

NAMUDNO'S NON-EXISTENT PRINCIPLE OF STATE EQUALITY

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INTRODUCTION

The fifty states are unequal in many respects—population (and thus representation in the House of Representatives), wealth, resources, climate, economic foundations, and industrial and technological development, to name a few. Federal legislation, therefore, often affects states unequally, and at times even singles out particular states for special treatment. Is such legislation suspect? In dicta in *Northwest Austin Municipal Utility District Number One v. Holder* (*NAMUDNO*), the Supreme Court cryptically suggested that it might be.¹ This term, in *Shelby County v. Holder*, the Court is poised to revisit the issue presented in *NAMUDNO*: whether section 5 of the Voting Rights Act (VRA),² which imposes special requirements on certain states and jurisdictions with histories of discrimination, is constitutional.³ In the process, the Court could choose to give the *NAMUDNO* dicta some bite.

The Court should not do so. The suggestion that federal legislation must treat states equally is a chimera, without support in constitutional text, history, or precedent. It is particularly unfounded with respect to legislation, like section 5 of the VRA, that is based on Congress's authority under the Fourteenth and Fifteenth Amendments to eradicate discriminatory denials of the right to vote. A constitutional requirement that legislation cannot treat states differently would call into question many typical legislative acts. The idea should be put to rest before it causes mischief.

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¹ 557 U.S. 193, 203 (2009).

² Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (codified as amended at 42 U.S.C. § 1973c (2006)).

³ See *Shelby Cnty. v. Holder*, 133 S. Ct. 594 (2012) (granting certiorari on the question “[w]hether Congress’ decision in 2006 to reauthorize Section 5 of the Voting Rights Act [u]nder the pre-existing coverage formula of Section 4(b) of the Voting Rights Act exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and Article IV of the United States Constitution”).

I

NAMUDNO'S DICTA, CONGRESSIONAL PRACTICE, AND THE
CONSTITUTIONAL TEXT

Section 5 of the VRA requires covered states and local jurisdictions to obtain “pre-clearance” from the Attorney General or a three-judge district court in Washington, D.C., before making certain changes to election rules, procedures, or districts.⁴ In *NAMUDNO*, a covered jurisdiction challenged the constitutionality of this statute.⁵

Two constitutional amendments adopted during Reconstruction after the Civil War provide possible authority for Congress’s enactment of section 5 of the VRA.⁶ Under the Fifteenth Amendment, the “right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude”; Congress has the “power to enforce this article by appropriate legislation.”⁷ The Fourteenth Amendment guarantees the “equal protection of the laws” to all persons; it too permits Congress to enforce this guarantee with “appropriate legislation.”⁸

The *NAMUDNO* petitioners argued that Congress could not impose section 5 requirements on them, even pursuant to Congress’s Fourteenth and Fifteenth Amendment enforcement powers, without a more specific showing that those requirements remedied ongoing discrimination in the jurisdiction.⁹ The Court identified the constitutional questions presented by the statute as “serious,” but managed to avoid them by adopting a saving construction of the statute.¹⁰ Specifically, the Court interpreted the statute to allow the jurisdiction to apply to be removed from section 5’s coverage under a so-called “bailout” provision of the VRA.¹¹

⁴ 42 U.S.C. § 1973c(a) (2006). Section 4(b) of the VRA contains the formula that determines which jurisdictions are subject to section 5. *See id.* §§ 1973b(b), 1973c(a).

⁵ 557 U.S. at 196.

⁶ With respect to federal elections, Congress has authority under the original, unamended Constitution to “make or alter” state regulations regarding the time, place, and manner of holding elections for U.S. senators and representatives. U.S. CONST. art. I, § 4. Its authority over laws and procedures governing elections for state offices, however, depends on the Reconstruction Amendments.

⁷ U.S. CONST. amend. XV.

⁸ U.S. CONST. amend. XIV.

⁹ *See NAMUDNO*, 557 U.S. at 200–01 (stating that there is no evidence that the district ever discriminated based on race and indicating that petitioners argued the section 5 requirements were unconstitutional unless the district could escape section 5’s coverage).

¹⁰ *Id.* at 204.

¹¹ *See id.* at 206–11 (interpreting section 4(b) of the VRA, 42 U.S.C. § 1973b(a)(1)(A) (2006), so that the utility district qualified as a “political subdivision” and thus could apply for bailout from section 5’s coverage).

In discussing the difficulty of the constitutional issue, the Court focused on the issue of congressional power.¹² But it also suggested, albeit cryptically, that the statute's unequal treatment of states might be grounds to view the VRA with suspicion. The Court's discussion of the constitutionality of disparate treatment of states was contained in a single paragraph:

The Act also differentiates between the States, despite our historic tradition that all the States enjoy "equal sovereignty." *United States v. Louisiana*, 363 U.S. 1, 16 (1960) (citing *Lessee of Pollard v. Hagan*, 3 How. 212, 223 (1845)); see also *Texas v. White*, 7 Wall. 700, 725–726 (1869). Distinctions can be justified in some cases. "The doctrine of the equality of States . . . does not bar . . . remedies for local evils which have subsequently appeared." *Katzenbach, supra*, at 328–329 (emphasis added). 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.¹³

What does this paragraph mean? It purports to identify a "tradition" of "equal sovereignty" for states and suggests that this tradition necessitates scrutiny of legislation focused on purely "local evils."¹⁴ The implication would seem to be that heightened scrutiny applies to legislation that treats states unequally. Yet the opinion avoids committing to that conclusion. It simply notes that a sufficient showing is required to support such legislation—without saying what that sufficient showing is.

