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Abstract

The Clean Air Act gives two regulatory powers to one state — California — that it forbids to all others: the power to regulate fuels, and the power to regulate motor vehicle construction. This paper makes the novel argument that by creating a differential in power between the states, these provisions violate the equal footing doctrine, and are therefore unconstitutional. In doing so, it provides the history of the doctrine, a foundational principle that pre-dates the Constitution and remains the law of the land today. Though the doctrine has been relegated to a bit part in modern jurisprudential debates, this article shows its vitality and power, and argues its re-emergence should begin with a rejection of the Clean Air Act's California preferences.

I. Introduction

Under several provisions of the Clean Air Act ("CAA"),[1] California has powers denied to all other states to regulate in the air quality arena.[2] Because of these provisions, federal courts have repeatedly halted attempts by other states to enforce regulations California would be permitted to make and enforce.[3] This outcome is not simply unjust — it is illegal, because the provisions of the CAA that give California its special status are unconstitutional. By giving California

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1. 42 U.S.C. § 7401 *et seq*. (2000).

2. 42 U.S.C. § 7507 (CAA § 177); 42 U.S.C. 7543(b), (e), (CAA § 209); 42 U.S.C. 7545(c)(4)(B), (CAA § 211)

3. *Am. Petroleum Inst. v. Jorling*, 710 F.Supp.421, 431 (N.D.N.Y. 1989).

the power to regulate in the air quality arena but denying other states the same sovereignty, these provisions violate the equal footing doctrine, which holds that all the states of the Union have equal dignity and sovereignty.

In this paper, I begin by outlining the provisions of the Clean Air Act that are intended to differentiate the power of the States, and examine the legislative history regarding these provisions and the unease many members of Congress felt about one state having powers denied to the others. Following that, I discuss the unsuccessful court challenges to these preferences that have been brought by less favored states. Turning to the equal footing doctrine's history, I begin by discussing the founder's debate about whether the states of the Union should be equals, concluding that both sides of the debate would not support the current state of affairs. The history of the doctrine in the legislative branch, dating from the Continental Congress through the first Congress and many Congresses since, follows. I finish the focus on the equal footing doctrine by tracing its long history in the Supreme Court and noting some modern attempts to use the doctrine in the appellate courts. I close by analyzing the application of the equal footing doctrine to the CAA sections giving preference to California.

II. California's Special Treatment in the Clean Air Act

Unlike other U.S. pollution laws,[4] the CAA does not permit states to be "laboratories" that test out stricter regulations on engine emissions or the content of fuels that impact pollution production. As detailed below, the exception to this is California, which is allowed to create regulations stricter than that of the federal government. Other states can choose to adopt the California standards or be subject to those set by the Environmental Protection Administration ("EPA"). The legislative history of these provisions shows a tension between the desire to have a single, federal standard for the benefit of many national industries and the desire by some states for very strict standards that would be unnecessary for (or unpalatable to) other states. While only a few judicial challenges to these provisions have been made (and no challenge has been made under either the equal footing doctrine or the delegation doctrine), existing juris-

4. E.*g*., The Clean Water Act, 33 U.S.C. 1311(b)(1)(C) (2006) (". . . any more stringent limitation . . . established pursuant to any State law . . . ."); The Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9614(a) (2006) ("Nothing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State.").

prudence shows the desire of states to exercise those powers that California possesses, and a firm belief by courts that the CAA does not allow them to do so.

A. Statutory Provisions

The ability of states to regulate features of new motor vehicles that impact emissions is governed by sections 209 and 177 of the CAA.[5] Section 209 provides, in part, that states may not "adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines."[6] There are two exceptions to this provision. The first is also found in section 209, which provides that any state that adopted standards prior to March 30, 1966, can set standards that are more stringent than the federal government's standards, as long as those standards meet three conditions: (1) they are not arbitrary and capricious; (2) they are needed to "meet compelling and extraordinary conditions" and (3) the standards and their enforcement procedures do not clash with the federal standards set by 42 USC 7521(a).[7] As Congress knew when this law was enacted in 1970, California is the only state that promulgated such regulations before March 30, 1966.[8]

The other exception to section 209's prohibition of state regulatory power is found in section 177, and was added in 1977. That section deals with regulation of vehicle engines in areas, called nonattainment areas, where pollution causes air quality to fall below federal standards.[9] The language of this provision makes the preference for California all the more blatant:

> [A]ny State . . . may adopt and enforce for any model year standards relating to control of new motor vehicles or motor vehicle engines. . .if:
> (1) such standards are identical to the California standards for which a waiver has been granted for such model year; and
> (2) California and such State adopt such standards at least two years before commencement of such model year.
> Nothing in this section . . . shall be construed as authorizing any such State to prohibit or limit, directly or indi-

5. 42 U.S.C. § 7543.
6. *Id*. § 7543(a).
7. *Id*. § 7543(b).
8. S. Rep. No. 91-1196, at 32 (1970).
9. 42 U.S.C. § 7507.

> rectly, the manufacture and sale of a new motor vehicle or motor vehicle engine that is certified in California as meeting California standards, or to take any action of any kind to create, or have the effect of creating, a motor vehicle or motor vehicle engine different from a motor vehicle or motor vehicle engine certified in California under California standards (a 'third vehicle') or otherwise create such a "third vehicle."[10]

In other words, after 1977, there are two types of vehicles permitted by federal laws from which states can choose: a first vehicle that meets EPA standards, or a second vehicle that meets California standards, as determined by California.

Non-road engines are also governed by section 209. That provision begins by saying "[n]o state or any political subdivision thereof shall adopt or attempt to enforce any standard or other requirement relating to the control of emissions" that are intended to regulate non-road engines in farm equipment and locomotives.[11] However, a qualification to that provision is found in section 209(e)(2)(A), which again gives California a named exception:

> [T]he Administrator [of the EPA] shall, after notice and opportunity for public hearing, authorize California to adopt and enforce standards and other requirements relating to the control of emissions from such vehicles or engines if California determines that California standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such authorization shall be granted if the Administrator finds that –
> (i) the determination of California is arbitrary and capricious;
> (ii) California does not need such standards to meet compelling and extraordinary conditions, or
> (iii) California standards and accompanying enforcement procedures are not consistent with this section.[12]

As with on-road vehicles and engines, in 1977 other states were given the power to adopt standards "identical" to that of California in lieu of federal standards.[13]

10. *Id.* § 7507.
11. *Id.* § 7543(e)(1).
12. *Id.* § 7543(e)(2)(A).
13. *Id.* § 7543(e)(2)(B)(i).

The final provision that gives California special status compared to other states is section 211, which deals with regulation of fuels. Under that provision, no state can set regulations requiring the use of fuel additives or particular fuels as long as a federal standard has been promulgated, unless the state's regulations are "identical" to federal regulations set by the EPA.[14] One exception to this rule is found in section 211(c)(4)(B), which allows any state with a waiver under section 7543(b) — the waiver only California is eligible for[15] — "[to] at any time prescribe and enforce, for the purpose of motor vehicle emission control, a control or prohibition respecting any fuel or fuel additive."[16] Unlike the other provisions, this exception does not allow states to adopt California standards in lieu of federal standards.

B. Congressional Debates about California's Special Status

1. 1970

The debates in the House of Representatives, and to a lesser degree those of the Senate, explain the reasoning behind such provisions. At the time the 1970 debates were taking place, the only state which had imposed restrictions on the construction of new motor vehicles was California, which represented ten percent of the auto market.[17] There was pressure to adopt those standards as the minimum required nationwide, but the federal government had not previously chosen to set such exacting standards.[18]

During the debate in the House of Representatives, some argued against the special treatment of California, and that all states should have the same powers. Representative John Saylor of Pennsylvania proposed an amendment to allow any state to pass regulations that would exceed the federal standards, arguing that Pennsylvania's and New York's air quality problems were worse than those of California and his home state should also have the power to pass regulations that exceeded the federal standard.[19] Another representative indicated that the air in Los Angeles was nearly five times worse than that of any other place in the nation.[20] Representative Sidney Yates, a Democrat from Illinois, spoke in favor of the amend-

14. *Id.* § 7545(4)(A).
15. S. Rep. No. 91-1196, at 32 (1970).
16. 42 U.S.C. § 7545(c)(4)(B).
17. 91 Cong. Rec. 116, 19219 (1970) (statement of Rep. Farbstein).
18. *Id.*
19. *Id.*, 19231-2.
20. *Id.*, 19232 (statement of Rep. Springer).

ment, arguing that his home state might also wish to pass such regulation. Ultimately, the feelings of those in favor of the amendment were summed up by Representative Leonard Farbstein, a Democrat from New York, who said he supported the amendment because it was meant to ensure "that the other States of the Union have the same right that the State of California has in setting standards that they deem necessary for the health and safety of their people."[21]

Another representative argued that data available to Congress indicated that the air in Los Angeles was nearly five times worse than that of any other place in the nation. Representative Springer, the most vocal opponent of Representative Saylor's amendment and a Republican from Illinois, had the following justification for his argument:

> Mr. SPRINGER. This was gone into in great detail. I will not go into all of it here as to why it was, but it was felt that you could not have 50 different emission standards. That is the reason, and that could conceivably happen . . . . Because he will let any locality that wants to set up its own emission standards. When you do that it means that you cannot drive from one county to another in Illinois, just the same as you could not drive in 50 different States, and you would have all different laws . . . May I say that we would not have done it in the State of California except in one county that has had the worst situation in the world, with the possible exception of London. There was a good reason for the exception of California.[22]

Others argued that leaving air quality decisions to the states would abrogate the federal responsibility to ensure healthy air and relieve the pressure on the federal government to set exacting standards.[23] After a lengthy debate, those who argued that allowing all states to regulate would be an abrogation of the federal responsibility to ensure healthy air and that 50 standards would be a practical nightmare prevailed. The amendment failed on a vote of 49 ayes, 79 noes.[24] After the vote, three representatives offered an amendment to make California standards those of the nation, arguing that the residents of New York should not be denied the benefits those in California enjoyed, but it too failed.[25]

21. 91 Cong. Rec. 116, 19232.
22. I*d*., 19224.
23. I*d*. S*ee*, *e.g*., final remarks of Rep. Springer.
24. I*d*., 19237.
25. H.R. Rep. No. 91-1146, at 52-53 (1970).

