Copyright © 2006 Environmental Law Institute®, Washington, DC. reprinted with permission from ELR®, http://www.eli.org, 1-800-433-5120.

36 ELR 10624 ELR NEWS & ANALYSIS 8-2006

No Second-Class States: Why the California Exceptions in the Clean Air Act Are Unconstitutional

by Valerie J.M. Brader

Editors' Summary: The U.S. Department of Transportation's new fuel economy rules for light trucks and sport utility vehicles are under fire, in part because the Bush Administration has taken the position that the new rules preempt the ability of California to set its own stricter rules under the CAA. Yet according to Valerie Brader, there is a weightier reason the new rules should stand: the provisions of the CAA giving California these regulatory powers are unconstitutional. She argues that the equal footing doctrine, a principle of American law that predates the U.S. Constitution and is still in force today, prohibits laws that create a differential in governing power between the states. Congress' attempt to give California powers not given to other states violates that doctrine.

I. Introduction

The ability of California to set stricter air quality regulations than the other 49 states has been relatively uncontroversial for decades, but the U.S. Department of Transportation (DOT) changed that in April 2006, by issuing a set of regulations that explicitly denied California the power to require that light trucks and sport utility vehicles (SUVs) meet stricter fuel economy standards.[1] Despite much public comment to the contrary, the DOT stood by its position that §32919(a) of the Energy Policy and Conservation Act[2] preempted the authority given to California by the Clean Air Act (CAA).[3] After this regulation was promulgated, senators from both parties sent a letter to the U.S. Environmental Protection Agency (EPA) urging it to break with the DOT and allow California and the states that have followed its lead to continue to set tougher vehicle emission standards to curb global warming in accordance with "the States' time-honored right."[4] The senators' letter cited several provisions of the CAA that grant California powers denied to all other states to regulate in the air quality arena, including in fuel economy.[5] These provisions may be time-honored, as they have been part of U.S. law since the 1970s. There is a legal rule that is far more time-honored, however, that undercuts the senators' argument: the principle that all states are equal in sovereignty. By giving California the power to regulate in the air quality arena but denying other states the same sovereignty, the CAA violates the constitutional principle that all the states of the Union have equal sovereign powers. The equal footing doctrine has the longest possible history in American law; it predates the U.S. Constitution and remains in force today. Although the majority of the jurisprudence regarding the equal footing doctrine has involved property matters, there is a more powerful arm of the doctrine that prevents the federal government from denying any state the powers held by her sister states. The CAA provisions giving California the right to set its own regulations when other states may not is a violation of this guarantee of equality

Valerie Brader, a member of the Michigan, Eastern District of Michigan, and U.S. Court of Appeals for the Sixth Circuit bars, is currently a clerk for the Hon. John Feikens (E.D. Mich.). Formerly, Brader was an environmental consultant with Booz Allen Hamilton and the staff assistant for natural resources for Gov. Phil Batt (R-Idaho). A Rhodes Scholar, she holds an A.B. magna cum laude in government from Harvard University, an M.Sc. in environmental change and management and an M.St. in historical research from the University of Oxford, and a J.D. magna cum laude from Georgetown University. A longer version of this Article is on file with the *Hastings West-Northwest Journal of Environmental Law & Policy* (forthcoming 2006). The author would like to thank Gregory Koory, Jeremy Schultze, and Robyn Tessin for their insights and suggestions.

1. Average Fuel Economy Standards for Light Trucks Model Years 2008-2011, 71 Fed. Reg. 17566 (Apr. 6, 2006).
2. 49 U.S.C. §§32901-32919 (1994).
3. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618; 71 Fed. Reg. at 17654.
4. Letter from Sen. Dianne Feinstein (D-Cal.) et al., to Stephen L. Johnson, Adm'r, U.S. EPA, at 1, *available at* http://www.net.org/warming/docs/pavley-letter-060331.pdf. *See also* Erica Werner, *Twenty-One Senators Press EPA to Allow Tougher Emission Standards*, Envtl. News Network, Mar. 31, 2006, http://www.enn.com/today.html?id=10188. The Center of Biological Diversity has also announced a lawsuit challenging these regulations on another ground, namely, failure to adequately consider overall environmental impacts. *See* Press Release, Center for Biological Diversity, New National Fuel Economy Standards Challenged (Apr. 6, 2006), *available at* http://www.biologicaldiversity.org/swcbd/press/CAFE-04-06-2006.html.
5. 42 U.S.C. §§7507, 7543(b), (e), 7545(c)(4)(B). Although other states can choose to adopt the California standards or be bound only by the federal standards, the Act gives no state other than California the right to select a level of regulation in the first instance.

Copyright © 2006 Environmental Law Institute®, Washington, DC. reprinted with permission from ELR®, http://www.eli.org, 1-800-433-5120.

and, therefore, is contrary to the fundamental construction of the Union.

Part II of this Article begins by highlighting those provisions of the CAA that give California its special status. Part III then discusses the Founding Forefathers' (the Founders') visions for the relationship between states, as well as that of the Continental Congress, and the long adherence to the equal footing doctrine by the legislative and executive branches. Part IV is devoted to the development of U.S. Supreme Court jurisprudence regarding the political implications of the equal footing doctrine. Part V applies these principles of law to the statutory provisions of the CAA that give California a preferred position, finding that the jurisprudence, together with an understanding of the Founders' intent, makes these sections of the CAA constitutionally invalid.

II. California's Special Treatment in the CAA

The CAA gives California many powers denied to other states concerning their ability to regulate the emissions of new motor vehicles.[6] CAA §209 provides, in part, that states may not "adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines."[7] Yet there are two exceptions to this provision. The first, also found in §209, provides that any state that adopted standards prior to March 30, 1966—in other words, California—may set standards that are more stringent than the federal government's standards as long as they fulfill certain conditions.[8] Congressional debate on the floor suggests that the rationale behind this was a concern that California's air pollution was far more severe than the rest of the nation's, although this point was contested.[9] The other exception is found in §177, added to the CAA in 1977. That section deals with regulation of vehicle engines in areas where pollution causes air quality to fall below federal standards, so-called nonattainment areas.[10] The language of this provision makes the preference for California all the more blatant:

> [A]ny State . . . may adopt and enforce for any model year standards relating to control of emissions from new motor vehicles or new motor vehicle engines . . . if:
>
> (1) such standards are identical to the California standards for which a waiver has been granted for such model year, and
> (2) California and such State adopt such standards at least two years before commencement of such model year . . . .
>
> Nothing in this section . . . shall be construed as authorizing any such State to prohibit or limit, directly or indirectly, the manufacture or sale of a new motor vehicle or motor vehicle engine that is certified in California as meeting California standards, or to take any action of any kind to create, or have the effect of creating, a motor vehicle or motor vehicle engine different than a motor vehicle or engine certified in California under California standards (a "third vehicle") or otherwise create such a "third vehicle."[11]