The default rule, of course, is that the Constitution requires only that Congress have a rational basis for the legislation it enacts. Courts instead apply strict or intermediate scrutiny under the Fifth and Fourteenth Amendments to laws that burden fundamental rights or draw classifications based on protected categories, such as race or gender.¹⁵ Strict scrutiny is nearly always fatal to legislation; it requires a showing that the legislation is narrowly tailored to a compelling

¹² See *id.* at 204 (asking whether "Congress exceeded its Fifteenth Amendment enforcement power in extending the preclearance requirements").

¹³ *Id.* at 203.

¹⁴ *Id.*

¹⁵ See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224–25 (1995) (distinguishing between "political judgments [that] are the product of rough compromise struck by contending groups within the democratic process" and suspect classifications that "touch upon an individual's race or ethnic background" (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978) (opinion of Powell, J.))); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938) (indicating that more exacting scrutiny may be appropriate where legislation "appears on its face to be within a specific prohibition of the Constitution" or where it implicates "prejudice against discrete and insular minorities").

governmental interest. Intermediate scrutiny, which applies to gender classifications, similarly requires a showing that legislation is closely tailored to an important governmental objective. In contrast, under rational basis review, legislation may be significantly over- or under-inclusive, meaning that Congress can impose requirements on significantly more or significantly fewer people than would be strictly necessary to remedy the problem the legislation addresses. To give an example in terms of states, under a rational basis framework, Congress might properly choose—as it did in the Clean Air Act¹⁶—to permit one state to take the lead in setting more stringent vehicle emissions standards, even if this choice is under-inclusive in that other states just as well have played that standard-setting role.

States do not need the form of protection from the ordinary political process that heightened scrutiny (strict or intermediate) provides. One common rationale for heightened scrutiny is that it provides judicial protection for unpopular groups and activities that the ordinary political process might not adequately protect against unfavorable treatment.¹⁷ While it is conceivable that a majority of states in Congress could routinely gang up on a single state or a minority group of states, the Constitution provides states with substantial means of political self-defense. Such means include, most significantly, the requirement that each state (regardless of size) have an equal number of senators in the Senate; other examples are the guarantees of state representation in the House of Representatives and Electoral College.¹⁸

The text of the Constitution, moreover, implies the absence of a general principle of state equality by mandating some forms of equal treatment but not others. In addition to equal representation in the Senate, states hold equivalent sovereign immunity and residual sovereign powers under the Tenth and Eleventh Amendments, as well as protection against unequal “Duties, Imposts, and Excises” or “Preference[s] . . . given by any Regulation of Commerce or Revenue to the Ports of one State over those of another.”¹⁹ Courts, to be sure,

¹⁶ 42 U.S.C. §§ 7543, 7545 (2006).

¹⁷ See, e.g., *Carolene Prods. Co.*, 304 U.S. at 153 n.4 (explaining protection for “discrete and insular minorities” on the grounds that prejudice against them “tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities”).

¹⁸ See generally Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546 (1954) (emphasizing that state interests are protected from national legislation principally by “their crucial role in the selection and the composition of the national authority”).

¹⁹ U.S. CONST. art. I, § 8, cl. 1; *id.* § 9, cl. 6.

have interpreted the Constitution to provide various “unenumerated” rights that are not specifically identified in the text, and some constitutional federalism principles lack a specific textual foundation.²⁰ Nevertheless, at least in the absence of some compelling reason to infer a constitutional principle of state equality, the specificity of guarantees such as the Tax Uniformity Clause and the Port Preference Clause suggests that no general rule otherwise guards states against unequal treatment in federal legislation.

Congress routinely enacts legislation that presumes only a rational basis is necessary for unequal treatment of states. For example, benefits formulas may result in unequal distribution of funds, depending on where eligible beneficiaries (whether individuals, school districts, foundations, or other parties) reside.²¹ The notorious congressional “earmarks”—line items funding particular parties or projects—that litter annual appropriations bills single out particular entities, localities, or even states for federal largesse.²² Congress sometimes establishes pilot projects that test particular federal initiatives in one state or several states before imposing them on the nation as a whole.²³ Congress may commit federal property to particular purposes that impose costs or burdens on the state where the property is located. A recent statute, for example, designated federal property in Nevada as a storage site for much of the nation’s nuclear waste.²⁴ To

²⁰ See, e.g., *Alden v. Maine*, 527 U.S. 706, 713 (1999) (holding that states’ sovereign immunity “neither derives from, nor is limited by, the terms of the Eleventh Amendment”); *Printz v. United States*, 521 U.S. 898, 905–25 (1997) (concluding that Congress cannot “commandeer[]” state officials based on “historical understanding and practice,” “the structure of the Constitution,” and “the jurisprudence of [the Supreme] Court”). See generally John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2005 (2009) (discussing recent decisions enforcing “what might be termed unenumerated states’ rights”).

