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## EQUAL FOOTING AND THE STATES “NOW EXISTING”: SLAVERY AND STATE EQUALITY OVER TIME

*James E. Pfander\* & Elena Joffroy\*\**

*This Essay reexamines the question whether the Constitution empowered Congress to ban slavery in the territories. We explore that question by tracking two proposed additions to the Constitution, one that would empower Congress to ban the migration and importation of enslaved persons to all new states and territories and one that would oblige Congress to admit new states on an equal footing with the old. We show that the Federalists supported and the Convention adopted the migration provision, enabling Congress to restrict slavery to the states “now existing.” But the Federalists opposed and the Convention rejected the equal footing doctrine.*

*Over time, things changed. In debates over the admission of Missouri to the Union as a slave state, Southerners offered a popular, if implausible, reinterpretation of the “Now Existing Caveat” to the Migration and Importation Provision that rendered it practically irrelevant to the expansion of slavery. What is more, Southerners pressed to extend a judge-made equal footing doctrine, urging that new states were entitled to legalize the ownership of people just as the old states were. Chief Justice Roger Taney wrote the Southern interpretation into the Constitution in the Dred Scott v. Sandford opinion, ignoring the Now Existing Caveat and embracing the equal footing doctrine as a matter of constitutional compulsion. While Dred Scott has not survived, the equal footing doctrine now undergirds the idea of equal state sovereignty in such U.S. Supreme Court decisions as Shelby County v. Holder. Meanwhile, the Federalist constitutional settlement has all but disappeared from view.*

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## INTRODUCTION

Historians sometimes argue, with William Garrison, that flaws in the original Constitution's design made the Civil War inevitable. On this view, the people who drafted and ratified the Constitution in 1787 to 1788 failed to take a stand against slavery and allowed the institution to take root and thrive.<sup>1</sup> Critics cite such provisions as the Three-Fifths Clause<sup>2</sup> and the Fugitive Slave Clause,<sup>3</sup> which not only countenanced slavery in the South but also expanded Southern representation in the House of Representatives, enabling slaveholders to recapture those who sought to escape from slavery.<sup>4</sup> By the time of *Dred Scott v. Sandford*,<sup>5</sup> the Constitution's slavery provisions had come to be understood as positive endorsements of the institution that encouraged the U.S. Supreme Court to proclaim that Congress had no power to restrict slaveholding in the territories.<sup>6</sup>

The failure of antebellum America to contain the growth of slavery and put it, as Abraham Lincoln proposed in debates with Stephen Douglas, on a path to "ultimate extinction" represents a grievous failure of politics.<sup>7</sup> But does it stem from a kind of original constitutional sin, as Garrison and the abolitionists would have it, or from a failure of ordinary politics to confront the spread of slavery in the decades after the founding? Was the failure to confine and eventually end slavery hardwired in the constitutional bargain? Or did the antislavery Federalists equip Congress with the tools needed to contain its growth? Was the antislavery rhetoric of Thomas Jefferson and the Virginians a smoke screen? If not, why did the Virginians fail to limit and end slavery?

This Essay offers a new perspective on the Framers' handling of slavery. Highlighting long-forgotten language, this Essay suggests that the language of Article I, Section 9 of the Constitution offers a fairly clear answer to the question of congressional power over the expansion of slavery. In a sectional bargain over commerce in slaves, the Constitution specifies that Congress, in the exercise of its power over interstate and foreign commerce, could immediately end much traffic in slaves. The relevant language reads as follows: "The Migration or Importation of such Persons as any of the States

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1. See, e.g., Paul Finkelman, *How the Proslavery Constitution Led to the Civil War*, 43 RUTGERS L.J. 405, 407 (2013).

2. U.S. CONST. art. I, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIV, § 2.

3. *Id.* art. IV, § 2, cl. 3, *amended by* U.S. CONST. amend. XIII.

4. See, e.g., W. B. Allen, *A New Birth of Freedom: Fulfillment or Derailment?*, in SLAVERY AND ITS CONSEQUENCES: THE CONSTITUTION, EQUALITY, AND RACE 64, 72–73 (Robert A. Goldwin & Art Kaufman eds., 1988); Don E. Fehrenbacher, *Slavery, the Framers, and the Living Constitution*, in SLAVERY AND ITS CONSEQUENCES: THE CONSTITUTION, EQUALITY, AND RACE, *supra*, at 1, 16; Finkelman, *supra* note 1, at 407. See generally SLAVERY AND THE LAW (Paul Finkelman ed., 2d ed. 2001); WILLIAM M. WIECEK, THE SOURCES OF ANTI-SLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848, at 228–48 (1977).

5. 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

6. See generally *id.*

7. See Abraham Lincoln, Speech in Chicago (July 10, 1858), *reprinted in* THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858, at 26, 31–33 (Paul M. Angle ed., 1991).

now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight.”<sup>8</sup> The language of the provision neatly addresses Congress’s power over both interstate movement (migration) and foreign commerce (importation) in “such Persons” as the states “now existing” shall think proper to admit.<sup>9</sup> The provision clearly implies, in short, that while Congress had limited authority over the domestic and foreign movement of enslaved people into and among the thirteen existing states until 1808, it was to have immediate and broad authority to regulate, and indeed prohibit, traffic in people in the newly formed states and the territories.

At the same time the Framers were debating the scope of Congress’s power over slavery, the noted antislavery delegate Gouverneur Morris was maneuvering to strip a provision from the Constitution that would guarantee the admission of new states on an equal footing with the old.<sup>10</sup> Equal footing was an article of faith among the Virginians and had appeared in the final version of the Northwest Ordinance, as adopted in July 1787 by the Continental Congress, sitting in New York.<sup>11</sup> But when an equal footing assurance emerged in the draft Constitution prepared by the Committee of Detail at the Philadelphia Convention in August 1787,<sup>12</sup> Morris moved to strike the provision.<sup>13</sup> Despite arguments from James Madison and George Mason for assured western equality, Morris won the point with only two slaveholding states, Maryland and Virginia, voting to preserve mandated admission on an equal footing.<sup>14</sup> Morris later successfully proposed substitute language, which provided simply that “[n]ew states may be admitted by the Legislature into this Union.”<sup>15</sup> This permissive phrasing captured Morris’s notion that Congress ought to enjoy freedom to attach conditions to new state admissions.<sup>16</sup>

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8. U.S. CONST. art. I, § 9.

9. *Id.*

10. See *infra* notes 55–56 and accompanying text.

11. See John Hanna, *Equal Footing in the Admission of States*, 3 BAYLOR L. REV. 519, 523 (1951) (analyzing the constitutionality of congressional conditions on admission). The Northwest Ordinance created a compact that purported to incorporate new states into the Union, contemplating statehood at a point of population level defined in relation to already existing states. PETER S. ONUF, *STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE* 48–49, 63 (ed. 2019).

12. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 188 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS] (“If the admission be consented to, the new States shall be admitted on the same terms with the original States. But the Legislature may make conditions with the new States, concerning the public debt which shall then be subsisting.”). The one permissible condition concerning public debts would seem to have foreclosed all other conditions by necessary implication. *Id.*

13. See *infra* notes 55–56 and accompanying text.

14. See *infra* notes 55–56 and accompanying text.

15. 2 FARRAND’S RECORDS, *supra* note 12, at 455.

16. Among the conditions were those meant to ensure that the new states would operate under a republican form of government. ONUF, *supra* note 11, at 47. The guarantee of a republican form had been a feature of western land policy for some time. The Northwest Ordinance of 1787 provided that when new states in the territory achieved a population of 60,000, they “shall be admitted” into Congress “on an equal footing with the original States,

The antislavery Federalists had thus secured constitutional provisions that empowered Congress to foreclose much interstate and foreign traffic in enslaved persons and to confine slavery to the states “now existing” (“the Now Existing Caveat”). Elimination of any assured equal footing, though rooted in doubts about the capacity of a rowdy frontier for self-government,<sup>17</sup> would conveniently foreclose arguments that bans on slavery deprived newly admitted states of their equal sovereignty as members of the Union. Still, as Southern delegates triumphantly reported to their constituents back home, the Constitution did not foreclose slavery or the slave trade in explicit terms or contain any provision that would expressly authorize Congress to emancipate those held in slavery under state law.<sup>18</sup> The Constitution did not end slavery, in short, but rather empowered Congress to restrict the geographic scope of slavery and to use new state admission legislation to condition statehood in ways that could enforce the prohibition of slavery. It thus assigned responsibility for the ultimate fate of slavery to members of Congress.

Of course, as we know, legislation and legislative will were in short supply. To be sure, Congress reenacted the Northwest Ordinance<sup>19</sup> in 1789, prohibiting slavery and involuntary servitude in the territory “northwest of the River Ohio.”<sup>20</sup> But the same Congress also adopted the Southwest Ordinance<sup>21</sup> in 1790 to provide for the government of the territory that became Tennessee.<sup>22</sup> Though modeled in most respects on the Northwest Ordinance, the southwest version did not include a provision barring slavery or the migration of enslaved people into the Tennessee territory.<sup>23</sup> Census records indicate that, by the mid-1790s, the territory included a substantial number of enslaved people.<sup>24</sup> Both Kentucky and Tennessee, formed from

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in all respects whatever; and shall be at liberty to form a permanent constitution and State government, provided the constitution and government so to be formed, shall be republican, and in conformity to the principles contained in these Articles.” *Id.* at 64. Equal footing, thus qualified, preserved a role for Congress in assessing the republican quality of governments adopted by new states when they applied for admission. The Constitution followed the Ordinance in this respect, linking new state admission, in Article IV, Section 3, to the requirement that Congress guarantee the states a republican form of government in Article IV, Section 4. In requiring conformity to its “principles,” the Ordinance referred to such guarantees as religious liberty, common law and the writ of habeas corpus, and the famous prohibition of slavery or involuntary servitude. *See* C. Perry Patterson, *The Relation of the Federal Government to the Territories and the States in Landholding*, 28 TEX. L. REV. 43, 65–66 (1949) (arguing that Congress had long attached conditions to admission).