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

Section 209 also governs non-road engines. It states that "[n]o State or any political subdivision thereof shall adopt or attempt to enforce any standard or other requirement relating to the control of emissions" that is intended to regulate non-road engines in farm equipment and locomotives.[12] It too provides California with an exception:

> the Administrator [of EPA] shall, after notice and opportunity for public hearing, authorize California to adopt and enforce standards and other requirements relating to the control of emissions from such vehicles or engines if California determines that California standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such authorization shall be granted if the Administrator finds that—
>
> (i) the determination of California is arbitrary and capricious,
> (ii) California does not need such California standards to meet compelling and extraordinary conditions, or
> (iii) California standards and accompanying enforcement procedures are not consistent with this section.[13]

As with on-road vehicles and engines, other states are given the power to adopt standards "identical" to that of California in lieu of the federal standards for non-road engines.[14]

The final provision that gives California special status as compared to other states is §211, which deals with the regulation of fuels. Under that provision, no state can set regulations requiring the use of particular fuels or fuel additives in lieu of federal standards unless the regulations are "identical" to federal regulations set by EPA.[15] An exception to this rule is found in §211(c)(4)(B), which allows any state with a waiver under §209(b)—a waiver for which only California is eligible[16]—"[to] at any time prescribe and enforce, for the purpose of motor vehicle emission control, a control or prohibition respecting any fuel or fuel additive."[17] Unlike the other provisions discussed above, this exception does not allow states to adopt the California standards in lieu of federal standards.

Although the U.S. Congress debated the wisdom of giving these powers to California while denying them to all other states, it did not debate the constitutionality of doing so.[18] It should have. The equal footing doctrine, a tenet of American law that predates the Constitution, trumps any efforts of Congress to elevate one state above the others. This doctrine, a principle of government that was utterly new to

6. *Id*. §7543.
7. *Id*. §7543(a).
8. *Id*. §7543(b), S. Rep. No. 91-1196, at 32 (1970).
9. 116 Cong. Rec. 19232 (1970).
10. 42 U.S.C. §7507.
11. *Id.*
12. *Id*. §7543(e)(1).
13. *Id*. §7543(e)(2)(A).
14. *Id*. §7543(e)(2)(B)(i).
15. *Id*. §7545(4)(A).
16. S. Rep. No. 91-1196, at 32 (1970).
17. 42 U.S.C. §7545(c)(4)(B).
18. H.R. Rep. No. 91-1146, at 52-53 (1970).

Copyright © 2006 Environmental Law Institute®, Washington, DC. reprinted with permission from ELR®, http://www.eli.org, 1-800-433-5120.

the world, has had a consistent presence in U.S. law since 1787, as the next section discusses.

III. A Great American Innovation: The Equal Footing Doctrine

One of the most successful and unique contributions of the American governmental system is the machinery that enables new territories to become full, equal members of the polity.[19] This "glorious fixture among American institutions," now known as the equal footing doctrine, first appeared in U.S. law in 1787. That year, the Continental Congress, the United States' earliest form of government,[20] passed an ordinance providing the means by which new states would be admitted to the Union. Also in 1787, the 55 delegates from several states convened at the Constitutional Convention in Philadelphia to debate the future of the nation's governmental structure, which resulted in the creation of the Constitution.[21] Both groups of early lawmakers struggled with foundational questions, notably how to allow the United States to grow. They had to decide whether the former colonies would become colonizers or whether they would create a new kind of polity that would allow new territories to become an equal part of the nation, with the same right to govern that the founding members enjoyed. After fierce debates, both groups of American lawmakers chose the latter, and the equal footing doctrine has been a cornerstone of the American system of government ever since.[22]

A. The Statutory History of the Equal Footing Doctrine

The phrase "equal footing" first appeared in U.S. law in the late 18th century when the Continental Congress passed the Northwest Ordinance of 1787.[23] This ordinance provided the means by which new states would be created out of western lands and then admitted into the Union. Under one of the articles of that ordinance, all of which are to be "considered as articles of compact between the original states, and the people and States in the said territory, and [to] forever remain unalterable unless by common consent," comes the language that territories should have the opportunity "for their admission to a share in the federal councils on an equal footing with the original States, at as early periods as may be consistent with the general interest."[24] Another "article of compact" provided that national debts would be paid "according to the same common rule or measure, by which apportionments thereof shall be made on the other States."[25]

The ordinance continued to have force after the Constitution went into effect on March 1, 1789. Very early in its first term, Congress voted to have the Northwest Ordinance continue in full effect under the newly constituted government, reprinting it in full as part of the statutes at large of the United States.[26] In all the future acts of Congress regarding the admittance of new states into the Union, Congress included language indicating the equal status of each new state, usually in a statement that the admission was on an "equal footing" with the other states; presidential proclamations followed the same rule.[27] The notion of "equal foot-

19. Daniel J. Boorstin, The Americans: The National Experience 421-22 (1965).

20. The First Continental Congress met from September 5, 1774, to October 26, 1774. The Second Continental Congress met from May 10, 1775, until the ratification of the Articles of Confederation on March 1, 1781. The Revolutionary War officially concluded in 1783. From 1781 until March 1, 1789, when the Constitution went into effect, the nation's legislative body was known as the Congress of the Confederation. This Article discusses primarily activities of the Congress of the Confederation, but occasionally reaches back farther in history, so to reduce confusion, it refers to all of these pre-constitutional legislative bodies as the Continental Congress.

21. Boorstin, *supra* note 19.

22. *Id.* at 422.

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

24. *Id.* art. V.

25. *Id.* art. IV.

26. 1 Stat. 50, ch. VIII (1789). The Northwest Ordinance received final House approval on July 21, 1789, Senate approval on August 4, 1789, and was signed into law by President George Washington on August 7, 1789.

