AN "EQUAL SOVEREIGNTY" PRINCIPLE BORN IN *NORTHWEST AUSTIN*, TEXAS, RAISED IN *SHELBY COUNTY*, ALABAMA

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"[A] small inconsequential village will shortly find out that there are causes and effects that have no precedent – such is usually the case in the Twilight Zone."

ROD SERLING, *The Twilight Zone: I Am the Night – Color Me Black* (CBS television broadcast Mar. 27, 1964)

Introduction

The 1965 Voting Rights Act[1] brought to a halt the regime of organized racial discrimination against voters in the South, by subjecting offending states and localities to federal oversight whenever they wanted to implement new voting procedures. But this renewable remedy as a viable solution to the historical and ongoing disenfranchisement of voters of color, would be short-lived. In 2009, the United States Supreme Court, in *Northwest Austin Municipal Utility District No. One v. Holder*, reinterpreted the mechanism used to identify the worst offending jurisdictions, as an infringement upon state sovereignty.[2] This would mark the eventual undoing of the heart of the Act, by the Court's 2013 opinion in *Shelby County v. Holder*.[3]

*Cornell University, B.S., Albany Law School, J.D. Thanks to my parents for inspiring this essay. I regret that I never thanked my Dad for the stories of his time in Virginia during the 1950's, where as a young Chinese American decorated veteran of the United States Army, he had to use either "White" or "Colored" facilities depending on who interpreted and enforced the rules at any given moment. Dad, thank you for everything you gave to us and this country. Mom, as always, thank you for your sacrifices making everything else I have possible. I am grateful to Anthony Paul Farley for the invitation to participate in this symposium. I also thank Deborah W. Post for insightful feedback on the earlier draft. This essay is also dedicated to the memory of Sylvia, Buddy, Rocky and Venice, each of whom displayed more humanity than the Court could ever bestow upon a state.

[1]Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1973-1973aa-6 (2006)).

[2]Northwest Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009).

[3]Shelby County v. Holder, 133 S.Ct. 2612 (2013).

Chief Justice John Roberts, who wrote both opinions, cited an "historic tradition that all the States enjoy 'equal sovereignty'"[4] and announced a "fundamental principle of equal sovereignty" of the states,[5] in the *Northwest Austin* opinion. Simultaneously drawing from and ignoring the long history of the unequal application of the *equal footing doctrine* for newly admitted states,[6] it appears the Chief Justice cleverly (or not so cleverly) dissected the definition of the doctrine[7] to equate "equal sovereignty" with an "equal footing," created a principle from within the doctrine, and then called it "fundamental," all with remarkable expediency.[8] The so-called "equal sovereignty" principle – made up of cut and pasted words and concepts[9] – has far reaching implications beyond weakening the Voting Rights Act and the issue of voter suppression in areas previously covered by the statute.[10]

This essay examines how Chief Justice Roberts, over the course of two Supreme Court opinions, created and applied a new "fundamental principle of equal sovereignty" which became the basis for invalidating a key component of the Voting Rights Act. The principle is a derivative of the equal footing doctrine, whereby new states are to be admitted with the same rights,

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[4]*Northwest Austin*, 557 U.S. at 203 (citing United States v. La., 363 U.S. 1 (1960) (citing Pollard v. Hagan, 44 U.S. 212, 223 (1845)).

[5]*Id.* at 203.

[6]This analysis of the history of the *equal footing doctrine* and its evolution into the so-called "equal sovereignty" principle is limited to the historical pretense of new sovereignties formed from unsettled land. The discussion of the taking of land and displacement of the first nations, in order to carve out the United States, is a subject that deserves its own scholarship.

[7]BLACK'S LAW DICTIONARY 240 (2nd Pocket ed. 2001) ("The principle that a state admitted to the Union after 1789 enters with the same rights, sovereignty, and jurisdiction within its borders as did the original 13 states.").

[8]*See generally* Suzanna Sherry, *Foundational Facts and Doctrinal Change*, 2011 U. ILL. L. REV. 145, 146 (2011) ("[J]udges may be unaware of (or unwilling to acknowledge) either the original assumptions or their replacements. This blindness can yield a jarring discontinuity between old doctrine and new doctrine, accompanied by a denial that the doctrine is changing at all.").

[9]*See* Victoria F. Nourse, *Making Constitutional Doctrine in a Realist Age*, 145 U. PA. L. REV. 1401, 1403 (1997) ("Doctrine is not simply random word-choice, but reflected job description.").

[10]*See, e.g.*, Letter from Greg Abbott to Kay Bailey Hutchison and John Cornyn (Jan. 5, 2010), 1 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP 51, 53 (2011) (arguing that the "Nebraska Compromise" for the passage of the Patient Protection and Affordable Care Act is unjustified in light of the "fundamental principle of equal sovereignty").

sovereignty and jurisdiction, equal to that of the original thirteen states. But the Court and others refer to the principle indistinguishably from references to the equal footing doctrine, adopting its case law history and thereby assuming a broader meaning for the underlying doctrine.[11] Whereas the *equal footing doctrine* applies to the admission of new states to the Union on an equal footing with the existing states, the "equal sovereignty" principle stands for the notion of a perpetual equality of the states. The irony here is that most of the states were not admitted on an equal footing, but rather with conditions and stipulations other states were not subject to.[12] Given the fact that the states were founded on unequal terms, the equal footing doctrine has existed more in form than substance. What the derivative "equal sovereignty" principle lacked in common law significance, the "fundamental" label would garner in constitutional credibility, for the Court to re-establish an ideology of the equality of the states.[13]

The "fundamental principle of equal sovereignty" reflects the trajectory in jurisprudence of the Roberts Court[14] and a leap back in time for this

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[11]*Shelby County*, 133 S.Ct. 2612; *Northwest Austin*, 557 U.S. at 203; *see, e.g.*, John G. Tamasitis, "*Things Have Changed in the South": How Preclearance of South Carolina's Voter Photo ID Law Demonstrates that Section 5 of the Voting Rights Act is No Longer a Constitutional Remedy*, 64 S.C. L. REV. 959, 988 (2013) (alteration in original) (citations omitted). Tamasitis confounded the principle with the doctrine:

> The concept of "equal sovereignty" rests on the principle that when a new state is admitted into the Union, it is provided all the powers that were afforded to the original states, and those powers may not be "diminished or impaired" by conditions under which the new state entered the Union. As a result, no state can be "deprived of any of the power constitutionally possessed by other [s]tates" so as to place them on unequal footing.

[12]*See* Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119 (2004).

[13]*See* Nourse, *supra* note 9, at 1435-36. Nourse explained how the "fundamental" label can boost the meaning behind a principle:

> The story is familiar enough: one day a judge has occasion to use an expression that involves an adjective of weight, power, strength, or direction (for example, "compelling," "hard," or "fundamental"). Upon reading this opinion, later courts seize upon the adjective and conclude that the earlier case stands for a principle that the adjective announces. Over time and repeated use, the chosen phrase is elevated to constitutional stardom.

[14]*See* Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1620-21 (2009) (citations omitted). Cho recognized that the Roberts Court had embarked on a new course of jurisprudence after the *Parents Involved* opinion in 2007, and was prescient enough to foretell that the then-upcoming *Northwest Austin* case might elucidate that new course:

nation. With a premium placed on deference to equal state sovereignty over equal protection of individuals, the paradox in the *Shelby County* opinion helped the South to rise again and become the center of this controversy. The history of non-enforcement of the post-Civil-War Amendments,[15] as a nod to

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> After analyzing the recent Parents Involved case as an incident suggesting a post-racial turn in the Court, it is entirely too early to tell whether the Court will continue to deploy colorblindness in its post-civil rights rhetoric or shift towards post-racialism. Upcoming cases on both employment discrimination and voting rights will provide a better database upon which this question might be revisited. Although Justice Roberts seems quite adept at the moral-equivalence soundbyte [sic] feature of post-racialism, such statements are also consistent with colorblindness and may remain just that. If future cases dealing with racial remediation effectuate a retreat from race, invoking racial progress or transcendence, race-neutral universalisms, moral equivalences, and distancing from standard civil-rights approaches, one would be on firmer grounds to announce the emergence of a post-racial Court.

