

“All States Are Equal, but Some States Are More Equal Than Others”: State Sovereignty Under the Equal-Footing Doctrine Through the Lens of Preadmission Status

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I.	INTRODUCTION	48
II.	THE QUESTION PRESENTED IN <i>ALCOA</i> : THE ORIGINAL-THIRTEEN THEORY	53
	<i>A. The Case for Equal Footing</i>	54
	<i>B. The Case for Exceptionalism</i>	59
III.	A QUESTION NOT PRESENTED IN <i>ALCOA</i> : WHAT OF THE FOURTEENTH STATE, VERMONT?.....	63
	<i>A. Vermont in the Revolutionary Era</i>	63
	<i>B. Judicial Abdication on Pre-Statehood Sovereignty</i>	68
	<i>C. The Original-Thirteen Theory and Public-Trust Doctrine in Vermont</i>	73
IV.	MESSING WITH TEXAS, AND OTHER STATES WITH CLAIMS OF EXCEPTIONALISM	81
	<i>A. One Lone Republic: The Lone Star State, Texas</i>	82
	<i>B. Two Erstwhile Sovereigns: California and Hawaii</i>	87
	1. The Bear Flag Revolution and the Golden State.....	87
	2. The Newlands Resolution and the Aloha State.....	90

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C. <i>Three (or Four) Cessions: Kentucky, Maine, and West Virginia (and Vermont?)</i>	95
1. Circumstances of the Later Cessionary States	96
2. Slicing the Nation into Ribbons	99
D. <i>Five Secessions: Texas, Louisiana, Mississippi, Alabama, and Florida</i>	102
1. The Submerged Lands Act of 1953	103
2. Picking Winners and Losers on the Gulf Coast	108
V. NOT MESSING WITH OKLAHOMA, AND THE EQUAL-FOOTING DOCTRINE	114
A. <i>The State of Sequoyah and the State of Oklahoma</i>	115
B. <i>Returning to the Underpinnings of the Equal-Footing Doctrine</i>	119
VI. ALL STATES ARE EQUAL, BUT SOME STATES ARE MORE EQUAL THAN OTHERS	124
VII. CONCLUSION	133

The whole doctrine of constitutional law is based on an attempt to preserve equal footing, equal treatment, and equality among the members of the Union, the respective States. I think the men at Philadelphia foresaw all too well this very type of issue before us today. Proponents of broadened boundaries for certain States, at the expense of other States, remind me of the description of another society in George Orwell’s book, *Animal Farm*. Their notion of good constitutional doctrine seems to be that “all States are equal, but some States are more equal than others.”¹

I. INTRODUCTION

On February 20, 2018, the Supreme Court denied the petition for certiorari in *North Carolina v. Alcoa Power Generating*.² This, as a matter of course, was of no great significance: it appeared on the Court’s routine order list along with many hundreds more denials; as

1. 99 CONG. REC. 3563 (1953) (statement of Sen. Humphrey) (lineation concatenated).

2. 138 S. Ct. 981 (2018).

in virtually all such dispositions, the Court offered no explanation; and indeed, the denial expressed no opinion on the merits of the underlying case.³ The decision below of the Fourth Circuit awarding victory to Alcoa and Cube Yadkin Generation was left undisturbed.⁴

As with many suits that meet their Waterloo at One First Street in the nation’s capital,⁵ the underlying dispute and litigation had been percolating for some time.⁶ The story began in the early part of the twentieth century, when Alcoa first set up an aluminum smelting operation in the rural Piedmont region of North Carolina, on the banks of the Yadkin River.⁷ Both North Carolina and Alcoa profited handsomely: for the state, the nearby hamlet exploded into an industry boomtown, bringing prosperity to an impoverished corner of the state; in return for Alcoa’s investment, North Carolina strongly supported Alcoa before the Federal Energy Regulatory Commission’s (FERC) predecessor when it sought the right to operate four hydroelectric dams

3. See *Singleton v. Comm’r*, 439 U.S. 940, 942 (1978) (Stevens, J., respecting denial of certiorari); *Brown v. Allen*, 344 U.S. 443, 554–60 (1953) (Frankfurter, J., dissenting); *Maryland v. Balt. Radio Show*, 338 U.S. 912, 917–19 (1950) (Frankfurter, J., respecting denial of certiorari).

