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The Fundamental Principle of Equal State Sovereignty: The Boundaries of the Constitutional Doctrine and Judicial Standards of Review

Frank Ricigliani

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I. Introduction

Glenn Kunkes’s bold statement that “The Times, They are a Changing”\(^1\) at least partially predicted the result in *Shelby County v. Holder* last term: the Court declared the coverage formula of the Voting Rights Act of 1965 unconstitutional.\(^2\) The Court’s reliance on the “fundamental principle of equal sovereignty” among the States\(^3\) surprised even influential jurists.\(^4\) Even Justice Ginsburg warned, in dissent, that the *Shelby County* majority misinterpreted the principle and improperly expanded it beyond its traditional domain.\(^5\) The controversial decision left open critical questions about the continuing constitutionality of the Voting Rights Act,\(^6\) including which level of scrutiny courts should apply when reviewing federal laws that invade traditional areas of state sovereignty.\(^7\)

The Court’s renewed deference to the fundamental principle of equal sovereignty corresponds with its decreased deference towards congressional policy-making pursuant to the

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\(^{4}\) Richard A. Posner, *Supreme Court 2013: The Year in Review*, SLATE (June 26, 2013, 12:16 A.M.), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/the_supreme_court_and_the_voting_rights_act_striking_down_the_law_is_all.html ("This is a principle of constitutional law of which I have never heard.").

\(^{5}\) *Shelby Cnty.*, 133 S. Ct. at 2649 (Ginsburg, J., dissenting).

\(^{6}\) See, e.g., *id.* at 2632 (Thomas, J., concurring) ("[I] would find [the preclearance requirement] unconstitutional.").

Fifteenth Amendment’s enforcement provision. The Court signaled a change in the standard of review in 2009 when it stated that “a departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets” in *Northwest Austin v. Holder*. In light of the Court’s decision in *Shelby County*, the analytical framework in *Northwest Austin* now applies to congressional statutes that treat states disparately. The new framework’s reduced judicial deference towards congressional findings and its increased scrutiny of federal statutes’ disparate treatment of states indicates a fundamental shift from *South Carolina v. Katzenbach* and its progeny.

While some suggest that the *Shelby County* clarified the Court’s standard of review for all exercises of enumerated congressional powers in the Constitution—not rational basis but the test in *McCulloch v. Maryland*—this Comment suggests that the Court’s standard of review will be different after *Shelby County*. The *Shelby County* standard for determining the constitutionality of departures from the fundamental principle of equal sovereignty is similar to the test employed in *McCulloch*, which the Court employed in *South Carolina v. Katzenbach*. Courts will use the *Shelby County* standard to evaluate the constitutionality of congressional disparate treatment of states, and not any and all exercises of enumerated congressional powers like the *McCulloch* test.

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9 *Northwest Austin*, 557 U.S. at 203.
10 *Shelby Cnty.*, 133 S. Ct. at 2623; *Northwest Austin*, 557 U.S. at 203.
13 *Shelby Cnty.*, 133 S. Ct. at 2622.
14 *Katzenbach*, 383 U.S. at 326 (“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the . . . constitution, are constitutional.”) (citing *McCulloch* v. Maryland, 17 U.S. 316, 421 (4 Wheat.) 316, 421 (1819)).
This new framework implies that any federal law that treats states disparately must be sufficiently justified by showing that the problem to be resolved by the statute requires disparate treatment of states. It remains ambiguous after Shelby County whether or not the test described in Northwest Austin, and applied in Shelby County, is limited to judicial review of Congressional exercises of power under the Fifteenth Amendment alone, or to any departure from the fundamental principle of equal sovereignty. This Comment argues that the fundamental principle of equal sovereignty mandates the standard of review expounded in Shelby County and Northwest Austin.

More exacting judicial scrutiny of federal statutes that treat states disparately—especially in matters traditionally left to the police powers of states—suggests that authority within the federalist structure of the Constitution is shifting back towards the states. The principle’s application in cases reviewing statutes that lie at the intersection of the Tenth Amendment and Article I seems appropriate after Shelby County, considering the modern Court’s jurisprudence on the proper federalist structure inherent in the Constitution. Thus, the “Court should make clear [the Shelby County] standard reaches beyond the context of the Voting Rights Act” and the Fifteenth Amendment, and “is not equivalent to the highly-deferential rational basis test.”

The Tenth Amendment’s reservation of state sovereignty acts as a limitation on congressional power and played an essential role in recent decisions where the Court invalidated federal laws. The resurgence of the principle of equal sovereignty in Northwest Austin and

15 See, e.g., Muller, supra note 12, at 304–05.
16 U.S. CONST. art. I, § 8; U.S. CONST. amend. X.
Shelby County\textsuperscript{20} is an indication that the Court recognizes an implied fundamental right to “equality of the States, in terms of their dignity, power and sovereignty . . . .”\textsuperscript{21} This right should be entitled the constitutional right of equal state sovereignty.\textsuperscript{22}

The fundamental right of equal state sovereignty, however, is different from previously recognized implied fundamental rights because its enjoyment—and its consequent entitlement to judicial protection—is applicable to both state government actors and private citizens.\textsuperscript{23} This conclusion is not inconsistent with the Court’s recognition of the derivative benefits that citizens enjoy as a result of federalism,\textsuperscript{24} and a private citizen’s standing to challenge federal action on the basis of a violation of the Tenth Amendment.\textsuperscript{25}

Standing of a private citizen on the basis of a violation of separation-of-powers or checks-and-balances constraint need not even be predicated upon a “vicarious assertion of a State’s constitutional interests.”\textsuperscript{26} Thus, a state or one of its political subdivisions\textsuperscript{27} or a private citizen\textsuperscript{28} can invoke the fundamental right as a basis to challenge a federal law that violates the principle. Finally, a violation of the fundamental principle of Equal State Sovereignty demands heightened judicial scrutiny and, consequently, less deference to government actors.\textsuperscript{29} The only

\textsuperscript{20}Shelby Cnty., 133 S. Ct. at 2623; Northwest Austin, 557 U.S. at 203.
\textsuperscript{22}Brief of Appellant, supra note 21, at 20.
\textsuperscript{23}Compare Shelby Cnty., 133 S. Ct. at 2612 (recognizing the fundamental principle of equal sovereignty and extending judicial protection to the exercise of State political authority against federal intrusion), with Harper v. Virginia, 383 U.S. 663 (1966) (acknowledging the fundamental right of citizens to vote), and Skinner v. Oklahoma, 316 U.S. 535 (1942) (determining the right to have offspring is a basic liberty of citizens that may not be deprived by unequal laws).
\textsuperscript{25}Bond v. United States, 131 S. Ct. 2355, 2366 (2011).
\textsuperscript{26}Id.
\textsuperscript{27}Shelby Cnty., 133 S. Ct. at 2612.
\textsuperscript{28}See Bond, 131 S. Ct. at 2366.
\textsuperscript{29}See Shelby Cnty., 131 S. Ct. at 2623; Brief of Appellant, supra note 21, at 25 (arguing that a violation of the fundamental principle of equal state sovereignty requires strict scrutiny).
question that remains is what level of scrutiny courts should apply to challenges of departures of the fundamental principle.

The primary purpose of this Comment is to address the level of scrutiny Courts should apply in cases that involve a deviation from the principle of equal state sovereignty, as well as the extent of the principle’s application. This Comment introduces a practical analytical framework to apply where a congressional statute is challenged for a departure from the principle. A successful analytical framework should include a well-defined standard to aid lower courts in interpreting challenged statutes and a limiting principle to define the boundaries of the doctrine’s application and aid Congress’s future legislative decisions.

