
Congress' Pet

Why the Clean Air Act's Favoritism of California Is Unconstitutional Under the Equal Footing Doctrine

Valerie J. M. Brader¹

2 March 2006

Abstract

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

I. Introduction

Under several provisions of the Clean Air Act (CAA),² California has powers denied to all other states to regulate in the air quality arena.³ Because of these provisions, federal courts

¹Ms. Brader, a member of the Michigan, Eastern District of Michigan, and Sixth Circuit bars, is currently a clerk for the Hon. John Feikens (E.D.Mich.). Formerly, Ms. Brader was an environmental consultant with Booz Allen Hamilton and the staff assistant for natural resources for Gov. Phil Batt (R-Idaho). A Rhodes Scholar, she holds an A.B. *magna cum laude* in Government (Harvard University), an M.Sc. in Environmental Change and Management (University of Oxford), an M.St. in Historical Research (University of Oxford), and a J.D. *magna cum laude* (Georgetown University).

have repeatedly halted attempts by other states to enforce regulations California would be permitted to make and enforce.⁴ This outcome is not simply unjust – it is illegal, because the provisions of the CAA which give California its special status are unconstitutional. By giving California the power to regulate in the air quality arena but denying other states the same sovereignty, these provisions violate the equal footing doctrine, which holds that all the states of the Union have equal dignity and sovereignty.

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

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

Unlike other U.S. pollution laws, notably the Clean Water Act, the CAA does not permit states to be "laboratories" that test out stricter regulations on engine emissions or the content of

² 42 U.S.C. 7401 et seq.

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

⁴ American Petroleum Institute v. Jorling, 710 F.Supp.421, 431 (N.D.N.Y. 1989).

fuels that impact pollution production. As detailed below, the exception to this is California, which is allowed to create regulations stricter than that of the federal government. Other states can choose to adopt the California standards or be subject to those set by the Environmental Protection Administration (EPA). The legislative history of these provisions shows a tension between the desire to have a single, federal standard for the benefit of many national industries and the desire by some states for very strict standards that would be unnecessary for (or unpalatable to) other states. While only a few judicial challenges to these provisions have been made (and no challenge has been made under either the equal footing doctrine or the delegation doctrine), the judicial activity that there is shows the desire of states to exercise those powers that California possesses, and a firm belief by courts that the CAA does not allow them to do so.

A. Statutory Provisions

The ability of states to regulate features of new motor vehicles that impact emissions are governed by section 209 and section 177 of the Clean Air Act.⁵ Section 209 provides, in part, that states may not “adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines.”⁶ There are two exceptions to this provision. The first is also found in Section 209, which provides that any state that adopted standards prior to March 30, 1966 can set standards that are more stringent than the federal government’s standards, as long as those standards meet three conditions: (1) they are not arbitrary and capricious; (2) they are needed to “meet compelling and extraordinary conditions” and (3) the standards and their enforcement procedures do not clash with federal standards of 42

⁵ 42 U.S.C. 7543.

⁶ 42 U.S.C. 7543(a).

USC 7521(a).⁷ As Congress knew when this law was enacted in 1970, California is only state that promulgated such regulations before March 30, 1966.⁸

The other exception to §209 is found in §177, and was added in 1977. That section deals with regulation of vehicle engines in areas where pollution causes air quality to fall below federal standards, called non-attainment areas.⁹ The language of this provision makes the preference for California all the more blatant:

“[A]ny State [...] may adopt and enforce for any model year standards relating to control of new motor vehicles or motor vehicle engines [...] if:

- (1) such standards are identical to the California standards for which a waiver has been granted for such model year; and
- (2) California and such State adopt such standards at least two years before commencement of such model year [...].

Nothing in this section [...] shall be construed as authorizing any such State to prohibit or limit, directly or indirectly, the manufacture and sale of a new motor vehicle or motor vehicle engine that is certified in California as meeting California standards, or to take any action of any kind to create, or have the effect of creating, a motor vehicle or motor vehicle engine different from a motor vehicle or motor vehicle engine certified in California under California standards (a ‘third vehicle’) or otherwise create such a ‘third vehicle.’”

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

Non-road engines are also governed by §209. That provision begins by stating “[n]o state or any political subdivision thereof shall adopt or attempt to enforce any standard or other

⁷ 42 U.S.C. §7543(b).

⁸ 91 Cong. Senate Report 1196, 32.

⁹ 42 U.S.C. 7507.

requirement relating to the control of emissions” that are intended to regulate non-road engines in farm equipment and locomotives.¹⁰ However, a qualification to that provision is found in §209(e)(2)(A), which again gives California a named exception:

“the Administrator [of the EPA] shall, after notice and opportunity for public hearing, authorize California to adopt and enforce standards and other requirements relating to the control of emissions from such vehicles or engines if California determines that California standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such authorization shall be granted if the Administrator finds that –

- (i) the determination of California is arbitrary and capricious;
- (ii) California does not need such standards to meet compelling and extraordinary conditions, or
- (iii) California standards and accompanying enforcement procedures are not consistent with this section.”

As with on-road vehicles and engines, in 1977, other states were given the power to adopt standards “identical” to that of California in lieu of federal standards.¹¹

The final provision that gives California special status compared to other states is § 211, which deals with regulation of fuels. Under that provision, no state can set regulations requiring the use of fuel additives or particular fuels as long as a federal standard has been promulgated unless its regulations are “identical” to federal regulations set by the EPA.¹² One exception to this rule is found in § 211(c)(4)(B), which allows any state with a waiver under § 7543(b) – the waiver only California is eligible for¹³ – “[to] at any time prescribe and enforce, for the purpose

¹⁰ 42 U.S.C. 7543(e)(1)

¹¹ 42 USC 7543(e)(2)(B)(i).

¹² 42 USC 7545(4)(A).

¹³ 91 Cong. Senate Report 1196, 32.

of motor vehicle emission control, a control or prohibition respecting any fuel or fuel additive.”¹⁴ Unlike the other provisions, this exception does not allow states to adopt California standards in lieu of federal standards.

B. Congressional Debates about California’s Special Status

1. 1970

The debates in the House of Representatives, and to a lesser degree those of the Senate, explain the reasoning behind such provisions. At the time the 1970 debates were taking place, the only state which had imposed restrictions on the constructions of new motor vehicles was California, which represented 10 percent of the auto market.¹⁵ There was some pressure to adopt those standards as the minimum required nationwide, but the federal government had not previously chosen to set such exacting standards.¹⁶

During the debate in the House of Representatives, some argued against the special treatment of California, and argued all states should have the same powers. Representative John Saylor of Pennsylvania proposed an amendment to allow any state to pass its own regulations that would exceed the federal standards, arguing that Pennsylvania’s and New York’s air quality problems were worse than those of California and his home state wanted to pass regulations that exceeded the federal standard.¹⁷ Another representative argued that data available to Congress indicated that the air in Los Angeles was nearly five times worse that of any other place in the nation.¹⁸ Representative Sidney Yates, a Democrat from Illinois, spoke in favor of the amendment, arguing that his home state might also wish to pass such regulation. Ultimately, the feelings of those in favor of the amendment are summed up by Representative Leonard

¹⁴ 42 U.S.C. 7545(c)(4)(B).

¹⁵ 91 Cong. House Debates 1970, 19219 (speech of Rep. Parbstein).

¹⁶ *Id.*

¹⁷ 91 Cong. House Debates 1970, 19231-2.

¹⁸ 91 Cong. House Debates 1970, 19232 (statement of Rep. Springer)

Farbstein, a Democrat from New York, who said he supported the amendment because it was meant to ensure “that the other States of the Union have the same right that the State of California has in setting standards that they deem necessary for the health and safety of their people.”¹⁹

Representative Springer, the most vocal opponent of the amendment and a Republican from Illinois, had the following justification for his argument:

Mr. SPRINGER. This was gone into in great detail. I will not go into all of it here as to why it was, but it was felt that you could not have 50 different emission standards. That is the reason, and that could conceivably happen. [...] Because he will let any locality that wants to set up its own emission standards. When you do that it means that you cannot drive from one county to another in Illinois, just the same as you could not drive in 50 different States, and you would have all different laws. [...] May I say that we would not have done it in the State of California except in one county that has had the worst situation in the world, with the possible exception of London. There was a good reason for the exception of California.²⁰

Others argued that leaving air quality decisions to the states would abrogate the federal responsibility to ensure healthy air and relieve the pressure on the federal government to set exacting standards.²¹ After a lengthy debate, the voices that argued that allowing all states to regulate would be an abrogation of the federal responsibility to ensure healthy air and that 50 standards would be a practical nightmare prevailed. The amendment failed on a vote of 49 ayes, 79 noes.²² After its failure, three representatives offered an amendment to make California standards those of the nation, arguing that the residents of New York should not be denied the benefits those in California enjoyed, but it too failed.²³

¹⁹ 91 Cong. House Debates 1970, 19232.

²⁰ 91 Cong. House Debates 1970, 19224.

²¹ 91 Cong. House Debates 1970. See, e.g., final remarks of Rep. Springer.

²² 91 Cong. House Debates 1970, 19237.

²³ 91 Cong. House Report 1146, 52-53.

