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## UNSTABLE FOOTING: *SHELBY COUNTY'S* MISAPPLICATION OF THE EQUAL FOOTING DOCTRINE

Austin Graham\*

The general government will, at all times, stand ready to check the usurpations of the state governments; and these will have the same disposition towards the general government.

—Alexander Hamilton<sup>1</sup>

The Constitution assigns states the power to regulate “The Times, Places and Manner” of federal elections but permits Congress discretion to override state determinations on the subject.<sup>2</sup> States have wider autonomy in establishing their internal voting laws and qualifications.<sup>3</sup> Generally, the Tenth Amendment<sup>4</sup> is regarded as the constitutional root of this authority.<sup>5</sup>

The Voting Rights Act of 1965<sup>6</sup> (VRA) fundamentally altered the traditional allocation of electoral control between the federal government and the states. Under the Act, certain states and political subdivisions were required to submit all proposed electoral legislation to federal officials for approval before such laws could take effect.<sup>7</sup>

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<sup>1</sup> THE FEDERALIST NO. 28, at 228 (Alexander Hamilton) (Philadelphia, J.B. Lippincott & Co. 1864).

<sup>2</sup> U.S. CONST. art. I, § 4, cl. 1.

<sup>3</sup> See *Oregon v. Mitchell*, 400 U.S. 112, 125 (1970) (“No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices.”); *Boyd v. Nebraska*, 143 U.S. 135, 161 (1892) (“Each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen, and the title to offices shall be tried, whether in the judicial courts or otherwise.”).

<sup>4</sup> U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

<sup>5</sup> *Mitchell*, 400 U.S. at 124–25 (“[T]he Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections.” (footnote omitted)). The Guarantee Clause also is considered a source of state power and a handicap on the federal government’s ability to control state elections. U.S. CONST. art. IV, § 4; see also Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 22–23 (1988).

<sup>6</sup> 42 U.S.C. §§ 1973–1973bb-1 (2006).

<sup>7</sup> See *infra* Part I.B.

At the time of the Act's passage and for many years after, this departure from the tradition of state control was justifiable as a remedy for the systematic scourge of racial discrimination in voting.<sup>8</sup>

In *Shelby County v. Holder*,<sup>9</sup> the Supreme Court dismantled the VRA's most stringent regime by invalidating the coverage formula employed to bring jurisdictions under federal oversight.<sup>10</sup> While *Shelby County* restored a more balanced allotment of electoral control, the decision recurrently referenced the principle of "equal sovereignty" of states as a restraint on the federal government's ability to disparately regulate states.<sup>11</sup> But this concept of equal state sovereignty does not have the constitutional foundation implied by *Shelby County*.<sup>12</sup> There does exist an equal footing doctrine that superficially bears some semblance to a principle of equal sovereignty.<sup>13</sup> The equal footing doctrine generally prohibits Congress from abridging the sovereignty of new states through conditions in acts admitting them to the Union.<sup>14</sup> Outside the context of state admissions, however, the equal footing doctrine has never limited Congress's ability to impose discrepant obligations on states through legislation.<sup>15</sup>

*Shelby County* was a patent misapplication of the equal footing doctrine. This Note proffers a three-factor explanation for the Court's decision to utilize the doctrine as justification for invalidating the Voting Rights Act's coverage formula. First, precedent had cabined the Court's capacity to annul the coverage formula with more established constitutional principles, so the Court had to reach for precedential support peripheral to the context of voting rights litigation. Second, the equal footing doctrine's varied historical applicability engendered flexibility in the doctrine that allowed for its use in the domain of voting rights litigation. Third, the Court did not actually employ the equal footing doctrine in *Shelby County*, and instead cited the doctrine's precedent as constitutional bedding for a discrete concept of state dignity as sovereigns.

This Note commences with an overview of the Voting Rights Act's structure and Court decisions interpreting it. Section II summarizes the equal footing doctrine's meaning and historical application. Section III posits an explanation for the Court's decision to employ the equal footing doctrine in *Shelby County*. The object of this Note

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<sup>8</sup> See *City of Rome v. United States*, 446 U.S. 156, 182 (1980) ("Congress' considered determination that at least another 7 years of statutory remedies were necessary to counter the perpetuation of 95 years of pervasive voting discrimination is both unsurprising and unassailable."); *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) ("The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century.").

<sup>9</sup> 133 S. Ct. 2612 (2013).

<sup>10</sup> *Id.* at 2631.

<sup>11</sup> See *infra* note 137.

<sup>12</sup> See *infra* Part II.B.

<sup>13</sup> See *infra* Part II.B.

<sup>14</sup> See *infra* Part II.B.

<sup>15</sup> See *infra* Part II.B.

is not to assess the rectitude of *Shelby County*'s invalidation of the Voting Rights Act coverage formula. Rather, the aim is to illustrate *Shelby County*'s flagrant misapplication of the equal footing doctrine.

## I. THE VOTING RIGHTS ACT

### A. Background to the Enactment of the Voting Rights Act of 1965

A century after the Civil War's culmination, racial discrimination continued to endure in the United States, particularly in the South.<sup>16</sup> The realm of elections was especially rife with inequity. Discriminatory voting laws were pervasive as Southern states unremittingly flouted the mandates of the Fifteenth Amendment through measures designed to inhibit African American participation in the electoral process.<sup>17</sup> Discriminatory voting devices, frequently in the mode of literacy tests and poll taxes, were a particularly effective method of denying minority suffrage.<sup>18</sup> Initially, Congress tried to fight racial discrimination in voting on a case-by-case basis and through expansion of the statutory mechanisms available to challenge voting laws.<sup>19</sup> These attempts by Congress<sup>20</sup> and federal courts<sup>21</sup> foundered, though, as Southern states interminably circumvented federal commands.<sup>22</sup>

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<sup>16</sup> Beginning in the late 1870s, many states codified Jim Crow laws sanctioning racial segregation in virtually all societal contexts. David Pilgrim, *What was Jim Crow?*, FERRIS STATE UNIV. (Sept. 2000), <http://www.ferris.edu/jimcrow/what.htm>.

<sup>17</sup> See *South Carolina v. Katzenbach*, 383 U.S. 301, 310–11 (1966).

<sup>18</sup> *Id.* at 311–12. Some officials encouraged outright violence to stymie African American participation in elections. On the eve of Wilmington, North Carolina's mayoral election in 1898, a candidate urged white voters to "[G]o to the polls tomorrow and if you find the negro out voting, tell him to leave the polls, and if he refuses[,] kill him; shoot him down in his tracks." Michael James Burns, Note, *Shelby County v. Holder and the Voting Rights Act: Getting the Right Answer with the Wrong Standard*, 62 CATH. U. L. REV. 227, 227 (2012) (quoting STEWART E. TOLNAY & E.M. BECK, *A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882–1930* 67 (1995)).

<sup>19</sup> The Civil Rights Act of 1957 established the Civil Rights Division of the Department of Justice, which was authorized to challenge the constitutionality of barriers to minority electoral participation. Christopher B. Seaman, *An Uncertain Future for Section 5 of the Voting Rights Act: The Need for A Revised Bailout System*, 30 ST. LOUIS U. PUB. L. REV. 9, 13 (2010); see also Sudeep Paul, *The Voting Rights Act's Fight to Stay Rational: Shelby County v. Holder*, 8 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 271, 271 (2013) (noting Title I of Civil Rights Act of 1964 expedited voting cases to three-judge federal panels).

<sup>20</sup> See Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000a (2006)); Civil Rights Act of 1960, Pub. L. 86-449, 74 Stat. 86 (codified as amended at 42 U.S.C. § 1971 (2006)); Civil Rights Act of 1957, Pub. L. 85-315, 71 Stat. 634 (codified as amended at 42 U.S.C. § 1971 (2006)).

<sup>21</sup> See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Terry v. Adams*, 345 U.S. 461 (1953); *Guinn v. United States*, 238 U.S. 347 (1915).

<sup>22</sup> See *Katzenbach*, 383 U.S. at 314 (1966).

By 1965, Congress was exasperated with the South's sustained exclusion of African Americans from the electoral process.<sup>23</sup> In January and February of 1965, Martin Luther King, Jr. organized marches designed to highlight the systematic denial of African Americans' voting rights in Alabama.<sup>24</sup> On March 7, 1965, state police seeking to dissolve a protest assaulted demonstrators with tear gas and clubs.<sup>25</sup> Fifty demonstrators were hospitalized, and the assault, dubbed "Bloody Sunday," brought national attention to the scourge of racial discrimination in the Deep South.<sup>26</sup> Bloody Sunday decisively showcased the need for robust federal legislation to protect minority voting rights in the South, and Congress responded with the Voting Rights Act of 1965, "a complex scheme of stringent remedies aimed at areas where voting discrimination ha[d] been most flagrant."<sup>27</sup> Using its Fifteenth Amendment enforcement authority,<sup>28</sup> Congress intended the VRA to finally bring to fruition the Constitution's command that the right to vote "shall not be denied or abridged" because of race.<sup>29</sup>

### *B. Structure of the Voting Rights Act*

The VRA's provisions are divisible into two categories: (1) permanent measures applicable across the nation, and (2) temporary remedial measures targeted against jurisdictions with the most flagrant histories of voting discrimination.<sup>30</sup> On a national scale, Section 2 prohibits any voting practice that "results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color."<sup>31</sup> Sections 3, 6(a), and 13(b) provide procedural mechanisms for challenging voting laws.<sup>32</sup> Sections 11 and 12 impose civil and criminal sanctions for interference with rights protected by the Act.<sup>33</sup> Section 10, in essence, invalidates the use of poll taxes throughout the country.<sup>34</sup>

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<sup>23</sup> *See id.* at 315.