17. For the persuasive claim that Morris was motivated by a distrust of those living on the frontier and a desire to preserve the influence of eastern elites, see Roderick M. Hills Jr., *The Unwritten Constitution for Admitting New States*, 89 FORDHAM L. REV. 1877 (2021).

18. *See infra* note 130 and accompanying text.

19. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50.

20. *Id.* *See generally* Denis P. Duffey, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929 (1995).

21. Act of May 26, 1790, ch. 14, 1 Stat. 123.

22. *See id.*

23. *See id.*

24. *See* U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, ch. A, ser. A195-209, at 35 (1975), [https://www2.census.gov/library/publications/1975/compendia/hist\\_stats\\_colonial-1970/hist\\_stats\\_colonial-1970p1-](https://www2.census.gov/library/publications/1975/compendia/hist_stats_colonial-1970/hist_stats_colonial-1970p1-)

land previously controlled by the slave states of Virginia and North Carolina, were admitted to the Union in the 1790s as slave states themselves.<sup>25</sup>

Legislative acquiescence to established patterns of migration and settlement, rather than constitutional law, thus played a central role in determining the expansion of slavery. The compromise between the (increasingly) free states in the North and the slave states in the South was projected across the map of the United States, as settlers pushed west to the Mississippi and took their institutions, peculiar and otherwise, with them. The Ohio River operated as the de facto extension of the Mason-Dixon Line, leading to an implicit bargain between the North and South. The sectional pattern recurred in the provisions that implemented the 1803 Louisiana Purchase<sup>26</sup> and in those that shaped the 1820 decision to admit Missouri to the Union as a slave state.<sup>27</sup> Even as Congress banned the international slave trade, effective 1808, at Jefferson's suggestion, Virginians were free to continue to bring enslaved people to domestic markets in the South.<sup>28</sup> Indeed, Jefferson's importation ban was largely symbolic; most of the slave states had already banned the international slave trade through laws that were understood to bolster the market value of domestic slave populations.<sup>29</sup> This perverse consequence of restrictions on the international slave trade was well known and explains why Congress chose, in 1776, to strip Jefferson's broadside against the international slave trade from the Declaration of Independence.<sup>30</sup>

Apart from what they say about efforts to constrain the growth of slavery, the Constitution's Now Existing Caveat and state admission provisions reveal something important about the nature of constitutionalism. While the Constitution places the states on an equal footing in some respects, such as in the rules governing representation in Congress, no explicit equal footing guarantee was adopted.<sup>31</sup> The Now Existing Caveat confirmed state inequality by requiring Congress to defer to the existing states' slave laws, yet empowered Congress to block slave traffic to and from any newly formed states. But things changed over time. The equal footing doctrine came to be seen as a matter of constitutional compulsion, and the Now Existing Caveat

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chA.pdf [<https://perma.cc/2R75-WWUY>] (reporting that the population of Tennessee in 1800 included 106,000 people, of whom 14,000 were people of color; ten years earlier, only 4000 people of color resided in the territory).

25. See Hanna, *supra* note 11, at 522–23.

26. See Act of Mar. 26, 1804, ch. 38, 2 Stat. 283.

27. See *infra* Part II.B. See generally Hanna, *supra* note 11.

28. See FREDERIC BANCROFT, *SLAVE TRADING IN THE OLD SOUTH 1–18* (1931) (Frederick Ungar Publ'g Co. 1959) (1931) (discussing the domestic slave market in the antebellum South).

29. See WOODY HOLTON, *FORCED FOUNDERS: INDIANS, DEBTORS, SLAVES, AND THE MAKING OF THE AMERICAN REVOLUTION IN VIRGINIA* 215 (1999).

30. On the decision of Congress to strike Jefferson's passage, criticizing King George for the international slave trade, see JOSEPH J. ELLIS, *AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON* 60–61 (1996) (distinguishing the domestic institution of slavery itself from the international slave trade and describing the messy truth that ending importation of enslaved persons would increase the wealth of planters like Jefferson).

31. See *infra* notes 49–84 and accompanying text.

eventually disappeared from discourse over the power of Congress to curtail slavery.

This Essay offers an account of varying fortunes of the equal footing doctrine and the Now Existing Caveat. Like twins separated at birth in a Charles Dickens novel, these two constitutional ideas led very different lives. While the Now Existing Caveat played a modest role in early debates over the expansion of slavery, one finds its lessons contorted and obscured by the motivated reasoning that appeared in sectional battles over congressional power. Eventually, the provision and the understanding of congressional power it confirmed fell away. Meanwhile, equal footing became an accepted theme in the admission of new states to membership in the Union and now enjoys constitutional status in the decisions of the Supreme Court. By the time of the Supreme Court's lengthy *Dred Scott* opinions, the transformation was complete. Majority and dissenting opinions debated new state admission in terms of equal footing under the Northwest Ordinance, but none of the opinions invoked the Now Existing Caveat in debating congressional power over slavery in the territories.<sup>32</sup>

#### I. EQUAL FOOTING AND THE EXPANSION OF SLAVERY

No figure better symbolizes the conflict between the founding-era ideal of liberty and the reality of slavery than Thomas Jefferson, the author of the Declaration of Independence. Jefferson owned slaves and failed to free them upon his death.<sup>33</sup> Opposed to the international slave trade, ostensibly on moral grounds, Jefferson and other wealthy plantation owners also understood that the market value of their own slaves depended in part on suppressing price competition from imported slaves. Opposed to slavery in theory as a good philosophe, Jefferson looked for ways to limit its expansion into the western territories. But as president, Jefferson dramatically expanded the slaveholding territory of the United States and the political

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32. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

33. For an account of Jefferson's early and apparently sincere antislavery activism (both as a legislator and lawyer), see generally William G. Merkel, *A Founding Father on Trial: Jefferson's Rights Talk and the Problem of Slavery During the Revolutionary Period*, 64 RUTGERS L. REV. 595 (2012). At this death, Jefferson did not free any of the people he had enslaved, aside from members of the Hemings family, including his sons. *Id.* at 600–01.

influence of his Democrat-Republican party.<sup>34</sup> Interest triumphed over principles of equality, however nicely phrased.<sup>35</sup>

The conflict between liberty and slavery also lay at the heart of the nation's policy, such as it was, of territorial expansion. Jefferson, like many on the western frontier, was a strong champion of equal rights for western settlers.<sup>36</sup> He worried that western settlements might split off from the United States and affiliate with foreign powers such as Spain, France, and Great Britain, all of which maintained a presence to the north in Canada, to the south in Florida, and to the southwest in Louisiana.<sup>37</sup> Jefferson believed that the best way to assure adherence to the United States and foster an empire of liberty was to guarantee the western settlements equal status as members of the Union.<sup>38</sup> He advocated for the speedy admission of western settlements to the rights of statehood and, with statehood, the speedy transfer of political authority to local voters under state constitutions that the people themselves had ratified.<sup>39</sup> Jefferson and other supporters of the idea of state equality, or what came to be known as the equal footing doctrine, rejected the view that eastern states should retain predominant political power by imposing colonial governments and second-class statehood on the western settlements.<sup>40</sup>

Yet, despite his advocacy of state equality, the early Jefferson also recognized the importance of preventing the westward expansion of slavery. Writing as a member of Congress under the Articles of Confederation, Jefferson produced a draft ordinance of 1784 to regulate the government and eventual admission of western states to the Union.<sup>41</sup> The ordinance called for the nation to set relatively compact territorial boundaries, defined stages of self-government, and promised admission to the Union on an equal footing when the new state's population reached a specified target.<sup>42</sup> Jefferson's

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34. For an account of the Louisiana Purchase from the perspective of a Northern opinion, see GARRY WILLS, "NEGRO PRESIDENT": JEFFERSON AND THE SLAVE POWER 114–26 (2005) (noting the Federalist opposition to Southern expansion and to the eventual admission of more slave states to the Union); GORDON WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 357–365 (2009). Jefferson and the Virginians took a different view, welcoming slave states and the political power they would add to Congress and the Electoral College, as well as the growing domestic market for slaves they would offer to slave owners in the old South. Indeed, the legislation implementing the Louisiana Purchase banned the importation of slaves to that region, thereby raising the value of enslaved people in the old South. WILLS, *supra*, at 121. Jefferson himself sold eighty-five people, seventy-one at public auction, and thereby benefited personally from the growing domestic market. *Id.*

35. On Jefferson's posture as to slavery, see ELLIS, *supra* note 30, at 314–15 (contrasting Jefferson's publicly stated moral opposition to slavery with his "long and clear record of procrastination and denial").

36. On Jefferson's early support for squatters in western Virginia, see DUMAS MALONE, JEFFERSON THE VIRGINIAN 258–59 (1948). On Jefferson's version of the land ordinance of 1784, see Report of the Committee (Mar. 1, 1784), in 6 THE PAPERS OF THOMAS JEFFERSON 603, 604 (Julian P. Boyd ed., 1952) (setting stages of development that would eventually guarantee new states admission to statehood).

37. See Report of the Committee, *supra* note 36, at 604.

38. WOOD, *supra* note 34, at 357–65.

39. *Id.*

40. See ONUF, *supra* note 11, at 49–50.

41. See Report of the Committee, *supra* note 36, at 604.

42. *Id.*



draft of the ordinance also included a provision prohibiting slavery in the territories after the year 1800, thereby effectively confining slavery to the existing states.<sup>43</sup> Both ideas—equal footing and the prohibition of slavery—appeared in the July 1787 Northwest Ordinance, which the old Confederation Congress adopted to govern the territory that would eventually become Indiana, Illinois, Michigan, Ohio, and Wisconsin.<sup>44</sup> Both ideas also occupied the members of the convention that would frame the Constitution in 1787. We explore the handiwork of the Philadelphia Convention in the next two sections.