27. In order of eventual admission of the states: 1 Stat. 191, ch. VII (1791) (Vermont) ("shall be received and admitted into this Union, as a new and entire member of the United States of America"); 1 Stat. 189, ch. IV, §2 (1791) (Kentucky) (same language as Vermont); 1 Stat. 491-92, ch. XLVII (1796) (Tennessee) ("in all other respects, as far as they be applicable, the laws of the United States shall extend to, and have force in the state of Tennessee, in the same manner, as if that state had originally been one of the United States"); 2 Stat. 322-23, ch. XXIII, §7 (1805) (Louisiana Enabling Act) ("upon the footing of the original states"); 2 Stat. 701-04, ch. L, §1 (1811) (Louisiana Admission Act) (supplemented as to courts and abolishing local government, 2 Stat. 743 (1812)); 3 Stat. 289-91, ch. LVII (1816) (Indiana Enabling Act); 3 Stat. 399-400 (1816) (Indiana Admission Act); 3 Stat. 348-49, ch. XXIII, §1 (Mississippi Enabling Act); 3 Stat. 472-73, res. I (1817) (Mississippi Admission Act); 3 Stat. 428-31, ch. LXVII, §§1, 4 (1818) (Illinois Enabling Act); 3 Stat. 536, res. I (1818) (Illinois Admission Act); 3 Stat. 489-92, ch. XLVII, §1 (1819) (Alabama Enabling Act); 3 Stat. 608, res. I (1819) (Alabama Admission Act); 3 Stat. 544, ch. XIX (1820) (Maine Admission Act); 3 Stat. 545-48, ch. XXII, §1 (1820) (Missouri Enabling Act); 3 Stat. 645, res. I (1821) (Missouri Admission Act); 3 Stat. 797 (1821) (Missouri Admission Proclamation); 3 Stat. 50-52, ch. C, §1(1836) (Arkansas Enabling Act) (as supplemented by 5 Stat. 58-59 (1836) and with changes assented to in 9 Stat. 42, ch. LXVIII (1846) and 30 Stat. 262, ch. 54 (1898)); 5 Stat. 50-51, ch. C (1836) (Arkansas Admission Act); 5 Stat. 49-50, ch. XCIX, §§2, 4 (1836) (Michigan Enabling Act) (as supplemented by 5 Stat. 59-60, ch. CXXL (1836)); 5 Stat. 742-43, ch. XLVIII, §§1, 4 (1845) (Florida and Iowa Admission Act) (as supplemented by 5 Stat. 788, ch. LXXV (1845) and 5 Stat. 789-90, ch. LXXVI (1845) and as amended by 9 Stat. 410-12, ch. CXXIII (1849); 5 Stat. 742-43, ch. XLVIII, §1 (1845) (Iowa and Florida Admission Act as supplemented by 5 Stat. 788 (1845) and 5 Stat. 789-90, ch. LXXVI (1845) and 9 Stat. 410-12, ch. CXXIV (1849)); 9 Stat. 108, res. I, §1 (1845) (Texas Admission Act); 9 Stat. 56-58, ch. LXXXIX, §1 (1846) (Wisconsin Enabling Act); 9 Stat. 178-79, ch. LIII §§1, 4 (1847) (Wisconsin Admission Act I); 9 Stat. 233-35, ch. L, §1 (1848) (Wisconsin Admission Act II); 9 Stat. 452-53, ch. L, §1 (1850) (California Admission Act); 11 Stat. 166-67, ch. LX, §1 (1857) (Minnesota Enabling Act); 11 Stat. 285, ch. XXXL, §1 (1858) (Minnesota Admission Act) (as supplemented by 11 Stat. 402, ch. LXXIV (1859); 11 Stat. 383-84, ch. XXXIII, §1 (1859) (Oregon Admission Act) (as amended by 12 Stat. 124, ch. II (1860); 11 Stat. 269-72, ch. XXVI (1858), §1 (Kansas Admission Act); 12 Stat. 126-28, ch. XX, §1 (1861) (Kansas Admission Act); 12 Stat. 633-34, ch. VI §1, ¶ 2 (1862) (West Virginia Admission Act); 13 Stat. 30-32, ch. XXXVI, §1 (1864) (Nevada Enabling Act) (as amended by 13 Stat. 85, ch. XCIV (1864)); 13 Stat. 47-50, ch. LIX (1864) (Nebraska Enabling Act) ("equal footing" in title only); 14 Stat. 391-92, ch. XXXVI, §1 (1867) (Nebraska Admission Act); 14 Stat. 82-21, No. 9 (1867) (Nebraska Admission Proclamation); 13 Stat. 32-25, ch. XXXVII, §1 (1864) (Colorado Enabling Act I) (as amended by 13 Stat. 137, ch. CXXXV (1864)); 18 Stat. 474-76, ch. 139, §1 (1875) (Colorado Enabling Act II) (as amended by 19 Stat. 5-6, ch. 17 (1876)); 25 Stat. 676 (North Dakota, South Dakota, Montana, and Washington Enabling Act) (as amended by 29 Stat. 189, ch. 256 (1896), 47 Stat. 150-51, ch. 172 (1932), 71 Stat. 5, Pub. L. 85-6 (1957), and 84 Stat. 987, Pub. L. 91-463 (1970)); 26 Stat. 215-19, ch. 656, §1 (1890) (Idaho Admission Act); 26 Stat. 222, ch.

Copyright © 2006 Environmental Law Institute®, Washington, DC. reprinted with permission from ELR®, http://www.eli.org, 1-800-433-5120.

ing" among the states serves as one of the earliest examples of Congress' exercise of its legislative power, and despite other opportunities to alter that concept, it has consistently reaffirmed this principle though the centuries.

B. The Constitutional Convention and Equality of States

The delegates to the Constitutional Convention of 1787 engaged in a serious debate about whether the founding states should have greater or equal powers than any new states. The opponents of giving newer states equal power saw the new states as a threat because they feared the new states would use their political power in opposition to the founding states' interests.[28] This group of Founders supported limiting the number of new states to 12.[29] Supporters of equality argued both that such an amendment was unnecessary because there would never be more than 12 new states, and that citizens of new states should not suffer discrimination.[30] After losing this initial battle, the opponents of equality for new states instead proposed a structuring of the government ensuring founding states' dominance over the national government, which was initially adopted by the Constitutional Convention as the policy to be incorporated in the draft Constitution that a smaller committee had the responsibility of writing.[31]

Despite the Convention's vote, the Committee of Detail's draft of the Constitution had a provision that new states should be "admitted on the same terms with the original states."[32] This reopened a strenuous debate on the issue, which finally ended when, in another vote, the Convention officially adopted the compromise language offered by one delegate, Gouverneur Morris, an opponent of equal power for new states: "New States may be admitted by the Legislature into the Union."[33] This language stayed in Article IV and is part of our Constitution today, alongside provisions setting the representation of states without reference to older or newer states. Therefore, although all the provisions of the Constitution implicitly treat all states equally, Morris successfully prevented an explicit statement of the "equal footing" of all the states. He expounded on his reasons for doing so in a letter written after the Louisiana Purchase:

> I always thought that, when we should acquire Canada and Louisiana, it would be proper to govern them as provinces and allow them no voice in our councils. In wording the third section of the fourth article, I went as far as circumstances would permit to establish the exclusion. Candor obliges me to add my belief, that, had it been more pointedly expressed, a strong opposition would have been made.[34]

Knowing Morris' views so plainly is helpful because it shows that the most ardent opponent of the equal footing language was opposed to the language because he wanted the original states to have more power than subsequent states. Given this, we can assume with a great deal of certainty that both the proponents and the opponents of the equal footing doctrine among the Founders would have opposed a situation in which a new state had *more* governing power than the original states.

