission.[125]

In fact, *Katzenbach*'s actual discussion of the VRA's preclearance regime reads as though the Court *was* applying the equal sovereignty principle. The Court began by recognizing that limiting the sovereignty of the covered states was "an uncommon exercise of congressional power . . . ."[126] The Court found, however, that "exceptional conditions can justify legislative measures not otherwise appropriate."[127] Here, the Court arguably implies that a law that violates the equal sovereignty of the states must be justified by "exceptional conditions" (or have a sufficient relationship to Congress's goal).

Shelby County's critics have exaggerated the case against the equal sovereignty principle based on this precedent. Although the equal footing

121. *Katzenbach*, 383 U.S. at 328-29.

122. *Id.*

123. *See supra* notes 87-88.

124. *Katzenbach*, 383 U.S. at 329 (emphasis added).

125. Admittedly, the Court states that the equality doctrine applies "only" to the admission of new states; however, this is a fair characterization of the precedent and need not foreclose future application of the doctrine in different contexts. *See id.* at 328-29.

126. *Id.* at 334.

127. *Id.*

cases do not directly apply outside the context of the admission of new states, their rationale and language support a broader application. Moreover, *Katzenbach* does not foreclose such a result, as the language used in *Katzenbach* is ambiguous and the Court's analysis of the coverage formula reads as though the Court were applying the equal sovereignty principle.

C. Policy

Scholars further contend the equal sovereignty doctrine is indefensible as a matter of policy. Perhaps the most powerful normative critique of the principle is that, as Reva Siegel asserts, it "elevates concern about the equality and dignity of states over the equality and dignity of citizens."[128] Siegel accuses the Court of applying the equal sovereignty principle only because it "was more concerned about the 'disparate treatment' that civil rights law inflicts on states than the disparate treatment that discrimination inflicts on citizens."[129]

In one sense, Siegel's comparison between individual rights and the equal sovereignty principle makes sense. Just as the courts apply heightened scrutiny to regulations that violate individual rights, the principle imposes scrutiny on any federal law that imposes unequal limits on state sovereignty. Stated simply, Congress must have a sufficient justification when it violates a fundamental individual right or limits the sovereign power of the states unequally. The principle essentially makes sovereignty a fundamental state right in the same way that privacy is a fundamental individual right.

The equal sovereignty principle, however, need not trump individual rights.[130] The Court in *Shelby County* makes this very point when it explains why *Katzenbach* was correct at the time it was decided. Even though the VRA violated the equal sovereignty principle from the moment it was enacted, the Court in *Shelby County* found that, at the time *Katzenbach* was decided, the VRA was sufficiently "justified to address

128. Siegel, *supra* note 8, at 71; *see also* Daniels, *supra* note 10, at 1944.

129. Siegel, *supra* note 8, at 69 (citation omitted).

130. Colby and this Article agree that the equal sovereignty principle is defensible from a policy standpoint. *See* Colby, *In Defense*, *supra* note 15. Only this Article, however, directly tackles the argument, raised by Siegel and others, that equal sovereignty elevates states' rights over individual rights. *See* Siegel, *supra* note 8; *see also* sources cited *supra* note 8.

'voting discrimination where it persist[ed] on a pervasive scale.'"[131] The Court explains,

> We therefore concluded [in *Katzenbach*] that "the coverage formula was rational in both practice and theory." It accurately reflected those jurisdictions uniquely characterized by voting discrimination "on a pervasive scale," linking coverage to the devices used to effectuate discrimination and to the resulting disenfranchisement. The formula ensured that the "stringent remedies [were] aimed at areas where voting discrimination ha[d] been most flagrant."[132]

Katzenbach—which was reaffirmed on its facts in *Shelby County*—demonstrates that Congress may violate the equal sovereignty principle when doing so is "sufficiently related" to the protection of individual rights. In fact, the Court in *Shelby County* struck down section 4(b)—the VRA's coverage formula—rather than section 5's preclearance requirement. "Congress may draft another formula based on current conditions,"[133] even though doing so would clearly still violate the equal sovereignty principle. Accordingly, Congress can violate the principle whenever doing so is sufficiently related to the protection of individual rights.

Even though the equal sovereignty of the states does not trump individual rights, *Shelby County*'s critics might still complain that, at least on the facts of that case, the Court invalidated a statute that protected individual rights based on state-sovereignty concerns. This result, however, is not due to any flaw in the content of the equal sovereignty principle. In theory, the equal sovereignty principle could just as easily be used to protect as to undermine individual rights. In *Shelby County*, the principle undermined a federal law that made it more difficult for certain states to pass laws that undermine the voting rights of minorities. But the principle would equally apply to a hypothetical federal law that, for example, imposed voter ID requirements on most states but left the states in the Deep South free to experiment with new voting requirements. The principle would also make it more difficult for Congress to grant exceptions to federal legislation that protects the rights of employees, the environment, and countless other federal laws favored by most legal academics. For example, just as the Clean Air Act allows California to regulate certain

131. Shelby Cty. v. Holder, 133 S. Ct. 2612, 2620 (2013) (quoting *Katzenbach*, 383 U.S. at 308).

132. *Id.* at 2625 (quoting *Katzenbach*, 383 U.S. at 308).

133. *Id.* at 2631.

activities that are off limits to the other states, any congressional attempt to provide similar exceptions to states such as Alaska or Texas to enable more pollution would equally violate equal sovereignty. The equal sovereignty principle is therefore neutral from a policy standpoint—it applies to statutes based on the manner in which they apply to the states rather than their content.[134]

Moreover, the equal sovereignty principle did not compel the Court to strike down section 4(b) of the VRA. As explained above, the Court in *Shelby County* held that section 4(b) was no longer sufficiently related to the protection of voting rights because "the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions."[135] In other words, the Court held that section 4(b)'s coverage formula was not sufficiently related to the protection of individual rights in 2013. As Justice Ginsburg made abundantly clear in her dissent, however, the Court easily could have concluded otherwise. Justice Ginsburg summarized evidence supporting the coverage formula as follows:

> The coverage provision identified a known list of places with an undisputed history of serious problems with racial discrimination in voting . . . . There was extensive evidence that, due to the preclearance mechanism, conditions in the covered jurisdictions had notably improved. And there was evidence that preclearance was still having a substantial real-world effect, having stopped hundreds of discriminatory voting changes in the covered jurisdictions since the last reauthorization. In addition, there was evidence that racial polarization in voting was higher in covered jurisdictions than elsewhere, increasing the vulnerability of minority citizens in those jurisdictions. And countless witnesses, reports, and case studies documented continuing problems with voting discrimination in those jurisdictions.[136]

Although she does not recognize the legitimacy of the equal sovereignty principle, the evidence Justice Ginsburg presents arguably demonstrates that singling out the states captured by section 4(b) was "sufficiently

134. The same could be said for *New York* and *Printz*. Although many scholars dislike the anti-commandeering principle, it was used (perhaps unintentionally) in *Prigg v. Pennsylvania*, 41 U.S. 539 (1842), to undermine the Fugitive Slave Act. *See, e.g.*, Paul Finkelman, Prigg v. Pennsylvania *and Northern State Courts: Antislavery Use of a Proslavery Decision*, 25 CIV. WAR HISTORY 5 (1979).

135. *Shelby Cty*, 133 S. Ct. at 2618.

136. *Id.* at 2651 (Ginsburg, J., dissenting).

related" to the need to protect voting rights. Rather than attacking the substance of the equal sovereignty principle, *Shelby County*'s critics therefore should focus on the Court's questionable application of the principle to reach an unpopular result.

D. Other Applications: PASPA and the Clean Air Act

Providing a balanced account of *Shelby County* is important because the equal sovereignty principle is potentially applicable outside the context of voting rights.[137] This Part provides a brief background of two federal statutes—the Professional and Amateur Sports Protection Act (PASPA) and the Clean Air Act—that violate the equal sovereignty principle. Looking at equal sovereignty in other contexts helps to illustrate why the principle is not inherently flawed, as striking down either statute would likely not have the same corrosive effects as *Shelby County*.

PASPA prohibits states from operating, licensing, or authorizing any gambling on professional or amateur sporting events.[138] The Act, however, provides an exception for any state that allowed sports gambling between 1976 and 1990.[139] During this period, Nevada allowed sports wagering in casinos, while Oregon, Montana, and Delaware authorized more limited sports lotteries.[140] PASPA therefore violates the equal sovereignty principle by allowing these states to enact regulations that are off limits to the other states.[141]

A strong argument can be made that PASPA's "disparate geographic coverage" is not "sufficiently related to the problem that it targets."[142] The Senate Judiciary Committee's report states that the purpose of PASPA is "to prohibit sports gambling conducted by, or authorized under the law of,

137. This section contains another departure from the Colby Article. Whereas Colby does not speculate as to how the equal sovereignty principle would apply in other situations, this section explores how the principle could be applied to two federal statutes.

138. Professional and Amateur Sports Protection Act, 28 U.S.C. §§ 3701-3704 (2012). The Act, of course, does not limit other forms of gambling.

139. *Id.* § 3704.

140. *See* Anthony G. Galasso, Jr., Note, *Betting Against the House (and Senate): The Case for Legal, State-Sponsored Sports Wagering in a Post-PASPA World*, 99 KY. L.J. 163, 163-64, 164 n.8 (2010).

141. In *Office of the Commissioner of Baseball v. Markell*, 579 F.3d 293, 304 (3d Cir. 2009), the Third Circuit held that Delaware could not authorize single game betting because the state did not allow such practices during the statutory period. PASPA therefore unequally limits the sovereignty of even the grandfathered states.

