

# INVENTING EQUAL SOVEREIGNTY

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*The Supreme Court’s 2013 decision in Shelby County v. Holder relied on the “fundamental principle” and “historic tradition” of equal sovereignty to hold one of the Voting Rights Act’s key provisions unconstitutional. Yet almost three years after Shelby County, and despite a recent wave of equal sovereignty challenges to major federal programs, the equal sovereignty principle remains largely unexamined. This Article seeks to provide some clarity—both to establish the contours of the equal sovereignty doctrine and to evaluate whether it is a sound rule of constitutional federalism.*

*The principle of equal sovereignty, as initially articulated by courts and subsequently explained by Shelby County, is an invented tradition that courts have used to justify independent determinations about federalism. Equal sovereignty was initially invented to address the constitutional challenges posed by the admission of new states. Conditions on the admission of new states sometimes diverged from then-common understandings about the proper balance between federal and state authority. And courts relied on appeals to equal sovereignty to ward off these challenges and adhere to contemporary rules about the scope of Congress’s delegated powers and the spheres in which the states were sovereign. Shelby County similarly used equal sovereignty to justify an independent claim about the states’ proper role in the federal system—that the states’ dignity entitles them to be viewed and treated as morally well-behaving institutions. Critically analyzing how courts have used the equal sovereignty principle reveals equal sovereignty for what it is—a set of arguments about the states’ proper role in the federal system—and allows us to engage with these arguments as such. While some early state admissions cases represent sensible contemporary efforts to balance competing principles of structure, Shelby County’s claim about federalism rests on highly questionable ideas related to state dignity.*

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“There is . . . a ‘fundamental principle of *equal* sovereignty’ among the States . . . .”<sup>1</sup>

#### INTRODUCTION

In 2013, *Shelby County v. Holder* relied on the principle of equal sovereignty to hold one of the key provisions of the Voting Rights Act (VRA) unconstitutional.<sup>2</sup> The provision contained a coverage formula that determined which jurisdictions were required to obtain federal approval (from a panel of federal judges or the Attorney General) before changing their voting laws.<sup>3</sup> The coverage formula required nine states to seek preclearance to amend their voting laws.<sup>4</sup>

When it was originally passed in 1965, the VRA required preclearance in any jurisdiction that had a test or device to restrict voting and less than 50 percent voter registration or turnout in the 1964 presidential election.<sup>5</sup> Congress subsequently reauthorized the VRA in 1970<sup>6</sup> and 1975,<sup>7</sup> and when it

1. *Shelby County v. Holder*, 133 S. Ct. 2612, 2621, 2624 (2013).

2. *Id.* at 2624.

3. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a), 79 Stat. 437, 439 (codified at 42 U.S.C. § 1973b (recodified at 52 U.S.C. § 10303 (2012))).

4. *Shelby County*, 133 S. Ct. at 2624.

5. Voting Rights Act of 1965 § 4(a).

6. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314, 315.

7. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, secs. 101, 202, §§ 4(a), 4(b), 89 Stat. 400, 400–01.

did so it expanded the coverage formula to include jurisdictions with restrictive voting practices and low turnout in the 1968 or 1972 elections.<sup>8</sup> The 2006 reauthorization retained the same coverage formula as the 1975 and 1982 reauthorizations: preclearance was required only in jurisdictions that had an unlawful voting test or device and low turnout as of 1972, 1968, or 1964.<sup>9</sup>

In 2009, three years after Congress reauthorized the VRA, *Northwest Austin Municipal Utility District No. One v. Holder* (NAMUDNO) expressed constitutional doubts about the reauthorization.<sup>10</sup> Four years after that, *Shelby County* invalidated the coverage formula in an opinion that opened and concluded with references to equal sovereignty.<sup>11</sup> *Shelby County* repeatedly emphasized how the coverage formula “differentiate[d] between the States” by requiring “only nine States” to preclear voting laws.<sup>12</sup> The opinion devoted paragraphs to describing differences that the VRA created between covered and noncovered jurisdictions,<sup>13</sup> and there were numerous references to the Act’s “disparate” or “differential” treatment of the states.<sup>14</sup> The equal sovereignty principle was, in the Court’s words, “highly pertinent” to why the coverage formula was unconstitutional.<sup>15</sup> And the only provision *Shelby County* invalidated was the coverage formula—the provision that resulted in different states being subjected to differential treatment.<sup>16</sup>

Yet almost three years after *Shelby County*, the equal sovereignty principle remains underexamined.<sup>17</sup> Many scholars have written about the immediate consequences of *Shelby County* and specifically how to prevent voter discrimination and disenfranchisement in the absence of the preclearance process.<sup>18</sup> But the question raised by the decision’s reasoning—whether

8. *Id.* secs. 3–4, §§ 4(a), 4(b).

9. Compare Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (codified as amended at 52 U.S.C. §§ 10101, 10301), with Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, sec. 2, §§ 4(a), 4(b), 96 Stat. 131, and Voting Rights Act Amendments of 1975, secs. 101, 202, §§ 4(a), 4(b).

10. 557 U.S. 193, 203 (2009) (construing VRA bailout provision to include municipalities).

11. *Shelby County v. Holder*, 133 S. Ct. 2612, 2618, 2630–31 (2013).

12. *Id.* at 2621, 2624.

13. *Id.* at 2624, 2627.

14. *E.g., id.* at 2622, 2624.

15. *Id.* at 2624.

16. *Id.* at 2631.

17. *E.g.*, Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2134, 2136 (2015) (“The Court’s creation of the equal sovereignty principle . . . raised many more questions than it answered. . . . *Shelby County* will not be the last word on equal sovereignty: . . . federal courts will . . . grapple with the logic and limits of the equal sovereignty principle for a while.”).

18. *E.g.*, Gabriel J. Chin, *Justifying a Revised Voting Rights Act: The Guarantee Clause and the Problem of Minority Rule*, 94 B.U. L. REV. 1551 (2014); Samuel Issacharoff, Comment, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95 (2013); Nicholas O. Stephanopoulos, *The South After Shelby County*, 2013 SUP. CT. REV. 55, 56 (“An urgent question in

Congress may distinguish among the states—has not received a similar amount of sustained attention.<sup>19</sup> In the wake of *Shelby County*, litigants have brought equal sovereignty challenges to several statutes, including major federal spending programs such as Medicaid.<sup>20</sup> And the federal courts have struggled to make sense of what the equal sovereignty principle now means.<sup>21</sup> This Article therefore seeks to provide some clarity—both to establish the contours of the equal sovereignty principle and to evaluate whether it is a sound rule of constitutional federalism.

*Shelby County* justified the equal sovereignty principle in conventionalist terms. For example, the opinion referred to “our historic tradition that all the States enjoy equal sovereignty.”<sup>22</sup> And *Shelby County* highlighted several cases—*Pollard’s Lessee v. Hagan*, *Texas v. White*, *United States v. Louisiana*, and *Coyle v. Smith*—that purportedly affirmed the equal sovereignty principle.<sup>23</sup> *Shelby County* claimed continuity with these cases, noting that “[o]ver a hundred years ago, [*Coyle v. Smith*] explained that our Nation ‘was and is a union of States, equal in power, dignity and authority.’”<sup>24</sup>

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the wake of *Shelby County* (and the subject of this article) is what will happen now to minority representation in the areas that formerly were covered by Section 5.”); Franita Tolson, *Congressional Authority to Protect Voting Rights After Shelby County and Arizona Inter Tribal*, 13 ELECTION L.J. 322 (2014).

19. After *Northwest Austin Municipal Utility District No. One v. Holder* (NAMUDNO), 557 U.S. 193 (2009), expressed constitutional doubts about the VRA, but before *Shelby County*, 133 S. Ct. 2612, Professor Zachary Price argued there was no state equality principle. 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](http://www.nyulawreview.org/sites/default/files/NYULawReviewOnline-88-1-Price_0.pdf) [<http://perma.cc/JU72-Y6TA>]. But see *Shelby County*, 133 S. Ct. at 2649 (Ginsburg, J., dissenting) (“In today’s decision, the Court ratchets up what was pure dictum in *Northwest Austin* . . .”). Before *Shelby County* was decided, Joseph Fishkin suggested the briefing and argument challenging the VRA relied on notions of “equal dignity.” Joseph Fishkin, *The Dignity of the South*, 123 YALE L.J. ONLINE 175 (2013), [http://www.yalelawjournal.org/pdf/1174\\_iyst6fvo.pdf](http://www.yalelawjournal.org/pdf/1174_iyst6fvo.pdf) [<http://perma.cc/7STA-PZFA>]. I agree with Fishkin’s focus on dignity, but having the actual opinion allows for more focused analysis.

20. E.g., *Mayhew v. Burwell*, 772 F.3d 80, 82 (1st Cir. 2014) (“Maine DHHS . . . argu[es] that the federal disapproval” of Maine’s Medicaid Amendment “violates Maine’s right to equal sovereignty . . .”); see also *NCAA v. Governor of New Jersey*, 730 F.3d 208, 214 (3d Cir. 2013) (“New Jersey argues that PASPA . . . violates . . . the ‘equal sovereignty’ principle . . .”); *United States v. Liu*, No. 2:13-CR-00050, 2015 WL 163006, at \*1, \*21 (E.D. Cal. Jan. 7, 2015) (equal sovereignty challenge to Controlled Substances Act); *United States v. Wilde*, 74 F. Supp. 3d 1092, 1093–94, 1099–1100 (N.D. Cal. 2014) (same); *United States v. Heying*, No. 14-CR-30 (JRT/SER), 2014 WL 5286153, at \*16 (D. Minn. Aug. 15, 2014) (same).

21. For example, the Third Circuit had a somewhat puzzling explanation for why it rejected an equal sovereignty challenge to a statute enacted under Congress’s commerce power. The Third Circuit reasoned that “while the guarantee of uniformity in treatment amongst the states cabins some of Congress’ powers, no such guarantee limits the Commerce Clause.” *NCAA*, 730 F.3d at 238 (citations omitted). But this reasoning ignores that the VRA was enacted pursuant to the Fifteenth Amendment, which does not contain an explicit uniformity requirement. U.S. CONST. amend. XV, § 2 (“The Congress shall have power to enforce this article by appropriate legislation.”).

22. 133 S. Ct. at 2621 (quoting *NAMUDNO*, 557 U.S. at 203).

23. *Id.* at 2623.

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

But the doctrinal basis of the equal sovereignty principle is far less compelling than these statements suggest. To be sure, in the early nineteenth and twentieth centuries, the Court invalidated several conditions on the admission of new states.<sup>25</sup> And, in the course of doing so, the Court sometimes made very broad statements about the states' purported equality.<sup>26</sup> But the Court also offered alternative articulations of the equal sovereignty principle. At times, it suggested that the equal sovereignty principle only requires Congress to admit new states on the same terms as the original states;<sup>27</sup> other times, it suggested that the principle only forbids Congress from imposing an admission condition that violates other constitutional rules—that is, constitutional rules other than the equal sovereignty principle.<sup>28</sup>

The admission condition cases are, for several reasons, better understood in this latter light. The admission conditions that the Court invalidated, or read to have little effect, would have altered the balance of power between the state and federal governments in ways that challenged contemporary understandings about the respective spheres of federal and state authority. Courts thus constructed historical narratives about the states' equal sovereignty to ward off these challenges and adhere to then-prevalent understandings about the scope of Congress's delegated powers.<sup>29</sup> Understood in this light, the equal sovereignty principle is a kind of invented tradition—a social practice whose authority allegedly stems from longstanding observance, but which turns out to be somewhat recent in origin.<sup>30</sup>

*Shelby County* broadened the equal sovereignty principle beyond how it had been used in prior cases. Whereas the nineteenth- and twentieth-century equal sovereignty cases invalidated conditions that exceeded the scope of Congress's delegated powers or interfered in a sphere in which the states were sovereign, *Shelby County* specifically disclaimed ruling on the constitutional validity of the preclearance regime itself. As such, the decision did not hold that the particular condition imposed on some of the states, preclearance, was itself unconstitutional.

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25. *E.g.*, *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 221 (1845).

26. *Coyle v. Smith*, 221 U.S. 559, 567 (1911) (“‘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.” (quoting U.S. CONST. art. IV, § 3)).

27. *E.g.*, *id.* at 566 (Congress's power to admit new states “is not [a power] to admit political organizations which are less or greater, or different in dignity or power.” (emphasis added)); *Stearns v. Minnesota*, 179 U.S. 223, 245 (1900) (“[A] State admitted into the Union enters therein in full equality with all the other[ ] [States] . . . .” (emphasis added)).

28. *E.g.*, *Coyle*, 221 U.S. at 573 (suggesting Congress may not impose conditions that “would not be valid and effectual if the subject of congressional legislation after admission”).

29. See Eric Hobsbawm, *Introduction: Inventing Traditions*, in *THE INVENTION OF TRADITION* 1, 9 (Eric Hobsbawm & Terrence Ranger eds., 2004) (noting how invented traditions “establish[ ] or legitimiz[e] . . . [particular] relations of authority”).

30. *Id.* at 1; cf. Richard A. Primus, *Judicial Power and Mobilizable History*, 65 MD. L. REV. 171, 173 (2006) (“Courts play an important role in developing and transmitting narratives and images of constitutional history.”).

Recognizing that *Shelby County* changed the doctrine raises two questions. First, was *Shelby County*'s doctrinal expansion justified? *Shelby County* maintained that equal sovereignty is a "fundamental" principle of constitutional structure.<sup>31</sup> And Thomas Colby and Jeffrey Schmitt have recently defended this idea, arguing that under the Constitution, "[n]o state, new or old, can have more or less sovereignty than the other states."<sup>32</sup> But while the principle of equal sovereignty, or equal states, has deep roots in both constitutional discourse and doctrine, it is far from a core constitutional principle. The equal sovereignty principle is not cleanly derived from any source that is widely recognized by courts or commentators as a valid basis for constitutional rules.<sup>33</sup> The principle is not articulated in the constitutional text, its historical roots are thin, and it potentially undermines other principles of structure that are embodied in the Constitution at a similar level of generality, such as federalism and nationalism. Nor has equal sovereignty been established through a pattern of congressional practice or more gradually spelled out by courts over time.<sup>34</sup> Congress has frequently distinguished among the states—even in early Congresses—and the Court has, on numerous occasions, upheld laws that distinguish among the states.<sup>35</sup> The most that can be said for the principle is that we can tell ourselves a story that connects it with the Tenth Amendment, which is associated with state sovereignty, or with the structure of the Constitution, from which many different principles could potentially be inferred. It is also possible to define the principle narrowly—if arbitrarily—so as not to invalidate that many federal laws. But that hardly seems enough to justify the rule that Congress is constitutionally required to treat the states equally.

Second, recognizing that *Shelby County* changed the doctrine raises the question of how it did so—that is, what does the equal sovereignty principle now mean? While *Shelby County* purported to rely on a rule that federal laws must generally treat the states equally, it is not always clear what it means for

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31. *Shelby County v. Holder*, 133 S. Ct. 2612, 2623 (2013).

32. Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. (forthcoming 2016) (manuscript at 19), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2616889](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2616889) [<http://perma.cc/3Y3C-Q79W>]; see also Jeffrey M. Schmitt, *In Defense of Shelby County's Principle of Equal State Sovereignty*, 68 OKLA. L. REV. (forthcoming 2016) (manuscript at 14), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2628225](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2628225) [<http://perma.cc/7HTJ-YYPZ>] ("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, the principle is entirely consistent with, and perhaps even supported by, both sources.").

33. See Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079, 1128–35 (2013) (identifying text, structure, ethos, doctrine, and history as sources of constitutional law); see also Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE L.J. 1213, 1239–40 (2015) (summarizing similar categories in Philip Bobbitt's modalities-of-constitutional-interpretation argument).

34. See generally Bradley & Siegel, *supra* note 33, at 1239–40 (identifying historical practice as source of constitutional law); Primus, *supra* note 33, at 1135–36 (identifying precedent as source of constitutional law).

35. See, e.g., *supra* notes 19 and 21.

federal law to treat the states “equally.” The concept of equality is amorphous,<sup>36</sup> and a rule requiring the federal government to treat the States equally could mean several different things.<sup>37</sup> Some ways of thinking about equality distinguish between disparate treatment (rules that contain express classifications) and disparate effects (rules that are formally equal but result in differential effects on different groups). In the context of states, a rule requiring Congress to treat the states equally might take the form of a no-state-identification principle that prohibits Congress from specifically identifying particular states to single them out for different treatment. But a rule requiring Congress to treat the states equally might also take the form of a no-disparate-effects principle that prohibits Congress from regulating in ways that have differential effects on different states. Or a rule requiring Congress to treat the states equally might embody both of these principles, or some combination of the two.

Courts might adopt a no-state-identification principle or a no-disparate-effects principle—or some combination of the two—as a means to identify a narrower category of constitutionally problematic laws.<sup>38</sup> That is, there might be nothing wrong with disparate treatment as such, or with disparate effects as a general matter. But the doctrine might adopt a presumption that laws codifying disparate treatment, or resulting in disparate effects, are unconstitutional as a way to smoke out particular laws that are constitutionally questionable. Disparate treatment might be impermissible either when it reflects an impermissible purpose or communicates an impermissible message. So too for laws that result in disparate effects, which might

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36. See, e.g., Jeremy Waldron, *The Substance of Equality*, 89 MICH. L. REV. 1350, 1351 (1991) (“The language of ‘equality’ and ‘inequality,’ then, seems appropriate in the discussion of these cases. But that language can be frustratingly mercurial in its application.”); Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 579–80 (1982). For critiques of Westen’s argument, see Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575 (1983), and Kenneth W. Simons, *The Logic of Egalitarian Norms*, 80 B.U. L. REV. 693 (2000).

37. The scholars who, prior to *Shelby County*, had assumed some kind of equal sovereignty principle exists offered different accounts of what kinds of federal laws implicate the equal sovereignty principle. E.g., 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, 156 (2007); Thomas B. Colby, *Revitalizing the Forgotten Uniformity Constraint on the Commerce Power*, 91 VA. L. REV. 249, 335 (2005) (“The troubling statutes are those that establish rules or standards that apply differently in different states or that treat some states (or localities) differently than others . . . .”); Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1519 (2007) (“More plausibly, state equality might operate to preclude measures that single out particular states for distinct treatment.”).

38. Equal protection doctrine distinguishes between disparate treatment and disparate impact. See, e.g., Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493 (2003). And it may do so in order to identify laws that are motivated by impermissible purposes or laws that communicate impermissible messages. See *id.* Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011).

be impermissible either when they reflect an impermissible purpose or communicate an impermissible message. In the context of equal sovereignty, it could be the case that Congress cannot constitutionally enact laws that are motivated by animus toward particular states, or laws that communicate the message that some states are worse than others. And courts could presume that disparate treatment is unconstitutional, or that laws resulting in disparate effects are unconstitutional as a means of identifying laws of these sorts. Whether these presumptions make sense may turn on the extent to which laws codifying disparate treatment of states, or resulting in differential effects on different states, tend to reflect an impermissible purpose or message.

Because the VRA's coverage formula did not specifically mention the names of particular states, it might be the case that *Shelby County* embodies a no-disparate-effects principle such that all laws that have differential effects on different states presumptively implicate the equal sovereignty principle. And there are some parts of the opinion that trade in the no-disparate-effects principle.<sup>39</sup> *Shelby County*, however, asserted continuity with a tradition of equal sovereignty and depicted the VRA as "extraordinary."<sup>40</sup> Moreover, many federal statutes single out particular states for different treatment or result in different effects on different states.<sup>41</sup> These statutes—and the cases upholding them—coupled with *Shelby County*'s self-professed conventionalism, suggest the doctrine does not, and should not, adopt a blunt presumption that laws are unconstitutional when they result in differential effects on different states. And *Shelby County* can plausibly be read to reflect a narrower concern with what the VRA signified or expressed about the covered states. Under this narrower reading, *Shelby County* manifested a concern with laws that single out particular states as having acted in ways that offend our shared notions of right and wrong—concerns that are rooted in the idea that the states are constitutionally entitled to be viewed and treated with dignity.

This Article therefore conceptualizes the scope of the equal sovereignty principle in terms of dignity. Under this view, laws will offend the equal sovereignty principle if they single out particular states that have behaved in especially immoral ways and subject those states to regulations that evoke an especially subservient and hierarchical relationship between the states and the federal government. Conceptualizing the equal sovereignty principle in terms of dignity characterizes it as an expressive norm—that is, a norm concerned with the meaning and communicative content of laws. Framing the equal sovereignty principle in terms of dignity also narrows the scope of the principle such that it will apply almost exclusively to legislation enacted under the Reconstruction Amendments. Those Amendments authorize

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39. *Shelby County v. Holder*, 133 S. Ct. 2612, 2624 (2013) ("While one State waits months or years and expends funds to implement a validly enacted law, its neighbor can typically put the same law into effect immediately, through the normal legislative process.").

40. *Id.* at 2618, 2624–26, 2628, 2630.

41. See *infra* Section II.D.



Congress to regulate states when states have violated constitutional prohibitions. Congressional statutes enacted pursuant to these Amendments are therefore more likely to single out particular states as having done something wrong and to communicate the message that those states are especially morally blameworthy. By narrowing the scope of the equal sovereignty principle, this conception insulates from equal sovereignty challenges the many existing federal statutes that differentiate between the states.

But conceptualizing the equal sovereignty principle in terms of dignity does little by way of justifying the principle itself. Rather, it contributes to the questionable state of doctrinal affairs in which Congress's powers are more limited under the Reconstruction Amendments than under Article I. And the idea that Congress is uniquely limited in differentiating between the states under the Reconstruction Amendments has especially little basis in the text, history, or structure of those Amendments. Conceptualizing the equal sovereignty principle in terms of dignity thus has significant flaws. But understanding *Shelby County* in this light makes sense of what the Court said in *Shelby County* and also results in fewer statutes being vulnerable to equal sovereignty challenges compared to other readings of the decision.

This Article proceeds in five parts. Part I explains the doctrine as it existed prior to *Shelby County*. Part I argues that the equal sovereignty doctrine prior to *Shelby County* is best understood as a placeholder for a set of limits on Congress's powers—namely, that Congress may only exercise its delegated powers and that the Constitution prohibits Congress from interfering with certain aspects of the states' sovereignty. However, *Shelby County* used equal sovereignty in a different way—the opinion specifically disavowed ruling on whether the preclearance process exceeded the scope of Congress's powers or violated some affirmative constraint on how Congress may regulate the states, aside from equal sovereignty.

Part II then analyzes whether *Shelby County* was justified in expanding the equal sovereignty principle. This Article argues it was not. The equal sovereignty principle, however defined, is far from a core constitutional principle—the text and historical sources do not specify such a principle; Congress has frequently distinguished among the states in a variety of ways; and the Court has upheld its doing so. Equal sovereignty will also undermine other constitutional values, such as federalism and nationalism, which are embodied in the Constitution at a similar level of generality as equal sovereignty.

Part III then unpacks how *Shelby County* may have changed the doctrine. Read in conjunction with other doctrines that rely on related ideas about equality and sovereignty, *Shelby County* appears to rely on a particular conception of state dignity. According to that conception, courts should carefully scrutinize federal laws that suggest some states should be subject to close federal supervision because they have behaved in especially immoral and blameworthy ways. Part IV then critically analyzes whether *Shelby County*'s doctrinal change is a good one.

## I. INVENTION: DOCTRINAL ORIGINS

Prior to *Shelby County*, the Supreme Court invoked the equal sovereignty principle in a series of cases invalidating or narrowly reading conditions on the admission of new states.<sup>42</sup> During this time the equal sovereignty doctrine had two elements. One line of reasoning suggested that all states must be admitted on the same terms as the original states. The second line of reasoning used equal sovereignty as a placeholder for unconstitutional conditions, meaning that conditions were invalid if they violated some other constitutional principle aside from equal sovereignty.