4. *North Carolina ex rel. N.C. Dep’t of Admin. v. Alcoa Power Generating, Inc.*, 853 F.3d 140 (4th Cir. 2017).

5. Waterloo “[r]efers to a village in central Belgium, south of Brussels, where England’s Duke of Wellington decisively defeated Napoleon on June 18, 1815. The phrase ‘met his Waterloo’ is often used to refer to a decisive or crushing defeat.” *Costa Del Moral v. Servicios Legales de P.R.*, 63 F. Supp. 2d 165, 170 n.1 (D.P.R. 1999). Meanwhile, “One First Street” is not infrequently used metonymously for the Court. See, e.g., *Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 224 (2d Cir. 2006) (“Following the Supreme Court’s decision in *Velazquez III*, the litigation leading to the present appeal commenced. Having returned to the district court from the halls of One First Street, the *Velazquez* plaintiffs decided to pursue the as-applied challenge to the regulation contemplated by our *Velazquez II* opinion.”).

6. See, e.g., John Eligon, ‘*This Ruling Gives Us Hope*’: *Supreme Court Sides With Tribe in Salmon Case*, N.Y. TIMES (June 11, 2018), <https://www.nytimes.com/2018/06/11/us/washington-salmon-culverts-supreme-court.html> (“Justice Anthony M. Kennedy recused himself, because the issue had come before him when he was a judge on the United States Court of Appeals for the Ninth Circuit, more than 30 years ago. With a 4-to-4 tie, the Supreme Court did not write an opinion on the underlying merits of the case.”).

7. See *Alcoa*, 853 F.3d at 144; Roddy Boyd, *Who Owns Our Water?*, S. INVESTIGATIVE REPORTING FOUND. (Jan. 29, 2015), <http://sirf-online.org/2015/01/29/who-owns-our-water/>.

on the Yadkin to supply power for its smelters.⁸ The concession of cheap, nearby electricity was vital to Alcoa in the low-margin and high-energy-cost market for aluminum production.⁹ Despite that private benefit, however, North Carolina persuaded FERC and long maintained that Alcoa's presence served the public interest in good jobs and stable employment.¹⁰

North Carolina changed her mind with the turn of the millennium.¹¹ In 2002, Alcoa had idled the smelter; in 2007, the factory itself was shuttered; and in 2010, Alcoa announced it would be dismantled, leaving the state with few jobs but Alcoa with the lucrative dam concession.¹² In 2006, meanwhile, in proceedings to renew its license before the FERC, Alcoa had formally claimed possession of the riverbed and lands around the dams, having accumulated title to "roughly 99%" of the relevant territory; by its argument, it had paid property taxes on the land since 1958, and in any event had long exercised effective control over the whole of the Yadkin hydroelectric operation.¹³ This succession of injuries was enough for the state: in 2010, North Carolina revoked a key state operating certificate for the Alcoa Yadkin hydroelectric plant—but was reversed on appeal.¹⁴ Private concerns too, hopeful of assuming the lucrative license, echoed North Carolina's argument to the FERC that the project was no longer in the public interest now that Alcoa had closed the manufacturing operation and its renewal should be denied—to no avail.¹⁵

8. *See Alcoa*, 853 F.3d at 144; Boyd, *supra* note 7.

9. *See Boyd*, *supra* note 7.

10. *Id.*

11. Given that states are the primary troupe of actors in these matters, the question of what pronoun to use for them assumes unusual prominence. Although some modern guides caution against the use of female pronouns for inanimate entities such as states and ships, *see, e.g.*, ANNE CURZAN, GENDER SHIFTS IN THE HISTORY OF ENGLISH 83 (2003), this Article opts for female forms throughout because the ability to distinguish at a glance between state and non-state actors appreciably improves ease of comprehension, and such usage remains frequent despite the scolding of style guides. *See* RODNEY HUDDLESTON & GEOFFREY PULLUM, THE CAMBRIDGE GRAMMAR OF THE ENGLISH LANGUAGE 488–89 (2002).