142. Shelby Cty. v. Holder, 133 S. Ct. 2612, 2616 (2013) (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 204 (2009)).

any State or other governmental entity."[143] If this statement is accepted as PASPA's purpose, a court could find, as Senator Charles Grassley asserted in the Committee Report, that "[t]here is simply no rational basis, as a matter of Federal policy, for allowing sports wagering in three States, while prohibiting it in the other 47."[144]

In *NCAA v. Governor of New Jersey*, however, the Third Circuit held that PASPA does not violate the equal sovereignty principle.[145] *NCAA* arose from a challenge to New Jersey's Sports Wagering Law, which authorized sports gambling in New Jersey casinos in an attempt to draw sports betting revenue from Las Vegas to Atlantic City.[146] The Third Circuit upheld PASPA by finding that PASPA's "true purpose" is "to stop the *spread* of *state-sanctioned* sports gambling" rather than to eliminate it.[147] The court found that PASPA's disparate geographic coverage, was justified because "[t]argeting only states where the practice did not exist is . . . *precisely tailored* to address the problem."[148] The court therefore held that equal sovereignty principle did not invalidate PASPA.[149]

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143. S. REP. NO. 102-248, at 3 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 3553, 3553. According to the Senate report, "Sports gambling . . . undermines public confidence in the character of professional and amateur sports," "promote[s] gambling among our Nation's young people," and inflicts harm "beyond the borders of those States that sanction it." *Id.* at 4-5, *as reprinted* in 1992 U.S.C.C.A.N. 3553, 3555-56.

144. S. REP. NO. 102-248, at 13 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 3553, 3563; *see also* Joshua Winneker et al., *Sports Gambling and the Expanded Sovereignty Doctrine*, 13 VA. SPORTS & ENT. L.J. 38, 53 (2013) (same); Galasso, *supra* note 140, at 167 ("It is difficult to understand why an exception was carved out for these states if sports wagering is indeed as dangerous as the majority of Congress believed."); Michael Welsh, Note, *Betting on State Equality: How the Expanded Equal Sovereignty Doctrine Applies to the Commerce Clause and Signals the Demise of the Professional and Amateur Sports Protection Act*, 55 B.C. L. REV. 1009, 1013 (2014) (arguing that PASPA is unconstitutional under equal sovereignty). In fact, a number of bipartisan bills have been proposed in Congress that would end Nevada's exemption. *See generally* Aaron Slavin, Comment, *The "Las Vegas Loophole" and the Current Push in Congress Towards a Blanket Prohibition on Collegiate Sports Gambling*, 10 U. MIAMI BUS. L. REV. 715 (2002).

145. 730 F.3d 208 (3d Cir. 2013).

146. *See* Welsh, *supra* note 144, at 1012.

147. *NCAA*, 730 F.3d at 239.

148. *Id.* The Third Circuit's reasoning, if used in other contexts, would virtually always allow Congress to grandfather in existing state regulations that are inconsistent with an otherwise uniform federal law.

149. The Third Circuit also expressed skepticism that the equal sovereignty doctrine should apply to federal law passed under the Commerce Clause. The court stressed that *Shelby County* was decided in the context of voting rights, which is "an area 'the Framers of the Constitution intended the States to keep for themselves.'" *Id.* at 238 (quoting Shelby

In sum, the equal soveringty principle's application to PASPA is indeterminate. The constitutionality of PASPA likely hinges on how the courts define the problem targeted by Congress.[150] If the problem is defined as gambling on sports, Nevada's exemption is arguably irrational. However, if the problem is defined as halting the spread of sports gambling, the Third Circuit's decision to uphold the law makes sense.

Like PASPA, the Clean Air Act (CAA) authorizes one state to pass legislation that is off limits to other states.[151] Although the CAA prohibits states from enacting motor vehicle emissions standards, it authorizes the EPA to waive the prohibition for any state that regulated emissions before March 30, 1966.[152] When Congress enacted the CAA in 1970, it knew that California was the only state that could qualify.[153] In 1977, Congress then gave the other states the option to follow California's standards rather than those set by the federal government.[154] The CAA therefore violates the

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Cty. v. Holder, 133 S. Ct. 2612, 2623 (2013)). For the Third Circuit, equal sovereignty does not apply with the same force to regulations passed under the Commerce Clause because "Congress' exercises of Commerce Clause authority are aimed at matters of national concern and finding national solutions will necessarily affect states differently." *Id.*

The Third Circuit, however, is wrong to suggest that equal sovereignty should be limited to the Fifteenth Amendment or the facts of *Shelby County*. *See* Welsh, *supra* note 144, at 1027-29 (arguing that equal sovereignty should apply to statutes passed under the Commerce Clause); Winneker et al., *supra* note 144, at 52 (same); *cf.* Colby, *supra* note 78 (arguing that Congress must adhere to a principle of uniformity when legislating under its commerce power). Equal sovereignty is based on basic federalism concerns that transcend the context of any one constitutional provision. As explained below, the Court has repeatedly limited Congress's commerce power based on similar structural federalism concerns. If anything, equal sovereignty should apply with greater force to the Commerce Clause, since "principles of federalism that constrain Congress' exercise of its Commerce Clause powers are attenuated when Congress acts pursuant to its powers to enforce the Civil War Amendments." Gregory v. Ashcroft, 501 U.S. 452, 468 (1991); *see also* City of Rome v. United States, 446 U.S. 156, 179 (1980) (noting that the Reconstruction Amendments "were specifically designed as an expansion of federal power and an intrusion on state sovereignty.").

150. This is similar to the Court's test for the Commerce Clause, which can often turn on how the courts define the activity that is being regulated. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1 (2005).

151. 42 U.S.C. §§ 7401-7671q (2012).

152. *Id.* § 7543(b).

153. Brader, *supra* note 72, at 121.

154. 42 U.S.C. § 7507; 42 U.S.C. § 7543(e).

equal sovereignty principle by granting only California the power to develop new auto emissions standards.[155]

Congress nevertheless has a strong argument that the CAA is constitutional because its enhancement of California's sovereignty is sufficiently related to its goal of reducing emissions. The House report states, "California was afforded special status due to that State's pioneering role in regulating automobile-related emissions, which pre-dated the Federal effort. In addition, California's air pollution problem was then, and still appears to be, among the most pervasive and acute in the Nation."[156] Due to California's "pioneering role," it has expertise in emissions regulations that other states lack. Moreover, allowing each state to pass different emissions standards would be far too disruptive to the auto market,[157] and, because of its large size, California has "an economy large enough to support separate standards."[158] In sum, Congress arguably had a good reason to unequally limit the sovereign power of the states in the CAA, meaning that the Act is arguably constitutional. The flexibility of the equal sovereignty principle, as demonstrated by its potential application to PASPA and the CAA, belies scholarly criticism that the principle is unworkable or that it poses a threat to individual rights.

III. The History of Equal Sovereignty

Scholars have perhaps most passionately argued that the equal sovereignty principle ignores constitutional history. Eric Posner, for example, complains that *Shelby County* contains "[n]one of the usual impressive array of founding authorities."[159] Many others contend that the principle lacks "any real appreciation of how the Civil War amendments, including the Fifteenth Amendment, changed the state-federal balance of power and the scope of the Tenth Amendment."[160] Reva Siegel further

155. *See* Brader, *supra* note 72; Colby, *supra* note 78, at 344 (asserting that the CAA "is an egregious example of discrimination among the states").

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

157. *See* Ann E. Carlson, *Federalism, Preemption, and Greenhouse Gas Emissions*, 37 U.C. DAVIS L. REV. 281, 314 (2003). Representative William L. Springer of Illinois, for example, argued that allowing each state to regulate its own emission standards would be unworkable because "[w]hen you do that it means that you cannot drive from one county to another in Illinois, just the same as you could not drive in 50 different States, and you would have all different laws . . . ." Brader, *supra* note 72, at 124.

158. *See* Carlson, *supra* note 157, at 314.

159. Posner, *supra* note 10.

160. Hasen, *supra* note 11, at 732; *see also sources cited supra* note 11.

asserts that the equal sovereignty principle "effaces the history of the Civil War and the Second Reconstruction."[161]

Likely because they have focused on an erroneous principle of equal treatment rather than equal sovereignty, *Shelby County*'s critics have again missed their mark. The idea of equal state sovereignty has been a fundamental assumption of our constitutional order throughout United States history.[162] The system developed at the Constitutional Convention, and followed throughout the antebellum period, assumed that the states were equal members of the Union. Rather than undermining this assumption, the Reconstruction Amendments empowered the federal government to treat the states differently only when doing so was sufficiently related to the protection of individual rights. Even the New Deal constitutional revolution, which was used to pass the civil rights legislation of the 1960s, did not eliminate the constitutional underpinnings of equal sovereignty. When the Roberts Court transformed this structural assumption of equal sovereignty into an enforceable check on federal power, it was using familiar reasoning to add a modest new element to its modern federalism jurisprudence.

A. The Antebellum Period

The principle of equal state sovereignty can be traced back to colonial ideas of federalism and sovereignty. According to legal historian Alison LaCroix, the core of eighteenth-century American federalism "was a belief that multiple independent levels of government could legitimately exist within a single polity, and that such an arrangement was not a defect to be lamented but a virtue to be celebrated."[163] This belief arose as a response to

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161. Siegel, *supra* note 8, at 71; *see also* Heller, *supra* note 11, at 371 ("The Court's decision in *Shelby County* largely ignored the story of race and voting that led to the enactment of the VRA."). The "Second Reconstruction" refers to the Civil Rights Movement.