## A. Admission Conditions

Occasionally, courts suggested that the equal sovereignty principle required Congress to admit all states on the same terms as the original states. Other cases, however, disavowed this conception of equal sovereignty, and Congress frequently admitted the states on different terms from one another. Moreover, a rule requiring Congress to admit all states on the same terms would have prevented Congress from imposing even those conditions that furthered constitutional values like federalism and nationalism.

The equal sovereignty principle initially appeared in cases addressing conditions on the admission of new states. *Pollard's Lessee v. Hagan* considered what effect a provision in Alabama's Enabling Act had on the states' title to lands underlying navigable waters.<sup>43</sup> The Enabling Act purported to require the State of Alabama to disclaim all title to unappropriated lands,<sup>44</sup> and *Pollard* held that the relevant provision did not provide the United States with title to lands underlying navigable waters.<sup>45</sup> *Coyle v. Smith* subsequently invalidated a condition in Oklahoma's Enabling Act that purported to require Oklahoma to keep Guthrie as the state capitol for seven years.<sup>46</sup>

These and other cases frequently articulated a fairly specific vision of what equal sovereignty meant—namely, that Congress must admit every

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42. Some cases *Shelby County* and *NAMUDNO* mentioned do little to explain the equal sovereignty principle. *Texas v. White* held that Texas had not ceased to become a state when it purported to secede. 74 U.S. 700, 726 (1868). But the opinion made no particular mention of the equality of the states rather than the indivisibility of the states in the Union. The Court's second holding also assumed that the federal government could establish a temporary or provisional government for former rebel states. *Id.* at 729–30. As the *Shelby County* dissent noted, *South Carolina v. Katzenbach* upheld a prior VRA reauthorization and, in doing so, suggested that the doctrine of the equality of states “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.” *Shelby County*, 133 S. Ct. at 2648 (Ginsburg, J., dissenting) (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 328–29 (1966)).

43. 44 U.S. (3 How.) 212, 220–21 (1845). Before *Pollard*, *Mayor of New Orleans v. United States* held that a similarly worded admission condition did not grant the United States title over lands dedicated to public squares or levees. 35 U.S. 662 (1836).

44. *Pollard*, 44 U.S. (3 How.) at 221.

45. *Id.* at 230.

46. 221 U.S. 559, 573–74 (1911).

state into the Union on the same terms and with the same powers as the original states.<sup>47</sup> *Coyle* stated that Congress's power to admit new states "is not [a power] to *admit* political organizations which are less or greater, or different in dignity or power . . ." <sup>48</sup> *United States v. Louisiana* stated that the equal sovereignty principle operated "upon admission."<sup>49</sup> And the *Shelby County* dissent criticized the majority's invocation of equal sovereignty on the ground that the majority wrongly applied the principle outside of the terms on which states are admitted to the Union.<sup>50</sup>

But even this narrow version of equal sovereignty is too broad. Other cases severely limited the idea that Congress is required to admit all states on the same terms as the original states. These cases instead suggested that Congress is only required to give new states the same rights to lands underlying navigable waters as it gave to the original states.<sup>51</sup> Newly admitted states have no right to other lands which the original states possessed, and the United States can retain title to those lands or limit how states make use of those lands.<sup>52</sup> Furthermore, the United States retains title to significant parcels of land in states admitted to the Union later in time.<sup>53</sup> Congress can also require a newly admitted state to disclaim title to lands underlying navigable

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47. See, e.g., *Pollard*, 44 U.S. (3 How.) at 222. These cases also contain some broad statements suggesting that all states forever have the same powers and sovereignty. E.g., *id.* at 230 ("The new states have the same rights, sovereignty, and jurisdiction . . . as the original states.").

48. 221 U.S. at 566 (emphasis added); *id.* at 567 ("This Union' was and is a union of States, equal in power, dignity and authority . . . To maintain otherwise would be to say that . . . through the power of Congress to admit new States, might come to be a union of states unequal in power . . ." (emphasis added)).

49. 363 U.S. 1, 16 (1960). Other cases similarly defined the principle in terms of admission. See, e.g., *Stearns v. Minnesota*, 179 U.S. 223, 245 (1900) ("[A] State admitted into the Union enters therein in full equality with all the other[ ] [States] . . .").

50. *Shelby County v. Holder*, 133 S. Ct. 2612, 2648 (2013) (Ginsburg, J., dissenting).

51. E.g., *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1227 (2012) (citing a series of nineteenth-century Supreme Court cases that, in applying equal sovereignty to newly admitted states, viewed the principle narrowly).

52. See *Texas v. Louisiana*, 410 U.S. 702, 713 (1973); *Scott v. Lattig*, 227 U.S. 229, 244 (1913); see also *United States v. Chavez*, 290 U.S. 357, 365 (1933) ("[T]he state shall be admitted into the Union on an equal footing with the original States. But the principle of equality is not disturbed by a legitimate exertion by the United States of its constitutional power in respect of its Indian wards and their property."); *United States v. Sandoval*, 231 U.S. 28 (1913) (upholding admission conditions designating areas of New Mexico as "Indian country" subject to federal regulation); *Ex parte Webb*, 225 U.S. 663 (1912) (upholding admission conditions of Oklahoma to the Union designating certain areas Indian territory subject to federal regulation); *Stearns*, 179 U.S. 223 (upholding the validity of provisions in Minnesota's admission statute that ceded federal land to state on certain conditions).

53. See Carolyn M. Landever, *Whose Home on the Range? Equal Footing, the New Federalism and State Jurisdiction on Public Lands*, 47 FLA. L. REV. 557, 585–86 (1995).

waters so long as Congress clearly deprives the state of title and the condition “serve[s] an appropriate public purpose,” such as “to perform international obligations, or . . . for the promotion and convenience of commerce with foreign nations and among the several States . . . .”<sup>54</sup>

Additionally, the idea that equal sovereignty prevents Congress from imposing different admission conditions on different states is vastly out of step with actual practice. Eric Biber has documented how Congress imposed conditions on nearly every state entering the Union.<sup>55</sup> “Of the thirty-seven states admitted to the Union since the adoption of the Constitution[,] . . . almost all of them have had some sort of condition imposed on them when they were admitted.”<sup>56</sup> The conditions ran the gamut of topics—prohibiting newly admitted states from taxing federal lands,<sup>57</sup> requiring a state to use tax proceeds from blocks of land for particular purposes,<sup>58</sup> prescribing procedures for how a state could acquire particular lands,<sup>59</sup> and others. Indeed, Biber claims that Congress used its power to admit new states to impose conditions on new states that evaded limits on Congress’s other delegated powers.<sup>60</sup> He argues that Congress “use[d] . . . conditions . . . in areas far removed from the enumerated powers of Article I . . . .”<sup>61</sup> For example, Congress required Louisiana to make English its official language,<sup>62</sup> New Mexico and Arizona to maintain English-speaking schools,<sup>63</sup> and Utah to ban polygamy.<sup>64</sup>

Admission conditions have been used for other purposes as well. Some justices suggested that certain admission conditions were designed to benefit

54. *United States v. Alaska*, 521 U.S. 1, 34, 40, 46 (1997) (quoting *Shively v. Bowlby*, 152 U.S. 1, 48 (1894)) (upholding Congress’s grant of title to federal government for purpose of establishing petroleum reserve); *see also Choctaw Nation v. Oklahoma*, 397 U.S. 620, 633–36 (1970) (upholding Congress’s grant of title to lands underlying navigable waters to Native American tribe); *cf. Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204–05 (1999) (discussing the federal government’s grant of certain hunting and fishing rights on state land to Indian tribes).

55. *See* Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119, 120, 132 (2004).

56. *Id.* at 120.

57. *E.g.*, Ohio Enabling Act, ch. 40, § 7, 2 Stat. 173, 175 (1802); *see also Van Brocklin v. Anderson*, 117 U.S. 151 (1886) (upholding this condition). Congress imposed this condition before the Court held that states lacked the power to tax federal instrumentalities. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431–33 (1819).

58. *E.g.*, New Mexico–Arizona Enabling Act, ch. 310, § 28, 36 Stat. 557, 574 (1910); *Ervien v. United States*, 251 U.S. 41 (1919) (upholding conditions related to land trust).

59. *E.g.*, New Mexico–Arizona Enabling Act § 3; *Lassen v. Arizona*, 385 U.S. 458 (1967) (enforcing limitation related to land trust).

60. Biber, *supra* note 55, at 124, 195.

61. *Id.* at 124.

62. Louisiana Enabling Act, ch. 21, § 3, 2 Stat. 641, 642 (1811); Biber, *supra* note 55, at 132, 138–39.

63. New Mexico–Arizona Enabling Act § 2; Biber, *supra* note 55, at 132.

64. Utah Enabling Act, ch. 138, § 3, 28 Stat. 107, 108 (1894); Biber, *supra* note 55, at 132, 150–62.

newly admitted states. Justice Powell reasoned that because the federal government held more land in newly admitted states than the original states, Congress ensured new states would have a tax base to support schools by establishing trusts requiring taxes on certain lands to be used “for the support of public education.”<sup>65</sup> Other conditions reflected the substantive policy preferences of the states seeking admission, rather than the preferences of Congress. For example, some western territories strongly supported presidential candidates’ calls to maintain public schools free from religious control.<sup>66</sup> And as a condition on these states’ admission, Congress required the states to provide for “the establishment and maintenance of systems of public schools . . . free from sectarian control.”<sup>67</sup>

Congress also imposed admission conditions on particular states in furtherance of its other delegated powers as well as other nationalist ends. Congress imposed, and the Court upheld, restrictions on commerce with Native American tribes or on Native American lands in furtherance of its powers to regulate commerce with Native American tribes and to regulate federal lands.<sup>68</sup> Other conditions regulated the land settlement process, such as by restricting how land could be distributed or used, in furtherance of Congress’s power to admit new states to the Union.<sup>69</sup> And Eric Biber suggested that, among the conditions that appeared to fall outside the scope of Congress’s Article I powers, many responded to perceived differences in newly admitted states and sought to “assimilate[ ] [a state] as a loyal, democratic unit of government . . . .”<sup>70</sup> For example, in addition to the conditions imposed on Utah and New Mexico,<sup>71</sup> the Reconstruction Congress imposed conditions on Southern states before allowing those states representation in

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65. *Andrus v. Utah*, 446 U.S. 500, 523–24 (1980) (Powell, J., dissenting).

66. See, e.g., Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL’Y 551, 573–75 (2003) (explaining that the western territories strongly “supported Blaine’s position” of insulating schools from religious influences); Joseph P. Viteritti, *Davey’s Plea: Blaine, Blair, Witters, and the Protection of Religious Freedom*, 27 HARV. J.L. & PUB. POL’Y 299, 314 (2003) (noting that the Washington territorial delegation “endorsed Blaine’s well-popularized views on religion and education”).

67. E.g., Act of Feb. 22, 1889, ch. 180, 25 Stat. 676, 677.

68. E.g., *United States v. Sandoval*, 231 U.S. 28 (1913); see U.S. CONST. art. I, § 8; U.S. CONST. art. IV, § 3, cl. 2.

69. E.g., *ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989) (limits on distribution of mineral lands); *Stearns v. Minnesota*, 179 U.S. 223 (1900) (tax limitations on railroads); see U.S. CONST. art. IV, § 3, cl. 2; see *id.* art. I, § 8 (allowing Congress to “make all laws which shall be necessary and proper for carrying into execution . . . all other powers vested by this Constitution in the government of the United States”). Different sources characterize the federal interests in these restrictions in different ways. See DANIEL FELLER, *THE PUBLIC LANDS IN JACKSONIAN POLITICS* 18–38 (U. Wisc. ed. 1984); PETER S. ONUF, *STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE* 3–15 (1987) (arguing that with respect to newly admitted states, national policymakers were concerned with preserving the Union and paying off debts).

70. Biber, *supra* note 55, at 120, 132.

71. Utah Enabling Act, ch. 138, § 3, 28 Stat. 107, 108 (1894); Biber, *supra* note 55, at 132, 150–68.

Congress.<sup>72</sup> Congress required southern states to include provisions in their constitutions to secure blacks' political rights and to ratify the Fourteenth Amendment.<sup>73</sup> The Constitution's nationalist structure exists in part to empower the federal government so that it is able to effectively exercise its delegated powers;<sup>74</sup> it also enables the Union to function as one cohesive unit.<sup>75</sup> And admission conditions were sometimes used to further these purposes. Thus, the idea that equal sovereignty requires Congress to admit all states on the same terms as the original states is inconsistent with case law, longstanding congressional practice, and other principles of constitutional structure, such as federalism and nationalism.<sup>76</sup>

### B. Placeholder for Unconstitutional Conditions

Equal sovereignty also sometimes referred to a prohibition against unconstitutional conditions. The principle served as something akin to a placeholder for certain limits on Congress's powers—namely, that Congress may only exercise its delegated powers and that the states are sovereign or autonomous in certain spheres. *Coyle*, for example, suggested that the equal sovereignty principle prohibited Congress from imposing conditions that “would not be valid and effectual if the subject of congressional legislation after admission.”<sup>77</sup> That is, the state admission cases used “equal sovereignty” to refer to two constitutional limits on Congress's powers: (1) Congress may only impose laws, including conditions on the admission of new

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72. This Article does not attempt to reargue the lawfulness of Congress's decision to deny Southern states representation. Compare, e.g., Akhil Reed Amar, *The Lawfulness of Section 5—And Thus of Section 5*, 126 HARV. L. REV. F. 109 (2013) (arguing that the Reconstruction Congress's preapproval process for states with deficient voting rules was a proper federal enforcement of the Constitution), with John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 390–91, 410–14 (2001) (proposing that amendments to the Constitution may be validly ratified despite possible constitutional violations of state autonomy in ratification process).

73. See *infra* text accompanying notes 398–399.

74. See *United States v. Comstock*, 560 U.S. 126, 133–135 (2010) (“[A] government, entrusted with such powers ‘must also be entrusted with ample means for their execution.’” (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 326, 408 (1819))); James L. Kainen, Book Review, 42 AM. J. LEGAL HIST. 196, 198 (1998) (“[Chief Justice Marshall’s] focus was on assuring that Congress might effectively exercise the powers expressly given it by the Constitution . . .”). Senator Ruggles posed the question as follows: “Must Congress adopt precisely the same laws on this subject . . . ? Is there no opportunity for discretion, for alteration, or detail? Such a course of reasoning would be absurd . . . .” 16 ANNALS OF CONG. 280 (1820).

75. Gil Seinfeld, *The Jurisprudence of Union*, 89 NOTRE DAME L. REV. 1085, 1085–86 (2014) (“[U]nion . . . mean[s] the interest in binding the several states into a single political community.”).

76. The drafting history of the Constitution also arguably implies that Congress is not required to admit all states on the same terms. The Constitutional Convention rejected a proposal requiring new states to “be admitted on the same terms with the original States.” 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 454 (Max Farrand ed., 1911) [hereinafter FARRAND].

77. *Coyle v. Smith*, 221 U.S. 559, 573–74 (1911).

states, that fall within its delegated powers, and (2) Congress may not enact laws, including conditions on the admission of new states, that interfere with spheres in which the states are sovereign or autonomous.<sup>78</sup> Compared to the prior conception of equal sovereignty as a limit on Congress's ability to impose different admission conditions on different states, this is the better understanding of how previous cases used the equal sovereignty principle—because it is consistent with a close reading of the early equal sovereignty cases; it makes sense of both subsequent cases and congressional practice; and it coheres with the text and structure of the Constitution. But understanding equal sovereignty as a placeholder for limits on Congress's powers does not do much to identify what those limits are. And whatever limits apply to Congress's power to admit new states may not apply to Congress's other delegated powers, such as its power to execute treaties.

Several equal sovereignty cases can be reasonably explained as reflecting the concern that certain admission conditions fell outside the scope of Congress's delegated powers or intruded on a sphere the Constitution reserved to the states. Consider *Coyle*, for example. *Coyle* limited Congress to exercising its delegated powers because, as the Court in that case suggested, it is not clear how any of Congress's delegated powers permit Congress to forcibly locate a state's capital.<sup>79</sup> There was also no narrative in *Coyle* or legislative materials that suggested Congress attempted to identify a plausible federal purpose for selecting Oklahoma's state capitol. *Coyle* also suggested that there are spheres in which the states are sovereign. A key part of *Coyle*'s reasoning was that establishing and locating a state capital is a power reserved to the states.<sup>80</sup> In several places, the Constitution assumes that state governments exist as governmental units.<sup>81</sup> And because states—as distinct, governmental entities—must have a minimal structure of government, it is

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78. These two limits overlap at times, especially where a congressional power authorizes Congress to regulate in a particular area, such as interstate commerce. See Richard Primus, *The Limits of Enumeration*, 124 *YALE L.J.* 576, 603 (2014) (explaining how the Court's Commerce Clause decisions, such as *Hammer v. Dagenhart*, 247 U.S. 251 (1918), could be understood either to say that a regulation exceeds the scope of Congress's delegated powers or that it interferes in a regulatory sphere reserved to the states). And the idea that Congress may not regulate in particular spheres has two distinct threads—that there are certain areas of regulation and certain forms of regulation that are off limits to Congress. An example of the area-of-regulation limit is *United States v. Butler*, which invalidated a federal tax on certain forms of agriculture. 297 U.S. 1 (1936). *Butler* held the tax unconstitutional because the regulation of agriculture, as a subject area, lies within “the reserved rights of the states.” *Butler*, 297 U.S. at 68. An example of the form-of-regulation limit is *New York v. United States*, which held that Congress may not require state legislatures to enact particular laws, even where it regulates within a field the Constitution delegated to it (such as interstate commerce). 505 U.S. 144, 166 (1992).

79. *Coyle*, 221 U.S. at 567 (stating that upholding condition “would result, first, that the powers of Congress would not be defined by the Constitution alone”).

80. *Id.* at 565 (“The power[s] to locate its own seat of government and to determine when and how it shall be changed from one place to another . . . are essentially and peculiarly state powers.”).

81. Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 *HARV. L. REV.* 2180, 2246–47 (1998); see, e.g., U.S. CONST. art. IV; *id.* art. I, § 2, cls. 1, 4.

not unreasonable to think that the power to choose a capitol is reserved to the states.

*Pollard*, like *Coyle*, intimated that Congress is limited to exercising those powers delegated to it and that Congress cannot interfere in spheres in which the states are sovereign or autonomous. *Pollard* directly raised the possibility that Congress could use an admission condition to expand the powers delegated to it by the Constitution. Three years before *Pollard*, the Supreme Court had held that the Constitution did not give Congress any title to lands underlying navigable waters.<sup>82</sup> In *Pollard*, the petitioner argued that Congress could admit a state subject to the condition that the state disclaim all title to lands underlying navigable waters.<sup>83</sup> The case therefore sharply presented the possibility that Congress could use an admission condition to change an aspect of the federal-state relationship that the Court had said three years earlier the Constitution established—that state governments generally own and maintain lands underlying navigable waters.<sup>84</sup> There were also other indicia that the title-claiming provision at issue in *Pollard* exceeded the scope of Congress's delegated powers. For example, it was not clear that the federal government articulated any purpose for which it would use the submerged lands, so it was not clear which delegated power the condition furthered.<sup>85</sup> And the federal government did not hold the land at issue free of conditions—the state cession acts and treaties giving the land to the United States purportedly limited the United States' title over the land—further suggesting the federal government sought to do more with the land than its title allowed it to do.<sup>86</sup>

*Pollard* also relied on the idea that the condition invaded a sphere in which the states were sovereign.<sup>87</sup> *Pollard* maintained that the ownership of

82. See *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842).

83. See *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 217–18 (1845) (summarizing arguments).

84. See *id.* *Idaho v. Coeur d'Alene Tribe* summarized these decisions as follows:

[L]ands underlying navigable waters have historically been considered “sovereign lands.” State ownership of them has been “considered an essential attribute of sovereignty.” *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195–98. The Court from an early date has acknowledged that the people of each of the Thirteen Colonies at the time of independence “became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government.” *Martin v. Lessee of Waddell*, 16 Pet. 367, 410 (1842) . . . [A new] State's title to these sovereign lands arises from the equal footing doctrine and is “conferred not by Congress but by the Constitution itself.” *Oregon ex rel State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977).

521 U.S. 261, 283 (1997).

85. See *infra* note 98 and accompanying text (explaining how, under then-existing preemption doctrine, state laws were preempted only where there was a direct conflict with a federal law or project).

86. See *Pollard*, 44 U.S. (3 How.) at 221–22.

87. *Id.* at 230 (“This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the states . . . . To give to



waters used for navigation is an incident of sovereignty reserved to the states.<sup>88</sup> And *Pollard* construed the pertinent admission condition, which purported to require the state to disclaim title to all lands, not to apply to lands underlying navigable waters—lands that were understood at the time to be held by the government with primary municipal and police powers, the states.<sup>89</sup> *Pollard* therefore could be understood as an early clear-statement rule, where the Court presumed Congress had not altered a significant aspect of the federal-state relationship or displaced the states' police powers without clearly saying so.<sup>90</sup> *Pollard* stated that “if an express stipulation had been inserted in the [condition], granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative.”<sup>91</sup> But no such provision had been inserted, and the Court did not read the admission condition to purport to do so.

In their defenses of the equal sovereignty principle, Thomas Colby and Jeffrey Schmitt note that other cases, such as *Escanaba Co. v. Chicago*, refer to equal sovereignty.<sup>92</sup> In *Escanaba*, a shipping company sought to force the city of Chicago to take down drawbridges it had constructed over the Chicago River on the ground that a condition on the admission of Illinois mandated that the navigable waters in the state “shall be common highways and

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the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the states of the power to exercise a numerous and important class of police powers.”).

88. *Id.* at 229; see also *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2132 (2013) (“We have long understood that as sovereign entities in our federal system, the States possess an ‘absolute right to all their navigable waters and the soils under them for their own common use.’” (quoting *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842))); *Coeur d'Alene Tribe*, 521 U.S. at 283 (citing *Martin* for the same proposition).

89. See *Pollard*, 44 U.S. (3 How.) at 221–22 (“Taking the legislative acts of the United States . . . and giving to each, separately, and to all jointly, a fair interpretation, we must come to the conclusion that *it was the intention of the parties to invest the United States with the eminent domain of the country ceded, both national and municipal, for the purposes of temporary government, and to hold it in trust for the performance of the stipulations and conditions expressed in the deeds of cession and the legislative acts connected with them.*” (emphases added)).

90. See, e.g., *Hillman v. Maretta*, 133 S. Ct. 1943, 1950 (2013) (“The regulation of domestic relations is traditionally the domain of state law. There is therefore a ‘presumption against pre-emption’ of state laws governing domestic relations.” (quoting *Egelhoff v. Egelhoff*, 532 U.S. 141, 151 (2001))).

91. 44 U.S. (3 How.) at 223 (emphasis added).