Part II provides a historical overview of the “equal footing doctrine,” which represents the early doctrinal development of the present doctrine of equal state sovereignty doctrine and the fundamental principle of equal sovereignty. Part III explains why the Court now recognizes an implied fundamental right to equal state sovereignty and discusses its potential implications for future public- and private-party plaintiffs. Part III.A develops an analytical framework for application of the equal state sovereignty doctrine. Part III.B tests the standard by examining federal statutes cited by the Shelby County dissent and discusses the implications of this new test on the federalist structure of the United States. This Comment concludes that the equal state sovereignty doctrine is a valid constitutional doctrine—now recognized as an implied fundamental constitutional right—which will provide judicial protection to both states and private citizens against unwarranted expansion of the federal government’s powers. In order to most effectively balance the constitutional interests at stake, this Comment recommends that the Court should adopt the Northwest Austin standard as the applicable framework in all cases involving the Equal State Sovereignty Doctrine.
II. Historical Overview of the Equal State Sovereignty Doctrine

The seeds of current constitutional doctrine are often sown early in the Republic’s legislative history and case law. In the case of the fundamental principle of equal sovereignty, and its correlative right of equal state sovereignty, the doctrine appeared before the first meeting of Congress. The Northwest Ordinance of 1787 (“the Ordinance”) created federal territory out of land ceded by the State of Virginia and the procedure by which such territories became states. The Ordinance possesses the status of a founding document, because it outlined ideas and principles of future political practice in the United States. The Ordinance clearly stated that when territorial governments “shall have sixty thousand free inhabitants therein, such State shall be admitted . . . on an equal footing with the original [s]tates.” Thus, America’s earliest political bodies, including the Confederate Congress (acting under its authority vested by the Articles of Confederation), understood each state would be treated equally in its exercise of sovereignty.

State political bodies also recognized that the Constitution’s explicit provisions and implicit principles called for the co-equal sovereignty of states, including both the original thirteen and states admitted by Congress pursuant to Article IV. For example, Kentucky—the second state admitted pursuant to Article IV, declared in 1824 that “the States of the Union should be sovereign, and co-equally so, seems to be not only contemplated, but enjoined by the

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32 Northwest Ordinance, 1 Stat. 50 (1787).
33 Id. The Northwest Ordinance was enacted by the Confederate Congress in 1787 prior to the ratification of the current U.S. Constitution. Id.
34 U.S. CONST. Art. IV, § 3
35 Act of February 4, 1791, ch. 4, 1 Stat. 189 (1791) (admitting Kentucky into the Union).
Constitution of the United States.” Regardless of its actions later in history, the Kentucky legislature later acknowledged that there were limits to this constitutional principle: “[South Carolina] and all other States, are bound by the terms of our constitutional union, to yield obedience to the system.” Because these documents were created prior to the Supreme Court’s own acknowledgement of the doctrine in Pollard v. Hagan, they suggest an universally accepted doctrine of equal state sovereignty going back to the Articles of Confederation and through the early 1800s.

A. The Pre-Coyle Cases and the Fundamental Principle’s Early Development

An early case used the Northwest Ordinance to analyze compacts between Congress and the individual states in which the states ceded territory that ultimately became new sovereign states and delineated the sovereign rights of the states that arose out of such compacts. In Pollard v. Hagan, the Court recognized that its decision would “draw the line that separates the sovereignty and jurisdiction of the government of the union, and the state governments . . . .” The Court knew the significance of its decision to both the continuing protection of individual state sovereignty and the status of newly-admitted states. Status as co-equal sovereigns in the Union after admission was most likely critical to maintaining a dual sovereignty structure in the country’s adolescence. As a result, Pollard v. Hagan is a seminal case for understanding the principle of equal sovereignty and its early recognition by the United States Supreme Court. The Pollard Court created what is now called the principle of equal sovereignty, and held that states admitted pursuant to Article IV enter the Union “on an equal footing with the original thirteen

39 Id.
states in all respects.\footnote{Id. at 224.} The use of the term “equal footing” indeed created some confusion throughout the history of the doctrine.\footnote{See infra, notes 73–92 and accompanying text.}

Though the Court could have diminished the states’ sovereignty by limiting the powers of newly-admitted states, it instead determined that such states were admitted on an equal footing with the original thirteen.\footnote{Id. at 221.} Thus, the Court held that states created out of territories ceded by Georgia in an agreement with the federal government—similar to the Northwest Territory—were the successors to all of the authority possessed by Georgia at the time of cession.\footnote{Id.} In so holding, the Court established the principle that all states possessed an equal amount of dignity and sovereign authority regardless of their method of admission to the Union and the date of their entry.

The post-bellum case of \textit{Texas v. White} also provides insight into the validity of the principle of equal sovereignty.\footnote{74 U.S. 700 (1868).} In \textit{White}, the Court faced the question of whether or not the states that seceded from the Union in rebellion maintained their status as co-equal sovereigns after the war.\footnote{Id. at 724.} While the Court noted that the states retained their sovereignty, freedom, and independence after signing both the Articles of Confederation and the Constitution, the Court also held that the Articles of Confederation created a “perpetual and “indissoluble” Union.\footnote{Id. at 725.} Most importantly for the purposes of the present discussion, the Court held that the rebellious states—as sovereigns within the Union—never truly seceded, but that the \textit{citizens} of those states seceded and illegally used state governments as a vehicle to achieve secession.\footnote{Id.}

\footnotesize{\textsuperscript{40} Id. at 224.} \textsuperscript{41} See infra, notes 73–92 and accompanying text. \textsuperscript{42} Id. at 221. \textsuperscript{43} Id. \textsuperscript{44} 74 U.S. 700 (1868). \textsuperscript{45} Id. at 724. \textsuperscript{46} Id. at 725. \textsuperscript{47} Id.}
affirmed the continual existence of states as separate sovereign entities throughout the rebellion and that such status did not change as a result of the Civil War.\textsuperscript{48}

\textit{White} is relevant, because the Court determined that those states that rebelled against the Union could not have their authority diminished as punishment for the rebellion.\textsuperscript{49} The Court also affirmed the status of state sovereignty under the Tenth Amendment and the importance of the separate existence of states to the political structure of dual sovereignty created by the Constitution.\textsuperscript{50} In essence, the \textit{White} Court determined that Confederate states always remained states in the Union, as equal partners in a joint enterprise, despite their professed rebellion.\textsuperscript{51}

\textbf{B. The \textit{Coyle} Decision and Post-\textit{Coyle} Development of the Fundamental Principle of Equal Sovereignty}

The principle of equal sovereignty arose again shortly after the admission of Oklahoma into the Union, in the Court’s decision in \textit{Coyle v. Smith}.\textsuperscript{52} Unlike the earlier pre-\textit{Coyle} cases that dealt with the abstract proposition of equal sovereignty,\textsuperscript{53} the \textit{Coyle} decision directly addressed an attempted Congressional infringement on state’s co-equal sovereignty. It is therefore critical to understand the factual background of the controversy at issue in \textit{Coyle} to be able to appreciate its value to the doctrine of equal sovereignty.