162. This marks two other material distinctions between Colby's work and this Article. First, Colby has argued, in past works, that the Commerce Clause is the source of imposition for a uniformity principle similar to equal sovereignty. *See* Colby, *supra* note 78. Because this Article defends a broader principle that applies beyond the context of commerce, it relies on different historical sources and arguments. Second, while Colby's more recent work and this Article reach similar conclusions regarding the origins and early history of the equal sovereignty principle, this Article goes further and attempts to provide an account of how equal sovereignty survived the New Deal and fits with the Court's modern federalism jurisprudence.

163. ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 6 (2010).

the British idea that sovereignty was indivisible because any attempt to divide it would end with one government ultimately seizing power.[164] Based on the colonial practice of relative local autonomy with London controlling imperial affairs such as international trade and war, eighteenth-century Americans believed that sovereignty could be divided and allocated to different levels of government.[165]

The question of how to divide power between the states and federal government was central to the Constitutional Convention. In the Virginia Plan, James Madison proposed a strongly nationalistic structure: the federal government would be given power over areas where uniformity was needed and a negative over all state legislation.[166] Charles Pinckney, one of the negative's supporters, asserted that "[s]tates must be kept in due subordination to the nation."[167] Madison agreed. He stated that the negative was "absolutely necessary to a perfect system" because "[e]xperience had evinced a constant tendency in the States to encroach on the federal authority."[168] James Wilson explained that, just as individuals gave up their autonomy to join a state, the states must give up their sovereignty to join the Union.[169] In its strongest form,[170] the negative would

164. *Id.* at 9. It was often said at this time that an "*imperium in imperio*, or dominion within dominion" was impossible. *Id.* at 9, 172-73. The British therefore vested unitary sovereignty in Parliament.

165. *Id.* at 7.

166. *See id.* at 138. The plan gave Congress the power "to negat[e] all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union." *Id.* at 148 (emphasis omitted). In other words, the "negative" of the Virginia Plan would have given Congress the power to invalidate state legislation much like the Supreme Court's modern power of judicial review.

167. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 164 (Max Farrand ed., rev. ed. 1937) [hereinafter FARRAND].

168. *Id.* Madison further asserted, "This prerogative of the General Govt. is the great pervading principle that must control the centrifugal tendency of the States; which, without it, will continually fly out of their proper orbits and destroy the order & harmony of the political system." *Id.* at 165.

169. *Id.* at 166, 172. Wilson asserted that the states must purchase "[f]ederal liberty" with "the necessary concession of their political sovereignty." *Id.* at 166. He continued, "If we mean to establish a national Govt. the States must submit themselves as individuals—the lawful Government must be supreme—either the Genl. or the State Government must be supreme." *Id.* at 172.

170. Whereas the Virginia Plan would have only allowed Congress a negative over laws that conflicted with the Constitution, Madison and others favored a more general negative over all state legislation. *See id.* at 164-73.

have essentially made the states a lower house of the national legislature.[171] The federal negative, therefore, abandoned the colonial theory of divided sovereignty in favor of a British-inspired model that would have consolidated sovereignty in the national government.[172]

The Convention, however, rejected Madison's federal negative in favor of a system of divided sovereignty. Many framers were unwilling to accept the negative's encroachment on state sovereignty.[173] Hugh Williamson "was agst. giving a power that might restrain the States from regulating their internal police."[174] Elbridge Gerry charged that "[t]he Natl. Legislature with such a power may enslave the States" and "enable the Genl. Govt. to depress a part for the benefit of another part."[175] Gunning Bedford, who tied the negative to representation in the national government, worried that the negative would allow the "large States [to] crush the small ones whenever they stand in the way of their ambitions or interested views."[176] Pierce Butler "was vehement agst. the Negative in the proposed extent, as cutting off all hope of equal justice to the distant States."[177] These framers rejected the federal negative because it was inconsistent with independent state sovereignty.[178] For these framers, the problem of divided sovereignty "could not be solved by merging two levels of government into one compound legislature."[179]

After rejecting the negative's consolidation of sovereignty in the national government, the framers settled on a plan that would both divide power between the states and federal government and empower the federal

171. As LaCroix explains, "Madison's comments suggest that he envisioned the legislatures operating almost as a single system—a compound legislature comprising inferior and superior bodies." LACROIX, *supra* note 163, at 152. In Madison's words, "The States cd. of themselves then pass no operative act, any more than one branch of a Legislature where there are two branches, can proceed without the other." FARRAND, *supra* note 167, at 165.

172. Madison modeled the veto on the British Privy Council, which had similar authority over colonial laws. *See* LACROIX, *supra* note 163, at 139-45.

173. *See id.* at 156 ("For many delegates, the prospect of a sweeping congressional power to veto states laws . . . threatened the integrity of the states themselves.").

174. FARRAND, *supra* note 167, at 165.

175. *Id.* at 165, 171.

176. *Id.* at 167.

177. *Id.* at 168.

178. *See* LACROIX, *supra* note 163, at 157.

179. *See id.* at 158.

judiciary to police this division.[180] Sovereignty was divided by granting only limited enumerated powers to Congress and leaving the rest to the state governments.[181] The Supreme Court was then empowered to police this division through the Supremacy Clause, which declares that federal law is the supreme law of each state, and Article III, which is "'tailored to facilitate Supreme Court enforcement' of the Supremacy Clause."[182] Through these clauses, the Court has the power to declare both that Congress has exceeded its enumerated powers (and therefore infringed on the subjects left for the states) and that states have acted beyond their proper sphere of power in violation of federal law.

Federalists used the Constitution's theory of divided sovereignty as a strong argument for ratification.[183] Following the British tradition, anti-federalists argued that sovereignty could not be split between the states and federal government.[184] In Federalist No. 9, Alexander Hamilton, one of the most extreme nationalists at the Constitutional Convention, replied that the "Constitution, so far from implying an abolition of State governments, makes them constituent parts of the national sovereignty . . . and leaves in their possession certain exclusive and very important portions of sovereign power."[185] In Federalist No. 32, he further explained that "the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States."[186] Hamilton expanded on his views in a speech at the New York ratifying convention. He declared that "[t]he laws of the United States are supreme, as to all their proper, constitutional objects: The laws of the states are supreme in the same way."[187] James Madison made the

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180. *Id.* at 169 (stating that the negative had "a theoretical commitment to unitary sovereignty"). Madison, however, never wavered from his belief that the negative was needed. *Id.* at 162-63.

181. *Id.* at 171.

182. *Id.* at 164 (internal citations omitted).

183. *See, e.g.*, RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN, 51-53 (1987).

184. In Antifederalist No. 17, for example, Brutus contended the federal government would use the combination of implied powers and the Supremacy Clause to abrogate state sovereignty and wield virtually limitless power. THE ANTIFEDERALIST NO. 17.

185. THE FEDERALIST NO. 9, at 46 (Alexander Hamilton) (Ian Shapiro ed., 2009).

186. THE FEDERALIST NO. 32, at 155 (Alexander Hamilton) (Ian Shapiro ed., 2009).

187. ALEXANDER HAMILTON: WRITINGS 510 (Joanne B. Freeman ed., 2001). Hamilton further stated that the states "are absolutely necessary to the system." *Id.* at 508. He continued, "Their existence must form a leading principle in the most perfect constitution we could form. I insist, that it never can be the interest or desire of the national legislature, to destroy the state governments." *Id.* Other federalists made similar statements. *See, e.g.*, BERGER, *supra* note 183, at 57-59.

same points in Federalist No. 39 when he said that the Constitution was "partly federal and partly national" because it "leaves to the several States a residuary and inviolable sovereignty over all other objects" not delegated to the federal government.[188] Although the line between state and federal power would not always be clear,[189] consolidation of sovereignty in any one level would be avoided by making the United States Supreme Court police of the division of authority.[190]

The Federalists' theory of divided sovereignty presupposes states that are equal in power. According to the Federalists, the states and federal government derived their sovereignty from different sources. The people of each state granted power to the state governments, and when doing so, they had an equal right to determine the amount of sovereignty granted. The people of the Union then ratified the Constitution and conferred sovereign power on the federal government and placed limitations on the sovereignty of the states. As the Federalist Papers remind us, the states, as "coequal societies,"[191] "retain all the rights of sovereignty which they before had."[192] This idea is confirmed in the Tenth Amendment, which provides, "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."[193] Because the states derive their power independently from the people of each state, they each have an equal claim to sovereignty. For

188. THE FEDERALIST NO. 39, at 197, 198 (James Madison) (Ian Shapiro ed., 2009). In Federalist 39, Madison referred to the states as "coequal societies." *Id.* at 196; *see also* THE FEDERALIST NO. 62, *supra* note 81, at 314 ("[T]he equal vote allowed to each State [in the Senate] is at once a constitutional recognition of the portion of the sovereignty remaining in the individual States . . . ."). John Dickinson similarly stated that the Constitution composed a government "by a combination of republics, each retaining all the rights of supreme sovereignty, excepting such as ought to be contributed to the union." 3 FARRAND, *supra* note 167, at 304. Supporters of ratification also commonly asserted that the Constitution left local matters the states. *See* BERGER, *supra* note 183, at 68-69. In Connecticut, for example, Sherman told voters that "[t]he Powers vested in the federal government are clearly defined, so that each state will retain its sovereignty in what concerns its own internal government . . . ." *Id.* at 70.