When the bill reached the Senate, there was no challenge to California's special status on the floor as there had been in the House. However, supporters again defended California's special status, relying heavily on the argument that California's air quality problems were much more severe than those in the rest of the country and noting that California had more cars per capita than any other state.[26] A committee report noted that the automobile industry argued that making California's standards the national standard would be inappropriate because "California's problem of automotive air pollution was unique and that different degrees of control for different pollutants would be needed to deal with problems in other areas of the nation."[27] The report went on to note that the bill as proposed contained federal pre-emption to "prevent a multiplicity of State standards for emissions control systems on new motor vehicles" and the California exemption existed due to "unusual instances."[28]

Following a conference committee to resolve differences, the bill was passed by both chambers with the California exemptions intact. President Nixon signed the bill into law on December 31, 1970.

2. 1977 Debates

In 1977, the California preference again engendered debate in Congress. A proposed amendment to the Clean Air Act, later adopted, was offered to give all states the power to choose between California's standards or the federal standards, but not to allow states to set their own standards. The debate over this amendment led to an exchange on the floor of the House of Representatives where members in favor of allowing states the ability to choose between the two standards used states' rights arguments to defend that position, and those opposing it raised the specter of a nightmare of interstate commerce where cars bought in one state would be illegal just across the border.

At one point, Representative Timothy Wirth of Colorado debated the question of the constitutionality of the California preference with Representative John Dingell of Michigan:

> Mr. WIRTH. [C]ould the gentleman tell me how the ability of the State of California or the State of Colorado or the State of Michigan, or wherever it may be, to set its

26. 91 Cong. Rec. 116, 33091 (statement of Sen. Murphy). *See also id.*, 42520 (remarks of Rep. Corman) and *id.*, 42521 (remarks of Rep. Holifield).

27. S. Rep. No. 91-1196 at 24 (1970).

28. *Id.* at 32.

> own standard is unconstitutional, as the gentleman is suggesting? What is unconstitutional about that?
> Mr. DINGELL. The Constitution provides that whenever the Federal Government speaks the States are not able to act in that area and we have done so in the Clean Air Act, except with a special exemption which we have enacted for the State of California, and then I have just described the penalties as a result of that.[29]

Thus, although Dingell addressed the constitutionality of Congress' power to govern interstate commerce, he did not address the heart of Wirth's question, which went to the equal powers of the state and the unconstitutionality of a grant of power to a single state denied to all other states. Representative Andrew Maguire of New Jersey next took up Wirth's argument, beginning one exchange by noting that his state was the most densely populated, and had large pollution problems related to traffic. He went on to say: "My State wants to be able to do what California is doing, and as I understand it some other States might also wish to do so. Why should we not be permitted to do that?"[30] Others likewise took up the argument: "[I]t seems to me that we should not deny the right we have given to California to other States with similar problems . . . . [W]e have one State right now, [Colorado], which has specific problems today over in the city of Denver. Are we going to tell them they cannot solve their pollution problems, just as California is solving theirs?"[31]

The states' rights arguments prevailed, and the amendment to allow non-California states the additional power to select California's standard or the federal standard was adopted, and became section 177. However, Congress never addressed whether allowing the State of California the power to set a national standard, while denying that power to all other states, was itself a violation of the Constitution. The statutory language granting California preference has not been altered or added to since that time.

C. Attempting to Assume Equal Powers

Following the passage of the CAA, states attempted to go beyond the EPA-promulgated standards in ways California was permitted to do. Although two states waged a court battle in defense of their standards, neither was successful. New York attempted to regu-

29. 95 Cong. Rec. 123, 16676. Rep. Dingell had previously given the rationale for the California preference as a way to respond to the uniquely severe pollution of that state. *Id.*

30. *Id.*, 16676.

31. *Id.*, 16677 (remarks of Rep. Carter).

late fuels, as California would be permitted to do in the late 1980s. In the 1990s, both Massachusetts and New York attempted to regulate the construction of new vehicles in ways which differed from California's regulations, although California had proposed, (but then dropped, a similar regulation.

1. Regulating Fuels — The J*orling* Decision

In the late 1980s, the State of New York attempted to regulate fuel volatility in ways that exceeded federal standards and did not match the regulations of California.[32] However, the American Petroleum Institute sued in federal court, arguing that the regulations contravened the CAA's prohibition against any fuel regulation by a state other than California, and therefore violated the Supremacy Clause of the Constitution.[33] The Institute also argued that because the regulation would unduly burden interstate commerce, the regulation violated the Dormant Commerce Clause.[34]

Judge Thomas McAvoy of the Northern District of New York heard the Institute's motion for a preliminary injunction and New York's cross-motion for dismissal. The court found that because New York's regulations were more restrictive than those promulgated by the EPA, the conclusion that the Supremacy Clause applied and the state's regulations therefore must yield was "inescapable."[35] Having so found, the court did not address the Dormant Commerce Clause argument. Although the court denied the injunction on the basis that irreparable harm had not been shown, it left the state defendant little hope that its regulation could survive without EPA choosing to adopt it.[36]

2. Regulating Vehicles — The Zero-Emission Vehicle Cases

In the mid to late 1990s, New York was again testing the limits, but this time it had company — Massachusetts. Both states, on EPA orders,[37] attempted to enact a regulation called the "Zero Emission Vehicle" standard. California had promulgated such a regulation in

32. S*ee* 6 N.Y. Comp. Codes R. & Regs. § 225-3 (2006).

33. A*m. Petroleum Inst. v. Jorling*, 710 F. Supp. 421 (N.D.N.Y. 1989).

34. I*d*.

35. I*d*. at 429.

36. I*d*. at 431.

37. V*irginia v.* EPA, 108 F.3d 1397, 1401 (D.C. Cir. 1997) (finding the requirement to adopt California standards to be invalid as beyond EPA's authority. New York and Massachusetts governors did not vote against the requirement to adopt California vehicle standards for their states).

1990,[38] and gained the required waiver from the EPA in 1993.[39] However, California removed the "Zero Emission Vehicle" standard in regulating the 1988-2000 vehicle classes.[40] The states of New York and Massachusetts both attempted to retain this standard despite California's pullback, arguing the standard they adopted was acceptable because it had been identical to one approved for use in California.[41] However federal courts ruled that because the state's standards for the vehicle class at issue did not exactly match those of California's, the standards were invalid as contrary to the CAA.[42]

In summary, the CAA's preference for California, clearly present in the statute, was challenged in Congress at the time of its adoption as unfair to other states. Although states other than California have attempted to enact regulations that California would be allowed to enforce under its special powers, the courts have held firm to the intent of Congress: a preference for California which prevents other states from doing what California may do. The next section of this paper discusses why such a preference is unconstitutional.

III. Equal Footing Doctrine: History and Modern Structure

In 1845, a Supreme Court justice called a dispute that revolved around the equal footing doctrine "the most important controversy ever brought before this court."[43] More recently, however, the doctrine granting newly formed states equal status has not been so gripping — it fact, it is cited as one of the most boring areas of law with which the Supreme Court must contend.[44] Nevertheless, dramatic reversals are not unusual in the doctrine's history.. The Constitutional Convention seemed to reverse its decisions on whether to refer to equal footing every time it voted, finally settling on an ambiguous comprise. Then, for nearly half of this country's history, the Supreme Court wavered between holding the doctrine was a statutory one that could be overridden by Congress' later acts, and holding the doctrine was constitutional in nature.

38. *Am. Auto. Mfrs. Ass'n v. Cahill*, 152 F.3d 196, 198-9 (2d Cir. 1998).

39. *Ass'n of Int'l Auto. Mfrs., Inc. v. Mass. Dep't of Envt'l Prot.*, 208 F.3d 1, 3 (1st Cir. 2000).

40. *Am. Auto. Mfrs. Ass'n*, 152 F.3d at 198-199.

41. *Id.* at 198; *Ass'n of Int'l Auto. Mfrs., Inc.* 208 F.3d 1 at 3.

42. *Am. Auto. Mfrs. Ass'n*, 152 F.3d at 200; *Ass'n of Int'l Auto. Mfrs., Inc.*, 208 F.3d at 7.

43. *Pollard v. Hagan*, 44 U.S. 212, 235 (1845) (Catron, J. dissenting).

44. Neil M. Richards, *The Supreme Court Justice and "Boring" Cases*, 4 GREEN BAG 401, 402 (2001). This lack of cachet is likely due to the doctrine's primary use in disputes over the ownership of submerged lands, coupled with receding public interest in control of waterways in an era of highways and the emergence of federalism as the primary basis for protecting powers of states.

Whether the equal footing doctrine renders the California preferences in the CAA unconstitutional depends on whether the doctrine is a constitutional one in the first place. Although the Supreme Court has consistently labeled it constitutional for some time now, because of the importance of the question to this paper's thesis, I will explain the doctrine's evolution through the Constitutional Convention, adoption by the first Congress, evolution through Supreme Court jurisprudence, and then conclude with a summary of what is now broadly recognized as the basis and contours of the doctrine.

A. The Constitutional Congress — The Debate, the Resolution, and Its Implications

The Constitutional Congress of 1787 engaged in a serious debate about whether later-admitted states should have the same powers as the original thirteen states. The chief opponent of giving new states power equal to the first thirteen was Gouverneur Morris of Pennsylvania; he was joined in his vociferous opposition by Elbridge Gerry of Massachusetts.[45]

Gerry spoke about the "dangers" posed by the Western states, and warned against putting the original states "in their hands. They will, if they acquire power, like all men, abuse it. They will oppress commerce and drain our wealth into the Western country."[46] He moved to limit the number of new states to 12 or fewer, so they would not outnumber the original states, a motion which was seconded by Rufus King of Massachusetts.[47]

A strong voice in favor of equal footing for all states was Roger Sherman of Connecticut, supported by two Virginians, James Madison and George Mason.[48] Sherman spoke against Gerry's motion, expressing his view that there was "no probability that the number of future states will exceed that of the existing states," but arguing that since "our children and grandchildren . . . will be as likely to be citizens of new Western States as of the old states . . . . [W]e ought to make no such discrimination as is proposed by the motion."[49] The motion failed on a vote of five states to four.[50]

However, the issue was far from settled, and soon a new proposal came from Morris. Morris argued that the Constitution should

45. MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES, 109 (Yale University Press 1913).

46. WILLIAM PETERS, A MORE PERFECT UNION: THE MAKING OF THE UNITED STATES CONSTITUTION, 123 (Crown Publishers 1987).

47. *Id*.