In 1906, Congress passed an Act admitting Oklahoma into the Union and imposing an unprecedented precondition to admission by requiring it to maintain Guthrie, Oklahoma, as the state’s capital city until 1913.\textsuperscript{54} Oklahoma’s legislature defiantly moved its capital to Oklahoma

\begin{itemize}
\item \textsuperscript{48} \textit{Id.}
\item \textsuperscript{49} \textit{Id.}
\item \textsuperscript{50} Texas v. White, 7 U.S. 700, 724 (1868).
\item \textsuperscript{51} \textit{Id.} at 726.
\item \textsuperscript{52} 221 U.S. 559 (1911).
\item \textsuperscript{53} Stearns v. Minnesota, 179 U.S. 223, 245 (1900) (“It has often been said that a state admitted into the Union enters therein in full equality with all the others, and such equality may forbid any agreement or compact limiting or qualifying political rights and obligations.”).
\item \textsuperscript{54} \textit{Coyle}, 221 U.S. at 564.
\end{itemize}
City and appropriated funds for the construction of buildings necessary to the proper function of a state government.55 The plaintiff-in-error originally brought the case to the Oklahoma Supreme Court to protect his property interests in the city of Guthrie.56

The Coyle Court first affirmed the proposition that all states admitted to the Union are admitted on an equal footing with the original thirteen states.57 In general, the Court held that Congress generally could not impose restrictions on a state’s sovereignty as a condition to the state’s admission to the Union.58 Specifically, the Court held that Congress exceeded its powers under the Guaranty and Admissions Clauses in Article IV by diminishing the sovereignty of Oklahoma.59

The Court also reiterated its interpretation of the federalist structure, consistent with its statement in White, and the importance of preserving state sovereign power under the Constitution.60 The Court implied the supremacy of any state government action in any matter “which was not plainly within the regulating power of Congress.”61 The Court expressly held that Congress could not restrict a state’s exercise of sovereignty merely because the state desired admission to the Union.62 In essence, the Court outlined the limits of congressional power to create terms of admission to states; by no means could Congress invade areas of state sovereignty through the use of its Admissions powers.63

55 Id. at 562.
56 Id. at 688.
57 Id. at 567.
58 Id.
59 U.S. CONST. art. IV, § 3 (“New States may be admitted by the Congress into this Union . . . .”); U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government . . . .”); Coyle, 221 U.S. at 566–68 (1911).
60 Coyle, 221 U.S. at 567 (“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.”).
61 Id. at 574.
62 Id.
63 Id.
The last paragraph of the Coyle decision is an incredibly important authority indicating the modern understanding of the principle of equal sovereignty. In that paragraph the Court cites former Chief Justice Chase’s opinions in Texas v. White and Lane County v. Oregon to affirm the importance of the separate existence of state governments to the Union’s republican form of government.\textsuperscript{64} Justice Lurton, writing for the majority, then declared that “the constitutional equality of states is essential to the harmonious operation of the scheme upon which the Republic was organized.”\textsuperscript{65}

Coyle represents the first opinion in which the Court addresses the status of states as equals in the Union \textit{subsequent} to their admission. Although the case involved a condition placed upon Oklahoma for its admission to the Union, the last paragraph of Coyle declares that every state is equal under the Constitution \textit{ad infinitum}.\textsuperscript{66} Significantly, the Court decided Coyle over four decades after the ratification of the Reconstruction Amendments,\textsuperscript{67} and the decision represents the opinion of leading American jurists at the time.

Though the Court rendered its decision in Coyle in the context of Oklahoma’s admission to the Union, the rule stated in the last paragraph of the opinion did not limit the principle of equal sovereignty to the context of newly-admitted states.\textsuperscript{68} Justice Lurton did not qualify his statement with any condition or limit the rule to any particular context. The Court cited ample case law to support the proposition that every state \textit{retained} certain powers inherent in the concept of sovereignty that could \textit{never} be “constitutionally diminished, impaired, or shorn away

\textsuperscript{64} \textit{Id.} at 579–80 (“Chief Justice Chase said in strong and memorable language that ‘the Constitution . . . looks to an indestructible Union, composed of indestructible states . . . . Without the states in union there could be no such political body as the United States.”).  
\textsuperscript{65} \textit{Id.} at 580.  
\textsuperscript{66} \textit{Coyle}, 221 U.S. at 580.  
\textsuperscript{67} U.S. \textit{CONST.} \textit{amends. XIII, XIV, XV.}  
\textsuperscript{68} \textit{Coyle}, 221 U.S. at 580 (“[T]he constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized.”).
by any conditions, compacts, or stipulations.”

Put simply, the fundamental principle of equal sovereignty and its omnipresence in constitutional law was axiomatic before its later diminishment in *South Carolina v. Katzenbach*. The Court decided *Coyle* after the ratification of the Reconstruction Amendments, and *Coyle* proves that the Court recognized a long-standing tradition of sovereign equality of all states well beyond the passage of those amendments.

Though the facts in *Coyle* involved Oklahoma and its admission to the Union, the doctrine was never limited to the context of newly-admitted states. The principle of equal sovereignty was only applied to the context of newly-admitted states due to the facts and circumstances of particular cases. The Oklahoma legislature enacted the state law at issue in *Coyle* after its admission into the Union. Thus, the fundamental principles of equal sovereignty are not limited, and never were limited, to the “terms upon which States are admitted to the Union . . . .”

C. Divergence of the Doctrine: States’ Property Rights vs. States’ Rights of Equal Sovereignty

Two separate doctrines emerge from *Coyle*: the “doctrine of equal footing” and the “doctrine of equal sovereignty.” This distinction is subtle, but does indeed exist in the post-*Coyle* development of case law. After *Coyle*, the doctrine deviates into two separate paths: one dealing with the property rights of states relative to the federal government along river waterbeds (“doctrine of equal footing”) and the other addressing the sovereign equality of states relative to their treatment by the federal government (“doctrine of equal sovereignty”).

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69 Id. at 573.
70 383 U.S. 301 (1966).
71 See, e.g., McCabe v. Atchison, Topeka, & Sante Fe Ry. Co., 235 U.S. 151, 159 (1914) (decided three years after *Coyle*).
Although this Comment deals strictly with the doctrine of equal sovereignty, it is necessary to clarify the post-Coyle divergence before examining the modern interpretation of the principle. The modern “equal footing” doctrine addresses the states’ assumption of legal title to the land along any riverbed within its territory upon admission to the Union.\textsuperscript{73} The first case to cite the doctrine of equal footing was \textit{Pollard v. Hagan}, because \textit{Pollard} addressed the equal sovereignty of Alabama relative to the federal government in the context of title to the land along a waterbed.\textsuperscript{74} In modern jurisprudence, the doctrine of “equal footing” refers to states’ title to land under navigable waters after admission to the Union.\textsuperscript{75}

Unfortunately, the Court continued to cite the \textit{Pollard} opinion’s proposition that states are “admitted on an equal footing” to address issues regarding the principle of equal state sovereignty until its decision \textit{Northwest Austin}.\textsuperscript{76} This created confusion and produced a split in opinion over the proper scope of the doctrine\textsuperscript{77} due to its earlier terminology. Even after \textit{Katzenbach}, which expressly stated the doctrine “applies only to the terms upon which States are admitted to the Union,”\textsuperscript{78} the Court recognized the continuing validity of the doctrine and \textit{Coyle}’s holding in the context of federal intervention in states’ relationships with their employees.\textsuperscript{79}

\textsuperscript{74} 44 U.S. 212, 224 (1845)
\textsuperscript{76} See, e.g., \textit{Coyle v. Smith}, 221 U.S. 559, 566–68 (1911).
\textsuperscript{77} See, e.g., \textit{Shelby Cnty. v. Holder}, 133 S. Ct. 2612, 2624 (2013) (“[T]he fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States.”) (emphasis added); id. at 2649 (Ginsburg, J., dissenting) (“[T]he principle ‘applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared.’”) (citing \textit{South Carolina v. Katzenbach}, 383 U.S. 301, 328–29 (1966)).
This Comment suggests that the confusion and inconsistency in the Court’s application of the doctrine of equal state sovereignty is a direct result of the use of the phrase “equal footing” in *Pollard v. Hagan* and the factual circumstances involved in *Coyle*. Yet neither case involved *terms of admission* of newly-admitted states as suggested by the *Katzenbach* Court.  