When the bill reached the Senate, there was no challenge to California's special status on the floor as there had been in the House. However, supporters again defended California's special status, relying heavily on the argument that California's air quality problems were much more severe than those in the rest of the country and noting that California had more cars per capita than any other state.²⁴ A committee report noted that the automobile industry argued that making California's standards the national standard would be inappropriate because "California's problem of automotive air pollution was unique and that different degrees of control for different pollutants would be needed to deal with problems in other areas of the nation."²⁵ The report went on to note that the bill as proposed contained federal pre-emption to "prevent a multiplicity of State standards for emissions control systems on new motor vehicles" and the California exemption existed due to "unusual instances."²⁶

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

2. 1977 Debates

In 1977, the California preference again engendered some debate in Congress. A proposed amendment to the Clean Air Act (which was later adopted) was offered to give all states the power to choose between California's standards or the federal standards (but not to allow states to set their own standards.) The debate over this amendment led to an exchange on the floor of the House of Representatives where members in favor of allowing states the ability to choose from two standards (the federal or the California standard) used states' rights

²⁴ 91 Cong. Senate Debates 1970, 33091 (Statement of Sen. Murphy). See also 91 Cong. House Debates 1970, 42520 (remarks of Sen. Corman) and 91 Cong. House Debates 1970, 42521 (remarks of Sen. Holifield).

²⁵ 91 Cong. Senate Report 1196, 24.

²⁶ 91 Cong. Senate Report 1196, 32.

arguments to defend that position, and those opposing it raised the specter of a nightmare of interstate commerce where cars bought in one state would be illegal just across the border.

At one point in the debates in the House of Representatives, Timothy Wirth of Colorado debated the question of the constitutionality of the California preference with John Dingell of Michigan:

Mr. WIRTH. [C]ould the gentleman tell me how the ability of the State of California or the State of Colorado or the State of Michigan, or wherever it may be, to set its own standard is unconstitutional, as the gentleman is suggesting? What is unconstitutional about that?

Mr. DINGELL. The Constitution provides that whenever the Federal Government speaks the States are not able to act in that area and we have done so in the Clean Air Act, except with a special exemption which we have enacted for the State of California, and then I have just described the penalties as a result of that.²⁷

Thus, although Dingell addressed the constitutionality of Congress' power to govern interstate commerce, he did not address the heart of Wirth's question, which went to the equal powers of the state, and the unconstitutionality of a grant of power to a single state denied to all other states. Representative Andrew Maguire of New Jersey next took up Wirth's argument, beginning one exchange by noting that his state was the most densely populated, and had large pollution problems related to traffic. He went on to say: "My State wants to be able to do what California is doing, and as I understand it some other States might also wish to do so. Why should we not be permitted to do that [...]?"²⁸ Others likewise took up the argument: "[I]t seems to me that we should not deny the right we have given to California or other States with similar problems. [...] [W]e have one State right now, [Colorado], which has specific problems

²⁷ 95 Cong. House Debates 1977, 16676. Dingell had previously given the rationale for the California preference as a response to the uniquely severe pollution of that state. Id.

²⁸ Id.

today over in the city of Denver. Are we going to tell them they cannot solve their pollution problems, just as California is solving theirs?”²⁹

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

C. Attempting to Assume Equal Powers

Following the passage of the CAA, states attempted to go beyond the EPA-promulgated standards in ways California was permitted to do. Though at least two states waged a court battle in defense of their standards, neither were successful. New York attempted to regulate fuels as California would be permitted to do in the late 1980s. In the 1990s, both Massachusetts and New York attempted to regulate the construction of new vehicles in ways that differed from California’s regulations, although California had proposed (but then moved back from) a similar regulation.

1. Regulating Fuels -- The Jorling Decision

In the late 1980s, the state of New York attempted to regulate fuel volatility in ways that exceeded federal standards and did not match the regulations of California.³⁰ However, the American Petroleum Institute sued in federal court, arguing that the regulations contravened the CAA’s prohibition against any fuel regulation by a state other than California, and therefore

²⁹ Id. at 16677 (remarks of Rep. Carter).

³⁰ 6 N.Y.C.R.R. §255-3.

violated the Supremacy Clause of the Constitution.³¹ The Institute also argued that because the regulation would unduly burden interstate commerce, the regulation violated the Dormant Commerce Clause.³²

Judge Thomas McAvoy of the Northern District of New York heard the Institute's motion for a preliminary injunction and New York's cross-motion for dismissal. The court found that because New York's regulations were more restrictive than those promulgated by the EPA, the conclusion that the Supremacy Clause applied and the state's regulations therefore had to yield was "inescapable."³³ Having so found, the court did not address the dormant commerce clause argument. Although the court denied the injunction on the basis that irreparable harm had not been shown, it left the state defendants little hope that its regulation could survive without EPA choosing to adopt it.³⁴

2. Regulating Vehicles -- The Zero-Emission Vehicle Cases

In the mid to late 1990s, New York was again testing the limits, but it had company – Massachusetts. Both states (on EPA's orders³⁵) had attempted to enact a regulation called the "Zero Emission Vehicle" standard. California had promulgated such a regulation in 1990,³⁶ and gained the required waiver from the EPA in 1993.³⁷ California removed the "Zero Emission Vehicle" standard, however, in regulating the 1988-2000 vehicle classes.³⁸ The states of New York and Massachusetts both attempted to retain this standard despite California's pull back,

³¹ American Petroleum Institute v. Jorling, 710 F.Supp.421 (N.D.N.Y. 1989).

³² Id.

³³ Id. at 429.

³⁴ American Petroleum Institute v. Jorling, 710 F.Supp.421, 431 (N.D.N.Y. 1989).

³⁵ Virginia v. Env't Protection Agency, **Error! Main Document Only.** 108 F.3d 1397, 1401 (D.C. Cir. 1997) (finding the requirement to adopt California standards to be invalid as beyond EPA's authority. New York and Massachusetts governors, however, did not vote against the requirement to adopt California vehicle standards for their states).

³⁶ American Automobile Mfrs. Ass'n v. Cahill, 152 F.3d 196, 198-9 (2d Cir. 1998).

³⁷ Ass'n of Int'l Automobile Mfrs., Inc. v. Mass. Dep't of Environmental Protection, 208 F.3d 1,3 (D.Mass. 2000).

³⁸ 152 F.3d at 199.

arguing the standard they adopted was acceptable because it had been identical to one approved for use in California.³⁹ However, federal courts ruled that because the state's standards for the vehicle class at issue did not exactly match those of California's for the vehicle class at issue, the standards were invalid as contrary to the CAA.⁴⁰

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

III. Equal Footing Doctrine: Its History and Modern Structure

In 1845, a Supreme Court justice called a dispute that revolved around the equal footing doctrine "the most important controversy ever brought before this court."⁴¹ More recently, however, the doctrine has not been so gripping – in fact, it is cited as one of the most boring areas of law with which the Supreme Court must contend.⁴² The equal footing doctrine is used to such dramatic reversals of status, however. The Constitutional Convention seemed to reverse its previous decision on whether or not to include such language every time it voted, finally settling on an ambiguous compromise. Then, for nearly half of this country's history, the Supreme Court

³⁹ 152 F.3d 196; 208 F.3d 1.

⁴⁰ *Id.*

⁴¹ *Pollard v. Hagan*, 44 U.S. 212, 235 (1845) (J. Catron dissent).

⁴² Neil M. Richards, *The Supreme Court Justice and "Boring" Cases*, 4 *The Green Bag* 401, 402 (2001). This lack of cachet is likely due to the doctrine's primary use in disputes over the ownership of submerged lands (coupled with the receding public interest in control of waterways in the era of the automobile and federal highways), coupled with the emergence of the federalism jurisprudence as the primary basis for protecting the powers of states.

wavered between holding the doctrine was a statutory one that could be overridden by Congress' later acts, and holding the doctrine was constitutional in nature.

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

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

The Constitutional Congress of 1787 engaged in a serious debate about whether later-admitted states (new states) should have the same powers as the founding states (the original 13). The chief opponent of giving new states power to those equal to the first thirteen was Gouverneur Morris of Pennsylvania; he was joined in his vociferous opposition by Elbridge Gerry of Massachusetts.⁴³

Gerry spoke about the “dangers” posed by the Western states, and warned against putting the original states “in their hands. They will, if they acquire power, like all men, abuse it. They will oppress commerce and drain our wealth into the Western country.”⁴⁴ He made a motion to limit the number of new states to 12 or less, so they would not outnumber the original states, which was seconded by Rufus King of Massachusetts.⁴⁵

⁴³ Max Farrand, The Framing of the Constitution of the United States, 109 (1913).

⁴⁴ William Peters, A More Perfect Union; The Making of the United States Constitution, 123 (1987).

⁴⁵ Id.

A vocal voice in favor of equal footing for all states was Roger Sherman of Connecticut, with support from two Virginians, James Madison and George Mason.⁴⁶ Sherman spoke against Gerry's motion, expressing his view that there was "no probability that the number of future states will exceed that of the existing states," but arguing that since "our children and grandchildren [...] will be as likely to be citizens of new Western States as of the old states, [...] we ought to make no such discrimination as is proposed by the motion."⁴⁷ The motion failed on a vote of five states to four.⁴⁸

However, the issue was far from settled, and soon a new proposal came from Morris. Morris argued that the Constitution should be structured to ensure the original states would dominate the national government.⁴⁹ This proposition had precedents within the existing governmental system: several of the original states, including North and South Carolina, Pennsylvania, and Virginia, did not allow later-created counties in the western portion of those states to participate equally in their state legislatures and assemblies.⁵⁰

Morris chaired the Convention's first committee responsible for apportionment of representatives from the existing and future states. In that role, he, with the help of Nathaniel Gorham of Massachusetts, brought forth a proposal that was intended to give the original thirteen the power to "deal[] out the right of Representation in safe numbers to the Western States."⁵¹ This proposal was adopted by the Convention.⁵²

⁴⁶ Max Farrand, The Framing of the Constitution of the United States, 143 (1913).

⁴⁷ William Peters, A More Perfect Union; The Making of the United States Constitution, 124 (1987).

⁴⁸ Id.

⁴⁹ Id. Specifically, Morris was adamant that Louisiana, if admitted to the Union, should not be allowed a "voice in our counsels." Eric Biber, The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union, 26 Am. J. Legal Hist. 119, 126 (2004), citing historian William Dunning's work.

⁵⁰ Id.