IV. Political Equal Footing in the Supreme Court

Although the phrase "equal footing" is not technically included in our Constitution, the Supreme Court has a long history of seeing the equal footing doctrine as a constitutional one, honoring the political implications of the doctrine above many competing values. While the majority of Court decisions regarding the equal footing doctrine have dealt with title to submerged lands, several have concerned the political relationships of states. These decisions have addressed some of the biggest issues of the nation's political history: Native Americans; slavery; religious freedom; and most pertinent to this discussion, the relationship between the federal government and the states. Although it was not until the 1840s that the Court would declare that the doctrine had a constitutional as well as a statutory basis, the Court has been remarkably consistent in describing the key role the equal footing doctrine plays in the nation's political structure. In addition, though the Court has usually dealt with the equal footing doctrine in the context of property rights, it has consistently identified the protection of political rights as the core of the doctrine and has staunchly guarded any perceived encroachment on those political rights.

A. The Doctrine as a Constitutional Mandate

The Supreme Court's equal footing jurisprudence first arose in cases concerning disputed property rights, and although some concurring opinions dwelt on it, there was little new law that applies to the CAA context. In 1845, however, the

664 (1890) (Wyoming Admission Act) (erroneously labeled as Wyoming Enabling Act in United States v. Wyoming, 331 U.S. 440, 442-43 (1947)); 28 Stat. 107, ch. 138, §§1, 4 (1894) (Utah Enabling Act); Proclamation Declaring Utah Statehood, 6 Thorpe 3700, ¶ 7 (Jan. 4, 1896), *available at* http://www.archives.state.ut.us/exhibits/Statehood/proctext.htm; 34 Stat. 267, ch. 3335, tit. and §26 (Oklahoma, New Mexico, and Arizona Enabling Act) (as amended by 34 Stat. 1286, ch. 2911 (1907)); 72 Stat. 339, §1 (Alaska); 73 Stat. 4, §1 (Hawaii).

28. Max Farrand, The Framing of the Constitution of the United States 109 (1913); William Peters, A More Perfect Union: The Making of the United States Constitution 123 (1987).

29. Peters, *supra* note 28 at 123.

30. Farrand, *supra* note 28, at 143; Peters, *supra* note 28, at 124.

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

32. Farrand, *supra* note 28, at 143. Farrand notes the Committee of Detail chose this language "either on their own responsibility or because they interpreted the views of the convention that way." *Id.* The idea that the leanings of the Convention may have been toward equality of the states receives some support from the fact that George Washington, the influential president of the Convention, had recently taken the position that the Union would be strengthened by having fewer and larger new states, instead of larger numbers of smaller and less populous states. Boorstin, *supra* note 19, at 244.

33. Farrand, *supra* note 28, at 144; U.S. Const. art. I, §2, cl. 1; §3, cl. 1.

34. Farrand, *supra* note 28, at 144 (citing letter to Henry W. Livingston). With the advantage of hindsight, the Founders' ability to craft a union of states that still functions today is deeply impressive, especially because it is clear that none of them envisioned anything close to the enormous expansion the United States would experience in just 200 years. Consider: some of those deciding how to admit new states believed the number of new states would never number above 12; their opponents expected to acquire Canada yet believed the new states would be uniformly poorer than the original ones. Although the current state of the Union is not in line with either vision, the fact that it stands as a true Union is taken for granted by nearly all its citizens and the world.

Copyright © 2006 Environmental Law Institute®, Washington, DC. reprinted with permission from ELR®, http://www.eli.org, 1-800-433-5120.

Supreme Court decided two major cases in the equal footing doctrine jurisprudence, and those two opinions are cornerstones of the equal footing jurisprudence today.

In *Pollard's Lessee v. Hagan*,[35] a case regarding the ownership of submerged lands, Justice John McKinley held that the equal footing doctrine was a constitutional doctrine.[36] (Recall that the words do not appear in the Constitution.) After quoting Article IV, §3, of the Constitution, which governs the admission of new states, the Court stated: "When Alabama was admitted into the union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain[.]"[37] The opinion then noted that "the United States have no constitutional capacity to exercise municipal jurisdiction [or] sovereignty" over the objections of a state.[38] "The right of Alabama and every other new state to exercise all the powers of government, which belong to and may be exercised by the original states of the union, must be admitted, and remain unquestioned."[39] The Court went on to hold that the only regulations Congress could impose on a new state are those that it could also impose on the original states.[40] This also meant that a new state's power "does not [. . .] exceed the power thereby conceded to Congress over the original states on the same subject."[41]

The second case of the term, *Permoli v. City of New Orleans*,[42] built on the identification of the equal footing doctrine as a constitutional mandate, and turned that principle to a question impacting the political sovereignty of states. The city of New Orleans had passed a statute fining Catholic priests who displayed corpses in churches during funerals, requiring that open-casket services be held in a specific chapel. The Reverend Bernard Permoli, who was fined after violating the statute, appealed this fine to the Supreme Court after losing in the Louisiana courts, arguing that its imposition violated the state constitution's guarantee of religious freedom. The Constitution, at that time, did not require state governments to protect their citizen's religious liberties, but the federal act enabling Louisiana to become a state did.[43] This situation posed a conundrum, since none of the original states had an enabling act or act of admission, whereas all of the new states did, often with a similar requirement. In other words, there was federal law regarding what the laws regarding religion in new states ought to be, but no similar provision of federal law for older states. The Supreme Court had to decide whether federal enabling acts could perpetually impose a restriction on some states if other states did not have the same restrictions.

A unanimous Court answered in the negative. It began by holding that it was proper for Congress to announce the terms under which it would accept a statehood petition and that Congress had the power to reject or accept as a whole such a petition, taking into account whether the "proper principles" were reflected in the proposed state constitution.[44] But if Congress admitted a state, it was precluded from going back and altering the state constitution to comply with the federal enabling act.[45] The Court rejected the idea that the provisions of federal law protecting religious liberty in the territories applied following statehood absent an explicit statement in the new state's laws.[46] One line of reasoning underlying this decision was that there could never be a federal cause of action for founding states facing the same situation, as those states would not have an enabling act, and, therefore, it would be a constitutional violation to subject the newer states to federal court oversight. Since the only guarantee of religious liberty was found in the state's constitution, the question of whether the municipal ordinance violated the state's constitution was a matter of state, not federal, law, "equally so in the old states and the new ones."[47] The Court therefore reasoned it had no jurisdiction.[48]

Therefore, heading into the Civil War, two key facets of the equal footing jurisprudence were firmly established: first, that the construction of the Constitution clearly embodied the equal footing doctrine, even if the words do not appear in the document; and second, that since the doctrine is constitutional, attempts by Congress to enact federal laws that limit the use of sovereignty by new states must be struck down if it could not have imposed the same restrictions on founding states.