<sup>24</sup> Jessie Kindig, *Bloody Sunday, Selma, Alabama (March 7, 1965)*, BLACKPAST, <http://www.blackpast.org/aah/bloody-sunday-selma-alabama-march-7-1965> (last visited Oct. 23, 2014).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Katzenbach*, 383 U.S. at 315.

<sup>28</sup> U.S. CONST. amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation.").

<sup>29</sup> U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

<sup>30</sup> Burns, *supra* note 18, at 231–32.

<sup>31</sup> Voting Rights Act of 1965 § 2 (codified at 42 U.S.C. § 1973a (2006)).

<sup>32</sup> *Katzenbach*, 383 U.S. at 316.

<sup>33</sup> *Id.*

<sup>34</sup> Voting Rights Act of 1965 § 10 (codified at 42 U.S.C. § 1973(h) (2006)).

The temporary measures are more formidable. Perhaps the Act's strongest provision is Section 5.<sup>35</sup> Under the Section 5 framework, a covered jurisdiction must submit any proposed alteration to its voting laws to the Justice Department or to the D.C. District Court for preclearance before such change can take effect.<sup>36</sup> The jurisdiction has the burden of demonstrating that its proposed change will not have a retrogressive effect on minority voting strength.<sup>37</sup> The Justice Department or the D.C. District Court will deny preclearance if the proposed change has the purpose or effect "of denying or abridging the right to vote on account of race or color."<sup>38</sup> A voting change abridges the right to vote if it diminishes a minority group's ability "to elect [its] preferred candidates of choice."<sup>39</sup>

The procedure for determining which states and jurisdictions were covered by preclearance was diagrammed in Section 4(b), a provision known as the coverage formula.<sup>40</sup> Under the original coverage formula, any state or jurisdiction that incorporated voting tests or devices<sup>41</sup> as of November 1, 1964, and had less than fifty percent of its voting age population registered to vote as of November 1, 1964, or experienced voter turnout of less than fifty percent in the 1964 presidential election, was subject to Section 5 preclearance.<sup>42</sup> Congress deliberately reverse-engineered the coverage formula, such that it pinpointed jurisdictions where it believed voting discrimination was most pervasive, and then concocted a formula to bring such jurisdictions into preclearance coverage.<sup>43</sup>

Upon taking effect, the coverage formula ensnared a sizeable portion of the South: Alabama, Georgia, South Carolina, Virginia, Mississippi, Louisiana, and twenty-six counties in North Carolina all immediately fell into coverage.<sup>44</sup> Alaska, three Arizona counties, and single counties in Hawaii and Idaho, respectively, also were determined to satisfy the formula's criteria by the end of 1965.<sup>45</sup> Subsequent amendments to the VRA brought additional states and jurisdictions into coverage.<sup>46</sup> By 2013, nine states

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<sup>35</sup> *Katzenbach*, 383 U.S. at 315–16.

<sup>36</sup> Voting Rights Act of 1965 § 5 (codified at 42 U.S.C. § 1973c (2006)).

<sup>37</sup> *See Beer v. United States*, 425 U.S. 130, 141 (1976) ("[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.").

<sup>38</sup> 42 U.S.C. § 1973c(a) (2006).

<sup>39</sup> *Id.* § 1973c(b).

<sup>40</sup> *See Katzenbach*, 383 U.S. at 317.

<sup>41</sup> Tests or devices triggering statutory coverage included literacy tests, grandfather clauses, property qualifications, and good-morals requirements. Burns, *supra* note 18, at 233.

<sup>42</sup> *Id.*

<sup>43</sup> *See Paul*, *supra* note 19, at 277–78.

<sup>44</sup> *Katzenbach*, 383 U.S. at 318.

<sup>45</sup> *Id.*

<sup>46</sup> *See William S. Consovoy & Thomas R. McCarthy, Shelby County v. Holder: The Restoration of Constitutional Order*, 2012–2013 CATO SUP. CT. REV. 31, 37–38 (2013).

in their entirety were subject to preclearance: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia.<sup>47</sup> Additionally, California, Florida, Michigan, New York, New Hampshire, North Carolina, and South Dakota all contained political subdivisions subject to preclearance.<sup>48</sup>

States or jurisdictions that do not meet the coverage formula's criteria still can fall into the preclearance regime through Section 3's bail-in procedure.<sup>49</sup> Accordingly, a jurisdiction is bailed into preclearance if a federal district court finds that the jurisdiction is intentionally denying citizens' constitutional voting rights.<sup>50</sup> Implementation of the bail-in provision is infrequent, though, as courts require a showing of intentional discrimination before coverage can attach.<sup>51</sup>

Conversely, covered states and jurisdictions can escape their preclearance obligations through Section 4(a)'s bailout provision.<sup>52</sup> Under Section 4(a), a covered jurisdiction can obtain a declaratory judgment from the D.C. District Court releasing it from preclearance if the jurisdiction demonstrates compliance with the VRA's mandates, and otherwise has maintained a clean record with respect to voting rights during the preceding ten years.<sup>53</sup> Although bailout provides a seemingly attractive escape mechanism from preclearance, in practice, only a fraction of covered jurisdictions have

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<sup>47</sup> Burns, *supra* note 18, at 236.

<sup>48</sup> *Id.*

<sup>49</sup> Voting Rights Act of 1965 § 3 (codified at 42 U.S.C. § 1973a(c) (2006)); *see also* Paul, *supra* note 19, at 274.

<sup>50</sup> *See* Paul, *supra* note 19, at 274.

<sup>51</sup> *See* Travis Crum, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992, 2009 (2010).

<sup>52</sup> Voting Rights Act of 1965 § 4(a) (codified at 42 U.S.C. § 1973b(a)(1) (2006)).

<sup>53</sup> *Id.* Christopher B. Seaman summarizes the bailout's statutory requirements in *An Uncertain Future for Section 5 of the Voting Rights Act: The Need for A Revised Bailout System*. *See* Seaman, *supra* note 19, at 25–26. To achieve bailout, a jurisdiction must demonstrate that during the ten years prior to seeking the declaratory judgment:

- (1) it has not used a discriminatory "test or device" with the purpose or effect of denying or abridging the right to vote;
- (2) no final court judgments, consent decrees, or settlements have been entered against it for discriminatory voting practices;
- (3) no federal examiners have been sent to the jurisdiction;
- (4) the jurisdiction, and all governmental units within its territory, have complied with Section 5, including the submission of all election changes for preclearance and the repeal of all changes to which objections were issued; and
- (5) no objection has been entered by the Department of Justice or the U.S. District Court to any change submitted by the jurisdiction and any governmental unit within its territory.

In addition, the jurisdiction was required to demonstrate it had taken affirmative steps to expand minority participation in the electoral process.

*Id.* (footnotes omitted).

achieved bailout.<sup>54</sup> In *Northwest Austin Municipal Utility District Number One*, Chief Justice Roberts attributes the bailout provision's underutilization to perceptions that its statutory requisites are inordinately burdensome.<sup>55</sup>

### C. Amendments to the VRA

Upon passing the VRA in 1965, Congress initially intended for the temporary provisions, including Sections 5 and 4(b), to expire in five years.<sup>56</sup> But Congress subsequently has amended the Act four times since 1965, simultaneously extending the temporary provisions' duration and widening the VRA's scope.<sup>57</sup> The VRA was first amended in 1970, the year in which the Act's temporary provisions were scheduled to expire.<sup>58</sup> The Voting Rights Act Amendments of 1970 prolonged the temporary provisions' applicability for five more years.<sup>59</sup> The 1970 amendments also tweaked the coverage formula, and preclearance expanded to any jurisdiction that employed a voting test or device as of November 1, 1968, and had voter registration or turnout for the 1968 presidential election below fifty percent of its voting age population.<sup>60</sup> The amended coverage formula captured jurisdictions in Alaska, Arizona, California, Connecticut, Idaho, Maine, Massachusetts, New Hampshire, New York, and Wyoming.<sup>61</sup>

The temporary provisions again were extended in 1975, this time for seven years.<sup>62</sup> The Voting Rights Act Amendments of 1975 further broadened the coverage formula such that preclearance applied to any jurisdiction that maintained a voting test or device as of November 1, 1972, and had voter registration or turnout below fifty percent for the 1972 presidential election.<sup>63</sup> As a result, the states of Alaska, Arizona, and Texas all became subject to statewide preclearance, as did political subdivisions in California, Florida, Michigan, New York, North Carolina, and South Dakota.<sup>64</sup> The 1975 amendments additionally expanded the VRA's protection to language minorities.<sup>65</sup> The definition of voting test or device now encompassed the furnishing of English-only voting materials in jurisdictions with substantial non-English

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<sup>54</sup> *Id.* at 11; *see also* *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 211 (2009) (observing that only 17 of 12,000-plus covered jurisdictions had successfully bailed out of coverage).

<sup>55</sup> *Nw. Austin*, 557 U.S. at 199 (“As enacted, §§ 4 and 5 of the Voting Rights Act were temporary provisions. They were expected to be in effect for only five years.”).

<sup>56</sup> Paul, *supra* note 19, at 276 n.44.

<sup>57</sup> Burns, *supra* note 18, at 228 n.9.

<sup>58</sup> Consovoy & McCarthy, *supra* note 46, at 37.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 37–38.