*Pollard* involved a property dispute between two landowners, and the issue of whether or not the federal government or the state of Alabama owned title to the land in question after Alabama’s admission into the Union was dispositive. 

It did not involve the Alabama’s admission, but rather the status of Alabama as a newly-admitted state in the Union. Though it is true that Congress violated the principle of equal sovereignty in *Coyle* through an unconstitutional exercise of power by attaching an invalid term of admission, the application of the principle determined whether or not a sovereign act by Oklahoma four years after its admission was prohibited. Finally, post-*Coyle* case law indicates the principle of equal sovereignty was never limited to the terms of admission of states. 

Three years after *Coyle*, the Court invoked the doctrine of equal state sovereignty to address Oklahoma’s power to enact laws with the same authority as a co-equal sovereign with other states. Thus, almost immediately after *Coyle*, the rule as stated in *Coyle* was applied to evaluate the constitutionality of Oklahoman legislation. The Court still unfortunately identified the doctrine barring the limitation of state sovereignty as the doctrine of “equal footing” in *McCabe*. In *McCabe*, the fundamental principle of equal sovereignty is apparently applied, but

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82 *Id.* at 222–24.
85 *Id.*
86 *Id.*
referred to by citation to the long line of cases using the phrase “equal footing” to support the doctrine’s proposition.\textsuperscript{87}

Although the terminology remained the same for some time, the “doctrine of equal footing” split into two separate doctrines after \textit{Coyle}, which both deal with separate constitutional issues.\textsuperscript{88} This reliance on the phrase found in \textit{Pollard} to cases like \textit{Coyle} perhaps caused the Court’s confusion in the 1960s when it first evaluated the Voting Rights Act.\textsuperscript{89} In \textit{Katzenbach}, the Court—for the first and last time—erroneously referred to the principle of equal sovereignty as “the doctrine of the equality of States.”\textsuperscript{90} The insignificant treatment with which the Court treated the doctrine of equal state sovereignty in \textit{Katzenbach} was unprecedented, and this non-recognition was effectively abrogated by the \textit{Shelby County} decision.\textsuperscript{91}

Beginning in 1917, the Court regularly invoked “the doctrine of equal footing”—now known as the principle of equal sovereignty or doctrine of equal state sovereignty—in the context of a state’s authority to pass laws as a separate sovereign under the Constitution.\textsuperscript{92} In \textit{Hawkins}, the Court reviewed the Iowa legislature’s workmen’s compensation legislation for its alleged unconstitutionality under the federal Constitution.\textsuperscript{93} The plaintiff argued that a workmen’s compensation law violated a provision of the Act of Congress accepting Iowa into the Union as a territory in 1838 and the acts of Congress that admitted the State of Iowa in 1845

\textsuperscript{87} \textit{Id.} at 159 (“Oklahoma was admitted to the Union ‘on an equal footing with the original states,’ and, with respect to the matter in question, had authority to enact such laws, not in conflict with the Federal Constitution, as other States could enact.”) (emphasis added).

\textsuperscript{88} \textit{Compare} PPL Montana, LLC v. Montana, 132 S. Ct. 1215, 1229 (2012) (“To determine title to a riverbed under the equal-footing doctrine,” \textit{with} Hawkins v. Bleakly, 243 U.S. 210, 217 (1917) (using the phrase “equal footing” to address the validity of a State law in contravention of the laws in effect when the State was a territory and under the authority of Congress).


\textsuperscript{90} \textit{Id.}

\textsuperscript{91} \textit{Shelby Cnty.}, 133 S. Ct. at 2623–24.

\textsuperscript{92} \textit{Hawkins}, 243 U.S. 210.

\textsuperscript{93} \textit{Id.} at 213–16.
and 1846.\textsuperscript{94} These Acts were enacted pursuant to the power given to Congress under the Northwest Ordinance of 1787.\textsuperscript{95} The plaintiff argued that Iowa’s workmen’s compensation legislation enacted by the state legislature violated the aforementioned congressional acts and the Northwest Ordinance\textsuperscript{96} by creating an expedited procedure by which injured employees could claim benefits under the law.\textsuperscript{97}

The Court categorically rejected the plaintiff’s argument that the legislation violated the provisions of the Northwest Ordinance.\textsuperscript{98} The Court also rejected the argument that the Acts of Congress creating and regulating the Iowa territory and its grant of admission to the Union could restrict the sovereignty of the state.\textsuperscript{99} The plaintiff attempted to use a seventy-five-year-old federal act of law to limit the ability of the state to regulate an area of the law\textsuperscript{100} that traditionally was left to the state to regulate.\textsuperscript{101} The Iowa legislature enacted the challenged state law, however, by an Act of the Iowa assembly in 1913,\textsuperscript{102} and the Court reviewed the law only in 1917.

The Court invoked the “doctrine of equal footing” in dismissing the argument that the congressional Acts of admission limited the authority of Iowa to pass legislation seventy-one

\textsuperscript{94} Id. at 216–17.
\textsuperscript{95} Northwest Ordinance, art. 2, 1 Stat. 50 (1787) (“The inhabitants of the said territory [including Iowa] shall always be entitled to the benefits . . . of the trial by jury.”) (emphasis added).
\textsuperscript{96} Hawkins, 243 U.S. at 216 (“Objection is made that the act dispenses with trial by jury.”)
\textsuperscript{97} Id. at 214–16 (describing the procedure under the new state law).
\textsuperscript{98} Id. at 216 (stating that the territory that eventually gave rise to the State of Iowa was created out of land purchased off of France as part of the Louisiana Purchase of 1803).
\textsuperscript{99} Id. at 217 (“This [argument] is easily disposed of. The Act of 1838 was no more than a regulation of territory belonging to the United States . . . and the act for admitting the state . . . admitted it ‘on an equal footing with the original states in all respects whatsoever.’”).
\textsuperscript{100} That area is state tort law, since the Iowa workmen’s compensation legislation abolished the common-law rules of negligence presumptions, burdens of proof, and elements. This formed the basis for the plaintiff’s argument that the law had abolished the right to trial by jury. Id. at 213–214. “[Such policies are] clearly within the domain of state governments.” Id. at 214.
\textsuperscript{101} See Hawkins, 243 U.S. at 212 (reviewing other state workmen’s compensation laws at the time of the opinion).
\textsuperscript{102} Id. at 211.
years after the admission of the state to the Union.\textsuperscript{103} The invocation of the doctrine to explain the invalidity of the plaintiff’s argument demonstrates that the doctrine of equal sovereignty was not limited to a ban on Congress imposing conditions on newly-admitted states that diminished their sovereignty. The Court cited \textit{Coyle} in support of the proposition that the equal state sovereignty doctrine’s application continues \textit{ad infinitum} to all constitutional acts of a state after its admission into the Union.\textsuperscript{104} The \textit{Hawkins} decision holds that the sovereign equality of states is never diminished and that all states retain the same sovereignty as the original thirteen states.\textsuperscript{105}

The Court recognized the doctrine of “equal footing”\textsuperscript{106} again in \textit{Skiriotes v. State of Florida}.\textsuperscript{107} The \textit{Skiriotes} Court began its analysis by unequivocally stating, “[s]ave for the powers committed by the Constitution to the Union, the State of Florida has retained the status of a sovereign.”\textsuperscript{108} The Court again applied the doctrine of equal state sovereignty in reasoning that Florida’s admission to the Union allowed the state to be admitted on an equal footing with the original thirteen states “in all respects whatsoever.”\textsuperscript{109} The opinion also cited Florida’s Act of admission in support of the proposition that every state is equal in its exercise of sovereignty subsequent to its admission to the Union.\textsuperscript{110}