B. The Equal Footing Doctrine Splits: Political Versus Property Rights

The new century brought some new facets to the equal footing doctrine, as the Court took the opportunity to delineate between two branches of the doctrine: the branch dealing with property rights, and the branch dealing with political rights. *Stearns v. Minnesota*[49] involved a challenge to a Minnesota law that gave a railroad company a special break on the taxation of previously public lands that were given by the federal government to the state at the time of admission. The Court explained that "different considerations may underlie the question as to the validity" of compacts between the state and the federal government regarding "political rights and obligations" and those that deal only with property.[50] The Court continued: "It has often been said that a state admitted into the Union enters therein in full equality with all the others, and such equality may forbid any agree-

35. 44 U.S. 212 (1845).

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

37. *Pollard's Lessee*, 44 U.S. at 223.

38. *Id.*

39. *Id.* at 224.

40. *Id.* at 229.

41. *Id.* at 230.

42. 44 U.S. 589 (1845).

43. *Id.* at 609. The U.S. Constitution did not require state governments to protect religious freedom until the Supreme Court "incorporated" this provision of the First Amendment in 1940. Cantwell v. Connecticut, 310 U.S. 296 (1940).

44. *Id.*

45. *Id.* at 610.

46. *Id.*

47. *Id.*

48. *Id.*

49. 179 U.S. 223 (1900).

50. *Id.* at 244-45.

Copyright © 2006 Environmental Law Institute®, Washington, DC. reprinted with permission from ELR®, http://www.eli.org, 1-800-433-5120.

ment or compact limiting or qualifying political rights and obligations."[51] Finding that property provisions did not truly involve a question of equality of status, the Court held that the state could be required to live up to the obligations of trust that the federal government had imposed as a condition of the land cession.[52]

The Court's affirmance of the importance and centrality of the political implications of the equal footing doctrine, coupled with a reduced emphasis on the property implications of the doctrine, was an obvious outgrowth of much of the jurisprudence of the equal footing doctrine as a whole, going back as far as Justice John Catron's concurrence in 1842 in *City of Mobile v. Eslava*.[53] The Court's decision in *Stearns*, however, did mark an important doctrinal step in that the Court declined to extend *Permoli*. In *Permoli*, the Court unanimously rejected the idea that federal courts could revisit the decision of state supreme courts as to the meaning of state constitutions simply because the federal enabling act of a state required certain elements in that constitution. In *Stearns*, however, the Court made no such argument concerning property. Arguably, since the founding states had not received their public lands from Congress, none of them would have to abide by restrictions on the use of their public lands that apply because public lands used to belong to the federal government.[54] The Court, therefore, might have found that subjecting those lands held publicly by newer states to extra obligations violated the equal footing doctrine. Instead, the Court chose to put property rights stemming in part from the equal footing doctrine on a lesser plane than political rights from the same source. Reading *Permoli* and *Stearns* together, the decisions create a two-tier equal footing doctrine: political rights have the premier position, and land rights are inferior.

The Court waited 11 years after *Stearns* before addressing the equal footing doctrine again, but it resumed discussions with the most important case regarding the political branch of the equal footing doctrine that has yet been written. *Coyle v. Smith*[55] posed the question of whether Oklahoma was permitted to move its state capital from Guthrie to Oklahoma City. Although any schoolchild who has been made to memorize the state capitals knows they were allowed to do so, few know why.

Oklahoma's enabling act required Guthrie to be the capital of the state until at least 1913; thereafter, the capital could be moved only if ratified by a popular election.[56] Oklahoma became a state in 1907, and in 1910, the state legislature passed a law to erect the necessary buildings in Oklahoma City and to move the capital.[57] The plaintiff, Coyle, owned a great deal of land in Guthrie and brought suit alleging that the move violated the state constitution and federal law because the move was both early and not affirmed by a popular vote.[58] The Oklahoma Supreme Court found no violation of any state law, and the U.S. Supreme Court declined to review that aspect of the court's decision. Instead, what it took up was the question of whether moving the capital was a violation of federal law.

The Court first held that "the power to locate its own seat of government, and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers."[59] It noted that the idea of a federal mandate to move a state capital in one of the original 13 states "would not be for a moment entertained."[60] The Court then set out to decide the question it framed: "Can a state be placed upon a plane of inequality with its sister states in the Union if the Congress chooses to impose conditions which so operate, at the time of its admission?"[61]

The Court first turned to the provisions of the Constitution dealing with the admission of states. It read those powers to have an inherent limitation, namely, the lack of power to "admit political organizations which are less or greater, or different in dignity or power, from those political entities which constitute the Union."[62] It then looked to the statutory basis of the equal footing doctrine, noting that all the acts admitting new states into the Union had recognized their equality with the previous states in terms that were, at a minimum, "emphatic and significant."[63]

> "This Union" was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new states, might come to be a union of states unequal in power, as including states whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress. . . . The argument that Congress derives from the duty of "guaranteeing to each state in this Union a republican form of government," power to impose restrictions upon a new state which deprive it of equality with other members of the Union, has no merit.[64]

With this serving as background, the Court distinguished three types of provisions that might be found in enabling acts: (1) those that are fulfilled upon the admission of the state; (2) those that are intended to operate in the future and are within the scope of the powers of Congress over the subject; and (3) those that operate in the future that restrict the powers of a state in respect to matters which would otherwise be exclusively within the sphere of state power.[65] Citing *Permoli*, the Court found the first set of provisions were constitutional, in that Congress could require certain

---

51. *Id.* at 245.
52. *Id.* at 253.
53. 41 U.S. 234 (1842).
54. Justice Edward White's concurrence, which was signed by Justices Horace Gray, John Marshall Harlan, and Joseph McKenna, makes this particularly clear, as it assumes that the Minnesota Supreme Court erred in deciding that the taxation system was not in violation of the state Constitution. *Sterns*, 179 U.S. at 257. Justice White then poses the question: "[Can Congress] confer upon a state legislature the right to violate the Constitution of the state?" and determines the answer, at least in this case, is no. *Id.*
55. 221 U.S. 559 (1911).
56. 34 Stat. 267 (1906).
57. *Coyle*, 221 U.S. at 563-64.
58. *Id.*
59. *Id.* at 565.
60. *Id.*
61. *Id.*
62. *Id.* at 566.
63. *Id.*
64. *Id.* at 567. Citing *Minor v. Happersett*, 88 U.S. 162 (1874), the Court tempered this language somewhat by stating that Congress may have the duty to make sure that the form of government is not changed to one that is anti-republican.
65. *Coyle*, 221 U.S. at 570-73.