⁵¹ Id. at 110.

⁵² Id.

However, something curious happened when it came time to actually draft the language of the Constitutional provisions regarding the admission of states. The Committee of Detail, consisting of Morris' ally on the issue, Gorham of Massachusetts, John Rutledge of South Carolina, Edmund Randolph of Virginia, James Wilson of Pennsylvania, and Oliver Ellsworth of Connecticut, emerged from their work with a provision that new states should be "admitted on the same terms with the original states."⁵³ This is surprising on two counts: first, the Convention had adopted the proposal opposing the type of language offered, and second, most committee members hailed from states that did not give newer counties equal representation. Max Farrand notes the Committee chose this language "either on their own responsibility or because they interpreted the views of the convention that way."⁵⁴ Morris objected strenuously, on the grounds that such a measure would throw power into the hands of the newer states.⁵⁵ Madison and others opposed him, but Morris' proposed language carried the day: "New States may be admitted by the Legislature into the Union."⁵⁶

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

"Your inquiry ... is substantially whether the Congress can admit, as a new State, territory, which did not belong to the United States when the Constitution was made. In my opinion they can not.

I always thought that, when we should acquire Canada and Louisiana, it would be proper to govern them as provinces, and allow them no voice in our councils. In wording the third section of the fourth article, I went as far as circumstances would permit to establish the exclusion. Candor obliges me to add my belief, that,

⁵³ Max Farrand, The Framing of the Constitution of the United States, 143 (1913).

⁵⁴ Id.

⁵⁵ Id.

⁵⁶ Id. at 144; Art. I, §2, cl. 1; Art. I, §3, cl. 1.

had it been more pointedly expressed, a strong opposition would have been made.”⁵⁷

* * * * *

What implications does this history have for the equal footing jurisprudence? As discussed below, although the Supreme Court now regularly recites the Constitutional basis for the equal footing doctrine, at one time that was a hotly contested point. If it is not a constitutional doctrine, and exists only in the statutory acts of admission or enabling acts, than can Congress override it – for instance, by granting powers to California that the original thirteen states do not have in the Clean Air Act? The history offers something for either side of the legal debate, but about the founder’s opinion of the current state of affairs, there is less doubt.

For those who would argue the Clean Air Act is not unconstitutional despite the equal footing doctrine, the best argument for that position is that the founders explicitly rejected language allowing for such an equal footing when they formulated the Constitution. In other words, the current Supreme Court jurisprudence that finds this doctrine is a constitutional one sits uneasily beside a history of the founders explicitly rejecting the inclusion of such provisions. If it is not a constitutional doctrine, than the equal footing doctrine would arise only from the statutes that regard the admission of new states, and therefore, might be overridden by later Congressional action.⁵⁸

The compromise language finally adopted by the Convention, however, has an evenness of treatment in other provisions that contradicted the professed aims of the opponents of the

⁵⁷ *Id.* at 144. With the advantage of hindsight, the founder’s ability to craft a union of states that still functions today is deeply impressive, especially because it is clear that none of them envisioned anything close to the enormous expansion the United States would experience in just 200 years. Consider: some of those deciding how to admit new states believed the number of new states would never number above 12; their opponents expected to acquire Canada yet believed the new states would be uniformly poorer than the original ones. Although the current state of the Union is not in line with either vision, the fact that it stands as a true Union is taken for granted by nearly all its citizens and the world.

⁵⁸ Whether a state could legally exit the Union if significant terms of its enabling act or act of admission were abrogated has never been seriously explored in a courtroom.

“equal footing” language. The representation in both houses of Congress is not dependent on the date the state joined the Union. The author of the crucial sentence regarding admittance (“New States may be admitted by the Legislature into the Union”) argued that it prohibited Congress from admitting any state formed from territory not owned by one of the states at the time of the Constitution’s adoption, and required that they remain provinces. However, that interpretation is difficult to pull out of the sentence in question, and Morris alone appears to have managed it. Even Morris admitted that many other founders would not have agreed with it, and the debates make it clear that a contentious issue was essentially resolved with compromise language that had as its chief asset room for ambiguity.

What a clear majority (if not all) of the founders would have thought about a new state (California) having powers denied to all the original states, however, is not ambiguous. It is clear from their writings that even the founders who objected to the “equal footing” language would object more vociferously had they believed the Constitution allowed Congress to grant California powers while denying those same powers to original states like Massachusetts and New York. Therefore, even if the founders voted against an explicit statement of equality, there is little support for the idea that the founders believed this allowed new states to have powers denied to the original states. To the contrary, the history of the Convention makes it clear that a provision disallowing newer states powers denied to the original thirteen would have been quite popular. The fact that this allocation of power was made a Congress where Representatives and Senators from new states far outnumber those from the original states would likely have caused the proposal to limit the number of states or their representation in Congress to allow the original states to dominate might very well have carried the day. In summary, even though there is ambiguity about the equal footing doctrine at the Constitutional Convention, what we know of

the debates makes it clear that none of the founders countenanced the idea that a newer state like California would have powers that the original thirteen did not possess.

B. Statutory Equal Footing

1. The Northwest Ordinance (Continental Congress)

In July of 1787, while the founders were debating whether or not to insert the words “equal footing” into the Constitution, another governing body, the Continental Congress, was inserting it into law. The words “equal footing” appeared first in the Northwest Ordinance of 1787.⁵⁹ Under a portion of the Ordinance to be “considered as articles of compact between the original states, and the people and States in the said territory, and forever remain unalterable unless by common consent,” comes the language that territories should have the opportunity “for their admission to a share in the federal councils on an equal footing with the original States, at as early periods as may be consistent with the general interest.”⁶⁰ Another “article of compact” provided that national debts would be paid “according to the same common rule or measure, by which apportionments thereof shall be made on the other States.”⁶¹

2. The First Congress

Very early in its first term, the first Congress voted to have the Northwest Ordinance continue in full effect under the newly constituted government, reprinting it in full as part of the statutes at large of the United States.⁶² Curiously, however, when admitting new states, it did not immediately use the “equal footing” language contained in the Ordinance, although the statutes for the admission of states do contain comparable language. The first state to be admitted after

⁵⁹ An Ordinance for the Government of the Territory of the United States North-West of the River Ohio. July 13, 1787. §13.

⁶⁰ *Id.* art. V.

⁶¹ *Id.* art IV.

⁶² 1 Stat. 50, Chap. VIII (1789). The Northwest Ordinance received final House approval on July 21, 1789, Senate approval on August 4, 1789, and was signed into law by President George Washington on August 7, 1789.

the adoption of the Constitution, was Vermont, in March of 1791, followed by Kentucky, with a 1792 admission dates. Both statutes (those for Vermont and Kentucky) provide that the new states “shall be received and admitted into this Union, as a new and entire member of the United States of America.”⁶³ The new Congress also gave the new states two seats in the House of Representatives pending the first census.⁶⁴ Thus, although they did not use the language of “equal footing,” the amount of representation indicates that Congress understood the phrase “new and entire” member states to the same rights and treatment as the original states.

3. Later Statehood Acts

The next state to join the Union was Tennessee, in 1796. Congress again failed to use the words “equal footing” in the applicable legislation, but expressed its sentiments regarding Tennessee’s status in much longer language: “in all other respects, as far as they be applicable, the laws of the United States shall extend to, and have force in the state of Tennessee, in the same manner, as if that state had originally been one of the United States.”⁶⁵

The Enabling Act of 1802⁶⁶, which set forth the guidelines for the admittance of Ohio, is where the use of the words “equal footing” and “same footing” reappeared front and center.⁶⁷ The words “equal footing” appear in the title of the Act (“the admission of such state in the

⁶³ 1 Stat. 191 Chap. VII (1791) (Vermont); 1 Stat. 189 Chap. IV §2 (1791) (Kentucky).

⁶⁴ 1 Stat. 191 Chap. IX (1791).

⁶⁵ 1 Stat. 491-492 Chap. XLVII (1796).

⁶⁶ Generally, the process of admitting states to the Union involves two major pieces of federal legislation: an “enabling act” and an “act of admission.” An enabling act states the terms under which Congress would approve statehood. E.g. 3 Stat. 289-291 Chap. LVII (1816) (titled “An act to enable the people of the Indiana territory to form a constitution and state government, and for the admission of such state into the Union on an equal footing with the original states.”). An act of admission is usually much shorter, simply declaring that the state is admitted into the Union. E.g. 3 Stat. 399-400 (1816) (Indiana Admission Act). There are, however, many exceptions to this rule: many states had only one piece of legislation, others had multiple enabling or admission acts. Several states also had presidential proclamations signed indicating their admission to the Union, some of which have been memorialized in the United States Statutes at Large. E.g. 14 Stat 82-21 No. 9 (1867) (Nebraska Admission Proclamation).

⁶⁷ 2 Stat. 173-75 Chap. XL (1802), modified as to real estate grants in 2 Stat. 225-27 Chap. XXI (1803).

Union, on an equal footing with the original States”).⁶⁸ The first section of the Act uses similar language, while also echoing some of the language from the Tennessee Act of Admission: “said state, when formed, shall be admitted into the Union, upon the same footing with the original states, in all respects whatever.”⁶⁹

From 1802 forward, the words “equal footing” or “same footing” appeared in the title or statute of all other enabling acts and acts of admission, such that every state admitted to the Union has explicitly entered on such footing.⁷⁰ In addition, Mississippi’s Admission Act of 1817

⁶⁸ Id.

⁶⁹ Id.