12. *Alcoa*, 853 F.3d at 145; Boyd, *supra* note 7.

13. North Carolina *ex rel.* N.C. Dep't of Admin. v. Alcoa Power Generating, Inc., 135 F. Supp. 3d 385, 388–91 (E.D.N.C. 2015).

14. Boyd, *supra* note 7.

15. *Id.*

With these efforts frustrated, therefore, in 2013 North Carolina took another tack and filed suit in state court seeking a declaration that Alcoa *could not* hold title to the submerged lands on which the dams sat because they underlay navigable waters pursuant to North Carolina law and thus were insusceptible of private ownership under the state’s public-trust doctrine.¹⁶ As such, the navigable waters of the river should be returned to North Carolina’s oversight (presumably so that the state could reap the dividends of the hydroelectric dams resting on the riverbed below).¹⁷ Alcoa disagreed and removed to federal court, citing precedent that navigability was a question of federal law and arguing that the Yadkin was nonnavigable under the federal standard, thus securing the private title.¹⁸ North Carolina conceded the general precedent for *other* states but claimed that as one of the *original* thirteen states, her own navigability law at the time of the Revolution controlled the question.¹⁹ Inventive though that theory be, the district court demurred, asserted federal jurisdiction,²⁰ found the river nonnavigable,²¹ and held for Alcoa.²² The Fourth Circuit affirmed,²³ albeit over a spirited and thoughtful dissent adopting North Carolina’s view.²⁴

The topics of submerged lands, riverine navigability, and federal jurisdiction do not likely elicit great excitement in many of those learned in the law, so much as the involuntary recall of rather less-cherished memories of preparation to sit the bar examination. Nonetheless, North Carolina’s quixotic quest to elevate herself and her twelve original cohorts in the Union above all other states merits

16. See Complaint, North Carolina *ex rel.* N.C. Dep’t of Admin. v. Alcoa Power Generating, Inc., No. 5:13-cv-00633-FL, 2013 WL 10510440 (N.C. Super. Ct. Aug. 2, 2013).

17. *Id.*

18. North Carolina *ex rel.* N.C. Dep’t of Admin. v. Alcoa Power Generating, Inc., 989 F. Supp. 2d 479, 480–81 (E.D.N.C. 2013).

19. *Id.* at 481–82.

20. See *id.* at 482.

21. See North Carolina *ex rel.* N.C. Dep’t of Admin. v. Alcoa Power Generating, Inc., No. 5:13-cv-633, 2015 WL 2131089, at *4 (E.D.N.C. May 6, 2015).

22. North Carolina *ex rel.* N.C. Dep’t of Admin. v. Alcoa Power Generating, Inc., 135 F. Supp. 3d 385, 388–91 (E.D.N.C. 2015).

23. See North Carolina *ex rel.* N.C. Dep’t of Admin. v. Alcoa Power Generating, Inc., 853 F.3d 140, 155 (4th Cir. 2017).

24. *Id.* at 155–73 (King, J., dissenting).

attention: if these “original thirteen” are indeed possessed of to-be-defined privileges beyond subsequent states, the implications for interstate comity could be substantial. It is for this very reason that the Supreme Court has unstintingly insisted on the so-called “equal-footing doctrine” prescribing that every state, on admission to the Union, is vested with rights precisely coequal and coextant to her predecessors.²⁵ As the Fourth Circuit’s majority followed that tradition, the Supreme Court’s declining certiorari is understandable.

Understandable though it may be, that demurral still left the question of the rights of the original thirteen states without a once-and-for-all answer from the Supreme Court. This Article thus explores these understudied issues in more depth. Part II details the divergence of opinion in the Fourth Circuit, comparing the arguments made by the majority and dissent against or in favor of North Carolina’s desired exceptionalism. Part III moves beyond *Alcoa* to a question not raised there: if the dissent had its way and the original thirteen states received the recognition they purportedly deserve, what would that mean for the fourteenth state, Vermont, whose admission to the Union was at least as unique as those of her thirteen antecedents? Treading yet further afield, Part IV takes up the cause of Texas and a number of other states that could press (and in some cases, have pressed) claims that they deserve exceptional treatment as well. With an instructive detour through Oklahoma, Part V segues back to the fundamental question of what the equal-footing doctrine truly means and why it is important. The Article draws to a close in Part VI with a final evaluation of how best to preserve parity amongst the states and more general thoughts about state sovereignty in the United States’ system of federalism, along with a few concluding observations.