<sup>62</sup> *Id.* at 38.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> 42 U.S.C. § 1973b(f)(2) (2006); *see* Burns, *supra* note 18, at 234.

speaking minority populations.<sup>66</sup> The 1975 amendments stand as the last time Congress substantively altered the coverage formula.<sup>67</sup>

The VRA's temporary provisions, in accordance with the 1975 amendments, were set to expire in 1982.<sup>68</sup> In the lead up to the provisions' scheduled expiration, Congress debated whether preclearance was still necessary in light of the considerable advances in minority electoral participation precipitated by the VRA.<sup>69</sup> In deciding to reauthorize the provisions, Congress took note of a tactical shift evident in covered jurisdictions.<sup>70</sup> Largely because of the VRA's mandates, jurisdictions had moved away from so-called first-generation barriers to minority electoral participation,<sup>71</sup> which were the impetus for the VRA's original enactment.<sup>72</sup> Congress found jurisdictions instead were utilizing more nuanced second-generation barriers, such as at-large voting schemes and dilutive redistricting plans, to minimize the political heft of minority voters.<sup>73</sup> The prevalence of second-generation barriers convinced Congress that preclearance remained a necessary mechanism to protect minority voters.<sup>74</sup> Thus, Congress extended preclearance and its coverage formula for twenty-five years.<sup>75</sup>

The VRA's most recent reauthorization occurred in 2006.<sup>76</sup> Prior to passing the 2006 amendments, Congress engaged in an exhaustive analysis of the VRA that generated over 12,000 pages of evidence and witness testimony.<sup>77</sup> All parties agreed the Act had proven highly effective in eliminating first-generation barriers to minority voting.<sup>78</sup> Minorities had realized enormous progress in political participation, as evidenced by registration rates, election turnouts, and political representation within covered jurisdictions.<sup>79</sup> Minorities' increased electoral participation spawned debate as to whether Congress finally should permit the VRA's temporary provisions to expire.<sup>80</sup>

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<sup>66</sup> Burns, *supra* note 18, at 234.

<sup>67</sup> *Id.*

<sup>68</sup> See Seaman, *supra* note 19, at 21.

<sup>69</sup> *Id.* at 23.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> Paul, *supra* note 19, at 279.

<sup>73</sup> Seaman, *supra* note 19, at 23.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 24.

<sup>76</sup> Burns, *supra* note 18, at 232.

<sup>77</sup> Seaman, *supra* note 19, at 36–37.

<sup>78</sup> See *Nw. Austin Mun. Dist. No. One v. Holder*, 557 U.S. 193, 201 (2009) (“The historic accomplishments of the Voting Rights Act are undeniable.”).

<sup>79</sup> See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, H.R. REP. NO. 109-478 § 2(b)(1) (2006) (certifying VRA had precipitated monumental increases in numbers of registered minority voters, rate of minority voter turnout, and minority political representation). During the 2004 presidential election, African Americans actually had higher voter registration and turnout rates than white voters in some covered states. *Nw. Austin*, 557 U.S. at 201.

<sup>80</sup> Seaman, *supra* note 19, at 34–35.

But the persistence of second-generation barriers<sup>81</sup> troubled Congress.<sup>82</sup> Reauthorization's proponents felt federal oversight was still warranted as a variety of factors evinced.<sup>83</sup> Renewal's supporters stressed that preclearance deterred covered jurisdictions from otherwise instigating discriminatory voting laws.<sup>84</sup> These supporters thereby won the day, and both the Senate and House overwhelmingly voted in favor of reauthorization.<sup>85</sup> The Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 prolonged application of the VRA's temporary provisions for another twenty-five years, locking in preclearance until 2031.<sup>86</sup>

The 2006 amendments produced two notable substantive changes to Section 5, which were formulated in response to a pair of Supreme Court decisions limiting preclearance's application.<sup>87</sup> First, Congress amended Section 5's language such that a voting change with the purpose or effect of diminishing a minority group's ability "to elect their preferred candidates of choice denies or abridges the right to vote."<sup>88</sup> Second, Congress added a provision explicating that the meaning of "purpose" within Section 5 included "any discriminatory purpose."<sup>89</sup>

Although Congress bolstered preclearance's statutory reach in 2006, the coverage formula remained static.<sup>90</sup> Whether a jurisdiction was subject to preclearance still hinged on election data from 1964, 1968, and 1972.<sup>91</sup> A group of Republican

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<sup>81</sup> Second-generation barriers dilute a minority group's voting power so as to inhibit their ability to elect favored candidates. Common second-generation barriers include at-large voting schemes, annexations, and multi-member districts. H.R. REP. NO. 109-478 § 2(b)(4)(A) (2006).

<sup>82</sup> *Id.* § 2.

<sup>83</sup> See Consovoy & McCarthy, *supra* note 46, at 39. These factors included racially polarized voting in covered jurisdictions, the Justice Department's continued issuance of Section 5 preclearance objections, the numerous filings of Section 2 litigation in covered jurisdictions, and the filing of enforcement actions to protect language minorities. H.R. REP. NO. 109-478, at 2-3.

<sup>84</sup> Seaman, *supra* note 19, at 33-34.

<sup>85</sup> The Senate unanimously passed reauthorization, while the House of Representatives voted in favor of reauthorization by a vote of 390 to 33. Burns, *supra* note 18, at 232 n.33.

<sup>86</sup> See Consovoy & McCarthy, *supra* note 46, at 38.

<sup>87</sup> See *Georgia v. Ashcroft*, 539 U.S. 461, 463 (2003) (holding that an assessment of whether a redistricting plan results in retrogression of minority group's effective exercise of electoral franchise depends on all relevant circumstances, and not only on comparative ability of minority group to elect its candidate of choice); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 341 (2000) ("[W]e hold that § 5 does not prohibit preclearance of a redistricting plan enacted with a discriminatory but non-retrogressive purpose.").

<sup>88</sup> 42 U.S.C. § 1973c(b) (2006).

<sup>89</sup> *Id.* § 1973c(c).

<sup>90</sup> See Consovoy & McCarthy, *supra* note 46, at 39.

<sup>91</sup> *Id.* Professor Richard Hasen, a prominent election law scholar, was an unexpected advocate for readjusting the coverage formula. See *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 217 (2006) (statement of Prof. Richard Hasen)

congressmen did propose an update to the coverage formula that would have incorporated election data from the 1996, 2000, and 2004 presidential elections in lieu of the older data.<sup>92</sup> In the proposed formula, a jurisdiction would fall into coverage if it employed a discriminatory voting test or had voter turnout below fifty percent in any of the last three presidential elections.<sup>93</sup> The proposed formula, though, was not included in the final amendments, due to concerns about its constitutionality.<sup>94</sup>

#### *D. Supreme Court Interpretation of Section 5 Through Northwest Austin*

For nearly fifty years, the Supreme Court upheld the validity of the VRA's temporary provisions, justifying its holdings on both congressional evidence and judicial deference.<sup>95</sup> The Court traditionally evaluated challenges to the preclearance regime under a lenient rational basis standard of review, maintaining that "Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."<sup>96</sup>

*South Carolina v. Katzenbach*<sup>97</sup> is the granddaddy of all preclearance litigation. Immediately after the VRA became effective, South Carolina challenged the constitutionality of assorted VRA provisions as overextensions of Congress's power and encroachments onto state sovereignty.<sup>98</sup> The Court principally regarded the challenge as an issue of whether Congress properly acted within its constitutional authority in enacting the VRA.<sup>99</sup> In resolving this question, *Katzenbach* laid down the standard of review that would safeguard the VRA for nearly a half century: "As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."<sup>100</sup> The Court expounded that the mandates of the Fifteenth Amendment "supersede[] any contrary exertions of state power"<sup>101</sup> and Congress, charged with enforcing the Fifteenth Amendment, has "full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting."<sup>102</sup> To support its reasoning, the Court conjured Chief Justice John

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("Congress should update the coverage formula based on data indicating where intentional state discrimination in voting on the basis of race is now a problem or likely to be one in the near future.").

<sup>92</sup> See Seaman, *supra* note 19, at 38–39.

<sup>93</sup> *Id.* at 39.

<sup>94</sup> *Id.* Constitutional concerns about the proposed coverage formula centered on its projected coverage of jurisdictions without notable histories of voting discrimination. Hawaii, for instance, was the only state qualifying for statewide coverage. *Id.*

<sup>95</sup> Paul, *supra* note 19, at 276–77.

<sup>96</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966).

<sup>97</sup> *Id.* at 301.

<sup>98</sup> *Id.* at 323.

<sup>99</sup> *Id.* at 324.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 325.

<sup>102</sup> *Id.* at 326.

Marshall's eminent language from *McCulloch v. Maryland*: ““Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.””<sup>103</sup>

After establishing its standard of review, the Court assessed the constitutionality of Section 4(b)'s coverage formula. The Court was satisfied Congress had sufficient evidence to conclude that jurisdictions covered by the formula had engaged in systematic discrimination.<sup>104</sup> The Court recognized that Congress purposefully devised a formula to pull particular jurisdictions into preclearance by pinpointing the two invidious characteristics they all shared: utilization of discriminatory voting tests and devices, and a voting rate in the 1964 presidential election substantially below the national average.<sup>105</sup> The Court accepted both characteristics as relevant to discrimination and held the coverage formula “rational in both practice and theory.”<sup>106</sup>

Following review of the coverage formula, the Court evaluated Section 5 with similar deference. Though conceding preclearance may have been “an uncommon exercise of congressional power,” the Court asserted that “exceptional conditions can justify legislative measures not otherwise appropriate.”<sup>107</sup> The Court acknowledged covered jurisdictions' continuous evasion of prior federal efforts to expand minority electoral participation and recognized that such jurisdictions likely would attempt more elusion in the future.<sup>108</sup> In light of the circumstances, the Court concluded “Congress responded in a permissibly decisive manner.”<sup>109</sup> *Katzenbach* thereby gave preclearance, and its coverage formula, a powerful endorsement of constitutional validity, and the opinion's reasoning remained the linchpin of federal courts' interpretations of the preclearance framework for decades.<sup>110</sup>

Following *Katzenbach*, the Court continued to uphold the constitutionality of the preclearance regime. *Allen v. State Board of Elections*<sup>111</sup> clarified that preclearance was not limited to state legislation concerning voter registration and extended to “any state enactment which altered the election law of a covered State in even a

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<sup>103</sup> *Id.* at 326 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)).