48. FARRAND, *supra* note 45, at 143.

49. PETERS, *supra* note 46, at 124.

50. *Id*.

be structured to ensure the original states would dominate the national government.[51] This proposition had precedents within the existing governmental system: several of the original states, including North and South Carolina, Pennsylvania, and Virginia, did not allow later-created counties in the western portion of those states to participate equally in their state legislatures and assemblies.[52]

Morris chaired the Convention's first committee responsible for apportionment of representatives from the existing and future states. In that role, with the help of Nathaniel Gorham of Massachusetts, Morris brought forth a proposal that was intended to give the original thirteen the power to "deal out the right of Representation in safe numbers to the Western States."[53] This proposal was adopted by the Convention.[54]

However, something curious happened when it came time to actually draft the language of the Constitutional provisions regarding the admission of states. The Committee of Detail, consisting of several of Morris' allies on the issue,[55] emerged from their work with a provision that new states should be "admitted on the same terms with the original states."[56] This was surprising on two counts: first, the Convention had adopted a proposal opposing such a position before the drafting committee began their work, second, most drafting committee members hailed from states that denied newer counties equal representation. Max Farrand notes the Committee chose this language "either on their own responsibility or because they interpreted the views of the convention that way."[57] Morris objected strenuously, on the grounds that such a measure would throw power into the hands of the newer states.[58] Madison and others opposed him, but Morris' proposed language carried the day: "New States may be admitted by the Legislature into the Union."[59]

51. *Id*. at 144. Specifically, Morris was adamant that Louisiana, if admitted to the Union, should not be allowed a "voice in our councils." Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 26 Am. J. Legal Hist. 119, 126 (2004) (citing historian William Dunning's work).

52. *Id*.

53. *Id*. at 110.

54. *Id*.

55. The committee consisted of Gorham of Massachusetts, John Rutledge of South Carolina, Edmund Randolph of Virginia, James Wilson of Pennsylvania, and Oliver Ellsworth of Connecticut. FARRAND, *supra* note 45, at 143.

56. FARRAND, *supra* note 45, at 143.

57. *Id*.

58. *Id*.

59. *Id*. at 144; art. I, § 2, cl. 1; art. I, § 3, cl. 1.

After the Louisiana Purchase, Morris was asked to explain this exact section of the Constitution, and did so in a letter to his friend Henry W. Livingston:

> Your inquiry . . . is substantially whether the Congress can admit, as a new State, territory, which did not belong to the United States when the Constitution was made. In my opinion they can not.
> I always thought that, when we should acquire Canada and Louisiana, it would be proper to govern them as provinces, and allow them no voice in our councils. In wording the third section of the fourth article, I went as far as circumstances would permit to establish the exclusion. Candor obliges me to add my belief, that, had it been more pointedly expressed, a strong opposition would have been made."[60]

What implications does this history have for the equal footing jurisprudence? As discussed below, although the Supreme Court now regularly recites the constitutional basis for the equal footing doctrine, at one time that was a hotly contested point. If it is not a constitutional doctrine, and exists only in the statutory acts of admission or enabling acts, then may Congress override it — for instance, by granting powers to California that the original 13 states do not have in the CAA? The history offers something for either side of the legal debate, but about the founders' opinion on our current state of affairs, there is less doubt.

For those who would argue the CAA is constitutional despite the equal footing doctrine, the best argument is that the founders explicitly rejected language allowing for such equal footing when they formulated the Constitution. In other words, the current Supreme Court jurisprudence that finds this doctrine is a constitutional one, sits uneasily beside a history of the founders explicitly rejecting the inclusion of such provisions. If it were not a constitutional doctrine, then the equal footing doctrine would arise only from statutes regarding

60. FARRAND, *supra* note 45, at 144. With the advantage of hindsight, the founders' ability to craft a union of states that still functions today is deeply impressive, especially because none of them envisioned anything close to the enormous expansion the United States would experience in just 200 years. Consider: Some deciding how to admit new states believed the number of new states would never number above 12; their opponents expected to acquire Canada, yet believed the new states would be uniformly poorer than the original states. Although the current state of the Union is not in line with either vision, the fact that it stands as a true Union is taken for granted by nearly all its citizens and the world.

the admission of new states, and therefore, may be overridden by later Congressional action.[61]

The compromise language finally adopted by the Convention has an evenness of treatment in other provisions that contradicts the professed aims of opponents of the "equal footing" language. The representation in both houses of Congress does not depend on the date the state joined the Union. As the author of the crucial sentence "New States may be admitted by the Legislature into the Union," Morris argued that it prohibited Congress from admitting any state formed from territory not owned by one of the states at the time of the Constitution's adoption, and required that they remain provinces. However, that interpretation is difficult to pull out of the sentence in question, and Morris alone appears to have managed it. Even Morris admitted that many other founders would not have agreed with his interpretation, and the debates make it clear that a contentious issue was essentially resolved with compromise language that had as its chief asset room for ambiguity.

What a majority, if not all, of the founders would have thought about a new state having powers denied to all the original states, however, is not ambiguous. It is clear from their writings that even the founders who objected to the "equal footing" language would have objected more vociferously had they believed the Constitution allowed Congress to grant California powers while denying those same powers to original states like Massachusetts and New York. Therefore, there is little support that the founders believed this allowed new states to have powers denied to the original states. To the contrary, the history of the Convention shows that a provision disallowing newer states powers denied to the original thirteen would have been quite popular.

The CAA allocation of power was made by a Congress where representatives and senators from new states far outnumbered those from the original states. This would have been deeply disturbing to the founders, who feared domination by the "new" states over the founding states. Congress, now dominated by "new" states, gave one of the new states governing power denied to all the founding states. Had the founders expected such an outcome, the tenor of the debates makes it clear the Convention would have prevented it by altering the language regarding the relationship between the states. In other words, even though the founders chose not to place the words "equal footing" in the Constitution, the proposal to do so would only have gained support if the founders had thought it possible that a

61. Whether a state could legally exit the Union if significant terms of its enabling act or act of admission were abrogated has never been seriously explored in a courtroom.

newer state like California would be granted powers that the original thirteen did not possess.

B. Statutory Equal Footing

1. The Northwest Ordinance (Continental Congress)

In July of 1787, while the founders were debating whether to insert the words "equal footing" into the Constitution, another governing body, the Continental Congress,[62] was inserting it into law. The phrase appeared first in the Northwest Ordinance of 1787.[63] Under a portion of the Ordinance to be "considered as articles of compact between the original states, and the people and States in the said territory, and forever remain unalterable unless by common consent," comes the language that territories should have the opportunity "for their admission to a share in the federal councils on an equal footing with the original States . . . as early . . . as may be consistent with the general interest."[64] Another "article of compact" provided that national debts would be paid "according to the same common rule or measure, by which apportionments thereof shall be made on the other States."[65]

2. The First Congress

Very early in its first term, the first Congress voted to have the Northwest Ordinance continue in full effect under the newly constituted government, reprinting it in full as part of the statutes at large of the United States.[66] Curiously, however, when admitting new states, Congress did not immediately use the "equal footing" language contained in the Ordinance, although statutes for admission of new states do contain comparable language. The first state to be

62. The First Continental Congress met from September 5, 1774, to October 26, 1774. The Second Continental Congress met from May 10, 1775, until the ratification of the Articles of Confederation on March 1, 1781. (The Revolutionary War officially concluded in 1783.) From 1781 until March 1, 1789 (when the U.S. Constitution went into effect), the nation's legislative body was known as the Congress of the Confederation. This Article discusses primarily activities of the Congress of the Confederation, but occasionally reaches back farther in history. To reduce confusion, this Article refers to all of these pre-constitutional legislative bodies as the Continental Congress.

63. An Ordinance for the Government of the Territory of the United States North-West of the River Ohio. July 13, 1787, § 13.

64. *Id*. art. V.

65. *Id*. art. IV.

66. Government of the North-West Territory, ch. 8, 1 Stat. 50 (1789). The Northwest Ordinance received final House approval on July 21, 1789, Senate approval on August 4, 1789, and was signed into law by President George Washington on August 7, 1789.

admitted after the adoption of the Constitution was Vermont, in March of 1791, followed by Kentucky, in1792. Both statutes for Vermont and Kentucky provide that the new states "shall be received and admitted into this Union, as a new and entire member of the United States of America."[67] Congress also gave the new states two seats in the House of Representatives, pending the first census.[68] Thus, although they did not use the language of "equal footing," the amount of representation indicates that Congress understood the phrase "new and entire" to entitle member states to the same rights and treatment as the original states.

3. Later Statehood Acts

The next state to join the Union was Tennessee, in 1796. Congress again avoided the words "equal footing" in the applicable legislation, but expressed sentiments regarding Tennessee's status in much broader language: "in all other respects, as far as they be applicable, the laws of the United States shall extend to, and have force in the state of Tennessee, in the same manner, as if that state had originally been one of the United States."[69]

The Enabling Act of 1802,[70] which admitted Ohio, is where "equal footing" and "same footing" reappeared front and center.[71] The words "equal footing" appear in the subtitle of the Act ("the admission of such state in the Union, on an equal footing with the original States").[72] The first section of the Act uses similar language, while

67. Vermont Admission Act, ch. 7, 1 Stat. 191(1791); Kentucky Admission Act, ch. 4,1 Stat. 189 (1791).

68. Representatives from Congress from Kentucky and Vermont, ch. 9, 1 Stat. 191 (1791).

69. Tennessee Admission Act, ch. 47, 1 Stat. 491 (1796).

70. Generally, the process of admitting states to the Union involves two major pieces of federal legislation: an "enabling act" and an "act of admission." An enabling act states the terms under which Congress would approve statehood. E.*g*. People of the Territory of Indiana Authorized to Form A State Government, ch. 57, 3 Stat. 289-291 (1816) (subtitled "An act to enable the people of the Indiana territory to form a constitution and state government, and for the admission of such state into the Union on an equal footing with the original states."). An act of admission is usually much shorter, simply declaring that the state is admitted into the Union. E.*g*. Indiana Admission Act, 14 Pub. Res. 1, 3 Stat. 399 (1816). There are, however, many exceptions to this rule: many states were admitted by only one piece of legislation, others had multiple enabling or admission acts. Several states were admitted by presidential proclamation , some of which have been memorialized in the United States Statutes at Large. E.*g*. Nebraska Admission Proclamation, 14 Stat 82-21 No. 9 (1867), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=72078.