As Senator Hubert Humphrey’s remarks in the epigram indicate, it would be odd indeed were there to be some elite subset of states that enjoyed perquisites superior to their ostensible peers.²⁶ Such super-states challenge the idiosyncratic but fundamental scheme of dual-sovereign federalism established by the Constitution, opening the barn doors to further demands for preferential treatment, whether at the

25. See CONG. RESEARCH SERV., 112-9, THE CONSTITUTION OF THE UNITED STATES: ANALYSIS AND INTERPRETATION 981-87 (2017) [hereinafter CRS ANNOT. CONST.].

26. See *supra* note 1.

express or implicit detriment of those states not included among the privileged elite. Sovereignty is not like a dominium of property, in which there is conjectured a “bundle of sticks” of which only some may be present: a sovereign is either sovereign or not.²⁷ If states are—as has been always proponed—quasi-independent sovereigns in their own right, they ought to be made sovereigns on equal footing.²⁸

II. THE QUESTION PRESENTED IN *ALCOA*: THE ORIGINAL-THIRTEEN THEORY

As stated in North Carolina’s brief supporting her petition for certiorari to the Supreme Court, the question presented was

North Carolina, like the other original States, gained sovereign title to its submerged lands in 1776, when it declared independence from the British Crown. Since that time, North Carolina’s sovereign property rights have been decided by state law.

Did the Court of Appeals err by holding that sovereign title to submerged lands in the original thirteen States depends on federal law instead?²⁹

Cube Yadkin Generation, LLC, successor in interest to Alcoa,³⁰ understood things rather differently:

Longstanding Supreme Court precedent establishes that a state’s claim of sovereign ownership to the bed of a river based on navigability at statehood

27. See Max Radin, *The Function of the States*, 25 OR. L. REV. 83, 86 (1946) (“The term sovereignty has august associations. And it has been invested with a kind of mathematically precise garb by the doctrines of Austin which still exercise a great influence over our legal thinking. Sovereignty is there made a fixed and solid concept, subject to neither qualification nor gradation.” (footnote omitted)).

28. *But see id.* (“This, however, is quite contrary both to the history of states and the history of the term.”).

29. Brief of Petitioner at i, *North Carolina v. Alcoa Power Generating, Inc.*, 853 F.3d 140 (4th Cir. 2017) (No. 17-683), 2017 WL 5187591, at *i (brief in support of petition for certiorari).

30. In the interim, Alcoa had sold its interest in the property at issue to Cube Yadkin Generation, LLC, and the latter had been granted intervention and was thus respondent to the petition. *See id.* at ii.

presents a quintessentially federal question governed by federal law. In accordance with this long line of precedent and basic principles of equal state sovereignty, the district court and the Fourth Circuit rejected North Carolina's novel argument that the 13 "original" states need not follow the federal navigability-at-statehood rule that governs in the other 37 states, and exercised jurisdiction over North Carolina's navigability-at-statehood claim.

The question[] presented [is] [w]hether the Court of Appeals correctly held that a state's sovereign title to submerged lands at statehood is a question of federal law in all 50 states, including North Carolina and the rest of the 13 original states.³¹

Though Senator Humphrey's Orwellian formulation has much oratorical resonance, frequent reference to North Carolina's view as the "But Some States Are More Equal Than Others" Understanding would be cumbersome, and the svelter acronym B.S.S.A.M.E.T.O.U. accidentally indecorous.³² North Carolina's own more modest denomination of her "original thirteen" theory must serve instead.