<sup>104</sup> *Id.* at 329–30.

<sup>105</sup> *Id.* at 330.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 334.

<sup>108</sup> *Id.* at 335 (“Congress knew that some of the States covered by § 4 (b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees. Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself.” (footnote omitted)).

<sup>109</sup> *Id.*

<sup>110</sup> *See, e.g., Lopez v. Monterey Cnty.*, 525 U.S. 266, 284–85 (1999); *City of Rome v. United States*, 466 U.S. 156, 179–80 (1980).

<sup>111</sup> 393 U.S. 544 (1969).

minor way.”<sup>112</sup> The Court thereby construed Section 5 as defending against attempts to dilute the voting power of minority groups.<sup>113</sup>

*Georgia v. United States*<sup>114</sup> reiterated the Court’s broad interpretation of preclearance’s function. The Court held that preclearance was mandated for covered states’ reapportionment plans,<sup>115</sup> iterating its explanation from *Allen* that Section 5 was applicable to any voting change with the potential to dilute minority voting strength.<sup>116</sup> The Court discarded Georgia’s as-applied challenge to the constitutionality of Section 5 in a single sentence referencing *Katzenbach*: “And for the reasons stated at length in *South Carolina v. Katzenbach* . . . we reaffirm that the Act is a permissible exercise of congressional power under § 2 of the Fifteenth Amendment.”<sup>117</sup>

In *City of Rome v. United States*,<sup>118</sup> the Court rejected the argument that Section 5 does not prohibit voting practices with a discriminatory effect alone, and held that a grant of preclearance demands absence of both discriminatory effect *and* purpose.<sup>119</sup> The city claimed that the Fifteenth Amendment explicitly barred only purposeful racial discrimination in voting, so Congress could not prohibit voting practices devoid of discriminatory intent even if such practices produced a discriminatory effect.<sup>120</sup>

The Court conceded that even if the Fifteenth Amendment facially proscribes only purposeful discrimination, precedent construing Congress’s Fifteenth Amendment enforcement authority foreclosed any argument that Congress could not allow voting modifications with only a discriminatory effect.<sup>121</sup> In support of its position, the Court reiterated its unstinting understanding of Congress’s enforcement authority under the Civil War Amendments.<sup>122</sup> In the Court’s view, the Civil War Amendments “were specifically designed as an expansion of federal power and an intrusion on state sovereignty,” such that they permitted Congress to intrude on state and local electoral control.<sup>123</sup> Fifteen years after the VRA’s enactment, *City of Rome* verified the Court’s sustained acceptance of the preclearance regime’s constitutionality.

*Lopez v. Monterey County*<sup>124</sup> indicated the Court’s complacency with preclearance nearly three decades after its initial expiration was supposed to occur. Federalism-based arguments against the Act’s constitutionality still proved futile. “[T]he Voting

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<sup>112</sup> *Id.* at 566.

<sup>113</sup> *Id.* at 569.

<sup>114</sup> 411 U.S. 526 (1973).

<sup>115</sup> *Id.* at 535.

<sup>116</sup> *Id.* at 534.

<sup>117</sup> *Id.* at 535.

<sup>118</sup> 446 U.S. 156 (1980).

<sup>119</sup> *Id.* at 172.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 173.

<sup>122</sup> *Id.* at 174–78.

<sup>123</sup> *Id.* at 179–80.

<sup>124</sup> 525 U.S. 266 (1999).

Rights Act, by its nature, intrudes on state sovereignty. The Fifteenth Amendment permits this intrusion . . . .”<sup>125</sup>

*Northwest Austin*<sup>126</sup> is notable for dicta probing the constitutionality of preclearance. For the first time in over forty years, the Court appeared troubled both by preclearance’s discrepant application among jurisdictions, and the coverage formula’s reliance on decades-old data.<sup>127</sup> A reverence for state sovereignty was evident in the Court’s language: “[A] departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.”<sup>128</sup> While the Court punted on the question of preclearance’s constitutionality by determining the district was eligible for bailout,<sup>129</sup> *Northwest Austin* was a harbinger of the Court’s attitude toward the modern constitutionality of the preclearance regime.

#### E. *Shelby County v. Holder*

Shelby County, Alabama had been subject to preclearance upon the VRA’s initial enactment in 1965.<sup>130</sup> Unlike the district in *Northwest Austin*, Shelby County was ineligible for piecemeal bailout because of several VRA infractions committed in the county during the preceding ten years.<sup>131</sup> Shelby County’s constitutional challenge to the preclearance framework ensued in 2010, after the county sought a declaratory judgment that the preclearance regime was unconstitutional.<sup>132</sup> Shelby County especially focused its attack on the coverage formula, which it considered the most viable avenue for disabling the preclearance regime since annulment of the formula would allow the Court to avoid the overarching issue of Section 5’s constitutionality.<sup>133</sup>

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<sup>125</sup> *Id.* at 284–85.

<sup>126</sup> *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009).

<sup>127</sup> *Id.* at 203 (“The evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance. The statute’s coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions.”).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 205, 211.

<sup>130</sup> See *Consovoy & McCarthy*, *supra* note 46, at 41 (“Shelby County became a covered jurisdiction not by virtue of any discriminatory conduct on its own part, but because it is located in a fully covered state: Alabama.”). Alabama was among the states covered under the 1965 Act. See *supra* note 44 and accompanying text.

<sup>131</sup> See *Consovoy & McCarthy*, *supra* note 46, at 42. Shelby County and its political subdivisions submitted 682 voting changes to the Justice Department between 1965 and 2012. Of these 682 proposed changes, the Justice Department objected to five. Paul, *supra* note 19, at 275.

<sup>132</sup> *Consovoy & McCarthy*, *supra* note 46, at 42.

<sup>133</sup> *Id.* at 43.

After lower courts rejected Shelby County's challenge,<sup>134</sup> the Supreme Court granted certiorari to determine whether the Act's disparate treatment of states was "justified by current needs."<sup>135</sup> Chief Justice Roberts began the opinion with a recitation of tenets enunciated in *Northwest Austin*: "[T]he Act imposes current burdens and must be justified by current needs" such that "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets."<sup>136</sup> Justice Roberts reiterated the pertinence of the principle of equal sovereignty throughout the opinion.<sup>137</sup> To a majority of the Court, the VRA offended this principle by compelling certain states to gain federal approval for internal legislation otherwise within their sovereign authority.<sup>138</sup> The Court stressed the comparative inequity of preclearance, noting covered jurisdictions needed federal approval for laws that noncovered jurisdictions could pass without beseeching federal approval.<sup>139</sup>

Addressing the coverage formula's constitutionality, the Court noted that upon the VRA's initial enactment in 1965, the reverse-engineered formula was "rational in both practice and theory."<sup>140</sup> The Court, though, disapproved of the formula's modern reliance on outdated data in consideration of the monumental improvements in minority electoral participation witnessed since the 1960s.<sup>141</sup> "Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions."<sup>142</sup> The Court rejected the government's contention that the coverage formula remained valid since it deterred covered jurisdictions from implementing second-generation barriers to minority participation: "Viewing the preclearance requirements as targeting such [second-generation] efforts simply highlights the irrationality of continued reliance on the § 4 coverage formula, which is based on voting tests and access to the ballot, not vote dilution."<sup>143</sup> The Court

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<sup>134</sup> *Shelby Cnty. v. Holder*, 679 F.3d 848, 884 (D.C. Cir. 2012); *Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424, 508 (D.D.C. 2011).

<sup>135</sup> *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2619 (2013).

<sup>136</sup> *Id.* at 2622 (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)).

<sup>137</sup> *Id.* at 2623 ("Not only do States retain sovereignty under the Constitution, there is also a 'fundamental principle of equal sovereignty' among the States."); *id.* at 2624 ("[A]s we made clear in *Northwest Austin*, the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States."); *id.* at 2623 ("Over a hundred years ago, this Court explained that our Nation 'was and is a union of States, equal in power, dignity and authority.'"); *id.* ("Indeed, 'the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized.'").

<sup>138</sup> *Id.* at 2624.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 2627 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 330 (1966)).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 2629.

<sup>143</sup> *Id.*

thus stonewalled the various justifications that had enabled preclearance to survive past challenges.

After noting Congress's failure to amend the coverage formula following *Northwest Austin*'s ominous dicta, the Court held the Section 4(b) coverage formula unconstitutional.<sup>144</sup> While the Court did not rule on Section 5's constitutionality,<sup>145</sup> by striking the coverage formula, the Court effectively nullified preclearance as well. Section 5's statutory configuration requires a coverage formula to demarcate its application.<sup>146</sup> Without a coverage formula, preclearance does not apply to any jurisdiction. Thus, *Shelby County* released all covered jurisdictions from preclearance.

Since the Court did not rule on Section 5's constitutionality, application of preclearance can resume if Congress can draft another formula outfitted for the modern era. In early 2014, a bipartisan group of congressional representatives introduced a bill containing a new coverage formula for the VRA.<sup>147</sup> However, the Court cautioned that "Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions."<sup>148</sup> For now, the nation wades into a novel electoral situation. Some formerly covered jurisdictions have never exercised full electoral autonomy in an era where racial equality is the societal norm. Whether the practical elimination of preclearance will generate a new wave of discriminatory voting laws remains an open question. Since *Shelby County*, some formerly covered states have passed laws that likely would have failed to achieve preclearance. In Texas and North Carolina, civil rights groups are challenging post-*Shelby County* voter ID requirements under Section 2 of the VRA.<sup>149</sup>

## II. THE EQUAL FOOTING DOCTRINE

### A. Development of the Equal Footing Doctrine

*Shelby County*'s designation of the "equal sovereignty principle" is a misnomer. The principle the Court purports to reference, based on its citation to *Coyle v. Smith*, is better recognized throughout federal jurisprudence as the equal footing doctrine.<sup>150</sup>

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<sup>144</sup> *Id.* at 2631.