[15] *Id.* at 1606 (citations omitted). Cho placed the post-Reconstruction period in the context of a racial-dictatorship era, wherein the post-Civil-War Amendments were circumvented in the name of states-rights-based federalism:

> The passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, along with Reconstruction-era civil-rights statutes, provided a brief respite from the racial-dictatorship era following the Civil War. This respite, a result of an interest convergence in maintaining Republican Party influence in the South, was cut short by the Hayes-Tilden Compromise of 1877, which ushered in the post-Reconstruction era with a vengeance. The post-Reconstruction era, with its devolution of state-based federalism accompanied by the withdrawal of federal troops from the South, left no significant federal support in place to enforce the rights of formerly enslaved people. In Derrick Bell's terms, the Hayes-Tilden Compromise represented the ultimate racial compromise: allowing disparate groups of whites to settle their political differences over the involuntary sacrifice of Blacks.
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> In the racial-dictatorship era, unreconstructed white normativity prevailed and legislatures passed laws that were clearly "race-d" to disadvantage peoples of color under the auspice of "states-rights" - based federalism. The courts in the racial-dictatorship era provided little relief. Indeed, courts eviscerated the meaning of the Reconstruction Amendments and civil-rights statutes by using seemingly neutral strategies to disenfranchise peoples of color in lockstep with sociopolitical forces that sought to restore the South's honor.

the dignity of the Southern states following their defeat in the War, was resurrected by Chief Justice Roberts' concoction of a principle used to release the states from federal oversight of local attempts at voter suppression.[16]

The "equal sovereignty" principle has already been applied to other issues besides voting legislation, and now its influence as a constitutional precedent appears dangerously limitless. As a principle derived from a doctrine which has endured in name but been applied pretentiously throughout this nation's history, the fundamental "equal sovereignty" principle has had to establish itself in the tradition of its creator's "existential logic,"[17] whereby according to Chief Justice Roberts, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[18] The method by which Roberts has imposed the principle into the lexicon of Constitutional law follows that rule of logic; that is, the way to create precedent is to create a precedent.

I. The Voting Rights Act: Uncovered

The Voting Rights Act of 1965 contained three key components: (1) a *nationwide ban* on voter discrimination based on race or color (protection for language-minority voters would be added in 1975), and (2) a *coverage formula* that determined how states and localities would be selected for (3) a *preclearance requirement*, under which the covered states and localities were subject to federal approval before enacting any changes to their voting procedures.[19] These were §§ 2, 4(b) and 5 respectively.[20] The Act was passed to eliminate organized voter suppression in parts of the nation with

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[16]*See* Joseph Fishkin, *The Dignity of the South*, 123 YALE L.J. ONLINE 175, para. 4 (2013), http://yalelawjournal.org/2013/06/08/fishkin.html (footnotes omitted) ("The Court invoked what it called a 'fundamental principle of equal sovereignty' of the states. This principle has a nice ring to it. But as a constraint on the federal government's power to treat states unequally, it has no basis either in constitutional text or in existing constitutional doctrine.").

[17]David Kow, *The (Un)compelling Interest for Underrepresented Minority Students: Enhancing the Education of White Students Underexposed to Racial Diversity*, 20 BERKELEY LA RAZA L.J. 157, 168 (2010).

[18]Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).

[19]42 U.S.C. §§ 1973(a), 1973b(b), 1973c (2006); *see also* Voting Rights Act Amendments of 1975, § 203 (requiring multilingual voting support for non-English-speaking voters).

[20]42 U.S.C. §§ 1973(a), 1973b(b), 1973c.

"entrenched racial discrimination" against voters of color.[21] "[T]he unprovoked attack on March 7, 1965, by state troopers on peaceful marchers crossing the Edmund Pettus Bridge in Selma, Alabama, en route to the state capitol in Montgomery, persuaded . . . President [Johnson] and Congress to overcome Southern legislators' resistance to effective voting rights legislation."[22] The initial law was set to expire after five years.[23]

In 2006, Congress reauthorized the Voting Rights Act for the fourth time, extending its provisions for another twenty-five years.[24] Before the final vote, "[t]he House and Senate Judiciary Committees held 21 hearings, heard from scores of witnesses, received a number of investigative reports and other written documentation of continuing discrimination in covered jurisdictions. In all, the legislative record Congress compiled filled more than 15,000 pages."[25] The reauthorization passed by a vote of 390 – 33 in the House, and 98 – 0 in the Senate.[26] Compelling data and anecdotes revealed a "second-generation" form of racial discrimination taking root in place of largely eradicated "first-generation barriers" against voters of color.[27] "Efforts to reduce the impact of minority votes, in contrast to direct attempts to block access to the ballot, are aptly described as 'second-generation barriers' to minority voting."[28]

"The coverage formula remained the same, based on the use of voting-eligibility tests and the rate of registration and turnout among all voters, but the pertinent dates for assessing these criteria moved from 1964 to include

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[21]*Shelby County*, 133 S.Ct. at 2618; *see also* South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966) (footnote omitted) ("The Voting Rights Act of 1965 reflects Congress' firm intention to rid the country of racial discrimination in voting. The heart of the Act is a complex scheme of stringent remedies aimed at areas where voting discrimination has been most flagrant."), *abrogated by Shelby County*, 133 S.Ct. 2612.
[22]United States Department of Justice, Civil Rights Division, History of Federal Voting Rights Laws, http://www.justice.gov/crt/about/vot/intro/intro_b.php (last visited Sept. 23, 2013).
[23]42 U.S.C. § 1973b(a) (1965).
[24]42 U.S.C. § 1973b(a)(8) (2006).
[25]*Shelby County*, 133 S.Ct. at 2636 (Ginsburg, J., dissenting) (citation omitted).
[26]152 Cong. Rec. 14,303-304, 15,325 (2006).
[27]*Shelby County*, 133 S.Ct. at 2651 (Ginsburg, J., dissenting).
[28]*Id.* at 2634 (Ginsburg, J., dissenting).

1968 and eventually 1972."[29] If "the Attorney General determine[d] [that a state or political subdivision] maintained on November 1, 1972, any test or device" such that "less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972," this *coverage formula* applied to subject that state or political subdivision to preclearance as of 1975.[30] "The [Act] permits a jurisdiction to bail out by showing that it has complied with the Act for ten years, and has engaged in efforts to eliminate intimidation and harassment of voters."[31] "It also authorizes a court to subject a noncovered [sic] jurisdiction to federal preclearance upon finding that violations of the Fourteenth and Fifteenth Amendments have occurred there."[32]

In 2009, the constitutionality of the §5 preclearance requirement was challenged by a Texas utility district in the *Northwest Austin* case.[33] The Supreme Court side-stepped the constitutional question, decided a separate statutory issue and remanded the case back to the United States District Court in Washington, D.C.[34] In 2013, the Supreme Court heard its next challenge to the constitutionality of the Voting Rights Act, this time brought by Shelby County, Alabama.[35] Just four years later, the outcome was markedly different. In *Shelby County*, the Court held that the §4(b) coverage formula was unconstitutional.[36] In a 5 – 4 decision, the majority effectively ended two of the main provisions of the Act, invalidating the coverage formula, and by implication, neutralizing the preclearance requirement.[37]

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[29]*Northwest Austin*, 557 U.S. at 200 (citing 42 U.S.C. § 1973b(b)).
[30]42 U.S.C. § 1973b(b) (2006 ed.).
[31]*Shelby County*, 133 S.Ct. at 2644 (Ginsburg, J., dissenting) (citing 42 U.S.C. § 1973b(a) (2006 ed. and Supp. V)).
[32]*Id.* (citing 42 U.S.C. § 1973a(c) (2006 ed.)).
[33]*Northwest Austin*, 557 U.S. 193.
[34]*Id.*
[35]*Shelby County*, 133 S.Ct. 2612.
[36]*Id.* at 2631.
[37]*Id.*

II. Giving Birth to a "Fundamental Principle of Equal Sovereignty"

Although not dispositive of the outcome in *Northwest Austin*,[38] Chief Justice Roberts gave birth in that case to a "fundamental principle of equal sovereignty" that would prove to be a decisive precedent[39] in *Shelby County*.[40] Depicting a legal principle as "fundamental" elevates its status in Constitutional law.[41] The notion of "equal sovereignty" in the context of federalism, was presented as a "fundamental principle" for the first time in *Northwest Austin*, yet even then only once in dicta without explanation.[42] The equal sovereignty principle, buttressed by the "fundamental" label, could therefore be afforded as much (if not more) jurisprudential weight as the fundamental voting rights[43] of citizens of the covered jurisdictions. That

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[38]*Northwest Austin*, 557 U.S. at 197 ("Our usual practice is to avoid the unnecessary resolution of constitutional questions.").