71. Ohio Admission Act, ch. 40, 2 Stat. 173 (1802), modified as to real estate grants in ch. 21, 2 Stat. 225-27 (1803).

72. I*d*.

echoing language from the Tennessee Act of Admission: "said state, when formed, shall be admitted into the Union, upon the same footing with the original states, in all respects whatever."[73]

From 1802 forward, the words "equal footing" or "same footing" appeared in the title or statute of all other enabling acts and acts of admission; every state admitted to the Union has explicitly entered on such footing.[74] In addition, Mississippi's Admission Act of 1817 contained a direct reference to the Northwest Ordinance of 1787, noting that admission of the state on "equal footing with the original states in all respects whatever" was pursuant to the terms of the Or-

73. I*d*.

74. In order of eventual admission of the states: Louisiana Enabling Act, ch. 23, 2 Stat 322-23 § 7 (1805) ("upon the footing of the original states"); Louisiana Admission Act, ch. 50, 2 Stat. 701-04 § 1 (1811) (supplemented as to courts and abolishing local government, ch. 93, 2 Stat. 743 (1812)); Indiana Enabling Act, ch. 57, 3 Stat 289-91 (1816); Indiana Admission Act, 14 Pub. Res. 1, 3 Stat. 399-400 (1816) ; Mississippi Enabling Act, ch. 23, 3 Stat 348-49 § 1; Mississippi Admission Act, 15 Pub. Res. 1, 3 Stat. 472-73 (1817); Illinois Enabling Act, ch. 67, 3 Stat. 428-31 §§ 1, 4 (1818); Illinois Admission Act, 15 Pub. Res. 1, 3 Stat. 536 (1818); Alabama Enabling Act, ch. 47, 3 Stat. 489-92 § 1 (1819); Alabama Admission Act, 16 Pub. Res. 1, 3 Stat. 608 (1819); Maine Admission Act, ch. 19, 3 Stat. 544 (1820); Missouri Enabling Act, ch. 22, 3 Stat. 545-48 § 1 (1820); Missouri Admission Act, 16 Pub. Res. 1, 3 Stat. 645 (1821); Missouri Admission Proclamation, 3 Stat. 797 (1821); Arkansas Enabling Act, ch. 100, 5 Stat. 50- § 1(1836) (as supplemented by ch. 120, 5 Stat. 58-59 (1836) and with changes assented to in ch. 68, 9 Stat. 42 (1846) and ch. 54, 30 Stat. 262 (1898)); Arkansas Admission Act, ch. 100,. 5 Stat. 50-51 (1836); Michigan Enabling Act, ch. 99, 5 Stat. 49-50 §§ 2, 4 (1836) (as supplemented by ch. 121, 5 Stat. 59-60 (1836)); Florida and Iowa Admission Act, ch. 28, 5 Stat. 742-43 §§ 1, 4 (1845) (as supplemented by ch. 75, 5 Stat. 788 (1845) and ch. 76, 5 Stat. 789-90 (1845) and as amended by ch. 123, 9 Stat. 410-12 (1849); Texas Admission Act, 29 Pub. Res. 1, 9 Stat. 108 §1 (1845); Wisconsin Enabling Act, ch. 89, 9 Stat. 56-58 § 1 (1846); Wisconsin Admission Act I, ch. 53, 9 Stat. 178-79 §§ 1, 4 (1847); Wisconsin Admission Act II, ch. 50, 9 Stat. 233-35 § 1(1848); California Admission Act, ch. 50, 9 Stat. 452-53 § 1(1850); Minnesota Enabling Act, ch. 60, 11 Stat. 166-67 § 1(1857); Minnesota Admission Act, ch. 31, 11 Stat. 285 §1 (1858) (as supplemented by ch. 74, 11 Stat. 402 (1859); Oregon Admission Act, ch. 33, 11 Stat. 383-84 § 1 (1859) (as amended by ch. 2, 12 Stat. (1860); Kansas Admission on Condition Act, ch. 26, 11 Stat. 269-72 § 1 (1858); ch. 20, 12 Stat. 126-28 § 1 (1861); West Virginia Admission Act, ch. 6, 12 Stat. 633-34 § 1 (1862); Nevada Enabling Act, ch. 36, 13 Stat. 30-32 § 1 (1864) (as amended by ch. 94, 13 Stat. 85(1864)); Nebraska Enabling Act, ch. 59, 13 Stat. 47-50 (1864) ("equal footing" in title only); Nebraska Admission Act, ch. 36, 14 Stat. 391-92 §1 (1867); Nebraska Admission Proclamation, 14 Stat. 82-21 No. 9 (1867) ; Colorado Enabling Act I, ch. 37,13 Stat. 32-25 § 1 (1864) (as amended by ch. 135, 13 Stat. 137 (1864)); Colorado Enabling Act, II, ch. 139, 18 Stat. 474-76 § 1 (1875) (as amended by ch. 17, 19 Stat. 5-6 (1876)); North Dakota, South Dakota, Montana and Washington Enabling Act, ch. 180, 25 Stat. 676 (1889) (as amended by ch. 256, 29 Stat. 189 (1896), ch. 172, 47 Stat. 150-51 (1932), Pub. L. No. 85-6, 71 Stat. 5 (1957), and Pub. L. 91-463, 84 Stat. 987 (1970)); Idaho Admission Act, ch. 656, 26 Stat. 215-19 § 1 (1890); Wyoming Admission Act, ch. 664, 26 Stat. 222 (1890)); Utah Enabling Act, ch. 138, 28 Stat. 107 §§ 1, 4 (1894); Proclamation Declaring Utah Statehood, 6 Thorpe 3700 (January 4, 1896); Oklahoma, New Mexico, and Arizona Enabling Act, ch. 3335, 34 Stat. 267, Title and § 26 (1906) (as amended by ch. 2911, 34 Stat. 1286 (1907)); Alaska Statehood Bill, Pub. L. 85-508, 72 Stat. 339 § 1 (1958); Hawaii Admissions Act, Pub. L. 86-3, 73 Stat. 4 § 1 (1959).

dinance.[75] Those terms were also referenced in several other statehood Acts.[76]

C. Equal Footing in the Supreme Court

The majority of Supreme Court cases dealing with the equal footing doctrine has been about the title to lands, especially submerged lands. The doctrine has played a key role, however, in some of the biggest issues of the United States' political history: decisions regarding the federal and state government relationship to American Indian tribes, the slavery debate, the spread of religious freedom, and most of all, the relationship between the federal government and that of the states. Although it wasn't until the 1840s that the Court would declare the doctrine had a constitutional as well as a statutory basis, the Court has been remarkably consistent in describing the major role the equal footing doctrine has played in the nation's political structure. In addition, the Court has always seen the heart of the doctrine as a protection of political rights, and guarded any perceived encroachment on political rights more carefully than state claims to land under the doctrine. Below, I discuss how the Supreme Court's equal footing jurisprudence has evolved over time.

1. Pre-Civil War: Land, Corpses, and Slavery

The first Supreme Court discussion of equal footing doctrine, in 1831, came from a concurrence.[77] Justice Baldwin noted that every state which had given up land to the federal government had conditioned that cession on admission to the Union on "an equal footing with the original states."[78] Citing the Northwest Ordinance of 1787, he found the intention to form "new, free, sovereign and independent states" to be the "clear meaning and understanding of all the ceding states, and of congress, in accepting the cession of their western lands up to the time of the adoption of the constitution."[79] Justice Baldwin cited the Tenth Amendment to support that states had an unimpaired right to individual sovereignty, in that the municipal regulations of one would not have any legal effect on those of another, and stated more generally that the Constitution "recognized" the sovereignty of an individual state.[80]

75. 15 Pub. Res. 1, 3 Stat. 473 (1817).
76. E.*g.*, Illinois Enabling Act, ch. 67, 3 Stat. 428-30 § 4 (1818).
77. *Cherokee Nation v. Georgia.*, 30 U.S. 1, 31 (1831).
78. I*d*. at 35 (Baldwin, J., concurring).
79. I*d*.
80. I*d*. at 47-48.

The first majority opinion of the Court discussing the equal footing doctrine came four years later, in *Mayor of New Orleans v. De Armas*.[81] It was swiftly followed by a second opinion, which also grappled with the difficulties of sorting out Louisiana's complex legal history.[82] In the first case, Chief Justice Marshall, writing for the Court, decided which of two claimants to a parcel of land had the better title: the petitioners, who traced their title back to a Spanish grant, or the City of New Orleans, which claimed land rights under French law and therefore the treaty providing for the Louisiana Purchase.[83] Marshall found that the Court lacked jurisdiction to hear the question, specifically holding that the Act admitting Louisiana as a state "on an equal footing with the original states in all aspects whatever" could not be read to give jurisdiction over the dispute.[84] Marshall noted that jurisdiction might exist under such a provision, however, if New Orleans argued the United States had claimed land that rightfully belonged to the State of Louisiana.[85]

Given the Court's opinion of 1835, it is unsurprising that the 1836 case involved New Orleans' contention that the United States had claimed land that rightfully belonged the City of New Orleans, via the State of Louisiana.[86] The Court stated that the rights of Louisiana were the same as the original states, since she was admitted to the union "on the same footing."[87] On that basis, the Court found the federal government could not claim the disputed property.[88] The court did not state whether the equal footing precedent that decided the case came from the admittance statute or the Constitution.

In 1840, the Supreme Court once again considered how the equal footing doctrine played into the tangled legal history of Louisiana.[89] In *Lessee of Pollard's Heirs v. Kibbe*,[90] Justice Baldwin, who opined many times about Louisiana property disputes, wrote a concurring opinion citing the Constitution, the Northwest Ordinance, and the "general course of legislation by Congress, in relation to the government and property in the disputed territory."[91] He concluded that the

81. *Mayor of New Orleans v. De Armas*, 34 U.S. 224, 235 (1835).