92. Colby, *supra* note 32 (manuscript at 29–31); Schmitt, *supra* note 32 (manuscript at 19). Colby also cites *Permoli v. New Orleans*, 44 U.S. (3 How.) 589, 610 (1845). Colby, *supra* note 32 (manuscript at 17). But *Permoli* held that after a state was admitted to the Union, the Court did not have jurisdiction to review a state ordinance on the ground that it purportedly violated a provision in the state constitution that had been required by the enabling statute. *Permoli*, 44 U.S. (3 How.) at 610 (“In our judgment, the question presented by the record is exclusively of state cognisance, and equally so in the old states and the new ones; and that the writ of error must be dismissed.”). If *Permoli* had held otherwise, every claim founded on a state constitutional provision related to the Northwest Ordinance or state enabling acts would be a federal question giving rise to federal jurisdiction.

forever free.”<sup>93</sup> *Escanaba* ruled for the city of Chicago, Colby claims, because “Congress could not use [its power to regulate navigable waterways] to grant Illinois less sovereign authority to regulate her rivers than other states have to regulate theirs.”<sup>94</sup>

The problem, however, is that like *Pollard*, *Escanaba* concluded that the pertinent condition did not actually withdraw from the state the power to construct the particular bridge.<sup>95</sup> *Escanaba* reasoned:

[W]e do not see that the clause of the ordinance upon which reliance is placed materially affects the question before us. . . . In the sense in which the terms are used by publicists and statesmen, free navigation is consistent with ferries and bridges across a river for the transit of persons and merchandise . . . .<sup>96</sup>

*Escanaba* therefore concluded that the city bridge did not conflict with the federal mandate that all navigable waters remain unencumbered.<sup>97</sup> *Escanaba*, like *Pollard*, appears to have narrowly interpreted the extent to which congressional statutes preclude state legislation, especially in areas thought to be of primarily state concern.<sup>98</sup>

93. *Escanaba Co. v. Chicago*, 107 U.S. 678, 679, 688 (1882) (quoting Act of August 7, 1789, ch. 8, 1 Stat. 50, 52 (originally enacted as Northwest Ordinance of 1787)).

94. Colby, *supra* note 32 (manuscript at 30).

95. See Schmitt, *supra* note 32 (manuscript at 18–19). Schmitt also relies on *Withers v. Buckley*, 61 U.S. 84 (1857). But *Withers*, like *Escanaba*, held the federal provision did not preclude the particular state improvement. *Id.* at 92–93 (“It cannot be imputed to Congress that they ever designed to forbid, or to withhold from the State of Mississippi, the power of improving the interior of that State . . . by regulating the rivers within its territorial limits . . .”).

96. *Escanaba*, 107 U.S. at 689 (“The navigation of the Illinois river is free . . . from any tax, impost, or duty, and its character as a common highway is not affected by the fact that it is crossed by bridges.”).

97. *Id.* at 690 (“Th[at] provision does not prevent . . . the construction of any work on the river which the State may consider important to commercial intercourse. . . . ‘A draw-bridge across a navigable water is not an obstruction.’” (quoting *Palmer v. Cuyahoga County*, 18 F. Cas. 1026 (C.C.D. Ohio 1834))). Another reason it did not conflict was that Congress had also not initiated any improvements or projects with which the bridge interfered. *Id.* at 690–91. This reflected the state of preemption doctrine at the time. Before 1912, “federal law trumped state law” only “when the two laws conflicted.” Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 166.

98. Subsequent cases interpreted *Escanaba* in this way. See, e.g., *Cummings v. Chicago*, 188 U.S. 410, 428 (1903) (citing *Escanaba* to frame the question in that case as: “Did Congress, in the execution of its power under the Constitution to regulate interstate commerce, intend by the legislation in question to supersede, for every purpose, the authority of Illinois over the erection of structures in navigable waters wholly within its limits?”); see also Paxton Blair, *Federal Bridge Legislation and the Constitution*, 36 YALE L.J. 808, 810 (1927) (“The effect of the decision [was] to declare that the states are the normal source of power to construct bridges and, save for the exceptional occurrence of positive action by Congress granting original and plenary power to particular grantees [to say that] they are the only source.” (footnote omitted)); Merritt Starr, *Navigable Waters of the United States—State and National Control*, 35 HARV. L. REV. 154, 165 (1921) (“The Congressional control of navigable streams does not

The cases that invalidated or narrowly construed admission conditions therefore used equal sovereignty as a placeholder for certain limits on Congress's powers. Other cases maintained that admission conditions were valid where the conditions "serve[d] an appropriate public purpose," meaning the conditions were related to Congress's delegated powers.<sup>99</sup> Several cases upheld conditions regulating commerce with Native Americans or commerce on Native American lands.<sup>100</sup> These cases reasoned that "the principle of equality is not disturbed by a legitimate exertion by the United States of its constitutional power[s]."<sup>101</sup> And, these cases maintained, because the United States had the power to regulate commerce with Native Americans<sup>102</sup> and dispose of federal property,<sup>103</sup> it could exercise those powers by specifically identifying particular states or by limiting some states' lawmaking authority more than others. More recent cases have also characterized the equal sovereignty cases in terms of unconstitutional conditions. Courts cite *Coyle* for the proposition that "Congress may not dictate a State's capital."<sup>104</sup> Courts have similarly characterized *Pollard*, citing the case and its progeny for the proposition that the "ownership of submerged lands . . . 'is an essential attribute of [state] sovereignty.'"<sup>105</sup>

In addition to making sense of the doctrine, viewing equal sovereignty as a placeholder for certain limits on Congress's powers also coheres with congressional practice. If Congress can impose admission conditions related to its delegated powers, Congress may use admission conditions to aid in the process of admitting new states into the Union because one of Congress's delegated powers is admitting new states to the Union. This captures the essence of many of the admission conditions, which were designed to incorporate a newly admitted state into the Union or otherwise aid in the process of settlement.<sup>106</sup>

The idea that equal sovereignty serves as a placeholder for other limits on Congress's powers also makes reasonable sense of the constitutional text.

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exclude the power of the states to authorize the construction and maintenance of improvements which do not interfere either with navigation or with the improvements or control of the Federal Government.").

99. *United States v. Alaska*, 521 U.S. 1, 23 (1997); *see also* *Shively v. Bowlby*, 152 U.S. 1, 48 (1894) ("Congress has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States . . . or to carry out other public purposes appropriate to the objects for which the United States hold the Territory.").

100. *See, e.g., United States v. Chavez*, 290 U.S. 357, 363, 365 (1933); *United States v. Sandoval*, 231 U.S. 28, 45 (1913); *Ex parte Webb*, 225 U.S. 663, 691 (1912).

101. *Chavez*, 290 U.S. at 365.

102. *Ex parte Webb*, 225 U.S. at 690–91.

103. *Ervien v. United States*, 251 U.S. 41, 45–46 (1919).

104. *E.g., Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1641 (2011); *New York v. United States*, 505 U.S. 144, 162 (1992); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 586 (1985).

105. *See, e.g., Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2132 (2013) (citing *United States v. Alaska*, 521 U.S. 1, 5 (1997)) (citing cases tracing back to *Pollard*).

106. *See* discussion *supra* Section I.A.

Article IV gives Congress the power to admit new states but says nothing about whether the process for admitting new states may include imposing conditions on those states.<sup>107</sup> The only limit on Congress's power to admit new states is that new states cannot be formed out of already existing ones.<sup>108</sup> And the Necessary and Proper Clause allows Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States," which includes Congress's power to admit new states.<sup>109</sup>

Colby objects that this narrow conception of equal sovereignty "seems ultimately pointless" if "Congress is free to discriminate among any and all states" once a state is admitted into the Union.<sup>110</sup> But different heads of power authorize Congress to do different things; it would therefore not be strange if Congress could limit some states' lawmaking powers more than others under its power to regulate interstate commerce, but not under its power to admit new states. Congress may, for example, tax an individual's failure to purchase health insurance under the taxing power, even though it may not do so under the Commerce Clause.<sup>111</sup> Congress also may abrogate the states' immunity from suits for damages under the Fourteenth Amendment but it may not do so under its power to regulate interstate commerce.<sup>112</sup>

Colby relatedly objects that conceptualizing equal sovereignty as a placeholder for unconstitutional conditions would mean that equal sovereignty has virtually no applications today given the broad scope of Congress's powers.<sup>113</sup> But this confuses acquired inconsequence with initial inconsequence: "[E]ven if we assume that the authors of [constitutional] rules expect those rules to have applications, it would be a mistake to . . . take a discovery that a rule has no present applications as proof that the rule is being wrongly read."<sup>114</sup> Initially, for over a hundred years, the equal-sovereignty-as-unconstitutional-conditions doctrine operated as a limit on Congress's powers.<sup>115</sup> As *Pollard* and *Coyle* illustrate, the doctrine prevented Congress from limiting new states' powers in ways that challenged then-common understandings about the proper spheres of federal and state authority.

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107. U.S. CONST. art. IV.

108. *Id.* art. IV, § 3.

109. *Id.* art. I, § 8.

110. Colby, *supra* note 32 (manuscript at 22).

111. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

112. *Compare Seminole Tribe v. Florida*, 517 U.S. 44, 59–66 (1996) (holding that Congress cannot abrogate the states' immunity from suits for damages under the Commerce Clause), *with Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (ruling that the Fourteenth Amendment permits Congress to abrogate the states' immunity from suits for damages).

113. *See* Colby, *supra* note 32 (manuscript at 22–23).

114. Primus, *supra* note 78, at 631–32.

115. *See supra* text accompanying notes 77–91.

While understanding equal sovereignty as a placeholder for other limits on Congress's powers makes sense for many reasons, conceptualizing equal sovereignty in this way can only tell us so much. Most importantly, identifying equal sovereignty as a placeholder for other limits on Congress's powers does not tell us what the relevant limits on Congress's powers are.<sup>116</sup> And the idea that equal sovereignty serves as a placeholder for other limits on Congress's powers is a reasonably accurate, and thus viable, constitutional rule only if the limits on Congress's powers are fairly narrow in scope. Congress imposed admission conditions related to many different areas of life, and today it is unclear in which, if any, spheres Congress may not regulate.<sup>117</sup> The subsequent cases that have limited *Pollard* to apply only to lands underlying navigable waters rather than all lands are but one example of how difficult it is to indefinitely define the proper spheres of federal and state authority.

Additionally, acknowledging that a particular set of limits applies to Congress's power to admit new states does not necessarily mean these limits also apply to Congress's other powers, such as Congress's power to execute treaties. While different heads of power authorize Congress to do different things, the power to admit new states and the power to execute treaties share an important similarity: they do not specify a substantive area in which Congress may regulate. To some, that is why Congress should only be able to enact legislation under these powers in areas elsewhere delegated to Congress; otherwise Congress could legislate in all spheres.<sup>118</sup>

There are, however, reasons why the set of limits that apply to Congress's power to admit new states might not apply to Congress's power to execute treaties. Various doctrines are premised on a set of ideas about why the federal government is empowered to act in areas of international concern.<sup>119</sup> These doctrines underscore the advantages to speaking with one voice and to pooling resources for greater power in the international sphere.<sup>120</sup> While the federal government does not always have exclusive purview over issues with an international dimension,<sup>121</sup> the aforementioned doctrines provide a reason to think it is a proper exercise in constitutional federalism for Congress to legislate in areas identified by the international

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116. Cf. Andrew Coan, *Implementing Enumeration* WM. & MARY L. REV. (forthcoming) (manuscript at 12–15), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2622238](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2622238) [<http://perma.cc/EA6X-UPH6>] (identifying the flaw in extrapolating limits on Congress's power from the idea that there must be limits).

117. See, e.g., Primus, *supra* note 78, at 596–98; Gil Seinfeld, *Article I, Article III, and the Limits of Enumeration*, 108 MICH. L. REV. 1389, 1394–96 (2010).

118. See generally Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005) (raising this concern in the context of Congress's power to execute treaties).

119. See Seinfeld, *supra* note 75, at 1109–14.

120. See *id.*

121. See Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008) (arguing that the power to regulate immigration is not an exclusively federal power).

community as areas of international concern, such as the execution of treaties. Admission conditions, by contrast, may not necessarily fall in an area suitable for federal regulation. Moreover, when Congress enacts treaty-related legislation, all states are represented to a greater extent than those states seeking admission when Congress imposes admission conditions, because admission conditions are created by a Congress that does not include the state subject to the admission condition. And the newly admitted state's lack of representation in Congress may be a reason to more carefully scrutinize the admission conditions imposed by Congress. Additionally, when Congress enacts legislation to enforce a treaty, the topic and reach of such legislation is limited by entities external to Congress—foreign states that must consent to the treaty and that may not be as beholden to Congress as newly admitted states are.<sup>122</sup> Finally, there is an entirely different corpus of congressional practice that speaks to the scope of Congress's powers to execute treaties, which some have suggested indicates that Congress may enact treaty-related legislation that does not relate to Congress's other delegated powers.<sup>123</sup>

Although understanding equal sovereignty as a placeholder for other limits on Congress's powers explains the doctrine, congressional practice, and constitutional text and structure reasonably well, it has very little to do with "equality." Rather, it rests on the idea that the Constitution limits Congress to exercising its delegated powers and that the Constitution makes the states sovereign and autonomous from the federal government in some respects.

Analyzing the early equal sovereignty cases thus reveals equal sovereignty for what it was: a series of claims about what powers the Constitution delegates to Congress and what spheres it reserves to the states. The "tradition" of equal sovereignty was largely invented in the course of deciding distinct questions about federalism, and it shares several characteristics common to invented traditions. Referring to the tradition of equal sovereignty allowed the Court to "establish[ ] [and] legitimize[ ] . . . [particular] relations of authority" between the state and federal governments.<sup>124</sup> Equal sovereignty was also created during a period of "rapid transformation"—the admission of new states—that challenged then-prevailing "social patterns" related to the proper spheres of federal and state authority.<sup>125</sup> Courts used the equal sovereignty principle to ward off these challenges, sometimes noting that the process of admitting new states and the conditions attached to

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122. States seeking admission may feel pressured to accept conditions in order to gain admission. Cf. ROBERT W. LARSON, *NEW MEXICO'S QUEST FOR STATEHOOD*, 267–68 (1968) (detailing the numerous conditions Congress imposed, and New Mexico accepted, as a prerequisite to its admission); ONUF, *supra* note 69, at 67–87 (discussing Ohio's unequal position in relation to Congress in its quest for admission to the Union and the admission conditions Congress accordingly imposed on it).

123. Jean Galbraith, *Congress's Treaty-Implementing Power in Historical Practice*, 56 WM. & MARY L. REV. 59 (2014).

124. See Hobsbawm, *supra* note 29, at 9; see also *supra* text accompanying notes 27–28.

125. See Hobsbawm, *supra* note 29, at 4.

new states' admission posed unique challenges to commonly held ideas about constitutional limits on Congress's powers.<sup>126</sup>

That *was* the equal sovereignty principle, but it is not how *Shelby County* used the equal sovereignty principle. There, the Court specifically disclaimed ruling on whether the condition imposed on covered states—preclearance—was constitutional. Part II examines whether *Shelby County* was right to broaden the equal sovereignty doctrine beyond how it had been used in prior cases.

## II. REINVENTION: STATE EQUALITY AS A CONSTITUTIONAL NORM

Recognizing equal sovereignty as a placeholder for limits on Congress's powers reveals that *Shelby County* made a change to the doctrine. *Shelby County* explicitly stated that it had not determined that the VRA's preclearance regime exceeded the scope of Congress's delegated powers or violated any affirmative constraint on how Congress may regulate the states (aside from the equal sovereignty principle).<sup>127</sup> The Court "issue[d] no holding on § 5," the provision actually requiring states to obtain federal approval before enacting voting laws.<sup>128</sup> *Shelby County* therefore did not use equal sovereignty as prior cases had—that is to hold that a particular condition may not be imposed on any state.

This Part argues that *Shelby County* was wrong to broaden the equal sovereignty doctrine. There is little basis in the constitutional text or the drafting history for any constitutional rule that requires Congress to treat the states equally. And the equal sovereignty principle may also undermine other principles that are embodied in the Constitution's structure at a similar level of generality, such as federalism and nationalism. The equal sovereignty principle also conflicts with both longstanding congressional practice and doctrine.

Moreover, even if the Constitution does embody some kind of rule that Congress must treat the states equally, it is hard to say what, exactly, treating states equally means. The equal sovereignty principle is derived from textual and historical abstractions that are made at a fairly high level of generality. Thus, neither text nor history provides much guidance on what the precise

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126. See *Coyle v. Smith*, 221 U.S. 559, 566–68 (1911) (worrying about congressional powers becoming "uncontrollable by courts" if "the powers of Congress [were not] defined by the Constitution alone").

127. *Shelby County v. Holder*, 133 S. Ct. 2612, 2631 (2013). *Shelby County* would fit in this category if the Court had concluded the VRA exceeded the scope of Congress's power to enforce the Fifteenth Amendment because Congress had not identified a sufficiently serious pattern of constitutional violations to justify imposing prophylactic legislation on the states. See, e.g., Ellen D. Katz, *What Was Wrong with the Record?*, 12 *ELECTION L.J.* 329, 329–30 (2013) (interpreting *Shelby County* as suggesting that "Congress may employ a remedy like preclearance only to reach the extreme Jim Crow variety [of unconstitutional conduct], but not to address the more contained type of unconstitutional conduct we see today"). For reasons why *Shelby County* should not be understood this way, see *infra* text accompanying notes 359–362.

128. *Shelby County*, 133 S. Ct. at 2631.

contours of the equal sovereignty principle might be. The relevant congressional practice and case law, which are more concrete and specific than the relevant text and history, fill in some of the details. But congressional practice and case law also highlight how difficult it is to define what it means to treat the states equally. The myriad conceptions of what it might mean to treat the states equally further illustrate why the contours of the equal sovereignty principle are so unclear.

#### A. Text

Courts and commentators have suggested that the constitutional text implies some kind of equality among the states. Some cases suggest the states are equal because the Constitution specifies several rights to which each state is entitled (including representation in the Senate and full faith and credit, among other things).<sup>129</sup> Some scholars likewise trace the equal sovereignty principle to provisions that require Congress to uniformly legislate in certain circumstances.<sup>130</sup> Congress's bankruptcy power, for example, is limited to establishing "*uniform* Laws on the subject of Bankruptcies *throughout the United States*";<sup>131</sup> and Article IV, section 1 provides that Congress "by *general* Laws" may "prescribe the Manner in which [state] Acts, Records, and Proceedings shall be proved."<sup>132</sup> Some have also suggested that other provisions, including the prohibition against making new states out of old states and various references to the "union" of states,<sup>133</sup> "embody state equality concerns."<sup>134</sup>

However, the textual arguments for the equal sovereignty principle are not particularly compelling. For example, the text allotting two senators to every state does not say anything about whether federal laws must treat the states equally outside the context of Senate apportionment.<sup>135</sup> And instead of reflecting a general rule that Congress must treat the states equally, the handful of explicit uniformity requirements applicable to certain congressional powers support the opposite inference—that there is no general rule

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129. See, e.g., *Coyle*, 221 U.S. at 567–68 (finding that the Guarantee Clause supports state equality principle); see also U.S. CONST. art. I, § 3; *id.* art. IV; *id.* amend. X; JACK N. RAKOVE, ORIGINAL MEANINGS 170 (1999) ("[N]o one could deny that the Senate was intended to embody the equal sovereignty of the states . . ."); Metzger, *supra* note 37, at 1518 (suggesting Senate apportionment scheme and Article IV reflect state equality principles).

130. See Colby, *supra* note 37, at 301–23 (suggesting these provisions imply general uniformity constraint on other Article I powers); Metzger, *supra* note 37, at 1518 (suggesting "the Effects Clause's requirement that Congress act by means of 'general laws' "embod[ies] state equality concerns").

131. U.S. CONST. art. I, § 8 (emphases added).

132. *Id.* art. IV, § 1 (emphasis added).

133. See, e.g., *Coyle*, 221 U.S. at 566–67 (the word "union" implies equality among the states).

134. Metzger, *supra* note 37, at 1518.

135. U.S. CONST. art. I, § 3.



requiring Congress to treat the states equally.<sup>136</sup> Additionally, the other purportedly relevant provisions of constitutional text, such as the New State Clause and various references to the “union,” make no explicit mention of state equality and are also equally—if not better—understood to reflect other constitutional principles.<sup>137</sup>

Some textual provisions even admit the possibility of Congress imposing different rules on different states. Article I, Section 9, for example, provides that “[t]he Migration or Importation of such Persons as any of the States *now existing* shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight.”<sup>138</sup> This provision seems to bar Congress, prior to 1808, from banning the foreign slave trade in the original states; by implication, it suggests that prior to 1808, Congress could ban the foreign slave trade in states not yet in existence.<sup>139</sup> Indeed, this is how both James Wilson<sup>140</sup> and James Madison<sup>141</sup> understood the provision.

Yet the textual argument against the state equality principle is not a slam dunk either. There was little discussion of the significance of the phrase “now existing” in Article I section 9.<sup>142</sup> The specific mention of a power to impose different rules on different states with respect to the foreign slave

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136. See Price, *supra* note 19, at 27–28 (“The text of the Constitution, moreover, implies the absence of a general principle of state equality by mandating some forms of equal treatment but not others.”).

137. See, e.g., Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 317 (1992) (arguing that the New State Clause is about territoriality); Seinfeld, *supra* note 75, at 1085–86 (“[U]nion . . . mean[s] the interest in binding the several states into a single political community.”).

138. U.S. CONST. art. I, § 9 (emphasis added).

139. Earlier versions of the provision had provided that Congress may not prohibit the importation of persons “as *the sev[eral] States*” thought proper to admit. 2 FARRAND, *supra* note 76, at 143; see also *id.* at 168–69, 183 (“No Tax or Duty shall be laid by the Legislature . . . on the emigration or Importation of such Persons as the several States shall think proper to admit; nor shall such emigration or Importation be prohibited.”). But the Committee of Eleven reported out a provision that read “[t]he migration or importation of such persons as the several States now existing shall think proper to admit, shall not be prohibited . . .” *Id.* at 396.

140. 3 FARRAND, *supra* note 76, at 160–61 (“[B]y this article, after the year 1808, the Congress will have power to prohibit such importation, notwithstanding the disposition of any State to the contrary. . . . And in the meantime, the new States which are to be formed will be under the control of Congress in this particular, and slaves will never be introduced amongst them.” (quoting James Wilson, Pennsylvania Convention (Dec. 3, 1787))).

141. *Id.* at 436 (“Out of this conflict grew the middle measure providing that Congress should not interfere until the year 1808; with an implication, that after that date, they might prohibit the importation of slaves into the States then existing, & previous thereto, into the States not then existing.” (quoting Letter from James Madison to Robert Walsh (Nov. 27, 1819))).

142. When the provision was discussed, delegates often noted that Virginia, South Carolina, or another state would not agree to a constitution that permitted Congress to immediately ban the foreign slave trade, see 2 FARRAND, *supra* note 76, at 364–65, 371, or it was discussed in terms that did not refer to the distinction between new and old states. *Id.* at 408–09.

trade may imply the absence of a general power to impose different rules on different states.<sup>143</sup> There was also little discussion of the uniformity provisions in Article I, which may weigh against reading a strong negative inference from them.<sup>144</sup> And even if the explicit uniformity requirements in Article I suggest that Congress is not generally required to treat all states the same, that implication is weaker with respect to the Reconstruction Amendments, which were added to the Constitution later.<sup>145</sup>

At bottom, the textual argument for the state equality principle is not much worse than the textual support for other constitutional rules, especially ones associated with the Tenth Amendment.<sup>146</sup> Because “[t]here is a[n] . . . association between the Tenth Amendment and the general idea of state sovereignty,” federalism- or state-sovereignty-preserving rules can “be classified as applications of the Tenth Amendment.”<sup>147</sup> The same may be true for equal sovereignty.