A. The Case for Equal Footing

The court of appeals majority treated the question presented as rather straightforward.³³ This was in large part because the Supreme Court had seemingly resolved the question of whose courts and laws should determine state riverine navigability just five years earlier in *PPL Montana, LLC v. Montana*.³⁴ That case presented analogous

31. Brief of Respondent at i, *North Carolina v. Alcoa Power Generating, Inc.*, 853 F.3d 140 (4th Cir. 2017) (No. 17-683), 2017 WL 367504, at *i (brief in opposition to petition for certiorari).

32. Given Orwell published his great work in 1945, and Senator Humphrey offered his remarks but eight years later in 1953, this is one instance in which an odd serendipity of acronymization does not evince the phenomenon of contrived "backronyms" ever more ubiquitous in the modern era. See BRUCE M. ROWE & DIANE P. LEVINE, *A CONCISE INTRODUCTION TO LINGUISTICS* 86–87 (5th ed. 2018).

33. *North Carolina ex rel. N.C. Dep't of Admin. v. Alcoa Power Generating, Inc.*, 853 F.3d 140, 147–49 (4th Cir. 2017).

34. 565 U.S. 576 (2012).

circumstances: for over a century, PPL Montana had operated hydroelectric dams on the Missouri, Madison, and Clark Fork Rivers in Montana and, with the apparent acquiescence of Montana, paid rent for the use of the riverbeds to the United States instead of the state.³⁵ This equability was upset when private citizens filed a suit on behalf of their schoolchildren challenging title to the submerged lands under the dams, alleging that they should rightly be subject to rent paid to the state as school trust lands.³⁶ Whether the state had acquired supervening title and could charge rents turned on whether the riverbeds in question were navigable at statehood.³⁷ But the Montana Supreme Court ultimately rejected the federal approach endorsed by the Supreme Court in favor of a more liberal construction under Montana law, per which the navigability of the river as a whole rather than the disputed segment was determinative.³⁸ Under her own legal standard, the state prevailed.³⁹

The Supreme Court, not one to countenance a state declining to follow its direction,⁴⁰ granted PPL’s petition for certiorari.⁴¹ The Court began at the beginning: “The rule that the States, in their capacity as sovereigns, hold title to the beds under navigable waters has origins in English common law.”⁴² When the colonies shed British rule, they thus acquired title under the same rule as newly minted sovereigns.⁴³ And when subsequent states acceded to the Union, they too gained title over navigable waters under what would one day be called the equal-footing doctrine “under which a State’s title to these lands was ‘conferred not

35. PPL Mont., LLC v. State, 229 P.3d 421, 426–27 (Mont. 2010), *rev’d*, 565 U.S. 576 (2012).

36. *Id.* at 427.

37. *Id.* at 448–49.

38. *Id.* at 451.

39. *Id.*

40. Indeed, Montana’s Supreme Court would get another scolding by the Supreme Court for its defiance the following year. *Am. Tradition P’ship Inc. v. Bullock*, 567 U.S. 516, 516 (2012) (per curiam) (“The question presented in this case is whether the holding of *Citizens United* applies to the Montana state law. There can be no serious doubt that it does.” (citing U.S. CONST. art. VI, cl. 2)).

41. PPL Mont., LLC v. Montana, 564 U.S. 1018 (2011) (granting cert. in part).

42. PPL Mont., LLC v. Montana, 565 U.S. 576, 589 (2012).

43. *Id.* at 590.

by Congress but by the Constitution itself”⁴⁴ because “the States in the Union are coequal sovereigns under the Constitution.”⁴⁵ Every state thus takes title upon statehood to then-navigable waters, while then-non-navigable waters remain vested in their prior owner, whether the United States or otherwise, and may be disposed of as any other property.⁴⁶ Critically, the question of navigability is thus quintessentially federal, for it emanates from the equal-footing doctrine that all states are peers in stature and powers, a constitutional prescription.⁴⁷