82. *New Orleans v. United States*, 35 U.S. 662 (1836).

83. *New Orleans v. De Armas*, 34 U.S. at 225-26.

84. *Id.* at 235.

85. *Id.* at 236.

86. *New Orleans v. United States*, 35 U.S. 662, 662 (1836).

87. *Id.* at 737.

88. *Id.*

89. Had Gouverneur Morris lived to see 1840, he might have pointed out that his idea to rule Louisiana as a province would have cut down on litigation.

90. 39 U.S. 353 (1840).

91. *Id.* at 369-371.

property in Louisiana was subject to the same laws as if the property had lain in another state.[92] Justice Baldwin stated that the equal footing of Louisiana was established when Congress passed Louisiana's Enabling Act, in 1805, thus extending the principles of the Northwest Ordinance.[93] He then compared the right to equal footing along with the rights to trial by jury and habeas corpus, among others.[94]

Two years later, another concurring opinion mentioned the equal footing doctrine, in a case involving title to land subject to different crowns; this time, the land in question was in Alabama.[95] In M*obile v*. E*slava*, Justice Catron explained the Court was aware that the Supreme Court of Alabama had reasoned because the original states had title to the submerged lands of their states, the equal footing doctrine would be violated if Alabama were not given the same title.[96] The majority affirmed the lower decision without reference to the equal footing doctrine, deciding the question on statutory interpretation alone.[97] But Justice Catron interpreted the doctrine, writing:

> The stipulation in the ordinance of 1787, and which is repeated in the resolution admitting Alabama, guarantying [*sic*] to the new state equal rights with the old, referred to the political rights and sovereign capacities left to the old states, unimpaired by the constitution of the United States; and which were confirmed to them by that instrument. New states have] equal capacities of self-government with the old states, and equal benefits under the Constitution of the United States. This is the extent of the guarantee. That each and all of the states have sovereign power over their navigable waters, above and below the tide, no one doubts.[98]

This spirited defense of equal footing has interesting implications First, although the concurrence refers explicitly to statutes, it implies a constitutional basis for the doctrine ("equal benefits under the Constitution"). Second, it makes clear that ownership of land is a relatively minor piece of the doctrine; at heart, the doctrine promises equality of political rights to all states.

92. I*d*. at 421.
93. I*d*. at 373.
94. I*d*. at 374.
95. M*obile v*. E*slava*, 41 U.S. 234 (1842).
96. I*d*. at 253.
97. I*d*. at 247.
98. I*d*. at 258-259.

In 1845, two cases on the Court's docket dealt with the equal footing doctrine, and the first explicit arguments that the doctrine was constitutional appeared. Despite Justice Catron's focus on political rights, the next time the Justices took up the topic,[99] it was yet another submerged lands case out of Alabama.[100] However, the Court did not limit the opinion to land issues. Writing for the Court, Justice McKinley cited the Northwest Ordinance, and for the first time, expressed a specific constitutional basis for the doctrine.[101] After quoting Article IV, Section 3, which governs the admission of new states, he stated, "When Alabama was admitted into the union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain."[102] The Court clarified that the doctrine was a constitutional and not merely a statutory one, finding in dicta that even if there had been an express stipulation of the rights of sovereignty or eminent domain, such a stipulation would have been "void and inoperative[,] because the United States ha[s] no constitutional capacity to exercise municipal jurisdiction [or] sovereignty" over objections by a state.[103] "The right of Alabama and every other new state to exercise all the powers of government, which belong to and may be exercised by the original states of the union, must be admitted, and remain unquestioned."[104] The Court held that the only regulations Congress could impose on a new state, were those that it could also impose on the original states.[105] The same reasoning also meant that a new State's power "does not . . . exceed the power thereby conceded to Congress over the original states on the same subject."[106]

99. Although a party cited the equal footing doctrine in his argument in an 1844 case, no member of the Court took up the topic again until 1845. *Gaines v. Chew*, 43 U.S. 619, 639 (1844).

100. *Pollard's Lessee v. Hagan*, 44 U.S. 212 (1845). Interestingly, this case is often seen as a weakening of the equal footing doctrine, in that it found Congress could award public lands to third parties before statehood, defeating the argument that the equal footing doctrine required Congress to not dispose of public lands so that they would devolve to the state upon admission. E.*g.*, *Utah Division of State Lands v. United States*, 482 U.S. 193, 196 (1987). The firm constitutional basis for the doctrine articulated in the case, however, strengthened the foundation for the core of the doctrine, even while declaring a new boundary. The Court explicitly declined to overrule *Pollard's Lessee v. Hagan* in *Goodtitle v. Kibbe*, 50 U.S. 471 (1850).

101. 44 U.S. at 222-23.

102. *Id.* at 223 (specifically, the same rights as granted to the state of Georgia on admission) *Id.*

103. *Id.*

104. *Id.* at 224.

105. *Id.* at 229.

106. *Id.* at 230.

Although Justice Catron dissented in this case, he objected not to the grounding of the doctrine in the Constitution or even the broad statements about the scope of permissible regulation by Congress, but to the doctrine's application to submerged land title. He argued that "no state complains, nor has any one ever complained, of the infraction of her political and sovereign rights by the United States," and that the case was really one regarding a right of property.[107] He also argued that the United States was being denied rights given to private landowners: "the United States did not part with the right of soil by enabling a state to assume political jurisdiction."[108] He closed his dissent by noting that he had chosen to write "because this is deemed the most important controversy every brought before this [C]ourt, either as it respects the amount of property involved, or the principles on which the present judgment proceeds."[109] In other words, the principles as to the political rights of states were not, in his view, in dispute; the specific application to the title of submerged lands was the application of the doctrine with which he took issue.

The second case of the term, *Permoli v. New Orleans*, was unquestionably about political rights.[110] The City of New Orleans had passed a statute fining Catholic priests who displayed corpses during funerals in their churches, requiring that open-casket services be held in a specific chapel. Reverend Bernard Permoli violated the statute and was fined accordingly. Noting that "the Constitution makes no provision for protecting the citizens of the respective states in their religious liberties" but that the state's enabling act required Louisiana to protect those rights as a condition of statehood, the Court resolved the conflict.[111]

In a unanimous opinion written by Justice Catron, the Court found it was proper for Congress to announce the terms under which it would accept a statehood petition, and that Congress could choose to reject as or accept such a petition as a whole, taking into account whether the "proper principles" were reflected in the proposed state constitution.[112] If Congress admitted a state, then it was precluded from going back to alter the state's constitution to comply with the enabling act.[113] The Court rejected that provisions of the Northwest

107. *Id.* at 232.

108. *Id.* at 234.

109. *Id.* at 235.

110. *Permoli v. New Orleans*, 44 U.S. 589 (1845).

111. *Id.* at 609. The U.S. Constitution did not require state governments to protect religious freedom until the Supreme Court "incorporated" this provision of the First Amendment in 1940. *See Cantwell v. State of Connecticut*, 310 U.S. 296 (1940).

112. *Id.*

113. *Id.* at 610.

Ordinance protecting religious liberty applied following statehood, or indeed that any territorial guarantees survived statehood, absent an explicit statement.[114] Since the only guarantee of religious liberty was therefore found in the state's constitution, the question of whether the ordinance violated the state's constitution was a matter of state, not federal, law, "equally so in the old states and the new ones."[115]

The reference to the old states is best understood this way: if the enabling acts created requirements for new states, then all legislation from those states that might violate the state constitution would also raise a question of federal law under the enabling act. The original 13 states had no enabling acts, and therefore, they would never grapple with a question of federal law arising from state constitutional violations. The Court found that violated the equal footing doctrine, and therefore, held it lacked jurisdiction the enabling act ceased to have an effect once the state was admitted. The Court therefore reasoned it had no jurisdiction.[116]

The next opinion to discuss the equal footing doctrine in any depth was the notorious D*red Scott* case.[117] Although the doctrine did not become the heart of the decision, the P*ermoli* decision had made future compromises problematic; the Court invalidated the Missouri Compromise on the basis that Congress could not prohibit slavery in the territories.[118]. Justice Nelson's concurring opinion may best illustrate the wrench that P*ermoli* threw into the slavery debate: "[I]t belongs to the sovereign state of Missouri to determine by her laws the question of slavery within her jurisdiction, subject only to such limitations as may be found in the Federal Constitution.. . . This is the necessary result of the independent and sovereign character of the State."[119] In other words, even if the Enabling Acts or Acts of Admission of a state specified that it should enter the Union as a slave or free state, there would be no legal recourse if, for instance, a state that had entered as a slave state then outlawed slavery.

2. The Equal Footing Doctrine Splits: Political vs. Property Rights

Between the Civil War and 1895, the Court took only four cases that mentioned the equal footing doctrine, and all dealt with title to submerged lands. Other than affirming in strong language that the equal footing doctrine was "settled" law with both a statutory and

114. I*d*.
115. I*d*.
116. I*d*.
117. S*cott v. Sanford*, 60 U.S. 393 (1856).
118. I*d*. at 438-39, 446-47.
119. I*d*. at 460-461.

constitutional basis, the cases were unremarkable.[120] In 1896, the Court, in the first of many cases to do so, decided a title dispute with an American Indian tribe in which it weighed treaty language against the land title the State claimed as a result of the equal footing doctrine.[121] The case continued the trend of increasing stress on the constitutionality and broad nature of the principle of equal footing, stating that Wyoming was "endowed with powers and attributes equal in scope to those enjoyed by the States already admitted"[122] and that the recognition of equal rights was "merely declaratory of the general rule."[123]

The new century brought some new facets to the equal footing doctrine, as the Court took the opportunity to delineate between two branches of the doctrine: the branch dealing with property rights, and the branch dealing with political rights. *Stearns v. Minnesota* involved a challenge to a Minnesota law that gave a railroad company a special break on taxation of lands previously given by the federal government to the State at the time of admission.[124] The Court explained that "different considerations may underlie the question as to the validity" of compacts between the state and the federal government regarding "political rights and obligations" and those compacts that dealt only with property.[125] The Court continued, "It has often been said that a State admitted into the Union enters therein in full equality with all the others, and such equality may forbid any agreement or compact limiting or qualifying political rights and obligations."[126] Finding that property provisions did not truly involve a question of equality, the Court held that the State could be required to live up to the obligations of a trust that the federal government imposed as a condition of the land cession.[127]

120. E.*g.*, *Mumford v. Wardwell*, 73 U.S. 423, 436 (1867) (equal footing doctrine as settled law); *Escanaba & Lake Mich. Transp. Co. v. Chicago*, 107 U.S. 678, 688-89 (1883) ("[Illinois] was admitted, and could be admitted, only on the same footing with the [original states."); *Ill. Cent.* R.R. *Co. v. Illinois*, 146 U.S. 387, 434 (1892) ("[T]he equality prescribed would have existed if it had not been thus stipulated"); *Shively v. Bowlby*, 152 U.S. 1, 34 (1894) ("Could such an intention be ascribed to Congress, the right to enforce it may be confidently denied. Clearly, Congress could exact of the new state the surrender of no attribute inherent in her character as a sovereign, independent state, or indispensable to her equality with her sister states, necessarily implied and guaranteed by the very nature of the federal compact.").