Copyright © 2006 Environmental Law Institute®, Washington, DC. reprinted with permission from ELR®, http://www.eli.org, 1-800-433-5120.

provisions in state constitution before admitting that state, but that upon admission, these provisions would be "subject to alteration and amendment" just as any other part of the state's constitution would be.[66] The Court closed its discussion on this first scenario by saying, "[T]here is to be found no sanction for the contention that any state may be deprived of any of the power constitutionally possessed by other states, as states, by reason of the terms on which the acts admitting them to the Union have been framed."[67]

The Court then turned to provisions intended to reach state actions that fell either within or outside the scope of Congress' legislative powers. The Court found that provisions that exceeded congressional scope were void because the state's powers could not be "constitutionally diminished, impaired, or shorn away by any conditions, compacts, or stipulations . . . which would not be valid and effectual if the subject of congressional legislation after admission."[68] In contrast, those conditions that could have legally been made part of a federal statute would be enforceable because the conditions were independently valid in that they were a statute passed by Congress within its authority.[69] The Court found that the question of the capital location was obviously beyond Congress' authority to dictate through legislation and, hence, was unconstitutional.[70] The Court closed with this language: "[T]he constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution."[71]

To date, *Coyle* offers the best explanation of states' political rights under the equal footing doctrine.[72] Though the case ostensibly addressed only the limitations of enabling acts, the Court's language covered a wider range, concluding that equality among states is an essential foundation of the country. It also created a method for handling challenges to conditions imposed by enabling acts—if Congress could have enacted the condition under its other statutory powers, the condition may be enforced. The Court, however, did not address the potential problem this method creates, namely, whether Congress can pass a law that impacts only one state.

In the modern era, *United States v. Texas*[73] is the case that best applies these earlier precedents to flesh out the political rights branch of the doctrine. Citing *Stearns*, the Court noted the long jurisprudential history of the equality of political rights (or political standing) and sovereignty under the equal footing doctrine.[74] The Court separately discussed the effect the doctrine has on property ownership, noting the consistent holding that later-admitted states had a right to own submerged lands because to do otherwise would deny them equal footing with the original states. The Court also noted some matters that were outside the boundaries of the clause:

> It does not, of course, include economic stature or standing. There has never been equality among the States in that sense. Some States when they entered the Union had within their boundaries tracts of land belonging to the Federal Government; others were sovereigns of their soil. Some had special agreements with the Federal Government governing property within their borders. Area, location, geology, and latitude have created great diversity in the economic aspects of the several States. The requirement of equal footing was designed not to wipe out those diversities but to create parity as respects political standing and sovereignty.[75]

In other words, the equal footing doctrine does not prevent the federal government from selling property to one state and not to another, or from taxing particular industries that hit one state harder than another. It does prevent the federal government from passing laws that create a disparity in respect to political sovereignty.

C. Recent Supreme Court Cases: Submerged Into the Submerged Lands Cases

Since the 1950s, the Supreme Court issued few major equal footing decisions concerning the political rights of states. Instead, the equal footing doctrine has been used nearly exclusively to determine title to submerged lands, with resulting forays into Native American and water law. Little more than a sentence or two is devoted to the equal footing doctrine in these cases, usually citing the nature of the doctrine before diving into the factual issues that bear upon its particular application.[76]

An exception to the Court's inactivity, however, took place in the 1970s, when the Court set forth a new principle as part of the equal footing doctrine and then repealed it four years later. The question on which the Court ruled and rapidly reversed itself was whether the equal footing doctrine mandated the application of federal common law over the laws of a state. In *Bonelli Cattle Co. v. Arizona*,[77] the Court was deciding whether the ownership of previously submerged lands divested from the state after the waters had been removed. The Court held that the equal footing doctrine did not entitle the state to the deed to those lands because there was no longer "a public benefit to be protected."[78] However, it also held that the state's (unsuccessful) invocation of the equal footing doctrine meant that the Court had to use federal common law to resolve the dis-

66. *Id.*
67. *Id.* at 570.
68. *Id.* at 573.
69. *Id.* at 574.
70. *Id.*
71. *Id.* at 580.
72. In 1918, in a case that spent little time on the equal footing doctrine, the Court would label the ideal that states have equal local governmental power a "truism" in deciding that the federal government had the power to enforce interstate compacts approved by Congress. Virginia v. West Virginia, 246 U.S. 565, 593 (1918).
73. 339 U.S. 707 (1950).
74. *Id.* at 716.
75. *Id.* (citation omitted).
76. Organized Village of Kake v. Egan, 80 S. Ct. 33, 37 (1959); California v. United States, 438 U.S. 645, 648, 654 (1978); California v. Arizona, 440 U.S. 59, 60 (1979); Montana v. United States, 405 U.S. 544, 551 (1981); California v. United States, 457 U.S. 273, 281, 285 (1982); Summa Corp. v. California, 466 U.S. 198, 205 (1984) ("The Federal Government, of course, cannot dispose of a right possessed by the State under the equal-footing doctrine of the United States Constitution."); United States v. Cherokee Nation of Okla., 480 U.S. 700, 706 (1987); Utah Div. of State Lands v. United States, 482 U.S. 193, 196-97 (1987); Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 472 (1988); Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 203-04 (1998); Idaho v. United States, 533 U.S. 262, 280 (2001).
77. 414 U.S. 313, 4 ELR 20094 (1973).
78. *Id.* at 320.

Copyright © 2006 Environmental Law Institute®, Washington, DC. reprinted with permission from ELR®, http://www.eli.org, 1-800-433-5120.

pute.[79] In essence, the *Bonelli* Court ignored the fact that the equal footing doctrine had long been interpreted to give control of these lands to the states, and cited as its authority for the alternative federal common law.

In 1977, the Court explicitly overruled *Bonelli* in *Oregon v. Corvallis Sand and Gravel Co.*[80] The Court held that a party's citation to the equal footing doctrine did not give the federal court licenses to apply federal common law to any questions that might later arise about title to that property. Rejecting the *Bonelli* reasoning, the Court ruled that the constitutional mandate of the equal footing doctrine meant that the state took title at the time of its admission, and that title became firm at that time, without being subject to later changes in federal common law.[81] The reasoning of the Court's opinion hearkened back to the *Permoli* decision's emphasis on the requirement that new states have the same legal constraints on their sovereignty as older states, noting that to decide that the equal footing doctrine allowed federal common law to be applied

> would result in a perverse application of the equal-footing doctrine. An original State would be free to choose its own legal principles to resolve property disputes relating to land under its riverbeds; a subsequently admitted State would be constrained by the equal-footing doctrine to apply the federal common-law rule, which may result in property law determinations antithetical to the desires of that State.[82]

The Court finished with an added justification for overruling *Bonelli* by saying that the case raised "an issue substantially related to the constitutional sovereignty of states," and therefore, "considerations of stare decisis play a less important role than they do in cases involving substantive property law."[83]