#### A. *The Omission of the Equal Footing Guarantee*

Despite its firm acceptance in constitutional doctrine, the equal footing doctrine has no obvious textual anchor in the document itself. Indeed, the history of the framing reveals a deep ambivalence about whether to constitutionalize the equal footing doctrine. One can certainly trace the doctrine's origins to Jefferson's republican territorial ideology and identify its influence on the rules by which the Constitution apportions state representation in the House of Representatives.<sup>45</sup> But the stubborn fact remains that the delegates to the Philadelphia Convention adopted a motion that stripped an explicit equal footing guarantee from the provision regulating the process of new state admission. Asked later about his understanding of the Convention's actions, Gouverneur Morris of Pennsylvania, the sponsor of the initiative to eliminate equal footing, explained that he had succeeded in his efforts to preserve fairly complete congressional control over the admission of new states.<sup>46</sup>

Morris's motion to strip the equal footing guarantee drew concerted opposition from the Virginia delegation, including James Madison, Edmund Randolph, and George Mason.<sup>47</sup> The Virginians could claim a special expertise in debates over western lands and a special interest in securing equal rights for the citizens of the new frontier states. Virginia's cession of the Old Northwest Territory had created the national domain, after all, and Jefferson had coined the term "equal footing" in 1784 to describe the basis for the admission of any new states erected in the Old Northwest.<sup>48</sup> As the debates in Philadelphia unfolded, moreover, the ink was still drying on the Northwest Ordinance of 1787, the old Congress's provision for the

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43. See *id.*; see also Robert F. Berkhofer, *Jefferson, the Ordinance of 1784, and the Origins of the American Territorial System*, 29 WM. & MARY Q. 231, 231–362 (1972).

44. For the reenactment of the Northwest Ordinance in 1789, see Act of Aug. 7, 1789, ch. 8, 1 Stat. 50. The Ordinance that was adopted by the Continental Congress in New York in July 1787 was quickly published in Philadelphia, where the Constitutional Convention was in session.

45. See generally Berkhofer, *supra* note 43.

46. Letter from Gouverneur Morris to Henry W. Livingston (Dec. 4, 1803), *reprinted in* 3 FARRAND'S RECORDS, *supra* note 12, at 404, 404.

47. 2 FARRAND'S RECORDS, *supra* note 12, at 454–55 (Aug. 29, 1787).

48. See ONUF, *supra* note 11, at 46–49. The Ordinance of 1784 contemplated statehood at a point of population defined by reference to that of the smallest state and upon "equal footing" with the other states. *Id.* at 47–48.

organization and eventual admission of new states in the Old Northwest Territory.<sup>49</sup> James Monroe, Jefferson's neighbor in Albemarle County, Virginia, helped to steer the famous ordinance through Congress and secured an equal footing guarantee for new states.<sup>50</sup>

Equal footing was, in short, an article of faith among the Virginians and it had gained some support within the Convention. When the Committee of Detail published its draft constitution on August 6, the provision for new state admission read:

New states lawfully constituted or established within the limits of the United States may be admitted, by the Legislature, into this Government; but to such admission the consent of two thirds of the members present in each House shall be necessary. If a new State shall arise within the limits of any of the present States, the consent of the Legislatures of such States shall be also necessary to its admission. If the admission be consented to, the new States shall be admitted on the same terms with the original States. But the Legislature may make conditions with the new States, concerning the public debt which shall be then subsisting.<sup>51</sup>

In thus providing for congressional consent to new state admissions, this provision was scarcely revolutionary. Both Northwest Ordinances—the stillborn compact of 1784 and its just-completed 1787 successor—assumed Congress would have to consent, by more than a simple majority, to a state's admission.<sup>52</sup> But the last two sentences narrowed the scope of Congress's power to condition such admission. The combination of the mandatory language of the penultimate sentence (“shall be admitted on the same terms”) and the allowance of conditions relating solely to public debt could have been read to foreclose Congress from imposing any other conditions on admission.

These two sentences led to the debate over equal footing. Morris took aim on August 29, moving to strike the last two sentences requiring admission on the “same terms with the original States.”<sup>53</sup> As Morris explained, he “did not wish to bind down the Legislature to admit Western States on the terms here stated.”<sup>54</sup> The Virginians sprang to defend equal footing. Madison was the first to oppose the motion and “insist[ed] that the Western States neither would nor ought to submit to a Union which degraded them from an equal rank with the other States.”<sup>55</sup> Mason noted that it might be good policy, if it were possible by just means, “to prevent emigrations to the Western Country.”<sup>56</sup> But, Mason argued, “[G]o the people will as they find it for their

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49. See generally THE NORTHWEST ORDINANCE: ESSAYS ON ITS FORMULATION, PROVISIONS AND LEGACY (Frederick Williams ed., 1989); Jack E. Eblen, *Origins of the United States Colonial System: The Ordinance of 1787*, 51 WIS. MAG. HIST. 294 (1968).

50. See THE NORTHWEST ORDINANCE: ESSAYS ON ITS FORMULATION, PROVISIONS AND LEGACY, *supra* note 49, at 31–32.

51. 2 FARRAND'S RECORDS, *supra* note 12, at 188 (Aug. 6, 1787).

52. See *supra* notes 43–47 and accompanying text.

53. 2 FARRAND'S RECORDS, *supra* note 12, at 454 (Aug. 29, 1787).

54. *Id.*

55. *Id.*

56. *Id.*

interest, and the best policy is to treat them with that equality which will make them friends and not enemies.”<sup>57</sup>

Despite these arguments, the states voted 9 to 2 for the Morris proposal; only Maryland and Virginia voted to preserve mandated admission on an equal footing.<sup>58</sup> Morris later successfully proposed substitute language, which provided simply that “[n]ew States may be admitted by the Legislature into this Union.”<sup>59</sup> This permissive phrasing captured Morris’s notion that the Congress ought to enjoy the freedom to attach conditions to new state admission.<sup>60</sup> At the same time, the new language substituted a simple majority vote for the prior draft’s requirement that new state admission achieve a two-thirds majority in each chamber.<sup>61</sup> Morris’s substitute appears in the final version of the Constitution essentially unchanged.<sup>62</sup> Morris would later explain, “In wording the third section of the fourth article, I went as far as circumstances would permit to establish the exclusion.”<sup>63</sup>

Morris’s late August victory over equal footing was not quite complete, however. Earlier in the Convention, he had lost a battle over the right of new states to equality of representation in Congress.<sup>64</sup> That engagement unfolded, with the Virginians as his principal antagonists, during the long June–July debates over the apportionment of representatives among the several states. Those well-known debates nearly brought the Convention to an early close as they pitted North against South over the enumeration of enslaved persons and also pitted the small states and their argument for equality of rights in the national legislature against the large states and their various demands for representation in accordance with size, wealth, and population.<sup>65</sup> The impasse ended on July 16 when the large state delegates reluctantly accepted a compromise that entailed a rule of equality among the states in the Senate and a regime of proportional representation in the House of Representatives.<sup>66</sup>

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57. *Id.* (footnote omitted).

58. *Id.*

59. *Id.* at 455. Of course, one might argue that the Convention viewed the express guarantee of equal footing as less significant, having already assured equality of state representation. But this “no big deal” argument for dismissing the significance of Morris’s work fails to account for the strong support that an express guarantee of equal footing enjoyed, especially among the Virginia delegation, and the evident significance that Morris ascribed to the abrogation of the guarantee.

60. *Id.* at 454; *see also* U.S. CONST. art. IV, § 3, *amended by* U.S. CONST. amend XVII (“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.”).

61. *See* 2 FARRAND’S RECORDS, *supra* note 12, at 188 (Aug. 6, 1787).

62. *See id.*

63. Letter from Gouverneur Morris to Henry W. Livingston, *supra* note 46, at 404. Morris explained that he sought to block equal footing in part in an effort to ensure that the United States, once it acquired Canada and Louisiana, could govern them as provinces. *Id.*

64. *See infra* notes 73–74 and accompanying text.

65. *See infra* notes 75–83 and accompanying text.

66. *See infra* notes 87–90.

Questions of western equality arose in the course of sorting out the proper rules for determining proportional representation.<sup>67</sup> In a debate over representation and tax burdens, Morris explained that representation should reflect the relative wealth of the states and that the “rule of representation ought to be so fixed as to secure to the Atlantic States a prevalence in the National Councils.”<sup>68</sup> Morris called specific attention to the new states to be formed in the west, arguing that the “new States will know less of the public interest” than the eastern states and may involve the community in wars—the burden of which would fall on the maritime states.<sup>69</sup>

To avoid these problems, Morris recommended that the Constitution include a provision to “prevent the maritime states from being hereafter outvoted by them.”<sup>70</sup> Morris’s argument for western pupilage attracted support from a number of delegates and from the convention at large. Both Rufus King of Massachusetts and John Rutledge of South Carolina agreed that the western states would one day threaten to outvote the east and both joined with Morris on the committee that reported the July 9 plan for the apportionment of representation.<sup>71</sup> Although the Convention continued to debate the numbers assigned to each state, it did vote 9 to 2 (with Virginia in the majority) to accept that portion of the committee report that gave the legislature power, in case of a division of old states or admission of new states, to “regulate the number of Representatives . . . upon the principles of wealth and number of inhabitants.”<sup>72</sup> The provision effectively authorized a Congress dominated by eastern states to deny western states equal voting rights in the legislature.

On further reflection, the Virginians engineered a reversal of this policy. Mason had argued in response to Morris that the western states “ought to be subject to no unfavorable discriminations.”<sup>73</sup> Shortly after the July 9 vote laid the groundwork for such discriminations, Edmund Randolph of Virginia expressed the concern that the national legislature might find a pretext to postpone alterations and keep “the power in the hands” of the east.<sup>74</sup> On July 10, Randolph moved to amend the apportionment provision to provide for a periodic census and a reapportionment.<sup>75</sup> Mason chimed in, urging the need

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67. See 1 FARRAND’S RECORDS, *supra* note 12, at 533–34 (July 5, 1787).

68. *Id.*

69. *Id.* Many in the Convention, like Morris, assumed the willingness of westerners to fight against both Native Americans over disputed territory and foreign nations to secure free navigation of the Mississippi to move their goods to market. See Hills, *supra* note 17.

70. See 1 FARRAND’S RECORDS, *supra* note 12, at 534 (July 5, 1787).

71. See *id.* at 559–62 (July 9, 1787). Elbridge Gerry of Virginia also warned against placing future western states on equal footing with the east. 2 *id.* at 2–3 (July 14, 1787).