²¹ See, e.g., 20 U.S.C. § 1411 (2006) (special education funding); 23 U.S.C. § 104 (highway funding); 42 U.S.C. § 1396d (medical assistance formula).

²² See, e.g., Water Resources Development Act of 2007, Pub. L. No. 110-114, §§ 3001–3182, 121 Stat. 1041, 1106–70 (codified as amended in scattered sections of 33 U.S.C.) (appropriating funds for various specified navigation-related projects); Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, § 727, 112 Stat. 553, 585 (Nov. 18, 2011) (appropriating funds for the Washington Metropolitan Area Transit Authority); Disaster Relief Appropriations Act, 2012, Pub. L. No. 112-77, 125 Stat. 1277, 1277 (2011) (appropriating funds for repairs on the Mississippi River and its tributaries).

²³ See, e.g., 42 U.S.C. § 280g-6 (Supp. V 2012) (authorizing the Secretary of Health and Human Services to select “at least 3 states” for pilot projects relating to chronic kidney disease); Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, div. A, tit. VII, § 727, 125 Stat. 552, 585 (2011) (funding a pilot project to test reforestation techniques in Gulf Coast areas); tit. III, 125 Stat. at 567 (appropriating funds “to conduct a demonstration” regarding certain public housing programs).

²⁴ See 42 U.S.C. § 10133 (2006) (establishing certain requirements with respect to the Yucca Mountain facility for storage of nuclear waste).

be sure, Congress's discretion with respect to such legislation regarding federal spending and property is particularly broad,²⁵ but at times Congress has even imposed regulatory burdens unequally. One example is the Clean Air Act, which, as indicated above, permits one state (California) to establish its own more stringent motor vehicle emissions and engine design standards while requiring other states to follow either California's standards or standards established by the federal government.²⁶

Courts have never before considered such legislation suspect.²⁷ In perhaps the most thorough consideration of the issue to date, the D.C. Circuit rejected arguments that the location of the federal nuclear waste facility in Nevada violated a constitutional principle of state equal treatment.²⁸ Although Nevada argued that the facility's selection violated a constitutional requirement that federal legislation treat states equally, the D.C. Circuit found "no basis in the Constitution" for Nevada's argument.²⁹

In short, to the extent that the Court in *NAMUDNO* implied that legislation treating states unequally should receive heightened

²⁵ See, e.g., *Kleppe v. New Mexico*, 426 U.S. 529, 536 (1976) ("[W]e must remain mindful that, while courts must eventually pass upon them, determinations under the Property Clause are entrusted primarily to the judgment of Congress."); *Helvering v. Davis*, 301 U.S. 619, 640 (1937) ("[D]iscretion [over spending] belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.").

²⁶ 42 U.S.C. §§ 7543, 7545 (2006). Another example is the Professional and Amateur Sports Protection Act (PAPSA), a 1992 law that generally prohibits sports gambling but exempts four states and allowed a fifth (New Jersey) to opt into the exception by enacting legislation within a one-year period (which the state failed to do). 28 U.S.C. §§ 3701–3704 (2006); see also *Nat'l Collegiate Athletic Ass'n v. Christie*, Civ. Action No. 12-4947 (MAS) (LHG), 2013 WL 772679, at *3–4 (D.N.J. Feb. 28, 2013) (explaining the operation of the statute and exceptions). A statute from the early years of the Republic granted jurisdiction over certain federal revenue offenses only to specified state courts in New York and Pennsylvania. Act of Mar. 8, 1806, 2 Stat. 354; see also Act of Apr. 21, 1808, 2 Stat. 489 (removing a sunset on the 1806 statute and extending the same jurisdiction to certain courts in Ohio). For an example from a recent appropriations statute, see Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, div. C, tit. II, § 211, 125 Stat. 552, 695 (2011), which exempted "[a] public housing agency or such other entity that administers Federal housing assistance for the Housing Authority of the county of Los Angeles, California, the States of Alaska, Iowa, and Mississippi" from a requirement that such entities include a resident on their respective governing bodies.

²⁷ A federal court recently rejected a constitutional challenge to PAPSA. See *Christie*, 2013 WL 772679, at *2. Courts also have rejected challenges to the Clean Air Act provisions granting special regulatory powers only to California. E.g., *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031 (9th Cir. 2007); *Ass'n of Int'l Auto. Mfrs., Inc. v. Comm'r, Mass. Dep't of Envtl. Prot.*, 208 F.3d 1 (1st Cir. 2000); *Am. Auto. Mfrs. Ass'n v. Cahill*, 152 F.3d 196 (2d Cir. 1998); *Virginia v. EPA*, 108 F.3d 1397 (D.C. Cir. 1997).

²⁸ See *Nuclear Energy Inst. v. EPA*, 373 F.3d 1251, 1303–09 (D.C. Cir. 2004).

²⁹ *Id.* at 1305.

scrutiny, the *NAMUDNO* dicta conflict with substantial and longstanding congressional practice, have no direct support in the Constitution's text, and are inconsistent with prior lower court case law.