[39]*Cf.* Charles Fried, *Constitutional Doctrine*, 107 HARV. L. REV. 1140, 1144 (1994). Fried discussed two requirements for doctrinal precedent:

> We require continuity in legal doctrine. Yet we also require each new decision to be more or less right on its merits, and not just because it accords with prior cases. The only way we can have both is for the new decision to be right, in part at least, because it accords with established doctrine . . . .

[40]*Shelby County*, 133 S.Ct. at 2624 (citing *Northwest Austin*, 557 U.S. at 203) ("[A]s we made clear in *Northwest Austin*, the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States.").

[41]*See* Nourse, *supra* note 9, at 1435-36.

[42]*Northwest Austin*, 557 U.S. at 203.

[43]*See, e.g.*, Bartlett v. Strickland, 556 U.S. 1, 10 (2009) ("one of the most fundamental rights of our citizens: the right to vote"); Bush v. Gore, 531 U.S. 98, 104 (2000) ("the right to vote as the legislature has prescribed is fundamental"); *cf.* Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL'Y 143, 145 (2008) ("Although the right to vote is considered a 'fundamental' right, courts often treat the right to vote as less than fundamental by employing a low level of scrutiny to election law challenges.").

"fundamental principle" is then cited numerous times in *Shelby County*, cementing its constitutional status.[44]

In the *Northwest Austin* opinion, the following was the single sentence where the Chief Justice used the word "fundamental" to describe the principle, citing no authority: "But 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."[45] This was only the second of two instances in the entire opinion mentioning the term "equal sovereignty," both in dicta.[46] Yet in the *Shelby County* opinion, the Chief Justice refers to an "equal sovereignty" principle seven times,[47] referencing his own "fundamental" sentence from *Northwest Austin* three times.[48] More problematic for the legitimacy of the principle is the incorrect citation in *Shelby County*, attributing the quoted phrase "fundamental principle of *equal* sovereignty" (with emphasis added by the Chief Justice) to a *Northwest Austin* citation to *United States v. Louisiana*, 363 U.S. 1, 16 (1960), *Lessee of Pollard v. Hagan*, 3 How. 212, 223 (1845) and *Texas v. White*, 7 Wall. 700, 725–726 (1869).[49] In fact, in *Northwest Austin*, it was the other "equal sovereignty" sentence regarding an "historic tradition that all the States enjoy 'equal sovereignty'" that cited to those other cases.[50] An "historic tradition" is not interchangeable with a "fundamental principle," and nowhere in those cited cases is the notion of "equal sovereignty"

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[44]*Shelby County*, 133 S.Ct. 2612 *passim*; *cf.* Fried, *supra* note 39, at 1141-42. Fried explained the link between credibility of cited cases and legal doctrine:

> Although doctrine does not entail respect for precedent, respect for precedent comes much closer to entailing doctrine. Reference to a prior decision to justify a present one requires identifying what it is about the prior decision that is being carried forward. A judge might, of course, say no more than that this new case seems similar to the old one and decline to explain what it is about the precedent that makes it controlling. If the citation is more than decoration, however, it implies that the prior decision explains and justifies the present result. Such an explanation is at least the germ of a doctrine . . . .

[45]*Northwest Austin*, 557 U.S. at 203.

[46]*Id.*

[47]*Shelby County*, 133 S.Ct. at 2618, 2621, 2622, 2623, 2624, 2630.

[48]*Id.* at 2622, 2623, 2624.

[49]*Shelby County*, 133 S.Ct. at 2623 (incorrect citation in original).

[50]*Northwest Austin*, 557 U.S. at 203.

discussed as "fundamental."[51] Moreover, with legislated disparities in rights and conditions of statehood among admitted states, the notions of an "equal footing" and "equal sovereignty" of the states have survived in the Court's mind and jurisprudence more as rhetorical heritage than true historic tradition.[52] Although modern-day seeds of a sovereign-dignity-of-states ideology appeared in two Supreme Court opinions in 1999, this may be distinguishable from the "equal sovereignty" principle since neither case was mentioned by the Chief Justice in *Northwest Austin* or *Shelby County*[53] – only one was cited once in the concurring opinion by Justice Thomas in *Northwest Austin*.[54]

A proper citation by Chief Justice Roberts in both *Northwest Austin* and *Shelby County*, for the phrase "fundamental principle of equal sovereignty," might have been to *Mexico's Position Regarding the Helms-Burton Act and Cuba*, dated August 28, 1996.[55] Mexico's concerns about the ongoing sanctions against Cuba and the reach of the United States created by the legislation announcing sanctions against Mexican companies and citizens if they engaged in commerce with Cuba, included the now-federalism-identified phrase of the Roberts Court. *Mexico's Position* reads in part: "Regarding the Helms-Burton Act . . . [,] [t]his legislation includes specific measures regarding its extraterritorial enforcement, which ignore the *fundamental principle of equal sovereignty* among States, and, consequently, are clearly incompatible with international law."[56] But, of course, referencing Mexico's 1996 position on a piece of legislation affecting *international* relations among nation-states, would undermine the proposition that the

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[51]*Shelby County*, 133 S.Ct. at 2623 (incorrectly citing *Northwest Austin*, 557 U.S. at 203 (citing United States v. Louisiana, 363 U.S. 1, 16 (1960); Lessee of Pollard v. Hagan, 3 How. 212, 223 (1845); and Texas v. White, 7 Wall. 700, 725–726 (1869) (order of citation in original))).

[52]*See infra* Part III; Biber, *supra* note 12, at 124 ("[T]he history of the use of conditions--used unequally against states that are perceived as different or disloyal, . . . and to subordinate states to an overarching federal system--raises questions about the historical grounding for the Court's legal conclusions.").

[53]*See* Alden v. Maine, 527 U.S. 706 (1999); College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 627 (1999).

[54]*Northwest Austin*, 557 U.S. at 217 (Thomas, J., concurring) (citing *Alden*, 527 U.S. at 713).

[55]*See* Mexico's Position Regarding the Helms-Burton Act and Cuba (Aug. 28, 1996), 20 HASTINGS INT'L & COMP. L. REV. 809 (1997).

[56]*Id.* at 812 (emphasis added).

principle stands for a federalism-based equal sovereignty. Omission of a legitimate citation reveals instead, a borrowed concept and unattributed phrase.

There was no authority cited in *Northwest Austin* for the federalism-proposition of a "fundamental principle of equal sovereignty," because up to that point none existed.[57] In *Shelby County*, as the next Supreme Court case on the constitutionality of the Voting Rights Act, the only authority that Chief Justice Roberts could have properly cited, to support the proposition, was his own *Northwest Austin* opinion from four years earlier.[58] A more skeptical view questions whether the Chief Justice did not intend the "equal sovereignty" principle to be couched in dicta and thus ignored by the other Justices in *Northwest Austin*, thereby allowing for its fermentation into precedent for citation by the next constitutional challenge to the Act.[59]

The Chief Justice explained, "[I]n 2009, we took care to avoid ruling on the constitutionality of the Voting Rights Act when asked to do so, and instead resolved the case then before us on statutory grounds. But in issuing that decision, we expressed our broader concerns about the constitutionality of the Act."[60] Lacking a precedent to nullify the parts of the Act in question, Chief Justice Roberts had no choice but to decide *Northwest Austin* on the statutory issue. In order to avoid this predicament in the next case, he created the "fundamental principle of equal sovereignty" as dictum, which could then be cited as precedent from that point forward.

In 2005, during his Senate confirmation hearing to become the next Chief Justice, the then-Judge Roberts testified that "Judges are like umpires.

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[57]*Northwest Austin*, 557 U.S. at 203.

[58]*See, e.g.*, *Shelby County*, 133 S.Ct. at 2622 (citation and footnote omitted). With no other authority for his proposition, Chief Justice Roberts relied on his own earlier opinion:

> In *Northwest Austin*, we stated that "the Act imposes current burdens and must be justified by current needs." And we concluded 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." These basic principles guide our review of the question before us.

[59]*See* Richard A. Posner, *The Voting Rights Act Ruling is about the Conservative Imagination.*, SLATE, June 26, 2013, 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.

[60]*Shelby County*, 133 S.Ct. at 2631.