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143. This inference, however, is not made elsewhere. For example, Article I Section 8 contains several clauses that appear to authorize Congress to enact criminal laws, but we do not infer from this that Congress may not enact criminal laws pursuant to its other delegated powers. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 6 (giving Congress the power to “provide for the Punishment of counterfeiting the Securities and current Coin of the United States”); *id.* art. I, § 8, cl. 10 (granting the power to “define and punish Piracies and Felonies committed on the high Seas”); *United States v. Comstock*, 560 U.S. 126, 135–36 (2010) (“[T]he Constitution, which nowhere speaks explicitly about the creation of federal crimes beyond those related to ‘counterfeiting,’ ‘[t]reason,’ or ‘Piracies and Felonies committed on the high Seas’ or ‘against the Law of Nations,’ nonetheless grants Congress broad authority to create such crimes.” (citations omitted)). Article I Section 9 referred to the foreign slave trade, which was understood to be within Congress’s power to regulate under the Commerce Clause. *See* U.S. CONST. art. I, § 8, cl. 3; *id.* art. I, § 9, cl. 1. So, at a bare minimum, this suggests Article I, Section 9 recognized Congress’s power to impose different rules on different states under the commerce power. *See supra* notes 111–112 and accompanying text (discussing scope of commerce power).

144. *Cf. Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1175 (2013) (“We have long held that the *expressio unius* canon does not apply ‘unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it.’” (quoting *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003))); Gillian E. Metzger, *The Constitutional Legitimacy of Freestanding Federalism*, 122 HARV. L. REV. F. 98, 102 (2009) (arguing that strong inferences should not be made with regard to exclusivity because the founders expected the details of constitutional federalism to work out over time).

145. *See Gomez-Perez v. Potter*, 553 U.S. 474, 486 (2008) (“‘[N]egative implications raised by disparate provisions are strongest’ in those instances in which the relevant . . . provisions were ‘considered simultaneously when the language raising the implication was inserted.’” (quoting *Lindh v. Murphy*, 521 U.S. 320, 330 (1997))).

146. *See* John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2029–40 (2009); Primus, *supra* note 33, at 1095–98. Several theorists have more generally catalogued the ways in which the content of constitutional law is not completely specified by the text. *See, e.g.*, Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 710–11 (1975); Primus, *supra* note 33, at 1106–13.

147. Primus, *supra* note 78, at 633; *see also* *Printz v. United States*, 521 U.S. 898, 905, 919 (1997) (“Because there is no constitutional text speaking to this precise question, the answer to the CLEOs’ challenge must be sought . . . in the structure of the Constitution [including the Tenth Amendment] . . . .”); *New York v. United States*, 505 U.S. 144, 156–57 (1991) (the

### B. Original Meaning and History

If constitutional text is not dispositive, perhaps equal sovereignty can be illuminated by or traced to the original public meaning of the Constitution. But an analysis of the original meaning of the Constitution reveals no clear understanding or expectation that the Constitution prohibits Congress from distinguishing among the states.<sup>148</sup> The sources often used by originalists—the records of the Convention, the Federalist Papers, and other contemporary writings indicative of public opinion—do not say much, if anything, about whether federal law may impose different rules on different states. They neither suggest Congress may distinguish among the states, nor that Congress may not do so.<sup>149</sup>

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anticommandeering principle “is not derived from the text of the Tenth Amendment”); *cf.* Alden v. Maine, 527 U.S. 706, 713, 728 (1999) (“[T]he sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather . . . the States’ immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution . . .”).

148. Originalists divide the methodology into (a) the “original public meaning” of the Constitution, and (b) the expected applications about how the Constitution would operate. Lawrence B. Solum, *Faith and Fidelity: Originalism and the Possibility of Constitutional Redemption*, 91 TEX. L. REV. 147, 152 (2012) (book review) (summarizing these theories). Equal sovereignty is probably either associated with the Tenth Amendment or implied by the general structure of the Constitution. Because these provisions are framed at a high level of generality, discerning their original public meaning involves some considerations of how contemporaries expected a principle would apply. See Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011, 2031–34 (2012) (book review). Subsequently disaggregating a principle’s public meaning from its expected applications is therefore difficult. See *id.*; *cf.* Mitchell N. Berman, *Originalism and Its Discontents (Plus a Thought or Two About Abortion)*, 24 CONST. COMMENT. 383, 393 (2007) (describing this difficulty with regard to original interpretations of the Equal Protection Clause); David A. Strauss, *Can Originalism Be Saved?*, 92 B.U. L. REV. 1161, 1166–67 (2012) (noting that original public meaning theory can become a “black hole”). Others identify in originalism a form of ethical argument whose force depends on whether an historical narrative resonates with Americans’ identities. See, e.g., Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1803–06 (1997); Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1 (2009). I try to touch on these approaches in this section.

149. Thomas Colby has argued that it was originally understood that Congress was required to legislate uniformly under the Commerce Clause. Colby, *supra* note 37, at 263–65. Colby maintains that the Port Preference Clause contains an implicit uniformity constraint on the commerce power “because the Framers had a narrow conception of the scope of the commerce power” which “include[d] only the power to tax and regulate commercial shipping and navigation between states. . . . [v]irtually all of [which] was conducted through ports.” *Id.* at 283–84 (footnote omitted). But it is unclear why we should assume the Port Preference Clause was coextensive with and therefore implicitly constrains the commerce power. Originalists who argue for a narrow interpretation of the Commerce Clause maintain that the power to regulate commerce includes the power to regulate all forms of trade or exchange of goods and commodities, not only trade or exchanges by port. See *United States v. Lopez*, 514 U.S. 549, 585–87 (1995) (Thomas, J., concurring); RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 280–88 (2004). Some of the historical evidence Colby cites refers to the commerce power separately, and in more capacious terms, than the power related to the regulation of ports. See Colby, *supra* note 37, at 283–84 (citing 3 FARRAND, *supra* note 76, at 116).

In general, references to the equality of the states in the convention records pertain to one specific issue—the formula for representation in the federal legislature—rather than any general principle about when federal law can distinguish among the states.<sup>150</sup> And it would be a stretch to say that the Senate apportionment scheme embodies some general principle that requires any kind of equal treatment of the states.<sup>151</sup> Most people agree the Senate apportionment scheme reflects a compromise on the formula for representation in the federal legislature, not agreement on any broad principle of state equality.<sup>152</sup> The Senate apportionment scheme may, for example, be attributable to the Convention’s voting rules, which required the consent of state delegations.<sup>153</sup> Any principle of structure embodied in the Senate apportionment scheme is also qualified by the House of Representatives’ representation scheme, which treats each state according to one standard (representation according to population) that authorizes different treatment of different states.<sup>154</sup> It may also be limited by the Seventeenth Amendment, which severs the direct connection between the Senate and the states—the Amendment makes senators popularly elected, rather than elected by state legislatures.<sup>155</sup>

References to the equality of the states in the Federalist Papers are also not especially informative.<sup>156</sup> Colby, for example, cites a series of statements—some from the Founding, others later in time—about how the Union is a “confederation of States equal in sovereignty.”<sup>157</sup> But none of these statements speak to Congress’s power to vary from that principle; nor do they delineate the spheres in which the states are equal sovereigns.<sup>158</sup>

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150. See, e.g., 1 FARRAND, *supra* note 76, at 167, 250–51, 324–25; 2 *id.* at 454.

151. See, e.g., *Wesberry v. Sanders*, 376 U.S. 1, 11–13 (1964) (suggesting drafting history of Senate apportionment scheme reflects a compromise between equal sovereignty and equal representation by population).

152. See 1 FARRAND, *supra* note 76, at 511 (representation issue threatened to “break up” the Convention); *id.* at 321, 532; THE FEDERALIST NO. 62, at 345 (James Madison) (Clinton Rossiter ed., 1961) (Senate representation is “evidently the result of compromise”); Bradford R. Clark, *Constitutional Compromise and the Supremacy Clause*, 83 NOTRE DAME L. REV. 1421, 1426 (2008) (“[D]elegates from large states were forced to compromise and incorporate specific proposals favored by small states. . . . includ[ing] the basis for representation in the Senate . . .”).

153. FRANCES E. LEE & BRUCE I. OPPENHEIMER, *SIZING UP THE SENATE: THE UNEQUAL CONSEQUENCES OF EQUAL REPRESENTATION* 26–27 (1999).

154. U.S. CONST. art. I, § 2; see also 1 FARRAND, *supra* note 76 at 179, 321 (noting that delegates thought that the House’s representation formula could disadvantage some states). The Elections Clause, moreover, ensures that voting qualifications vary by state because it fixes qualifications for voting in each state to “the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.” U.S. CONST. art. I, § 2 cl. 1.

155. U.S. CONST. amend. XVII; see also *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 820–21 (1995).

156. See e.g., THE FEDERALIST NO. 62 (James Madison).

157. See Colby, *supra* note 32 (manuscript at 36 & n.162) (quoting 35 ANNALS OF CONG. 397 (1820) (statement of Sen. Pinkney)).

158. See *id.* at 36–42.

There are also a number of contemporaneous statements that are critical of the idea of equal sovereignty.<sup>159</sup>

Courts invoking equal sovereignty sometimes trace the principle to the Northwest Ordinance of 1787,<sup>160</sup> but the Ordinance's meaning is unclear. The Northwest Ordinance established a three-part progression toward statehood for certain territories and provided that new states would be admitted on an "equal footing" "in all respects whatever" with the original states.<sup>161</sup> However, "equal footing" did not necessarily promise new states the same legislative sovereignty as the original states. The Northwest Ordinance was passed while some delegates to the Constitutional Convention proposed to restrict new states' voting powers to ensure that newly admitted states could never outvote the original states.<sup>162</sup> One legal historian described these proposals as "the political opposite of the 'equal footing' principle," and suggested the Ordinance drafters understood "equal footing" to mean new states would receive fair representation in Congress.<sup>163</sup> Additionally, the Northwest Ordinance actually broadened Congress's powers over the would-

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159. In drafting debates, Madison maintained that "whatever reason might have existed for the equality of suffrage [among the States] when the Union was a federal one among sovereign States, it must cease when a national Govern[ment] should be put into the place." 1 FARRAND, *supra* note 76, at 37; *see also* 2 *id.* at 8–9. Others expressed similar concerns. 1 *id.* at 184 ("Brearly[ ] opposes the equality of Representation, alledges [*sic*] that although it is numerically equal, yet in its operation it will be unequal . . ."). And while the Senate eventually gave each state equal representation, the House's representation scheme differentiated between the states.

With respect to subsequent congressional debates on admission conditions, numerous congressional representatives defended Congress's ability to impose different terms on different states. *See, e.g.*, 35 ANNALS OF CONG. 280 (1820) ("Congress has "a right to prescribe the terms" of a states' admission "provided those terms are compatible with the Constitution, and do not violate any of the essential rights of sovereignty." (quoting Sen. Ruggles)); *id.* at 288–89 (the phrase "may be admitted" in the New State Clause "implies that Congress must exercise their discretion. . . limited [only] by the Federal Constitution, and . . . exercised in conformity with its principles" (quoting Sen. Trimble)); *id.* at 281 ("[I]t had been the constant practice of Congress to impose similar restrictions upon new States, when admitted into the Union. . . Ohio, Indiana, and Illinois . . . were required to form their constitutions in conformity with the ordinance of 1787." (quoting Sen. Ruggles)); *see also id.* at 282–85.

160. *See, e.g.*, *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 222 (1845). The Ordinance is sometimes viewed as a source of constitutional law. *See id.*; ONUF, *supra* note 69, at 133–53 (highlighting that contemporaries viewed Ordinance as constitutional); Denis P. Duffey, Note, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929 (1995). Courts also sometimes trace the equal sovereignty principle to the state enabling acts, but these acts imposed different conditions on different states. *See supra* text accompanying notes 55–67.

161. ONUF, *supra* note 69, at 62–64. Congress later ratified the Northwest Ordinance. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50.

162. 2 FARRAND, *supra* note 76, at 3; Letter from James Madison to Robert Walsh (Nov. 27, 1819) in 9 THE WRITINGS OF JAMES MADISON 8 (Gaillard Hunt ed., 1910) ("[I]t remains to be decided how far the States formed within that Territory . . . are on a different footing from its other members, as to their legislative sovereignty.").

163. GEORGE WILLIAM VAN CLEVE, *A SLAVEHOLDERS' UNION: SLAVERY, POLITICS, AND THE CONSTITUTION IN THE EARLY AMERICAN REPUBLIC* 129, 155–56 (2010).

be states, resulting in different treatment of those states.<sup>164</sup> Whereas the 1784 Ordinance implied that new states would be “free to legislate on virtually any subject other than war, peace, or monarchy,”<sup>165</sup> the operative 1787 Ordinance established “forever . . . unalterable” compacts prohibiting religious discrimination and slavery in the new states, among other things.<sup>166</sup> Madison inferred from the Ordinance that it would be up to Congress to determine whether newly admitted states would have the same “legislative sovereignty” as the original states.<sup>167</sup>

### C. Structure

Courts and commentators also sometimes infer the equal sovereignty principle from the Constitution’s structure.<sup>168</sup> Colby, for example, emphasizes constitutional structure in his defense of the equal sovereignty principle, describing the principle as part of the “very nature of our constitutional compact.”<sup>169</sup> And it is true that many constitutional rules are derived from inferences about the Constitution’s structure.<sup>170</sup> Many judicial decisions justify constitutional rules in terms of principles like federalism or nationalism, which are inferred from the Constitution’s general structure and specific provisions.<sup>171</sup> Courts, for example, reason that the nationalist structure of

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164. The 1784 Ordinance permitted settlers to establish a temporary government whereas the 1787 Ordinance specified that the territory would be temporarily governed by a congressionally appointed governor. ONUF, *supra* note 69, at 47, 60–61.

165. VAN CLEVE, *supra* note 163, at 155.

166. ONUF, *supra* note 69, at 62–64.

167. Letter from James Madison to Robert Walsh, *supra* note 162 (“[I]t remains to be decided how far the States formed within that Territory . . . are on a different footing from its other members, as to their legislative sovereignty.”).

168. See, e.g., *Coyle v. Smith*, 221 U.S. 559, 580 (1911) (“[T]he constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized.”).

169. See Colby, *supra* note 32 (manuscript at 36–52).

170. See Manning, *supra* note 146, at 2004; Primus, *supra* note 33, at 1130 (“[T]he idea that structure can be a valid nontextual source of constitutional rules enjoys widespread if quiet acceptance . . .”).

171. Some do so with respect to federalism. See, e.g., *United States v. Lopez*, 514 U.S. 549, 579 (1995) (“[T]here is widespread acceptance of our authority to enforce the dormant Commerce Clause, which we have but inferred from the constitutional structure . . .”); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991) (“[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms . . .”); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547 (1985) (“It is equally true, however, that the text of the Constitution provides the beginning rather than the final answer to every inquiry into questions of federalism, for ‘[b]ehind the words of the constitutional provisions are postulates which limit and control.’” (quoting *Monaco v. Mississippi*, 292 U.S. 313, 322 (1934))). Others do so with respect to nationalism. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 385 (1819) (“The security against abuse is to be found in the constitution and nature of the government, in its popular character and structure.”); *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 343 (1816) (“It is a mistake that the constitution was not designed to operate upon states, in their corporate capacities. It is crowded with provisions which restrain or annul the sovereignty of the

the Constitution implicitly delegates powers to the federal government that enable the federal government to serve nationalist ends.<sup>172</sup> Relatedly, courts reason that the Constitution's federalist structure implicitly prohibits Congress from regulating in ways that undermine the purposes of federalism.<sup>173</sup> But not all structural inferences are created equal. And the structural case for the equal sovereignty principle is especially weak, because equal sovereignty potentially undermines other principles that the Constitution embodies at a similar level of generality, such as federalism and nationalism.<sup>174</sup>

### 1. Federalism

The equal sovereignty principle is potentially inconsistent with federalism because equal sovereignty may undermine several of federalism's key goals. The standard benefits of federalism are well rehearsed: Federalism enables local decisionmaking, which may be better informed about local problems.<sup>175</sup> It also may provide more opportunities for individual citizens to engage in the governing process, perhaps making the process more democratic.<sup>176</sup> Federalism also allows for more regulatory diversity, which may satisfy the preferences of more citizens than uniform regulation can, because like-minded citizens can aggregate together and select their preferred rules.<sup>177</sup> Regulatory diversity also may result in experimentation as different jurisdictions try out different policies.<sup>178</sup>

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states in some of the highest branches of their prerogatives.”); *Chisholm v. Georgia*, 2 U.S. 419, 465 (1793) (Wilson, J.) (“Fair and conclusive deduction, then, evinces that the people of the United States did vest this Court with jurisdiction over the State of Georgia.”); see also Metzger, *supra* note 144, at 102–05.

172. See Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 *STAN. L. REV.* 115, 115–16 (2010) (“A federal constitution ideally gives the central and state governments the power to do what each does best.”). The Court occasionally invokes this kind of reasoning. *E.g.*, *United States v. Comstock*, 560 U.S. 126, 142–43 (2010) (construing federal custodial power based on assumption that federal government could prevent “an interstate epidemic”); *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 413–24 (2003) (reasoning that the executive’s foreign affairs preemption power is based on benefits of the president “speak[ing] for the Nation with one voice”).

173. See *Lopez*, 514 U.S. at 564 (rejecting government’s proposed interpretation of Commerce Clause because “it is difficult to perceive any limitation on federal power [in the theory], even in areas such as criminal law enforcement or education where States historically have been sovereign”). In holding that Congress may not require state officers to enforce federal law, *Printz* openly weighed “the effect that federal control of state officers would have upon” the states’ ability to provide “security” from the federal government. *Printz v. United States*, 521 U.S. 898, 922, 935 (1997).

174. See Manning, *supra* note 146, at 2055–58 (“[T]he Constitution’s structural provisions reflect cross-cutting purposes.”).

175. Richard Briffault, “What About The ‘Ism?’” *Normative and Formal Concerns in Contemporary Federalism*, 47 *VAND. L. REV.* 1303, 1327–29 (1994).

176. *Id.*

177. Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 *U. CHI. L. REV.* 1484, 1493–94 (1987).

178. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

If we take seriously the claim that it is better for federalism when states differ from one another, then prohibiting Congress from enacting laws that specifically identify particular states or that impose regulations with differential effects on different states would be inconsistent with federalism.<sup>179</sup> Ensuring different treatment of different states would provide a measure of regulatory diversity, possibly satisfying the preferences of more citizens than one uniform law could. Allocating different powers to different states would also ensure some experimentation in regulatory policies. By differentiating between the states, federal law may preserve many benefits of federalism such as regulatory diversity, satisfaction of more citizens' preferences, and regulatory experimentation.

There are also reasons to embrace the possibility that these benefits of federalism can be secured by federal law rather than by its absence. Today, states often exercise lawmaking powers concurrently with the federal government rather than in completely separate spheres.<sup>180</sup> And in an era where federal statutes cover a wide range of substantive areas, allowing those statutes to differentiate among the states may be an essential mechanism for preserving the benefits that flow from states differing from one another—benefits originally associated with exclusive state regulation in substantive areas.

Consider, for example, two statutes that authorize differential treatment of different states. The Professional and Amateur Sports Protection Act (PASPA) prohibits state-run gambling, except in states that had gambling operations prior to the Act's passage.<sup>181</sup> The legislative history indicates these "state exemptions" were intended to ensure the legislation would "not [ ] interfere with existing laws, operations, or revenue streams."<sup>182</sup> A uniform prohibition could have "threaten[ed] the economy of Nevada, which over many decades ha[d] come to depend on legalized private gambling."<sup>183</sup> PASPA's regulatory carve-outs thus respected local differences between the states and, in doing so, preserved a measure of regulatory diversity and local decisionmaking by allowing a handful of states to choose whether to retain state-run gambling operations.

Similar to PASPA, the Clean Air Act (CAA) generally preempts state vehicle-emissions standards, but it requires the EPA to more freely allow California to adopt its own standards.<sup>184</sup> Other States may choose to adopt

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179. Cf. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 580–88 (1985) (O'Connor, J., dissenting) (arguing state diversity is a beneficial end of federalism).

180. See, e.g., Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 *YALE L.J.* 534 (2011) (discussing the growing number of federal schemes implemented by the states).

181. 28 U.S.C. §§ 3702, 3704 (2012).

182. 138 *CONG. REC.* 12,973 (1992).

183. 137 *CONG. REC.* 256 (1991).

184. See Clean Air Act (CAA) § 209, 42 U.S.C. § 7543(a)–(b)(1) (2012); see generally H.R. REP. NO. 95-294, at 23 (1977) as reprinted in 1977 U.S.C.C.A.N. 1077, 1101 (describing the 1977 CAA amendments and maintaining the unique authority of California to adopt and enforce its own motor vehicle emission standards).



either the EPA or California's vehicle-emissions standard.<sup>185</sup> The CAA's legislative history shows that Congress recognized California's unique history of developing rigorous vehicle-emissions regulations.<sup>186</sup> By permitting California to more freely develop its own vehicle-emission standards and allowing other states to select between the California and federal standards, the CAA allows for more local decisionmaking and more diverse vehicle-emissions standards than a uniform federal rule.<sup>187</sup>

A uniformity requirement on federal law may also undermine federalism by maximizing the number of states subject to federal direction. If Congress is limited to choosing between legislation that establishes one uniform federal standard or no federal legislation at all, which permits each state to develop its own standard (possibly resulting in fifty different standards), Congress may choose to establish one uniform standard that limits all the states. In the CAA, for example, Congress could have reasonably concluded that fifty different vehicle-emissions standards were too many but that the automobile industry could tolerate two different standards.

## 2. Nationalism

Treating some states differently from others also furthers values associated with nationalism. The benefits and purposes of nationalism may include, among other things, having a federal government that is capable of effectively exercising those powers delegated to it, as well as unity, cohesion, and coordination.<sup>188</sup>

Differentiating between the states furthers the purposes of nationalism, because it provides a useful regulatory tool that enables the federal government to effectively exercise its delegated powers.<sup>189</sup> There are often differences between the states that call for different treatment. A federal oil tax, for example, exempted oil that was produced in "a well located north of the Arctic Circle" or "a well located on the northerly side of the divide of the Alaska-Aleutian Range."<sup>190</sup> Alaska's "fragile ecology, [ ] harsh environment, and [ ] remote location" may have made Alaskan oil more expensive to produce, and by reducing the taxes applicable to that oil, the tax exemption

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185. 42 U.S.C. § 7507.

186. *Air Pollution and Alternative Fuels, Hearing Before the H.R. Comm. on Energy and Commerce*, 101st Cong. 5–6 (1989) (statement of Cal. State Assemb. Byron Sher); S. REP. NO. 101-228, at 45–46 (1989), as reprinted in 1990 U.S.C.C.A.N. 3385, 3431–32.

187. Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 Nw. U. L. REV. 1097, 1110 (2009).

188. See Cooter & Siegel, *supra* note 172, at 117; Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1158–63 (1988) (describing nationalist premises of federal courts doctrines); Seinfeld, *supra* note 75, at 1085–86.

189. Another way of framing this argument is that, because Congress's powers are plenary in fields in which it may regulate, it should be able to specify which states exercise which lawmaking powers within that domain. See *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 423, 434 (1946).