189. *See* BERGER, *supra* note 183, at 62 (quoting Wilson as telling the Pennsylvania Convention that he could not pretend "that the line [between state and federal power] is drawn with mathematical precision," but that "the powers are as minutely enumerated and defined as was possible.").

190. *See* LACROIX, *supra* note 163, at 135 (stating that the Convention intended to have the judiciary "mediate between state and general governments").

191. THE FEDERALIST NO. 39, *supra* note 188, at 196 (Madison).

192. THE FEDERALIST NO. 32, *supra* note 186, at 155 (Hamilton).

193. U.S. CONST. amend. X.

the Federalists, the structure of the Union implied that, at least as a default, the states were equal in sovereign power.

This conception of the Union, however, was not universally accepted. A competing theory of federalism, advanced by Southern leaders such as Spencer Roane and John C. Calhoun, rejected the founders' idea that sovereignty could be divided between two levels of government. Unitary sovereignty instead resided with the states, and the Union was a mere compact between these true sovereign powers.[194] Moreover, because the states were the sovereign creators of the Constitution, the states themselves could judge the extent of the powers delegated to the federal government.[195] Secessionists took this argument a step further by arguing that the northern states' violation of constitutional provisions like the Fugitive Slave Clause relieved the Southern states of any obligation to remain bound by the compact.[196] Under compact theory, the federal government lacked the power to limit state sovereignty at all, much less unequally.[197]

Nationalists responded to compact theory with the framers' theory of divided sovereignty. In *McCulloch v. Maryland*[198] and *Martin v. Hunter's Lessee*,[199] the Marshall Court used divided sovereignty to reject compact theorists' contention that the Supreme Court lacked the power to render an interpretation of the Constitution that was binding on the states.[200] In *McCulloch*, Marshall began by explaining that "[t]he government proceeds directly from the people."[201] The people, he explained, delegated sovereign

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194. *See, e.g.*, SHAPIRO, *supra* note 84, at 127.

195. 6 THE WORKS OF JOHN C. CALHOUN 68-73 (Richard K. Crall ed., 1857); JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 148 (Gerald Gunther ed., 1969) [hereinafter JOHN MARSHALL'S DEFENSE].

196. *See, e.g.*, SECESSION DEBATED 7-8, 41-42 (William W. Freehling & Craig M. Simpson eds., 1992) (speeches by Thomas R. R. Cobb and Senator Robert Toombs).

197. Although compact theory is best known for its association with nullification and secession, it was advanced throughout the antebellum period on both sides of the Mason-Dixon Line. *See, e.g.*, CHRISTIAN G. FRITZ, AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA'S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR 210-11, 218 (2008) (discussing the use of various approaches to compact theory by James Madison, Calhoun, and the Hartford Convention); 3 FARRAND, *supra* note 167, at 183, 192 (statements of Luther Martin); Jeffrey Schmitt, *Rethinking* Ableman v. Booth *and States' Rights in Wisconsin*, 93 VA. L. REV. 1315, 1329 (2007) (discussing compact theory and its use in antislavery constitutional argument in the North).

198. 17 U.S. (4 Wheat.) 316, 403 (1819).

199. 14 U.S. (1 Wheat.) 304 (1816).

200. *See* ALFRED H. KELLY ET AL., THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 180-85 (1991).

201. *McCulloch*, 17 U.S. at 403.

power to the federal government in the Constitution and to the state governments in each state constitution.[202] As Marshall stated, "[T]he powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other."[203] Justice Joseph Story, perhaps the strongest nationalist on the antebellum court,[204] expressed similar views. In his highly influential Commentaries on the Constitution, he asserted that "it is perfectly clear that the sovereign powers vested in State governments . . . remained unaltered and unimpaired except so far as they were granted to the government of the United States."[205] Moreover, in his opinion for the Court in *Martin v. Hunter's Lessee*, Story adopted the Federalists' idea that the people had created the Supreme Court as the neutral arbiter of disputes regarding the allocation of sovereignty between the states and federal government.[206]

Daniel Webster, "the Expounder of the Constitution" and northern leader of the Whig Party in Congress,[207] expressed similar views in his famous debate with Hayne over the nullification crisis in 1830. Webster proclaimed that the federal government

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202. *Id.* at 410.

203. *Id.* Marshall expanded on his arguments in a public defense of *McCulloch* in the *Philadelphia Union* and the *Alexandria Gazette*. *See* JOHN MARSHALL'S DEFENSE, *supra* note 195, at 195 ("The United States is a nation; but a nation composed of states in many, though not in all, respects, sovereign.").

204. *See* JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 238 (1971) ("His major concern, during some thirty-four years of vigorous judicial activity, was to strengthen and expand the powers of the federal government; and some would add he did his best to emasculate the powers of the states.").

205. *See* STORY, *supra* note 78, § 417.

206. Although Chief Justice Marshall was recused in *Martin*, his public defense of *McCulloch* made essentially the same points as Justice Story. JOHN MARSHALL'S DEFENSE, *supra* note 195, at 203-14. Marshall also defended the Supreme Court's role in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 414-15 (1821). The Taney Court defended divided sovereignty in a number of opinions as well. *See* Ableman v. Booth, 62 U.S. (21 How.) 506, 516 (1858) ("[T]he powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres."); The License Cases, 46 U.S. 504, 588-89 (1847) ("The federal government is supreme within the scope of its delegated powers, and the State governments are equally supreme in the exercise of those powers not delegated by them . . . ."); New York v. Miln, 36 U.S. 102, 138 (1837) ("[A] state has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation; where that jurisdiction is not surrendered or restrained by the [C]onstitution . . . .").

207. ROBERT V. REMINI, DANIEL WEBSTER: THE MAN AND HIS TIME 28-29 (1997).

> is as popular, just as truly emanating from the people as the State Governments. It is created for one purpose; the State Governments for another. It has its own powers; they have theirs. There is no more authority with them to arrest the operation of a law of Congress, than with Congress to arrest the operation of their laws.[208]

Webster further asserted that any fear that the North would use federal power to interfere with the slave law of the Southern states was "wholly unfounded and unjust" because it would "evade the constitutional compact and to extend the power of the Government over the internal laws and domestic condition of the States."[209] Therefore, even Webster, the great defender of the Union, shared the federalists' belief in divided sovereignty, which gave each state an equal and complete right to govern all local matters not delegated to the federal government.[210]

During the secession crisis, President Lincoln also invoked divided sovereignty. In his first inaugural address, Lincoln told the South, "I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe *I have no lawful right to do so*, and I have no inclination to do so."[211] In the same speech, Lincoln reminded the

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208. SPEECHES OF HAYNE AND WEBSTER IN THE UNITED STATES SENATE, ON THE RESOLUTION OF MR. FOOT, JANUARY, 1830, at 78 (Redding & Co., 1852). Webster further asserted,

> The States are unquestionably sovereign, so far as their sovereignty is not affected by this supreme law [of the Constitution.] . . . We are all agents of the same supreme power, the people. The General Government and the State Governments derive their authority from the same source. Neither can, in relation to the other, be called primary; though one is definite and restricted, and the other general and residuary.

Id. at 70.

209. *Id.* at 44.

210. *See* Michael Les Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39, 44 ("Webster too admitted the necessity for keeping 'the general government and the State government each in its proper sphere.'") (quoting THE GREAT SPEECHES AND ORATIONS OF DANIEL WEBSTER 272 (Little, Brown & Co., 1889) ("Whipple's edition")). In his response to nullification, President Andrew Jackson similarly asserted that the states and federal government must each exercise their powers "within its appropriate sphere" and warned that the "destruction of our State governments or the annihilation of their control over the local concerns of the people would lead directly to revolution and anarchy." STATES' RIGHTS AND AMERICAN FEDERALISM: A DOCUMENTARY HISTORY 108 (Frederick D. Drake & Lynn R. Nelson eds., 1999).

211. ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 580 (Roy P. Basler ed., 1946) (emphasis added). Lincoln further said that the proposed Corwin Amendment, which would

South that his Republican Party had adopted the following in its platform in 1860: "That the maintenance inviolate of the rights of the states, and especially the right of each state to order and control its own domestic institutions according to its own judgment exclusively, is essential to that balance of powers on which the perfection and endurance of our political fabric depends . . . ."[212]

The Union Army, of course, ultimately vindicated the constitutional structure of Lincoln, Webster, and Marshall and defeated compact theory and its elevation of the states over the federal government. The victory of the Union, however, did not bring about the end of the states or create national sovereignty over all matters. Instead, it secured the victory of divided sovereignty—a theory that implied the equal power of the states.

B. Reconstruction

After the Confederacy's surrender, however, Congress did not permit the Southern states to reenter the Union on equal terms. Republicans feared that a return to the old constitutional order would allow the Southern states to ignore or reverse the transformative effects of the war. Without personal liberty, protection from racial violence, and economic rights, Republicans feared that "emancipation would be little more than a mockery."[213] The Thirteenth and Fourteenth Amendments were therefore passed to give the federal government the power to protect these fundamental individual rights. The Fifteenth Amendment also guaranteed black suffrage, so that the freedmen could use the franchise to guarantee state protection and thus make prolonged federal intervention unnecessary. Together, the Reconstruction Amendments limited state power and significantly enhanced the authority of the federal government.

Historians vigorously debate the extent to which the Amendments departed from the basic structure of antebellum federalism. A number of scholars contend that the Reconstruction Amendments brought about revolutionary changes in federalism by granting Congress broad powers to legislate directly to protect individual rights.[214] Robert J. Kazorowski, for

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have prohibited Congress from abolishing or interfering with slavery, was already "implied constitutional law." *Id.* at 587.