Umpires don't make the rules, they apply them."[61] However, extending the baseball metaphor, he announced in *Northwest Austin* the rule 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[,]"[62] and then in *Shelby County*, applying that rule, he called a strike-three against the same coverage formula in existence during the earlier case. With these two opinions, the Chief Justice both made a rule and applied it, and thus the principle was born in *Northwest Austin* and raised in *Shelby County*.

III. Unequal Sovereignty Among the States, Under the Equal Footing Doctrine

Chief Justice Roberts' majority opinion in *Shelby County* belies the true history of an unequal sovereignty among the states. Not only was the language of state equality considered and debated at the Constitutional Convention, and then intentionally omitted from the text of the Constitution,[63] but of the states admitted after the original thirteen were formed, nearly all had some condition or stipulation tied to their statehood that did not apply equally to the other states.[64] Moreover, slavery became a defining trait, whereby states were admitted as "slave states" or "free states" up to the time of the Civil War.[65] Later, the period of Reconstruction would end abruptly with the Hayes-Tilden Compromise of 1877, which allowed for the legacy of non-enforcement of the post-Civil-War Amendments in the

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[61]Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary, 109th Cong. 55 (2005).

[62]*Northwest Austin*, 557 U.S. at 203.

[63]2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 454 (rev. ed. 1937).

[64]*See* Biber, *supra* note 12, at 120 ("Of the thirty-seven states admitted to the Union since the adoption of the Constitution (plus the eleven Southern states readmitted after the Civil War), almost all of them have had some sort of condition imposed on them when they were admitted.").

[65]*See id.* at 127 ("And slavery, of course, was a major factor in the admission of states before the Civil War."); *see also* Steve Suitts, *States' Rights Resurgent: The Attack on the Voting Rights Act*, SOUTHERN SPACES, Aug. 29, 2013, http://www.southernspaces.org/2013/states-rights-resurgent-attack-voting-rights-act#section1 (describing how "every time Congress considered acquiring new territory or adopting a new state, [it] had to be declared 'free' or 'slave.'").

Southern states, ushering in a new era of racial oppression.[66] These inequalities among the states existed against the backdrop of the equal footing doctrine.

At the beginning of the republic, there were thirteen states born of colonization, followed by revolution, then confederation. With the eastern part of the present-day continental United States divided into the original states by the colonial settlers, the land to the west had yet to be converted. Before new territories could be established, some of the land had to be ceded to the federal government by the existing states, for the purpose of eventually creating and admitting new states to the Union. This was accomplished by compacts between the federal government and the original land-holding states, enabling acts and other means to admit new states.[67]

The Commonwealth of Virginia ceded the land that would eventually become the states of Ohio, Indiana, Illinois, Michigan, Wisconsin, and part of Minnesota.[68] But before the land, known as the Northwest Territory, became these states, the Continental Congress adopted the Ordinance of 1784, containing "the first specific use of the term 'equal footing,'" to structure the governance of the territories and lay the groundwork for statehood.[69] This was later replaced by the Northwest Ordinance of 1787, which became the foundation for state admissions "on an equal footing,"[70] notwithstanding its article banning slavery[71] and despite various selective conditions of statehood imposed by Congress. Maintaining the illusion of an "equal footing" was so important that "[s]ince the admission of Tennessee in 1796, Congress has included in each State's act of admission a clause providing that the State

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[66]*See supra* text accompanying note 15.

[67]*See* Biber, *supra* note 12, at 128 ("The enabling act is important because it is usually the bill which spells out the conditions that Congress expects the new state to meet before (and after) admission . . . .").

[68]Digital History, http://www.digitalhistory.uh.edu/disp_textbook_print.cfm?smtid=3&psid=255 (last visited Sept. 2, 2013).

[69]James R. Rasband, *The Disregarded Common Parentage of the Equal Footing and Public Trust Doctrines*, 32 LAND & WATER L. REV. 1, 32 (1997).

[70]*Id.* at 33-34.

[71]Ordinance of 1787: The Northwest Territorial Government, art. VI, 1 U.S.C., XLIII, LVLVII (Office of the Law Revision Counsel of the House of Representatives ed., 2006).

enters the Union 'on an equal footing with the original States in all respects whatever.'"[72]

Even as the new states were subjected to disparate treatment by the federal government, the equal footing doctrine persevered and gained political favor.[73] "The historical record thus reveals that the equal footing language arose out of a concern that if western territories were not promised admission to the Union on an equal sovereign footing, insurrection from within or influence from without could entice them away from the United States."[74] Today, this historical denial continues with the birth of the "fundamental principle of equal sovereignty," despite the origins of an *unequal* sovereignty of the states.

The Northwest Ordinance of 1787, including its language of "equal footing" and the ban on slavery, was readopted by the United States in the Act of 1789, in order to bind all states to its terms after the Constitution was ratified.[75] However, this did not deter Georgia in 1802 from ceding its western lands with the stipulation that any state created out of this territory would be subject to the terms of the Northwest Ordinance, *except for* the Article banning slavery.[76] Congress accepted this stipulation, paving the way for the admission of Mississippi in 1817 and Alabama in 1819 as slave states.[77] The Constitution as ratified had no impact on the slavery status of new states, with Kentucky admitted in 1792 as a slave state and Ohio in 1803 as a free state, "thereby making the Ohio River a natural dividing line between the free and slave states of the country."[78]

The 1850 Supreme Court case, *Strader v. Graham*, involved three men enslaved under Kentucky law who entered the free state of Ohio and escaped

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[72]Doctrine of the Equality of States, http://law.onecle.com/constitution/article-4/22-doctrine-of-equality-of-states.html (last visited Aug. 23, 2013).

[73]*See* Biber, *supra* note 12, at 123-24.

[74]Rasband, *supra* note 69, at 34.

[75]*See id.* at 33 n.130.

[76]*See Pollard*, 44 U.S. at 221-22.

[77]*See id.* at 226-27; Biber, *supra* note 12, at 202.

[78]The Northwest Ordinance of 1787 and its Effects, http://www.americanhistoryusa.com/ northwest-ordinance-1787-effects/ (last visited Sept. 2, 2013).

to Canada.[79] The Court held that Ohio's ban on slavery was based on the Ordinance of 1787, and that no provision of the Ordinance was applicable to other territories and the states once the Constitution had been adopted.[80] For this argument, Chief Justice Taney referred to the Court's 1845 case, *Pollard v. Hagan*, and its discussion of the Ordinance and the applicability of acts of Congress to other territories.[81]

Pollard v. Hagan and *Coyle v. Smith* are the two seminal equal footing doctrine cases.[82] In *Pollard*, the issue concerned navigable waters and the submerged lands underneath, and whether Alabama acquired the title to these lands within its borders upon admission as a new state, or the federal government retained ownership under the enabling act for the pre-statehood territory.[83] The Court ruled in favor of Alabama and held that the state "has been admitted into the union on an equal footing with the original states"[84] and that "new states have the same rights, sovereignty, and jurisdiction over this subject as the original states."[85] As mentioned in *Strader*, the Court in *Pollard* also discussed the applicability of acts of Congress:

> Every constitutional act of Congress is passed by the will of the people of the United States, expressed through their representatives, on the subject-matter of the enactment; and when so passed it becomes the supreme law of the land, and operates by its own force on the subject-matter, in whatever state or territory it may happen to be. The proposition, therefore, that such a law cannot operate upon the subject-matter of its enactment, without the express consent of the people of the new state where it may happen to be, contains its own refutation, and requires no farther examination.[86]

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[79]Strader v. Graham, 51 U.S. 82 (1850).
[80]*Id.* at 96-97.
[81]*Id.* at 95 (citing *Pollard*, 44 U.S. 212).
[82]*See* Biber, *supra* note 12, at 175 (citing Coyle v. Smith, 221 U.S. 559 (1911) and *Pollard*, 44 U.S. 212).
[83]*Pollard*, 44 U.S. 212.
[84]*Id.* at 229.
[85]*Id.* at 230.
[86]*Id.* at 224-25.