190. 26 U.S.C. §§ 4991(b), 4994(e) (1976) (repealed 1988).

accounted for the higher cost of producing Alaskan oil.<sup>191</sup> Federal law also requires only “the States of Alaska, Idaho, Oregon and Washington” to advise the federal government about laws and regulations pertaining to salmon.<sup>192</sup> There are geographic reasons why those states—but not, for example, Oklahoma—should advise the federal government about laws relating to salmon.<sup>193</sup>

Differences between the states may also call for different treatment even where the differences are attributable to the state’s laws or policies. The states sometimes differ from one another because they choose to pursue different policies. And, in some cases, there will be some continuity with respect to which states pursue which policies. Political theories about federalism assume that citizens choose to associate with states based on the policies a state has previously chosen to pursue; this may cause states to pursue the same policies as they have done in the past.<sup>194</sup>

Treating some states differently than others may further other values associated with nationalism, such as limiting disunity among the states. For example, federal law allows “[t]he State[s] of South Carolina” and “Nevada” to “limit the volume of low-level radioactive waste accepted for disposal . . . to a total of 8,400,000 cubic feet” and “1,400,000 cubic feet” respectively.<sup>195</sup> Doing so prohibits other states from using South Carolina and Nevada as dump sites. Exempting states from otherwise applicable federal requirements, as in PASPA, may also benefit the federal structure more than an unyielding requirement that attempts to impose one rule on all the states.<sup>196</sup>

While the Constitution may refer to the states collectively, that does not justify an inference that Congress is required to treat all of the states the same. Part of Colby’s structural argument for the equal sovereignty principle is that the Constitution was ratified against a “backdrop understanding” of equal sovereignty that was “drawn from European notions of international law.”<sup>197</sup> But states in the Union are not sovereign in the same way that international states are sovereign; indeed, they differ in ways that speak to the

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191. *United States v. Ptasynski*, 462 U.S. 74, 78, 85 (1983).

192. 16 U.S.C. § 3635 (2012).

193. *See id.*

194. *See* Seth F. Kreimer, *Federalism and Freedom*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 71–72 (2001); *see also* Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 136–39, 157–58 (2001) (noting that a “classic argument[ ] for federalism” is that people can “accommodate their own preferences by voting with their feet” and migrate to states that share their political preferences); Ernest A. Young, *The Volk of New Jersey? State Identity, Distinctiveness, and Political Culture in the American Federal System* 66–105 (Duke Law Sch. Pub. Law & Legal Theory Series No. 2015-11, Feb. 24, 2015), <http://ssrn.com/abstract=2552866> [<http://perma.cc/8CPQ-DKTR>].

195. 42 U.S.C. § 2021e(b) (2012).

196. Thus, while Colby maintains that the equal sovereignty principle functions as a means for “generating unity,” sometimes it may do the opposite. Colby, *supra* note 32 (manuscript at 47–48).

197. *Id.* (manuscript at 50, 52). Colby also maintains that “equal sovereignty is an essential, implicit structural component of virtually any federalist system.” *Id.* (manuscript at 46). But federalist systems vary in many different ways, and it is hard to maintain that any one

relevance of the international law version of the equal sovereignty principle. The international law version of the equal sovereignty principle maintains that all states are on an equal playing field because no one state or lawmaking body is superior to another.<sup>198</sup> But that premise does not hold for states in the Union. Under the Supremacy Clause, federal law is supreme, and states are subject to federal law.<sup>199</sup> The federal government thus occupies a position with respect to states in the Union that does not exist in international law. And this means the key premise of the international law version of the equal sovereignty principle—that there is no hierarchy among lawmakers on the international field—does not apply to states in the Union.<sup>200</sup> Moreover, the contours of the equal sovereignty principle in international law do not obviously support a domestic analog that requires Congress to treat all states the same.<sup>201</sup> Under international law, equal sovereignty merely gives all foreign states the legal capacity to make international law and to be recognized by other states *as states*.<sup>202</sup> This articulation of the equal sovereignty principle more closely resembles the theory that equal sovereignty means that all states in the Union possess the constitutionally essential attributes of statehood, whatever those may be.<sup>203</sup>

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attribute is the essence of a federal system. Vicki C. Jackson, *Comparative Constitutional Federalism and Transnational Judicial Discourse*, 2 INT'L J. CONST. L. 91, 104–05 (2004); Manning, *supra* note 146, at 2061; cf. Leah M. Litman, *Structural Outliers: The Role of Historical Novelty in Constitutional Structure* 66 DUKE L.J. (forthcoming 2017) (on file with author) (arguing that a statute's novelty is not a sign that it is unconstitutional on constitutional federalism grounds).

198. Hans Kelsen, *The Principle of Sovereign Equality of States as a Basis for International Organization*, 53 YALE L.J. 207, 208–09 (1944); Ulrich K. Preuß, *Equality of States—Its Meaning in a Constitutionalized Global Order*, 9 CHI. J. INT'L L. 17, 23–26 (2008).

199. U.S. CONST. art. VI, cl. 2; *Testa v. Katt*, 330 U.S. 386 (1947). See generally Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1034–42 (1995).

200. See JAMES CRAWFORD, *BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 448–49 (8th ed. 2012) (“A corollary of their independence is the equality of states, historically expressed by the maxim *par in parem non habet imperium*.” (footnote omitted)); 1 OPPENHEIM'S *INTERNATIONAL LAW* 339 (Robert Jennings & Arthur Watts eds., 9th ed. 1996) (“[T]he member states of the international community are equal to each other as subjects of international law.”).

201. Today, the international law principle of equal sovereignty is also riddled with exceptions—different states exercise different lawmaking powers in different international bodies, and the principle has “waning effectiveness as a shield from external intervention.” Gabriella Blum, *The Crime and Punishment of States*, 38 YALE J. INT'L L. 57, 104 (2013); see also Preuß, *supra* note 198, at 25–26.

202. See sources cited *supra* note 198.

203. See *Coyle v. Smith*, 221 U.S. 559, 567 (1911) (“‘This Union’ was and is a union of States . . . each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself.”).

## D. Congressional Practice

In part because the meaning of the constitutional text, history, and structure are ambiguous, a useful measure of the constitutional validity of the equal sovereignty principle is its “descriptive accuracy,”<sup>204</sup> meaning whether the principle describes or fits with most congressional practice.<sup>205</sup> A congressional history of treating some states differently than others bears on the legitimacy and scope of the equal sovereignty principle, because it engages with the Court’s own justification for the equal sovereignty principle—the purported “historic tradition that all the States enjoy equal sovereignty.”<sup>206</sup> Because the Court’s account of equal sovereignty rested on tradition and convention, we should feel comfortable eliminating accounts of the equal sovereignty principle that depart too far from congressional practice.<sup>207</sup> Congressional statutes may also offer more specific evidence on the scope of the equal sovereignty principle, at least compared to the high-level abstractions and inferences that are made from the Constitution’s text, history, and structure.

The reality is that Congress has frequently enacted both laws that specifically identify particular states and laws that result in differential effects on different states.<sup>208</sup> And it has done so for a very long time.<sup>209</sup> Statutes passed in the first and second Congresses regulated merchandise reports for ships

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204. Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1203, 1233 (1987).

205. *Id.*; see also Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 540–41 (1999).

206. *Shelby County v. Holder*, 133 S. Ct. 2612, 2621 (2013) (quoting *NAMUDNO*, 557 U.S. 193, 203 (2009)).

207. There may also be independent reasons for why the validity of a constitutional interpretation should be measured in part by congressional practice. See David A. Strauss, *What Is Constitutional Theory?*, 87 CALIF. L. REV. 581, 582 (1999) (“[A theory] cannot call for a wholesale departure from existing practices.”). Some of these reasons range from legitimacy, see Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1112–13 (2008), to rule of law values, see Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 178 (2008), to judicial humility, see Leah M. Litman, *Taking Care of Federal Law*, 101 VA. L. REV. 1289, 1339 (2015).

208. The *Shelby County* dissent intimated that Congress frequently distinguishes among the states. 133 S. Ct. at 2649 (Ginsburg, J., dissenting) (“Federal statutes that treat states disparately are hardly novelties.”). But the Court and commentators have identified only a handful of relatively recent laws differentiating between the states. *E.g., id.* (listing PASPA, cooperative spending formulas, and designation of Yucca Mountain); Price, *supra* note 19, at 29 n.26 (additionally listing Clean Air Act, federal housing assistance requirement, and 1806 statute).

209. Evidence of early congressional practice may also serve as evidence of original meaning. See Michael Bhargava, *The First Congress Canon and the Supreme Court’s Use of History*, 94 CALIF. L. REV. 1745, 1746–47 (2006).

by establishing different reporting requirements for ships that docked in different states.<sup>210</sup> Statutes granted authority to federal officials to issue transportation permits and the federal officials' authority varied by state;<sup>211</sup> the payment of federal judges also varied by state.<sup>212</sup> Statutes passed in the early 1800s also differentiated between the states by granting jurisdiction over certain federal revenue offenses only to certain state courts<sup>213</sup> and by allocating federal money or federal improvements to particular states.<sup>214</sup>

Beyond these historical examples, many statutes today specifically identify particular states for differential treatment or adopt a rule that has differential effects on different states. Consider the following laws (some of which have already been discussed):

- Some federal laws impose limits on states' lawmaking powers while exempting particular states, or categories of states, from federal regulation.
  - PASPA prohibits state-run gambling unless state gambling "was authorized by a statute" and "actually was conducted" prior to October 1991.<sup>215</sup> Federal law prohibited states from imposing taxes on internet access between 1998 and 2001 unless, before 1998, "a State . . . generally collected such tax on charges for Internet access."<sup>216</sup>
  - In the area of commercial driving regulation, federal law establishes "[s]pecial rules for Wyoming, Ohio, Alaska, Iowa, and Nebraska."<sup>217</sup> "Ohio may allow the operation of commercial motor vehicle combinations with 3 property-carrying units of 28.5 feet each," but other states

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210. 1 Laws of the United States of America, ch. 35, § 20, 199–200 (1796) (specifying that each shipmaster had "twenty-four hours after the arrival" of the ship to make the report "except in the state of Georgia, where such report shall be made within forty-eight hours").

211. *Id.* at 185–86. Congress specified that the collector of Pennsylvania could grant permits for transportation of goods to and from New York, New Jersey, Delaware, and Maryland; the collector of New York could grant similar permits across New Jersey; and the collector of Maryland or Virginia could grant permits for transportation across Delaware and Pennsylvania. This resulted in greater limits on some states' lawmaking powers, because federal officials' determinations occasionally preempted or displaced contrary state law. *E.g.*, *Gibbons v. Ogden*, 22 U.S. 1 (1824).

212. 1 Laws of the United States of America, ch. 17, 45 (1796). The judge for the district of Maine received \$1,000; the judge for the district of Massachusetts received \$1,200. *Id.*

213. *See* Act of Mar. 8, 1806, ch. 14, 2 Stat. 354, 354 (granting jurisdiction to certain New York and Pennsylvania state courts); *see also* Act of Apr. 21, 1808, ch. 51, 2 Stat. 489 (reaffirming 1806 statute and extending the same jurisdiction to certain courts in Ohio).

214. FELLER, *supra* note 69, at 51; *see also* Alison L. LaCroix, *The Interbellum Constitution: Federalism in the Long Founding Moment*, 67 *STAN. L. REV.* 397, 409–10 (2015) (discussing the passing of internal improvement legislation and how many of these bills were specific to certain states).

215. 28 U.S.C. § 3704 (2012). The legislative history of the statute recognized the exemption was intended to and would allow state-run gambling only in Oregon, Nevada, and Delaware. *See* S. REP. NO. 102-248, at 9–10 (1991).

216. Internet Tax Freedom Act, Pub. L. No. 105-227, § 1101(a)–(d), 112 Stat. 2681, 2719 (1998).

217. 49 U.S.C. § 31112(c) (2012).

may not.<sup>218</sup> And, unlike other states, “Nebraska may allow the operation of a truck tractor and 2 trailers or semitrailers not in actual lawful operation on a regular or periodic basis on June 1, 1991.”<sup>219</sup>

- All states except for California that seek to obtain a waiver from the EPA’s preemption provisions bear the burden of proof to show that their emission standards are at least as protective as the federal standards. But California may adopt its own vehicle-emission standards unless the EPA shows that California’s standards are not equally protective of public health.<sup>220</sup>
- The Employee Retirement and Income Security Act (ERISA) preempts all state laws that “relate to any employee benefit plan,”<sup>221</sup> but exempts from that provision “the Hawaii Prepaid Health Care Act” or subsequent amendments to the Act.<sup>222</sup>
- Federal housing law generally requires entities administering federal housing assistance “to include a resident of public housing or a recipient of assistance.”<sup>223</sup> But “the Housing Authority of the county of Los Angeles, California and [of] the States of Alaska, Iowa, and Mississippi” are exempt from this requirement.<sup>224</sup>
- Some federal laws empower particular states to do things others cannot do.
  - Federal law allows “[t]he State of South Carolina . . . [to] limit the volume of low-level radioactive waste accepted for disposal . . . to a total of 8,400,000 cubic feet.”<sup>225</sup> Federal law also contains state-specific provisions for Washington and Nevada.<sup>226</sup>
  - Congress frequently signs off on interstate compacts, making federal laws that apply only to particular states.<sup>227</sup>
- Some federal laws establish programs that are limited to particular states.
  - Federal law requires only “the States of Alaska, Idaho, Oregon and Washington” to advise the federal government about laws and regulations pertaining to salmon.<sup>228</sup>

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218. *Id.* § 31112(c)(2).

219. *Id.* § 31112(c)(5).

220. Clean Air Act § 209, 42 U.S.C. § 7543 (2012); *see also* H.R. REP. NO. 95-294, at 23 (1977) (discussing California’s “broad discretion” in the emissions waiver context).

221. 29 U.S.C. § 1144(a) (2012).

222. *Id.* § 1144(b)(5)(A).

223. Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, § 211, 125 Stat. 552, 695 (2011).

224. *Id.*; *see also* Price, *supra* note 19, at 29 n.26.

225. 42 U.S.C. § 2021e(b)(1) (2012).

226. *Id.* § 2021e(b)(2)–(3).

227. *See, e.g.*, Red River Compact, Pub. L. No. 96-564, 94 Stat. 3305 (1980) (allocating water rights among the states of Arkansas, Louisiana, Oklahoma, and Texas); Tarrant Reg’l Water Dist. v. Herrmann, 133 S. Ct. 2120 (2013) (interpreting the Red River Compact).

228. 16 U.S.C. § 3635 (2012).

- Federal law authorizes the Secretary of Energy to operate a home-heating oil reserve in and for “the States of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, Pennsylvania, and New Jersey.”<sup>229</sup>
- Federal law gives benefits to some states but not others, or gives different packages of benefits to different states.
  - Federal law establishes differing Medicare payments—the amount that hospitals, including state-run hospitals, are reimbursed for medical expenses—for different states. “[F]rontier States,” meaning states in which at least half of the counties have a population of less than six individuals per square mile, are reimbursed at a different rate than nonfrontier states.<sup>230</sup> Other cooperative-spending programs contain similar formulas that are also tied to population and that result in different treatment of different states<sup>231</sup> or that single out particular regions for different treatment.<sup>232</sup>
  - Federal law provides for a litany of tax benefits for various “bond[s] . . . issued by the State of Alabama, Louisiana, or Mississippi” or projects or loans initiated by those states.<sup>233</sup>
  - Spending programs condition a state’s receipt of federal money on the state complying with terms specified by federal law. But the programs also authorize federal agencies to waive the terms for some states but not others. These states that received waivers may receive federal money even though they are not required to comply with the same terms applied to other states.<sup>234</sup>
  - Federal spending provisions frequently contain earmarks for particular states.<sup>235</sup> In the wake of Hurricane Katrina, Congress earmarked billions of dollars for Louisiana and Mississippi.<sup>236</sup>
- Federal laws treat states differently in other ways as well.

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229. 42 U.S.C. § 6250. For other examples, see 26 U.S.C. § 143(l) (2012), 40 U.S.C. §§ 17702–08 (2012), and 43 U.S.C. § 390g (2012).

230. 42 U.S.C. §§ 1395w-4(e)(1)(I), 1395ww(3)(E)(iii).

231. 42 U.S.C. §§ 3796bb, 13925, 13971.

232. 40 U.S.C. § 14502.

233. 26 U.S.C. § 1400N.

234. See 20 U.S.C. § 7861 (2012); 40 U.S.C. § 14502(d)(5); 42 U.S.C. § 1315; see also Samuel R. Bagenstos, *Federalism by Waiver After the Health Care Case*, in *THE HEALTH CARE CASE 227, 228* (Nathaniel Persily et al. eds., 2013).

235. E.g., Disaster Relief Appropriations Act, 2012, Pub. L. No. 112-77, 125 Stat. 1277, 1277 (2011); Joshua Bone, *Stop Ignoring Pork and Potholes: Election Law and Constituent Service*, 123 *YALE L.J.* 1406, 1417 n.42 (2014); Price, *supra* note 19, at 28.

236. E.g., CONG. BUDGET OFFICE, *THE FEDERAL GOVERNMENT’S SPENDING AND TAX ACTIONS IN RESPONSE TO THE 2005 GULF COAST HURRICANES*, at 1–2 (2007), [https://www.cbo.gov/sites/default/files/110th-congress-2007-2008/reports/08-07-hurricanes\\_letter\\_0.pdf](https://www.cbo.gov/sites/default/files/110th-congress-2007-2008/reports/08-07-hurricanes_letter_0.pdf) [<http://perma.cc/UJ22-4DC4>]; see also MATT FELLOWES & AMY LIU, *THE BROOKINGS INSTITUTION, FEDERAL ALLOCATIONS IN RESPONSE TO KATRINA, RITA, AND WILMA: AN UPDATE* (2006), [http://www.brookings.edu/~media/research/files/reports/2006/8/metropolitanpolicy%20fellowes/20060712\\_katrinafactsheet.pdf](http://www.brookings.edu/~media/research/files/reports/2006/8/metropolitanpolicy%20fellowes/20060712_katrinafactsheet.pdf) [<http://perma.cc/82YC-6TCR>].

- Congress designated an area in Nevada, Yucca Mountain, as a site for high-level radioactive waste, allocated funds for the project, and imposed obligations on Nevada related to the designation.<sup>237</sup> Congress also allowed the president to designate other areas as radioactive-waste sites, which would trigger a similar set of benefits and obligations on states with designated sites.<sup>238</sup>
- The Agricultural Adjustment Act established state quotas for crop production.<sup>239</sup>

Unlike the constitutional text and history, congressional practice provides evidence not only about whether equal sovereignty should be thought of as a constitutional rule, but also about what its contours might be. Given the relevant congressional practice, it is hard to defend the idea that Congress may not regulate in ways that have differential effects on different states or specifically identify particular states when legislating.

The equal sovereignty principle could be narrowly defined, for example, only to apply to laws that have differential effects on different states' law-making powers, as opposed to laws that treat private individuals differently by virtue of the fact that those individuals are in different states.<sup>240</sup> That is, it might be the case that federal law could penalize an individual for jaywalking in State A but not State B. But federal law could not allow State A to legalize jaywalking, but forbid State B from legalizing jaywalking. Indeed, this is how both Colby and Schmitt define the equal sovereignty principle: "It is a guarantee of equal *sovereignty*,"<sup>241</sup> which, to them, means that every state must have the same "independent authority and . . . right to govern."<sup>242</sup> They therefore maintain that the equal sovereignty principle is not concerned with laws framed in geographic terms that merely affect some states more than others, such as federal spending laws or laws that merely regulate federal property that happens to be in particular states.<sup>243</sup>

But many of the aforementioned statutes curtail or expand some states' lawmaking authority more than others and, in doing so, differentially affect different states' ability to govern. PASPA, ERISA, CAA, commercial-driving

237. 42 U.S.C. §§ 10133, 10136, 10137.

238. *Id.* § 10136.

239. *See, e.g.*, 7 U.S.C. § 1344(b) (2012) (apportioning the national acreage allotment among states proportionate to their historical production levels).

240. The phrase "equal footing" or "political . . . sovereignty" could imply this limitation. *See* United States v. Texas, 339 U.S. 707, 716 (1950) (emphases added).

241. Colby, *supra* note 32 (manuscript at 59).

242. *Id.* (quoting *Sovereignty*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/sovereignty> [<http://perma.cc/JGH4-MQUX>]); Schmitt, *supra* note 32 (manuscript at 12–13) ("supreme dominion, authority, or rule" (quoting *Sovereignty*, BLACK'S LAW DICTIONARY (9th ed. 2009))); *id.* (manuscript at 14) ("The only category of federal legislation that violates the equal sovereignty principle, therefore, is legislation that prohibits a select number of states—but not others—from passing certain types of regulations."); accord Brader, *supra* note 37, at 155–56 (defining equal sovereignty principle this way).

243. Colby, *supra* note 32 (manuscript at 62–63); Schmitt, *supra* note 32 (manuscript at 13).



restrictions, and waste-removal provisions all allow some states to make laws that others cannot. The same is true for provisions that impose staffing requirements on only some state administrative bodies; through these requirements, such provisions remove from those states the authority to govern themselves by other means.<sup>244</sup>

Laws that are framed in “geographic” terms will also differentially affect states’ regulatory authority by virtue of the doctrine of preemption. Some Surface Mining Act provisions establish different requirements for mining operations in “prime farmland.”<sup>245</sup> Because some states have more “prime farmland” than others, the law limited some states’ lawmaking powers more than others. For example, where the more stringent Surface Mining Act provisions applied, a state was precluded from adopting the more lenient land-use regulations that other states with less prime farmland could adopt.

For similar reasons, laws that purport to regulate federal property will have differential effects on different states’ lawmaking authority. The power to regulate federal property allows Congress to impose regulations that apply outside the formal boundaries of federal property.<sup>246</sup> More importantly, federal laws enacted pursuant to Congress’s power to regulate federal property may preempt state law.<sup>247</sup> Thus, by prohibiting certain conduct on federal public lands (or lands adjacent to those lands), federal law may preclude a state from adopting a policy that permits that conduct—meaning that a state cannot go below whatever floor is established by federal law.<sup>248</sup> Under

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244. See Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099 (2005) (describing differences in governance structures as one kind of regulatory diversity); Douglas Laycock, *Notes on the Role of Judicial Review, the Expansion of Federal Power, and the Structure of Constitutional Rights*, 99 YALE L.J. 1711, 1733 (1990) (book review) (“It is not difficult to understand the state’s interest in controlling the relationship between itself and its employees . . .”).

245. *Hodel v. Indiana*, 452 U.S. 314 (1981).

246. See *Kleppe v. New Mexico*, 426 U.S. 529, 546 (1976) (“[I]t is clear that regulations under the Property Clause may have some effect on private lands not otherwise under federal control.”); *United States v. Alford*, 274 U.S. 264, 267 (1926) (“Congress may prohibit the doing of acts upon privately owned lands that imperil the publicly owned forests.”); *Camfield v. United States*, 167 U.S. 518 (1897).

247. *Kleppe*, 426 U.S. at 543 (“Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause.” (citations omitted)); see *id.* at 545 (“The Act . . . overrides the New Mexico Estray Law.”).

248. Some federal property regulations target all federal lands and thus will impose greater restrictions on states in which there are more federally held lands. See, e.g., *S.D. Mining Ass’n v. Lawrence County*, 155 F.3d 1005, 1011 (8th Cir. 1998) (finding county law preempted under mining regulations imposed on federal land); *N.M. State Game Comm’n v. Udall*, 410 F.2d 1197, 1201–02 (10th Cir. 1969) (determining that the National Park Service can remove deer from national park without seeking permit as required by state law); cf. *United States v. Lindsey*, 595 F.2d 5, 6 (9th Cir. 1979) (per curiam) (finding individuals on state property could be convicted of building a fire without permits because state property was adjacent to federal land); *United States v. Allen*, 578 F.2d 236, 238 (9th Cir. 1978) (“Congress, in the exercise of this authority, has enacted legislation reserving to the United States the right to

ordinary principles of conflict preemption, states may not enact laws that conflict with the purposes and objectives of federal law, and therefore a law that varies by state or only applies in particular states will differentially affect states' lawmaking powers.<sup>249</sup>

More generally, defining the equal sovereignty principle so narrowly undermines the idea that there is any deep structural, constitutional commitment to equal sovereignty.<sup>250</sup> Once we acknowledge that the federal government may regulate in ways that have differential effects on different states' lawmaking powers<sup>251</sup> or spend its money so as to expand some states' regulatory options more than others<sup>252</sup> or impose restrictions on federal property that affect what regulations different state can impose,<sup>253</sup> then equal sovereignty looks less and less like a core commitment or deep structural truth about our constitutional system.