72. 1 *id.* at 559–60 (July 9, 1787).

73. *Id.* at 534 (July 5, 1787).

74. *Id.* at 561.

75. *Id.* at 570–71 (July 10, 1787) (moving “that in order to ascertain the alterations in the population & wealth of the several States the Legislature should be required to cause a census, and estimate to be taken within one year after its first meeting; and every years thereafter—and that the Legis[ature] arrange the Representation accordingly” (quoting Caleb Strong, Statement in the Massachusetts Convention (Jan. 18, 1788), *reprinted in* 3 FARRAND’S RECORDS, *supra* note 12, at 260, 260)).

for an admission of western states on an “equal footing with their brethren.”<sup>76</sup> Madison delivered a supporting speech, the length and elaborate character of which suggest that he had worked with Randolph the night before to develop the census motion.<sup>77</sup> Morris fought back, worrying about “fetter[ing] the Legislature too much” and urging the protection of Atlantic primacy.<sup>78</sup> But by July 16, after much back-and-forth over slavery, representation, and direct taxation, language that required reapportionment in accordance with changes in the population had become a part of the Constitution.<sup>79</sup>

The linkage between apportionment and equality for the new states in the west appears more clearly in the early version of the apportionment provision than in the final version. Consider the somewhat ponderous preamble to the apportionment provision in the Committee of Detail’s draft of August 6, 1787:

As the proportions of numbers in [the] different states will alter from time to time; as some of the States may hereafter be divided; as others may be enlarged by the addition of territory; as two or more States may be united; as new States will be erected within the limits of the United States, the Legislature shall, in each of these cases, regulate the number of representatives by the number of inhabitants.<sup>80</sup>

This provision expressly extended the rule of apportionment to new states, however formed, and explicitly assured equality of representation to any western states erected “within the limits of the United States.”<sup>81</sup>

The final terms of the Constitution contain a similar guarantee of equality of representation but use streamlined language that has served partially to obscure their connection to the debates over equal footing. On the House side, Article I, Section 2, Clause 3 provides that “[r]epresentatives and direct taxes shall be apportioned among the several States *which may be included within this Union*” in accordance with their respective numbers.<sup>82</sup> As the italicized language suggests, the rule applies both to the existing states and to any states that might later join the Union. The relevant provision then provides for a census, shortly after Congress meets, and every ten years thereafter, to ensure that later apportionment of representatives will reflect changes in population over time and across the geographic extent of the nation.<sup>83</sup> Finally, Clause 3 assures that the least populous states have some voice in the lower chamber, expressly declaring that “each State shall have at Least one Representative.”<sup>84</sup> The Senate provision states the principle

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76. *Id.* at 578–79 (July 11, 1787) (expressing his hope that “[i]f the Western States are to be admitted to the Union as they arise, they must . . . be treated as equals, and subjected to no degrading discriminations”).

77. *Id.* at 584–86.

78. *Id.* at 581.

79. 2 *id.* at 14 (July 16, 1787).

80. *Id.* at 178 (Aug. 6, 1787).

81. *Id.*

82. U.S. CONST. art. I, § 2 (emphasis added).

83. *Id.*

84. *Id.*

with greater brevity, declaring in Article I, Section 3 that “each State” shall have “two Senators” to be “chosen by the Legislature thereof.”<sup>85</sup>

In the end, then, the Convention guaranteed a measure of equal footing to the new states in the form of assured equality of representation in the Senate and representation based on population in the House. Such a population-based determination nicely replaced a discretionary admission standard with an arithmetic formula that ensured a measure of dominance for existing states so long as their populations grew more rapidly than those along the frontier. But the Convention’s decision to substitute Morris’s permissive language (“may be admitted”) for mandatory language (“shall be admitted on equal terms”) gave Congress a measure of discretion over the terms of new state admission unrelated to representation. Unlike the 1787 Northwest Ordinance’s mandate to admit new states “on an equal footing with the original States, in all respects whatever,” Congress would decide.<sup>86</sup> In time, the decisions that Congress and the new states were to make in the admission process, along with larger currents in the dynamic relationship between the Supreme Court and Congress, would play a decisive role in shaping the emergence of the equal footing doctrine.<sup>87</sup>

*B. The Preservation of Broad Congressional Power over Slavery, Outside the States “Now Existing”*

Standing alone, an equal footing guarantee would seem to authorize the expansion of slavery. Existing states had the right to choose whether to allow slavery within their borders; a broad promise of equal footing would enable newly admitted states to make the same choice when they achieved statehood. But such choices could expand slavery to the states carved out of western lands. Perhaps that explains why both Jefferson’s 1784 draft and the finally enacted Northwest Ordinance of 1787 coupled a promise of equal footing with an explicit slavery prohibition.<sup>88</sup> Absent a ban on slavery, equal footing could threaten the country’s ability to contain slavery, a goal that many in the North and South professed to share. Morris’s opposition to equal footing, though rooted in concerns with representation, may have also reflected his own deeply felt opposition to slavery. He played a key role in debates over the Constitution’s Now Existing Caveat, which sharply

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85. U.S. CONST. art. I, § 3, *amended by* U.S. CONST. amend XVII. In retrospect, one might argue that the structural guarantee of equal state representation in Congress would eventually lead to the adoption of the equal footing doctrine. It certainly did in one sense, ensuring representation of newly admitted states (in the House, Senate, and Electoral College) that shifted legislative, executive, and judicial power to the South and west in exactly the way Morris feared. Whether the quantum of equality conferred by the Constitution’s representational provisions should be seen as overriding the explicit rejection of constitutionally required equal footing in the document itself poses a question of interpretation that may turn on how much weight to ascribe to structure as a modality of interpretation.

86. 2 FARRAND’S RECORDS, *supra* note 12, at 188 (Aug. 6, 1787).

87. For an account of those factors, see generally Hills, *supra* note 17.

88. See generally Berkhofer, *supra* note 43.

distinguishes between slavery in the old and new states and represents a clear rejection of equal footing.<sup>89</sup>

The Convention included the Now Existing Caveat over the course of its debates on the scope of Congress's commerce power with respect to the slave trade.<sup>90</sup> Slaveholding states, most notably Georgia and South Carolina, sought "a specific exemption for the [slave] trade from the normal operation of what became the Commerce Clause."<sup>91</sup> To confer that exemption, the Committee of Detail's draft of August 6, 1787, proposed a migration and importation provision to limit Congress's commerce power:

No tax or duty shall be laid by the Legislature on articles exported from any State; nor on the migration or importation of such persons as the several States shall think proper to admit; nor shall such migration or importation be prohibited.<sup>92</sup>

While the draft language did not say so directly, its reference to "such persons" was widely understood as a euphemism for "slaves."<sup>93</sup> By limiting Congress's power over slavery, the provision was framed in terms that would apply to any new states that might join the Union.

No wonder, then, that the proposal "provoked an acrimonious debate concerning the whole subject of slavery."<sup>94</sup> Many of the non-slaveholding states, plus Virginia, "were anxious to procure a perpetual decree against the Importation of Slaves."<sup>95</sup> Representative Luther Martin of Maryland proposed amended language that would "allow a prohibition or tax on the importation of slaves."<sup>96</sup> Others, such as Rufus King of Massachusetts,

89. See *infra* notes 106–09 and accompanying text.

90. See Finkelman, *supra* note 1, at 417 ("Under the [originally] proposed Constitution, Congress would have had the power to regulate all foreign commerce, which meant that Congress could have banned the African slave trade if it had chosen to do so."); Charles D. Weisselberg, *Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 940 n.20 (1995) ("[A]t the time the Constitution was ratified, slaves were seen as potential articles of commerce."); see also Walter Berns, *The Constitution and the Migration of Slaves*, 78 YALE L.J. 198, 201 (1968) ("[E]veryone, Southerner and Northerner, pro-slavery and antislavery, seems to have assumed from the beginning that the traffic in slaves was commerce and subject to Congress's power to regulate commerce.").

91. Finkelman, *supra* note 1, at 417.

92. 2 FARRAND'S RECORDS, *supra* note 12, at 183 (Aug. 6, 1787).

93. See Ozan O. Varol, *Temporary Constitutions*, 102 CALIF. L. REV. 409, 446 n.253 (2014) ("Although the [draft migration and importation provision] itself did not include the word 'slaves,' the phrase 'such persons' was understood to be a euphemism for slaves." (citing Finkelman, *supra* note 1, at 413)). John Jay also clarified in an 1819 letter that "[s]laves were the persons intended" in the provision but that "[t]he word slaves was avoided, probably on account of the existing toleration of slavery, and of its discordancy with the principles of the Revolution." Letter from John Jay to Elias Boudinot (Nov. 17, 1819), in 4 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 430, 431 (Henry P. Johnston ed., New York, G. P. Putnam's Sons 1893).

94. Berns, *supra* note 90, at 200.

95. James McHenry, Address Before the Maryland House of Delegates (Nov. 29, 1787), reprinted in 3 FARRAND'S RECORDS, *supra* note 12, at 144, 149; see also Charles C. Pinckney, Speech in South Carolina House of Representatives (Jan. 1788), reprinted in 3 FARRAND'S RECORDS, *supra* note 12, at 252, 254.

96. 2 FARRAND'S RECORDS, *supra* note 12, at 364 (Aug. 21, 1787).

suggested that “at least a time [should] have been limited for the importation of slaves.”<sup>97</sup> Southern delegations responded by rejecting outright the suggestion that Congress might one day end the slave trade.<sup>98</sup> Charles Pinckney was adamant that South Carolina could not accept a version of the clause that prohibited the slave trade.<sup>99</sup> And Oliver Ellsworth of Connecticut favored “leav[ing] the clause as it stands,” which would “let each state import what it pleases.”<sup>100</sup> The matter was subsequently turned over to the Committee of Eleven, along with “the clause relating to taxes on exports [and] to a navigation act.”<sup>101</sup> As Morris presciently observed, the matter would require “a bargain among the Northern [and] Southern States.”<sup>102</sup>

Following deliberations, the Committee of Eleven’s August 24 report proposed language that would confirm congressional power over the slave trade subject to two limitations:

The migration or importation of such persons as the several States now existing shall think proper to admit, shall not be prohibited by the Legislature prior to the year 1800—but a Tax or Duty may be imposed on such importation at a rate not exceeding the average of the Duties laid on Imports.<sup>103</sup>

This language still barred Congress from prohibiting the “migration [and] importation” of slaves.<sup>104</sup> But the draft qualified the restriction by specifying a temporal boundary—“prior to the year 1800.”<sup>105</sup> The draft also restricted the geographic scope of the prohibition by limiting it to legislation adopted by Congress that would affect the slave trade in “the several States now existing.”<sup>106</sup> The clear implication was that Congress was to have broad power over slavery in new states and territories.