II

AN INTUITION IN SEARCH OF A THEORY

The Court seemed to derive its intuition that federal legislation must treat states equally from two sources: first, language in *South Carolina v. Katzenbach*, a prior case addressing the constitutionality of section 5 of the VRA;³⁰ and second, case law applying the “equal footing doctrine,” which ensures that all new states enter the Union on an equal footing with their predecessors.³¹ Neither of these sources supports *NAMUDNO*'s dicta. Although a third set of cases not cited in *NAMUDNO*—those interpreting the Tenth Amendment—might provide a more persuasive basis for an equal treatment principle, these decisions likewise do not suggest a need for heightened scrutiny of the VRA's unequal treatment of states.³²

A. *Katzenbach and the Reconstruction Amendments*

The Court in *NAMUDNO* appeared to base its equal sovereignty principle in part on *Katzenbach*. In that case, decided in 1966, the Supreme Court upheld VRA section 5 as a proper remedy for unconstitutional discrimination and denial of voting rights.³³ The *NAMUDNO* Court, however, invoked *Katzenbach* as support for a principle of state equal treatment that could cast doubt on the validity of VRA section 5. Quoting *Katzenbach*, the Court observed: “Distinctions [between states] can be justified in some cases. ‘The doctrine of the equality of States . . . does not bar . . . remedies for local evils which have subsequently appeared.’”³⁴

Note the ellipses and added emphasis. The quote in *NAMUDNO*

³⁰ 383 U.S. 301 (1966). See *infra* Part II.A for further discussion of *Katzenbach*.

³¹ See *infra* Part II.B for further discussion of the doctrine.

³² See *infra* Part II.C for further discussion of the sufficiency of political safeguards in protecting state sovereignty.

³³ *South Carolina v. Katzenbach*, 383 U.S. 301, 337 (1966). The central issue before the Court this term is whether the record today still justifies section 5's coverage. See *Shelby Cnty. v. Holder*, 133 S. Ct. 594 (2012); see also *Nw. Austin Mun. Util. Dist. No. One v. Holder* (*NAMUDNO*), 557 U.S. 193, 202 (2009) (“Some of the conditions that we relied upon in upholding this statutory scheme in *Katzenbach* . . . have unquestionably improved.”).

³⁴ *NAMUDNO*, 557 U.S. at 203 (alteration in original) (quoting *Katzenbach*, 383 U.S. at 328–29).

omits key phrases from *Katzenbach*, thereby reversing the implication of the quoted passage. The Court in *Katzenbach* observed, with respect to section 5, that “[i]n acceptable legislative fashion, Congress chose to limit its attention to the geographic areas where immediate action seemed necessary.”³⁵ It then stated: “The doctrine of the equality of States, invoked by South Carolina, does not bar this approach, for *that doctrine applies only to the terms upon which States are admitted to the Union*, and not to the remedies for local evils which have subsequently appeared.”³⁶ As a citation in the opinion makes clear, the italicized portion of this statement refers to the equal footing doctrine.³⁷ The *Katzenbach* opinion thus concludes—correctly, as explained below³⁸—that the equal footing doctrine applies only to the terms on which states are admitted to the Union, not to other or subsequent legislation that addresses local problems. Far from supporting a principle of state equal treatment, the statement from *Katzenbach* quoted in *NAMUDNO* denied that any such principle exists.

It would be particularly surprising to apply a principle of state equal treatment to Congress’s enforcement powers under the Fourteenth and Fifteenth Amendments. These two amendments were adopted during Reconstruction principally to address concerns about discrimination against former slaves.³⁹ Thus, although the Fourteenth and Fifteenth Amendments guarantee voting rights and equal protection of the laws throughout the nation, and although Congress typically has enforced them with general, nationwide legislation, there is little doubt that their drafters were concerned principally with discriminatory practices concentrated in one region of the country—the former Confederacy.

In fact, in the *Civil Rights Cases*, a seminal early decision interpreting the Fourteenth Amendment, the Supreme Court struck down the Civil Rights Act of 1875 precisely because it did *not* discriminate

³⁵ 383 U.S. at 328.

³⁶ *Id.* at 328–29 (emphasis added).

³⁷ *Id.* at 329 (citing the equal footing decision *Coyle v. Smith*, 221 U.S. 559 (1911)).

³⁸ See *infra* Part II.B (arguing that the equal footing doctrine does not require that federal legislation treat states equally).

³⁹ See ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877*, at 446 (1988) (identifying the “concern of the Fifteenth Amendment’s drafters “to enfranchise blacks in the border states and prevent a retreat from Reconstruction in the South[] ”); John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 401–02 & nn.137–44 (2001) (discussing the Fourteenth Amendment drafters’ objective of repealing southern Black Codes, which limited the rights of freed slaves).

between states.⁴⁰ The 1875 Act guaranteed “full and equal enjoyment” of various public accommodations to “citizens of every race and color, regardless of any previous condition of servitude.”⁴¹ The Supreme Court held that this legislation was unconstitutionally overbroad because it “applie[d] equally to cases arising in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in States that may have violated the prohibition of the amendment.”⁴² Today, courts typically cite the *Civil Rights Cases* for the proposition that the Fourteenth Amendment applies only to “state action” and thus does not permit Congress to ban private discrimination.⁴³ Modern doctrine, moreover, likely would not support facial invalidation of the 1875 Act based on the putative unconstitutionality of its application to particular states.⁴⁴ Nevertheless, the holding of the *Civil Rights Cases*—that the Fourteenth Amendment requires Congress to differentiate between states—highlights the irony in *NAMUDNO*’s suggestion that some unenumerated, implicit requirement of the Constitution may *prohibit* such disparate treatment of states.