#### E. Doctrine

The Court has also frequently upheld federal statutes that result in different treatment of different states, as well as statutes that specifically identify particular states.<sup>254</sup> Furthermore, the cases interpreting the uniformity

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manage vegetative surface resources on an unpatented claim and specifically stating that any mining claims (such as the Allens') 'shall not be used . . . for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto.'" (quoting 30 U.S.C. § 612 (1970)); *United States v. Brown*, 552 F.2d 817, 822–23 (9th Cir. 1977) ("[T]he regulations prohibiting hunting and possession of a loaded firearm were promulgated pursuant to that authority, and are valid prescriptions designed to promote the purposes of the federal lands within the national park. Under the Supremacy Clause the federal law overrides the conflicting state law allowing hunting within the park." (footnote omitted) (citations omitted)). Other times federal laws regulate particular federal properties, which will differentially affect the states in which those federal properties are located. *See, e.g.*, *Minnesota v. Block*, 660 F.2d 1240, 1252 (8th Cir. 1981) (rejecting challenge to regulation of federal property that limited state authority over boundary waters because "[t]his authority, like any other state police power, however, must yield to any valid exercise of federal power"); *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080, 1083 (9th Cir. 1979) (finding local ordinances purporting to require a private energy developer on federal land to obtain a use permit preempted under lease entered into under federal Mineral Leasings Act enacted pursuant to Property Clause); *Brubaker v. Bd. of Cty. Comm'rs*, 652 P.2d 1050, 1054 (Colo. 1982) (finding that the El Paso County Board of Commissioners was precluded from refusing to grant a special use permit for drilling operations on federal land because the operations had already been approved by the federal government).

249. *See* *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987) (applying conflict preemption principles to law enacted under property power); *Kleppe*, 426 U.S. at 546 (finding state law preempted under law enacted pursuant to property power).

250. I explore this argument more in depth in *Structural Outliers: The Role of Historical Novelty in Constitutional Structure*. Litman, *supra* note 197 (manuscript at 40–52).

251. Colby, *supra* note 32 (manuscript at 60).

252. *Id.* (manuscript at 61–62).

253. *Id.* (manuscript at 60).

254. Federal courts rejected numerous equal sovereignty challenges prior to *Shelby County*. *See* *Nuclear Energy Inst. v. EPA*, 373 F.3d 1251, 1303–09 (D.C. Cir. 2004) (per curiam) (rejecting an equal sovereignty challenge to the choice of the Yucca Mountain site);

provisions applicable to various congressional powers—provisions that require Congress, in certain circumstances, to legislate “uniform[ly] throughout the United States”—reflect different conceptions of what it means to treat the states equally.<sup>255</sup>

### 1. Upholding Laws Distinguishing Among the States

The Court has upheld several laws enacted under the Commerce Clause that result in differential effects on different states. *Hodel v. Indiana*, for example, upheld the Surface Mining Act provisions that established different requirements for mining operations in “prime farmland.”<sup>256</sup> Because the states had different amounts of “prime farmland,” the extent to which land in each state was subject to more stringent land-use requirements varied.<sup>257</sup> *Hodel* upheld the provisions, reasoning that “[a] claim of arbitrariness cannot rest solely on a statute’s lack of uniform geographic impact.”<sup>258</sup>

Even in cases where the Constitution explicitly requires federal law to be uniform, the Court has upheld laws that result in differential effects on different states. *United States v. Ptasynski* upheld the previously mentioned oil tax that exempted oil produced through “a well located north of the Arctic Circle.”<sup>259</sup> And *Hanover National Bank v. Moyses* held that federal bankruptcy law was uniform because it applied one general standard to all the states, even though that standard resulted in treatment that varied by state.<sup>260</sup> Federal bankruptcy law incorporated state law to define the content of the bankruptcy estate such that whether a person’s property was part of the bankruptcy estate varied by state: the same type of property might be part of the bankruptcy estate in State A, but not State B.<sup>261</sup>

The Court has also upheld laws that specifically identify particular states, even in cases where the Constitution explicitly requires federal law to

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*United States v. Gardner*, 107 F.3d 1314, 1318–19 (9th Cir. 1997) (rejecting challenge to federal government’s claim to public lands in Nevada); *Nevada v. Watkins*, 914 F.2d 1555 (9th Cir. 1990) (rejecting equal sovereignty challenge to Yucca Mountain site designation); *Potter v. Murray City*, 760 F.2d 1065, 1067–68 (10th Cir. 1985) (rejecting challenge to condition that Utah ban polygamy); *Branson Sch. Dist. RE-82 v. Romer*, 958 F. Supp. 1501, 1512–14 (D. Colo. 1997) (rejecting challenge to conditions on Colorado’s use of certain lands).

255. U.S. CONST. art. 1, § 8, cl. 1.

256. 452 U.S. 314 (1981).

257. *Hodel*, 452 U.S. at 332–33. Another example is *Secretary of Agriculture v. Central Roig Refining Co.*, which upheld the Sugar Act of 1948’s quotas for how much sugar could be produced in different regions. 338 U.S. 604 (1950). Noting that the law established “geographic” quotas, the *Roig* Court explained, “[s]uffice it to say that since Congress fixed the quotas on a historical basis it is not for this Court to reweigh the relevant factors . . . .” *Roig*, 358 U.S. at 618.

258. 452 U.S. at 332; see also *Morgan v. Virginia*, 328 U.S. 373, 388–89 (1946) (Frankfurter, J., concurring); *Currin v. Wallace*, 306 U.S. 1, 14 (1939).

259. 462 U.S. 74, 77, 85 (1983) (quoting 26 U.S.C. §§ 4991(b), 4994(e) (Supp. V 1976) (repealed 1988)).

260. 186 U.S. 181, 190 (1902).

261. *Id.* at 189–90.

be uniform. *Blanchette v. Connecticut General Insurance Corp.* upheld a law that established bankruptcy reorganization procedures for railroads within the “States of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, Ohio, Indiana, Michigan, and Illinois.”<sup>262</sup> *Blanchette* maintained there was “flexibility inherent” in the uniformity requirement, which allows Congress to “take into account differences that exist between different parts of the country.”<sup>263</sup>

## 2. Revisiting What Equal Treatment Means

The uniformity cases bring us back to the idea that it is difficult to define what it means to treat the states equally. There are several possible accounts of what it means to treat the states “equally,” and indeed, different cases reflect different conceptions of what treating the states equally means. Some cases interpreting the scope of Congress’s bankruptcy or tax powers, such as *Moyses*, maintained that “equal treatment” means subjecting all the states to one standard that does not specifically identify particular states.<sup>264</sup> Treating the states equally, in other words, meant adopting a formally uniform standard, even if that standard results in different treatment of different states. *Ptasynski*, by contrast, appeared to embrace the idea that treating the states equally means not regulating with an impermissible purpose, intimating that laws framed in “geographic” terms are invalid only when motivated by “geographic discrimination.”<sup>265</sup>

Neither of these principles is necessarily a better definition of what it means for federal law to treat states equally. For one thing, the idea that the Constitution only requires Congress not to specifically identify particular states may be too formalistic.<sup>266</sup> Certain aspects of the VRA, for example, looked like Congress had treated some states differently than others: the coverage formula was designed to differentiate between the states, and, by selecting a coverage formula, Congress knew which states would be treated differently.<sup>267</sup> And a rule prohibiting Congress from specifically identifying particular states would not be implicated by, for example, a law that applied only north of a certain latitude. That standard does not mention the names of particular states, though it defines the law’s scope to include some states but not others.

A rule prohibiting Congress from specifically identifying particular states also may not cover other occasions where it seems unequal for the

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262. 419 U.S. 102, 108 & n.2 (1974) (quoting 45 U.S.C. § 702(13) (Supp. III 1970)).

263. *Id.* at 158–59.

264. See, e.g., *Knowlton v. Moore*, 178 U.S. 41, 86 (1900); *Edye v. Robertson*, 112 U.S. 580, 594 (1884).

265. *United States v. Ptasynski*, 462 U.S. 74, 85 (1983).

266. Cf. *Primus*, *supra* note 38, at 509 (“A better understanding, however, is that the doctrine of express classifications is not in practice about formal statutory language.”).

267. See *infra* text accompanying notes 353–355.

federal government to formally treat all states the same. One water law scholar has argued that it would violate the equality of the states to apply the prior appropriation doctrine to interstate water disputes.<sup>268</sup> Under the prior appropriation doctrine, a later-in-time claim to water use cannot defeat earlier claims; the first person to use water establishes her right to the water and also limits any subsequent person's use of the water, because subsequent users cannot interfere with how the first person used the water.<sup>269</sup> Applying the prior appropriation doctrine to all states formally treats states the same. But doing so arguably results in unfair disparities between the states, because western states' water rights will always be limited by how earlier-admitted states used those waters.<sup>270</sup> The western states would have no claim to equal amounts of water, or to an amount of water proportionate to their size; they would have a claim only to the amount of water that would not interfere with earlier states' use of that water.

A rule prohibiting Congress from specifically identifying particular states may also be too broad. Congress may formally identify particular states in order to equalize the playing field among the states. For example, the United States acquired land that formed different states in different ways.<sup>271</sup> Some justices maintained that, in light of these differences, the federal government had to treat the new states differently in order to treat them equally:

[Because] [v]ast tracts within the boundaries of the [new] State belonged to the Federal Government. . . . the new State's potential revenue base would be restricted severely unless the Federal Government waived its immunity from taxation. *In order to place Ohio on an equal footing with the original States*, Congress . . . granted the State a fixed proportion of the lands within its borders for the support of public education.<sup>272</sup>

A rule prohibiting Congress from imposing regulations that have differential effects on different states may also be too broad. In cooperative spending programs, for example, federal transportation programs provide different states with different amounts of money depending on the number of highways in each state in order to allow each state to repair all of its highways.<sup>273</sup> If federal law instead gave each state \$2 million dollars, some states would be able to repair all of their highways but other states would not.

Nor is it clear that treating the states equally means not regulating for the purpose of disadvantaging particular states. The problem with this account of equal treatment may lie, in significant respects, with its judicial

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268. Josh Patashnik, *Arizona v. California and the Equitable Apportionment of Interstate Waterways*, 56 ARIZ. L. REV. 1, 41–46 (2014).

269. *E.g.*, *id.* at 3.

270. *Id.* at 35–46.

271. *Andrus v. Utah*, 446 U.S. 500, 522–23 (1980) (Powell, J., dissenting).

272. *Id.* (emphasis added) (footnote omitted).

273. 23 U.S.C. § 119(d) (2012).

enforcement.<sup>274</sup> There are many differences between the states, some naturally occurring and some that result from the policies a state has pursued.<sup>275</sup> It would therefore be easy for Congress to identify, *ex post*, some difference between the states to justify federal regulations that either specifically identified particular states or that resulted in differential effects on different states, even if those regulations were motivated, *ex ante*, by an impermissible purpose.<sup>276</sup>

To take stock: there may be a long-standing belief that the states are equal to one another in some respects. But the principle of state equality has little basis in constitutional text or drafting history, and these sources also do not specify the contours of the state equality principle. Furthermore, the idea that federal laws cannot constitutionally specifically identify particular states or result in differential effects on different states potentially conflicts with other principles that are embodied in the Constitution's structure, longstanding congressional practice, and judicial precedent.

### III. REDEFINITION: STATE EQUALITY AS STATE DIGNITY

While *Shelby County* appears to have changed the doctrine, identifying the exact change *Shelby County* made requires a certain amount of speculation. *Shelby County* did not define the equal sovereignty principle with any specificity or acknowledge that any change had occurred. Recognizing this ambiguity, this Part offers one reading of *Shelby County*—namely, that the Court searchingly reviewed the VRA because it differentiated between the states in a way that impinged on the covered states' dignity.<sup>277</sup> The idea that the states' constitutional dignity limits how Congress may regulate the states motivates other federalism doctrines, such as the state sovereign immunity and commandeering doctrines. In those contexts, the states' dignity entitles them to be viewed as well-behaving institutions that deserve to be treated with respect. A close reading of *Shelby County* suggests that the Court conceptualized the equal sovereignty principle in similar state dignity terms.

#### A. State Dignity

##### 1. Unpacking State Dignity

Several doctrines rely on the concept of state dignity. These include both the doctrine of state sovereign immunity, as well as doctrines prohibiting

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274. See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1250–52 (1978).

275. See generally Young, *supra* note 194.

276. *Ptasynski*, for example, concluded that an exemption for Alaskan oil was not “intended to grant Alaska an undue preference” because of differences between Alaska and other states. *United States v. Ptasynski*, 462 U.S. 74, 86 (1983).

277. Scholars have observed this in passing. See, e.g., Fishkin, *supra* note 19 (regarding argument and briefing); Issacharoff, *supra* note 18, at 100–01; Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 70–71 (2013).

Congress from commandeering the states. Under the state sovereign immunity doctrine, Congress may not subject unconsenting states to suits for damages by private individuals.<sup>278</sup> To explain states' immunity from suit, the Court has repeatedly invoked the concept of dignity: states "retain the dignity . . . of sovereignty;"<sup>279</sup> "[s]overeign immunity . . . 'accords the States the respect owed them as members of the federation;'"<sup>280</sup> immunity avoids "the indignity of subjecting a State"<sup>281</sup> to the adjudicative process, which would "denigrate[ ] the . . . States."<sup>282</sup> The concept of dignity does real work here—it is, in the Court's words, a "central," "preeminent," and "primary" justification for state sovereign immunity.<sup>283</sup>

In the sovereign immunity context, states' "dignity" refers to a set of three related entitlements. The first is a kind of unaccountability. The sovereign immunity cases describe the indignity of a state being "summoned . . . to answer" for wrongful behavior and being "required to answer" allegations.<sup>284</sup> The implication is that it is inconsistent with states' dignity to hold them accountable, even for past wrongful behavior:<sup>285</sup> the states' dignity "excuses [the state] from having to account for its actions."<sup>286</sup> The second element of states' dignity is hierarchical—by virtue of the states' dignity, the state does not have to answer to citizens for what the state has done. That is, the state's superior status means that it is an indignity for the state to have to answer to individuals who lack a commensurable status to the state.<sup>287</sup> The third element of the states' dignity is that the states' status entitles them to be viewed with a certain kind of respect: the states' dignity requires citizens and the federal government to assume states will behave themselves in ways that reflect their status. The Court's focus on state dignity prompted a cautionary warning that the federal government cannot "assume the States will refuse to honor the Constitution or obey the binding laws of the United States."<sup>288</sup> Almost a century earlier, Justice Harlan made the same point,

278. See, e.g., *Alden v. Maine*, 527 U.S. 706, 756–60 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44, 75–76 (1996).

279. *Alden*, 527 U.S. at 715.

280. *Id.* at 748–49 (quoting *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)); *id.* at 715 (immunity is "central to sovereign dignity"); see also *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 769 (2002) (same).

281. *Alden*, 527 U.S. at 749 (quoting *Ex parte Ayres*, 123 U.S. 445, 505 (1887)).

282. *Id.*

283. *S.C. State Ports Auth.*, 535 U.S. at 760, 765, 769.

284. *Id.* at 760.

285. See Don Herzog, *Aristocratic Dignity?*, in *DIGNITY, RANK & RIGHTS* 99, 105 (Meir Dan-Cohen ed., 2012); Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 *NOTRE DAME L. REV.* 1011, 1038–47 (2000).

286. See Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 *STAN. L. REV.* 1921, 1946 (2003).

287. See Herzog, *supra* note 285, at 99–106; Meltzer, *supra* note 285, at 1038–47; Resnik & Suk, *supra* note 286, at 1946–48.

288. *Alden v. Maine*, 527 U.S. 706, 755 (1998).

which he explicitly framed in terms of maintaining a “decent respect for the States.”<sup>289</sup>

Elements of this kind of thinking about state dignity also appear in the anticommandeering doctrine.<sup>290</sup> The anticommandeering cases hold that Congress may not require state legislatures to enact particular laws<sup>291</sup> or require state executives to enforce or administer federal law.<sup>292</sup> To justify these doctrines, the Court has used language evoking dignity.<sup>293</sup> Indeed, the Court has depicted commandeering as Congress “dragoon[ing]” the states, and has expressed concern that commandeering “reduc[ed] [the states] to puppets of a ventriloquist Congress.”<sup>294</sup>

At least two of these conceptions of state dignity also appeared in contemporary thinking about Reconstruction. First, there was real discomfort with acknowledging Southern states’ responsibility for the institution of slavery. Eric Foner’s historical account of Reconstruction describes how concerns for the dignity of the South led post-Civil War Southern state conventions to “sidestep[ ] the question of responsibility” for slavery and proclaim that “[t]he institution of slavery [was] destroyed,” rather than noting which states had destroyed it and which states had defended it.<sup>295</sup> David Blight’s account of Reconstruction similarly highlights the extent to which notions of state dignity led contemporaries to proclaim that “slavery was everyone’s and no one’s responsibility.”<sup>296</sup> These narratives share a common thread—

289. *Ex Parte Young*, 209 U.S. 123, 176 (1908) (Harlan, J., dissenting).

290. See generally Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1556–64 (2000) (concluding that expressive considerations play a major role in anticommandeering cases); Evan H. Caminker, *Judicial Solicitude for State Dignity*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 81 (2001) (exploring the implications of the Court’s unease about state dignity in anticommandeering cases); Adam B. Cox, *Expressivism in Federalism: A New Defense of the Anti-Commandeering Rule?*, 33 LOY. L.A. L. REV. 1309 (2000) (concluding that anti-commandeering might serve to promote state autonomy).

291. *New York v. United States*, 505 U.S. 144, 161–66 (1992).

292. *Printz v. United States*, 521 U.S. 898, 907–33 (1997).

293. Adam Cox has described how the reasoning in these cases demonstrates a concern that “commandeering might send a message . . . denigratory of state[s].” Cox, *supra* note 290, at 1339–40. “The very word ‘commandeering’ conjures up . . . an extreme exercise of subordination . . .” Anderson & Pildes, *supra* note 290, at 1559. For the argument that the anticommandeering rules cannot be justified on this basis, see Caminker, *supra* note 290, at 90–91, and Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism*: New York, Printz, and Yeskey, 1998 SUP. CT. REV. 71, 137–42.

294. *Printz*, 521 U.S. at 928 (quoting *Brown v. EPA*, 521 F.2d 827, 839 (1975)).

295. ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863–1877*, at 194 (1988) (quoting *JOURNAL OF THE PROCEEDINGS AND DEBATES IN THE CONSTITUTIONAL CONVENTION OF THE STATE OF MISSISSIPPI, AUGUST 1865*, at 165 (1865)).

296. DAVID W. BLIGHT, *RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY 205* (2001); *id.* (quoting a Confederate veteran saying, “It is not now profitable to discuss the right or wrong of the past . . . neither should the question be raised as to the morals of Massachusetts selling her slaves and South Carolina holding hers . . . .”); *id.* at 61 (quoting Horace Greeley as saying “I entreat you to forget the years of slavery, and secession, and civil war now happily past . . .”).



notions of fault and responsibility are inconsistent with state dignity. Second, there was also a series of claims that relied on the idea that the Southern states should be viewed in ways commensurate with their status as states. In an 1863 piece, *Reconstruction of The Union*, the writer implored the North “to consider and respect the South as an equal.”<sup>297</sup> Resisting the idea of federal supervision during Reconstruction, Southern representatives spoke of the “‘respect’ due the South” and “the ‘equal honor and equal liberties of each section.’”<sup>298</sup>

The idea that states have this particular kind of dignity has a doctrinal foothold in both sovereign immunity and anticommandeering doctrine. But state dignity is not a universal rule across other doctrines. State courts are constitutionally obligated to hear federal claims,<sup>299</sup> and the commandeering cases maintain that the federal government can impress state judicial officers into federal service.<sup>300</sup> Congress may also impose direct, affirmative obligations on the states in the course of regulating the states under the Commerce Clause.<sup>301</sup> Congress may also conditionally preempt state laws by threatening to impose federal regulations unless the state regulates according to federal directives.<sup>302</sup> Each of these mechanisms arguably implicates states’ dignity but is nonetheless permissible. State dignity therefore only selectively appears in the doctrine, but it is at least a motivating force in sovereign immunity and anticommandeering doctrines.

## 2. State Dignity in Equal Sovereignty

*Shelby County* draws on these conceptions of state dignity in several ways. First, the opinion’s language and reasoning reflect a general uneasiness with holding states accountable for violations of federal law, as well as a more specific concern with singling states out for violating constitutional guarantees that have a moral valence to them. The Court also generally framed the equal sovereignty principle in terms of dignity, and the Court’s uneasiness with how the VRA treated the covered states—by requiring them to seek permission before enacting laws—reflects state-dignity concerns as well.

*Shelby County* relies on the idea that states’ dignity entitles them to a kind of unaccountability—it requires us to ignore the states’ past wrongful behavior. *Shelby County* suggested the VRA was inconsistent with the Reconstruction Amendments, because the Amendments were not designed to “punish [the states] for the past.”<sup>303</sup> This is trafficking in the intuition from

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297. CITIZEN OF IOWA, RECONSTRUCTION OF THE UNION: SUGGESTIONS TO THE PEOPLE OF THE NORTH ON A RECONSTRUCTION OF THE UNION 11 (1863).

298. Fishkin, *supra* note 19, at 182 (quoting BLIGHT, *supra* note 296, at 81–84).

299. See *Testa v. Katt*, 330 U.S. 386 (1947).

300. *Printz v. United States*, 521 U.S. 898, 907, 928–29 (1997).

301. See *Reno v. Condon*, 528 U.S. 141, 148 (2000); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554–57 (1985).

302. *New York v. United States*, 505 U.S. 144, 171–74 (1992).

303. See *Shelby County v. Holder*, 133 S. Ct. 2612, 2629 (2013) (emphasis added).

state sovereign immunity doctrine that it is inconsistent with the states' dignity to hold the states accountable for their past wrongful behavior. *Shelby County* repeatedly faulted Congress for relying on a history of particular states behaving badly.<sup>304</sup> As *Shelby County* noted, the VRA reflected the fact that the covered states refused to ratify the Reconstruction Amendments; openly defied the Reconstruction Amendments through Black Codes and other laws; and repeatedly, over several decades, attempted to resist federal civil rights laws.<sup>305</sup> The Court cited a history of states' defiance of federal law: "States 'merely switched to discriminatory devices not covered by the federal decrees,' 'enacted difficult new tests,' or simply 'defied and evaded court orders.'"<sup>306</sup> The coverage formula itself referred to a time—between 1964 and 1972—when the covered states openly defied federal law.<sup>307</sup>

But the VRA did not merely seek to hold the states accountable for violations of federal law. Rather, the VRA identified states as having acted in ways that offend basic notions of right and wrong. As the Court noted, Congress relied on the covered states' history of racial discrimination.<sup>308</sup> The covered "States had enacted a variety of requirements and tests 'specifically designed to prevent' African-Americans from voting."<sup>309</sup> These are ugly facts, and they add another dimension to the Court's uneasiness about holding states accountable for violations of federal law. The VRA did not merely call out some states for failing to pay their employees the minimum wage; rather, it singled out states that acted in especially morally blameworthy ways. *Shelby County* observed that the VRA "distinguish[ed] between [the] States in . . . a fundamental way"—by suggesting that some states were more likely to violate federal constitutional guarantees with a moral resonance.<sup>310</sup> And *Shelby County* reflects a concern with singling out states on that basis.<sup>311</sup>

Other language in *Shelby County* similarly conveys that the Court conceptualized the constitutional injury to the states in terms of dignity. *Shelby County*'s use of the phrase "disparate treatment"<sup>312</sup> to describe the VRA evokes dignity-oriented concerns: the phrase "disparate treatment" typically describes impermissible forms of discrimination.<sup>313</sup> *Shelby County* also disapprovingly referred to the coverage formula as "'reverse-engineered': Congress identified the jurisdictions to be covered and *then* came up with

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304. *Id.* at 2627, 2629.