212. KIRK H. PORTER & DONALD BRUCE JOHNSON, NATIONAL PARTY PLATFORMS, 1840-1956, at 32 (1974).

213. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 225 (1989).

214. This view is most comprehensively presented in the work of Robert J. Kazorowski. *See* ROBERT J. KAZOROWSKI, THE NATIONALIZATION OF CIVIL RIGHTS: CONSTITUTIONAL

example, concludes that "with the Thirteenth and then the Fourteenth Amendment, the Constitution of the United States gave to all Americans the fundamental rights of citizenship and delegated to Congress the authority to protect citizens in their enjoyment of these rights."[215] Under this interpretation, the state action doctrine, which prevents Congress from protecting individual rights from being violated by private parties, emasculates the original meaning of the Fourteenth Amendment.[216] Rather than relying on its commerce power, Congress therefore should have been able to enact legislation such as the Civil Rights Act of 1964 directly under the Fourteenth Amendment.[217]

Other historians contend that the Reconstruction Amendments were designed to operate within the antebellum structure of federalism. According to these scholars, the conservative Republicans who dominated the Reconstruction Congress merely intended for the Amendments to prohibit the states from violating individual rights.[218] Michael Les Benedict, for example, claims that Republicans possessed an "overriding desire to preserve for the states the primary responsibility for the protection of citizens' rights."[219] Moreover, prominent conservative Republicans

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THEORY AND PRACTICE IN A RACIST SOCIETY, 1866-1883 (1987) [hereinafter KAZOROWSKI, THE NATIONALIZATION OF CIVIL RIGHTS]; ROBERT J. KAZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876 (1985) [hereinafter KAZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION]; Robert J. Kazorowski, *To Begin the Nation Anew: Congress, Citizenship, and Civil Rights After the Civil War*, 92 AM. HIST. REV. 45 (1987) [hereinafter Kazorowski, *To Begin the Nation Anew*]; *see also, e.g.*, Jack Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801 (2010).

215. Kazorowski, *To Begin the Nation Anew*, *supra* note 214, at 49.

216. KAZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION, *supra* note 214, at 214-17; KAZOROWSKI, THE NATIONALIZATION OF CIVIL RIGHTS, *supra* note 214, at 303-07, 337.

217. *See* Balkin, *supra* note 214, at 1801.

218. Benedict provides the most detailed and convincing historical argument in favor of this interpretation. *See* MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION 1863-1869 (1974) [hereinafter BENEDICT, A COMPROMISE OF PRINCIPLE]; Michael Les Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39 [hereinafter Benedict, *Preserving Federalism*]; Michael Les Benedict, *Preserving the Constitution: The Conservative Basis of Radical Reconstruction*, 61 J. AM. HIST. 65 (1974) [hereinafter Benedict, *Preserving the Constitution*]; *see also, e.g.*, EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS 1863-1869 (1990); FONER, *supra* note 213, at 259 (asserting that "few Republicans wished to break completely with the principles of federalism" and "[m]ost Republicans assumed the states would retain the largest authority over local affairs.").

219. Benedict, *Preserving the Constitution*, *supra* note 218, at 76.

repeatedly claimed that the Amendments did not fundamentally alter the federal system.[220] Under this view, Congress could act under its enforcement powers only when the states failed to obey the commands of the Amendments.[221] In this way, the Amendments "preserved the state jurisdiction upon which Republicans had been so unwilling to encroach."[222]

Regardless of which interpretation is correct, however, the Reconstruction Amendments did not jettison the basic structure of divided sovereignty adopted at the Convention and accepted throughout the antebellum era. Even under an expansive reading of the Amendments, they do not grant Congress the unitary sovereignty of the English Parliament or

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220. *Id.* at 77; *see also* Benedict, *Preserving Federalism*, *supra* note 218, at 48. For example, John Bingham, the drafter of section one of the Fourteenth Amendment, explained that "[i]t takes from no State any right . . . but it imposes a limitation upon the States to correct their abuses of power." FONER, *supra* note 213, at 259. Bingham further declared that "the care of the property, the liberty, and the life of the citizen . . . is in the States and not the federal government. I have sought to effect no change in that respect." CONG. GLOBE, 39th Cong. 1st Sess. 1292 (1866); *see also, e.g.,* CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866); CONG. GLOBE, 39th Cong., 1st Sess. 1785 (Sen. Stewart), 476, 600 (Sen. Trumbull) (1866). Even prior to Reconstruction, Bingham believed that Article IV's Privileges and Immunities Clause prohibited the states from violating the civil rights of state citizens, regardless of race. GERALD N. MAGLIOCCA, AMERICAN FOUNDING SON: JOHN BINGHAM AND THE INVENTION OF THE FOURTEENTH AMENDMENT 63-64 (2013). Bingham designed the Amendment so that the federal government could ensure that the states upheld this obligation rather than relying on the good faith of the states. *See id.* at 113-15. In this way, the Amendment did not undermine states' rights because no state had any right "to withhold from any citizen of the United States within its limits . . . any of the privileges of a citizen of the United States." *Id.* at 116 (quoting Bingham).

221. Although most scholars, like Benedict, focus on the Fourteenth Amendment, this analysis applies with equal force to the Fifteenth Amendment. To the chagrin of some Radical Republicans, the Fifteenth Amendment did not federalize voting or require the states to have uniform standards. Instead, while the Amendment prohibits racial discrimination in voting rights, states retain the sovereign power to run elections and enact voting legislation. As one Senator explained, "The whole question of suffrage, subject to the restriction that there shall be no discrimination on account of race, is left as it now is." FONER, *supra* note 213, at 446. Republicans sought to enfranchise blacks, who voted Republican, while preserving the states' right to disenfranchise the poor, illiterate, and immigrant populations, all of whom generally voted Democrat. *Id.* at 446-47. In fact, the Fifteenth Amendment renewed calls from both parties to end federal intervention within the Southern states. James Garfield, for example, asserted that "[t]he Fifteenth Amendment confers upon the African race the care of its own destiny. It places their fortunes in their own hands." *Id.* at 449; *see also* Benedict, *Preserving Federalism*, *supra* note 218, at 48-49. Like the other Reconstruction Amendments, the Fifteenth Amendment was not meant to radically alter the structure of federalism.

222. Benedict, *Preserving the Constitution*, *supra* note 218, at 90.

unlimited power to infringe on the sovereignty of the states. At most, they grant the limited power to legislate for the protection of individual rights. In other words, while Congress may be able to limit state sovereignty under its Reconstruction powers, it can only do so when its actions are sufficiently related to the protection of individual rights. *Shelby County*'s critics are therefore incorrect to assert that the equal sovereignty principle—which requires only that federal laws that unequally limit state sovereign powers be sufficiently related to the problem Congress seeks to address—is inconsistent with the history of Reconstruction.

Legislation passed during Reconstruction confirms this understanding. The Civil Rights Act of 1866 (the Act) guarantees to all persons, regardless of race, the equal protection of the laws and an equal right to contract, bring lawsuits, and own land.[223] Although the Act gave the federal government the ultimate responsibility to protect individual civil rights, its structure nevertheless demonstrates the continuing vitality of state sovereignty. Under the Act, the states retain primary responsibility to protect individual rights by providing law enforcement, equal access to the courts, and other services. The federal government can intervene only if a state effectively allows the reinstitution of a condition analogous to slavery by failing to adequately protect the civil rights of its citizens.[224] The Civil Rights Act, therefore, gives the federal government the power to limit state sovereignty only when doing so is "sufficiently related to" the protection of individual rights.[225]

The Reconstruction Act of 1867 created military rule within the South and placed conditions on the readmission of the Southern states.[226] However, Republicans assumed that once the Southern states provided civil and political equality, the freedmen would gain sufficient power within the states to prevent future deprivations.[227] Large-scale federal interference with local state sovereignty was thus meant to end as soon as the Southern states provided the freedmen with equal civil rights.[228] As Eric Foner

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223. Civil Rights Act of 1866, Pub. L. No. 39-26, 14 Stat. 27.

224. *See* FONER, *supra* note 213, at 245.

225. And yet, President Johnson vetoed the act on the grounds that it was a "stride towards centralization, and the concentration of all legislative powers in the national Government." *Id.* at 250 (quoting Johnson). The Act was passed over his veto. *Id.*

226. These conditions included the ratification of new constitutions including manhood suffrage and ratification of the Fourteenth Amendment. *Id.* at 276.

227. *Id.* at 277.

228. However, some moderate Republicans thought the Act was unconstitutional because it infringed too far on state sovereignty. When Congress added new conditions in 1870, Lyman Trumball, for example, "insisted that Congress could no more dictate the contents of

explains, Republicans "expected the relatively rapid return of the Southern states as *equal members* of the Union."[229] The Freedmen's Bureau Bill, which provided direct legal and economic assistance to the freedmen, was similarly viewed as a temporary measure justified only by the South's attempted secession.[230] These measures are consistent with equal sovereignty because, although the Reconstruction Act and Freedmen's Bureau unequally limited the sovereign power of the Southern states, they were sufficiently related to the problem of protecting the individual rights of the freedmen.