V. Challenging the California Provisions of the CAA

The question of whether Congress can give regulatory powers to one state but not others would be an issue of first impression for any court.[84] To answer that question, it is helpful to determine the limitations of the equal footing doctrine as elucidated by the Court in past decisions. From *Pollard's Lessee*, we know Congress cannot impose regulations on a new state unless the same regulations could be imposed upon the original states.[85] From *Permoli*, we know that no political right can be a matter of federal law in one state unless it is a matter of federal law in all states.[86] From *Stearns*, we know that the equality of states "may forbid any agreement . . . limiting or qualifying political rights or obligations."[87] From *Coyle* we know that the "republican form of government" clause of the Constitution does not give Congress the power to impose restrictions upon a new state that deprive it of the equal power to exercise "the residuum of sovereignty not delegated by the Constitution itself" with other members of the Union.[88] Finally, we know from *Corvallis Sand* that one state cannot be constrained by federal common law when another state is "free to choose its own legal principles."[89]

The Supreme Court jurisprudence is not our only source of basic principles. The Founders had several debates on the equal footing doctrine, so we also have an unusually rich history and understanding of their thoughts on this issue. We know that even the Founders who objected to the "equal footing" language never intended to allow a newer state to exercise governing power that the founding states could not also exercise, since their opposition to the "equal footing" doctrine stemmed from a desire to keep more power for the founding states. It is also clear that those who supported the "equal footing" doctrine would have opposed powers going to one state that were denied to another, since their support centered around the fact that all states ought to have equal power to govern themselves. The recorded debates also make clear that had the Founders known that a newer state would gain governing powers denied to founding states by a Congress dominated by newer states, the "equal footing" language would almost certainly have gained enough support to appear in the Constitution. One lodestar can be drawn from the Founders, therefore: none of the Founders would support a new state, such as California, being granted powers to govern that are denied to all other states, including the founding states.

Given these background principles, it is clear that the California preferences in the CAA present significant constitutional difficulties, as they allow California to set its own rules while denying her sister states the same governing powers. In order to be constitutional, therefore, one of two things must be true: (1) the Commerce Clause, which is the basis for the power to enact the CAA, contains an "override" of the general principle that states must have equal governing power; or (2) the power to regulate air quality was "conceded to Congress" over the states,[90] and, thus, Congress can selectively bestow it on some states but not others. As discussed below, neither of these two contentions has merit.

A. Does the Commerce Clause Override the Equal Footing Doctrine?

The Supreme Court has held that the judiciary's inherent powers to make the federal common law cannot override the equal footing doctrine.[91] Likewise, the Court has held that Congress' duty to guarantee to each state a republican form

79. *Id*. at 330 n.7.
80. 429 U.S. 363 (1977).
81. *Id.*
82. *Id.* at 378.
83. *Id.* at 381.
84. Although there have been several challenges to the provisions giving preference to California in the CAA, none of them have been based on the equal footing doctrine. American Petroleum Inst. v. Jorling, 710 F. Supp. 421, 19 ELR 21051 (N.D.N.Y. 1989); Virginia v. Envtl. Protection Agency, 108 F.3d 1397, 1401 (D.C. Cir. 1997); Association of Int'l Auto. Mfrs., Inc. v. Massachusetts Dep't of Envtl. Protection, 208 F.3d 1, 3 (D. Mass. 2000); American Auto. Mfrs. Ass'n v. Cahill, 152 F.3d 196, 198-99 (2d Cir. 1998). These cases do show, however, that either states that wish to regulate in this arena or manufacturers forced to follow these regulations would have standing to bring a case challenging them. The Supreme Court has never heard a challenge to these provisions.
85. Pollard's Lessee v. Hagan, 44 U.S. 212, 229 (1845).
86. Permoli v. City of New Orleans, 44 U.S. 589, 610 (1845).
87. Stearns v. Minnesota, 179 U.S. 223, 244-45 (1900).
88. Coyle v. Smith, 221 U.S. 559, 567 (1911).
89. Oregon v. Corvallis Sand and Gravel Co., 429 U.S. 363, 378, 7 ELR 20137 (1977).
90. *See Pollard's Lessee*, 44 U.S. 212, 230 (1845).
91. *Corvallis Sand*, 429 U.S. at 378.

Copyright © 2006 Environmental Law Institute®, Washington, DC. reprinted with permission from ELR®, http://www.eli.org, 1-800-433-5120.

of government does not allow it to override equal footing of the states.[92] Since neither of these two powers of the federal government, one of which (the republican form of government) is explicitly embodied in a constitutional provision, has been interpreted to override the requirement that states have equal governing powers, the Commerce Clause would have to differ from either of these provisions in some way to indicate that it was intended to override the general principle that the states are to be treated equally. It does not.

The Constitution provides for a republican form of government in Article IV,[93] which also contains the Full Faith and Credit Clause[94] and clauses regarding the admission of states.[95] It is Article IV, therefore, that is the foundational text for what it means to be a state, and it contains the explicit recognition that the Union will be one of states exercising independent sovereign powers. The Commerce Clause, provided for in Article I's list of congressional powers, is much less obviously related to the sovereign nature of states, notably because it cannot literally be "read together" with the other clauses, including those clauses giving rise to the equal footing doctrine.[96] Therefore, if either the Commerce Clause or the Republican Form of Government Clause were to be read as "trumping" or limiting the equal footing doctrine, it would seem to be the republican form of government clause. However, the Supreme Court has already held that the equal footing doctrine is not limited by its neighboring clause guaranteeing a republican form of government.[97]

The argument that the Commerce Clause can be used as an override of the equal footing doctrine has one more problem given the language of the Constitution: the care the Founders took to limit it. The Commerce Clause is specifically limited by at least two other clauses that demand equal treatment of the states: Article I, §8, clause 1, of the Constitution provides that "all Duties, Imposts and Excises shall be uniform throughout the United States." And Article I, §9, clause 6, states: "No preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another."[98] Thus, the ability of Congress to raise funds, and its ability to regulate the main sources and routes of commerce, the ports, were both expressly limited by the Founders to require equal treatment of the states. Given these textual restrictions, interpreting the Commerce Clause as a check on the equal footing doctrine is highly problematic because it requires a theory of why the Founders, who required the most obvious and common uses of the Commerce Clause power to be exercised in an even-handed manner, intended Congress to be able to trump this principle when exercising the power in less expected ways. There is certainly no evidence from the debates that the Founders intended such an outcome, while there is ample evidence of broad support for equality in the text of the Constitution and in the records of the debate. Therefore, the constitutionality of the CAA vis-à-vis the equal footing doctrine cannot depend on congressional exercise of the Commerce Clause power.

B. May Congress Give Differential Regulatory Powers?

The second argument in favor of the constitutionality of the CAA's California provisions is that Congress is not "taking" the sovereign powers of the state protected by the equal footing doctrine; rather, it is selectively bestowing its own power to regulate. The Supreme Court teaches that Congress may confer

> "upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." If Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge.[99]

It has not, however, ruled on the question of whether Congress can confer the power to regulate on a matter of interstate commerce on only one state—in other words, whether such a delegation would be vulnerable to an equal footing doctrine challenge.