In the ensuing debate, delegates considered drafts that would have more clearly specified the provision’s application to slavery, but the Convention preferred a measure of circumlocution.<sup>107</sup> Claiming that he sought to avoid ambiguity, Morris proposed a straightforward declaration that the

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97. *Id.* at 220 (Aug. 8, 1787).

98. In particular, Southern states that continued to import slaves “were extremely averse to any restriction on their power to do so.” Letter from James Madison to Robert Walsh (Nov. 27, 1819), in 3 FARRAND’S RECORDS, *supra* note 12, at 436, 436.

99. 2 FARRAND’S RECORDS, *supra* note 12, at 355, 364 (Aug. 21, 1787) (stating that South Carolina would not join the Union if the importation of slaves was prohibited).

100. *Id.*

101. *Id.* The Committee thus reviewed the provision alongside the following proposition: “No Navigation Act shall be passed without the Assent of two thirds of the Members present in each House.” *Id.* at 169. The Committee of Eleven was composed of Representatives John Langdon, King, William Samuel Johnson, William Livingston, George Clymer, John Dickinson (misspelled as “Dickenson”), Martin, Madison, Hugh Williamson, William Pinkney, and Abraham Baldwin—one representative from each state present. *Id.* at 375 (Aug. 22, 1787).

102. *Id.* at 374.

103. *Id.* at 396 (Aug. 24, 1787).

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 414–16 (Aug. 25, 1787).



“importation of slaves into [North] Carolina, [South] Carolina & Georgia . . . shall not be prohibited.”<sup>108</sup> Explaining that he sought only to identify the three states that most opposed congressional power over the slave trade,<sup>109</sup> Morris slyly noted that he would not insist on the language if delegates from those states objected.<sup>110</sup> In response, Mason opposed the naming “lest it should give offence to the people of those States.”<sup>111</sup> John Dickinson of Pennsylvania also proposed that the document speak more directly, eschewing euphemism and suggesting language that would have blocked Congress from prohibiting the “importation of slaves.”<sup>112</sup>

With its proposal to speak more directly, Morris’s language invited delegates to consider whether the restriction on congressional power would operate only for the benefit of existing states or would apply more broadly to protect new states from the prohibitory power of Congress. The Dickinson proposal tracked Ellsworth’s earlier suggestion; it blocked limits on slave importation into “such of the States as shall permit the same.”<sup>113</sup> While that avoided any reference to particular states, the Dickinson proposal would apparently operate for the benefit of all states, including those admitted after the Constitution was ratified.<sup>114</sup> This was, in effect, an argument that new states were to be placed on an equal footing with respect to slavery. But in the end, the delegates chose to preserve Congress’s power to prohibit the migration and importation of enslaved persons into new states. When the Convention completed its work and referred the draft to the Committee of Style and Arrangement, its language preserved the slaveholding power of only “the several States now existing.”<sup>115</sup> In a series of decisions roughly contemporaneous with the late August debate over equal footing, the Convention had thus chosen to distinguish rather sharply between congressional power over old states and new.<sup>116</sup>

Following a tweak or two from the Committee of Style and Arrangement,<sup>117</sup> the text came to rest in the form that appears in the Constitution as Article I, Section 9:

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108. *Id.* at 415.

109. For accounts of South Carolina’s distinctive role at the Constitutional Convention of 1787 in opposing federal regulation of slavery and of its subsequent decision to reopen its ports to the importation of enslaved persons from Africa, see Jed Handelsman Shugerman, *The Louisiana Purchase and the Reopening of South Carolina’s Slave Trade in 1803*, 22 J. EARLY REP. 263 (2002).

110. 2 FARRAND’S RECORDS, *supra* note 12, at 414–16 (Aug. 25, 1787).

111. *Id.* at 415.

112. *Id.* at 416.

113. *Id.*

114. Specifically, the desire was to narrow the scope to the three core slaveholding states; if not that, then to states where slavery is not prohibited; and, at the very least, to the “States now existing.” *Id.*

115. *Id.*

116. *See id.*

117. *See* Report of Committee of Style (Sept. 12, 1787), *reprinted in* 2 FARRAND’S RECORDS, *supra* note 12, at 590, 596 (replacing the word “Legislature” with “Congress”); *see also* U.S. CONST. art. I, § 9.

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.<sup>118</sup>

Two features of the final version deserve mention. The switch from “several States” to “any of the States now existing” serves to highlight the peculiar position of the states that sought to preserve the migration and importation of enslaved people.<sup>119</sup> Morris, the leading draftsman on the Committee of Style, apparently continued to see the importance of characterizing the state power as one specific to particular states rather than one shared in common by the several states.<sup>120</sup> Second, the tax provision distinguishes between importation, where duties were permissible, and migration, where they were not.<sup>121</sup> Wealthy plantation owners in Maryland and Virginia tended to support taxes on the “importation” of slaves but would oppose any similar restriction on “migration,” which could depress the domestic market value of their own slaves.<sup>122</sup>

Comments made during the ratification debates largely confirm this account of congressional power over slavery, outside the states now existing. The Migration and Importation Provision, considered alongside those on navigation, was understood to represent a bargain between slaveholding and non-slaveholding states. As Martin explained to the Maryland Convention on November 29, 1787, the eastern states were “very willing to indulge the southern States, at least with a temporary liberty to prosecute the *slave-trade*, provided the Southern States would, in their turn, gratify them, by laying *no restriction on navigation acts*.”<sup>123</sup> The bargain over commerce in slaves was widely viewed as “the result of a compromise . . . between the delegates of those States favoring slavery and those in which the system was already prohibited or was fast dying out.”<sup>124</sup>

Ratification debates also recognized the limited scope of the retained right of the Southern states. At the Massachusetts ratification convention, for instance, General William Heath assured the convention that “migration or importation” is “confined to the states now *existing only*; new states cannot

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118. U.S. CONST. art. I, § 9, cl. 1.

119. See 2 FARRAND’S RECORDS, *supra* note 12, at 610 n.2 (Sept. 14, 1787) (indicating that “as the several States” had been replaced with “any of the States now existing”).

120. See *supra* notes 15–16, 46, 60–63 and accompanying text.

121. See 2 FARRAND’S RECORDS, *supra* note 12, at 656.

122. See *supra* notes 29–31 and accompanying text.

123. Luther Martin, Genuine Information (Nov. 29, 1787), *reprinted in* 3 FARRAND’S RECORDS, *supra* note 12, at 172, 210–13 (emphasis added).

124. ROBERT LANSING & GARY M. JONES, GOVERNMENT: ITS ORIGIN, GROWTH, AND FORM IN THE UNITED STATES 108 (1902); see also Berns, *supra* note 90, at 198 (stating that proponents of slavery “had exacted a compromise at Philadelphia in 1787, according to which Congress was forbidden to abolish the slave trade for twenty years”).

claim it.”<sup>125</sup> James Madison shared this view, as did later commentators. Speaking in response to the Quaker petition drive against slavery in 1790, Madison explained that “there are a variety of ways by which [Congress] could countenance the abolition of the [slave trade], and regulations might be made in relation to the introduction of [enslaved people] into the new States to be formed out of the Western Territory.”<sup>126</sup> Likewise, James Wilson’s comments to the Pennsylvania convention on December 4, 1787, indicate an understanding that the restriction on congressional power was limited to existing states.<sup>127</sup> Wilson explained that the slave trade in “new States which are to be formed” would “be under the control of Congress” and “slaves [would] never be introduced amongst them.”<sup>128</sup> As Wilson also noted, the provision showed a distinct departure from the “confederation, [wherein] the States may admit the importation of slaves as long as they please.”<sup>129</sup>

During debate in the Virginia convention in June 1788, Governor Edmund Randolph described the “exception made respecting the importation of negroes” as a temporary “exception from the power given them of regulating commerce.”<sup>130</sup> After 1808, Congress could, by the exercise of that power, prevent future “importation[.]” of slaves.<sup>131</sup> Likewise, at the Pennsylvania convention, Wilson described the provision as granting a “power in the general government, whereby they may lay an interdiction on this reproachful trade”—slavery.<sup>132</sup> Indeed, Wilson went so far as to argue, perhaps in a reflection of wishful thinking, that the “tax or duty [that] may be imposed on such importation . . . [would] operate as a partial prohibition” on slavery.<sup>133</sup>

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125. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 115 (Jonathan Elliot ed., Washington, Jonathan Elliot 2d ed. 1836) [hereinafter ELLIOT’S DEBATES] (Jan. 30, 1788).

126. WIECEK, *supra* note 4, at 94 (quoting 1 ANNALS OF CONG. 1245 (1790) (Joseph Gales ed., 1834) (statement of James Madison)). Wiecek notes that Madison changed his mind as to western states in the Missouri Compromise debates of 1820. *Id.*

127. James Wilson, Statement at the Pennsylvania Convention (Dec. 4, 1787), *reprinted in* 3 FARRAND’S RECORDS, *supra* note 12, at 161, 161–62.

128. *Id.* at 161. Wilson also remarked that it was notable that Congress has the power to impose the tax only on those *imported*. *Id.*

129. *Id.*

130. 3 ELLIOT’S DEBATES, *supra* note 125, at 464 (June 15, 1788); *see also* Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 26 n.94 (2010) (discussing Randolph’s remarks at the Virginia ratifying debates). This grandfather clause, protecting traffic in enslaved persons among the states then existing, was itself grandfathered in language that prohibited any amendment prior to its expiration in 1808. *See* U.S. CONST. art. V (“[P]rovided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article . . .”).