B. Flat-Footed Use of Equal Footing

The Court in *NAMUDNO* also appeared to base its “tradition” of “equal sovereignty” on the equal footing doctrine—the constitutional principle that all states enter the Union on an equal footing with their predecessors.⁴⁵ The equal footing doctrine, however, provides no support for a requirement of equal treatment of states in federal legislation. Quite the opposite, by upholding provisions unique to particular states, the equal footing case law establishes that Congress may treat states unequally.

⁴⁰ 109 U.S. 3, 14 (1883) (striking down the Act because it applied equally to states that had not violated the Fourteenth Amendment).

⁴¹ Civil Rights Act of 1875, ch. 114, 18 Stat. 335, 336.

⁴² *The Civil Rights Cases*, 109 U.S. at 14.

⁴³ See, e.g., *United States v. Morrison*, 529 U.S. 598, 621 (2000).

⁴⁴ See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1091 (1995) (“Under current approaches to constitutional adjudication, the *Civil Rights Cases* would not be decided the same way . . .”).

⁴⁵ While the Court was not explicit about its reliance on the equal footing doctrine, it cited an equal footing case, *United States v. Louisiana*, 363 U.S. 1 (1960) (citing *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 232 (1845)), as its only substantial authority for this proposition. *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 557 U.S. 193, 203 (2009). The Court also cited *Texas v. White*, 74 U.S. (7 Wall.) 700 (1869), signaled with a “see also.” *Id.* That case held simply that Texas had no right to secede from the Union because the Constitution establishes “an indestructible Union, composed of indestructible States.” *White*, 74 U.S. (7 Wall.) at 725.

The equal footing doctrine addresses a specific constitutional problem. Congress has authority under the Constitution to admit new states to the Union.⁴⁶ Congress might be tempted to use this authority to impose conditions or constraints on new states that it could not constitutionally impose on existing states.⁴⁷ And in fact, historically, Congress not only required territories to meet numerous conditions before qualifying for statehood, but also imposed numerous requirements on them as conditions for their ultimate admission as states.

The equal footing doctrine, which the Court first articulated in the 1830s,⁴⁸ provides that such conditions are enforceable only if Congress could have imposed them on an existing state.⁴⁹ A state is a state is a state, in other words. Insofar as the Constitution establishes the distribution of sovereign powers between the states and the federal government—through, for example, the enumeration of specific, limited powers of Congress, the protection of sovereign immunity for states under the Eleventh Amendment, and specific guarantees like the Port Guarantee Clause—that distribution applies to all states,

⁴⁶ U.S. CONST. art. IV, § 3, cl. 1.

⁴⁷ This risk is not fanciful. At the Constitutional Convention, one delegate (Gouverneur Morris of Pennsylvania) opposed language in the state admission clause that would have required explicitly that new states enter the Union on equal terms with old ones. MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 109 (1913). This delegate later confessed in a letter his view that additional territory acquired in Louisiana and elsewhere should be formed into “provinces” of the United States rather than co-equal states of the Union. *Id.* at 144. As discussed below, moreover, Congress did impose conditions on some states that sought to impair aspects of their fundamental sovereignty under the Constitution. *See infra* notes 52–57 and accompanying text (discussing Oklahoma admission conditions).

⁴⁸ *See, e.g.,* Mayor of New Orleans v. De Armas, 34 U.S. 224, 235 (1835). The phrase “equal footing” appeared in the Northwest Ordinance, which promised that new states formed out of the territory covered by the ordinance would enter the Union “on an equal footing” with the original states. An Act to Provide for the Government of the Territory Northwest of the River Ohio, art. V, ch. 8, 1 Stat. 50, 53 n.a (1789). Nearly every state admission statute has declared the new state to be admitted to the Union on an “equal footing” or the “same footing” with predecessor states. *See* Valerie J.M. Brader, *Congress’s Pet: Why the Clean Air Act’s Favoritism of California Is Unconstitutional Under the Equal Footing Doctrine*, 13 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 119, 135 & n.74 (2007) (collecting statutes). Early Supreme Court cases were ambiguous as to whether the equal footing doctrine derived from the Constitution or from statutory language of the Northwest Ordinance and state admission statutes, but in 1845 the Court made clear that the doctrine is constitutional in nature. *Compare De Armas*, 34 U.S. at 235–36 (discussing the statute admitting Louisiana on an equal footing with earlier states), *with Pollard*, 44 U.S. (3 How.) at 223 (indicating that certain stipulations in an admission statute could be “void and inoperative”).