The best argument for the ability of Congress to create an inequality of power among the states is that the equal footing doctrine does not mean that states must have equal regulatory powers; instead, there is a class of sovereign powers that cannot be restricted, and a lesser set of governmental powers that can be restricted. This distinction would, in theory, distinguish much of the Supreme Court jurisprudence on the equal footing doctrine. To apply it in this context, the power to set a state capital location is a sovereign power that cannot be restricted; the power to regulate air quality through vehicle emissions is a lesser power that can be restricted.

The case that best refutes this argument is the case that clearly states the limits of the equal footing doctrine's political arm. In *Texas*, the Supreme Court noted the parameters of the equal footing doctrine, stating that economic, geographic, geologic, and area differences were not intended to be equalized but that "political standing and sovereignty" were.[100] Reading the CAA California provisions makes it clear they involve differences of political sovereignty, not geography or even air quality. Congress did not choose to allow all states with air quality below a certain level set these regulations; it allowed the one state that had previously regulated air quality in certain ways to continue writing new regulations in those areas, while forbidding all those that had not already acted. Yet §209 of the CAA is not a simple "grandfathering" clause; this is a grant of power to regulate in the future. The CAA's California provisions only allow a state to have new powers (powers to go beyond federal law) if it chose to exercise its powers in the past. The one state that had chosen to regulate in particular ways was given a power denied to all the states that had chosen not to exercise

92. *Coyle*, 221 U.S. at 567.

93. U.S. Const. art. IV, §4.

94. *Id.* art. IV, §1.

95. *Id.* art. IV, §3.

96. *Id.* art. I, cl. 3.

97. *Id.* art. IV, cl. 1.

98. The fact that all federal funds came through taxation of imports at the time the Constitution was drafted makes these restrictions all the more important. U.S. Const., art I, §8, cl. 1. The Supreme Court has interpreted this clause as follows: "The truth seems to be, that what is forbidden is, not discrimination between individual ports within the same or different States, but discrimination between States." Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. 421, 435 (1856).

99. Western & S. Life Ins. Co. v. State Bd. of Equalization of Cal., 451 U.S. 648, 652-53 (1981) (quoting Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 44 (1980)); H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 542-43 (1949).

100. United States v. Texas, 339 U.S. 707, 716 (1950).

Copyright © 2006 Environmental Law Institute®, Washington, DC. reprinted with permission from ELR®, http://www.eli.org, 1-800-433-5120.

their (until then) equal right to do so.[101] The CAA does not provide for the end of this special status once California's air quality is brought in line with that of her sister states, nor is there a provision to allow a state that develops an air quality problem more severe than California's the chance to assume special regulatory powers. This underscores that these provisions are not about an inequality of economics or geography—they are about sovereignty. As such, they are the kind of provisions to which the equal footing doctrine is intended to apply.

Nothing in the Commerce Clause can be easily read to curtail the power of the equal footing doctrine; if anything, the opposite is true. Similarly, the argument that Congress can bestow a power to regulate on a single state is problematic, especially when that regulation is not based on differences of economy or geography. The CAA provisions that give a preference to California are based not on differences of air quality or economic conditions, but instead on the exercise of sovereign power, and, therefore, are unconstitutional under the equal footing doctrine.

VI. Conclusion

If there is such a thing as a "super-precedent," then those cases finding that the Constitution prohibits differentials in governing powers between the states must be it: the law predates even the Constitution, and the jurisprudence has been consistently against curtailing that power. The Continental Congress, the first Congress, and dozens of congresses since have continued to recognize the importance of the sovereign equality of the states.

The soundness of this conclusion is underscored by an examination of the Founders' intent. Those Founders who opposed adding "equal footing" language to the Constitution did so because they feared that new states would come to have more power than the original 13. The proponents of equal footing argued that they did not want to discriminate against new states and that the citizens of each state should have the same power as the citizens of the others. Regardless of which side they were on, the Founders clearly would have been united in their opposition to a situation in which a newer state had regulatory powers denied to the original states. The Constitution is devoid of language making distinctions between the powers of states, and several provisions expressly seek equal treatment for all of them by Congress. The Founders' negative opinion of the power of Congress to devolve special powers on California, therefore, cannot be much in doubt.

The equal footing doctrine renders unconstitutional those provisions of the CAA giving California a right to regulate certain aspects of air quality while denying them to other states. If a court does in fact find these provisions unconstitutional, the offending provisions would be struck, leaving only one class of vehicles in the United States—the "federal" vehicles—until the other branches could again act.[102]

If Congress cannot give one state the regulatory power to control vehicle emissions, then it has two choices: give such powers to all the states, or create a two-tier standard of regulation itself. Assuming Congress would reject the former given the difficulty and impracticality of having 50 different regulatory schemes, the second choice is the more probable legislative outcome: the federal government could promulgate two sets of standards, one more stringent than the other, and allow each state to choose between them. For the ease of discussion, assume these two standards are called the "normal protection" and "extra protection" standards.

Striking down the current California provisions in the CAA would not necessarily result in worse air quality. The status quo would be a possibility, assuming Congress simply adopted the current California regulations for its own "extra protection" standard. Even if Congress were to set the "extra protection" regulations at a level less stringent than the current California regulations, however, the outcome could be an improvement nationwide if a greater number of states opted for the "extra protection" than currently select the California standards. There may be states that would like extra protection, but not to the degree California chooses. Through their representatives in Congress, citizens in all states would have the opportunity to have a voice in setting the "extra protection" standards, so more states that currently adopt the California standards might find the "extra protection" standards palatable.

The equal footing doctrine has roots in the laws of this country that predate the Constitution. The Continental Congress first put it into law, the first Congress of the United States placed it in a statute that is still applicable today, and the Supreme Court has interpreted it to be a fundamental part of the Constitution and the political structure of the United States. The jurisprudence has always recognized that the most important feature of the doctrine is an assurance that each state would have the same sovereignty within its borders as every other state. Just as our Union should have no second-class citizens,[103] it should have no second-class states.

---

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

102. States attempting to regulate in these arenas would have standing to raise a constitutional challenge under the equal footing doctrine. Assuming Massachusetts and New York did not repeal the statutes imposing zero-emission controls following the court decisions in *American Automobile Manufacturers Ass'n v. Cahill*, 152 F.3d 196, 28 ELR 21491 (2d Cir. 1998), and *Association of International Automobile Manufacturers, Inc. v. Commissioner*, 208 F.3d 1, 30 ELR 20469 (1st Cir. 2000), these states might now be able to bring such a challenge. In addition, automotive companies forced to comply with California's regulations would likely have standing to challenge those regulations as an exercise of unconstitutional power, assuming they argued that the delegation to a single state of Congress' power to regulate was a violation of the equal footing doctrine and is therefore void. *See supra* note 84.

103. *See, e.g.*, Attorney Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 922 (1986); *Hooper*, 472 U.S. at 623; NAACP v. Claiborne Hardware Co., 458 U.S. 886, 912 (1982); Bell v. Wolfish, 441 U.S. 520, 583 (1979).