131. 3 ELLIOT’S DEBATES, *supra* note 125, at 464 (June 15, 1788); *see also* 1 ANNALS OF CONG. 1230 (1790) (Joseph Gales ed., 1834) (including a statement from Representative William Smith of South Carolina stating that “the Constitution secures [the slave] trade to the States, independent of Congressional restrictions, for a term of twenty-one years”).

132. James Wilson, Statement at the Pennsylvania Convention (Dec. 3, 1787), *reprinted in* 3 FARRAND’S RECORDS, *supra* note 12, at 160, 161.

133. *Id.* This interpretation later carried into the Missouri Compromise debates, wherein Senator David Morrill of New Hampshire characterized the provision as “a grant of power

Even those who defended the Constitution to ratifying conventions in South Carolina expressed views largely consistent with the consensus. Pinckney, for example, explained the provision as follows:

By this settlement we have secured an unlimited importation of negroes for twenty years. Nor is it declared that the importation shall be then stopped; it may be continued. We have a security that the general government can never emancipate them, for no such authority is granted; and it is admitted, on all hands, that the general government has not powers but what are expressly granted by the Constitution, and that all rights not expressed were reserved by the several states.<sup>134</sup>

Pinckney thus highlighted South Carolina's position as an existing state, free from congressional commerce restrictions for twenty years and presumptively free from any emancipation legislation by virtue of the enumerated powers doctrine.

In following Morris's lead, the Constitution put in place a structure that allowed Congress broad power over the growth of slavery. The migration and importation restriction, protecting only the existing states, left Congress free to ban the movement of slaves into new states and federal territories. The elimination of any equal footing guarantee, moreover, left Congress free to insist on the prohibition of slavery in any state that applied for admission to the Union. Congress may have lacked any express power to emancipate slaves in the existing states, as Southern delegates reported to their ratifying conventions. But Congress had power to confine slavery to those states.

## II. REVERSAL OF FORTUNES: EQUAL FOOTING'S RISE AND THE DECLINE OF THE NOW EXISTING CAVEAT

Congress chose to exercise its power by banning slavery in the Old Northwest Territory and allowing slavery to expand in the Old Southwest. Of the thirteen original states as of the outbreak of the Civil War, the six states south of the Mason-Dixon line had preserved the legality of slavery, while the seven states to the north (except New Jersey) had prohibited the practice.<sup>135</sup> Congress admitted an additional thirteen states from the territory east of the Mississippi River.<sup>136</sup> Of those, six would join the Union as slave states and seven would enter as free states.<sup>137</sup> Over the course of this practice of new state admission, the meaning of the Now Existing Caveat would come under sharp attack and the equal footing doctrine would emerge from Congress and begin to inform the decisional law of the Supreme Court.

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suspended for a certain period." See 35 ANNALS OF CONG. 137 (1820) (statement of Sen. David Morrill).

134. 4 ELLIOT'S DEBATES, *supra* note 125, at 286 (Jan. 17, 1788).

135. See Randy J. Sparks, *Blind Justice: The United States's Failure to Curb the Illegal Slave Trade*, 35 LAW & HIST. REV. 53, 56–58 (2017).

136. *Id.*

137. *Id.*

*A. New State Admission and Equal Footing*

The sectional bargain emerged early on. The Northwest Ordinance, as adopted in 1787 and reenacted in 1789, promised equal footing to new states subject to a ban on slavery. A similar equal footing promise appeared in the 1790 Southwest Ordinance, which was to govern the admission of Tennessee to the Union, albeit without any accompanying prohibition of slavery.<sup>138</sup> Congress allowed Kentucky to enter the Union as a slave state at roughly the same time Vermont gained admission as a free state.<sup>139</sup> Both were admitted as “new and entire” members of the Union, a formulation that resembles an equal footing guarantee.<sup>140</sup> When Tennessee entered the Union as a slave state in 1796, Congress adopted what would become its standard formulation, declaring the new state to have been admitted on an “equal footing.”<sup>141</sup> Peter Onuf reports that equal footing assurances of one kind or another appeared in every antebellum state admission statute.<sup>142</sup>

In time, these legislative promises of equal footing would confirm a structural conception of equal state sovereignty that newly admitted states would invoke in challenging federal restrictions and conditions. Thus, Alabama would argue, in an important early case, that its right to navigable waters within its territory was comparable to that of the original states.<sup>143</sup> And Louisiana would argue that the requirement of religious liberty that Congress imposed on it as a condition of admission did not continue to control after statehood.<sup>144</sup> These arguments succeeded, giving rise to what

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138. Indeed, the Southwest Ordinance included the explicit guarantee that “no regulations made or to be made by Congress shall tend to emancipate Slaves” in the Southwest Territory. Act of May 26, 1790, ch. 14, 1 Stat. 123; *see also* MICHAEL A. BELLESILES, *REVOLUTIONARY OUTLAWS: ETHAN ALLEN AND THE STRUGGLE FOR INDEPENDENCE ON THE EARLY AMERICAN FRONTIER 190–94* (1993).

139. *See id.* The people of Vermont argued that Congress should recognize their sovereignty and independence from New York. *Id.* Referring to these developments with apparent approval, Jefferson described the “Vermont doctrine”—that the people can create their own states. *Id.*

140. On the terms for the admission of Kentucky and Vermont, see Act of Feb. 4, 1791, ch. 4, 1 Stat. 189; Act of Feb. 18, 1791, ch. 8, 1 Stat. 191. These declared each state admitted “as a new and *entire member* of the United States of America.” Ch. 4, 1 Stat. at 189 (emphasis added); ch. 8, 1 Stat. at 191 (emphasis added). In 1796, Congress admitted Tennessee as the third new state, declaring it to be “one of the United States of America, on an equal footing with the original states, in all respects whatever”—phraseology that has ever since been substantially followed in admission acts, concluding with the act concerning the admission of Oklahoma, which declared that Oklahoma would be admitted “on an equal footing with the original states.” Act of June 1, 1796, ch. 47, 1 Stat. 491, 491–92 (admitting Tennessee); Act of June 16, 1906, ch. 3335, 34 Stat. 267, 267 (admitting Oklahoma).

141. Ch. 47, 1 Stat. at 491.

142. *See* Peter S. Onuf, *New State Equality: The Ambiguous History of a Constitutional Principle*, PUBLIUS, Fall 1988, at 53, 54. Onuf stated that the Northwest Ordinance “was extended directly or by implication to other territories. Every state was admitted—whether by act or joint resolution of Congress or by presidential proclamation—with an express declaration of equality.” *Id.*

143. *See* Hanna, *supra* note 11, at 531. *See generally* Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845).

144. *See generally* Permol v. City of New Orleans, 44 U.S. (3 How.) 589 (1845).

the Supreme Court would come to describe as the “equal footing doctrine.”<sup>145</sup>

Well established in antebellum discourse, the equal footing doctrine was restated in 1911 in what has become the doctrine’s leading case, *Coyle v. Smith*.<sup>146</sup> *Coyle* arose from Congress’s decision, imposed as a condition on Oklahoma’s admission to statehood, that the state capitol was to remain at a specific location.<sup>147</sup> A short time later, in defiance of the condition, Oklahoma proposed to move its state capitol to a new location.<sup>148</sup> In the ensuing litigation, the Supreme Court sided with the state.<sup>149</sup> Under the Constitution, Congress had no power to dictate the location of state capitols to the other states of the Union; equal footing meant that Congress had no power to impose such conditions on Oklahoma.<sup>150</sup> *Coyle*’s conception of equal footing continues to inform the Court’s approach to state sovereignty, perhaps most memorably in the form of the equal sovereignty principle on which the Court relied to invalidate the Voting Rights Act of 1965<sup>151</sup> in *Shelby County v. Holder*.<sup>152</sup>

### B. *The Disappearance of the Now Existing Caveat*

*Shelby County* has sparked a good deal of interest in the origins of the equal footing doctrine and its implications for federalism doctrine today.<sup>153</sup> Less attention has been paid to the doctrine’s connection to the Now Existing Caveat and the debate over the expansion of slavery.<sup>154</sup> Yet equal footing informed debates over congressional power to ban slavery in the territories,

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145. For an account of the doctrine’s emergence, see Hills, *supra* note 17 (describing the impact of political currents in the doctrine’s acceptance in both Congress and on the Supreme Court). For an overview of conditions imposed on new state admission, see Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119 (2004).

146. 221 U.S. 559 (1911).

147. *See id.* at 563–66.

148. *Id.* at 562–64.

149. *Id.* at 579–80.

150. *See id.* Equal footing has a two-edged quality that sometimes narrows state prerogatives. In *United States v. Texas (Texas Tidelands)*, 339 U.S. 707 (1950), the doctrine operated to strip the state of Texas of the ownership of land underlying its marginal seas, despite evidence in the admission documents that Congress had agreed to confirm those rights in Texas. *See id.* at 713–14, 717–19.

151. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

152. 570 U.S. 529 (2013); *see also id.* at 556–57. The Court has relied on equal footing, both in *Alden v. Maine*, 527 U.S. 706 (1999), and in *Franchise Tax Board v. Hyatt*, 139 S. Ct. 1485 (2019), to support its holdings that the states enjoy an immunity from suit.

153. *See generally* Tom Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. 1087 (2016); Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207 (2016); Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468 (2007).