305. *See id.* at 2628 ("That comparison reflected the different histories of the North and South.")

306. *Id.* at 2624 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966)).

307. *Id.* at 2627–28.

308. *Id.* at 2624, 2628.

309. *Id.* at 2624 (quoting *Katzenbach*, 383 U.S. at 310).

310. *Id.* at 2630–31.

311. *See id.* at 2624.

312. *E.g., id.* at 2630.

313. *See, e.g., Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2418–19 (2013); *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013).

criteria to describe them.”<sup>314</sup> The Court then equated reverse-engineering with Congress “subjecting a *disfavored* subset of States” to federal regulation.<sup>315</sup> The idea that the VRA targeted “disfavored States” calls to mind the Court’s reasoning that laws may work an indignity on particular groups when the laws subject “disfavored class[es]” to “disfavored legal status.”<sup>316</sup>

Second, *Shelby County* generally framed the equal sovereignty principle in terms of dignity. *Shelby County* quoted *Coyle*’s statement that the United States is “a union of States, equal in . . . dignity.”<sup>317</sup> During oral argument, the advocates<sup>318</sup> and justices<sup>319</sup> repeatedly referred to equal sovereignty in terms of dignity, as did the petitioners in their briefs.<sup>320</sup> In the *NAMUDNO* argument, Justice Kennedy stated that, in his view, the VRA implicitly contained “a finding that the sovereignty of Georgia is less than the *sovereign dignity* of Ohio.”<sup>321</sup>

Third, *Shelby County*’s language suggests that the particular way in which the covered states were treated—the preclearance process—implicated the dignity-driven idea that states should be treated as having a certain status. Laws may implicate equality concerns based in part on how the laws treat those singled out for differential treatment.<sup>322</sup> *Shelby County* described

314. 133 S. Ct. at 2628.

315. *Shelby County*, 133 S. Ct. at 2628 (emphasis added).

316. *Romer v. Evans*, 517 U.S. 620, 633 (1996) (quoting *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 181 (1980) (Stevens, J., concurring)); see also *Lawrence v. Texas*, 539 U.S. 558, 575 (2003); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 63 (1996).

317. 133 S. Ct. at 2623 (quoting *Coyle v. Smith*, 221 U.S. 559, 567 (1911)).

318. Transcript of Oral Argument at 21–23, *Shelby County*, 133 S. Ct. 2612 (No. 12-96) [hereinafter *Shelby County* Transcript]; see also Fishkin, *supra* note 19 (noting that *Shelby County* advocates argued that Act offends “equal dignity” of covered states).

319. See, e.g., *Shelby County* Transcript, *supra* note 318, at 58 (“Justice Scalia: Do you think all of the noncovered States are worse . . . than the nine covered States . . . ?”); Fishkin, *supra* note 19, at 175 (noting the Chief Justice’s question: “[I]s it the government’s submission that the citizens in the South are more racist than citizens in the North?” (quoting *Shelby County* Transcript, *supra* note 318, at 41–42)).

320. Brief for Petitioner at 49–50, *Shelby County*, 133 S. Ct. 2612 (No. 12-96); Reply Brief for Petitioner at 9, *Shelby County*, 133 S. Ct. 2612 (No. 12-96); see Fishkin, *supra* note 19.

321. Transcript of Oral Argument at 34, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009) (No. 08-322) (emphasis added).

322. See, e.g., Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 818 (2014). In assessing the constitutionality of laws that target or burden particular individuals, the Court considers what kind of burden the law imposes. *United States v. Windsor*, for example, stated that the Defense of Marriage Act implicated equality principles in part because the law operated as “a system-wide enactment” that imposed significant burdens and costs on same-sex couples. 133 S. Ct. 2675, 2694 (2013). And *Romer v. Evans* explained that a law was invalid in part because it imposed a “broad and undifferentiated disability” on those subjected to differential treatment. 517 U.S. 620, 632 (1996). The constitutional norms of equality between persons are not necessarily the same as the norms of equality between states. But in either case, how a law treats those subjected to differential treatment may affect the assessment of whether the law amounts to unequal treatment at all.

the VRA as “*subjecting*” some states to federal regulation.<sup>323</sup> And the Court disapprovingly noted how the Act “requires States to *beseech* the Federal Government for *permission* to implement laws.”<sup>324</sup> The Court’s depiction of how the VRA positioned the covered states as subjects beseeching a superior is reminiscent of the language from the anticommandeering cases, which evinced a concern that commandeering did not treat the states in ways commensurate with their importance.<sup>325</sup> *Shelby County* also contains multiple references to the burden the preclearance process imposed on the states that were selected for differential treatment: preclearance was, in the Court’s words, an “extraordinary measure[ ]” that “required States to obtain federal permission before enacting *any* law related to voting”;<sup>326</sup> it “suspend[ed] *all* changes to state election law—however innocuous”;<sup>327</sup> and it was a “stringent,” “potent,” and “uncommon exercise of congressional power.”<sup>328</sup>

The language and reasoning in *Shelby County* therefore suggests the Court conceived of the equal sovereignty principle in terms of dignity.

### B. *Alternative Accounts*

There are, however, other ways to read *Shelby County*—the decision could be an application of the congruence and proportionality standard, which is a form of heightened scrutiny the Court applies to certain kinds of legislation enacted under the Fourteenth Amendment. *Shelby County* could instead embody a general skepticism of laws that are based on outdated data. While both of these ideas also appeared in *Shelby County*, they are not, standing alone, the basis for the Court’s opinion. Rather, both of these ways of reading *Shelby County* are linked with the Court’s apparent concern for state dignity.

#### 1. Congruence and Proportionality

*Shelby County* might be read to suggest that courts will searchingly review laws that distinguish among the states if those laws were enacted pursuant to the Reconstruction Amendments.<sup>329</sup> One might think that *City of Boerne v. Flores* supports this account of the equal sovereignty principle,

323. *Shelby County*, 133 S. Ct. at 2628 (emphasis added).

324. *Id.* at 2616 (emphasis added).

325. See, e.g., Cox, *supra* note 290, at 1331–40 (describing how the reasoning in these cases demonstrates a concern that “commandeering might send a message . . . denigratory of state autonomy”).

326. 133 S. Ct. at 2618 (emphasis added).

327. *Id.* at 2624 (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009)).

328. *Id.* (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 315, 334, 337 (1966)).

329. Here, I treat the Reconstruction Amendments collectively. There may be reasons why *Boerne*’s congruence-and-proportionality requirement would not apply to the Fifteenth Amendment. See Evan H. Caminker, “*Appropriate*” *Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127, 1190–91 (2001). Besides the tension with congruence and proportionality, there are other reasons why a rule explicitly imposing a heightened standard of

because *Boerne* imposed limits on Congress's Reconstruction Amendment powers that do not apply to Congress's powers under Article I. Under *Boerne*, when Congress exercises its Fourteenth Amendment enforcement power, Congress may only impose regulations that are "congruen[t] and proportional[ ]," rather than merely rationally related to the objective of the law.<sup>330</sup> *Boerne* therefore requires a closer fit between a law and the problem it is designed to address than would be required under Article I.<sup>331</sup>

However, *Shelby County* described equal sovereignty as a freestanding and fundamental principle not specifically tied to any particular congressional power.<sup>332</sup> The Court only mentioned the Fifteenth Amendment when it quoted the Amendment in a section detailing the history of the VRA and one other time in passing.<sup>333</sup> And, prior to *Shelby County*, the Court had never said that *Boerne*'s congruence-and-proportionality standard applied to legislation enacted under the Fifteenth Amendment.<sup>334</sup> Nor did *Shelby County* say that it did.

Moreover, *Boerne*'s congruence-and-proportionality requirement does not require more rigorous scrutiny of Congress's decision to impose different rules on different states. *Boerne* established limits on Congress's powers under the Fourteenth Amendment in order to ensure that Congress enforces the Amendment's substantive guarantees.<sup>335</sup> To ensure that Congress enforces, but does not change, the Amendment's substance, the congruence-and-proportionality test measures the disparity between what the Constitution prohibits states from doing and what Congress prohibits states from doing.<sup>336</sup> The difference between what Congress requires of the states and what the Constitution requires of the states goes to the core of *Boerne*'s claim that Congress does not have "the power to decree the substance of" the Amendments or to "alter[ ] the[ir] meaning."<sup>337</sup>

But Congress's choice of which states to regulate does not change the meaning of those substantive guarantees. For example, Congress may choose to establish "private remedies against . . . States for *actual* violations" of the Constitution; this kind of law clearly "enforces" the Reconstruction Amendments, because it punishes the states only for unconstitutional conduct.<sup>338</sup>

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review on legislation enacted under the Reconstruction Amendments would be unjustified. See *infra* Section IV.B.

330. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

331. *Id.*

332. *E.g.*, *Shelby County*, 133 S. Ct. at 2618 ("the principle"); *id.* at 2621 ("our historic tradition"); *id.* at 2622 ("the fundamental principle"); *id.* at 2623–24 (same).

333. *Id.* at 2619, 2629.

334. See Jeremy Amar-Dolan, Note, *The Voting Rights Act and the Fifteenth Amendment Standard of Review*, 16 U. PA. J. CONST. L. 1477, 1479 (2014).

335. See 521 U.S. at 519.

336. See, *e.g.*, *id.* at 532; see also *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 80–83, 91 (2000); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 647 (1999).

337. 521 U.S. at 519.

338. *United States v. Georgia*, 546 U.S. 151, 158 (2006).

But the same would be true if Congress instead chose to create private remedies against only some states for actual constitutional violations. Where Congress enacts prophylactic legislation—legislation that prohibits the states from doing something the Constitution permits—*Boerne* requires Congress to establish a pattern of states violating judicial interpretations of the Constitution.<sup>339</sup> But Congress may choose to impose a regulation on only some of the states that are violating the Constitution without creating any real risk that Congress is changing the substance of the Amendment's guarantees as opposed to enforcing them.

The equal sovereignty principle is not an application of *Boerne*'s congruence-and-proportionality for another reason. *Boerne*'s congruence-and-proportionality requirement may sometimes require Congress to treat some states differently than others. Imagine that in one state, there are 500 constitutional violations per year; in every other state there is one constitutional violation per year.<sup>340</sup> If the corresponding legislation must apply the same rule to all the states, there is something off balance when a law imposes the same burden on a state with 500 violations as on a state with one. *United States v. Morrison* relied on this idea in holding that the Violence Against Women Act (VAWA) exceeded Congress's powers under the Fourteenth Amendment.<sup>341</sup> VAWA purported to create a cause of action against individuals in every state,<sup>342</sup> and *Morrison* held this was not congruent or proportional to the problem of state-sanctioned gender discrimination. *Morrison* explained:

Congress's findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States. By contrast, the § 5 remedy upheld in *Katzenbach v. Morgan*, was directed only to the State where the evil found by Congress existed, and in *South Carolina v. Katzenbach*, the remedy was directed only to those States in which Congress found that there had been discrimination.<sup>343</sup>

This reasoning highlights how *Boerne*'s concern that Fourteenth Amendment legislation should have a closer "fit" between means and ends implies that federal statutes sometimes can impose different rules on different states. Even before *Morrison*, the *Civil Rights Cases* relied on similar reasoning to invalidate the Civil Rights Act of 1875, noting that the Act "applie[d] equally to cases arising in States which have the justest laws respecting the personal

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339. *Boerne*, 521 U.S. at 531–36; see also *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 (2001); *Kimel*, 528 U.S. at 89; *Fla. Prepaid*, 527 U.S. at 645; *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999).

340. Cf. *Graham v. Florida*, 560 U.S. 48, 64 (2010) ("[T]here are 123 juvenile nonhomicide offenders serving life without parole sentences. A significant majority of those, 77 in total, are serving sentences imposed in Florida. The other 46 are imprisoned in just 10 States . . . ." (citation omitted)).

341. 529 U.S. 598, 627 (2000).

342. *Id.* at 626 ("Section 13981 is also different from these previously upheld remedies in that it applies uniformly throughout the Nation.").

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

rights of citizens . . . as to those which arise in States that may have violated the prohibition of the amendment.”<sup>344</sup>

In addition to undermining a law’s “fit,” a uniformity requirement would also maximize the number of states subject to federal supervision. *Nevada Department of Human Resources v. Hibbs* illustrates this dynamic.<sup>345</sup> *Hibbs* held that the Family and Medical Leave Act provisions requiring state employers to provide twelve weeks of family-care leave were congruent and proportional exercises of Congress’s power to enforce the Reconstruction Amendments.<sup>346</sup> To explain that conclusion, *Hibbs* focused on the “shortcomings of *some* state policies,” including the fact that “seven States had childcare leave provisions that applied to women only.”<sup>347</sup> If a pattern of some, or seven, states engaging in constitutional violations justifies federal legislation, a uniformity requirement would require Congress to impose federal supervision on all the states rather than just some of them. Before *Hibbs*, *Morrison* had implied that Congress may be able to regulate all of the states if Congress establishes that a majority of the states are engaged in constitutional violations.<sup>348</sup> But even if Congress may regulate all of the states based only on a pattern of constitutional violations in twenty-six states, a uniformity requirement will still result in more states being subject to federal supervision. The same would be true if Congress could regulate the states only if all fifty were engaged in constitutional violations: without a uniformity requirement, Congress could choose to impose federal regulation on some of the states rather than on all of them.

## 2. Stale Facts

*Shelby County* might alternatively mean that laws that are based on old data are suspect, or that laws restricting state autonomy based on old data are suspect. The opinion repeatedly expressed concern with the fact that the coverage formula relied on “decades-old data” documenting the states’ actions thirty to forty years ago.<sup>349</sup> Allison Orr Larsen has recently argued that it was on this basis that *Shelby County* invalidated the coverage formula.

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344. 109 U.S. 3, 14 (1883).

345. 538 U.S. 721 (2003).

346. *Id.* at 737.

347. *Id.* at 733 (emphasis added). *Hibbs* noted several other possible shortcomings with other states’ laws. *Id.* at 733–34.

348. See *Morrison*, 529 U.S. at 636 (noting the “problem of discrimination . . . does not exist in . . . even most States”). The legislative history showed “at least 21 States documenting constitutional violations” and Congress “made its own findings about pervasive gender-based stereotypes” in other states’ legal systems. *Id.* at 666 (Breyer, J., dissenting).

349. See *Shelby County v. Holder*, 133 S. Ct. 2612, 2619, 2622, 2627 (2013) (suggesting Act “must be justified by current needs” (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009))).

According to Larsen, “the passage of time and changed circumstances created a distinct reason to invalidate the law—rendering it obsolete and effectively expired.”<sup>350</sup> But while *Shelby County* repeatedly faulted Congress for relying on “decades-old data,” the passage of time alone had not rendered the VRA unconstitutional. *Shelby County* invalidated the 2006 reauthorization of the VRA—not the versions that had been enacted in 1965 or 1974.<sup>351</sup>

*Shelby County* suggested that the 2006 reauthorization was the same as the prior versions with respect to the old data: “Congress did not use the record it compiled to shape a coverage formula grounded in current conditions. It instead reenacted a formula based on 40-year-old facts . . . .”<sup>352</sup> The coverage formula, to be sure, specifically referred to “40-year-old” facts. But it is not clear why the Court concluded Congress had entirely ignored the 15,000-page legislative record in choosing to stick with the same coverage formula.<sup>353</sup>

It is also difficult to reconcile the idea that Congress can never consider or rely on decades-old facts with the reality of congressional legislation. For example, the legislative history of the CAA rehashes California’s regulation of vehicle emissions over decades.<sup>354</sup> Statutes preempting state law also document the kinds of laws that states enacted in the past—sometimes several decades ago.<sup>355</sup> Prior cases have also suggested that Congress can enact a law based on “historical” data: *Secretary of Agriculture v. Central Roig Refining Co.* upheld the Agricultural Adjustment Act’s regional sugar quotas, reasoning that “Congress fixed the quotas on a historical basis.”<sup>356</sup> And “[o]utside of *Shelby County* . . . the Supreme Court has never struck down a law” on the basis that it was “too old to remain constitutional.”<sup>357</sup> It has, however, done so on the ground that a law works some indignity on the states.<sup>358</sup>

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350. Allison Orr Larsen, *Do Laws Have a Constitutional Shelf Life?*, 94 TEX. L. REV. 59, 61 (2015).

351. 133 S. Ct. at 2620–21.

352. *Id.* at 2629.

353. See *id.* at 2639–44 (Ginsburg, J., dissenting) (describing Congress’s review of DOJ submissions); J. Morgan Kousser, *Do the Facts of Voting Rights Support Chief Justice Roberts’s Opinion in Shelby County?*, 2015 TRANSATLANTICA 1 (2016), <http://transatlantica.revues.org/7462> [perma.cc/R764-4DMR]; Bertrall L. Ross II, *The State as Witness: Windsor, Shelby County, and Judicial Distrust of the Legislative Record*, 89 N.Y.U. L. REV. 2027, 2061–62 (2014).

354. See sources cited *supra* note 186.

355. See H.R. REP. NO. 112-470, at 396 (2012) (discussing particular state laws that are not preempted); H.R. REP. NO. 110-374, pt. 1, at 24 (2007); H.R. REP. NO. 108-770, at 22–23 (2004) (identifying particular state laws as preempted); H.R. REP. NO. 108-680 (2004) (identifying particular state laws consistent with federal policy); H.R. REP. NO. 106-775, pt. 1, at 170 (2000) (discussing proposed legislation’s incongruence with current standards); S. REP. NO. 106-299, at 63 (2000) (identifying particular state laws consistent with federal policy); H.R. REP. NO. 103-877, at 68 (1994) (identifying particular states that regulate activity); H.R. REP. NO. 103-677, at 86 (1994) (Conf. Rep.) (identifying particular states that do not regulate activity).

356. 338 U.S. 604, 618 (1950).

357. Larsen, *supra* note 350, at 38.

358. See discussion *supra* Section III.A.1.



The idea that Congress cannot consider old facts is also ill-suited to the particular context of the VRA. If Congress, in reauthorizing the VRA, could not consider historical facts, Congress would be limited in its ability to consider how the VRA affected the number and frequency of constitutional violations in the covered states.<sup>359</sup> But this would be in tension with *Boerne*'s congruence-and-proportionality requirement, which requires Congress to rigorously justify legislation enacted under the Fourteenth Amendment and to establish a particularly close connection between a law's means and ends.<sup>360</sup>

*Shelby County* did repeatedly mention the fact that the coverage formula was based on decades-old data. But the constitutional defect in *Shelby County* was not only that Congress relied on decades-old data, or even that it relied on such data to limit state autonomy. Rather, the constitutional violation in *Shelby County* was about the kind of decades-old data on which Congress had relied—data that evinced the states' ugly histories of racial discrimination—and the purpose it was used for—predicting that states were likely to discriminate on the basis of race in voting regulations. Larsen suggested that courts may be justified in finding a statute unconstitutional on the ground that the statute relied on stale facts so long as the statute independently called for “a form of heightened scrutiny.”<sup>361</sup> And *Shelby County* implied that the VRA warranted a form of heightened scrutiny, because the Act distinguished between the states in ways that impinged on the covered states' dignity.<sup>362</sup>

Unlike the early admission cases' version of equal sovereignty, *Shelby County*'s conception of equal sovereignty is more clearly related to equality in that it is particularly likely to be implicated by laws that differentiate between the states. Laws of this nature suggest that some responsibility or blame lies with the particular states subject to federal regulation, thus implicating notions of unaccountability and states' dignity. Laws regulating most or all of the states, by contrast, hold everyone—and thus no one—accountable.

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359. See Katz, *supra* note 127.

360. See Ellen D. Katz, *Dismissing Deterrence*, 127 HARV. L. REV. F. 248 (2014). Cases applying the congruence and proportionality standard may have incentivized Congress to hew to a version of the VRA that had previously been upheld. Nathaniel Persily, *The Constitutional Relevance of Alleged Legislative Dysfunction*, 117 YALE L.J. POCKET PART 256 (2008), <http://yalelawjournal.org/forum/the-constitutional-relevance-of-alleged-legislative-dysfunction> [<http://perma.cc/V8TM-KQMG>] (naming this and other judicially driven incentives for Congress not to compile additional evidence in legislative record).

361. Larsen, *supra* note 350, at 101.

362. Larsen argued that “federalism notions . . . cannot explain the statute’s invalidation” because they were “not enough to invalidate the law in 1965 or 1972 or 1982.” *Id.* at 60 n.5. But the federalism concerns I have identified could warrant some kind of heightened review that made the VRA’s reliance on outdated data problematic. See *id.* (“The nature of the constitutional violation in *Shelby County* is also wrapped up in notions of federalism . . .”).

## IV. REFLECTION: DOCTRINAL JUSTIFICATIONS

Identifying state dignity as a motivating principle in *Shelby County's* application of the equal sovereignty principle does two things. First, it helps to categorize equal sovereignty as an expressive norm, meaning one that is concerned with the symbolic significance of laws. Expressive norms of constitutional law are grounded in the idea that “[p]ublic policies can violate the Constitution . . . because the meaning they convey expresses inappropriate respect for relevant constitutional norms.”<sup>363</sup> Scholars have argued that several federalism doctrines—most notably anticommandeering and state sovereign immunity doctrines—are best understood as expressive norms.<sup>364</sup> These scholars maintain that anticommandeering and state sovereign immunity doctrines’ focus on state dignity reveals a concern with what federal laws communicate or express about the states’ role in the federal system.<sup>365</sup> Because *Shelby County* is driven by the same conception of state dignity that appears in these doctrines, it is reasonable to think that equal sovereignty too may be an expressive norm. The rhetoric in *Shelby County* also evinces a concern with what the VRA said, or communicated, about the covered states.<sup>366</sup>

Second, conceptualizing the equal sovereignty principle in terms of state dignity narrows the scope of the principle, such that it will apply almost exclusively to legislation enacted under the Reconstruction Amendments. By virtue of *Boerne* and its progeny, legislation enacted under the Reconstruction Amendments must focus on occasions where states have violated the Constitution. These kinds of laws therefore may be particularly likely to implicate state-dignity concerns that arise from holding states accountable for wrongful behavior.

Framing the equal sovereignty principle in terms of dignity, and correspondingly narrowing the principle, has a significant upside—insulating the many existing federal laws that differentiate between the states from equal sovereignty challenges. But conceptualizing the equal sovereignty principle in terms of dignity does little by way of providing a justification for the principle. Specifically, it is hard to spell out a persuasive justification for an equal sovereignty principle that is grounded in dignity. This Part explores two different kinds of justifications for the equal sovereignty principle: (1) instrumental justifications, which maintain that laws are unconstitutional

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363. Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 755 (1998).

364. See, e.g., Anderson & Pildes, *supra* note 290, at 1551–63; Seinfeld, *supra* note 75, at 1088.

365. See, e.g., Anderson & Pildes, *supra* note 290, at 1551–63; Cox, *supra* note 290, at 1331–40; Resnik & Suk, *supra* note 286; Suzanna Sherry, *States are People Too*, 75 NOTRE DAME L. REV. 1121, 1125–31 (2000).

366. See *infra* text accompanying notes 369–389.

because the message they convey results in adverse effects or consequences;<sup>367</sup> and (2) intrinsic justifications, which maintain that laws are unconstitutional because they convey a particular message.<sup>368</sup>

#### A. Instrumental Justifications

One set of justifications for expressive norms maintains that laws may not communicate a message if communicating that message results in adverse effects or consequences.<sup>369</sup> Under this view, laws may not express a message for instrumental reasons—that is to avoid causing downstream harms that result from communicating that message.