⁷⁰ In order of eventual admission of the states: 2 Stat 322-23 Chap. XXIII §7 (1805) (Louisiana Enabling Act (“upon the footing of the original states”)); 2 Stat. 701-04 Chap. L §1 (1811) (Louisiana Admission Act) (supplemented as to courts and abolishing local government, 2 Stat. 743 (1812)); 3 Stat 289-91 Chap. LVII (1816) (Indiana Enabling Act); 3 Stat. 399-400 (1816) (Indiana Admission Act); 3 Stat 348-49 Chap. XXIII §1 (Mississippi Enabling Act); 3 Stat. 472-73 Resolution I (1817) (Mississippi Admission Act); 3 Stat. 428-31 Chap. LXVII §1, §4 (1818) (Illinois Enabling Act); 3 Stat. 536 Resolution I (1818) (Illinois Admission Act); 3 Stat. 489-92 Chap. XLVII §1 (1819) (Alabama Enabling Act); 3 Stat. 608 Resolution I (1819) (Alabama Admission Act); 3 Stat. 544 Chap. XIX (1820) (Maine Admission Act); 3 Stat. 545-48 Chap. XXII §1 (1820) (Missouri Enabling Act); 3 Stat. 645 Resolution I (1821) (Missouri Admission Act); 3 Stat. 797 (1821) (Missouri Admission Proclamation); 3 Stat. 50-52 Chap. C § 1(1836) (Arkansas Enabling Act) (as supplemented by 5 Stat. 58-59 (1836) and with changes assented to in 9 Stat. 42 Chap. LXVIII (1846) and 30 Stat. 262 Chap. 54 (1898)); 5 Stat. 50-51 Chap. C (1836) (Arkansas Admission Act); 5 Stat. 49-50 Chap. XCIX §2, §4 (1836) (Michigan Enabling Act) (as supplemented by 5 Stat. 59-60 Chap. CXXL (1836)); 5 Stat. 742-43 Chap. XLVIII §1, §4 (1845) (Florida and Iowa Admission Act) (as supplemented by 5 Stat. 788 Chap. LXXV (1845) and 5 Stat. 789-90 Chap. LXXVI (1845) and as amended by 9 Stat. 410-12 Chap. CXXIII (1849); 5 Stat. 742-43 Chap. XLVIII §1 (1845) (Iowa and Florida Admission Act as supplemented by 5 Stat. 788 (1845) and 5 Stat. 789-90 Chap. LXXVI (1845) and 9 Stat. 410-12 Chap. CXXIV (1849)); 9 Stat. 108 Resolution I §1 (1845) (Texas Admission Act); 9 Stat. 56-58 Chap. LXXXIX § 1 (1846) (Wisconsin Enabling Act); 9 Stat. 178-79 Chap. LIII § § 1, 4 (1847) (Wisconsin Admission Act I); 9 Stat. 233-35 Chap. L § 1(1848) (Wisconsin Admission Act II); 9 Stat. 452-53 Chap. L §1(1850) (California Admission Act); 11 Stat. 166-67 Chap LX §1(1857) (Minnesota Enabling Act); 11 Stat. 285 Chap. XXXL §1 (1858) (Minnesota Admission Act) (as supplemented by 11 Stat. 402 Chap. LXXIV (1859); 11 Stat. 383-84 Chap. XXXIII §1 (1859) (Oregon Admission Act) (as amended by 12 Stat. 124 Chap. II (1860); 11 Stat. 269-72 Chap. XXVI (1858) § 1 (Kansas Admission Act); 12 Stat. 126-28 Chap. XX §1 (1861) (Kansas Admission Act); 12 Stat. 633-34 Chap. VI §1 ¶ 2 (1862) (West Virginia Admission Act); 13 Stat. 30-32 Chap. XXXVI § 1 (1864) (Nevada Enabling Act) (as amended by 13 Stat. 85 Chap. XCIV (1864)); 13 Stat. 47-50 Chap. LIX (1864) (Nebraska Enabling Act) (“equal footing” in title only); 14 Stat. 391-92 Chap. XXXVI §1 (1867) (Nebraska Admission Act); 14 Stat 82-21 No. 9 (1867) (Nebraska Admission Proclamation); 13 Stat. 32-25 Chap. XXXVII § 1 (1864) (Colorado Enabling Act I) (as amended by 13 Stat. 137 Chap. CXXXV (1864)); 18 Stat. 474-76 Chap. 139 § 1 (1875) (Colorado Enabling Act II) (as amended by 19 Stat. 5-6 Chap. 17 (1876)); 25 Stat. 676 (North Dakota, South Dakota, Montana and Washington Enabling Act) as amended by 29 Stat. 189 Chap. 256 (1896), 47 Stat. 150-51 Chap. 172 (1932), 71 Stat. 5 P.L. 85-6 (1957), and 84 Stat. 987 P.L. 91-463 (1970)); 26 Stat. 215-19 Chap. 656 § 1 (1890) (Idaho Admission Act); 26 Stat. 222 Chap. 664 (1890) (Wyoming Admission Act) (erroneously labeled as Wyoming Enabling Act in United States v. Wyoming, 331 U.S. 440, 442 43 (1947)); 28 Stat. 107, Chap. 138 §§ 1, 4 (1894) (Utah Enabling Act); Proclamation Declaring Utah Statehood, 6 Thorpe 3700 ¶ 7 (January 4, 1896) (available online at <http://www.archives.state.ut.us/exhibits/Statehood/proctext.htm>); 34 Stat. 267 Chap. 3335, Title and § 26

contained a direct reference to the Northwest Ordinance of 1787, noting that the admission of the state on an “equal footing with the original states in all respects whatever” was pursuant to the terms of the Ordinance.⁷¹ That Ordinance’s terms were also referenced in several other statehood Acts.⁷²

C. Equal Footing in the Supreme Court

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

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

The first Supreme Court case to discuss the equal footing doctrine was in 1831 is more famous for other reasons: Cherokee Nation v. Georgia, 30 U.S. 1 (1831). In a concurring opinion, Justice Baldwin noted that every state that had given up land to the federal government

(Oklahoma, New Mexico, and Arizona Enabling Act) (as amended by 34 Stat. 1286 Chap. 2911 (1907)); 72 Stat. 339 § 1 (Alaska); 73 Stat. 4 § 1 (Hawaii)

⁷¹ 3 Stat. 473 Resolution I (1817).

⁷² E.g. 3 Stat. 428-30 Chap. LXVII §4 (1818).

had conditioned that cession on the formation of states that would be admitted to the Union on “an equal footing with the original states.” Id. at 35. Citing the Northwest Ordinance of 1787, he found the intention to form “new, free, sovereign and independent states” to be the “clear meaning and understanding of all the ceding states, and of Congress, in accepting the cessation of their western lands up to the time of the adoption of the Constitution.” Id. He went on to cite the Tenth Amendment for the idea that the states had an unimpaired right to individual sovereignty, in that the municipal regulations of one would not have any legal effect on those of another, and stated more generally that the Constitution “recognized” the sovereignty of an individual state. Id. at 47-48.

The first majority opinion of the Court discussing the equal footing doctrine came four years later. Mayor of New Orleans, et al. v. De Armas, 34 U.S. 224 (1835). It was swiftly followed by a second opinion, which also grappled with the difficulties of sorting out Louisiana’s complex legal history. Mayor of New Orleans, et al. v. United States, 35 U.S. 662 (1836). In De Armas, Chief Justice Marshall, writing for the Court, was asked to decide which of two claimants to a parcel of land had the better title: the petitioners, who traced their title back to a grant from the Spanish government, or the City of New Orleans, who claimed a right to the land under the terms of French law and therefore the treaty providing for the purchase of Louisiana. De Armas, 34 U.S. at 225-26. Marshall found that the Court did not have jurisdiction to hear the question, holding specifically that the Act admitting Louisiana as a state “on an equal footing with the original states in all aspects whatever” could not be read to give jurisdiction over the dispute. Id. at 235. Marshall noted that jurisdiction might exist under such a provision, however, if New Orleans was arguing the United States had laid a claim to land that rightfully belonged to the state of Louisiana. Id. at 236.

Given the Court's opinion of 1835, it is unsurprising that the case of 1836 involved New Orleans' contention that the United States had claimed land that rightfully belonged the City of New Orleans (via the State of Louisiana). 35 U.S. 662. The Court stated that the rights of Louisiana were the same as the original states, since she was admitted to the union "on the same footing." Id. at 737. On that basis, the Court found the federal government could not claim the disputed property. Id. The court did not state whether the equal footing doctrine that decided the case came from its admittance statute or the Constitution.

In 1840, the Supreme Court once again considered how the equal footing doctrine played into the tangled legal history of Louisiana.⁷³ In the case of Lessee of William Pollard's Heirs v. Kibbe, 39 U.S. 353, Justice Baldwin, who had been assigned many times to cases involving Louisiana property disputes, wrote a concurring opinion in which he cited the Constitution, the Northwest Ordinance, and the "general course of legislation by Congress, in relation to the government and property in the dispute territory" in drawing his conclusions that the property in Louisiana was subject to the same laws as if the property had lain in another state.⁷⁴ He stated that the equal footing of Louisiana was established when Congress passed Louisiana's Enabling Act, in 1805, thus extending the principles of the Northwest Ordinance to it.⁷⁵ Justice Baldwin then listed the right to equal footing along with the rights to trial by jury and habeas corpus, among others.⁷⁶

Just two years later, there was another concurring opinion mentioning the equal footing doctrine in a case involving title to land that had been under different crowns (although this time, the land in question was in Alabama). In City of Mobile v. Eslava, Justice Catron explained that

⁷³ Had Gouverneur Morris lived to see 1840, he might have pointed out that his idea to rule Louisiana as a province would have, if nothing else, cut down on litigation.

⁷⁴ 39 U.S. at 371.

⁷⁵ Id. at 374.