<sup>145</sup> *Id.*

<sup>146</sup> See 42 U.S.C. § 1973c (2006) ("Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title *based upon determinations made under the first sentence of section 1973b(b)* of this title . . . ." (emphasis added)).

<sup>147</sup> Ari Berman, *Members of Congress Introduce a New Fix for the Voting Rights Act*, THE NATION (Jan. 16, 2014), <http://www.thenation.com/blog/177962/members-congress-introduce-new-fix-voting-rights-act#>.

<sup>148</sup> *Shelby Cnty.*, 133 S. Ct. at 2631.

<sup>149</sup> Jaime Fuller, *How Has Voting Changed Since Shelby County*, WASH. POST (July 7, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/07/07/how-has-voting-changed-since-shelby-county-v-holder/>.

<sup>150</sup> See *Shelby Cnty.*, 133 S. Ct. at 2623 ("Over a hundred years ago, this Court explained

The equal footing doctrine generally stipulates that a state, upon its admission to the Union, is on “equal footing” with all other states and entitled to the same sovereign powers held by existing states.<sup>151</sup> The doctrine protects states’ sovereignty by minimizing Congress’s ability to impose inequitable terms of admission on states through acts conferring statehood.<sup>152</sup>

The Constitution references neither equal footing nor equal sovereignty of states.<sup>153</sup> The Constitutional Congress of 1787 contemplated including a constitutional provision mandating states to be “admitted on the same terms with the original states,” but the phrase was omitted from the final text.<sup>154</sup> The “equal footing” phrase did appear in early American legislation, notably the Northwest Ordinance of 1787.<sup>155</sup> The ordinance stipulated that states created from territory ceded by Virginia to the federal government would join the Union with the same sovereign rights as existing states.<sup>156</sup> The Northwest Ordinance, originally passed before the Constitution was finalized, was reauthorized in 1789 following the Constitution’s adoption.<sup>157</sup>

In 1796, Congress used the “equal footing” phrase in the act admitting Tennessee to the Union. Tennessee thereby joined the United States ““on an equal footing with original states in all respects whatever.””<sup>158</sup> Since Tennessee’s admission, the “equal

that our Nation ‘was and is a union of States, equal in power, dignity and authority.’” (quoting *Coyle v. Smith*, 221 U.S. 559, 567 (1911))).

<sup>151</sup> See Robert Barrett, *History on an Equal Footing: Ownership of the Western Federal Lands*, 68 U. COLO. L. REV. 761, 770–71 (1997).

<sup>152</sup> See Alexander H. Southwell, *The County Supremacy Movement: The Federalism Implications of a 1990s States’ Rights Battle*, 32 GONZ. L. REV. 417, 462 (1997) (“The reasoning behind this doctrine is both preserving new states’ ability to exercise all of its powers under the Constitution and preventing Congress from enlarging its own authority by imposing conditions on new states’ sovereignty.”).

<sup>153</sup> See U.S. CONST. art. IV, § 3, cl. 1 (“New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.”).

<sup>154</sup> Valerie J. M. Brader, *Congress’ Pet: Why the Clean Air Act’s Favoritism of California Is Unconstitutional Under the Equal Footing Doctrine*, 13 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 119, 130, 132 (2007).

<sup>155</sup> *Id.* at 133. Justice O’Connor disclosed the equal footing doctrine’s common law foundation in *Utah Division of State Lands v. United States*, 482 U.S. 193, 195–96 (1987). Under English common law, the King possessed title to all submerged lands under navigable water as a sovereign attribute. Upon achieving independence, the Thirteen Colonies inherited title to submerged lands under navigable waters within their borders as part of the succession of sovereignty from the British monarchy. *Id.*

<sup>156</sup> See John Hanna, *Equal Footing in the Admission of States*, 3 BAYLOR L. REV. 519, 523 (1951).

<sup>157</sup> *Id.*

<sup>158</sup> Southwell, *supra* note 152, at 461 (quoting FRANCIS NEWTON THORPE, 6 THE FEDERAL AND STATE CONSTITUTIONS 3414 (1906)).

footing” phrase (or the equivalent “same footing” wording) has appeared in the text or title of every subsequent enabling act admitting a state to the Union.<sup>159</sup>

*B. Supreme Court Application of the Equal Footing Doctrine*

In 1831, a Supreme Court Justice first referenced the equal footing doctrine.<sup>160</sup> In a concurring opinion, Justice Henry Baldwin remarked that new states were “to be admitted into the union on an equal footing with the original states; of course, not shorn of their powers of sovereignty and jurisdiction within the boundaries assigned by congress to the new states.”<sup>161</sup> The first majority Court opinion to acknowledge the doctrine was *Mayor of New Orleans v. De Armas* in 1835.<sup>162</sup>

*Pollard v. Hagan*<sup>163</sup> was the equal footing doctrine’s first leading role, and the decision expounded the doctrine’s constitutional underpinning.<sup>164</sup> *Pollard* concerned competing claims of title to submerged land in Alabama.<sup>165</sup> The plaintiff claimed title through a patent issued by the United States government in 1836, while the defendant argued rightful title under a grant recognized in 1795 by Georgia’s legislature prior to Georgia’s cession of territory that would eventually form Alabama.<sup>166</sup> Rejecting the plaintiff’s claim, the Court explained that “[w]hen 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” as held by existing states.<sup>167</sup> Since Georgia’s cession of the territory that came to form Alabama was made on the condition that any state created from that land would stand on equal footing with existing states, Article IV, Section Three of the Constitution obliged the Court to honor Georgia’s intent in granting the territory.<sup>168</sup> Alabama’s admission on an equal footing thus gave it exclusive control of its territory and precluded federal grants of its territory.<sup>169</sup> *Permoli v. New Orleans* further cemented the equal footing doctrine’s

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<sup>159</sup> *Id.*; see also Brader, *supra* note 154, at 134–35.

<sup>160</sup> Brader, *supra* note 154, at 136.

<sup>161</sup> *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 35 (1831) (Baldwin, J., concurring).

<sup>162</sup> *Mayor of New Orleans v. De Armas*, 34 U.S. 224, 235 (1835) (“This article obviously contemplates two objects. One, that Louisiana shall be admitted into the union as soon as possible, upon an equal footing with the other states . . .”).

<sup>163</sup> 44 U.S. (3 How.) 212 (1845).

<sup>164</sup> See Brader, *supra* note 154, at 139 n.100.

<sup>165</sup> *Id.* at 139.

<sup>166</sup> *Pollard*, 44 U.S. at 214, 218.

<sup>167</sup> *Id.* at 223.

<sup>168</sup> *Id.* See U.S. CONST. art. IV, § 3 (“New states may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.”).

<sup>169</sup> *Pollard*, 44 U.S. at 228–29; see also Barrett, *supra* note 151, at 783 (“The linchpin of anti-federal arguments is *Pollard v. Hagan* . . .”); Hanna, *supra* note 156, at 531 (“The

protection of state sovereignty.<sup>170</sup> *Permoli* held Louisiana's admission to the Union "on an equal footing with the original states, in all respects whatever," entitled it to sovereign control over subjects not expressly regulated by federal law or the Constitution.<sup>171</sup>

After *Pollard* and *Permoli*, the Court intermittently utilized the equal footing doctrine for the remainder of the nineteenth century. The doctrine mostly was associated with title disputes between states and the federal government,<sup>172</sup> though it was pressed into newfound situations too. The infamous *Dred Scott* decision, for instance, referenced the doctrine in a discussion about the comparative rights of states.<sup>173</sup>

Another nineteenth century case featuring the doctrine likewise reflected the era's underlying racial inequity. *Ward v. Race Horse* involved a Native American prosecuted for violating a Wyoming hunting statute.<sup>174</sup> Prior to Wyoming's admission to the Union, Race Horse's tribe had formed a treaty with the federal government allowing for broad hunting privileges over federal land in exchange for the tribe's agreement to settle on a reservation.<sup>175</sup> Upon achieving statehood, Wyoming's legislature imposed hunting regulations in contravention to privileges in the tribe's treaty.<sup>176</sup> In upholding Race Horse's prosecution, the Court reasoned that Wyoming acquired control over all its territory upon achieving statehood, and the state was within its sovereign rights to impose hunting regulations irrespective of the treaty.<sup>177</sup> To recognize otherwise, the Court asserted, would deny Wyoming admission on an equal footing.<sup>178</sup>

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theory of the Court [in *Pollard*] was that the eminent domain, as an element of sovereignty, belonged exclusively to the states.").

<sup>170</sup> 44 U.S. (3 How.) 589, 607 (1845).

<sup>171</sup> *Id.*

<sup>172</sup> See, e.g., *id.* at 609; *Shively v. Bowlby*, 152 U.S. 1, 7, 27, 34 (1894); *Sands v. Manistee River Improvement Co.*, 123 U.S. 288, 296 (1887); *Van Brocklin v. Tennessee*, 117 U.S. 151, 167–68 (1886); *Escanaba & Lake Michigan Transp. Co. v. Chicago*, 107 U.S. 678, 688–89 (1883).