The \textit{Skiriotes} Court unambiguously cited the holding in \textit{Coyle} to state the rule that there is a sovereign equality of states in their exercise of authority under the Constitution’s Tenth

\begin{footnotes}
\footnote{103} Id. at 217.
\footnote{104} Id.
\footnote{105} Id.
\footnote{106} The Court uses “equal footing” to refer to what the Author of this Comment calls the doctrine of equal state sovereignty. The use of the term “equal footing” to refer to the present doctrine is not truly differentiated by the Court until \textit{Northwest Austin v. Holder} in 2009, although the distinction in the case law is made clear from the discussion above.
\footnote{107} 313 U.S. 69, 77 (1941).
\footnote{108} Id.
\footnote{109} Id.
\footnote{110} Id. (citing Congress’s Act of March 3, 1845, 5 Stat. 742.).
\end{footnotes}
Amendment.111 *Skiriotes* was decided in 1945, and, similar to the legislation in *Hawkins*, the Florida legislature enacted the legislation at issue nearly a century after Florida’s admission to the Union. The *Skiriotes* opinion is significant, because it demonstrated the consistent application of the principle of equal sovereignty during the post-*Coyle* period outside the context of newly-admitted states’ sovereignty. The principle’s application, although still referred to as the doctrine of “equal footing” in *Skiriotes*, made clear that the principle was not limited historically to the terms of admission of new states.112 The state statute at issue in *Skiriotes* was enacted eighty-two years after Florida’s admission into the Union.113

The cases above demonstrate the Court’s understanding of the “equal footing” doctrine both before and after *Coyle*.114 It is clear that by 1941, the Court recognized a long-existing doctrine of equal sovereignty but the nomenclature had not changed since *Pollard*. Between *Pollard* and *Skiriotes*, however, the doctrine evolved in two separate directions. The modern “equal footing” doctrine is largely confined to legal issues regarding title to land underneath navigable waters in modern constitutional law.115

Although the principle of equal sovereignty arose out of the doctrine of equal footing, the Court has applied the *equal sovereignty doctrine* only when a state’s authority to pass laws as sovereign is challenged.116 In 1950, the Court recognized that “[t]he ‘equal footing’ clause has long been held to refer to political rights and to sovereignty,”117 and finally acknowledged the

111 *Id.* (citing *Coyle* v. Smith, 221 U.S. 559, 580 (1911)).
112 *Skiriotes*, 313 U.S. at 77.
113 *Id.* at 70.
doctrinal distinction between its prior application in different contexts. The Court by then was using the phrase “equal footing” to implicitly refer to the principle of equal sovereignty.  

In modern constitutional law and debate, the doctrine of “equal footing” is confined to the context of state property rights relative to the federal government, while a state’s rights to equal sovereignty is now distinct and referred to as the principle of equal sovereignty. The principle of equal sovereignty’s development through over a century in the Court’s decisions under the term “equal footing” should not be confused with the modern “equal footing” doctrine. The Northwest Austin decision finally eradicated the confusion of the two doctrines with its reference to the “principle of equal sovereignty.”

III. Equal State Sovereignty: A New Implied Fundamental Right

An understanding of the increased importance of federalism and the separation-of-powers limitations to the modern Court’s understanding of the Tenth Amendment is critical to the development of the newly-acknowledged, implied fundamental right to equal state sovereignty in Shelby County. The Court’s interpretation of the Tenth Amendment changed drastically after its recognition that federalism is a political system “more sensitive to the diverse needs of a heterogeneous society,” which permits “innovation and experimentation,” enables greater citizen “involvement in democratic processes,” and makes government “more responsive by putting the States in competition for a mobile citizenry.” Since Gregory v. Ashcroft, the Court has consistently acknowledged a theoretical basis for the extension of the Tenth Amendment’s

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118 Id. at 716.
120 E.g., Shelby Cnty. v. Holder, 133 S. Ct. 2623, 2625 (2013) (“Not only do States retain sovereignty under the Constitution, there is also a ‘fundamental principle of equal sovereignty’ among the States . . . .”) (citing Northwest Austin Mun. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009)).
121 Northwest Austin, 557 U.S. at 203.
protection to both states and private-party plaintiffs. The revitalization of federalist principles has coincided with the limitation of the scope of congressional remedial powers under the Reconstruction Amendments.

The Court’s reinvigoration of federalist principles in *Gregory v. Ashcroft* followed the theoretical development and recognition of the values inherent in federalism and the federalist structure’s importance to individual rights and autonomy. Many of the cases cited in the *Northwest Austin* decision were found in scholarly works in the late-1980s. While the Court recognized the importance of its own expansive interpretation of the Commerce Clause, the Spending Clause, and the Supremacy Clause to the expansion of federal power relative to the states in *New York v. United States*, it noted that the federalist framework remained the same.

*New York* was the first case in which the Court substantially limited the federal government’s ability to regulate areas traditionally reserved to the states pursuant to their police powers. Interestingly, the Court cited *Coyle* and reaffirmed the federalist principles that

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128 U.S. CONST., art. I, § 8, cl. 3
129 U.S. CONST., art. I, § 8, cl. 1
130 U.S. CONST., art. VI, cl. 2
131 New York v. United States, 505 U.S. 144, 159 (1992) (“The actual scope of the Federal Government’s authority with respect to the States has changed over the years, therefore, but the constitutional structure underlying and limiting that authority has not.”).
132 Id.
133 Id. at 162 (citing Coyle v. Smith, 221 U.S. 559 (1911)).
134 Id. (“Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States.”) (citing Lane Cnty. v. Oregon, 74 U.S. 71, 76 (1868)). Justice Lurton cited this same opinion in support of his proclamation of equal sovereignty at the end of the *Coyle* opinion. Coyle, 221 U.S. at 579–80.
logically underlie the principle of equal sovereignty as stated by the Coyle Court eighty-two years before New York. The Court noted that even when Congress is granted the power to compel or prohibit citizens’ acts, the Court never extended that power to include “directly compel[ling] the States to require or prohibit those acts.”135 Thus, the New York decision limited Congress’s powers to that of encouragement, regulation, or preemption where constitutionally permissible.136

In essence, New York limited the ability of Congress to invade areas of traditional state regulation, or to truly compel states—as opposed to an individual citizen of the United States—to act in a certain manner at all.137 The central holding in New York is the anti-commandeering principle, which is a the fundamental right of states not to be directly forced into enacting and enforcing a federal regulation.138 The Court’s decision in New York, when considered in conjunction with Bond v. United States139 and Shelby County v. Holder,140 created a fundamental right of states not to be commandeered and to be treated as co-equal sovereigns in all respects.141

When Congress commandeers a state’s government, it violates the Tenth Amendment and diminishes the sovereign equality of the targeted state or states. Congress may place no statutory obligation on a state to act in a certain way,142 because states possess a fundamental right against such diminishment of their sovereignty. A departure from the doctrine of equal

135 New York, 505 U.S. at 166.
136 Id. at 166–69.
137 Id. at 144 (“In providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.”) (emphasis added).
138 Id. at 161 (“Congress may not simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.”) (citing Hodel v. Va. Surface Mining & Reclamation Ass’n., Inc., 452 U.S. 264, 288 (1981)).
139 131 S. Ct. 2355 (2011).
140 133 S. Ct. 2612 (2013).
state sovereignty is particularly egregious when Congress treats states disparately.\textsuperscript{143} Even as early as \textit{New York}, the Court recognized that Congress must have a “sufficiently important” federal interest to justify a violation of a state’s rights as sovereign.\textsuperscript{144} Every state’s fundamental right to equal sovereignty is explicitly recognized in the Court’s test for violations of the Tenth Amendment, as set forth in \textit{New York}.\textsuperscript{145} While the \textit{New York} test requires a sufficiently important federal interest to compel a state to enact or regulate in conformity with a federal regulatory regime, any departure from the fundamental principle of equal sovereignty requires that a congressional “statute’s disparate geographic coverage be sufficiently related to the problem it targets.”\textsuperscript{146}