⁷⁶ Id.

that the Court was aware of an opinion from the Supreme Court of Alabama, in which the lower court reasoned (in part) that because the original states had title to the submerged lands of their states, the equal footing doctrine would be violated if Alabama was not given the same title.⁷⁷

The majority of the Court affirmed the lower decision without reference to the equal footing doctrine, deciding the question on statutory interpretation alone.⁷⁸ Justice Catron wrote to take give his interpretation of the equal footing doctrine, writing:

The stipulation in the ordinance of 1787, and which is repeated in the resolution admitting Alabama, guarantying [*sic*] to the new state equal rights with the old, referred to the political rights and sovereign capacities left to the old states, unimpaired by the constitution of the United States; and which were confirmed to them by that instrument [... New states have] equal capacities of self-government with the old states, and equal benefits under the Constitution of the United States. This is the extent of the guarantee. That each and all of the states have sovereign power over their navigable waters, above and below the tide, no one doubts.⁷⁹

This spirited defense of the concept of equal footing has interesting implications for the equal footing jurisprudence: first, although the concurrence refers explicitly to statutes, it also implies a Constitutional basis for the equal footing doctrine (“equal benefits under the Constitution”). Second, it makes clear that the ownership of land is relatively minor piece of the doctrine; at its heart, it refers to the equality of the political rights of all states.

In 1845, there were two cases on the court’s docket that dealt with the equal footing doctrine, and the first explicit arguments that the doctrine was constitutional in nature appeared in that context. Despite Justice Catron’s focus on the political rights, the next time the justices

⁷⁷ 41 U.S. 234, 253 (1842).

⁷⁸ *Id.* at 247.

⁷⁹ *Id.* at 258-59.

took up the topic again,⁸⁰ it was yet another submerged lands case out of Alabama.⁸¹ However, the Court’s opinion did not limit itself to land issues. Writing for the Court, Justice McKinley cited the Northwest Ordinance, but for the first time, expressed a specific Constitutional basis for the doctrine as well.⁸² After quoting Article IV, § 3, which governs the admission of new states, he then went on to say, “When Alabama was admitted into the union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain[.]”⁸³ The Court went on to clarify that the doctrine was a Constitutional and not merely a statutory one, finding (in dicta) that even if there had been an express stipulation of the rights of sovereignty or eminent domain, such a stipulation would have been “void and inoperative because the United States have no constitutional capacity to exercise municipal jurisdiction [or] sovereignty” over the objections of a state.⁸⁴ “The right of Alabama and every other new state to exercise all the powers of government, which belong to and may be exercised by the original states of the union, must be admitted, and remain unquestioned.”⁸⁵ The Court went on to hold that the only regulations Congress could impose on a new state are those that it could also impose on the original states.⁸⁶ That the same reasoning also meant that a new State’s power

⁸⁰ Although a party cited the equal footing doctrine in his argument in an 1844 case, no member of the Court took up the topic again until 1845. Gaines v. Chew, 43 U.S. 619, 639 (1844).

⁸¹ Pollard’s Lessee v. Hagan, 44 U.S. 212 (1845). Interestingly, this case is often seen as a weakening of the equal footing doctrine, in that it found Congress could award public lands to third parties before statehood, defeating the argument that the equal footing doctrine required Congress not to dispose of public lands so that they could devolve to the state upon admission. E.g. Utah Division of State Lands v. United States, 482 U.S. 193, 196 (1987). The firm Constitutional basis for the doctrine articulated in the case, however, strengthened the foundation for the core of the doctrine, even while declaring a new boundary. The Court explicitly declined to overrule Pollard’s Lessee v. Hagan in Goodtitle et al. v. Kibbe, 50 U.S. 471 (1850).

⁸² 44 U.S. at 222-23.

⁸³ Id. at 223.

⁸⁴ Id. at 223.

⁸⁵ Id. at 224.

⁸⁶ Id. at 229.

“does not [...] exceed the power thereby conceded to Congress over the original states on the same subject.”⁸⁷

Although Justice Catron dissented, he objected not to the grounding of the doctrine in the Constitution or even the broad statements about the scope of permissible regulation by Congress, but to the doctrine’s application to submerged land title. He argued that “no state complains, nor has any one ever complained, of the infraction of her political and sovereign rights by the United States,” and that the case was really one regarding a right of property.⁸⁸ He argued that the United States was being denied rights given to private landowners: “The United States did not part with the right of soil by enabling a state to assume political jurisdiction.”⁸⁹ He closed his dissent noting that he had chosen to write “because this is deemed the most important controversy every brought before this court, either as it respects the amount of property involved, or the principles on which the present judgment proceeds.”⁹⁰ In other words, the principles as to the political rights of states were not, in his view, in dispute; the specific application to the title of submerged lands was the application of the doctrine with which he took issue.

The second case of the term, Permoli v. City of New Orleans, was unquestionably about political rights, and Justice Catron wrote for the Court.⁹¹ The City of New Orleans had passed a statute fining Catholic priests who displayed corpses during funerals in the churches, requiring that open-casket services be held in a specific chapel. The Rev. Bernard Permoli violated the statute and was fined accordingly. Noting that “the Constitution makes no provision for protecting the citizens of the respective states in their religious liberties” but that the state’s enabling act had required Louisiana to protect those rights as a condition of acceptance of their

⁸⁷ Id. at 230.

⁸⁸ Id. at 233.

⁸⁹ Id. at 234.

⁹⁰ Id. at 235.

⁹¹ Permoli v. New Orleans, 44 U.S. 589 (1845).

petition for statehood, the Supreme Court set out to resolve the conflict.⁹² In a unanimous opinion written by Justice Catron, the Court found that it was proper for Congress to announce the terms under which it would accept a statehood petition, and that it had the choice to reject as a whole or accept as a whole such a petition, taking into account whether the “proper principles” were reflected in the proposed state constitution.⁹³ If Congress admitted a state, then it was precluded from going back to alter the state’s constitution to comply with the enabling act.⁹⁴ The Court rejected the idea that the provisions of the Northwest Ordinance protecting religious liberty applied following statehood, or indeed that any territorial guarantees survived statehood absent an explicit statement of such.⁹⁵ Since the only guarantee of religious liberty was therefore found in the State’s Constitution, the question of whether the ordinance violated the state’s Constitution was a matter of state, not federal, law, “equally so in the old states and the new ones.”⁹⁶ The reference to the old states is best understood this way: if the enabling acts did create requirements for new states, then all legislation from those states that might or might not be in violation of the state Constitution would also raise a question of federal law under the enabling act. The original 13 states had no enabling acts, and therefore, they would never have a question of federal law in the same situation. The Court found that such a situation would violate the equal footing doctrine, and therefore, found there was not a federal question presented because the enabling act ceased to have an effect once the state was admitted. The Court therefore reasoned it had no jurisdiction.⁹⁷

⁹²Id. at 609.

⁹³Id.

⁹⁴Id. at 610.

⁹⁵Id.

⁹⁶Id.

⁹⁷Id.

The next case to discuss the equal footing doctrine in any depth was the notorious Dred Scott v. Sanford.⁹⁸ Although it did not become the heart of the decision, it is apparent with hindsight that although the Court invalidated the Missouri Compromise on the basis that Congress could not prohibit slavery in the territories, the Court's decision to rely on the Permoli reasoning regarding the equal footing doctrine⁹⁹ made future compromises problematic. Justice Nelson's concurring opinion may best illustrate the wrench that Permoli had thrown in the slavery debate: "[I]t belongs to the sovereign state of Missouri to determine by her laws the question of slavery within her jurisdiction, subject only to such limitations as may be found in the Federal Constitution. [...] That is the necessary result of the independent and sovereign character of the State."¹⁰⁰ In other words, even if the Enabling Acts or Acts of Admission of a state specified that it should enter the Union as a slave or free state, there would be no legal recourse if, for instance, a state that had entered as a slave state then outlawed slavery.

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

Between the Civil War and 1895, the Court took only four cases that mentioned the equal footing doctrine, and all dealt with title to submerged lands. Other than affirming in strong language that the equal footing doctrine was "settled" law with both a statutory and Constitutional basis, the cases were unremarkable.¹⁰¹ In 1896, the Court, in the first of many cases to do so, decided a title dispute with an American Indian tribe in which it weighed treaty

⁹⁸ 60 U.S. 393 (1856).

⁹⁹ Id. at 438-39; 446-47.

¹⁰⁰ Id. at 460.

¹⁰¹ E.g., Mumford v. Wardwell, 73 U.S. 423, 436 (1867) (settled law); Escanaba & Lake Michigan Transp. Co. v. City of Chicago, 107 U.S. 678, 688-89 (1883) ("[Illinois] was admitted, and could be admitted, only on the same footing with them."); Illinois Cent. R. Co. v. Illinois, 146 U.S. 387, 434 (1892) ("[T]he equality prescribed would have existed if it had not been thus stipulated."); Shively v. Bowlby, 152 U.S. 1, 34 (1894) ("Could such an intention be ascribed to [C]ongress, the right to enforce it may be confidently denied. Clearly, [C]ongress could exact of the new state the surrender of no attribute inherent in her character as a sovereign, independent state, or indispensable to her equality with her sister states, necessarily implied and guaranteed by the very nature of the federal compact.").

language with the tribe against the land title the State claimed as a result of the equal footing doctrine.¹⁰² The case continued the trend of increasing stress on the Constitutionality and broad nature of the principle of equal footing, stating that Wyoming was “endowed with powers and attributes equal in scope to those enjoyed by the states already admitted” and that the recognition of equal rights was “merely declaratory of the general rule.”¹⁰³

The new century brought some new facets to the equal footing doctrine, as the Court took the opportunity to delineate between two branches of the doctrine: the branch dealing with property rights, and the branch dealing with political rights. Stearns v. Minnesota involved a challenge in a Minnesota law that gave a railroad company a special break on taxation of lands that were previously public lands given by the federal government to the State at the time of admission.¹⁰⁴ The Court explained that “different considerations may underlie the question as to the validity” of compacts between the State and the federal government regarding “political rights and obligations” and those compacts that deal only with property.¹⁰⁵ The Court continued, “It has often been said that a state admitted into the Union enters therein in full equality with all the others, and such equality may forbid any agreement or compact limiting or qualifying political rights or obligations.” Finding that property provisions did not truly involve a question of equality of status, the Court held that the State could be required to live up to the obligations of trust that the federal government had imposed as a condition of the land cession.¹⁰⁶

The Court’s reaffirmance of the importance and centrality of the political implications of the equal footing doctrine, and in recognizing but downplaying the property implications, was an obvious outgrowth of much of the jurisprudence of the equal footing doctrine as a whole, going

¹⁰² Ward v. Race Horse, 163 US 504 (1896).