<sup>173</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 461 (1856) ("Has the law of Illinois any greater force within the jurisdiction of Missouri, than the laws of the latter within that of the former? Certainly not. They stand upon an equal footing. Neither has any force extra-territorially, except what may be voluntarily conceded to them."); see also James Blacksher & Lani Guinier, *Free at Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right to Vote: Shelby County v. Holder*, 8 HARV. L. & POL'Y REV. 39 (2014).

<sup>174</sup> 163 U.S. 504, 507 (1896).

<sup>175</sup> *Id.* at 508–09.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 514–16.

<sup>178</sup> The enabling act declares that the State of Wyoming is admitted on equal terms with the other States, and this declaration, which is simply an expression of the general rule, which presupposes that States, when admitted into the Union, are endowed with powers and attributes equal in scope to those enjoyed by the States already admitted, repels any presumption that in this particular case Congress intended to admit the State of Wyoming with diminished governmental authority.

*Id.* at 514–15.

The early twentieth century witnessed several significant decisions in the equal footing canon. *Stearns v. Minnesota*<sup>179</sup> demarcated a split in the equal footing doctrine's protection of political and territorial sovereignty.<sup>180</sup> *Stearns* held Congress could impose limitations on states' territorial sovereignty through enabling acts, since "a mere agreement in reference to property involves no question of equality of status."<sup>181</sup> But *Stearns* stipulated the equal footing doctrine "may forbid any agreement or compact limiting or qualifying political rights and obligations."<sup>182</sup>

Nearly a decade later, the Court showcased the equal footing doctrine's staunch protection of political sovereignty. *Coyle v. Smith* posited a challenge to Oklahoma's legislative reassignment of the state's capital city from Guthrie to Oklahoma City.<sup>183</sup> Oklahoma's enabling act had mandated Guthrie was to serve as the state capitol until 1913, after which the state's citizens would choose the capital city by popular vote.<sup>184</sup> But the state legislature moved the capital on its own initiative in 1910.<sup>185</sup> *Coyle*'s principal issue concerned the validity of this legislative transplantation made in contravention to an enabling act restriction.<sup>186</sup> The Court sided with Oklahoma, as "[t]he power to locate its own seat of government . . . is essentially and peculiarly [a] state power[.]"<sup>187</sup> In potent language, *Coyle* provided the most loquacious articulation of the equal footing doctrine's purport to date:

"This Union" was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new States, might come to be a union of States unequal in power, as including States whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission. Thus it would result, first, that the powers of Congress would not be defined by the Constitution alone, but in respect to new states, enlarged or restricted by the conditions imposed upon new states by its own legislation admitting them into the Union; and, second, that such new States might

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<sup>179</sup> 179 U.S. 223 (1900).

<sup>180</sup> See Brader, *supra* note 154, at 142.

<sup>181</sup> *Stearns*, 179 U.S. at 245.

<sup>182</sup> *Id.*

<sup>183</sup> 221 U.S. 559, 563 (1911).

<sup>184</sup> *Id.* at 564.

<sup>185</sup> *Id.* at 562.

<sup>186</sup> *Id.* at 563.

<sup>187</sup> *Id.* at 565.

not exercise all of the powers which had not been delegated by the Constitution, but only such as had not been further bargained away as conditions of admission.<sup>188</sup>

The Court mustered the equal footing doctrine to resolve a grouping of mid-twentieth century title disputes between states and the federal government. *United States v. Texas*<sup>189</sup> was a showdown over offshore resources in the Gulf of Mexico.<sup>190</sup> The Court held resources beyond the low-water mark “involve national interests and national responsibilities,”<sup>191</sup> and enjoined Texas from harvesting resources outside its inland water.<sup>192</sup> The decision atypically applied the doctrine as a limitation on state, rather than federal, power. “The ‘equal footing’ clause prevents extension of the sovereignty of a State into a domain of political and sovereign power of the United States from which the other States have been excluded, just as it prevents a contraction of sovereignty which would produce inequality among the States.”<sup>193</sup>

*United States v. Louisiana*<sup>194</sup> similarly involved a disagreement between the federal government and states over Gulf resources.<sup>195</sup> The Court rejected the argument that the equal footing doctrine compelled extension of equal seaward boundaries for all Gulf states.<sup>196</sup> In the tradition of *Stearns*, property rights as an attribute of sovereignty did not warrant the equal footing doctrine’s unconditional protection.<sup>197</sup>

In the second half of the twentieth century, plaintiffs deployed equal footing arguments in a host of backdrops, both familiar and novel. Disputes over title to land remained a common setting for the doctrine.<sup>198</sup> But the doctrine was summoned in less conventional domains too, including challenges to congressional designation of a nuclear depository<sup>199</sup> and a polygamy prohibition.<sup>200</sup>

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<sup>188</sup> *Id.* at 567. Justice Roberts quoted much of this paragraph from *Coyle* in explicating the equal sovereignty principle in *Shelby County*. See *supra* note 137.

<sup>189</sup> 339 U.S. 707 (1950).

<sup>190</sup> *Id.* at 709.

<sup>191</sup> *Id.* at 719.

<sup>192</sup> *Id.* at 720.

<sup>193</sup> *Id.* at 719–20 (citations omitted).

<sup>194</sup> 363 U.S. 1 (1960).

<sup>195</sup> *Id.* at 4–5.

<sup>196</sup> *Id.* at 76–77.

<sup>197</sup> See *supra* notes 179–82 and accompanying text.

<sup>198</sup> See, e.g., *Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987).

<sup>199</sup> *Nevada v. Watkins*, 914 F.2d 1545, 1555 (9th Cir. 1990) (“[T]he equal footing doctrine is not a restriction on Congress’ power to enact regulations concerning the siting of a national nuclear waste repository pursuant to the Property Clause.”).

<sup>200</sup> *Potter v. Murray City*, 760 F.2d 1065, 1067–68 (10th Cir. 1985) (holding plaintiff’s claim that the provision of Utah’s enabling act forbidding polygamy violated equal footing doctrine lacked merit because state had power to subsequently legalize polygamy upon achieving statehood).

The equal footing doctrine was largely foreign to election litigation through the twentieth century.<sup>201</sup> *Katzenbach* notably rejected application of the equal footing doctrine to Voting Rights Act litigation to the effect that the doctrine's applicability in that context seemed foreclosed.<sup>202</sup> In *Katzenbach*, the Court succinctly dismissed South Carolina's equal footing challenge to the preclearance regime, explaining "The doctrine of the equality of States . . . applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared."<sup>203</sup>

Not until *Northwest Austin*,<sup>204</sup> over forty years after *Katzenbach*, did the Court assign any constitutional heft to the equal footing doctrine in the context of VRA litigation. *Northwest Austin* cited equal footing precedent in dicta questioning the coverage formula's constitutionality.<sup>205</sup> "[A] departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets."<sup>206</sup> Though referring to equal sovereignty, *Northwest Austin* supported its assertions with citations to the equal footing cases of *United States v. Louisiana*<sup>207</sup> and *Texas v. White*.<sup>208</sup> Those cases, though, pertained to circumstances relating to enabling acts.<sup>209</sup> *Northwest Austin* strategically cited language from *Katzenbach*, reiterating that, "The doctrine of the equality of States . . . does not bar . . . remedies for *local* evils which have subsequently appeared."<sup>210</sup> Omitted was language qualifying the equal footing doctrine's applicability to the context of state admissions.<sup>211</sup>

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<sup>201</sup> See *South Carolina v. Katzenbach*, 383 U.S. 301, 328–29 (1966).

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* (citing *Coyle v. Smith*, 221 U.S. 559 (1911)).

<sup>204</sup> *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009).

<sup>205</sup> *Id.* at 203.

<sup>206</sup> *Id.*

<sup>207</sup> 363 U.S. 1 (1960). See *supra* notes 194–97 and accompanying text.

<sup>208</sup> 74 U.S. (7 Wall.) 700 (1869). *Texas v. White* loosely pertained to the equal footing doctrine. The case concerned the validity of a sale of U.S. bonds by the Texan confederate government. The opinion discussed the nature of the Union, but does not explicitly reference the equal footing of states. See *id.* at 725.

<sup>209</sup> See 363 U.S. at 66. *United States v. Louisiana* is somewhat comparable to *Northwest Austin* in that Louisiana objected to differential treatment among states, specifically the more extensive seaward boundaries afforded to Texas and Florida. *Id.* at 76–77. The case diverges from *Northwest Austin*, though, in that the extended boundaries of Texas and Florida were granted as part of their terms of admission into the United States. *Id.* Subjugation to preclearance assuredly was not a term of Texas's admission to the Union.

<sup>210</sup> *Nw. Austin*, 557 U.S. at 203 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 328–29 (1966)) (alterations in original).

<sup>211</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 328–29 (1966) ("The doctrine of the equality of States, invoked by South Carolina, does not bar this approach, for that doctrine applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared.").