Even the Ku Klux Klan Act of 1871,[231] perhaps the most radical of the Reconstruction statutes, reflects Congress's continued assumption of equal state sovereignty. Congress passed the law to give President Grant the authority to address rampant Klan violence that was undermining the economic and political rights of the freedmen in the South.[232] The Act made it a federal crime for individuals to conspire to deny the rights of others to vote, hold office, serve on juries, or enjoy the equal protection of the laws. Although the law applied to individuals as well as state actors, Republicans defended the constitutionality of the law by arguing that the state's failure to protect the rights guaranteed by the Amendments amounted to state action that justified a federal response.[233] The Act therefore reflects the Republican belief that the Fourteenth Amendment limited state sovereignty by prohibiting states from violating individual rights and granted Congress the limited power to step in only when the states failed to abide by the Constitution. By this logic, the Act's unequal intervention in the Southern states was consistent with the equal sovereignty principle because it was sufficiently related to Congress's need to address the southern states' inaction in the face of massive violence. As Benedict explains, "No one who reads the debates over the Ku Klux Klan Act can fail to be impressed with the effort Republicans made to reconcile their desire to afford

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Southern state constitutions than interfere in the affairs of the North." *Id.* at 453. More generally, moderate Republican leader Carl Schurz warned that using federal power to protect the freedmen could create a "habit of overriding State rights." *Id.* at 498.

229. *Id.* at 277.

230. *Id.* at 150-53, 243; Benedict, *Preserving Federalism*, *supra* note 218, at 48.

231. The Enforcement Act of 1871, Pub. L. No. 42-22, 17 Stat. 13 (1871).

232. *See* FONER, *supra* note 213, at 455-58.

233. Benedict, *Preserving Federalism*, *supra* note 218, at 50; Robert J. Kaczorowski, *Searching for the Intent of the Framers of the Fourteenth Amendment*, 5 CONN. L. REV. 368, 398 (1972). Bingham, for example, asserted that Congress could act "against the denial of rights by States, whether the denial be acts of omission or commission." MAGLIOCCA, *supra* note 220, at 161; *see also* CONG. GLOBE, 42nd Cong. 1st Sess. app. at 85 (1871).

protection to citizens in the South with the contours of the federal system they wanted to preserve."[234]

Republican policy during Reconstruction in other areas further demonstrates that they did not believe the Amendments gave Congress unlimited power to infringe on state sovereignty.[235] For example, when Southern states that had been redeemed by Democrats dismantled public schools created during Reconstruction, some Republicans proposed that the federal government directly provide education.[236] Because "[m]any Republicans also viewed education as a state responsibility," however, the proposal "generated little support and never came to a vote."[237] Proposals to provide federal services in healthcare, railroads, and the telegraph met a similar fate.[238] Moreover, although Congress established an eight-hour workday for federal employees, the regulation of private industry was left to the states.[239] When discussing a federal bill to impose a quarantine to end the cholera epidemic in 1866, Republican Senator James W. Grimes stated:

> During the prevalence of the war we drew to ourselves here as the Federal Government authority which had been considered doubtful by all and denied by many of the statesmen of this country. That time . . . has ceased and ought to cease. Let us go back to the original condition of things, and allow the States to take care of themselves.[240]

Although most Republicans felt free to interfere with local affairs in the South to protect the rights of the freedmen, they were not willing to destroy state sovereignty, especially in the North. According to Republican John Bingham, the author of section one of the Fourteenth Amendment, "Equality of men and States before the law, was the watchword, the central, informing, vital thought of the Republican party."[241]

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234. Benedict, *Preserving Federalism*, *supra* note 218, at 50.

235. Foner explains that "even among Republicans, doubts about the activist state persisted, and of numerous initiatives envisioning a continued expansion of federal authority, only a handful were enacted into law." FONER, *supra* note 213, at 451.

236. *Id.* at 452.

237. *Id.* Republicans could not even pass a bill that would have helped finance state-run public schools. *Id.*

238. *Id.* at 451-52.

239. *Id.* at 480-81.

240. CONG. GLOBE, 39th Cong., 1st Sess., 2446 (1866); Benedict, *Preserving Federalism*, *supra* note 218, at 47.

241. MAGLIOCCA, *supra* note 220, at 154.

Throughout the late nineteenth and early twentieth centuries, the Supreme Court also interpreted the Amendments to preserve state sovereignty.[242] The *Slaughter House Cases*,[243] for example, narrowly interpreted federal power under the Privileges and Immunities Clause, and *United States v. Cruikshank*[244] held that the Fourteenth Amendment did not grant the federal government the power to protect individuals from private violence. The Court not only interpreted federal power under the Reconstruction Amendments narrowly but it also repeatedly struck down federal legislation on the grounds that Congress could not regulate areas reserved for the states.[245] The Court in *Hammer v. Dagenhart*,[246] for example, stated, "The power of the States to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general government."[247] As the Court explained in *Pennoyer v. Neff*, "[E]xcept as restrained and limited by [the Constitution,] [the states] possess and exercise the authority of independent States."[248] During this era, the Court believed that, because of this independent and inherent authority, "[t]he several States are of equal dignity and authority."[249]

242. The Supreme Court's Reconstruction jurisprudence is well known for its preservation of federalism and states' rights. Many scholars contend that the Court subverted the intent of the Amendments in the name of federalism. *See, e.g.*, FRANK J. SCATURRO, THE SUPREME COURT'S RETREAT FROM RECONSTRUCTION: A DISTORTION OF CONSTITUTIONAL JURISPRUDENCE (2000). Michael Les Benedict, however, responds that "the Supreme Court's construction of congressional power under the constitutional amendments hardly subverted Republican intent. Committed, as were nearly all Americans of the time, to maintaining the State's primary jurisdiction over criminal offenses, endorsing the basic concepts of dual federalism, the Court still managed to sustain Congress's power to protect directly citizens' fundamental civil and political rights." Benedict, *Preserving Federalism*, *supra* note 218, at 77. The Court's fidelity to the framers' intent is beyond the scope of this Article.

243. 83 U.S. 36, 78-79 (1872).

244. 92 U.S. 542, 569 (1875).

245. *See, e.g.*, CHEMERINSKY, *supra* note 14, at 104-05.

246. 247 U.S. 251 (1918).

247. *Id.* at 275.

248. 95 U.S. 714, 722 (1878).

249. *Id.*

C. The New Deal

After 1936, the Supreme Court changed course and upheld the New Deal's vast expansion of federal power.[250] While upholding the Fair Labor Standards Act in *United States v. Darby*, for example, the Court stated that "[t]he power of Congress over interstate commerce 'is complete in itself, may be exercised to its utmost extent,' and 'can neither be enlarged nor diminished by the exercise or non-exercise of state power.'"[251] The Court continued to explain that the Tenth Amendment "states but a truism" and therefore imposes no limitations on federal power.[252] The Court's New Deal jurisprudence evolved into the modern rule that economic regulations are subject to rational basis review. In cases such as *Katzenbach v. McClung*[253] and *Heart of Atlanta Motel Inc. v. United States*,[254] the Court upheld modern civil rights law under this expansive interpretation of congressional power to regulate the economy. As Bruce Ackerman has persuasively argued, the Court's New Deal jurisprudence can be seen as a legitimate change to the Constitution that should be respected by the modern Supreme Court.[255]

Like the constitutional changes of Reconstruction, however, the New Deal Constitution does not erase the background assumption of divided sovereignty. The basic thrust of the New Deal adjustment is that congressional power to regulate the economy should not be limited by any perceived need to protect a separate zone of authority for the states.[256] Even under an expansive reading of the New Deal, it did not change the "truism" that all power that is not delegated to the federal government is retained by the states and the people. The People may have expanded Congress's enumerated powers in the New Deal, but they have still divided sovereignty between the federal and state governments. In other words, the New Deal did not eliminate state sovereignty or change the framework established in

250. The reasons for the Court's "switch in time" are beyond the scope of this Article. For more on this issue, see, for example, BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998).

251. 312 U.S. 100, 114 (1941).

252. *Id.* at 124.

253. 379 U.S. 294 (1964).

254. 379 U.S. 241 (1964).

255. *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998).

256. *See, e.g.*, Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1498 (1994); John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, (2009). This rejected system, where a sphere of authority was reserved to the states, is known as "dual federalism." *Id.*

1787.[257] The equal sovereign power of each state is thus implicit in the structure of the New Deal Constitution just as it was implicit in the original Constitution.

At the doctrinal level, however, the equal sovereignty principle is at odds with the New Deal Constitution's use of rational basis review. Although the states start with an equal level of sovereignty as a default, New Deal constitutional principles would apply rational basis review to any federal law that changes this default and unequally affects the sovereignty of the states. Within the New Deal framework, state sovereignty is typically not a limit on federal power. *Shelby County*, however, limits federal power in the name of state sovereignty by requiring any violation of the principle of equal sovereignty to be "sufficiently related" to Congress's legislative goal. Here, *Shelby County*'s critics have a point—the Court's use of state sovereignty as a limit on federal power is in tension with the New Deal.

D. New Federalism

Shelby County's conversion of equal sovereignty from a background assumption of federalism into a modest limit on federal power, however, is perfectly consistent with the federalism jurisprudence of the Rehnquist and Roberts courts. Using "a form of structural inference," the Court in these cases has developed "implied limitations in federal power that are traceable to some form of historically reconstructed original understanding of the appropriate federal-state balance."[258] These courts have been driven by a desire to impose some limitations on the potentially unbounded power granted to Congress in the New Deal.[259]

In *Gregory v. Ashcroft*, for example, the Court held that Congress must give a clear statement before it will interpret a federal statute to intrude on a subject traditionally left for the states.[260] In justifying this rule, the Court asserted that "under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations

257. Instead, it merely expanded the scope of federal power and reduced the scope of state power.

258. Manning, *supra* note 256, at 2006, 2024-25; *see also* Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 831 (1998); Ernest A. Young, Alden v. Maine *and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601, 1620 (2000).