121. *Ward v. Race Horse*, 163 U.S. 504 (1896).

122. *Id.* at 514.

123. *Id.* at 511.

124. *Stearns v. Minnesota*, 179 U.S. 223 (1900).

125. *Id.* at 244-45.

126. *Id.* at 245.

127. *Id.* at 253.

The Court's reaffirmance of the importance and centrality of the doctrine's political implications, while recognizing but downplaying the property implications, was an obvious outgrowth of the jurisprudence as a whole, going back as far as Justice Catron's concurrence in 1842.[128] *Stearns* did mark an important doctrinal step, in that the Court declined to extend *Permoli*. Recall that in the *Permoli* decision, the Court unanimously rejected that federal courts could reconsider state Supreme Courts decisions interpreting state constitutions simply because the enabling act of a state required certain elements in that constitution. The rationale was there could never be a federal cause of action for the original thirteen states in the same situation, as they lacked an enabling act, and therefore, it would be a violation of the equal footing doctrine to subject the newer states to federal court oversight. In *Stearns*, however, the Court made no such argument considering property. Arguably, because the original thirteen states had not received their public lands from Congress, none of their public lands would have the same limitations.[129] The Court might have found, therefore, that subjecting those lands held publicly by newer states to extra obligations violated the equal footing doctrine. Instead, the Court chose to put property rights stemming from the equal footing doctrine on a lesser plane than political rights from the same source. Reading *Permoli* and *Stearns* together, the two decisions create a dualism political rights and land rights under the equal footing doctrine that remains to this day.

3. Fleshing Out the Political Branch of the Equal Footing Doctrine

After *Stearns*, the Court waited 11 years before addressing the equal footing doctrine again, but resumed discussions with the most important case regarding the political branch of the equal footing doctrine that has been written. *Coyle v. Smith* posed the question of whether Oklahoma was permitted to move its state capital from Guthrie to Oklahoma City.[130] Although any schoolchild who has been made to memorize the state capitals knows the state was allowed to do so, few know why.

128. *Mobile v. Eslava*, 41 U.S. 234 (1842).

129. Justice White's concurrence, which was signed by Justices Harlan, Gray and McKenna, makes this particularly clear, as it assumes that the Minnesota Supreme Court erred in deciding that the taxation system was not in violation of the state Constitution. *Stearns v. Minnesota*, 179 U.S. at 257. White then poses the question "[Can Congress] confer upon a state legislature the right to violate the Constitution of the state?" and determines the answer, at least in this case, is "No." *Id.*

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

Oklahoma's Enabling Act required that the capital of the state should remain Guthrie until at least 1913, and then could be moved only if the move was ratified by a popular election.[131] Oklahoma became a state in 1907, and in 1910, the state legislature passed a law to erect the necessary buildings in Oklahoma City and to move the capital.[132] The plaintiff, Coyle, owned a great deal of land in Guthrie, and brought suit alleging that the move violated the state constitution and federal law.[133] The Oklahoma Supreme Court found no violation, and the U.S. Supreme Court declined to review that decision. What it took up was the question of whether there was a violation of federal law.

Holding that "the power to locate its own seat of government, and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers," the Court also noted that the idea of a federal mandate to move a state capital in one of the original thirteen states "would not be for a moment entertained."[134] With that preamble, the Court set out to decide the question it framed: "Can a state be placed upon a plane of inequality with its sister states in the Union if the Congress chooses to impose conditions which so operate, at the time of its admission?"[135]

The Court first turned to the provisions of the Constitution dealing with the admission of states. It read those powers to have an inherent limitation, namely the lack of power to "admit political organizations which are less or greater, or different in dignity or power, from those political entities which constitute the Union."[136] It then looked to the statutory basis of the equal footing doctrine, noting that all the acts admitting new states into the Union had recognized their equality with the previous states in terms that were, at a minimum, "emphatic and significant."[137]

> "This Union" was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new sates, might come to be a union of states

131. Oklahoma Enabling Act, ch. 3335, 34 Stat. 267 (1906).
132. *Coyle v. Smith*, 221 U.S. at 563-64.
133. *Id.*
134. *Id.* at 565.
135. *Id.*
136. *Id.* at 566.
137. *Id.*

> unequal in power, as including states whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress . . . . The argument that Congress derives from the duty of "guaranteeing to each state in this Union a republican form of government" power to impose restrictions upon a new state which deprive it of equality with other members of the Union, has no merit.[138]

With this background, the Court distinguished three types of provisions that might be found in enabling acts: those that are fulfilled upon the admission of the state, those that are intended to operate in the future and are within the scope of the powers of Congress over the subject, and those that operate in the future and restrict the powers of a state in respect to matters which would otherwise be exclusively within the sphere of state power.[139] Citing P*ermoli*, the Court found the first set of provisions were constitutional, in that Congress could require certain provisions in a state constitution before admitting that state, but that upon admission, these provisions would be "subject to alteration and amendment" just as any other part of the state's constitution would be.[140] The Court closed discussion of the first provision by saying, "there is to be found no sanction for the contention that any state may be deprived of any of the power constitutionally possessed by other States, as States, by reason of the terms on which the acts admitting them to the Union have been framed."[141]

The Court then turned to provisions intended to reach future actions that were within or outside the scope of the powers of Congress. The Court found that provisions that exceeded the scope of Congress over the subject were void, because the state's powers could not be "constitutionally diminished, impaired, or shorn away by any conditions, compacts, or stipulations . . . which would not be valid and effectual if the subject of congressional legislation after admission."[142] In contrast, those conditions which could have been made part of a statute would be enforceable, because the conditions

138. I*d*. at 567. The Court tempered this language by stating that Congress may have the duty to make sure that the form of government is not changed to one that is anti-republican, citing M*inor v*. H*appersett*, 21 Wall. 162 (1874). C*oyle v*. S*mith*, 221 U.S. at 567-68.

139. C*oyle v*. S*mith*, 221 U.S. at 568.

140. I*d*.

141. I*d*. at 570.

142. I*d*. at 573.

were independently valid, passed by Congress within its authority.[143] The Court found that the question of the capital's location was obviously beyond Congress' authority to dictate through legislation, and hence, was unconstitutional.[144] The Court closed:

> [T]he constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the union will not be the Union of the Constitution.[145]

Coyle remains both the most recent case to discuss the political rights of states under the equal footing doctrine and the case offering the best explication of the doctrine.[146] Although the case was ostensibly about the limitations in enabling acts that could be given weight, the Court's language was much more wide-ranging, concluding that equality of states forms an essential foundation of the country. *Coyle* also created a method for handling challenges to conditions in enabling acts: determine whether Congress could have enacted the condition under other statutory powers, and if so, the condition may be enforced. The Court did not, however, address the potential problem this method creates; namely, the question of whether Congress can pass a law that impacts only one state.

In the modern era, the best explication of the status of the equal footing doctrine came in 1950, in *United States v. Texas*.[147] Citing *Stearns*, the Court noted the long jurisprudence of equal political rights and sovereignty required by the equal footing doctrine.[148] The Court separately discussed the effect the doctrine has on property ownership, noting that the Court had consistently held that to deny the later-admitted states ownership of submerged lands would deny them equal footing, "since the original States did not grant these properties to the United States but reserved them to themselves."[149] The Court also noted some matters that were outside the boundaries of the clause:

143. *Id.* at 574.

144. *Id.*

145. *Id.* at 580.

146. In 1918, in a case that spent little time on the equal footing doctrine, the Court would label the ideal that states have equal local governmental power a "truism" in deciding that the federal government had the power to enforce interstate compacts approved by Congress. *Virginia v. West Virginia*, 246 U.S. 565, 593 (1918).

147. 339 U.S. 707 (1950).

148. *Id.* at 716.

149. *Id.*

> It does not, of course, include economic stature or standing. There has never been equality among the States in that sense. Some States when they entered the Union had within their boundaries tracts of land belonging to the Federal Government; others were sovereigns of their soil. Some had special agreements with the Federal Government governing property within their borders. Area, location, geology, and latitude have created great diversity in the economic aspects of the several States. The requirement of equal footing was designed not to wipe out those diversities but to create parity as respects political standing and sovereignty.[150]

4. Modern Supreme Court Cases: Submerged into the Submerged Lands Cases

Since the 1950s, no major equal footing case has dealt with political rights or even discussed them. Instead, the doctrine has been used nearly exclusively in cases deciding property issues regarding submerged lands, with resulting forays into American Indian law and water law. Little more than a sentence or two is devoted to the equal footing doctrine in these cases, usually a simple statement about the nature of the doctrine before diving into factual issues that bear upon a particular application.[151]

The exception came with two cases from the 1970s, when the Court set forth a new principle as part of the equal footing doctrine, and then repealed it soon afterward. The question on was whether the equal footing doctrine mandated the application of federal common law over the laws of a state. In *Bonelli Cattle Co. v. Arizona*, the Court decided whether the ownership of previously submerged lands divested from the State after the waters had been removed. The Court held that the equal footing doctrine did not entitle the state to the deed to those lands, because there was no longer "a public bene-

150. *Id.* (citation omitted).