Although the Court in *Strader* announced that the Northwest Ordinance was not binding on new states outside the original Northwest Territory, and therefore due to the equality of the states, also could no longer be binding on the states formed within the Territory, and that the Ordinance and its readopted 1789 version were nullified when the Constitution took effect, *Pollard* stands for a different proposition. In its discussion of the applicability of acts of Congress, the Court in *Pollard* acknowledged that a constitutional act passed by Congress pertaining to any particular state or territory, not necessarily upon its admission but also thereafter, is binding on that jurisdiction.[87] Furthermore, it is not a prerequisite for the state or territory to expressly agree to be bound by the act in order to be subject to its terms. Therefore, according to this reasoning and in contrast to the *Strader* holding, the fact that Congress readopted the Northwest Ordinance of 1787 in the Act of 1789, after the Constitution was ratified, means that the terms of the 1789 Act *are* applicable to new states and territories, insofar as the terms do not conflict with the Constitution. Even if *Strader*'s holding were correct, Congress continued to admit new states with terms derived from the Ordinance, and since the distinction between free and slave states remained, the nation continued to grow as a union of unequal sovereignties.

The explicit pronouncement in the *Pollard* opinion means that a federal law is not per se unconstitutional by virtue of its differential application upon the various states. Rather, a federal law that applies to a particular state (and not necessarily others) will be binding on that state, when the law is duly passed by Congress and otherwise constitutional. *Coyle* stands for a similar proposition, that Congress may only impose those conditions on a state's admission that its powers under the Constitution would allow it to impose upon other states.[88] Both *Pollard* and *Coyle* support the constitutionality of the targeted treatment of covered jurisdictions under the §4(b) coverage formula of the Voting Rights Act. The propositions in these seminal cases mean that the coverage formula did not have to apply the §5 preclearance provision equally to all areas of the country in which it *could* apply, that is, everywhere voter discrimination meets the criteria of the

[87] *Id.*

[88] *Coyle*, 221 U.S. at 573-74.

formula, but that it may limit §5's application to only certain areas as long as §5 *could be* applied everywhere.

To make the argument for an "historic tradition" of "equal sovereignty," Chief Justice Roberts referenced both *Pollard* and *Coyle*.[89] But neither of these opinions supports the notion of a principle of equal sovereignty invalidating the targeted application of federal law to select areas of the nation. In his essay, *The Dignity of the South*, Joseph Fishkin described how the Chief Justice even used creative editing of text in another case to change its meaning, in order to affirm his professed principle:

> In *South Carolina v. Katzenbach*, in 1966, the Court actually considered and rejected this same argument against section 5 of the [Voting Rights Act], holding that South Carolina's invocation of a "doctrine of the equality of the states" posed no problem because "that doctrine applies only to the terms upon which States are admitted to the Union," not to a statutory provision like section 5. Rather audaciously, the [*Northwest Austin*] Court quoted this very sentence from *Katzenbach* as support for the idea that a ""doctrine of the equality of the states" exists--concealing the part about how ""that doctrine applies only to the terms upon which States are admitted to the Union" behind a strategically placed ellipsis.[90]

Despite the *Strader* holding invalidating the Northwest Ordinance's ban on slavery, the nation continued to progress along this divide. While the humanitarian tragedy of slavery is unquestionable today, at the time, newly formed states where the ban applied, could not develop their respective economies in the same manner as the states that benefited from the aggregate labor of the enslaved masses. In states that maintained the practice, "[p]owerful economic and political interests protected Black

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[89]*Shelby County*, 133 S.Ct. at 2623; *Northwest Austin*, 557 U.S. at 203.

[90]Fishkin, *supra* note 16, at para. 4 (footnotes omitted) (citing *Katzenbach*, 383 U.S. at 328-29 (1966); *Northwest Austin*, 557 U.S. at 203); *see generally* Suzanna Sherry, *The Four Pillars of Constitutional Doctrine*, 32 CARDOZO L. REV. 969, 973 (2011) ("We should expect judges to straightforwardly and honestly give the reasons for their decision. A lack of candor would allow judges to evade the rule of law because they could reach their preferred results without confronting doctrinal inconsistencies, inconvenient facts or legal sources, or powerful counterarguments.").

slavery."[91] This basic difference between the states led the nation down the path of war, as the Southern states asserted their sovereignty from the North. Following their defeat in the Civil War, "[t]he readmission of the Southern states was attached to a number of significant conditions, including the ratification of the Fourteenth Amendment, and a requirement that the suffrage of all state citizens who had voting rights under the Reconstruction state constitutions--which provided for black suffrage--never be abridged."[92]

"[T]he Military Reconstruction Act of 1867, which allowed former Confederate states to be readmitted to the Union if they adopted new state constitutions that permitted universal male suffrage, catapulted newly emancipated slaves into an unmatched period of active democratic engagement."[93] "Early Reconstruction legislatures were marshalled [sic] by high levels of Black voters and deep political mobilization. For example, voting turnout for Blacks in the early years of Reconstruction sometimes reached as high as ninety percent."[94]

In 1876, after a hotly contested Presidential election, what followed was a notorious era of disparity between the Northern and Southern states, in the name of states' rights.[95] The Hayes-Tilden Compromise of 1877 effectively ended the gains made under Reconstruction, when the close election result was settled by the political compromise giving the presidency to Republican Rutherford B. Hayes in exchange for the withdrawal of federal troops from the South, paving the way there for non-enforcement of federal civil rights laws, suppression of the Black vote and de jure racial segregation.[96] Professor Sumi Cho described how the former-Confederate states used the courts to undo civil rights protections for their African

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[91]john a. powell, *The Race and Class Nexus: An Intersectional Perspective*, 25 LAW & INEQ. 355, 363 (2007).
[92]Biber, *supra* note 12, at 143-44 (footnotes omitted).
[93]Sheryll D. Cashin, *Democracy, Race, and Multiculturalism in the Twenty-First Century: Will the Voting Rights Act Ever Be Obsolete?*, 22 WASH. U. J.L. & POL'Y 71, 75-76 (2006) (citing Reconstruction Act of 1867, 14 Stat. 428-429, 15 Stat. 2-4, 14-16 (1867)).
[94]powell, *supra* note 91, at 375 (footnote omitted).
[95]*See* Suitts, *supra* note 65.
[96]*See* Cho, *supra* note 14, at 1606; Suitts, *supra* note 65.

American citizens, and the Supreme Court's refusal to enforce the post-Civil-War Amendments:

> Southern states sought to eliminate federal oversight of state affairs because they fiercely opposed the juridical equality suggested by the Thirteenth, Fourteenth, and Fifteenth Amendments and the Reconstruction Acts. Subsequent nineteenth-century Supreme Court decisions similarly announced neutral-sounding rationales such as "no private constitutional rights," "no special rights," and "equal application," to defeat civil-rights legislation and newly enacted constitutional protections. These cases all involved African Americans, and the Court decided them in opposition to civil rights, as necessitated by the Hayes-Tilden Compromise.[97]

Professor john a. powell discussed the movement among the Southern states to amend their constitutions during post-Reconstruction, renewing the fervor of state sovereignty in the South:

> Constitutional conventions were held in Mississippi (1890), South Carolina (1895), Louisiana (1898), Alabama (1901), and Virginia (1902) for the purpose of removing Blacks entirely from state politics. These conventions were made possible through violence, fraud and other voting restrictions that overcame initial resistance. In fact, many of these constitutions were merely promulgated rather than submitted to the state at large for ratification. The restrictions these conventions enacted were neutral as to race, but had the effect of barring all Blacks and many poor Whites through poll taxes and literacy tests.[98]

By the time the nation was thrust into the post-Reconstruction period of what Cho referred to as the "racial-dictatorship era," from the term coined by sociologists Michael Omi and Howard Winant,[99] unequal sovereignty

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[97]Cho, *supra* note 14, at 1607-08 (citations omitted).

[98]powell, *supra* note 91, at 378 (footnotes omitted).

[99]Cho, *supra* note 14, at 1605, 1606 (citation omitted); *id.* at 1611 ("In the pre-civil-rights era, courts played a key role in enabling unreconstructed whiteness. They developed neutral-sounding legal

already existed among the states, through admission conditions and stipulations for statehood, placing some states on an unequal footing with the others. "Conditions have been imposed on some of the earliest states to be admitted to the Union and on the most recent, from Ohio in 1803 to Hawaii in 1959."[100] "The history of admission conditions shows that Congress, at the time of the very creation of new sovereign states that would become part of the federal American government, has not considered the sovereignty of those states to be the most important factor to be considered."[101]

Not all conditions were unique to each state, but few applied universally to every state.[102] The imposition of certain conditions was targeted towards certain territories, based on which social or political characteristics of a given territory Congress wanted to tailor for admission.[103] A review of some of these conditions brings to light that Congress, through the different sets of criteria for the admission of different states, essentially created unequal sovereignties entering the Union on unequal footing.