154. On the doctrine’s operation to protect the prerogatives of slave states to ignore the freedom laws of the North, see *Strader v. Graham*, 51 U.S. (10 How.) 82 (1850) (finding that neither Ohio state law declaring slavery illegal, nor the slavery prohibitions of the Northwest Ordinance, established a federal limit on Kentucky’s authority to determine that formerly enslaved musicians had not been freed by traveling to Ohio).

and it figured prominently in the politics of the Missouri Compromise. Southern representatives argued that the proposal to ban slavery in the newly admitted state of Missouri would violate the equal footing doctrine.<sup>155</sup> Northern representatives countered that the Now Existing Caveat clearly contemplated congressional power over the migration of slaves and authorized differential treatment of newly admitted states.<sup>156</sup> Those debates mark a turning point for the Now Existing Caveat, as Southerners drew on a claim that first appeared in the Kentucky Resolutions of 1798 to argue that the migration provision did not actually speak to slavery after all.<sup>157</sup>

The argument on which Southerners relied seems oddly implausible by modern standards. In drafting Kentucky's resolutions decrying the Alien and Sedition Acts of 1798,<sup>158</sup> Jefferson argued that federal laws requiring the registration and restricting the movement of aliens were inconsistent with the rights of alien friends in Kentucky to move freely into and around the commonwealth.<sup>159</sup> According to Jefferson, federal restrictions on free movement of alien friends came within the terms of Article I, Section 9, which restricted Congress's power over the "migration" of such persons.<sup>160</sup> It followed that Congress lacked power to restrict the migration of aliens until the year 1808 and, on that basis, the federal laws were void.<sup>161</sup>

This argument seems hard to square with the evident meaning of the provision. As we have seen, the Migration and Importation Provision was drafted and understood during ratification debates to address the problem of slavery, not to regulate the movement of European immigrants to the United

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155. See, e.g., 36 ANNALS OF CONG. 1316 (1820); see also *infra* note 176 and accompanying text.

156. See, e.g., 35 ANNALS OF CONG. 137 (1820) (statement of John Jay) ("I understand the sense and meaning of this clause to be, that the power of the Congress, although competent to prohibit such migration and importation, was not to be exercised with respect to the then existing States, (and them only) until the year 1808; but that the Congress were at liberty to make such prohibition as to any new State which might, in the meantime, be established. And further, that, from and after that period, they were authorized to make such prohibition as to all the States, whether new or old.").

157. See *supra* notes 119–24.

158. Act of June 25, 1789, ch. 58, 1 Stat 570.

159. Jefferson's Draft of Kentucky Resolutions of 1798, reprinted in 1 ALEXANDER H. STEPHENS, A CONSTITUTIONAL VIEW OF THE LATE WAR BETWEEN THE STATES app. D at 570, 572 (Philadelphia, Nat'l Publ'g Co. 1868) ("Resolved, That in addition to the general principle, as well as the express declaration, that powers not delegated are reserved, another and more special provision, inserted in the Constitution from abundant caution, has declared that 'the migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year 1808:' that this commonwealth does admit the migration of alien friends, described as the subject of the said act concerning aliens: that a provision against prohibiting their migration, is a provision against all acts equivalent thereto, or it would be nugatory: that to remove them when migrated, is equivalent to a prohibition of their migration, and is, therefore, contrary to the said provision of the Constitution, and void." (quoting U.S. CONST. art. 1, § 9, cl. 1)).

160. See *id.*

161. In contrast, Jonathan Dayton argued—during congressional debates surrounding the Alien and Sedition Acts—that the Migration and Importation Provision was not intended to "extend to the importation or introduction of citizens from foreign countries." 8 ANNALS OF CONG. 1993 (1798) (statement of Rep. Jonathan Dayton).

States.<sup>162</sup> Jefferson took the provision wholly out of context in proposing its operation as a limit on congressional power over the movement of foreign nationals. Under Jefferson's interpretation, moreover, the provision makes no sense. Why would the Framers limit Congress's power over European migration until 1808 and then remove the limit? Why, moreover, would the Framers distinguish European migration to "existing states" from that to newly formed states and territories? Such discrimination makes sense as a reflection of the sectional compromise over congressional regulation of the movement of enslaved people but makes no sense as to European migrants, who might enter the United States through the port cities in existing states and move to the frontier.<sup>163</sup> Finally, Jefferson's argument could be said to fail on its own terms, inasmuch as Kentucky was not a state "existing" when the Constitution was ratified and not entitled to claim an exemption from federal power.<sup>164</sup> It perhaps reveals something of a weakness of Jefferson's argument that it does not appear in the Virginia Resolutions of 1798 as drafted by Madison.<sup>165</sup>

Modern readers may interpret the term migration as more applicable to the international than to the interstate movement of people. But the founding generation consistently used the term migration or emigration to describe interstate movement. When George Mason spoke in support of equal footing at the Convention, he invoked the inevitable movement of people to the frontier and spoke of "emigrations to the Western Country."<sup>166</sup> Similarly, when historians discuss the movement of enslaved people in the antebellum South, they speak of both speculative movement—conducted by slave traders who purchased people in the old South for transport to the new South<sup>167</sup>—and "planter migration."<sup>168</sup> The term "planter migration," which historians use to describe the movement of enslaved people along with their owners in an overland caravan comprised of people on foot and in wagons,<sup>169</sup> can be

162. See *supra* note 29.

163. The records of the Philadelphia Convention may also provide some guidance here. Earlier versions of the provision used the language "emigration and Importation." See 2 FARRAND'S RECORDS, *supra* note 12, at 168–69. Yet the final version replaced "emigration"—which could perhaps be read to apply to foreign migration or importation—with "migration"—which seems to cover interstate migration as well as foreign importation. See *id.* (reporting an earlier version of the provision: "No Tax or Duty shall be laid by the Legislature . . . on the emigration or Importation of such Persons as the several States shall think proper to admit; nor shall such emigration or Importation be prohibited").

164. To be sure, Kentucky was part of Virginia at the time of the Constitution's ratification and might have argued that it was entitled to claim the benefit of the provision as part of a state in existence on the relevant date. See Hanna, *supra* note 11, at 522–23.

165. See Virginia Resolutions of 1798–99, reprinted in STEPHENS, *supra* note 159, at 578 app. E.

166. Rush Welter, *The Frontier West as Image of American Society: Conservative Attitudes Before the Civil War*, 46 MISS. VALLEY HIST. REV. 593, 600 (1960).

167. See BANCROFT, *supra* note 28, at 1–18 (discussing the migration of enslaved people in the antebellum South via an interstate market).

168. See generally Michael L. Nicholls, "The Squint of Freedom": African-American Freedom Suits in Post-revolutionary Virginia, SLAVERY & ABOLITION, no. 2, 1999, at 47.

169. See Michael Tadman, *Slave Trading in the Ante-bellum South: An Estimate of the Extent of the Inter-regional Slave Trade*, 13 J. AM. STUD. 195, 202–03 (1979).



seen in contemporaneous accounts. For instance, one Alabama traveler during the 1840s met “a great many families and planters emigrating to Alabama and Mississippi to take up cotton plantations, their slaves tramping through the waxy ground on foot, and the heavy wagons containing the black women and children dragging on, and frequently breaking down.”<sup>170</sup>

Despite its internal incoherence and its departure from common usage, Jefferson’s account of migration and the Now Existing Caveat would evolve into an article of faith among Southerners—a kind of southern manifesto. By treating the term “migration” as aimed at the movement of Europeans, the Southern interpretation attempted to neutralize the provision’s reaffirmation of congressional power over the interstate movement of slaves. By thus defanging the Migration and Importation Provision, Congress was said to retain only the authority to limit the importation of slaves, a power Congress had exercised in laws that took effect in 1808. Rather than confirming the continuing authority over the interstate movement of enslaved persons, in short, the Now Existing Caveat could be dismissed as one having little relevance to debates over congressional power.

Those arguments reappeared in debates over Congress’s power to condition Missouri’s admission to the Union on an agreement to prohibit slavery within the state.<sup>171</sup> To be sure, Northern representatives pressed the language and history of the relevant provisions. Senator Jonathan Roberts of Pennsylvania argued that “it was the intention of the framers of that instrument to vest Congress with the power of prohibiting the extension of slavery, beyond the States in which it was then tolerated.”<sup>172</sup> And Senator David Morrill of New Hampshire described the provision as a “duty negatively expressed,” arguing that “[t]he abolition of slavery was contemplated by the framers” who “prospectively viewed [a] period . . . when Congress should manifest a disposition to abolish the slave trade.”<sup>173</sup> This position echoed John Jay’s—in a letter from 1819, Jay argued that Article I, Section 9, Clause 1 demonstrated that Congress had the power to abolish slavery in any states not then existing.<sup>174</sup> With the power to abolish the slave trade, surely Congress could block the entry of slaves into Missouri.<sup>175</sup>

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170. *See id.* at 203 (quoting a traveler named G. W. Featherstonehaugh).

171. *See* 33 ANNALS OF CONG. 1195 (1819) (debating whether “under the Constitution, Congress had not the power to impose [the prohibition of slavery] or any other restriction, or to require of the people of Missouri their assent to this condition, as a prerequisite to their admission into the Union”).

172. 35 ANNALS OF CONG. 280 (1820) (statement of Sen. Jonathan Roberts).

173. 31 ANNALS OF CONG. 103 (1818) (statement of Sen. David Morrill) (referencing the Migration and Importation Provision).

174. For the text of Jay’s letter, see 4 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY, *supra* note 93, at 430–31.

175. According to Representative Taylor, “[t]he power of Congress to prohibit the moving of ‘such persons’ into Territories and into States which did not think proper to admit them has never been denied, and, in fact, was rightfully exercised before the year 1808.” 35 ANNALS OF CONG. 960 (statement of Rep. John Taylor). Further, any limitation on Congress’s power was “expressly confined to the States now existing.” *Id.* at 292.

But the Southerners channeled Jefferson in denying the relevance of the Migration and Importation Provision. According to Senator William Pinkney of Maryland, “migration” and “importation” were synonymous, and *neither* related to the interstate slave trade.<sup>176</sup> The Southern states also argued that the provision spoke of all “persons,” including white immigrants, not just slaves.<sup>177</sup> According to Representative Charles Pinckney of Maryland, migration “applie[d] wholly to free whites” and meant “‘voluntary change of servitude,’ from one country to another.”<sup>178</sup> Similarly, Representative Robert McLane of Delaware maintained that the provision was not intended to prevent migration of slaves—or anyone else—between states.<sup>179</sup> Under the Southern interpretation, the provision “was intended to restrain Congress from interfering with emigration from Europe.”<sup>180</sup>

The proposal to condition Missouri’s admission into the Union also led to debates over the equal footing doctrine. Missouri’s own delegate, John Scott, offered an argument grounded in equal footing: he observed that Pennsylvania and Virginia were free to decide for themselves about the legality of slavery and urged that Missouri was entitled to do the same.<sup>181</sup> Yet such arguments ran headlong into the Now Existing Caveat;<sup>182</sup> by limiting the scope of the Migration and Importation Provision to “States now existing,” the Framers implicitly “admit[ted] the possibility of Congress imposing different rules on different states.”<sup>183</sup> As New York’s James Tallmadge explained, Pennsylvania and Virginia were both part of the group of thirteen states that originally ratified the Constitution.<sup>184</sup> As John Ruggles of Maine noted, “[I]t had been the constant practice of Congress to impose similar restrictions upon new States, when admitted into the Union. . . .