The standing of private citizens to challenge federal laws on the basis of a violation of the Tenth Amendment did not quickly follow \textit{New York}. The extension of standing to private citizens to challenge violations of Tenth Amendment by Congress in \textit{Bond},\textsuperscript{147} however, makes the recognition of a right to Equal State Sovereignty seem certain. The right to Equal State Sovereignty, or the standing to challenge violations of any principles of federalism, is not limited to the state itself.\textsuperscript{148} A private citizen now possesses a legally cognizable right to challenge the federal government’s usurpation of authority traditionally left to the state.\textsuperscript{149} If an individual can

\begin{itemize}
  \item \textsuperscript{143} Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013).
  \item \textsuperscript{144} \textit{New York}, 505 U.S. at 177.
  \item \textsuperscript{145} \textit{Id.} (“In determining whether the Tenth Amendment limits the ability of Congress to subject state governments to generally applicable laws, the Court . . . will evaluate the strength of federal interests in light of the degree to which such laws would prevent the State from functioning as a sovereign . . . .”) (emphasis added).
  \item \textsuperscript{146} \textit{Shelby Cnty.}, 133 S. Ct. 2622.
  \item \textsuperscript{147} \textit{Bond v. United States}, 131 S. Ct. 2355, 2366 (2011).
  \item \textsuperscript{148} \textit{Id.}
  \item \textsuperscript{149} \textit{Id.}
\end{itemize}
demonstrate harm from a federal undermining of state sovereignty, the individual citizen is entitled to the protection and rights traditionally afforded to the state.\textsuperscript{150}

Shortly after the expansion of private-party standing to challenge violations of the Tenth Amendment and federalist principles, \textit{Shelby County} unequivocally announced that the fundamental principle of equal sovereignty remains “highly pertinent in assessing subsequent disparate treatment of States.”\textsuperscript{151} \textit{Shelby County}’s demand that “\textit{any} departure from the fundamental principle of equal sovereignty”\textsuperscript{152} meet the requirements of the \textit{Northwest Austin} test compels the conclusion that there is now an implied fundamental right to equal sovereignty that is enjoyed by all states.

A private litigant challenging a federal law on Tenth Amendment grounds need not even assert the state’s constitutional interests in his or her claim.\textsuperscript{153} If the private litigant may challenge a law “enacted in contravention of constitutional principles of federalism,”\textsuperscript{154} then how can a state not be entitled to assert its rights under the doctrine of equal state sovereignty?\textsuperscript{155} The “individual liberty rights” of private parties are as threatened as state interests under such circumstances.\textsuperscript{156}

The aforementioned case law and a scrupulous review of constitutional principles developed since \textit{New York} suggest the conclusion that states possess a right to equal sovereignty.

\textsuperscript{150} Id. (“\textit{A}ction that exceeds the National Government’s enumerated powers undermines the sovereign interests of States [and] the unconstitutional action can cause concomitant injury to persons in individual cases.”).
\textsuperscript{151} \textit{Shelby Cnty.}, 133 S. Ct. at 2624.
\textsuperscript{152} Id. at 2622
\textsuperscript{153} \textit{Bond}, 131 S. Ct. at 2365.
\textsuperscript{154} Id.
\textsuperscript{155} Id. at 2364 (“\textit{L}imitations that federalism entails are not therefore \textit{a matter of rights belonging only to the States.}”) (emphasis added). This language strongly suggests that the Tenth Amendment gives positive rights to the states as well as private litigants.
\textsuperscript{156} Petition for Writ of Certiorari at 43, N.J. Thoroughbred Horsemen’s Ass’n v. Nat’l Collegiate Athletic Ass’n, No. ___ (U.S. ___ 2014) [see note at FN 18]
that must be protected by the judiciary the same way any fundamental right is protected.\textsuperscript{157} At the very least, this Comment argues that the Court recognized the fundamental principle of equal sovereignty as far back as 1845\textsuperscript{158} and that the Court has invoked the principle throughout American constitutional history.\textsuperscript{159}

Assuming that there is a right to equal state sovereignty, two questions arise: (1) whether the right is confined to the exercise of congressional power pursuant to the Fifteenth Amendment; and (2) what judicial scrutiny courts should apply in reviewing any federal law that violates that right. Some have argued that courts should apply strict scrutiny to any action that burdens a fundamental right.\textsuperscript{160} This argument focuses on the liberty interests of individual citizens that are burdened when states suffer a violation of their right to equal state sovereignty.\textsuperscript{161} This Comment argues, however, that the test developed in \textit{Northwest Austin} and applied in \textit{Shelby County} is a form of intermediate review, because it is not as exacting as strict scrutiny.


The Court developed the current test for \textit{“any”} departures from the fundamental principle of equal sovereignty in \textit{Northwest Austin v. Holder}.\textsuperscript{162} As stated above, the Supreme Court held that \textit{“any”} departure from the fundamental principle of equal sovereignty requires a showing that

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., Kramer \textit{v. Union Free Sch. Dist.}, 395 U.S. 621 (1969) (protecting the right of citizens to vote and depriving a statute of its normal presumption of constitutionality).
\item Pollard \textit{v. Hagan}, 44 U.S. 212 (1845).
\item Brief for Appellant, \textit{supra} note 22, at *25.
\item Brief for Appellant, \textit{supra} note 21, at *24–25.
\end{enumerate}
\end{footnotesize}
a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.”

The Court held in Shelby County that the Voting Rights Act no longer meets the requirements of that test because the law’s disparate geographic burdens were not sufficiently related to the problem the law targeted. This statement of rule is consistent with the Court’s statement in New York that “[w]here a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly [and not commandeer state governments].”

There is no logical reason to support the assertion that the fundamental principle of equal sovereignty is limited to the context of the Fifteenth Amendment. The principle’s application is found in the historical documents created even before the Constitution, state documents in the ante-bellum period, and case law from 1845 until the present day. Therefore, the principle of equal sovereignty has never been limited to the context of the Fifteenth Amendment, and easily outdates the amendment itself by any measure. In fact, some have even argued that the only instances in which the Court has allowed “any departure . . . from the fundamental principle of equal sovereignty have involved federal laws that enforce rights guaranteed by the Reconstruction Amendments.”

Also, if the principle of equal sovereignty is limited to the Fifteenth Amendment, then “unchecked plenary Congressional power to balkanize the nation and create the equivalent of

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163 Id. (emphasis added).
164 Shelby Cnty. v. Holder, 133 S. Ct. at 2623–30 (“Northwest Austin requires an Act’s ‘disparate geographic coverage’ to be ‘sufficiently related’ to its targeted problems.”).
166 Northwest Ordinance, 1 Stat. 50 (1787).
167 See supra, notes 36–37 and accompanying text.
168 See supra, notes 38–121 and accompanying text.
169 Shelby Cnty., 133 S. Ct. at 2622.
internal colonies” is permitted. As a result, this Comment suggests that the principle is neither limited to congressional power under the Fifteenth Amendment nor to the Reconstruction Amendments generally, but rather acts as an integral part of American constitutional law and the “Court’s jurisprudence since 1845.” For these reasons, the Court should explicitly acknowledge the principle of equal state sovereignty as a fundamental right of states and their citizens, and designate a standard of review for any departures from the principle.