With that understanding, resolving the case was simple. Montana had disregarded Supreme Court jurisprudence calling for segment-by-segment analysis in favor of its holistic view of the entire river, assailing the Court’s test as “a piecemeal classification of navigability—with some stretches declared navigable, and others declared non-navigable.”⁴⁸ Hying to the defense of its precedent, the Supreme Court recited a series of normative and practical reasons why its segmented approach was superior.⁴⁹ Ultimately, however, the relative wisdom of the state and federal approach was immaterial, for the Constitution provides that the federal approach prevail.⁵⁰ Montana’s privileging her own law was “based upon an infirm legal understanding of this Court’s rules of navigability for title under the equal-footing doctrine.”⁵¹ For navigable riverbeds that passed to the state as sovereign, the state was free to—as did Montana—provide for protection against the executive’s alienating those riverbeds to private parties under what is commonly known as the public-trust doctrine.⁵²

44. *Id.* at 591 (quoting *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977))

45. *Id.* (citing *Pollard’s Lessee v. Hagan*, 44 U.S. (3 How.) 212, 228–29 (1845); *Knight v. United States Land Ass’n*, 142 U.S. 161, 183 (1891); *Shively v. Bowlby*, 152 U.S. 1, 13 (1894)).

46. *Id.*

47. *Id.* (“It follows that any ensuing questions of navigability for determining state riverbed title are governed by federal law.” (citing *United States v. Utah*, 283 U.S. 64, 75 (1931); *United States v. Oregon*, 295 U.S. 1, 14 (1935))).

48. *PPL Mont., LLC v. State*, 229 P.3d 421, 441 (Mont. 2010).

49. *PPL Mont., LLC*, 565 U.S. at 594–96.

50. *See* U.S. CONST. art. IV, § 3, cl. 2.

51. *PPL Mont., LLC*, 565 U.S. at 604.

52. *See id.* at 603–04.

But she could not take into trust lands she lacked in the first instance.⁵³ The Court concluded with a verbal rap across Montana’s knuckles:

As the Court said in *Brewer–Elliott*, “It is not for a State by courts or legislature, in dealing with the general subject of beds or streams, to adopt a retroactive rule for determining navigability which . . . would enlarge what actually passed to the State, at the time of her admission, under the constitutional rule of equality here invoked.”⁵⁴

So much for the Treasure State. Back in the Tarheel State, North Carolina was pressing her view that her complaint was a state matter, and federal law did not inform the navigability of her rivers.⁵⁵ This was because *PPL Montana, LLC* rested on the fact that the equal-footing doctrine emanated from the Constitution, whereas the doctrine supposedly had no bearing on the original thirteen states, who need no doctrine to make them equal to themselves.⁵⁶ Put another way, North Carolina saw the Constitution as operating to make the latter thirty-seven states coequal to the first thirteen, while the original thirteen remained outside the doctrine, being sovereign in their own right upon independence from Great Britain, well before the formation of the United States.⁵⁷

The majority, however, found this theory wanting. True, North Carolina might well have been able to dictate navigability herself following the Declaration of Independence, but that was immaterial to the source of North Carolina’s title in navigable waters as a state of the Union.⁵⁸ In *Oregon v. Corvallis Sand & Gravel Co.*, the Supreme Court had made this pellucid, and reaffirmed the same in *PPL Montana, LLC*: “a ‘State receives absolute title to the beds of navigable

53. *See id.*

54. *Id.* at 604–05 (quoting *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 88 (1922)).

55. *North Carolina ex rel. N.C. Dep’t of Admin. v. Alcoa Power Generating, Inc.*, 853 F.3d 140, 146 (4th Cir. 2017).

56. *Id.* at 146–47 (“[North Carolina] maintains that because it was one of the original [thirteen] States, the law governing navigability for title must be state law. Thus, it contends, ‘*PPL*, an equal footing case, has no bearing on the riverbed title of an original State.’”).

57. *Id.* at 147.