¹⁰³ Id. at 511, 514-15.

¹⁰⁴ 179 U.S. 223 (1900).

¹⁰⁵ Id. at 244-45.

¹⁰⁶ Id. at 253.

back as far as Justice Catron's concurrence in 1842.¹⁰⁷ Stearns did, however, mark an important doctrinal step, in that the Court declined to extend Permoli. Recall that in the Permoli decision, the Court unanimously rejected the idea that federal courts could revisit the decision of state Supreme Courts as to the meaning of state Constitutions simply because the enabling act of a state required certain elements in that Constitution. One line of reasoning that underlay that decision was that there could never be a federal cause of action for the original 13 states in the same situation, as they would not have an enabling act, and therefore, it would be a violation of the equal footing doctrine to subject the newer states to federal court oversight. In Stearns, however, the Court made no such argument considering property. Arguably, since the original 13 states had not received their public lands from Congress, none of their public lands would have the same limitations.¹⁰⁸ The Court might have found, therefore, that subjecting those lands held publicly by newer states to extra obligations violated the equal footing doctrine. Instead, the Court chose to put property rights stemming in part from the equal footing doctrine on a lesser plane than political rights from the same source. Reading Permoli and Stearns together, the two decisions create a dualism going forward that remains to this day between political rights and land rights under the equal footing doctrine.

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

After Stearns, the Court waited 11 years before addressing the equal footing doctrine again, but resumed discussions with the most important case regarding the political branch of the equal footing doctrine that has yet been written. Coyle v. Smith posed the question of whether

¹⁰⁷ Mobile v. Eslava, 41 U.S. 234 (1842).

¹⁰⁸ White's concurrence, which was signed by Harlan, Gray and McKenna, makes this particularly clear, as it assumes that the Minnesota Supreme Court erred in deciding that the taxation system was not in violation of the state Constitution. 179 U.S. at 257. White then poses the question "[Can Congress] confer upon a state legislature the right to violate the Constitution of the state?" and determines the answer, at least in this case, is no. Id.

Oklahoma was permitted to move its state capital from Guthrie to Oklahoma City.¹⁰⁹ Although any schoolchild who has been made to memorize the state capitals knows they were allowed to do so, few know why.

Oklahoma's Enabling Act required that the capital of the state should be Guthrie until at least 1913, and then could be moved only if the move was ratified by a popular election.¹¹⁰ It became a state in 1907, and in 1910, the state legislature passed a law to erect the necessary buildings in Oklahoma City and move the capital.¹¹¹ The plaintiff, Coyle, owned a great deal of land in Guthrie, and brought suit alleging that the move violated the state Constitution and federal law.¹¹² The Oklahoma Supreme Court found no violation, and the U.S. Supreme Court declined to review that decision. What it took up was the question of whether there was a violation of federal law.

Holding that “the power to locate its own seat of government, and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers,” the Court also noted that the idea of a federal mandate to move a state capital in one of the original 13 states “would not be for a moment entertained.”¹¹³ With that preamble, the Court set out to decide the question it framed: “Can a state be placed upon a plane of inequality with its sister states in the Union if the Congress chooses to impose conditions which so operate, at the time of its admission?”¹¹⁴

The Court first turned to the provisions of the Constitution dealing with the admission of states. It read those powers to have an inherent limitation, namely the lack of power to “admit

¹⁰⁹ Coyle v. Smith, 221 U.S. 559 (1911).

¹¹⁰ 34 Stat. 267 (1906).

¹¹¹ 221 U.S. at 563-64.

¹¹² Id.

¹¹³ Id. at 565.

¹¹⁴ Id.

political organizations which are less or greater, or different in dignity or power, from those political entities which constitute the Union.”¹¹⁵ It then looked to the statutory basis of the equal footing doctrine, noting that all the acts admitting new states into the Union had recognized their equality with the previous states in terms that were, at a minimum, “emphatic and significant.”¹¹⁶

‘This Union’ was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new states, might come to be a union of states unequal in power, as including states whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress. [...] The argument that Congress derives from the duty of ‘guaranteeing to each state in this Union a republican form of government’ power to impose restrictions upon a new state which deprive it of equality with other members of the Union, has no merit.¹¹⁷

With this background, the Court distinguished three types of provisions that might be found in enabling acts: those that are fulfilled upon the admission of the state, those that are intended to operate in the future and are within the scope of the powers of Congress over the subject, and those that operate in the future that restrict the powers of a state in respect to matters which would otherwise be exclusively within the sphere of state power.¹¹⁸ Citing Permoli, the Court found the first set of provisions were Constitutional, in that Congress could require certain provisions in state Constitution before admitting that state, but that upon admission, these provisions would be “subject to alteration and amendment” just as any other part of the state’s

¹¹⁵ Id. at 566.

¹¹⁶ Id.

¹¹⁷ Id. at 567. The Court tempered this language somewhat by stating that Congress may have the duty to make sure that the form of government is not changed to one that is anti-republican, citing Minor v. Happersett, 21 Wall. 162 (1874).

¹¹⁸ Id. at 690.

Constitution would be.¹¹⁹ The Court closed the discussion of the first situation by saying, “There is to be found no sanction for the contention that any state may be deprived of any of the power constitutionally possessed by other states, as states, by reason of the terms on which the acts admitting them to the Union have been framed.”¹²⁰

The Court then turned to provisions intended to reach further actions that were within or without the scope of the powers of Congress over the subject. The Court found that provisions that exceeded the scope of Congress over the subject were void, because the state’s powers could not be “constitutionally diminished, impaired, or shorn away by any conditions, compacts, or stipulations [...] which would not be valid and effectual if the subject of congressional legislation after admission.”¹²¹ In contrast, those conditions which could have legally been made part of a statute would be enforceable, because the conditions were independently valid in that they were a statute passed by Congress within its authority.¹²² The Court found that the question of the capital location was obviously beyond Congress’ authority to dictate through legislation, and hence, was unconstitutional.¹²³ The Court closed with this language:

[T]he constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the union will not be the Union of the Constitution.¹²⁴

¹¹⁹ Id.

¹²⁰ Id. at 691.

¹²¹ Id. at 692.

¹²² Id. at 693.

¹²³ Id. at 695.

¹²⁴ Id.

Coyle remains both the most recent case to discuss the political rights of states under the equal footing doctrine and the case offering the best explication of the doctrine.¹²⁵ Though the case was ostensibly only about the limitations in enabling acts that could be given weight, the Court's language was much more wide-ranging, concluding with broad language about the equality of states as an essential foundation of the country. It also created a method for handling challenges to conditions in enabling acts going forward: determine whether Congress could have enacted the condition under its other statutory powers, and if so, it may be enforced. The Court did not, however, address the potential problem this method creates: namely, the question of whether Congress can pass a law that impacts only one state.

Going into the modern era, the best explication of the state of the equal footing doctrine came in 1950, in the case of United States v. Texas.¹²⁶ Citing Stearns, the Court noted the long jurisprudential history of the equality of political rights (or "political standing") and sovereignty required by the equal footing doctrine.¹²⁷ The Court separately discussed the effect the doctrine has on property ownership, noting that the Court had consistently held that to deny the later-admitted states ownership of submerged lands would deny them equal footing with the original states, "since the original States did not grant these properties to the United States but reserved them to themselves."¹²⁸ The Court also noted some matters that were outside the boundaries of the clause:

It does not, of course, include economic stature or standing. There has never been equality among the States in that sense. Some States when they entered the Union had within their boundaries tracts of land belonging to the Federal

¹²⁵ In 1918, in a case that spent little time on the equal footing doctrine, the Court would label the ideal that states have equal local governmental power a "truism" in deciding that the federal government had the power to enforce interstate compacts approved by Congress. Virginia v. West Virginia, 246 U.S. 565, 593 (1918).

¹²⁶ 339 U.S. 707 (1950).

¹²⁷ Id. at 716.

¹²⁸ Id.

Government; others were sovereigns of their soil. Some had special agreements with the Federal Government governing property within their borders. [citation omitted] Area, location, geology, and latitude have created great diversity in the economic aspects of the several States. The requirement of equal footing was designed not to wipe out those diversities but to create parity as respects political standing and sovereignty.¹²⁹

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

Since the 1950s, there has not been a major equal footing doctrine case that dealt with political rights or even discussed them. Instead, the equal footing doctrine has been used nearly exclusively in cases deciding property issues regarding submerged lands, with resulting forays into the areas of American Indian law and water law. Little more than a sentence or two is devoted to the equal footing doctrine in these cases, usually simply a sentence citing the nature of the doctrine before diving into the factual issues that bear upon a particular application.¹³⁰

The exception to this rule of the modern era comes with two cases from the 1970s, where the Court set forth a new principle as part of the equal footing doctrine, and then repealed it soon after. The question on which the Court ruled and rapidly reversed itself was whether the equal footing doctrine mandated the application of federal common law over the laws of a state. In Bonelli Cattle Co. v. Arizona, the Court was deciding whether the ownership of previously submerged lands divested from the State after the waters had been removed. The Court held that the equal footing doctrine did not entitle the state to the deed to those lands, because there

¹²⁹ Id.