⁴⁹ *See, e.g.,* Coyle v. Smith, 221 U.S. 559, 570 (1911) (rejecting “the contention that any State may be deprived of any of the power constitutionally possessed by other States, as States, by reason of the terms in which the acts admitting them to the Union have been framed”).

whether admitted to the Union in 1789 or, like Alaska and Hawaii, in 1959.⁵⁰ The equal footing principle says nothing about whether federal legislation, validly enacted pursuant to Congress's enumerated powers, must treat states equally. Insofar as Congress could treat the original states unequally, it can do the same to new states—as indeed it did in some admission conditions upheld by the Supreme Court under the equal footing doctrine.⁵¹

The case law makes this point clear. A classic example of the doctrine is *Coyle v. Smith*.⁵² In Oklahoma's admission statute, Congress required the state to accept, as a condition of its admission, that its capital could not be moved from the city of Guthrie until at least 1913.⁵³ Oklahoma accepted this condition, and President Roosevelt admitted the state to the Union by proclamation on November 16, 1907.⁵⁴ In 1910, however, the Oklahoma legislature violated the condition by passing a statute moving the capital to Oklahoma City.⁵⁵ Although a Guthrie landowner argued that the state statute was invalid because it violated the federal admission statute,⁵⁶ the Supreme Court held that the admission condition requiring the state capital to remain in Guthrie was unenforceable.⁵⁷ "The power[s] to locate its own seat of government, and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose," the Court reasoned, "are essentially and peculiarly state powers."⁵⁸ In other words, Congress was using its power to admit new states to the Union to

⁵⁰ The Constitution's specification of states' governmental powers and immunities distinguishes them from two other types of local government in the United States: territorial governments and Native American tribes. Under governing case law, Congress holds "plenary" authority to modify the degree of sovereignty exercised by territories and Indian tribes. See generally Zachary S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 COLUM. L. REV. (forthcoming 2013) (manuscript at 3–4) (on file with the *New York University Law Review*).

⁵¹ For a contrary argument—that the equal footing doctrine requires equivalent "political sovereignty" for all states and thus renders unconstitutional the Clean Air Act provisions disparately treating California—see Brader, *supra* note 48, at 155. This contrary view fails to account for the limitations of the equal footing doctrine identified in the discussion here.

⁵² 221 U.S. 559 (1911).

⁵³ Oklahoma Enabling Act of June 16, 1906, ch. 3335, 34 Stat. 267, 269.

⁵⁴ Proclamation No. 780, *reprinted in* 35 Stat. 2160 (1907); see also 34 Stat. at 271. Following a common procedure for admission statutes, the statute authorized the President to admit the state by proclamation if he deemed the statutory conditions for admission satisfied. 34 Stat. at 271.

⁵⁵ See *Coyle*, 221 U.S. at 563.

⁵⁶ *Id.*

⁵⁷ *Id.* at 579.

⁵⁸ *Id.* at 565.

impose conditions on Oklahoma that it could not constitutionally impose on existing states. Accordingly, the condition in the admission statute was invalid under the equal footing doctrine.

As the Court explained in *Coyle*, Congress's power to admit new states to the Union is not a power "to admit political organizations which are less or greater, or different in dignity or power, from those political entities which constitute the Union."⁵⁹ Rather, "[t]he power is to admit new States into *this* Union."⁶⁰ "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 Thus, conditions in admissions statutes are unenforceable insofar as they "operate[] to restrict the powers of [the] new state in respect of matters which would otherwise be exclusively within the sphere of state power."⁶²

The *Coyle* Court was careful, however, to distinguish two other types of conditions. First, the equal footing doctrine imposes no limit on Congress's power to set conditions that must be fulfilled prior to the state's admission to the Union.⁶³ In fact, Congress made extensive use of admission conditions to influence the constitutions, laws, politics, and social conditions in territories before admitting them as states, particularly in cases where Congress feared the new state might be difficult to assimilate into mainstream American society.⁶⁴ *Coyle* makes clear that the equal footing doctrine places no limit on such admission conditions. The doctrine simply prevents Congress from continuing to burden the state with such conditions after the state's admission.

Second, the equal footing doctrine does not bar the effect of conditions in admission statutes that "are within the scope of the conceded powers of Congress over the subject."⁶⁵ In other words, if Congress could have enacted the provision pursuant to its usual enumerated powers, the fact that the provision appears in a state admission statute does not affect its enforceability.⁶⁶ In that

⁵⁹ *Id.* at 566.

⁶⁰ *Id.* at 567 (internal quotation marks omitted).

⁶¹ *Id.* (internal quotation marks omitted).

⁶² *Id.* at 568.

⁶³ *See id.* ("Congress may require, under penalty of denying admission, that the organic law of a new State at the time of admission shall be such as to meet its approval.").

⁶⁴ *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, 121 (2004).

⁶⁵ *Coyle*, 221 U.S. at 568; *id.* at 574.

⁶⁶ The Court explained that Congress may "embrace in an enactment introducing a new state into the Union" legislation that regulates interstate commerce or otherwise falls "within the sphere of the plain power of Congress." *Id.* at 574. Such conditions are

circumstance, enforcement of the condition does not impair the state's equal sovereignty with other states, because Congress could have enacted the provision in any case, even after the state's admission.