58. *See id.* at 148.

waterways within its boundaries *upon admission to the Union*’ and that its absolute title to the beds of navigable waters ‘is conferred not by Congress but *by the Constitution itself.*’⁵⁹ Regardless of her status preadmission, the state’s prerogatives post-admission were governed by the Constitution itself, whether it be that charter by its ratification for the thirteen original states or the Act of Congress admitting a subsequent state pursuant to constitutional authority.⁶⁰ The equal-footing doctrine operates not to raise later states to the level of the original thirteen but to define the residuum of coequal sovereignty afforded to all states in equal portion by the constitutional division of the atom of sovereignty between the federal and state governments.⁶¹

North Carolina’s attempt to argue otherwise, continued the majority, “posits an unacceptable inequality among the States in its effort to avoid federal jurisdiction.”⁶² It would be strange if not outright perverse to adopt an interpretation of the equal-footing doctrine that functioned to create inequality amongst the states.⁶³ In the instant case, doing so would result in a “bizarre state of affairs” under which a quarter of the states would look to their own courts as to navigability while the rest would be forced into federal court.⁶⁴ The courts of one state would be forbidden jurisdiction of a question permitted in a sister state.⁶⁵ The selfsame river might lurch fitfully from navigable to nonnavigable not based on waterfalls or rapids but because it crossed a state line.⁶⁶ This could not stand: “Such an outcome would place the

59. *Id.* at 147 (quoting *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977)).

60. *Id.* at 148 (“[T]he nature of its sovereignty emanating from ratification formed the basis for federal jurisdiction.”).

61. *Id.* at 147.

62. *Id.* at 148–49.

63. *Id.* at 149.

64. *Id.*

65. *Id.*

66. *Id.* (“Thus, for example, state courts in Georgia, one of the original [thirteen] States, would apply state law to resolve the navigability for title issues for the Chattahoochee River, while federal courts in Florida, a later-admitted State, would apply federal law to rule on the navigability of the same river under the principles articulated in *PPL Montana*. Consequently, Georgia courts could hold that when a portion of the river is navigable, the entire river is navigable, as the State of Montana did in *PPL Montana*, rejecting any notion of segmentation for purposes of determining navigability and disregarding portages for unnavigable segments, whereas Florida

States on *unequal* footing and would, indeed, challenge the supremacy of federal law and the equal application of Supreme Court cases to the States.”⁶⁷

B. *The Case for Exceptionalism*

As compelling as all that sounds, Judge Robert King of the Fourth Circuit was unpersuaded.⁶⁸ In dissent, he initially distinguished interlocking but discrete theories of federal jurisdiction: the theory that under *Martin v. Waddell’s Lessee*, state sovereignty of navigable waters is governed by the Constitution; and second, that the application of the equal-footing doctrine raises a federal question.⁶⁹

Taking the first, Judge King observed trenchantly that the majority had quoted *Waddell’s Lessee* rather selectively in dismissing the relevance of North Carolina’s title prior to the Union.⁷⁰ In fact, Chief Justice Roger Taney had confirmed there that the thirteen original states became sovereign at the Revolution, and thenceforth “held an ‘absolute right to all their navigable waters, and the soils under them . . . subject only to the rights *since* [i.e., later or thereafter] surrendered by the constitution to the general government.”⁷¹ As for what those surrendered rights were, the answer was writ clear in the Constitution: simply a servitude granted by the state to the United States that the latter might regulate and improve navigation under the Commerce Clause.⁷² By contrast, no clause purports to transfer title of lands a state already held.⁷³ With these predicates in mind, the conclusion was clear to Judge King:

North Carolina’s fee simple title to its lands—and thus to the waters and riverbeds of the Yadkin River—did not

would have to conclude, being governed by *PPL Montana*, that segmentation was necessary and that portages precluded a finding of navigability.”).

67. *Id.* (emphasis added).

68. *Id.* at 155 (King, J., dissenting).

69. *Id.* at 156.

70. *Id.*

71. *Id.* at 156–57 (quoting *Martin v. Waddell’s Lessee*, 41 U.S. (16 Pet.) 367, 410 (1842)).

72. *Id.* at 157 (quoting *Gibson v. United States*, 166 U.S. 269, 271–72 (1897)).