259. *See* Manning, *supra* note 256, at 2020-25; H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 894 (1999); Ernest Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1757-58 (2005).

260. 501 U.S. 452, 460-61 (1991).

imposed by the Supremacy Clause. . . . The States thus retain substantial sovereign authority under our constitutional system."[261] The clear statement rule is commonly invoked to narrow the reach of federal statutory provisions.[262]

The Court also invoked structural federalism concerns to justify placing limitations on Congress's enumerated powers. In *United States v. Lopez*[263] and *National Federation of Independent Business v. Sebelius*,[264] the Court significantly narrowed congressional power by holding that the Commerce Clause does not empower Congress to regulate noneconomic activity or create commerce. Moreover, in *New York v. United States* and *Printz v. United States*, the Court held that Congress cannot commandeer the states and force them to pass legislation or enforce federal law.[265] Each of these cases is based on a general desire to preserve state sovereignty rather than any specific provision in the text. The Court justified its decision in *Printz*, for example, by explaining that "[a]lthough the States surrendered many of their powers to the new Federal Government, they retained a residuary and inviolable sovereignty."[266]

In *Alden v. Maine* the Court also used structural federalism concerns to broadly interpret sovereign immunity to extend to suits brought in state court.[267] The *Alden* court asserted that "[a]lthough the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation."[268] The Court then concluded that Congress cannot authorize suits against states in their own courts because doing so would "denigrate[] the separate sovereignty of the

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261. *Id.* at 457 (quoting Tafflin v. Levitt, 493 U.S. 455, 458 (1990)).

262. Manning, *supra* note 256, at 2025-29.

263. 514 U.S. 549, 567-68 (1995) (concluding that the Court must ensure that a regulation enacted under the Commerce Clause does not blur "the boundaries between the spheres of federal and state authority") (Kennedy, J., concurring).

264. 132 S. Ct. 2566 (2012).

265. *See* Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144, 161-69 (1992).

266. *Printz*, 521 U.S. at 918-19 (internal quotations omitted). Moreover, in *Sebelius*, the Court began its analysis with the reminder that "the National Government possesses only limited powers; the States and the people retain the remainder." 132 S. Ct. at 2577. The Court further explained that "[t]he independent power of the States also serves as a check on the power of the Federal Government," and that "the Constitution is not the source of [the states'] power." *Id.* at 2578.

267. Alden v. Maine, 527 U.S. 706 (1999). The Eleventh Amendment applies only to the federal judicial power. *See* U.S. CONST. amend. XI.

268. *Alden*, 527 U.S. at 748.

States."[269] As a result, litigants often have no effective redress against wrongs committed by the state.

Viewed within this context, the equal sovereignty principle is a modest and defensible contribution to the Court's federalism jurisprudence. Although the New Deal constitutional approach would not limit federal power to protect state sovereignty, modern federalism jurisprudence uses constitutional law to judicially enforce basic structural features of the Constitution. Based on the history discussed in this Article, the equal sovereignty principle arguably flows from the structure of the Constitution at least as naturally as the principles announced in the cases discussed above. Moreover, equal sovereignty is a modest addition to the federalism canon, because, unlike these other doctrines that impose serious obstacles to federal legislation and the vindication of federal rights, equal sovereignty would apply only to those rare statutes that unequally limit state power. Moreover, unlike cases like *Printz* or *Lopez*, the equal sovereignty doctrine does not categorically bar Congress from regulating any particular subject or from passing any form of statute; instead, it merely requires that Congress have a good reason when it unequally limits state sovereignty. In sum, equal sovereignty is consistent with constitutional history and fits naturally with the Court's modern federalism jurisprudence.

E. History and Equal Treatment

Scholars have likely labeled the equal sovereignty principle as inconsistent with history only because they have equated it with equal treatment. Unlike equal sovereignty, the equal treatment principle has been decisively rejected throughout U.S. history. Although most scholars have focused their attention on Reconstruction—a time of massive federal intervention in the economic, political, and legal systems of only the Southern states—the principle of equal treatment was actually rejected much earlier.

At the direction of John C. Calhoun, South Carolina advanced the equal treatment principle during the nullification crisis of the 1830s. With the price of cotton plummeting on world markets, high federal tariffs placed a huge strain on South Carolina's planter-based economy.[270] In South Carolina's *Exposition and Protest*, Calhoun argued that the tariff was

269. *Id.* at 749.

270. *See* WILLIAM W. FREEHLING, THE ROAD TO DISUNION VOLUME 1: SECESSIONISTS AT BAY: 1776-1854, at 255 (1990); *see also* FOREST MCDONALD, STATES' RIGHTS AND THE UNION: IMPERIUM IN IMPERIO, 1776-1876, at 103 (2000).

unconstitutional because it did not treat the states equally.[271] Calhoun asserted that the powers of the "general government are intended to act uniformly on all the parts."[272] The tariff, however, created "inequality and oppression" because it imposed severe economic burdens on the South that were then used to subsidize manufacturing in the North.[273] The tariff was unconstitutional, Calhoun asserted, because it was "being converted into an instrument for rearing up the industry of one section of the country on the ruins of another."[274] Calhoun then developed an elaborate theory to justify state nullification of the allegedly unconstitutional tariff.[275]

Calhoun's constitutional theories of nullification and equal treatment, however, were decisively rejected by the American people.[276] In his Proclamation on Nullification, President Jackson, for example, explained, "This objection [of unequal treatment] may be made with truth to every law that has been or can be passed. The wisdom of man never yet contrived a system of taxation that would operate with perfect equality."[277]

Rejection of equal treatment, however, did not imply a rejection of equal sovereignty. Jackson was also a firm believer in state sovereignty. In his Second Inaugural Address, for example, Jackson asserted that "the destruction of our State governments or the annihilation of their control over the local concerns of the people would lead directly to revolution and anarchy."[278]

When scholars contend that the equal sovereignty principle is inconsistent with constitutional history, they seem to have Calhoun's views on the tariff in mind. Calhoun's argument for equal treatment, however, is

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271. Although the state legislature adopted the Exposition, it was secretly written by Calhoun. Freehling, *supra* note 270, at 257.

272. Exposition and Protest: Reported by the Special Committee of the House of Representatives of South Carolina on the Tariff (Dec. 19, 1828), *reprinted in* THE STATUTES AT LARGE OF SOUTH CAROLINA 263 (Thomas Cooper ed., 1836).

273. *Id.* at 248-49. Calhoun asserted that the tariff "imposes on the agricultural interests of the South . . . the burden not only of sustaining the system itself, but that also of sustaining government." *Id.* at 249. At the same time, he believed that "the manufacturing States . . . bear no share of the burden of the Tariff." *Id.*

274. *Id.* at 248. Calhoun further asserted, "This unequal lot is ours. We are the serfs of the system, out of whose labor is raised, not only the money that is paid into the Treasury, but the funds out of which are drawn the rich reward of the manufacturer and his associate in interest." *Id.* at 252. *See also* McDonald, *supra* note 270, at 104.

275. McDonald, *supra* note 270, at 104-05.

276. Freehling, *supra* note 270, at 284; Kelly, *supra* note 200, at 211.

277. Proclamation No. 26, 11 Stat. 771 (Dec. 10, 1832).

278. STATES' RIGHTS AND AMERICAN FEDERALISM: A DOCUMENTARY HISTORY 108 (Frederick D. Drake & Lynn R. Nelson eds., 1999).

very different from the principle of equal sovereignty. Like President Jackson, even supporters of a strong national government believed that sovereignty was divided between the state and federal governments with the people of each state having the right to create state governments equal in power.

F. A Racist Legacy

Several scholars go so far as to contend that the equal sovereignty principle should be rejected because of its association with slavery and Jim Crow. James Blacksher and Lani Guinier assert that the equal sovereignty principle has a "racially discriminatory pedigree" because its origins "can be traced back to the Court's infamous decision in *Dred Scott v. Sandford*" and *Prigg v. Pennsylvania*.[279] Joseph Fishkin similarly argues that the equal sovereignty principle should be rejected because it "inscribe[s] into the Constitution some of the core constitutional claims, unsuccessful even in their own time, of the defeated Confederacy and its apologists."[280] Although appeals to state sovereignty have undeniably been used to pursue racist goals, *Shelby County*'s critics have again exaggerated their claims.[281]

The equal sovereignty principle is far older than the Court's slavery jurisprudence. As demonstrated above, the idea that the states have an equal claim to sovereignty is as old as the Union. Throughout the antebellum period, this idea was held, not just by defenders of slavery, but also by nationalists such as Hamilton, Marshall, Webster, and Lincoln. In fact, the very Republicans who pushed the Reconstruction Amendments through Congress held similar beliefs.[282]

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279. Blacksher & Guinier, *supra* note 12, at 39. They further assert that "[t]he only cases prior to *Shelby County* that had applied this principle to block federal legislation because it impacted *existing* states differently were *Dred Scott* and *Prigg v. Pennsylvania*." *Id.* at 44 n.21.

280. Fishkin, *supra* note 8, at 192.

281. This Article's analysis of slavery jurisprudence again departs from the forthcoming Colby article. While both works agree that *Dred Scott* did not create the equal sovereignty principle, Colby does not challenge the incorrect scholarly claim that the Taney Court's slavery jurisprudence was based on equal sovereignty or make the connection between antislavery constitutionalism and equal sovereignty.