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176. Charles Pinckney, Statement in the House of Representatives (Feb. 14, 1820), *reprinted in* 3 FARRAND’S RECORDS, *supra* note 12, at 439, 443.

177. 34 ANNALS OF CONG. 1234 (1819) (statement of Rep. Robert McLane) (“This clause . . . could not mean to authorize Congress to prohibit the migration from one State to another, because it would conflict with another provision, that citizens of one State shall be entitled to all the privileges of free citizens in another, which secures the right of emigration.”).

178. Pinckney, *supra* note 176, at 443.

179. *See* 34 ANNALS OF CONG. 1234 (statement of Rep. Robert McLane).

180. *See* Sen. Walter Lowrie, Statement in the U.S. Senate (Jan. 20, 1820), *reprinted in* 3 FARRAND’S RECORDS, *supra* note 12, at 438, 438; *see also* 35 ANNALS OF CONG. 202–03 (statement of Rep. Robert McLane).

181. 33 ANNALS OF CONG. 1197 (1819) (statement of Rep. John Scott).

182. *Id.* at 1207 (“The words ‘now existing’ clearly show the distinction for which we contend. The word *slave* is nowhere mentioned in the Constitution, but this section has always been considered as applicable to them, and unquestionably reserved the right to prohibit their importation into any new State before the year 1808.”).

183. Litman, *supra* note 153, at 1231 (noting the Committee of Eleven’s decision to add the “now existing” limitation to the original construction of the clause); *see also* 33 ANNALS OF CONG. 1207 (statement of Sen. Nathaniel Tallmadge) (arguing that the Constitution “seems to contemplate a difference between the old and the new States”).

184. 33 ANNALS OF CONG. 1213 (arguing that the “mutual concessions” made by the original thirteen states did not extend to new states); *see also* 35 ANNALS OF CONG. 138 (stating that after 1808, the agreement allowing Congress to “pass laws to prevent the ‘migration’ and further ‘importation’ of slaves” was “binding on the whole”).

[Ohio, Indiana, and Illinois] were [all] required to form their constitutions in conformity with the ordinance of 1787.”<sup>185</sup>

Perhaps due to the strength of these contentions, the Southern arguments shifted from a focus on text to a discourse on the inherent nature of state sovereignty. In the ensuing debates, as Professor Tom Colby usefully recounts,<sup>186</sup> Senator Pinkney of Maryland argued that the “Union” established by the Constitution is a “confederation of States equal in sovereignty.”<sup>187</sup> Representative McLane expressed a similar view, explaining that “the very essence of our Government [is] that all the States composing the Union should have equal sovereignty.”<sup>188</sup> Senator Lyman Trumbull of Illinois agreed, explaining that there was congressional authority to admit new states to a “Union of coequal States.”<sup>189</sup> By Trumbull’s account, “[t]here is no authority to admit States into any other Union. . . . You have a different Union if you have a Union of unequal States.”<sup>190</sup> The idea of a Union impressed Representative Benjamin Hardin of Kentucky as well, who described the Union as the constitutional agreement between states. “If Congress makes Missouri surrender any portion of her sovereignty that was not surrendered by the old States,” Hardin asked, “how can she be a party to the original agreement[?]”<sup>191</sup>

In the end, of course, the North capitulated in what prominent historians describe as a rout. Missouri entered the Union as a slave state, presumably with its head held high and sovereignty fully intact.<sup>192</sup> Maine, meanwhile, entered the Union as a free state and the sectional bargain was preserved.<sup>193</sup> The disposition in favor of the expansion of slavery did not necessarily establish a precedent in favor of equal footing: those voting to admit Missouri could have done so on policy grounds without accepting the Southerners’ argument that Congress lacked constitutional power to condition admission as proposed. But the debates clearly demonstrated how even the clearest textual provision, one ratified only thirty years earlier, can lose its power to clarify and constrain in the face of intensely motivated reasoning.

### III. DENOUEMENT: *DRED SCOTT*

Many have reckoned with *Dred Scott*, the decision in which the Supreme Court reached out to settle the question of slavery in the territories and ended up settling very little.<sup>194</sup> Black people, according to the Court, were “not

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185. 35 ANNALS OF CONG. 281 (statement of Sen. John Ruggles).

186. See Colby, *supra* note 153, at 1125 n.177.

187. 35 ANNALS OF CONG. 397 (statement of Sen. William Pinkney).

188. 34 ANNALS OF CONG. 1230 (1819) (statement of Rep. Robert McLane).

189. CONG. GLOBE, 41st Cong., 2nd Sess. 639 (1870).

190. *Id.*

191. 35 ANNALS OF CONG. 1080 (statement of Rep. Benjamin Hardin).

192. Act of Mar. 6, 1820, ch. 22, 3 Stat. 545.

193. Act of Mar. 3, 1820, ch. 19, 3 Stat. 544.

194. See generally *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

included, and were not intended to be included, under the word ‘citizens’ in the Constitution, and [could] therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.”<sup>195</sup> Under the Fifth Amendment, the substantive due process rights of slave owners, including their right to migrate to new territories with the people they viewed as their property, trumped any claim Congress might make to regulate slavery.<sup>196</sup> These startling assertions attracted President Abraham Lincoln’s sustained and trenchant criticism, and the North followed him into a civil war that would eventually seek to end slavery altogether.

We focus here on those features of the *Dred Scott* opinions that bear most directly on the story of equal footing and the Now Existing Caveat. In what amounts to the judicial suppression of controlling text, Chief Justice Roger Taney’s majority opinion makes no mention of the Now Existing Caveat and its confirmation of congressional power over slavery in new states and territories. Instead, Taney relied in part on the limited scope of Congress’s Article IV power over the territories and invoked the equal footing doctrine as further evidence that federal power was restricted.<sup>197</sup> Attempting to respond to the historical fact that the Northwest Ordinance foreclosed slavery in the territories and led to the imposition of conditions forbidding slavery in the states on admission, Taney discredited the Ordinance as exceeding congressional power under the Confederation and as having little resolving power after the Constitution’s ratification.<sup>198</sup>

Then, turning to the scope of congressional power under the Constitution, Taney quoted a lengthy section of a letter, dated November 1819, from Madison.<sup>199</sup> Writing during the heat of the Missouri Compromise debate, Madison managed to persuade himself that the Constitution conferred but limited power on Congress over the migration of slaves and the terms of new state admissions.<sup>200</sup> He first downplayed the “migration” clause by adopting the Southern interpretation in describing it as applicable to foreign nationals and as having no application to the interstate movement of slaves.<sup>201</sup> He then continued:

As to the power of admitting new States into the Federal compact, the questions offering themselves are, whether Congress can attach conditions, or the new States concur in conditions, which after admission would *abridge* or *enlarge* the constitutional rights of legislation common to other States; whether Congress can, by a compact with a new State, take power either to or from itself, or place the new member above or below the equal rank and rights possessed by the others; whether all such stipulations expressed or implied would not be nullities, and be so pronounced when

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195. *Id.* at 404.

196. *Id.* at 450.

197. *Id.* at 447.

198. *Id.* at 435–38.

199. *Id.* at 491–92.

200. *See id.*

201. *See id.* Notably, Madison’s view on the matter departed from the position he had articulated in 1790. *See supra* note 126 and accompanying text.

brought to a practical test. It falls within the scope of your inquiry to state the fact, that there was a proposition in the convention to discriminate between the old and the new States by an article in the Constitution. The proposition, happily, was rejected.<sup>202</sup>

In describing the Philadelphia Convention as having confirmed equal footing by rejecting a provision that would have authorized Congress to discriminate against new states, Madison's memory was selective. True, the Virginians beat back a proposal to deny new states equality of representation, but they failed to secure the explicit guarantee of equal footing that had appeared in the Committee of Detail's draft. Morris and the Federalists stripped that provision from the Constitution and confirmed broad congressional power over the migration and importation of enslaved people, except in the states "now existing."<sup>203</sup>

Like Taney's opinion in *Dred Scott*, Madison's letter did not address the meaning of the Now Existing Caveat. That seems odd, given the central role the provision had played in the controversy over the admission of Missouri as a slave state. In November 1819, the same month Madison wrote the letter Taney quoted, John Jay invoked the Now Existing Caveat in the course of arguing that Congress clearly had power to regulate slavery as a condition of Missouri's admission to the Union.<sup>204</sup> He wrote:

I understand the sense and meaning of this clause to be, that the power of the Congress, although competent to prohibit such migration and importation, was not to be exercised with respect to the *then existing* States (and them only) until the year 1808; but that the Congress were at liberty to make such prohibition as to any new State, which might, in the *mean* time, be established, and further, that from and after *that period*, they were authorized to make such prohibition, as to all the States, whether new or old.<sup>205</sup>

Rather than address the relevant language, as understood in Jay's account and that of many others, Taney was content to rely on Madison's post hoc reconstruction of the events in question. Long after Madison had failed to secure the relevant assurance in Philadelphia, Taney confirmed that Virginia's conception of equal footing had made its way into the Constitution, where it remains to this day. Written constitutionalism, in the form of the Now Existing Caveat, was thus subordinated to an unwritten equal footing doctrine.

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202. *Id.* (quoting Letter from James Madison to Robert Walsh (Nov. 27, 1819) (on file with the Library of Congress)).

203. *See supra* Part I.

204. *See* Letter from John Jay to Elias Boudinot, *supra* note 93, at 430–31.

205. *Id.*