This reasoning takes for granted that valid federal legislation may affect states unequally. Legislation admitting a state, by definition, affects only that state and not others, but the Court did not view this feature of the legislation as problematic. To the contrary, it presumed Congress could employ its usual legislative powers to adopt such legislation.⁶⁷ In fact, in other cases, the Court has upheld admission conditions that have a disparate impact on states, so long as the conditions are a valid exercise of congressional power. In *United States v. Sandoval*, the Court upheld admission conditions prescribing that certain areas of New Mexico would qualify as "Indian country" subject to federal regulation pursuant to Congress's authority over Indian affairs.⁶⁸ The Court did not ask whether Congress had identified comparable areas of other states as Indian country. It was enough that the legislation had a valid constitutional basis in Congress's enumerated powers.⁶⁹ Similarly, in *Minnesota v. Mille Lacs Band of Chippewa Indians*, the Court held that an Indian tribe's hunting and fishing rights under a federal treaty remained enforceable notwithstanding Congress's subsequent admission of the territory in which the tribe's lands were located as a state of the Union.⁷⁰ The state argued that its admission to the Union on an equal footing with other states abrogated the tribe's treaty rights, because authority over

permissible because

in every such case such legislation would derive its force not from any agreement or compact with the proposed new state, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject, and therefore would not operate to restrict the state's legislative power in respect of any matter which was not plainly within the regulating power of Congress.

Id.

⁶⁷ *Id.*

⁶⁸ 231 U.S. 28, 38 (1913).

⁶⁹ *Id.* at 49 ("Being a legitimate exercise of [Congress's] power [over Indian affairs], the legislation in question does not encroach upon the police power of the state, or disturb the principle of equality among the states."). The Court's reasoning in *Sandoval* is quite unattractive in other respects. Reflecting the biases of its time, it describes the Pueblo communities at issue in the case as "essentially a simple, uninformed, and inferior people." *Id.* at 39. The principle of federal authority over Indian affairs on which the Court's holding turns, however, remains a cornerstone of federal Indian law. See, e.g., *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2323–24 (2011) (collecting cases establishing Congress's "plenary authority" over Indian affairs).

⁷⁰ 526 U.S. 172, 204–05 (1999).

natural resources is a fundamental attribute of state sovereignty.⁷¹ The Court rejected this view. According to the Court, the treaty remained enforceable because it reflected a valid exercise of federal power under the Constitution: “Although States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers, such as treaty making.”⁷²

Other cases exhibit similar reasoning with respect to federal property rights. In *Stearns v. Minnesota*, the Court addressed the validity of provisions in Minnesota’s admission statute that ceded federal land to the state on the condition that the state preserve certain tax breaks for a railroad operating on the land.⁷³ The Court upheld these provisions on the grounds that Congress could have imposed them on any state as a condition of cession of federal land.⁷⁴ The Court did not ask whether Congress had imposed the same conditions in other land deals, nor whether Congress had granted other states comparable land cessions; it presumed that the cession to Minnesota was a valid exercise of congressional authority over federal property. The Court later elaborated on this point in *United States v. Texas*, explaining that the equal footing doctrine was not designed to eliminate the inevitable economic diversity among states, but rather “to create parity as respects political standing and sovereignty.”⁷⁵ Congress therefore may enter “special agreements” with states or otherwise legislate for them unequally; the only parity required by the equal footing doctrine is the limitation of Congress to its proper enumerated powers in enacting such legislation.⁷⁶

In fairness, as some equal footing cases themselves attest, the proper boundary between federal and state authority—and thus the fundamental attributes of state sovereignty that are protected by the equal footing doctrine—may itself be contested. For example, one such area of contention concerns state regulatory authority over certain waterways and submerged lands. In 1842, the Supreme Court held that the original thirteen states retained “the absolute right to all

⁷¹ *Id.* at 202–04.

⁷² *Id.* at 204.

⁷³ 179 U.S. 223 (1900).

⁷⁴ *Id.* at 251–52.

⁷⁵ 339 U.S. 707, 716 (1950). The Court noted that the equal footing principle cannot purport to eliminate disparities among states stemming from “[a]rea, location, geology and latitude,” given that “[t]here has never been equality among the states in that sense.” *Id.*

⁷⁶ *Id.* at 716–17.

their navigable waters and the soils under them.”⁷⁷ Extending this principle to later-admitted states under the equal footing doctrine, the Court has held that all states retain title, by virtue of the Constitution, to “beds of waters” that were navigable at the time of admission or that are “tidally influenced.”⁷⁸ In one of the earliest cases on this issue, however, dissenting Justices complained that the state’s title to submerged lands presented a question of property rather than sovereignty, and thus that “the United States did not part with the right of soil by enabling a state to assume political jurisdiction.”⁷⁹

Insofar as the category of fundamental sovereign powers protected by the equal footing doctrine is malleable, one might assert that the powers burdened by section 5 of the VRA—that is, state and local authority over state and local election rules and procedures—should be protected, making unequal regulation of such state authorities suspect. But this theory would turn the Fourteenth and Fifteenth Amendment inquiry on its head. To the extent that federal civil rights legislation properly remedies unconstitutional forms of discrimination, it falls squarely within the enforcement powers conferred upon Congress by the Fourteenth and Fifteenth Amendments. As such, it is “plainly within the regulating power of Congress,” and therefore not within the reserved sovereignty of states protected by the equal footing doctrine.⁸⁰ Even the submerged land cases acknowledge that states take title subject to “the paramount power of the United States to control such waters for purpose of navigation and in interstate and foreign commerce.”⁸¹ State authority over elections is no less subject to Congress’s “paramount power” to protect federal constitutional rights. Indeed, as discussed above, it would be particularly perverse to apply a principle of state equal treatment to block legislation enacted pursuant to the Reconstruction Amendments, given their origins in an effort to protect rights of a particular group of people (former slaves) in a particular region of the country (the former Confederacy).⁸²

In sum, the equal footing doctrine provides no support for a general requirement that federal legislation treat states equally. Quite the opposite: The very cases elaborating the doctrine make clear that Congress can treat states unequally, so long as it employs its proper

⁷⁷ *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842).