151. *Organized Village of Kake v. Egan*, 80 S. Ct. 33, 37 (1959); *California v. United States*, 438 U.S. 645, 648, 654 (1978); *California v. Arizona*, 440 U.S. 59, 60 (1979); *Montana v. United States*, 450 U.S. 544, 551 (1981); *California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 281, 285 (1982); *Summa Corp. v. California ex rel. State Lands Comm'n*, 466 U.S. 198, 205 (1984) ("The Federal Government, of course, cannot dispose of a right possessed by the State under the equal-footing doctrine of the United States Constitution"); *United States v. Cherokee Nation of Okla.*, 480 U.S. 700, 706 (1987); *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195197 (1987); *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 472 (1988); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 203-204 (1998); *Idaho v. United States*, 533 U.S. 262, 280 (2001).

fit to be protected."[152] However, the Court determined that the State's unsuccessful invocation of the equal footing doctrine meant that the Court had to use federal common law to resolve the dispute.[153]

In 1977, the Court explicitly overruled B*onelli*, teaching that the equal footing doctrine's effect on land ownership occurs at admission only; after that time, "the force of that doctrine was spent," and it was not a basis on which federal common law could be applied to overrule the decisions of a state.[154] The Court noted that "precisely the contrary is true," stating that precedent made it clear the doctrine results in a State taking title, notwithstanding post-statehood efforts of the federal government to grant that title to others.[155] The reasoning of the Court's opinion harkened back to P*ermoli*, noting that to decide that the equal footing doctrine allowed federal common law to be applied:

> would result in a perverse application of the equal-footing doctrine. An original State would be free to choose its own legal principles to resolve property disputes relating to land under its riverbeds; a subsequently admitted State would be constrained by the equal-footing doctrine to apply the federal common-law rule, which may result in property law determinations antithetical to the desires of that State.[156]

The Court finished with an added justification for overruling its decision of just a few years earlier, saying that the case raised "an issue substantially related to the constitutional sovereignty of states," and therefore, "considerations of *stare decisis* play a less important role than they do in cases involving substantive property law."[157]

D. Modern Attempts to Revivify the Equal Footing Doctrine

Though the Supreme Court has not decided any cases dealing with political rights in modern times, the Circuit courts have. In particular, the Ninth and Tenth Circuits have considered attempts by a wide range of litigants to revivify the political branch of the equal footing doctrine. Although unsuccessful, anti-nuclear activists, polygamists, and sagebrush rebels have all attempted to use the doc-

152. B*onelli Cattle Co. v. Arizona*, 414 U.S. 313, 323 (1973).
153. I*d*. at 330 n.27.
154. O*regon ex rel. State Land Bd. v. Corvallis Sand and Gravel Co.*, 429 U.S. 363, 371 (1977).
155. I*d*.
156. I*d*. at 378.
157. I*d*. at 381.

trine. The first two groups are primarily concerned with the political arm of the equal footing doctrine; the Sagebrush Rebellion has focused on the property aspects. As discussed below, although their attempts failed, the courts have continued, sometimes in dicta, to reaffirm the power of the equal footing doctrine.

1. Nuclear Waste and the Equal Footing Doctrine

The Department of Energy set its sights on putting the nation's first long-term geologic repository for spent nuclear fuel and high-level radioactive waste in Nevada, at a site called Yucca Mountain. In *Nevada v. Watkins*, the State of Nevada challenged Congressional authority to designate Yucca Mountain, which is federal property, as the sole site for possible development of the repository.[158] Among other theories, the State raised the argument that the equal footing doctrine prevented Congress from selecting a single state as the nuclear waste repository for the country absent that state's consent, because to do so would make her unequal to her sister states.[159]

In a discussion that did not consider whether this question fell within the property arm of the doctrine or the political arm, the Court ruled that because the passing of title of submerged lands to the States had not prevented the federal government from continuing to pass laws impacting navigation, the fact that the federal government did own Yucca Mountain meant that there was no restriction on Congress' power to enact regulations concerning the national nuclear waste repository pursuant to the Property Clause.[160] Although the opinion included a quote from *Coyle v. Oklahoma*, the opinion otherwise lacked any indication of the elevated position of the political rights equal footing doctrine over the property rights equal footing doctrine. Instead, the Court used the property rights side of the jurisprudence to decide an arguably political question relying on fairly weak grounds from a doctrinal standpoint.[161]

2. Polygamy and the Equal Footing Doctrine

In the 1980s, a policeman terminated for practicing plural marriage sued various state and local officials, arguing that Utah's Ena-

158. *Nevada v. Watkins*, 914 F.2d 1545 (9th Cir. 1990).

159. *Id.* at 1554.

160. *Id.* at 1555.

161. The opinion did quote *United States v. Texas*, 339 U.S. 707, 716 (1950), regarding the impossibility of the states being equal in, among other things, geology. The best argument for upholding the court's decision is that the Ninth Circuit implicitly found the placing of a nuclear waste depository in Nevada to involve an inequality of rock formations rather than of political rights. As the opinion did not support that argument, however, its strength is limited.

bling Act, which prohibited polygamy, violated the equal footing doctrine.[162] Essentially, the plaintiff hoped to prove that Utah had been forced to adopt this law as a condition of admission,[163] and that requirement unconstitutionally restricted Utah's legislating powers. The Tenth Circuit, however, argued that there was no need to reach this question, although it provided a lengthy footnote regarding *Coyle v. Smith*, the case addressing the location of Oklahoma's capital.[164] In an analysis that touched on questions of redressability, the court noted that since statehood, Utah had never attempted to change those portions of state statutes and the state Constitution that prohibited polygamy.[165] Noting that it was "settled public policy" that it would be in Utah's power to enact such a prohibition, the court found the claim lacked merit, because of a lack of evidence that the state government would repeal the law but for the federal mandate.[166]

3. Sagebrush Rebellion

Attempts to expand the property branch of the equal footing jurisprudence have come largely from the group of Western activists known as the "sagebrush rebellion." Ranchers accused of allowing their animals to graze on federal lands without authorization raised the clause as a defense in the late 1990s.[167] The ranchers argued that the national forest lands were not properly held by the United States, because the equal footing doctrine required all public lands to be turned over to the State of Nevada upon its admission.[168] Finding that the Property Clause meant Congress would not be required to divest itself from title, regardless of the equal footing doctrine, the court held that the federal government had the right to hold that property upon Nevada's admission.[169]

162. *Potter v. Murray City.*, 760 F.2d 1065 (10th Cir. 1985).

163. Although the court did not need to address it, there is a great deal of historical support for the contention that the Church of Jesus Christ of Latter-Day Saints, which made up the majority of Utahans at the time, did not wish to end the practice of polygamy and did so only when it received word that federal soldiers were on the march toward them. LEONARD ARRINGTON AND DAVIS BITTON, THE MORMON EXPERIENCE: A HISTORY OF THE LATTER-DAY SAINTS, 165-68 (Knopf 1979).

164. *Potter v. Murray City*, 760 F.2d at 1068 n.3.

165. *Id.* at 1068.

166. *Id.*

167. *United States v. Gardner*, 107 F.3d 1314 (9th Cir. 1997).

168. *Id.* at 1317. The State of Nevada opposed this position, as did the states of Alaska, Maine, Montana, New Mexico, Oregon, and Vermont. *Id.* n.1. However, Nevada's position might have been different had the livestock been on a different type of federal land, as the state had passed a law claiming ownership of all public lands within its boundaries, but had exempted national forest lands. *Id.* n.2.

169. *Id.* at 1318.

E. Summary: Equal Footing Jurisprudence

Despite its power, the equal footing doctrine has kept a low profile. It may be the least known doctrine to be a regular subject of Supreme Court decisions since the earliest days of the Union. It evolved into two, non-equal branches, both having Constitutional roots. The first branch of the doctrine to emerge was the less powerful one involving property rights, largely issues of title to submerged lands. This branch, which has involved the majority of equal footing cases before the Court, has at its heart the holding that in order for the newer states to have the same rights and sovereign powers as the original thirteen, those states had to hold title to submerged lands, absent a pre-statehood grant of such lands to American Indian tribes by the federal government. The second branch of the doctrine involves the political rights of states, which the Court has stressed is more powerful than the protections offered to states regarding land ownership. Attempts to limit or qualify the political rights and obligations of the states is highly suspect under the equal footing doctrine.

Both branches of the doctrine, however, are rooted in the Constitution. Since 1845, the Court has interpreted Article IV's provisions regarding the admission of states and the relationships between them as the constitutional underpinning of the equal footing doctrine. That holding has been applied consistently since that time, and it is settled law. What remains unsettled is whether CAA provisions allowing California the right to regulate in areas that are forbidden to her sister states violate the doctrine.

III. Application of Equal Footing Doctrine to the CAA and California

When Congress passed the CAA in 1970, and when it amended the Act in 1977, it clearly intended to give to any state that had adopted certain emission control regulations before 1966 the power not just to keep those regulations, but to engage in further regulation of that industry.[170] From the Congressional debates, it is clear that although the statutory language did not specifically name California, justifications for the exception arose from concerns about California's air quality.[171] That same regulatory power is explicitly denied to other states, as federal courts have ruled when some of the original states

170. 42 U.S.C. 7543(a); 42 U.S.C. § 7542(b).

171. *See, e.g.*, 91 Cong. Rec. 19224 (1970).

attempted to exercise the same power.[172] Although the Congresses that passed the original CAA and its 1977 amendments debated the fairness of giving one state powers denied to another, they did not debate whether they had the power under the Constitution to do so. As discussed below, under the equal footing doctrine, the Congresses did not.

A. Questions of Constitutionality

In order to evaluate whether CAA provisions allowing California regulatory power denied to other states is constitutional, it is necessary to answer a question the Supreme Court has never directly faced: does Congress' power under the Commerce Clause allow it place restrictions on some states but not others?