This Comment argues that the test expounded in *Northwest Austin* and *Shelby County* is perfect for balancing federal interests and the modern necessity of centralized political power with the states’ right to equal sovereignty. Under the *Northwest Austin* test, a federal statute must be sufficiently related to the problem it targets if the statute treats states disparately. This test is much less exacting than the Court’s prior application of, for example, unconstitutional racial classifications. Unlike the Court’s expression of exacting judicial scrutiny in other cases, the Court in *Shelby County* demanded that the statute only “impose[] burdens” that can “be justified by current needs.” This standard is markedly different from the stringent requirement of a “compelling government purpose” needed under strict scrutiny.

A statute facing review under the *Northwest Austin* test need not be “narrowly tailored” as well; rather, its disparate geographic coverage must be “sufficiently related” to the problem it targets. A close reading of the choice of words in the *Northwest Austin* test suggests that the Court did not apply strict scrutiny for departures from the fundamental principle of equal

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171 Id. at 39.
172 Id. at 36.
173 *Shelby Cnty.*, 133 S. Ct. at 2622.
174 Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995) (“Federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest.”) (emphasis added).
175 *Shelby Cnty.*, 133 S. Ct. at 2622.
176 See *Adarand Constructors*, 515 U.S. at 235.
177 *Shelby Cnty.*, 133 S. Ct. at 2622.
sovereignty. The right to equal state sovereignty should not require such exacting scrutiny—at least when a state raises it as the basis for challenging a federal law—because states possess vast public resources and other fundamental rights and responsibilities under the Constitution. Although these public resources are not even comparable to the vast wealth possessed by the federal branches of government, the ability to tap these resources to settle disputes justifies a less demanding form of review than when an individual citizen’s fundamental rights are threatened by government action.

The Northwest Austin test falls somewhere in between strict scrutiny review and rational basis review. At least one author suggests that the Court declined to address the standard of review in both Northwest Austin and Shelby County. Yet Derek T. Muller confines his reasoning to the standard of review for any exercise of congressional authority pursuant to any enumerated power. Muller does agree, however, that the test employed in Shelby County is supported by the Court’s past practices and that it provides further evidence of the modern Court’s unwillingness to allow congressional power to exceed its constitutional bounds. Congress’s potential exercise of enumerated powers, however, is too varied to limit any exercise of any enumerated power to one standard of review. Thus, this Comment only agrees that the Northwest Austin and Shelby County standard is appropriate in any judicial review of departures from the fundamental principle of equal sovereignty.

The Northwest test may be classified as an “intermediate” form of review: slightly less demanding and more deferential than review under strict scrutiny, and slightly less deferential to congressional findings and more demanding in its inspection of the law’s validity than rational

178 Muller, supra note 12, at 305.
179 Muller, supra note 12, at 288.
180 Muller, supra note 12, at 317–18.
basis. This level of scrutiny is appropriate because it adequately balances the preservation of individual states’ sovereignty against the congressional need to address geographically disparate problems through legislation.

And while the principles of “[f]ederalism also protect[] the liberty of all persons within a State,”181 the independent political needs of a state government should not be considered entitled to the same protection as that of, for example, the right to vote.182 Thus, the Northwest test strikes the perfect balance between the centripetal pressures of modern commerce and the traditional centrifugal distribution of authority within the federalist structure of government. For the purposes of analysis, an application of the test to different federal statutes may properly elucidate the suitability of applying the Northwest Austin test when a state—or a state’s citizen—asserts a violation of the doctrine of equal state sovereignty.

B. Testing the Test: Applying the Northwest Austin Test to Different Federal Statutes

Justice Ginsburg, in the dissenting opinion in Shelby County, argued that the majority misapplied the principle of equal sovereignty, argued that “federal statutes that treat states disparately are hardly novel,” and questioned whether “such provisions remain safe given the Court’s expansion of equal sovereignty’s sway.”183 While federal statutes do indeed often treat states disparately, not all of these statutes will necessarily fail the Northwest Austin test. The following application of the test to two fundamentally different federal statutes—one that meets the requirements of the test and one that fails—illustrates the strengths of the test and its potential application in the future.

183 Shelby Cnty., 133 S.Ct. at 2649 (Ginsburg, J., dissenting).
The federal Professional and Amateur Sports Protection Act (PASPA) limits its ban on state-sponsored sports betting to states where “[an authorized sports-betting] scheme . . . actually was conducted in that state or other governmental entity at any time during the period beginning September 1, 1989, and ending October 2, 1991.”184 In the most recent review of the constitutionality of PASPA, federal courts afforded the statute a presumption of constitutionality.185 If the Supreme Court grants certiorari, this Comment anticipates the Court will review PASPA under the *Northwest Austin* “sufficiently related” test.

The *Shelby County* dissent cited PASPA in support of the proposition that the majority’s unprecedented expansion of the principle of equal sovereignty could cause “much mischief” to federal statutes.186 PASPA does treat states disparately by preventing the passage of any sports wagering scheme by state governments other than those states exempted by Section 3704.187 PASPA violates the principle of equal sovereignty because the problem it addresses (sports wagering sanctioned by state governments) is not sufficiently related to its disparate geographic coverage.188 PASPA restricts states in their exercise of authority in an “area subject to the States’ traditional police powers.”189 PASPA represents the type of infringement upon equal state sovereignty that the fundamental principle of equal sovereignty is designed to prohibit.

Because PASPA’s disparate geographic coverage (the law’s prohibition, in effect, is limited to forty-six states) is not sufficiently related to the problem of sports betting,190 PASPA violates the doctrine of equal state sovereignty and should be declared unconstitutional upon

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186 *Shelby Cnty.*, 133 S. Ct. at 2649.
187 28 U.S.C. §§ 3702, 3704 (2006); *see Nat’l Collegiate Athletic Ass’n*, 926 F. Supp. 2d at 571 (“Congress has chosen through PASPA to limit the geographic localities in which sports wagering is lawful.”).
188 *But see Nat’l Collegiate Athletic Ass’n*, 926 F. Supp. 2d. at 571.
189 *Id.* at 571.
future review. PASPA treats states disparately, in effect, through the language of its exemptions in Section 3704. PASPA also reduces the ability of states that are not exempted by the law to raise revenue through enacting legislation authorizing sports betting.

PASPA is the type of law that would be covered under the doctrine of equal state sovereignty because it treats states disparately on its face. The problem the statute addresses is not sufficiently related to the statute’s disparate geographic effect. “Congress enacted PASPA in 1992 in response to growing efforts by States to allow sports wagering.” Yet, “PASPA completely ‘releases Nevada from PASPA’s grip.’” Finally, PASPA intrudes upon a traditional area of state sovereignty.

Thus, PASPA’s unequal treatment of states is not sufficiently related to the problem it targets. If Congress’s purpose was to limit sports wagering, or stop the spread of sports wagering, then how can an exemption for Nevada from PASPA’s coverage be sufficiently related to the problem of ending or curbing the spread of sports wagering? In Nevada alone, “at least $2.9 billion” per year is wagered on sports. Allowing an exemption from PASPA to the state that sanctions the most sports wagering in the country—while simultaneously prohibiting other states from enjoying the benefits of legalized sports betting—is an excellent example of congressional disparate treatment of sovereign states. This disparate treatment, and its lack of any relationship to ending or preventing the spread of sports wagering, would be found unconstitutional under the *Northwest Austin* standard. States could then begin to enjoy the

191 *Nat’l Collegiate Athletic Ass’n*, 730 F.3d 208.
195 Id. at 6.
benefits of taxing sports wagering and "staunch the sports wagering black market by allowing . . . taxable sports wagering venues."\textsuperscript{197}

Justice Ginsburg also cited, in the \textit{Shelby County} dissent, the federal statute that limits federal funding for nuclear waste disposal to the state of Nevada after December 22, 1987.\textsuperscript{198} This federal statute, like PASPA, provides for disparate treatment of all states except Nevada in its grant of federal funds for the purpose of disposing of nuclear waste at the Yucca Mountain site.\textsuperscript{199} Unlike PASPA, however, Section 10136 is a federal statute that passes the \textit{Northwest Austin} test and is not in contravention of the doctrine of equal state sovereignty.