Louisiana (1812) was required to allow religious freedom, conduct criminal trials by jury, and disclaim all unappropriated federal lands.[104] Mississippi (1817) had to "guarantee that the Mississippi [River] would be a common highway free from taxation or toll."[105] Michigan (1837) was forced to cede any land claims it had in Ohio.[106] Texas (1845) was annexed and admitted by a joint resolution, which required that it "cede all military fortifications, but allowed [it] to keep all public lands and required it to pay its own debts from the independence period. It also required that any portion of Texas north of the Missouri Compromise line be admitted without

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doctrines to rationalize discrimination; created self-serving legal distinctions to enable limiting principles; and crafted lofty, but thoroughly racially contingent foundational principles to define the nation.").

[100]Biber, *supra* note 12, at 129.

[101]*Id.* at 194.

[102]*See id.* at 129-31, Table One (summarizing the conditions for every admitted state).

[103]*Id.* at 120 ("Basic civil liberties, language, religion, race relations, and the structure of the family and marriage have all been elements that Congress has used as touchstones in attempting to reassure itself that the new state will be a loyal member of a homogeneous American federal democratic state.").

[104]*Id.* at app. (citations omitted).

[105]*Id.* (citation omitted).

[106]*Id.* (citation omitted).

slavery."[107] "West Virginia [1863] was required to alter the timing of the emancipation of slaves as a condition for admission."[108] Nevada (1864) was admitted during the Civil War, on the condition that it banned slavery.[109] Utah (1896) was "forever prohibited" from allowing polygamous marriages.[110] Oklahoma (1907) was required "to prohibit the liquor trade in the former Indian Territory for at least twenty-one years after admission."[111] "Restrictions on the lands and moneys granted to [New Mexico (1912)] for various purposes were even stricter than in previous statehood laws; the lands and proceeds from the sale and rental of the lands were to be held in trust for the purposes for which they were granted."[112] "Hawaii [1959] was required to establish and maintain an agency to run the Hawaiian home lands for the benefit of native Hawaiians."[113]

Among the conditions of admission for a handful of states were English-language preservation mandates found in no other state-admission acts or compacts. The requirement to conduct all state government functions in English was demanded of Louisiana.[114] Public education to be offered only in English was required of Oklahoma, New Mexico and Arizona.[115] In addition, New Mexico and Arizona required their state officers and legislators to be proficient in English as a condition of statehood.[116] Not only were there no such requirements placed on other newly admitted states, neither was the English language a mandate in the original thirteen states. In fact, no issue of language arose unless territories considered for statehood already had significant populations of residents who spoke languages other than

[107]*Id.* (citation omitted).
[108]*Id.* (citation omitted).
[109]*Id.* (citation omitted).
[110]*Id.* (citation omitted).
[111]Biber, *supra* note 12, at app. (citation omitted).
[112]*Id.* (citation omitted); *see also id.* at 162 (footnote omitted) ("Slavery was a factor in keeping New Mexico from being admitted immediately in 1850--New Mexicans were not enthusiastic about permitting slavery, but the South was not about to admit a free state New Mexico that would have blocked any expansion of slavery to the West.").
[113]*Id.* at app. (citation omitted).
[114]*Id.* (citation omitted).
[115]*Id.* (citations omitted).
[116]*Id.* (citations omitted).

English.[117] Behind the appearance of maintaining cultural uniformity with the rest of the nation at the time, was a deep-seated Congressional xenophobia.[118] Such conditions could only have arisen with the equal footing doctrine, even in full bloom, as more of an ideal than a reality. "[T]he history of admission conditions might indicate the Court should be taking a more subtle, nuanced approach to its state sovereignty cases."[119]

When the United States Congress readopted the Northwest Ordinance of 1787 in 1789, it accepted the terms of the earlier enactment, including its ban on slavery in new states. As the nation expanded its footprint westward in the 1700's and 1800's, every exception made by the federal government to that general ban on slavery diluted the doctrine of equal footing. Every pre-admission condition and stipulation between prospective states and the United States, which did not apply equally to all the other states, effectively relegated the relevance and effect of the doctrine to specific issues like submerged lands and navigable waterways. The founding of the states with the dichotomous legality of slavery created an inherently unequal sovereignty among the states, and the collective denial about this basic difference culminated in the Civil War. Reconstruction-era gains ended with the Hayes-Tilden Compromise of 1877, which reinforced the unequal sovereignty between states by allowing the Southern states a de facto pass from enforcing the post-Civil-War Amendments. By the time Chief Justice Roberts wrote of the "historic tradition" of "equal sovereignty" in the *Northwest Austin* opinion in 2009, there remained more of a tradition of *citing* the historic equal-footing-doctrine cases as precedent, than an actual history of equality between the states.

IV. Shelby County's Paradox

[117]*See, e.g.*, *id.* at 196 ("New Mexico had to show progress in the Americanization and assimilation of its Mexican-American population.").
[118]*See id.* at 198 ("[A]dmissions conditions have been used (to impose assimilation and homogeneity on theoretically sovereign members of a Union) . . . .").
[119]*Id.* at 124.

Whether a prospective state would be allowed to practice slavery was an issue so germane to the agreements between the original territory-ceding states and the federal government, that new states were admitted as either "slave states" or "free states."[120] At the same time, the issue of slavery was so incidental to statehood that the charade of the equal footing doctrine remained largely intact, with states admitted "on an equal footing with the original states in all respects whatever,"[121] regardless of the slavery status of a new state.[122] This is akin to the hypocrisy of the founding fathers of the nation affirming the words of the Declaration of Independence, that "all men are created equal,"[123] while many of them engaged in the practice of enslaving other men (and women and children).[124] The general category of slaves and slavery was apparently deemed merely tangential to the ideals of equality, as to men and states alike, so that while some states could practice slavery and some states could not, all could subscribe to the equal footing doctrine's virtues with a straight face.

It would require an altered reality to transcend a history of demanding or denying slavery as a condition of statehood under the color of an equal footing doctrine, in order to apply a contemporary jurisprudence of

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[120]Suitts, *supra* note 65; *see* powell, *supra* note 91, at 363-64 (quoting Eric Foner, The Story of American Freedom 36 (1998)) ("The divide over slavery and the Constitution created a structure in which the states became the primary political units and retained wide authority over internal matters. As such, the federal structure, and the limited federal government erected by the Constitution, 'insulated slavery in the states from outside interference . . . .'").

[121]Ordinance of 1787, art. V.

[122]*See, e.g.*, Ohio Enabling Act, 2 STAT. 173 (1802) ("equal footing" applied to a free state); Alabama Enabling Act, 3 STAT. 489 (1819) ("equal footing" applied to a slave state).

[123]THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[124]Encyclopædia Britannica - The Founding Fathers and Slavery, http://www.britannica.com/EBchecked/topic/1269536/The-Founding-Fathers-and-Slavery (last visited Sept. 30, 2013) (listing the prominent founding fathers by slave-holding status, with 14 slaveholders among the 21 listed); *see also* powell, *supra* note 91, at 364 (footnotes omitted) (quoting Eric Foner, The Story of American Freedom 40 (1998)):

> The contradiction between the ideal of personal liberty and the existence of slavery was an uncomfortable ethical and philosophical tension. Race emerged as the "justification for the existence of slavery in a nation ideologically committed to freedom as a natural right," and the beginning of an enduring racialized ideology appeared.

ERIC FONER, THE STORY OF AMERICAN FREEDOM 36 (1998) ("In the first sixteen presidential elections, between 1788 and 1848, all but four placed a southern slaveholder in the White House.").

acknowledging the recent history of the "evils" of voter discrimination in the South while embracing an "historic tradition" of equal state sovereignty. This is a reason why the Supreme Court could not reach a holding that the Voting Rights Act was unconstitutional, when it had the chance in *Northwest Austin* in 2009, notwithstanding the yet unripe "fundamental principle of equal sovereignty." Only by obscuring the discrepancy between historical fact and fiction could the Court elevate the "equal sovereignty" principle to a "fundamental" stature with an "historic tradition."