¹³⁰ Organized Village of Kake v. Egan, 80 S.Ct. 33, 37 (1959); California v. United States, 438 U.S. 645, 648 and 654 (1978); California v. Arizona, 440 U.S. 59, 60 (1979); Montana v. United States, 405 U.S. 544, 551 (1981); California v. United States, 457 U.S. 273, 281 and 285 (1982); Summa Corp. v. California, 466 U.S. 198, 205 (1984) (“The Federal Government, of course, cannot dispose of a right possessed by the State under the equal-footing doctrine of the United States Constitution”); United States v. Cherokee Nation of Oklahoma, 480 U.S. 700, 706 (1987); Utah Division of State Lands v. United States, 482 U.S. 193, 196-7 (1987); Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 472 (1988); Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 203-204 (1998); Idaho v. United States, 533 U.S. 262, 280 (2001).

was no longer “a public benefit to be protected.”¹³¹ However, the Court held that the State’s (unsuccessful) invocation of the equal footing doctrine meant that the Court had to use federal common law to resolve the dispute.¹³²

In 1977, the Court explicitly overruled Bonelli, teaching that the equal footing doctrine’s affect on land ownership was at the time of admission only; after that time “the force of that doctrine was spent”, and it was not a basis on which federal common law could be applied to overrule the decisions of a state.¹³³ The Court noted that “precisely the contrary is true” noting that prior precedents had made it clear the doctrine results in a State taking title notwithstanding post-statehood efforts of the federal government to grant that title to others.¹³⁴ The reasoning of the Court’s opinion hearkened back to that in the Permolli decision, noting that to decide that the equal footing doctrine allowed federal common law to be applied

would result in a perverse application of the equal-footing doctrine. An original State would be free to choose its own legal principles to resolve property disputes relating to land under its riverbeds; a subsequently admitted State would be constrained by the equal-footing doctrine to apply the federal common-law rule, which may result in property law determinations antithetical to the desires of that State.¹³⁵

The Court finished with an added justification for overruling its decision of just a few years earlier by saying that the case raised “an issue substantially related to the constitutional sovereignty of states”, and therefore, “considerations of stare decisis play a less important role than they do in cases involving substantive property law.”¹³⁶

¹³¹ Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 320 (1973).

¹³² Id. at 330 n 7.

¹³³ Oregon v. Corvallis Sand and Gravel Co., 429 U.S. 363, 370 (1977).

¹³⁴ Id.

¹³⁵ Id. at 378.

¹³⁶ Id. at 381.

D. Modern Attempts to Revivify the Equal Footing Doctrine

Though the Supreme Court has not decided any cases dealing with political rights in modern times, the Circuits have. In particular, the Ninth and Tenth Circuits have considered attempts by a wide range of litigants to revivify the political branch of the equal footing doctrine. Although unsuccessful in their attempts, anti nuclear activists, practitioners of polygamy, and the Sagebrush Rebels have all attempted to use the doctrine. The first two groups mentioned are primarily concerned with the political arm of the equal footing doctrine; the Sagebrush Rebellion has focused on the property aspects. As discussed below, although their success has been limited, the courts have continued, sometimes in dicta, to reaffirm the potential power of the equal footing doctrine.

1. Nuclear Waste and the Equal Footing Doctrine

The Department of Energy has its sights set on putting the nation's first long-term geologic repository for spent nuclear fuel and high-level radioactive waste in Nevada, at a site called Yucca Mountain. In Nevada v. Watkins, the State of Nevada challenged Congressional authority to designate Yucca Mountain, which is federal property, as the sole site for possible development of the repository.¹³⁷ Among other theories, the State raised the argument that the equal footing doctrine prevented Congress from selecting a single state as the nuclear waste repository for the country absent that state's consent, because to do so would make her unequal to her sister states.¹³⁸

In a discussion of the doctrine that did not discuss whether the Court felt this question fell within the property arm of the doctrine or the political arm, the Court ruled that since the passing of the title to the States of submerged lands had not prevented the federal government from

¹³⁷ 914 F.2d 1545 (9th Cir. 1990).

¹³⁸ Id. at 1554.

continuing to pass laws impacting navigation, the fact that the federal government did own Yucca Mountain meant that there was no restriction on Congress' power to enact regulations concerning the national nuclear waste repository pursuant to the Property Clause.¹³⁹ Although the opinion did include a quote from Coyle v. Oklahoma, the opinion otherwise completely lacked any indication that the panel understood the elevated position of the political rights equal footing doctrine over the property rights equal footing doctrine. The fact that the decision used the property rights side of the jurisprudence to decide an arguably political question, therefore, makes the decision's grounding fairly weak from a doctrinal standpoint.¹⁴⁰

2. Polygamy and the Equal Footing Doctrine

In the 1980s, a policeman terminated for practicing plural marriage sued various state and local officials, arguing that Utah's Enabling Act (which prohibited polygamy forever) violated the equal footing doctrine.¹⁴¹ Essentially, the plaintiff hoped to prove that Utah had been forced to adopt this law as a condition of admission,¹⁴² and that requirement unconstitutionally restricted Utah's legislating powers. The Tenth Circuit, however, argued that there was no need to reach this question, although it provided a lengthy footnote regarding Coyle v. Smith (the case regarding the Oklahoma capital location).¹⁴³ In an analysis that appeared to touch on questions of redressability, the court noted that since statehood, Utah had never attempted to change those

¹³⁹ Id. at 1555.

¹⁴⁰ The opinion did quote United States v. Texas regarding the impossibility of the states being equal in (among other things) geology. The best argument for upholding the court's decision is that the Ninth Circuit implicitly found the siting of a nuclear waste depository in Nevada to involve an inequality of rock formations rather than of political rights. As the opinion itself did not make that argument, however, its strength is limited.

¹⁴¹ Potter v. Murray City et al., 760 F.2d 1065 (10th Cir. 1985).

¹⁴² Although the court did not need to address it, there is a great deal of historical support for the contention that the Church of Jesus Christ of Latter-Day Saints, which made up the majority of Utahans at the time, did not wish to end the practice of polygamy and did so only when it received word that federal soldiers were on the march toward them. Leonard Arrington and Davis Bitton, The Mormon Experience: A History of the Latter-day Saints, 165-68 (1979).

¹⁴³ Id., 1068 n4.

portions of the state statutes and Constitution that prohibited polygamy.¹⁴⁴ Noting that it was “settled public policy” that it would be in Utah’s power to enact such a prohibition (as a regulation of marriage), the court found the claim lacked merit, because of a lack of evidence that the state government would choose to repeal the law but for the federal mandate.¹⁴⁵

3. Sagebrush Rebellion

Attempts to expand the property branch of the equal footing jurisprudence have come largely from the group of American Western activists known as the “sagebrush rebellion.” Ranchers accused of allowing their animals to graze on federal lands without authorization raised the clause as a defense in the late 1990s.¹⁴⁶ The ranchers argued that the national forest lands were not properly held by the United States, because the equal footing doctrine required all public lands to be turned over to the State of Nevada upon its admission.¹⁴⁷ Finding that the Property Clause meant Congress would not be required to divest itself from title, regardless of the equal footing doctrine, the court held that the federal government had the right to hold that property upon Nevada’s admission.¹⁴⁸

E. Conclusion

The equal footing doctrine has kept a low profile: it may be the least known doctrine that has been the regular subject of Supreme Court decisions since the earliest days of the Union. It has evolved into two, non-equal branches, both seen as having Constitutional roots. The first branch of the doctrine to emerge was the less powerful one involving property rights of states,

¹⁴⁴ *Id.*, 1068.

¹⁴⁵ *Id.*, 1068.

¹⁴⁶ *United States v. Gardner*, 107 F.3d 1314 (9th Cir. 1996)

¹⁴⁷ *Id.* at 1317. The State of Nevada opposed this position, as did the states of Alaska, Maine, Montana, New Mexico, Oregon, and Vermont. However, Nevada’s position might have been different had the livestock been on a different type of national land, as the state had passed a law claiming ownership over all public lands in its boundaries, but had exempted national forest lands. *Id.* n. 1 and n. 2.

¹⁴⁸ *Id.*

largely issues of title to submerged lands. This branch, which has involved the majority of equal footing cases before the Court, has at its heart the holding that in order for the newer states to have the same rights and sovereign powers as the original thirteen, those states had to hold title to submerged lands, absent a pre-statehood grant of such lands to American Indian tribes by the federal government. The second branch of the doctrine involves the political rights of states, which the Court has stressed is more powerful than the protections offered to states regarding land ownership. Attempts to limit or qualify the political rights and obligations of the states is highly suspect under the equal footing doctrine.

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

III. Application of Equal Footing Doctrine to CAA and California

When Congress passed the Clean Air Act in 1970, and when it amended it in 1977, it had the clear intention: to give to any state that had adopted certain emission control regulations before 1966 the power not just to keep those regulations, but to engage in further regulation of that industry.¹⁴⁹ From the Congressional debates, it is clear that although the statutory language did not specifically name California, the justifications for making the exception always had to do with California's air quality.¹⁵⁰ That same regulatory power is explicitly denied to any other states, as federal courts have ruled when some of the original states have attempted to exercise

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

¹⁵⁰ See, e.g., 91 Cong. House Debates 1970, 19224.

the same power.¹⁵¹ But although the Congresses that passed the original act and its 1977 amendments debated the fairness of giving one state powers denied to another, it did not debate whether it had the power under the Constitution to do so. As discussed below, under the equal footing doctrine, it did not.