### C. *Shelby County and its Equal Sovereignty Principle*

In *Shelby County*,<sup>212</sup> the Court sunk in the dagger so thinly veiled in *Northwest Austin*'s dicta. *Shelby County* lionized "the fundamental principle of equal sovereignty" as though it was constitutional text.<sup>213</sup> While there is some appeal to an idea of equal sovereignty among states, particularly from a federalist perspective, the equal footing doctrine does not posit a principle of equal sovereignty outside the context of states' terms of admission, and even that tenet is qualified.<sup>214</sup>

In her *Shelby County* dissent, Justice Ginsburg lambasted the Court's utilization of the equal footing doctrine.<sup>215</sup> Justice Ginsburg pointed to multiple instances of congressional legislation differentiating amongst states outside the context of states' admittance.<sup>216</sup> Justice Ginsburg further accentuated that *Katzenbach* had explicitly rebuffed the doctrine's applicability as a challenge to the coverage formula, questioning how the majority could postulate such a glaring inconsistency to justify overruling a congressional act:

If the Court is suggesting that dictum in *Northwest Austin* silently overruled *Katzenbach*'s limitation of the equal sovereignty doctrine to "the admission of new States," the suggestion is untenable. *Northwest Austin* cited *Katzenbach*'s holding in the course of *declining to decide* whether the VRA was constitutional or even what standard of review applied to the question. In today's decision, the Court ratchets up what was pure dictum in *Northwest Austin*, attributing breadth to the equal sovereignty principle in flat contradiction of *Katzenbach*. The Court does so with nary an explanation of why it finds *Katzenbach* wrong, let alone any discussion of whether *stare decisis* nonetheless counsels adherence to *Katzenbach*'s ruling on the limited "significance" of the equal sovereignty principle.<sup>217</sup>

Justice Roberts fleetingly acknowledged *Shelby County*'s irregularity with precedent. He mentioned *Coyle* involved a matter of state admission, and ceded *Katzenbach* had declined to extend the equal footing doctrine outside the realm of state admissions.<sup>218</sup> But Roberts, as Ginsburg noted, largely sidestepped the issue by reaching to *Northwest Austin*'s dicta.<sup>219</sup> "[A]s we made clear in *Northwest Austin*, the fundamental

<sup>212</sup> *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

<sup>213</sup> *Id.* at 2622 (quoting *Nw. Austin*, 557 U.S. at 203).

<sup>214</sup> *Stearns v. Minnesota*, 179 U.S. 223, 245 (1900) (stipulating that the equal footing doctrine "may forbid any agreement or compact limiting or qualifying political rights and obligations").

<sup>215</sup> *Shelby Cnty.*, 133 S. Ct. at 2648–49 (Ginsburg, J., dissenting).

<sup>216</sup> *Id.* at 2649 (Ginsburg, J., dissenting).

<sup>217</sup> *Id.* (Ginsburg, J., dissenting) (citation omitted).

<sup>218</sup> *Id.* at 2623–24.

<sup>219</sup> *Id.* at 2624.

principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States.”<sup>220</sup>

The Chief Justice is simply wrong here. Congress cannot abridge states’ comparative political equality through restrictions imposed in enabling acts, but there is not a recognized constitutional doctrine prohibiting Congress from differentiating amongst the states through legislation *after* their admission to the Union. Such differentiation is relatively common.<sup>221</sup> But *Shelby County* not only insisted an equal sovereignty principle exists, the decision utilized this chimerical canon to annul a legislative regime that had effectively enfranchised millions of Americans and debilitated the institutionalized plague of racial discrimination in voting.

### III. A PROSPECTIVE EXPLANATION FOR *SHELBY COUNTY*’S RELIANCE ON THE EQUAL FOOTING DOCTRINE

As discussed, the “fundamental principle of *equal sovereignty*”<sup>222</sup> is not a recognized doctrine in U.S. jurisprudence.<sup>223</sup> The equal *footing* doctrine is a principle inhibiting congressional debasement of state sovereignty through conditions in enabling acts,<sup>224</sup> but the doctrine lacks the gravitas attributed to it in *Shelby County*.<sup>225</sup> *Shelby County*’s equal sovereignty principle thus is a doctrinal bastardization at best, afforded precedential support only through omission and tactful editing.

The unavoidable question beseeched by *Shelby County* is why the Court chose the equal footing doctrine to strike down the VRA’s coverage formula? An amalgamation of three factors proffers a prospective explanation. First, precedent constricted the Court’s ability to annul the VRA’s coverage formula using more conventional constitutional tenets. Second, the equal footing doctrine supplied a flexible axiom for the Court to fashion into ostensive justification for its holding. Finally, the equal footing doctrine served as a façade for an ideological philosophy advocating the dignity of states as political sovereigns.

#### *A. Precedential Restriction of the Court’s Ability to Annul the Coverage Formula*

Precedent upholding preclearance’s framework likely necessitated the Court’s embrace of a doctrine largely remote to VRA litigation in order to defeat the coverage

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<sup>220</sup> *Id.*

<sup>221</sup> See *supra* note 216 and accompanying text.

<sup>222</sup> *Shelby Cnty.*, 133 S. Ct. at 2623.

<sup>223</sup> See *supra* Part II.C.

<sup>224</sup> See *Coyle v. Smith*, 221 U.S. 559, 573 (1911) (“[W]hen a new State is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original States, and that such powers may not be constitutionally diminished, impaired or shorn away by any conditions, compacts or stipulations embraced in the act under which the new State came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission.”).

<sup>225</sup> See *Shelby Cnty.*, 133 S. Ct. at 2623.

formula. The equal footing doctrine offered a relatively untarnished doctrinal vantage from which the Court could attack the disfavored coverage formula.

Beginning with *Katzenbach*, the Court assumed a highly deferential posture toward Congress's authority to implement and reauthorize the VRA.<sup>226</sup> Any argument that states retained sovereign primacy over electoral affairs under the Tenth Amendment<sup>227</sup> was summarily repudiated.<sup>228</sup> "As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."<sup>229</sup> From the VRA's inception, the Court evaluated challenges to the preclearance regime with a rational basis standard that foreclosed constitutional challenges based on the Tenth Amendment.<sup>230</sup>

For four decades after *Katzenbach*, the Court consistently guarded the VRA with robust language dismissive of federalism concerns inherent in the Act's structure. *City of Rome* indicated the Court's deference to Congress had not waned with time.<sup>231</sup> In *City of Rome*, federalism's principles were "necessarily overridden by [Congress's] power to enforce the Civil War Amendments 'by appropriate legislation.'"<sup>232</sup> Through the 1990s, the Court remained unquestioning of the VRA's intrusion onto state sovereignty.<sup>233</sup>

*Northwest Austin* indicated a shifting attitude on the Court, though. Principles of federalism materialized as a counter to preclearance's intrusiveness.<sup>234</sup> But precedent effectively insulated the preclearance regime from constitutional assailment under traditional strains of federalist argument. If the Court was to strike preclearance or its coverage formula, it would need to do so on grounds not conclusively refuted by

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<sup>226</sup> See Paul, *supra* note 19, at 278.

<sup>227</sup> See *Boyd v. Nebraska*, 143 U.S. 135, 161 (1892) ("Each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen, and the title to offices shall be tried, whether in the judicial courts or otherwise.").

<sup>228</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 325 (1966) ("The gist of the matter is that the Fifteenth Amendment supersedes contrary exertions of state power. 'When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.'" (quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960))).

<sup>229</sup> *Id.* at 324.

<sup>230</sup> See Paul, *supra* note 19, at 278.

<sup>231</sup> See *City of Rome v. United States*, 446 U.S. 156, 182 (1980) ("Congress' considered determination that at least another 7 years of statutory remedies were necessary to counter the perpetuation of 95 years of pervasive voting discrimination is both unsurprising and unassailable. The extension of the Act, then, was plainly a constitutional method of enforcing the Fifteenth Amendment.").

<sup>232</sup> *Id.* at 179.

<sup>233</sup> See *Lopez v. Monterey Cnty.*, 525 U.S. 266, 284 (1999) ("In short, the Voting Rights Act, by its nature, intrudes on state sovereignty.").

<sup>234</sup> *Nw. Austin Mun. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009) (discussing federalism costs instituted by the VRA).

precedent. The equal footing doctrine, cloaked as the principle of equal sovereignty, afforded a moderately intact avenue for the Court to debase the preclearance regime without grating forty years of precedent.

*Katzenbach* undeniably rejected an equal footing argument in the context of preclearance litigation.<sup>235</sup> But after *Katzenbach*'s succinct dismissal, the equal footing doctrine laid dormant in the realm of preclearance litigation. Challengers to preclearance likely considered the doctrine a fruitless avenue for undermining preclearance on account of *Katzenbach*'s terse dismissal. Or perhaps challengers were cognizant of the doctrine's appropriate context. Regardless, the doctrine proved decisive in *Shelby County* as precedential backing for the equal sovereignty principle. The Court likely assigned constitutional gravitas to the equal footing doctrine partly because the doctrine had a diminutive history in VRA litigation. Unlike other federalist-strain arguments,<sup>236</sup> the Court had not repetitively rejected the doctrine as a constraint on the preclearance regime's constitutionality. A single sentence from *Katzenbach* was the only precedent explicitly denying the equal footing doctrine's suitability in preclearance litigation.<sup>237</sup> Thus, the doctrine likely enticed the Court in its pursuit of doctrinal justification undermining the preclearance regime.

In sum, it is likely that *Shelby County* roused the equal footing doctrine because it was one of the few channels of argument not resoundingly foreclosed by precedent. So long as the Court ignored context and brushed aside a sentence of precedent, the doctrine furnished a facial restriction on Congress's capacity to impose disparate obligations on states.

### B. The Equal Footing Doctrine's Flexibility

The equal footing doctrine's pliability may further explain *Shelby County*'s reliance on it. The doctrine has touched a comprehensive range of subject matter, including issues of title;<sup>238</sup> ownership of bonds;<sup>239</sup> corporate tax breaks;<sup>240</sup> a treaty

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<sup>235</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 328–29 (1966).

<sup>236</sup> *See Lopez*, 525 U.S. at 283 (“[W]e have specifically upheld the constitutionality of § 5 of the Act against a challenge that this provision usurps powers reserved to the States.”); *City of Rome*, 446 U.S. at 179 (“[P]rinciples of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments ‘by appropriate legislation.’ Those Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty.”); *Katzenbach*, 383 U.S. at 325 (“The gist of the matter is that the Fifteenth Amendment supersedes contrary exertions of state power.”).