Shelby County sufficiently reframed the discrepancy between past and present inequities and a presumption of equal state sovereignty as the norm. First, there had to be repeated references to how times have improved for at least one racial group protected by the Voting Rights Act.[125] Second, those improvements in voting by that racial group had to be credited to the Act itself.[126] Third, with the differences blurred between covered localities under the Act and non-covered localities, with respect to the patterns of discrimination prohibited by the Act, a claim could more palatably be made that the equality of the states was and always will be sacrosanct. Accordingly, in all the data cited by the Chief Justice to demonstrate how voter registration and turnout have changed for the better for African Americans in the covered states,[127] the extent to which each protected group has or has not yet been helped by the Act remains unclear from the analysis in the opinion. In contrast, the evidence considered by Congress for the 2006 reauthorization of the Act pointed to the continuing need for federal oversight of covered jurisdictions. Considering the harm to be protected by the Voting Rights Act concerns discrimination based on race, color or language, it is important to note that the only data referenced by the Chief Justice were

[125]*E.g.*, *Shelby County*, 133 S.Ct. at 2619 (citation omitted) ("Census Bureau data indicate that African–American voter turnout has come to exceed white voter turnout in five of the six States originally covered by § 5, with a gap in the sixth State of less than one half of one percent."); *id.* at 2625 (citation omitted) ("[T]here has been approximately a 1,000 percent increase since 1965 in the number of African–American elected officials in the six States originally covered by the Voting Rights Act.").

[126]*Id.* at 2626 ("There is no doubt that these improvements are in large part *because of* the Voting Rights Act. The Act has proved immensely successful at redressing racial discrimination and integrating the voting process.").

[127]*See id.* at 2618-19, 2624-26.

registration, voting and election rates for African Americans and a general category of indistinguishable "minorities,"[128] with no mention of how language-minority groups have fared. Meanwhile, the research suggests that language-minority voters continue to experience discrimination at historic levels.[129]

The paradox in the *Shelby County* opinion is that racial discrimination against voters occurring in some of the states, in the view of the equal-sovereignty adherents on the Court, represents an inequality *between* the states rather than one *created by* the states themselves. Under this view, the legal device targeting the voter discrimination in the covered states is deemed to have sufficiently resolved the problem, thereby restoring the equality between states, notwithstanding the continuing discrimination in some covered and non-covered jurisdictions. This approach argues that allowing the coverage formula to remain in place tips the scale past the point of equilibrium among the states, thereby creating a new inequality between them. The logic is simple, that insofar as the need for the remedy is ameliorated, continuing to apply the remedy does more harm than good.

This framework for analyzing the voter discrimination, wherever it occurs, is inherently problematic. In this model, there are just three possible scenarios: (1) the covered states have higher rates of discrimination than the non-covered states and the remedy is applied to the former, (2) discrimination continues in the covered states, but at lower rates than in the non-covered states, and the remedy remains in place as is, or (3) the same premise as scenario 2, except the remedy no longer applies. Scenario 1 represents the Voting Rights Act of 1965 and each reauthorization since then. Scenario 2, the majority of the Court argues, is the pre-*Shelby County* situation that led the majority to hold the coverage formula unconstitutional. Scenario 3

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[128]*Id.* at 2618-19, 2624-26; *see also* Cho, *supra* note 14, at 1630 (quoting ANTONIA DARDER & RODOLFO D. TORRES, AFTER RACE: RACISM AFTER MULTICULTURALISM 3 (2004)) ("The authors seem centrally concerned with how the black-white dichotomies inherent in race relations 'render the other racialized populations invisible.'").

[129]*See* Michael Jones-Correa & Israel S. Waismel-Manor, *Verifying Implementation of Language Provisions in the Voting Rights Act*, *in* PROTECTING DEMOCRACY: USING RESEARCH TO INFORM THE VOTING RIGHTS REAUTHORIZATION DEBATE 161, 177 (Ana Henderson ed., 2007) ("The preliminary findings of this study suggest that there is significant noncompliance across counties covered by Section 203 provisions, both in the provision of written materials for linguistic minorities as well as the availability of staff assistance in languages other than English.").

represents the post-*Shelby County* environment, where the remedy applies nowhere without a coverage formula.

Goldilocks and the three bears would be dumbfounded to learn that Chief Justice Roberts chose the porridge that is "too cold."[130] That is, of the three scenarios, the Chief Justice and the majority selected scenario 3, which neutralized the preclearance requirement (the remedy) while voter discrimination continues to percolate throughout the states. The porridge that is "too hot" is scenario 1, where the states committing the worst discrimination are the ones that were the most directly regulated by the Act – in the Court's mind this situation is no longer warranted. The porridge that is "just right" is scenario 2, because the built-in flexibility for coverage allowed states and other jurisdictions to be included or excluded from the preclearance requirement, by exhibiting track records of disenfranchisement or voting rights compliance, respectively. Since jurisdictions ultimately controlled their own fate with their behavior, it was "just right."

The *Shelby County* opinion criticizes Congress for failing to update the coverage formula after being warned in *Northwest Austin* in 2009,[131] that "the Act imposes current burdens and must be justified by current needs."[132] This equal-sovereignty focus on burdens to the jurisdictions demands a justification for the Act's imposition upon the states, shifting the burden of proof from localities with recent histories of discriminatory voting schemes to Congress' current remedies for such discrimination. By framing the temporal discussion on the currency of burdens and currency of needs, the historical markers linking the offender jurisdictions are excluded from the conversation. Any reference to the past as justification for anything in the present is a nonstarter under this framework by the Chief Justice.

The fact is the Act does impose current burdens out of current needs, but these include the need to stem historical patterns of voter discrimination

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[130]*See* JOHN HASSALL, *Goldilocks and the Three Bears*, *in* OLD NURSERY STORIES AND RHYMES (1904).
[131]*See Shelby County*, 133 S.Ct. at 2631 ("But in issuing that decision, we expressed our broader concerns about the constitutionality of the Act. Congress could have updated the coverage formula at that time, but did not do so. Its failure to act leaves us today with no choice but to declare § 4(b) unconstitutional.").
[132]*Northwest Austin*, 557 U.S. at 203.

within jurisdictions that continue to show trends of recurrence. The historically worst-offending jurisdictions were the starting point for inclusion, using 1972 as the latest baseline year set by the 1975 reauthorization. Chief Justice Roberts narrowly assessed that "[c]overage today is based on decades-old data and eradicated practices."[133] It was the original data from the 1965 Voting Rights Act that identified the states to be included under the coverage formula then, and it was current ongoing data that kept those states within its scope today. The historical data combined with new statistics was the precise mechanism of the formula that led to the proper selection of the worst offenders *over time*. If left unchecked over time, discriminatory behavior becomes a discriminatory scheme and the effects become entrenched. The impact on communities can last through generations of voters for every tainted election, when considering United States Senators serve for six years at a time, Presidents serve four to eight years, and together they confirm and appoint federal judges and Supreme Court justices who serve for life.

Ironically, it is the very genius of the Act that the Chief Justice found most objectionable. The §4(b) coverage formula was not concerned with casting a wide net to bring within its scope all jurisdictions that have engaged in one or two recent instances of voter discrimination – that is the job of §2. The formula did not function like a thermometer measuring the *political* temperature from moment to moment, but rather it was like a weather satellite capturing longer-term patterns of change in the *racial* climate. Chief Justice Roberts, quoting himself from *Northwest Austin*, faulted the coverage formula for failing to evaluate "current political conditions" and instead relying on a 1965 comparison of the states.[134] The efficacy of the coverage formula was that it monitored bad behavior over a period of time, starting with the jurisdictions that had the worst track records of racial discrimination in voting, at the inception of the Voting Rights Act. These states and localities were examined under a current shifting 10-year look-back period, which rewarded reformed jurisdictions with opportunities to bail out of coverage. Since the latest baseline year of 1972, jurisdictions have been released from coverage by maintaining clean track

[133] *Shelby County*, 133 S.Ct. at 2627.

[134] *Id.* at 2628 (quoting *Northwest Austin*, 557 U.S. at 203).

records,[135] and others have been included for coverage due to patterns of voting indiscretions within recent years.[136] In the case of those localities recently brought within the coverage of the Act, obviously no 1964 or 1972 voting procedure in these places factored into the equation – it had nothing to do with "decades-old data." Moreover, if jurisdictions were subject to preclearance based solely on historical data, no covered jurisdictions since the 1960's or 1970's would have lost any §2 discrimination lawsuits, which is simply not the case.[137]

In furtherance of the paradox in *Shelby County*, Chief Justice Roberts ventured into "the different histories of the North and South," to legitimize the "comparison between the States in 1965."[138] The idea was that the different histories of the Northern and Southern states allowed for the Voting Rights Act in 1965 to address that specific difference in otherwise equal states.[139] In other words, if not for those different histories, the Act in 1965 would have been unconstitutional. The Chief Justice noted that "[t]he Court invoked that history [of the South]—rightly so—in sustaining the disparate coverage of the Voting Rights Act in 1966."[140] His statement acknowledges

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[135]*Id.* at 2644 (Ginsburg, J., dissenting) (citation omitted) ("Nearly 200 jurisdictions have successfully bailed out of the preclearance requirement, and DOJ has consented to every bailout application filed by an eligible jurisdiction since the current bailout procedure became effective in 1984.").