The statute explicitly states that Congress "finds that . . . radioactive waste creates potential risks and requires safe and environmentally acceptable methods of disposal."\textsuperscript{200} Congress further determined that radioactive waste is "a national problem . . . created by the accumulation of (A) spent nuclear fuel from nuclear reactors; and (B) radioactive waste from (i) reprocessing of spent nuclear fuel; (ii) activities related to medical research, diagnosis, and treatment; and (iii) other sources."\textsuperscript{201} The problem is indeed serious and presents a troubling national issue. The statute, however, still treats the forty-nine states that do not receive federal funding and the state of Nevada disparately. Under \textit{Northwest Austin}, this disparate treatment must be sufficiently related to the disposal of accumulated radioactive waste to be a constitutional exercise of congressional power.

Congress determined that Yucca Mountain, Nevada constituted the best site for high-level nuclear waste disposal and thus funneled all future funds to the state after that

\begin{itemize}
\item \textsuperscript{197} \textit{Id.}
\item \textsuperscript{198} \textit{Shelby Cnty. v. Holder}, 133 S. Ct. 2612, 2649 (2013).
\item \textsuperscript{199} 42 U.S.C. § 10136 (2006).
\item \textsuperscript{200} 42 U.S.C. § 10131 (2006).
\item \textsuperscript{201} 42 U.S.C. § 10131 (2006).
\end{itemize}
determination.\textsuperscript{202} Section 10136 provides an excellent example of a federal statute that departs from the principle of equal sovereignty, albeit in an insignificant manner and with perhaps undesired effects.\textsuperscript{203} Regardless of the other consequences of the statute’s disparate treatment beyond the scope of the distribution of federal funds, the statute singles out the state of Nevada for the receipt of federal funds, and only Nevada, after a specified date.\textsuperscript{204} The problem (targeted by the statute) of disposing of “high-level radioactive waste and such spent nuclear fuel” in a repository required a specific geographic location that would solve the problem of locating and establishing a nationally-funded high-level radioactive waste repository.\textsuperscript{205}

Thus, the problem of disposing of high-level radioactive waste in a safe and responsible manner required locating a remote depository site. The statute’s disparate treatment of states, through the limiting of federal funds to Nevada, is, therefore, sufficiently related to the problem addressed by the federal statute. Finally, the distribution of federal funds to Nevada alone is sufficiently related to the federal government’s disparate treatment of states under Section 10136. Thus, if challenged, the statute would likely be upheld under the \textit{Northwest Austin} test.

The application of the \textit{Northwest Austin} test to the federal statutes above shows that the application of the framework can be workable within the modern constitutional structure. PASPA’s limitations and disparate treatment of states violate the principle of equal sovereignty because Congress’s disparate treatment of states under PASPA is not sufficiently related to the

\begin{itemize}
\item \textsuperscript{202} Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 5032(a), 101 Stat. 1330 (1987) (amending the earlier version of the same statute to limit federal funding for nuclear waste disposal to only the State of Nevada \textit{after} determining Yucca Mountain was an acceptable nuclear waste repository). This problem targeted by the statute is sufficiently related to the geographic peculiarities of the Yucca Mountain site, and would therefore pass the \textit{Northwest Austin} test.
\item \textsuperscript{203} 42 U.S.C. § 10136 (2006).
\item \textsuperscript{204} \textit{Id.} at § 10136.
\item \textsuperscript{205} \textit{Id.} at § 10131.
\end{itemize}
problem of sports betting.\textsuperscript{206} In contrast, Section 10136 addresses the problem of locating and funding a nuclear waste repository and treats states disparately by funding only Nevada for that purpose.\textsuperscript{207} But the problem Congress targets by distributing federal funds unequally pursuant to the statute is sufficiently related to the statute’s geographically disparate coverage.\textsuperscript{208}

The hypothetical application of the test above shows that unwarranted federal intrusions upon traditional areas of state sovereign authority are invalidated under the test. On the other hand, federal statutes that address significant federal issues, and bear sufficient relationship to the disparate effects they have upon states, are protected and may be maintained under the \textit{Northwest Austin} framework.\textsuperscript{209} This shows that a recognition of the states’ right to equal state sovereignty is both desirable and practical if the test remains the same as the one applied in \textit{Northwest Austin}. It most likely will not cause the unbridled “mischief” predicted by the \textit{Shelby County} dissent in its actual application.\textsuperscript{210}

\textbf{IV. Conclusion}

In conclusion, the equal state sovereignty doctrine is a valid constitutional doctrine based on centuries of case law and principles derived from America’s oldest documents.\textsuperscript{211} The right to equal sovereignty under the Constitution is recognized as an implied fundamental constitutional right, and this recognition is apparent from a reading of the Court’s Tenth Amendment cases.\textsuperscript{212} The \textit{Northwest Austin} test—if applied in the context of alleged violations

\textsuperscript{210} Id.
\textsuperscript{211} See Northwest Ordinance, 1 Stat. 50 (1787).
\textsuperscript{212} Brief for Appellants, \textit{ supra} note21, at *19 (“[T]he entire line of federalism decisions from \textit{New York} in 1992 to \textit{Sebelius} in 2012 makes clear that the Supreme Court is unwilling to trust the political process to protect constitutional federalism.”).
of the equal state sovereignty doctrine—will best curb an unwarranted and excessive expansion of the doctrine and provides an optimal level of judicial scrutiny for the constitutional problem it addresses.

The recognition and respect of the right to equal state sovereignty benefits both states and private citizens, for “fidelity to principles of federalism is not for the states alone to vindicate.”\(^{213}\) The individual citizens’ liberties that flow from the principles of federalism provide the most compelling reason for the recognition of the equal state sovereignty doctrine. Yet the complexities of modern technology and interstate—and indeed international—commerce require a balancing of the state and citizens’ rights of equal state sovereignty against the effective governance of the federal government.

The modern Court holds that individual liberties are best protected by maintaining the principles of federalism. As the Court noted in Bond, these principles are not some abstract concept that protect the state as a political entity.\(^{214}\) The separation of powers between central and provincial governments provide layer upon layer of protection against the incursion of arbitrary power.\(^{215}\) The Court faces the difficult problem of balancing the needs of an interdependent federation of states and the rights and responsibilities of those states under the Constitution. The Northwest Austin test can protect the rights of states while allowing reasonable disparate treatment of the states by the federal government when necessary.

The Comment argues that the Court must now explicitly hold that every state in the Union maintains the right to equal sovereignty and dignity, and that every citizen within a state may use that right as the basis for a challenge to federal action that violates the Constitution.

\(^{213}\) Bond v. United States, 131 S. Ct. 2355, 2364 (2011).

\(^{214}\) Id.

\(^{215}\) Id. at 2365 (“[T]he dynamic between and among the branches is not the only object of the Constitution’s concern. The structural principles secured by the separation of powers protect the individual as well.”).
More importantly, however, it must clarify the confines of this doctrine and explain that it is not limited—nor should it be—to Congress’s exercise of its remedial power under the Fifteenth Amendment. This Comment concludes that the *Northwest Austin* test should be expressly adopted by the Court to aid lower courts in consistently and productively applying the principle of equal sovereignty in the future.