<sup>237</sup> *See supra* note 203 and accompanying text.

<sup>238</sup> *See United States v. Louisiana*, 363 U.S. 1, 22–23 (1960); *United States v. Texas*, 339 U.S. 707, 713–21 (1950); *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 223–24 (1845).

<sup>239</sup> *See Texas v. White*, 74 U.S. (7 Wall.) 700 (1869). *Texas v. White* loosely pertained to the equal footing doctrine. *See supra* note 208.

<sup>240</sup> *See Stearns v. Minnesota*, 179 U.S. 223, 243–44 (1900).

with Native Americans,<sup>241</sup> transplantation of a state capitol,<sup>242</sup> even slavery.<sup>243</sup> *Stearns*<sup>244</sup> further gave the territorial aspect of sovereignty protected by the doctrine less fortitude than its political counterpart.<sup>245</sup> Thus, even within its proper context, the equal footing doctrine has stood for different ideals, such that its true import is somewhat obscured.

Though the factual backdrop to the equal footing doctrine's application has varied over time, until *Northwest Austin* and *Shelby County*, the doctrine's function always pertained in some degree to states' terms of admission. But if this lone constancy in application is bypassed, the equal footing doctrine ostensibly presents a general restraint on Congress's ability to impose dissimilar obligations on states. *Shelby County* seems to have cherry-picked the doctrine's functional restriction on Congress, while disregarding the doctrine's crucial contextual relation to matters pertaining to state admissions.

*Shelby County*'s strategically worded quotation from *Coyle* lends credence to the proposition of selective interpretation. "Over a hundred years ago, this Court explained that our Nation 'was and is a union of States, equal in power, dignity and authority.'"<sup>246</sup> The subsequent sentence in *Coyle*, tactfully omitted by Chief Justice Roberts, qualified the preceding assertion of state equality to the context of state admissions.<sup>247</sup> Examination of *Shelby County*'s citations thereby buttresses the insinuation that the Court customized the relatively pliable equal footing doctrine into a vehicle for its equal sovereignty principle.

### C. The Equal Footing Doctrine as a Mask for a State Sovereignty Doctrine

A final consideration relevant to *Shelby County*'s use of the equal footing doctrine implicates the ideology of some members of the Court. While *Shelby County* cited equal footing precedent, the Court may have created a new constitutional doctrine entirely. Among some conservative scholars, the ideal of the states' dignity as

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<sup>241</sup> See *Ward v. Race Horse*, 163 U.S. 504, 510–14 (1896).

<sup>242</sup> See *Coyle v. Smith*, 221 U.S. 559 (1911).

<sup>243</sup> See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 461 (1856).

<sup>244</sup> 179 U.S. 223 (1900).

<sup>245</sup> See *id.* at 245; *supra* note 214 and accompanying text.

<sup>246</sup> See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2623 (2013) (quoting *Coyle v. Smith*, 221 U.S. 559, 567 (1911)).

<sup>247</sup> *Coyle*'s next sentence qualifies the previous assertion:

To maintain otherwise would be to say that the Union, through the power of Congress to admit new States, might come to be a union of States unequal in power, as including States whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission.

*Coyle*, 221 U.S. at 567.

sovereigns is esteemed as a lost tenet in the structure of American government.<sup>248</sup> As Joseph Fishkin details in *The Dignity of the South*, the theory of state dignity fundamentally demands respect for states as sovereign entities distinct from the collective Union.<sup>249</sup> The theory is not substantiated by constitutional text, but purportedly engrained in the American system of dual sovereignty.<sup>250</sup>

In accordance with the theory of state dignity, preclearance violated states' dignity through the federal government's seizure of a traditional aspect of state sovereignty: the power to regulate elections.<sup>251</sup> Some proponents of state dignity contend that since the end of the Civil War, the federal government has steadily usurped sovereign power from the South. These state dignity theorists thus consider Congress's continued subjugation of Southern states to rigorous federal oversight as debasing those states' dignity as sovereigns.<sup>252</sup>

William Rehnquist is regarded as the Court's modern foreman of state dignity.<sup>253</sup> The "Rehnquist Revolution" of the 1990s began to stanchion the concept of state dignity, as Court decisions from this period often departed from the twentieth century trend of judicial deference to Congress.<sup>254</sup> Rehnquist's Court refuted the constitutionality of federal legislation ranging from gun regulations<sup>255</sup> to civil remedies for victims of gender-related crimes.<sup>256</sup> Rhetoric from these decisions evinced the Court's high regard for state dignity<sup>257</sup>: "The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities."<sup>258</sup>

Rehnquist's death in 2005 did not extinguish the state dignity renaissance. Contemporary decisions continue to reference the dignity of states, directly or tangentially, in discussions on state sovereignty and the proper scope of congressional power.<sup>259</sup>

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<sup>248</sup> Columbia University historian William Dunning was a prominent proponent of the sovereign dignity of states around the turn of the 19th century. Dunning proliferated a contorted account of the Civil War and its aftermath that characterized the Civil War and Reconstruction as a campaign of federal oppression that had resulted in a flagrant appropriation of states' constitutional powers. Dunning's writings were distributed in American schools during the formative years of some members of the current Supreme Court and may have influenced their perceptions of sovereignty. See Joseph Fishkin, *The Dignity of the South*, 123 *YALE L.J. ONLINE* 175, 183–86 (2013).

<sup>249</sup> See *id.* at 176.

<sup>250</sup> See *id.* at 176, 187.

<sup>251</sup> See *id.* at 176–77.

<sup>252</sup> See *id.* at 178.

<sup>253</sup> See *id.* at 186.

<sup>254</sup> See *id.*

<sup>255</sup> *United States v. Lopez*, 514 U.S. 549, 567 (1995).

<sup>256</sup> *United States v. Morrison*, 529 U.S. 598, 627 (2000).

<sup>257</sup> See, e.g., *Printz v. United States*, 521 U.S. 898, 935 (1997).

<sup>258</sup> *Fed. Mar. Comm'n v. S.C. Ports Auth.*, 535 U.S. 743, 760 (2002).

<sup>259</sup> See, e.g., *Arizona v. United States*, 132 S. Ct. 2492, 2522 (2012) (Scalia, J. dissenting) (opining that if Arizona did not have sovereign authority to regulate state citizenship then the Court "should cease referring to it as a sovereign State").

Justice Roberts, who once clerked for Rehnquist, penned the majority opinions in both *Northwest Austin* and *Shelby County*. Both decisions stand as victories for state dignity, and the principle is rhetorically embedded in both opinions.<sup>260</sup>

Though *Shelby County* conflated state dignity with the equal footing doctrine, the Court intentionally may have fused the concepts to supply precedential validation for a broader conviction about the proper interplay between state and federal governments. Since state dignity is not a recognized constitutional doctrine, the Court likely needed some precedential sustenance to back its convictions. The equal footing doctrine furnished a relatively obscure doctrinal avenue that the Court could fashion into a modern tenet requiring Congress to respect the sovereign domain of states. Citation to equal footing precedent thus only served as a precedential foundation. The Court's choice to phrase the doctrine as the "fundamental principle of *equal* sovereignty' among the States,"<sup>261</sup> instead of using equal footing language, strengthens the supposition that the Court is referencing a separate concept altogether.

If the Court has in fact created a new doctrine of state dignity, the enduring implications could prove momentous. Congress certainly will have to consider a discrepant impact on states in the conception of another VRA coverage formula; *Shelby County* said as much.<sup>262</sup> But the repercussions of such a doctrine may extend beyond the confines of preclearance litigation. No qualifying language tempered *Shelby County*'s declaration that "the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States."<sup>263</sup> It is not implausible to construe that phrasing to mean *any* congressional legislation differentiating among states must respect the principle of states' sovereign dignity.

A state dignity doctrine could posit an obstacle to any congressional attempts to implement legislation with variant impact on states. On the other hand, the Court simply may have twisted precedent to annul an obsolete coverage formula it considered unfair in its modern application. After all, the Court did preserve the constitutionality of Section 5, which itself offends the concept of state dignity. Nonetheless, *Shelby County*'s most meaningful consequence could be the origination of a constraint on congressional authority based on the concept of states' dignity as sovereigns.

#### CONCLUSION

The Supreme Court misapplied the equal footing doctrine as justification for striking the Voting Rights Act's coverage formula. *Shelby County* displaced the equal

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<sup>260</sup> *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2623 (2012) ("Over a hundred years ago, this Court explained that our Nation 'was and is a union of States, equal in power, dignity and authority.'" (quoting *Coyle v. Smith*, 221 U.S. 559, 567 (1911))); *id.* ("This 'allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States.'" (quoting *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011))).

<sup>261</sup> *Id.* at 2623.

<sup>262</sup> *Id.* at 2624.

<sup>263</sup> *Id.*

footing doctrine from its proper context in order to provide a doctrinal limitation on Congress's capacity to enact legislation with discrepant impact on states. It is highly improbable that the *Shelby County* majority, composed of some of the nation's preeminent constitutional scholars, was heedless to the decision's irregularity with precedent.

There is indication the Court may have fashioned the equal footing doctrine into an entirely new mechanism cabining Congress's power to enact legislation incongruently impacting states. Regardless of whether the Court was correct to invalidate the VRA's coverage formula, it is disconcerting to know that the nation's highest judicial body largely invented a judicial doctrine to annul federal legislation it considered outdated and inequitable.

Whether *Shelby County*'s equal sovereignty principle will persist as a doctrinal constraint on Congress is uncertain. More definitive is the effective end of preclearance as a mechanism for protecting minority voting rights, and *Shelby County* has delivered many states a level of electoral autonomy last seen in the days of Jim Crow.