A. Questions of Constitutionality

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

To answer that question, it is helpful to determine what limits the jurisprudence has established exist, due to the equal footing doctrine. From Pollard's Heirs v. Kibbe, we know Congress cannot use enabling acts to subject property in one state to laws different from that if the property had lain in another state.¹⁵² From Pollard's Lessee v. Hagan, we know Congress cannot impose regulations on a new state unless the same regulations could be imposed upon the original states.¹⁵³ From Permolli, we know that no political right can be a matter of federal law in one state unless it is a matter of federal law in all states.¹⁵⁴ From Stearns, we know that the equality of states "may forbid any agreement or compact limiting or qualifying political rights or obligations."¹⁵⁵ From Coyle we know that the "republican form of government" clause of the Constitution does not give Congress the power to impose restrictions upon a new state which deprive it of the equal power to exercise "the residuum of sovereignty not delegated by the

¹⁵¹ Jorling, 710 F.Supp. 432; Virginia v. EPA, 108 F.3d 1397; American Automobile Mfrs., Inc. v. Mass Dep't of Environmental Protection, 208 F.3d 1.

¹⁵² 39 U.S. at 371.

¹⁵³ 44 U.S. at 229.

¹⁵⁴ 44 U.S. at 610.

¹⁵⁵ 179 U.S. at 244-45.

Constitution itself” with other members of the Union.¹⁵⁶ Finally, we know from Corvallis Sand that one state cannot be constrained by federal common law when another State is “free to choose its own legal principles.”¹⁵⁷

Given this background, there are at least two issues that must be determined in order to answer the question of ultimate constitutionality of the Clean Air Act’s California provisions. First, does the Commerce Clause embody a more expansive grant of power than any of the “republican form of government” clause, the clause allowing Congress to admit states, or the judiciary’s ability to impose federal common law, such that it, unlike all these other powers, can trump the Constitutional basis for equal footing? Second, if power is “conceded to Congress” over the states,¹⁵⁸ can Congress selectively bestow it on a some states but not others – in other words, even if Congress cannot “take away” the powers of a single state, could it “give” its own powers to a single state?

A. Commerce Clause vs. Republican Form of Government

The Supreme Court holds that the judiciary’s inherent powers to make the federal common law cannot override the equal footing doctrine.¹⁵⁹ Likewise, the Court holds that Congress’ duty to guarantee to each state a republican form of government does not allow it to override equal footing of the states.¹⁶⁰ Thus, to argue that the Commerce Clause contains a power these two provisions does not requires finding that the Commerce Clause was intended to be a broader or stronger grant of power than the power to guarantee a republican form of government.

¹⁵⁶ 221 U.S. at 567.

¹⁵⁷ 429 U.S. at 378.

¹⁵⁸ See Pollard’s Lessee v. Hagan, 44 U.S. at 230.

¹⁵⁹ Corvallis Sand 429 U.S. at 378

¹⁶⁰ Coyle v. Smith, 221 U.S. 559, 567 (1911).

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

There has never been a case in which the Supreme Court has interpreted the Article I powers of Congress to be inherently any different from those powers given to Congress in Article I are greater than those given in Article IV. Moreover, although the Commerce Clause gives Congress the power to regulate commerce "among the several States," it never makes any statement that States can be treated differently, which would be important, given that so many other provisions of the Constitution require that they be treated identically. In fact, like the republican form of government clause, the Commerce Clause is placed nearby language indicating the equality of States: Art I §8 clause 1 provides that "all Duties, Imposts and Excises shall be uniform throughout the United States." Finally, and most damningly for the proposition that the Commerce Clause would allow differential treatment of states, Art I. § 9 clause 6 of the Constitution states "No preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another." The importance of this is underscored by the fact that the original Constitution provided for income to the national government through taxation of imports.¹⁶¹

¹⁶¹ Art I. § 8 cl. 1.

As the above discussion shows, the proposition that the Commerce Clause carries enough weight to overcome the presumption of equal footing is faulty: not only is it a less obvious source of such power than the republican form of government clause due to its placement in the Constitution, but the document itself contains language limiting the use of the Commerce Clause power and proscribing equality of the states in its usage. Therefore, the constitutionality of the Clean Air Act vis a vis the equal footing doctrine cannot depend on Congressional exercise of the Commerce Clause power.

B. Can Congress Give Differential Regulatory Powers?

The second argument in favor of the Constitutionality of the Clean Air Act's California provisions is that Congress is not "taking" the sovereign powers of the state protected by the equal footing doctrine – it is selectively bestowing its own power to regulate.

The Supreme Court teaches that Congress may confer "upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy. If Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge."¹⁶² However, it has not ruled on the question of whether Congress can infer the power to regulate on a matter of interstate commerce on only one state – in other words, whether such a delegation would be vulnerable to an equal footing clause challenge.

Proponents of such an argument might point to the jurisprudence allowing Congress to spend tax dollars for any purpose it deems necessary and proper, without regard to equality

¹⁶² Western and Southern Life Ins. Co. v. State Bd. of Equalization of California, 451 U.S. 648, 652-53 (1981), citing Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 44 (1980); H. P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 542-543 (1949).

between the states.¹⁶³ Any analysis, however, would inevitably center on the differences between the Commerce Clause and its powers to appropriate federal funds as it sees fit. For instance, while the taxation clause has no accompanying restriction providing for equal treatment of the states, Congress' power to regulate interstate commerce does: as discussed above, a clause of the Constitution provides that Congress cannot use its power to give preference to one state's ports over another. In addition, the Court's federalism jurisprudence indicates a strong difference between the powers of Congress when appropriating funds and the power of Congress to regulate. In New York v. United States, the Court noted that while the Congress may attach conditions to receiving federal funds, it cannot otherwise commandeer state legislative processes using its regulatory power under the Commerce Clause.¹⁶⁴ Therefore, the Commerce Clause does not appear to be able to insulate federal law from a challenge under the equal footing doctrine.

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

¹⁶³ See, e.g., United States v. Butler, 297 U.S. 1, 66 (1936) (Congress can spend tax dollars as long as it deems the expenditure to be necessary and proper.)

¹⁶⁴ 505 U.S. 144 (1992)

Ironically, the case that best refutes this argument is the case that clearly states the limits of the equal footing doctrine's political arm. In United States v. Texas the Supreme Court noted the parameters of the equal footing doctrine: economic, geographic, geologic, and area differences were outside – “political standing and sovereignty” were inside.¹⁶⁵

Reading the Clean Air Act California provisions makes it clear they involve differences of political sovereignty, not geography or even air quality. Congress did not choose to allow all states with air quality below a certain level the power to set these regulations; it allowed states that had previously regulated air quality in certain ways to continue writing new regulations in those areas, while forbidding all those that had not already acted. In other words, Congress conditioned new powers on the decision of the States to exercise their own sovereign powers. The one State that had chosen to regulate in particular ways was given a power denied to all the States that had chosen not to exercise their (until then) equal right to do so.¹⁶⁶ There is no provision allowing this power to disappear once California's air quality was brought in line with that of her sister states, nor is there a provision to allow a State with air quality worse than California's equal regulation. This underscores that these provisions are not about an inequality of economics or geography – they are about sovereignty. As such, they are the kind of provisions to which the equal footing doctrine is intended to apply.

The soundness of this conclusion is underscored by an examination of the founders' intent. Those founders who opposed adding “equal footing” language to the Constitution – men like Morris, Gerry, and King – did so because they feared that new states would come to have

¹⁶⁵ 339 U.S. at 716.

¹⁶⁶ In a potentially analogous case, the Supreme Court has rejected, as a violation of equal protection, a State's legislative attempt to condition benefits on whether the potential recipient was a newcomer. *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 623 (U.S. 1985). Here, it might be argued that Congress is attempting to condition benefits on whether the potential State was a newcomer to a field of regulation, which would be a violation of the equal footing doctrine.

more power than the original thirteen. The proponents of equal footing argued that they did not want discrimination, in that all the citizens of the new country should have the same rights. These arguments make it clear that all the founders would have been united in their opposition to a situation in which a newer State had regulatory powers denied to the original States. The Constitution is devoid of language making distinctions between the powers of States, and several provisions expressly seek equal treatment for all of them by Congress. The first Congress, adopting in full the previous law passed under the Articles of Confederation, placed the equal footing doctrine into law, and did not pass laws that gave one state powers different from that of another. The founders' negative opinion of the power of Congress to devolve special powers on California, therefore, can not be much in doubt.

IV. Conclusion

The equal footing doctrine renders unconstitutional those provisions of the Clean Air Act giving to California a right to regulate certain aspects of air quality, and denying them to other states. There are two potential outcomes: first, that attempts of other States like New York and Massachusetts to enact regulations that California has the power to enact should be permitted.¹⁶⁷ If the federal government is concerned that 50 or more different regulatory enactments would be unworkable, there is a simple solution: it could promulgate two sets of standards, one more stringent than the other, and allow each state to choose between them. The end result, therefore, might be the status quo, except that the citizens of California would not be given more powers than the citizens of other States.

¹⁶⁷ States attempting to regulate in these arenas would have standing to raise a Constitutional challenge to the equal footing doctrine. Assuming New York and Massachusetts did not repeal the statutes imposing zero-emission controls following the court decisions, these states might now be able to bring such a challenge. In addition, automotive companies forced to comply with California's regulations would likely have standing to challenge those regulations as an exercise of unconstitutional power, assuming they argued that the delegation to a single state of Congress' power to regulate was a violation of the equal footing doctrine, and is therefore void.

The equal footing doctrine has roots in the laws of this country that pre-date the Constitution. The Court has recognized a Constitutional nexus for it, the first Congress placed it in a statute that is still applicable today, and the courts have repeatedly cited its fundamental nature to the political structure of the United States. Though the majority of the cases throughout time have dealt with land ownership issues, the jurisprudence has always recognized that the most important feature of the doctrine is an assurance that each state would have the same sovereignty within its borders as every other state. Just as this Union should have no second class citizens,¹⁶⁸ it should have no second class States.

¹⁶⁸ See, e.g., *Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 922 (1986); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 623 (1985); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982); *Bell v. Wolfish*, 441 U.S. 520, 583 (U.S. 1979).