*Coyle* and *Shelby County* suggested one instrumental justification for equal sovereignty—“the harmonious operation of the scheme upon which the Republic was organized.”<sup>370</sup> The idea here seems to be that equal sovereignty enables the union of fifty states to function as one cohesive unit. This principle motivates various doctrines ranging from the dormant Commerce Clause,<sup>371</sup> to interstate recognition of judgments,<sup>372</sup> to intergovernmental tax immunity.<sup>373</sup>

However, these other doctrines are default rules that Congress is free to alter. That is, while states generally may not discriminate against out-of-state commerce, Congress can allow them to do so.<sup>374</sup> The same is true for interstate recognition of judgments: states have limited freedom to decline to recognize out-of-state judgments, but Congress may expand the circumstances under which they may do so.<sup>375</sup> So too with inter-governmental tax immunity: states are generally not free to tax the federal government, but Congress may waive the federal government’s immunity from state taxation.<sup>376</sup> There are various reasons why Congress is entrusted with these powers: each state is represented in Congress, Congress is structured to legislate for the entire Union, and Congress’s powers are plenary.<sup>377</sup> The key point is that other doctrines designed to safeguard the cohesiveness of the Union are

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367. See Primus, *supra* note 38, at 569–70 (characterizing a theory of expressive harm that is “concerned with the damage done by the content of messages that laws send” as consequentialist).

368. See *id.* at 577.

369. *Id.* at 569.

370. *Shelby County v. Holder*, 133 S. Ct. 2612, 2623 (2013) (quoting *Coyle v. Smith*, 221 U.S. 559, 580 (1911)).

371. Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1113 (1986).

372. Metzger, *supra* note 37, at 1493–94.

373. Seinfeld, *supra* note 75, at 1105–09.

374. See *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91–92 (1984); Metzger, *supra* note 37, at 1483.

375. See Metzger, *supra* note 37, at 1532 (discussing how Section 2 of DOMA authorizes states to deviate from the interstate recognition of judgments doctrine).

376. See Seinfeld, *supra* note 75, at 1105–09.

377. See Metzger, *supra* note 37, at 1482–83.

default rules that Congress may alter. It would thus be strange if, in the name of ensuring that the fifty states operate as a cohesive union, equal sovereignty functioned as a strong constraint on congressional power. It is true, in both the dormant Commerce Clause and Full Faith and Credit Clause examples, that Congress authorizes the states, rather than Congress, to discriminate against other states. But this distinction seems to be of little difference. States may only discriminate against other states with Congress's blessing, and Congress also occasionally authorizes only some states to discriminate against other states, as opposed to authorizing all of the states to do so.<sup>378</sup>

Moreover, it is not clear that equal sovereignty identifies particularly problematic forms of tension between the states and the federal government or among the states. Federalism envisions that the states will at times express disagreement with federal policies—including by organizing opposition to a policy or by enacting different policies.<sup>379</sup> But, at other times, the states are forced to grin and bear it—they are not allowed to nullify or repeal federal statutes with which they disagree.<sup>380</sup> And it is not clear that equal sovereignty identifies occasions where states' disagreement with or distaste for federal policy is especially harmful to the Union.

A second possible instrumental justification for equal sovereignty is that the principle “preserv[es] and reinforce[es] [the] public[’s] perception of the states as credible alternative political institutions.”<sup>381</sup> Treating states differently does not necessarily compromise or undermine the values that federalism serves, such as increasing local decisionmaking or ensuring regulatory diversity. But there is a sense in which some benefits of federalism, including greater opportunities for meaningful political participation and limiting the power of the federal government, depend on the existence of states as “alternative political institutions.”<sup>382</sup> In other words, for federalism to work, the states must be able to do meaningful things—to pursue novel regulatory programs, organize resistance to federal overreaching, et cetera.<sup>383</sup> The equal sovereignty principle may be designed to ensure that the public continues to believe that the states are capable of doing these things.<sup>384</sup>

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378. See *supra* notes 370–374 and accompanying text.

379. See generally Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 *YALE L.J.* 1256 (2009); Larry Kramer, *Understanding Federalism*, 47 *VAND. L. REV.* 1485 (1994).

380. See Seinfeld, *supra* note 75.

381. Cox, *supra* note 290, at 1312.

382. *Id.* at 1323.

383. See, e.g., Bulman-Pozen & Gerken, *supra* note 379; Kramer, *supra* note 379.

384. It is not clear how the equal sovereignty principle could ensure that the states are actually capable of doing these things. The equal sovereignty principle does not meaningfully enhance local decisionmaking or state autonomy, see *supra* Section II.C.1, or the states' capacity to enact effective policies that diminish the need for federal regulation.

However, this account of equal sovereignty probably rests on too many questionable assumptions to serve as a justification.<sup>385</sup> For example, did people (either federal legislators or citizens) perceive the VRA as denigrating the states? Did they internalize those perceptions and choose not to participate in their states' political processes? Did striking down the VRA's coverage formula wash away those perceptions? Is the Court's message that states are important political institutions worthy of respect sufficiently clear?

The answer to some of these questions is probably "no." A survey of the congressional record disclosed thirty-three mentions of *Shelby County*, but almost all of them are critical and call for Congress to make a new VRA.<sup>386</sup> In none of these occasions did members of Congress even mention equal sovereignty or signal an understanding that it must treat the states as well-behaving institutions. As of this writing, a news search for *Shelby County* and "equal sovereignty" or "sovereign dignity" revealed only fifty sources, almost all of them law professors' blogs.<sup>387</sup> Many of the blogs, like the congressional record, are critical of the decision.<sup>388</sup> It is also unlikely that the opinion in *Shelby County* had a significant effect on how people viewed their states. It is not clear how many non-lawyers read the opinion or took away from the opinion the idea that the states are important, well-behaving political institutions.<sup>389</sup> The preclearance process may have had some effect on citizens' perceptions of the covered states, or at least the states' authority to regulate voting qualifications. But in this telling, the imposition of preclearance was the primary constitutional defect in the VRA, and *Shelby County* pointedly avoided issuing a holding on the validity of preclearance.<sup>390</sup>

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385. For other problems with the foregoing account of the equal sovereignty principle, compare the discussion of problems related to state sovereign immunity in Caminker, *supra* note 290, at 90–91.

386. The search was for: "Shelby County" /p "Holder." *E.g.*, 159 CONG. REC. 228 (2013); 159 CONG. REC. 1000 (2013); *cf.* Adler & Kreimer, *supra* note 293, at 138 (conducting a similar search regarding *Printz* and *New York*). One senator proclaimed: "[T]he *Shelby County* decision was a dreadful decision and wrongly decided." 160 CONG. REC. 6177 (2014).

387. The search terms were: "Shelby County" & ("equal sovereignty" or "sovereign dignity").

388. *E.g.*, Paul Abrams, *The 15th Amendment Trumps the 10th Amendment On Voting Rights*, HUFFINGTON POST: BLOG (July 1, 2013, 8:27 AM), [http://www.huffingtonpost.com/paul-abrams/the-15th-amendment-trumps\\_b\\_3527256.html](http://www.huffingtonpost.com/paul-abrams/the-15th-amendment-trumps_b_3527256.html) [<http://perma.cc/ND7Z-L7WC>].

389. *Cf.* Richard Primus, *Why Enumeration Matters*, 115 MICH. L. REV. (forthcoming 2016) (manuscript at 31–34), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2471924](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2471924) [<https://perma.cc/QB3U-N9ZG>] (suggesting that, for some legal principles articulated in Supreme Court opinions, "the primary audience . . . is not the broader public").

390. *Shelby County v. Holder*, 133 S. Ct. 2612, 2631 (2013).

### B. *Intrinsic Justifications*

Another kind of justification for expressive norms maintains that laws may not communicate messages that are themselves constitutionally problematic.<sup>391</sup> That is, laws may not express a particular message if the message itself violates some constitutional principle. Under this view, the fact that a law expresses or conveys a particular message—based on some objectively reasonable public meaning of the statute—is what renders the law invalid.<sup>392</sup>

On some level, it is harder to engage with intrinsic justifications than instrumental ones. An expressive norm is intrinsically justified when it is unconstitutional for legislators to evince a particular viewpoint or attitude. But how do we know whether a particular viewpoint is constitutionally acceptable for legislators to hold, especially with respect to federalism? It might be hard to separate whether a statute “(objectively) say[s] the right thing about federalism” from whether the statute “is otherwise justified on federalism grounds.”<sup>393</sup> In the context of the equal sovereignty principle, for example, the principle would be intrinsically justified if there were something unconstitutional about the federal government evincing the view that some states are especially morally blameworthy.

This understanding of the principle, however, seems unjustified given how it will uniquely limit Congress’s ability to differentiate between the states under the Reconstruction Amendments. Under *Boerne* and its progeny, legislation enacted under the Reconstruction Amendments must focus on occasions where states have violated the Constitution. Laws enforcing the Reconstruction Amendments may therefore be especially likely to implicate state-dignity concerns that arise from holding states accountable for wrongful behavior. However, as this Part explains, the constitutional text, early history, and structure do not suggest that laws that are enacted under the Reconstruction Amendments and that differentiate between the states are constitutionally suspect.

#### 1. Text

The text of the Reconstruction Amendments arguably suggests that Congress has more latitude to single out particular states when legislating under those Amendments than when it legislates under Article I. The Reconstruction Amendments give Congress the power to “enforc[e]” the Amendment’s guarantees.<sup>394</sup> “Enforcing” a law entails a substantial and well-recognized amount of discretion in selecting from among all wrongdoers.<sup>395</sup>

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391. See Primus, *supra* note 38, at 566–70.

392. Anderson & Pildes, *supra* note 290, at 1513.

393. Adler & Kreimer, *supra* note 293, at 143.

394. U.S. CONST. amends. XIII, XIV, XV.

395. See, e.g., Saikrishna Bangalore Prakash, *The Statutory Nonenforcement Power*, 91 TEX. L. REV. See Also 115, 120–21 (2013), <http://www.texasrev.com/wp-content/uploads/Prakash.pdf> [<http://perma.cc/J4F6-7YD9>] (discussing the executive’s authority to set enforcement priorities); see also Daniel T. Deacon, Note, *Deregulation Through Nonenforcement*, 85

And, under the Reconstruction Amendments, Congress has the power to “enforce” the Amendments, including the discretion to choose which wrongdoers will be subject to enforcement actions. It is also more coherent to think that Congress “enforces” a law or “remedies” a violation by targeting particular wrongdoer(s) than by regulating all of the states collectively.<sup>396</sup>

## 2. Early History

Some early history undermines the idea that the Reconstruction Amendments uniquely limit Congress’s ability to treat some states differently than others.<sup>397</sup> The Reconstruction Amendments prohibited practices—namely, slavery and the Black Codes—that were occurring primarily in only some states; the Amendments themselves were designed to constrain the Southern states specifically.<sup>398</sup> The Reconstruction Acts imposed conditions on Southern states, conditioning their congressional representation on their ratifying state constitutions that aligned with federal directives and received congressional approval.<sup>399</sup> The first and second Reconstruction Acts divided up “the rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas” into five military districts.<sup>400</sup> The Acts authorized federal military officials to conduct voter registration and to organize state constitutional conventions in those states.<sup>401</sup> Federal law suspended the writ of habeas corpus in Southern states.<sup>402</sup> The Freedmen’s Bureau Act gave the War Department the power to “control . . . all subjects relating to refugees and freedmen *from rebel*

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N.Y.U. L. REV. 795 (2010) (critiquing the high degree of executive discretion in nonenforcement via agency inaction).

396. *City of Boerne v. Flores* maintained “enforce” means to “remedy or prevent.” 521 U.S. 507, 519 (1997).

397. Cf. CONG. GLOBE, 39th Cong., 2nd Sess. 1183 (1867) (statement of Rep. Raymond) (“We lay down the basis of reconstruction for restoring this Union.”); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 199 (1998) (“From this vantage point, the First Reconstruction Act is functionally equivalent to Article Seven of the 1787 Constitution.”); Akhil Reed Amar et al., *Reconstructing the Republic: The Great Transition of the 1860s*, in *TRANSITIONS: LEGAL CHANGE, LEGAL MEANINGS* 98, 112 (Austin Sarat ed., 2012) (“[T]he First Reconstruction Act plainly directed ex-gray states to ratify the Fourteenth Amendment with all deliberate speed.”).

398. E.g., FONER, *supra* note 295, at 446 (“[The] concern [of the Fifteenth Amendment’s drafters] was to enfranchise blacks in the border states and prevent a retreat . . . in the South.”); Harrison, *supra* note 72, at 401–02 (arguing that one objective of the Fourteenth Amendment was repealing Southern Black Codes). This differs from the narrative surrounding Congress’s power to regulate interstate commerce, which focused on the states’ collective failures. See, e.g., Barry Friedman & Daniel T. Deacon, *A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause*, 97 VA. L. REV. 1877, 1886–94 (2011).

399. Second Reconstruction Act of 1867, ch. 6, § 5, 15 Stat. 2, 3–4 (amending First Reconstruction Act of 1867, ch. 153, § 5, 14 Stat. 428, 429).

400. Third Reconstruction Act of 1867, ch. 30, § 1, 15 Stat. 14, 14.

401. First Reconstruction Act of 1867, ch. 153, §5–6, 14 Stat. 428, 429; Second Reconstruction Act of 1867 § 1–2.

402. Act of Mar. 3, 1863, ch. 81, 12 Stat. 755; Harrison, *supra* note 72, at 405.

states.”<sup>403</sup> Subsequent acts gave federal commissioners the “power to seize, hold, use, lease, or sell . . . any lands . . . formerly held under color of title by the late so-called confederate states.”<sup>404</sup> The Emancipation Proclamation freed “all persons held as slaves within any State or designated part of a State, [where] the people” were “in rebellion against the United States.”<sup>405</sup>

Some early congressional debates also support the idea that the Reconstruction Amendments allow Congress to treat some states differently than others.<sup>406</sup> Some representatives at the time expressed concerns about whether Congress would have any power, after the states’ admission, to do anything to disobedient states.<sup>407</sup> Other representatives responded that Congress could treat states differently from one another if some of the states violated a federal constitutional guarantee.<sup>408</sup> With respect to the principle of equal sovereignty, some representatives maintained that if “the Congress of the United States have [sic] the right, speaking for all the States, to make a general regulation . . . then they may make it in the case of any State . . .”<sup>409</sup> There was one exchange where a representative asserted it was “desirable that this important question of State equality should now be once more looked at and determined.”<sup>410</sup> Another representative asked him “to point me to the clause of the Constitution which requires it,” and the debate ended.<sup>411</sup>

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403. Act of Mar. 3, 1865, ch. 90, 13 Stat. 507, 507 (emphasis added); see also Act of July 16, 1866, ch. 200, 14 Stat. 173, 173–74 (renewing the Freedmen’s Bureau Act on these terms).

404. Act of July 16, 1866 § 12.

405. Abraham Lincoln, Final Emancipation Proclamation (Jan. 1, 1863), in ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 689 (Roy P. Basler ed., 1946).

406. To be sure, there were some contrary statements as well. See CONG. GLOBE, 40th Cong., 2nd Sess. 2603 (1868) (statement of Mr. Morton) (“[B]ut when these States are admitted, when they have complied with all our conditions and come back and are received, then they stand upon the same platform with every other State in the Union.”).

407. *Id.* at 2602 (statement of Sen. Trumbull) (“[A]s I said, this thing of imposing conditions upon States is attended with a great deal of difficulty . . .”); see also *id.* (“I am not prepared to say what steps should be taken in case the State of Nebraska should hereafter change its constitution, and in that change adopt a different rule in regard to suffrage from that which was recognized at the time the State was admitted.”).

408. *Id.* at 2603 (statement of Sen. Stewart) (“If one of these compacts should be violated . . . Congress then would have power to interfere with or without such a fundamental condition . . .”); see also *id.* at 2605 (statement of Sen. Stewart) (“[W]henever [States] abuse any of the functions which are legitimately State functions so as to be in conflict with . . . the Constitution, it is the duty of the Congress of the United States to interfere.”).

409. *Id.* at 2605 (statement of Sen. Conkling); see also *id.* (statement of Sen. Stewart) (discussing both *Pollard* and *Dred Scott* with respect to the equal sovereignty principle).

410. *Id.* at 2606 (statement of Sen. Buckalew).

411. *Id.* at 2607 (statement of Sen. Drake). The minority report to the Acts argued that “States possess[ ] equal rights and powers. States unequal are not known to the Constitution.” See EDWARD MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION, April 15, 1865 – July 15, 1870, at 94 (Da Capo Press, Inc. 1972) (1871). However, the majority report made no mention of the state equality principle. *Id.* at 84–93.



### 3. Constitutional Structure: Federalism and Nationalism

The Reconstruction Amendments authorize Congress to regulate the states directly and to do so in noneconomic spheres that Congress may not be able to regulate under its power to regulate interstate commerce.<sup>412</sup> In these areas, there are often very real differences between the states that might call for different treatment. Consider the laws enacted during Reconstruction, which required some states to ratify the Fourteenth Amendment and established terms on which Southern states could enact and ratify state constitutions.<sup>413</sup> Today, Eighth Amendment cases<sup>414</sup> and Fourteenth Amendment substantive due process cases<sup>415</sup> frequently highlight the extent to which some states treat classes of their citizens very differently than other states do. Other cases do as well. *Nevada Department of Human Resources v. Hibbs*, for example, catalogued at least four different ways in which states differed from one another in providing family-leave policies,<sup>416</sup> and the legislative history in *Morrison* documented myriad differences in how the states prosecuted gender-based crimes.<sup>417</sup>

The standard account of federalism also assumes that states will differ from one another in noneconomic spheres. The idea that citizens migrate to states and communities that “share their values” assumes that the states will differ from one another and experiment with “social, economic, and regulatory polic[ies].”<sup>418</sup> And there are reasons to think the states differ more in noneconomic spheres than economic ones. The Court’s enumerated-powers jurisprudence more freely permits Congress to regulate in economic spheres than noneconomic ones, because Congress has greater latitude to regulate under Article I than under the Fourteenth Amendment.<sup>419</sup> Congress’s wider authority to regulate under the Commerce Clause may mean that the states are more able to differ from one another in noneconomic spheres than in economic spheres: where Congress has greater authority to regulate (in economic spheres), it may enact more federal law and, in doing so, limit the states’ regulatory options and ability to differ from one another.<sup>420</sup>

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412. See *United States v. Morrison*, 529 U.S. 598, 626–27 (2000).

413. See *supra* text accompanying notes 72–73.

414. E.g., *Graham v. Florida*, 560 U.S. 48 (2010); *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Roper v. Simmons*, 543 U.S. 551 (2005). The Eighth Amendment, of course, applies to the states by virtue of the Fourteenth Amendment.

415. E.g., *Lawrence v. Texas*, 539 U.S. 558 (2005).

416. 538 U.S. 721, 733–34 (2003).

417. See *Morrison*, 529 U.S. at 636; see also *id.* at 666 (Breyer, J., dissenting).

418. Douglas Laycock, *Voting with Your Feet Is No Substitute for Constitutional Rights*, 32 HARV. J.L. & PUB. POL’Y 29, 33–34 (2009) (summarizing this view); see also Baker & Young, *supra* note 194, at 157–58.

419. See Roderick M. Hills, Jr., *The Individual Right to Federalism in the Rehnquist Court*, 74 GEO. WASH. L. REV. 888, 889–90 (2006).

420. See *id.* at 888–89 (arguing enumerated powers doctrine will lead to more noneconomic differences between states); Young, *supra* note 194 (noting large differences in social norms between states).

The idea that the Reconstruction Amendments uniquely limit Congress's ability to distinguish among the states also runs counter to the idea that the Reconstruction Amendments authorize greater intrusions into state sovereignty than Article I does. Current doctrine, for example, maintains that Congress can subject states to suits for damages under the Fourteenth Amendment, but not under the interstate commerce power.<sup>421</sup> The reason is that the Reconstruction Amendments sanctioned a great "shift in the federal-state balance" and authorized "intrusions by Congress . . . into the judicial, executive, and legislative spheres of autonomy previously reserved to the States."<sup>422</sup> Subsequent developments, particularly the second Reconstruction during the 1960s, solidified the scope of Congress's powers to expand and enforce civil rights.<sup>423</sup> Thus, it would be strange if Article I permitted Congress to regulate the states in ways that the Reconstruction Amendments do not.<sup>424</sup>

*Shelby County* also suggested that the VRA infringed on the covered states' dignity because it singled them out based on their histories of racial discrimination.<sup>425</sup> The opinion thus implies that Congress may be especially limited in its ability to differentiate between the states when enacting legislation that seeks to remedy racial discrimination and enforce the equal protection guarantee of the Fourteenth Amendment or the prohibition against racial discrimination in voting of the Fifteenth Amendment. But the Reconstruction Amendments uniquely empowered Congress to remedy racial discrimination. Indeed, the Amendments were in part a response to the states' racial discrimination.<sup>426</sup> And subsequent legislative, judicial, and political developments have solidified the idea that how states treat their citizens, and specifically whether states are discriminating on the basis of race, is a matter of national concern and a proper basis for federal legislation.<sup>427</sup> It would therefore be strange if Congress were uniquely limited in its ability to remedy racial discrimination under the Fourteenth and Fifteenth Amendments.

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421. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). Some Article I powers partially waive the states' immunity from suit. See *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 359 (2006).

422. *Fitzpatrick*, 427 U.S. at 455; see also Vicki C. Jackson, *Holistic Interpretation: Fitzpatrick v. Bitzer and Our Bifurcated Constitution*, 53 STAN. L. REV. 1259, 1270–71 (2001).

423. Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 516–17 (2000).

424. See Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 193–94 (1997) (noting that the majority's position in *Boerne* "cannot be grounded in federalism, because . . . the relevant provision of the Constitution — the Fourteenth Amendment — cuts the other way").

425. See *supra* text accompanying notes 303–311.

426. There may also be legitimacy reasons to give Congress greater power to remedy racial discrimination under the Reconstruction Amendments. See Richard A. Primus, *The Riddle of Hiram Revels*, 119 HARV. L. REV. 1680, 1711–14 (2006).

427. See Post & Siegel, *supra* note 423; Jane S. Schacter, *A Moment for Pragmatism*, 113 MICH. L. REV. 973, 978 (2015) (describing how social movements and political contestation solidified these ideas).

## CONCLUSION

Explaining where we are now is no easy task. We could interpret *Shelby County* as an application of the congruence-and-proportionality standard—that is, as standing for the proposition that *Boerne*'s congruence-and-proportionality requirement applies to legislation enacted under the Fifteenth Amendment and that the preclearance process was not a congruent and proportional exercise of Congress's powers. Doing so would avoid explicitly incorporating into the law a principle that relies on unappealing ideas about state dignity. But it also would not avoid many of the unfortunate consequences of recognizing *Shelby County*'s focus on dignity, which are tied to how the doctrine will uniquely limit Congress's powers under the Reconstruction Amendments.

We could instead embrace the fact that *Shelby County* focused on what the VRA expressed about the covered states. Doing so would expose the serious flaws with the Court's analysis. But it may have some benefit as well. In the Court's words, the VRA was unique in how and why it differentiated between the states: "The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem."<sup>428</sup> While this could have been a mark in the VRA's favor, the VRA's novelty is now a consolation prize: it provides a way of distinguishing, and thus legitimizing, other federal statutes that differentiate between the states, even if doing so requires vilifying the VRA.

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428. *Shelby County v. Holder*, 133 S. Ct. 2612, 2618 (2013).