[136]*Id.* (citation omitted) ("Several jurisdictions have been subject to federal preclearance by court orders, including the States of New Mexico and Arkansas.").

[137]*Id.* at 2642-43 (Ginsburg, J., dissenting) (citation omitted) (discussing the findings of a 1982 - 2004 study of §2 lawsuits, which showed that "Controlling for population, there were nearly *four* times as many successful §2 cases in covered jurisdictions as there were in noncovered jurisdictions.").

[138]*Id.* at 2628 ("It was in the South that slavery was upheld by law until uprooted by the Civil War, that the reign of Jim Crow denied African–Americans the most basic freedoms, and that state and local governments worked tirelessly to disenfranchise citizens on the basis of race.").

[139]*But see* powell, *supra* note 91, at 367 (citation omitted):

> By 1860, only six percent of the Northern black population lived in states in which they could vote (Massachusetts, New Hampshire, Vermont, Rhode Island and Maine) and only half of eligible black voters in these states actually voted due to white terror at the polls. The white republic was also defended in state referendums. In the North between 1840 and 1870, equality with Black people was overwhelmingly rejected by white voters in 17 of 19 referendums.

[140] *Shelby County*, 133 S.Ct. at 2628.

that the purported equal sovereignty of the states *allows* for their different treatment for different histories. If it was the *history* of discrimination in a particular state that in 1965 allowed the coverage formula to distinguish it from other states, and not simply on the basis of "current political conditions" at the time, there is no merit to the Chief Justice's objection to the most recent coverage formula which combines data from 1964, 1968 or 1972, with current data, in order to differentiate the covered states from the others. Even in light of the paradox of standardizing equality of the states above equality of the people, the §4(b) coverage formula should have been held constitutional.

Conclusion

Chief Justice Roberts derived his new "fundamental principle of equal sovereignty" from the equal footing doctrine, which at its best has pertained to specific issues such as state ownership of land underneath navigable waterways, and at its worst has been applied unevenly to the admission of new states, as most were admitted with individually tailored sets of conditions. Whatever the particular issue, the underlying context of the doctrine had always been the contention that new states are admitted on an equal footing with the existing states. The so-called equal *sovereignty* principle, in contrast to the equal *footing* doctrine, depicts a perpetual equality of the states. This derivative principle of the equal footing doctrine was invoked by the Chief Justice as its equivalent notion of the equality of the states, and served as the basis for the majority of the Supreme Court in *Shelby County* to hold the heart of the Voting Rights Act unconstitutional.[141]

As the Northwest Ordinance of 1787 reflected the myth of an equal footing among the states, the *Northwest Austin* opinion of 2009 marked the birth of a fundamental equal sovereignty principle based upon that myth. Whereas the admission of the new state of Alabama in 1819 on an *unequal* footing with other new states was under the guise of an equal footing doctrine, the *Shelby County, Alabama* opinion in 2013 relaxed the constraints

[141]*See* Pamela S. Karlan, *What Can Brown Do for You?: Neutral Principles and the Struggle over the Equal Protection Clause*, 58 DUKE L.J. 1049 (2009) ("[T]he Roberts Court . . . has adopted an understanding of neutral principles that fundamentally undermines the Fourteenth Amendment's commitment to full civic inclusion.").

against inequality in voting under the guise of the "equal sovereignty" principle. This same state that was admitted as a "slave state" on the one hand, and on the other hand, "on an equal footing"[142] with other states admitted as "free states," ironically contains the county that just successfully argued for its equal sovereignty with other jurisdictions, to allow for voting restrictions free from federal oversight.

Even as history reveals an equal footing doctrine consistently applied in name but not substance, out of its definition and case law, Chief Justice Roberts has given birth to a "fundamental principle of equal sovereignty." Chief Justice Earl Warren in *Katzenbach* declared that "[t]he doctrine of the equality of States . . . applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared."[143] Yet disregarding this clear pronouncement by the Court in 1966, the Roberts Court cited other parts of the *Katzenbach* opinion to create a precedent for arguing that the Voting Rights Act infringed upon the equal sovereignty of the states.

The opinion in *Shelby County* presents a paradox of the racial discrimination against voters in some states as an inequality among the *states*, as opposed to an inequality among the *voters* created by the offending jurisdictions. Under this framework, any remedy for the voting discrimination either aims to restore the equality between states by resolving the subject discrimination, or creates a new inequality between them by going too far. But the Act's built-in flexibility, to release compliant jurisdictions from coverage and include those with recent patterns of discrimination, ensured that it would not go too far. In the opinion, Chief Justice Roberts objected to the coverage formula's reliance on "decades-old data" to differentiate between the states, yet he acknowledged the legitimacy of the "disparate coverage" of the Voting Rights Act in 1965 based on "the different histories of the North and South."[144]

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[142]*Pollard*, 44 U.S. at 223.

[143]*Katzenbach*, 383 U.S. at 328-29.

[144]*Shelby County*, 133 S.Ct. at 2627, 2628.

When Congress reauthorized the Voting Rights Act in 2006, it recognized the continuing need for federal preclearance of voting changes in the covered jurisdictions. After Chief Justice Roberts issued his opinion in *Shelby County* in 2013, what remained of the Act were the preclearance requirement and nationwide ban on voter discrimination, enforced only by lawsuits. Justice Ginsburg in her dissent, noted "that litigation under §2 of the [Act] was an inadequate substitute for preclearance in the covered jurisdictions. Litigation occurs only after the fact, when the illegal voting scheme has already been put in place and individuals have been elected pursuant to it, thereby gaining the advantages of incumbency."[145]

Bolstered by a new era of fundamental equal sovereignty, states have gained a presumption of innocence when implementing any voting changes. The burden of proof has shifted from the discriminatory jurisdictions to the Congressional remedy for the discrimination. States that were previously covered by the Voting Rights Act have already mobilized to implement new voting procedures.[146] Dr. Martin Luther King, Jr. wrote in a letter once, "Injustice anywhere is a threat to justice everywhere."[147] In order for a new coverage formula to meet the bar set by *Shelby County*, the remedy for injustice anywhere must equally apply to the same injustice everywhere, otherwise in a strange twist, the remedy becomes the injustice upon the affected locale.

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[145]*Id.* at 2640 (Ginsburg, J., dissenting).

[146]*See, e.g.*, Kevin Johnson & Richard Wolf, *Justice Department sues Texas over new voter ID law*, USA TODAY, Aug. 22, 2013, http://www.usatoday.com/story/news/politics/2013/08/22/voting-rights-texas-photo-id-justice-department-lawsuit/2685349/ ("The Texas law requires government-issued photo identification before voting. Among the permissible forms is a concealed handgun license; student IDs are not allowed."); Karen Brooks, *U.S. senator seeks federal review of North Carolina voting law*, Reuters, Aug. 13, 2013, http://www.reuters.com/article/2013/08/13/us-usa-voting-northcarolina-idUSBRE97C0Y820130813 ("North Carolina Governor Pat McCrory, a Republican, signed into law sweeping new election reforms, making his the first state to enact new restrictions since the U.S. Supreme Court struck down parts of a Civil Rights-era law designed to protect minority voters."); Transcript of *The Voting Rights Act: Hard-Won Gains, An Uncertain Future*, NPR, July 21, 2013, http://www.npr.org/2013/07/21/204284355/whats-next-for-the-voting-rights-act ("Texas, Mississippi, North Carolina and Alabama have either passed or are working on similar voter ID laws."); *see also* Kara Brandeisky et al., *Everything That's Happened Since Supreme Court Ruled on Voting Rights Act*, PROPUBLICA, Nov. 4, 2014, http://www.propublica.org/article/voting-rights-by-state-map (providing "an updated look at the state of voting rights around the country.").

[147]Rev. Dr. Martin Luther King, Jr., LETTER FROM BIRMINGHAM JAIL 2 (The Overbrook Press 1968).