⁷⁸ *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1227–28 (2012).

⁷⁹ *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 235 (1845) (Catron, J., dissenting).

⁸⁰ *Coyle v. Smith*, 221 U.S. 559, 574 (1911).

⁸¹ *PPL Montana*, 132 S. Ct. at 1228 (quoting *United States v. Oregon*, 295 U.S. 1, 14 (1935)).

⁸² See *supra* Part II.A.

legislative powers.

C. Political Safeguards of Federalism

A final possible basis for a principle of state equal treatment may be found in two cases the *NAMUDNO* opinion did not cite, *South Carolina v. Baker*⁸³ and *Garcia v. San Antonio Metropolitan Transit Authority*.⁸⁴ In these cases, the Supreme Court discussed the “limits on Congress’s authority to regulate state activities”⁸⁵ imposed by the Tenth Amendment, which provides that powers not conferred by the Constitution upon the federal government are reserved to the states (or “the people” more generally).⁸⁶ *Baker* and *Garcia* abandoned earlier decisions that suggested that the Tenth Amendment might protect states against certain forms of federal regulation.⁸⁷ The Court held instead that constitutional protections against burdensome federal regulation are “structural, not substantive—*i.e.*, that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity.”⁸⁸ Nevertheless, the *Baker* Court did leave open the possibility that “some extraordinary defects in the national political process might render congressional regulation of state activities invalid under the Tenth Amendment.”⁸⁹

It might be argued that section 5 of the VRA is suspect because some breakdown in the political process led to its unequal coverage of particular states. But it seems doubtful that any breakdown in the political process with respect to this statute was sufficiently extreme to fall within the *Garcia/Baker* exception. Some scholars, to be sure, have argued that the current coverage formula resulted from a failure of political will to develop a more sensible formula when Congress last reauthorized the VRA in 2006.⁹⁰ Although Congress reauthorized section 5 of the VRA several times since 1965, in 2006 it made no change to the coverage formula chosen in the last reauthorization in 1982, even though that formula relied on arguably out-of-date data

⁸³ 485 U.S. 505 (1988).

⁸⁴ 469 U.S. 528 (1985).

⁸⁵ *Baker*, 485 U.S. at 505.

⁸⁶ U.S. CONST. amend. X.

⁸⁷ See *Garcia*, 469 U.S. at 557 (overruling the holding of *National League of Cities v. Usery*, 426 U.S. 833 (1976), that Congress lacks authority under the Commerce Clause to impose labor standards on state governments); *Baker*, 485 U.S. at 512 (discussing *Garcia*).

⁸⁸ *Baker*, 485 U.S. at 512.

⁸⁹ *Id.* (discussing *Garcia*).

⁹⁰ See, e.g., Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 208–09 (2007) (arguing that “a debate over the coverage formula” in 2006 “likely would have led to the complete unraveling of the bill”).

from 1972.⁹¹ In 1982, however, Congress did expand the VRA's bailout provisions, making it easier—particularly under the saving construction adopted in *NAMUDNO*—for jurisdictions to escape section 5's strictures if they are no longer appropriate for that jurisdiction.⁹² These bailout provisions may substantially mitigate the over-inclusiveness of the coverage formula based on practices in 1972.

In any event, invalidation of section 5 under the Tenth Amendment based on political process defects would require an intensive examination of the legislative process that led to the reauthorization. As a general matter, by emphasizing that political safeguards are ordinarily sufficient to protect state sovereignty from excessive federal intrusion, the Court's Tenth Amendment cases reinforce the proposition that unequal treatment of states is permissible. Special scrutiny is appropriate under this line of cases only if evidence establishes that the legislation resulted from a severe breakdown of the normal political process.

CONCLUSION

NAMUDNO's suggestion that legislation treating states unequally is suspect is without foundation. It threatens, moreover, to cause much mischief. States are unequal, and Congress may have rational reasons to treat them unequally, as it does in numerous forms of routine legislation. The political process is sufficient to ensure that the losers today may be winners tomorrow. Courts should not override the outcomes of this political give-and-take through probing review of such legislation.

⁹¹ See generally *Nw. Austin Mun. Util. Dist. No. One v. Holder* (*NAMUDNO*), 557 U.S. 193, 200 (2009) (discussing reauthorizations).

⁹² Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified at 42 U.S.C. § 1973b(a)(1) (2006)) (amending the provision that determines coverage of section 5). For a description of the changes and their practical effect, see *Shelby Cnty. v. Holder*, 679 F.3d 848, 856 (D.C. Cir.), cert. granted in part, 133 S. Ct. 594 (2012).