To answer that question, it is helpful to determine what limits the jurisprudence has established, due to the equal footing doctrine. From *Pollard's Heirs v. Kibbe*, we know Congress cannot use enabling acts to subject property in one state to laws different from that if the same property had lain in another state.[173] From *Pollard's Lessee v. Hagan*, we know Congress cannot impose regulations on a new state unless the same regulations could be imposed upon the original states.[174] From *Permoli*, we know that no political right can be a matter of federal law in one state unless it is a matter of federal law in all states.[175] From *Stearns*, we know that the equality of states "may forbid any agreement or compact limiting or qualifying political rights or obligations."[176] From *Coyle* we know that the "Republican Form of Government" clause of the Constitution does not give Congress the power to impose restrictions upon a new state which deprive it of the equal power to exercise "the residuum of sovereignty not delegated by the Constitution itself." Finally, we know from *Corvallis Sand* that one state cannot be constrained by federal common law when another state is "free to choose its own legal principles."[177]

Given this background, there are at least two issues that must be determined in order to answer the question of ultimate constitutionality of the CAA California provisions. First, does the Commerce Clause embody a more expansive grant of power than the "Republi-

172. *Am. Petroleum Inst. v. Jorling*, 710 F. Supp. 421, 432 (N.D.N.Y. 1989).; *Virginia v.* EPA, 108 F.3d 1397, 1411-1412 (D.C. Cir. 1997); *Am. Auto. Mfrs., Inc. v. Mass. Dep't of Envt'l Prot.*, 208 F.3d 1, 8 (1st. Cir. 2000).

173. 39 U.S. 353, 376 (1840).

174. 44 U.S. 212, 228-229 (1845).

175. 44 U.S. 589, 610 (1845).

176. 179 U.S. 223, 244-45 (1900).

177. *Oregon ex rel. State Land Bd. v. Corvallis Sand and Gravel Co.*, 429 U.S. 363, 378 (1977).

can Form of Government" clause, allowing Congress to admit states or the judiciary's ability to impose federal common law, such that, unlike all these other powers, it may trump the constitutional basis for equal footing? Second, if power is "conceded to Congress" over the states,[178] can Congress selectively bestow it on a some states but not others — in other words, even if Congress cannot "take away" the powers of a single state, could it "give" its own powers to a single state?

B. Commerce Clause vs. Republican Form of Government

The Supreme Court has held that the judiciary's inherent powers to make the federal common law cannot override the equal footing doctrine.[179] Likewise, the Court has held that Congress' duty guaranteeing each state a republican form of government does not allow it to override equal footing of the states.[180] Thus, to argue that the Commerce Clause contains a power these two provisions does not, requires finding that the Commerce Clause was intended to be a broader or stronger grant of power than the power to guarantee a republican form of government.

The Commerce Clause power comes in Article I's list of Congressional powers unrelated to the admission of new states; the republican form of government clause is found in Article IV, which contains the full faith and credit clause, the provision requiring extradition among the states, the fugitive slave clause, the admission of states, and the Property Clause. Thus, the republican form of government clause is found in the set of clauses generally providing for equality within and between the states. Thus, if any clause would be seen as moderating the generality equality of each state, it would be the republican form of government clause.

The Supreme Court has never interpreted Article I powers of Congress as inherently greater than those in Article IV. Moreover, although the Commerce Clause gives Congress the power to regulate commerce "among the several States," it does not suggest that States can be treated differently, consistent with other provisions of the Constitution which require that the states be treated identically. In fact, like the republican form of government clause, the Commerce Clause is placed near language indicating the equality of States. Art I, Section 8, clause 1 provides that "all Duties, Imposts and Excises shall be uniform throughout the United States." Finally, and most damningly for the proposition that the Commerce Clause would al-

178. *See Pollard's Lessee v. Hagan*, 44 U.S. at 230.

179. *Corvallis Sand*, 429 U.S. at 378.

180. *Coyle v. Smith*, 221 U.S. at 567.

low different treatment of states, Article I, Section 9, Clause 6 of the Constitution states "No preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another." This is underscored by the fact that the original Constitution provided for income to the national government though taxation of imports.[181]

As the above discussion shows, the proposition that the Commerce Clause carries enough weight to overcome the presumption of equal footing is faulty. Not only is it a less obvious source of such power than the republican form of government clause, due to its placement in the Constitution, but the text limits the use of Commerce Clause power and proscribes equality of the states in its usage. Therefore, the constitutionality of the CAA vis-à-vis the equal footing doctrine cannot depend on Congressional exercise of the Commerce Clause.

C. Can Congress Grant Differential Regulatory Powers?

The second argument in favor of the constitutionality of the CAA California provisions is that Congress is not "taking" the sovereign powers of the state protected by the equal footing doctrine — it is selectively bestowing its own power to regulate.

> The Supreme Court teaches that Congress may confer:
> upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy. If Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge.[182]

However, the Court has not ruled on the question of whether Congress may infer the power to regulate on a matter of interstate commerce on only one state — in other words, whether such a delegation would be vulnerable to an equal footing clause challenge.

Proponents of such an argument might point to jurisprudence allowing Congress to spend tax dollars for any purpose it deems necessary and proper, without regard to equality between the states.[183] Analysis, however, would inevitably center on the differences be-

181. U.S. CONST. art I., § 8, cl. 1.

182. *Western and Southern Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 652-53 (1981), quoting *Lewis v.* BT *Inv't Managers, Inc.*, 447 U.S. 27, 44 (1980); H. P. *Hood & Sons, Inc. v.* DuMond, 336 U.S. 525, 542-543 (1949).

183. *See, e.g., United States v. Butler*, 297 U.S. 1, 66 (1936) (Congress can spend tax dollars as long as it deems the expenditure to be necessary and proper).

tween the Commerce Clause and Congressional powers to appropriate federal funds as it sees fit. For instance, while the taxation clause has no accompanying restriction providing for equal treatment of the states, Congress' power to regulate interstate commerce does. As discussed above, the Constitution provides that Congress cannot use its power to give preference to one state's ports over another. In addition, the Court's federalism jurisprudence indicates a strong difference between the powers of Congress when appropriating funds and the power of Congress to regulate. In *New York v. United States*, the Court noted that while the Congress may attach conditions to receiving federal funds, it cannot otherwise commandeer state legislative processes using its regulatory power under the Commerce Clause.[184] Therefore, the Commerce Clause does not appear to insulate federal law from a challenge under the equal footing doctrine.

The best argument for Congress' ability to create an inequality of power through a post-statehood boon, even if it cannot do so by a pre-statehood restriction, is that the equal footing doctrine does not mean that states must have equal regulatory powers, only that they must have equal *constitutional* powers. A proponent of the differing regulatory power would argue that California has the same constitutional status of every other state, and that what is being given is an extra-constitutional power. The argument would continue that political equality of states under the equal footing doctrine is restricted to constitutional powers, and does not require that the states have equal lawmaking powers within their borders.

Ironically, the case that best refutes this argument is the case that clearly states the limits of the equal footing doctrine's political arm. In *United States v. Texas*, the Supreme Court noted the parameters: economic, geographic, geologic, and area differences lay outside the doctrine — "political standing and sovereignty" were inside.[185]

The CAA California provisions involve differences of political sovereignty, not geography or even air quality. Congress did not choose to allow all states with air quality below a certain level the power to set these regulations; it allowed states that had previously regulated air quality in certain ways to continue writing new regulations, while forbidding the same privilege to those that had not already acted. Congress conditioned new powers on the decision of the States to exercise their own sovereign powers. The one state that had chosen to regulate in particular ways was given a power denied to all the states that had chosen not to exercise their equal right to

184. *New York v. United States*, 505 U.S. 144, 145 (1992).

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

do so.[186] There is no provision allowing this power to disappear once California's air quality was brought in line with that of her sister states, nor is there a provision to allow a regulation by a state with air quality worse than California's. These provisions are not about an inequality of economics or geography — they are about sovereignty. As such, they are the kind of provisions to which the equal footing doctrine is intended to apply.

The soundness of this conclusion is underscored by an examination of the founders' intent. Those founders who opposed adding "equal footing" language to the Constitution — men like Morris, Gerry, and King — did so because they feared that new states would come to have more power than the original 13. The proponents of equal footing argued that they did not want discrimination; all the citizens of the new country should have the same rights. The founders would have been united in their opposition to a newer state receiving regulatory powers denied to the original states. The Constitution is devoid of language making distinctions between the powers of states, and several provisions expressly seek equal treatment for all of them by Congress. The first Congress, adopting in full the previous law passed under the Articles of Confederation, placed the equal footing doctrine into law, and did not pass laws that gave one state powers different from that of another. The founders' negative opinion of the power of Congress to devolve special powers on California, therefore, can not be much in doubt.

IV. Conclusion

The equal footing doctrine renders unconstitutional those provisions of the CAA giving to California a right to regulate certain aspects of air quality, and denying that right to other states. There are two potential outcomes: first, that attempts of other states like New York and Massachusetts to enact regulations that California has the power to enact should be permitted.[187] If the federal government is

186. In a potentially analogous case, the Supreme Court has rejected, as a violation of equal protection, a State's legislative attempt to condition benefits on whether the potential recipient was a newcomer. *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 623 (1985). Here it might be argued that Congress is attempting to condition benefits on whether the potential state was a newcomer to a field of regulation, which would violate the equal footing doctrine.

187. States attempting to regulate in these arenas would have standing to raise a constitutional challenge to the equal footing doctrine. Assuming New York and Massachusetts did not repeal the statutes imposing zero-emission controls following the court decisions, these states might now be able to bring such a challenge. In addition, automotive companies forced to comply with California's regulations would likely have standing to challenge those regulations as an exercise of unconstitutional power, assuming they argued that the delegation to a single state of Con-

concerned that fifty or more regulatory enactments would be unworkable, there is a simple solution: it could promulgate two sets of standards, one more stringent than the other, and allow each state to choose between them. The result, therefore, might be the status quo, except that California would not be given more powers than the other states.

The equal footing doctrine has roots in laws that pre-date the Constitution. The Court has recognized a Constitutional nexus for it, the first Congress placed it in a statute that is still applicable today, and the courts have repeatedly cited its fundamental nature to the political structure of the United States. Though the majority of the cases throughout time have dealt with land ownership issues, the jurisprudence has always recognized that the most important feature of the doctrine is an assurance that each state would have the same sovereignty within its borders as every other state. Just as this Union should have no second class citizens,[188] it should have no second class states.

gress' power to regulate was a violation of the equal footing doctrine, and therefore would be void.

188. *See, e.g.*, *Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 922 (1986); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 623 (1985); NAACP *v. Claiborne Hardware Co.*, 458 U.S. 886, 911-912 (1982); *Bell v. Wolfish*, 441 U.S. 520, 583 (1979) (Stevens, J., dissenting).

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