282. *See supra* Part III.B. Fishkin bases his argument on his assertion that although the states retain some residual sovereignty in the sense that they can pass legislation, after Reconstruction, "there is no room for claims that our constitutional order requires new limits on federal power as a way of respecting the dignity of the states as independent sovereigns." Fishkin, *supra* note 8, at 185. As an historical matter, this statement is incorrect. As explained above, Reconstruction is fully consistent with a separate sphere of sovereign

The Taney Court's slavery jurisprudence, moreover, is completely unrelated to the equal sovereignty principle. In *Prigg v. Pennsylvania*, the Supreme Court held that the Fugitive Slave Clause of the Constitution granted slave owners a right to recover their fugitive slaves without any interference from state laws designed to protect free blacks from kidnapping.[283] As Justice McLean argued in dissent, the Court's decision actually undermined "the inherent and sovereign power of a [free] state, to protect its jurisdiction and the peace of its citizens."[284] Rather than rely on equal sovereignty, *Prigg* nationalized a proslavery interpretation of the Fugitive Slave Clause and undermined state sovereignty by prohibiting northern states from protecting free blacks from kidnapping.[285]

The equal sovereignty principle also cannot be blamed for the Court's infamous decision in *Dred Scott*.[286] The Court in *Dred Scott* held that blacks could not be United States citizens and that Congress could not ban slavery in the federal territories.[287] Chief Justice Taney reasoned that because the federal territories were held for the "equal benefit" of the states, congressional discrimination against property in slaves would violate the Due Process Clause.[288] As Justices McLean and Curtis argued in dissent, the Court's argument assumed that slavery—previously viewed as a matter of local law—extended into the federal territories of its own force.[289] The

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authority for the states. Scholars such as Fishkin are reading the New Deal constitutional settlement back into Reconstruction.

283. 41 U.S. (16 Pet.) 539 (1842). The Court therefore held that Pennsylvania's personal liberty law, which required slave catchers to bring fugitives before a judicial officer before removing them from the state, was unconstitutional and reversed Prigg's conviction under the law. *Id.* The Court further held that the fugitive clause granted Congress the power to pass the Fugitive Slave Act of 1793. *Id.* at 541.

284. *Id.* at 673. Judge Abraham D. Smith of the Wisconsin Supreme Court asserted that *Prigg* caused "[t]he slave code of every State in the Union [to be] engrafted upon the laws of every free State." *In re* Booth, 3 Wis. 1, 122 (1854). He further stated that, under *Prigg*, "The rights, interests, feelings, dignity, sovereignty, of the free States are as nothing, while the mere pecuniary interests of the slaveholder are everything." *Id.* at 131.

285. *See* H. ROBERT BAKER, PRIGG V. PENNSYLVANIA: SLAVERY, THE SUPREME COURT, AND THE AMBIVALENT CONSTITUTION 63 (2012); Paul Finkleman, *Sorting Out* Prigg v. Pennsylvania, 24 RUTGERS L.J. 605, 630 (1993); Jeffrey M. Schmitt, *Immigration Enforcement Reform: Learning from the History of Fugitive Slave Rendition,* 103 GEO. L.J. ONLINE 1, 1-4 (2014), http://georgetownlawjournal.org/files/2014/05/Schmitt.Immigration Enforcement1.pdf; Jeffrey M. Schmitt, *The Antislavery Judge Reconsidered*, 29 L. & HIST. REV. 797, 799 (2011).

286. Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857).

287. *Id.*

288. *Id.* at 448.

289. *Id.* at 548-49, 626-27 (McClean, J., dissenting) (Curtis, J., dissenting).

Court, therefore, nationalized slavery by elevating the sovereignty of the Southern states over that of the Northern states that had rejected slavery in favor of free labor.[290] After Justice Taney determined that property in slaves existed in the federal territories, he then relied on a principle of equal treatment—not equal sovereignty—to find that Congress could not discriminate against the law of slavery.[291] In sum, *Dred Scott* relied on a nationalization of slavery—and thus a limitation on the sovereignty of the northern states—rather than the equal sovereignty principle.

Not only did the Taney Court's slavery jurisprudence promote national power at the expense of state sovereignty, but it also repudiated antislavery use of state sovereignty arguments. During the antislavery furor brought about by the Kansas-Nebraska Act, the Wisconsin Supreme Court held that the Fugitive Slave Act of 1850 was unconstitutional and developed a radical doctrine of states' rights to shield its decision from federal review.[292] Using the traditionally Southern compact theory of the Union, the Wisconsin Supreme Court argued that, because the federal government was the mere "creature" of the sovereign states,[293] the states could render a final determination of the powers delegated under the Constitution.[294] After the court's decision, the states' rights issue dominated local politics in Wisconsin and helped propel the antislavery Republican Party to power.[295] In *Ableman v. Booth*, Chief Justice Taney upheld the constitutionality of the Fugitive Slave Act of 1850 and thoroughly repudiated the Wisconsin Supreme Court's doctrine of states' rights.[296] Rather than rely on equal state sovereignty, Chief Justice Taney's opinion was a nationalist

290. Jeffrey M. Schmitt, *Constitutional Limitations on Extraterritorial State Power: State Regulation, Choice of Law, and Slavery*, 83 MISS. L.J. 59, 105 (2014). In fact, as Lincoln famously argued in his senatorial debates with Stephen Douglass, *Dred Scott* arguably laid the groundwork for the nationalization of slavery. *First Debate: Ottawa, Illinois, August 21, 1858*, NAT'L PARK SERV., http://www.nps.gov/liho/historyculture/debate1.htm (last visited Oct. 19, 2015). Fear that *Dred Scott* signaled an end to state sovereignty in the North with respect to slavery helped to propel the Republican Party to power in 1860. *See* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 437 (1978).

291. *See* Benedict, *supra* note 210, at 45.

292. *See* H. ROBERT BAKER, THE RESCUE OF JOSHUA GLOVER: A FUGITIVE SLAVE, THE CONSTITUTION, AND THE COMING OF THE CIVIL WAR 120-22, 136-61 (2006); Schmitt, *supra* note 221, at 1315.

293. *In re* Booth, 3 Wis. 1, 101 (1854) (Smith, J., concurring).

294. *Id.*

295. *See* Schmitt, *supra* note 221, at 1338. The Ohio Supreme Court nearly followed suit in *Ex parte* Bushnell, 9 Ohio St. 77, 184-85 (1859).

296. 62 U.S. (21 How.) 506 (1859).

exposition of federal judicial power that could easily have been written by Joseph Story or John Marshall.

The Wisconsin episode not only demonstrates that the equal sovereignty principle was unconnected to the Taney Court's slavery jurisprudence, but, like PASPA and the CAA, it also shows that arguments from state sovereignty are not inherently racist, immoral, or otherwise undesirable. I have elsewhere argued that principles of state sovereignty support recent California legislation that provides progressive standards for animal welfare and carbon emissions.[297] Although state sovereignty was admittedly used as a basis for the secession of the Confederate states and a justification for Jim Crow, the constitutional idea of divided sovereignty is not inherently racist or undesirable. Instead, as the Wisconsin and California counterexamples demonstrate, state sovereignty provides a way for states to charter a course that differs from that of the federal government. Whether that course is a just one depends on the desirability of federal policy more than anything inherent in the doctrine of state sovereignty.

Conclusion

According to legal scholars, *Shelby County*'s principle of equal sovereignty is indefensible. The doctrine, academics contend, is theoretically unworkable, undermines individual rights, has no basis in constitutional doctrine, is inconsistent with constitutional history, and is tainted by its racist origins. Perhaps because the Court used the principle to strike down a pillar of the Civil Rights Movement and enable Southern states to pass new voter suppression laws, scholarly criticism has been both scathing and unanimous.

Once the equal sovereignty principle is properly understood, however, these criticisms miss their mark. The equal sovereignty principle does not require Congress to treat the states equally; instead, it applies only when Congress limits the sovereign power of the states in an unequal manner. In part because this principle dovetails with the Court's other federalism jurisprudence, it imposes a relatively mild limit on congressional power. And, although equal state sovereignty is not commanded by the text or the Court's precedent, it is fully consistent with, and arguably even supported by, these traditional legal sources. Equal sovereignty is also neutral from a

297. Jeffrey M. Schmitt, *Making Sense of Extraterritoriality: Why California's Progressive Global Warming and Animal Welfare Legislation does not Violate the Dormant Commerce Clause*, 39 HARV. ENVTL. L. REV. 423 (2015).

policy standpoint—it merely protects the power of the states to enact policies that differ from those of the federal government.

Despite widespread assertions to the contrary, perhaps the strongest argument in favor of equal sovereignty is based on history. The basic structure of the Constitution, as explained by the framers and nationalist leaders at every level of the antebellum federal government, implies the equal sovereignty of the states. Instead of destroying this basic structure, the Reconstruction Amendments and New Deal expanded federal power within the tradition of divided sovereignty between the states and the federal government. The equal sovereignty of the states has therefore been a basic structural assumption throughout our constitutional history. Through its federalism jurisprudence of the last several decades, the Supreme Court has regularly transformed such structural principles into enforceable constitutional doctrine. The sometimes hyperbolic academic criticism of the equal sovereignty principle seems out of place once the case is properly situated within its historical context.

The real problem with *Shelby County* is not the content of the equal sovereignty principle but rather the manner in which the Court applied the doctrine. The record provided the Court with a clear basis to find that the VRA's unequal effects on state sovereignty were sufficiently related to the modern reality of racial discrimination in the covered jurisdictions. Much like many other controversial cases, the Court used ambiguous law to reach an unnecessary result.