73. *Id.* at 158 (“And the Constitution itself is silent with respect to—and had no adverse impact on—the land titles of the Thirteen Original States.”).

come from the Constitution or the federal government. North Carolina has owned the Yadkin River free and clear since 1776—before the Revolution—when North Carolina declared its independence from the British Crown. As a matter of sovereignty, the people of North Carolina acquired title in 1776 to “all the territories, seas, waters, and harbours, with their appurtenances,” upon declaring independence from the Crown.⁷⁴

This conclusion, his dissent continued, was wholly consistent with prior precedent both state and federal.⁷⁵ Indeed, in 1954, the Fourth Circuit itself had endorsed the proposition, as well as North Carolina’s version of the public-trust doctrine, under which such navigable waters “held by the State in trust for all its citizens . . . could in no way be obtained by an individual, by grant, deed, judgment, or otherwise.”⁷⁶ And so North Carolina retained preeminent title to the Yadkin, as determined by her own law.⁷⁷

As for the majority’s salient points about the equal-footing doctrine, Judge King found them off the mark.⁷⁸ The majority had referred to the doctrine as emanating from the Constitution, but the dissent honed in on *where* exactly it emanated from, localizing its source in the New States Clause of Article IV.⁷⁹ The doctrine thus functioned as North Carolina imagined, “imbu[ing] the newly admitted states with the same ‘political rights and sovereignty’ enjoyed by the other States, ensuring that the States remain ‘alike in power, dignity, and authority.’”⁸⁰ But of course the New States Clause had no operation on North Carolina, for she was never the subject of that clause, and the clause could not operate to divest North Carolina of the

74. *Id.* at 157. He identified a third concern as well, that *Grable & Sons Metal Products v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), federalizes the question of jurisdiction, but that question is not germane to the present discussion.

75. *Id.* at 157–58 (discussing *State v. Taylor*, 304 S.E.2d 767, 770 (N.C. App. Ct. 1983) and *Swan Island Club, Inc. v. White*, 114 F. Supp. 95, 99 (E.D.N.C. 1953), *aff’d sub nom. Swan Island Club, Inc. v. Yarbrough*, 209 F.2d 698 (4th Cir. 1954)).

76. *Id.* at 158 (quoting *Swan Island Club, Inc.*, 114 F. Supp. at 99).

77. *Id.*

78. *Id.* at 158–59.

79. *Id.* at 159.

80. *Id.* (quoting 81A C.J.S. *States* § 8, Westlaw (database updated June 2019)).

lands she already held *sub silentio*.⁸¹ Indeed, the equal-footing doctrine, as “a creature of the federal judiciary,” was not even formulated until sixty years after North Carolina came into possession of the Yadkin (under her own law), so it could scarcely be thought to retroactively dispossess the state of her title.⁸²

The fact that later-admitted states are subject to a federal test followed from the circumstances of their creation: being constituted of land previously held by the United States, they cannot be granted more than the United States held, and therefore the federal navigability test for what title inured to the United States circumscribes what was granted to the new state.⁸³ Or, looked at another way, the question is federal because the territory granted a newly admitted state is pendent on a quintessentially federal action in admitting the state to the Union, as the Supreme Court explained in *United States v. Oregon*.⁸⁴ Either way, later-admitted states are crucially different from the original thirteen.

Turning finally to the more rarefied questions of fairness and equality, Judge King rejected the majority’s contention that different rules for different states yielded a “bizarre state of affairs” that could not be stomached.⁸⁵ The differing outcomes follow not from different flavors of sovereignty but factually distinct histories to the state’s land: quoting the Supreme Court, King noted that “[s]ome States when they entered the Union had within their boundaries tracts of land belonging to the Federal Government; others were sovereigns of their soil.”⁸⁶ It is only natural that states inheriting their territory from the federal government would receive only what the federal government adjudged

81. *See id.*

82. *Id.*

83. *Id.* (“When a new state comes into the Union, the title to the navigable waters therein, and the lands beneath those waters, pass from the United States to the newly admitted state. For example, when one sovereign (a new state) replaces another (the United States), the new sovereign (the new state) gains title only to those lands therein that the former sovereign (the United States) held in that capacity. As a result, the federal navigability test has been used to determine whether title to waters—and the lands beneath those waters—remains with the United States or passes to the newly admitted state. Accordingly, if the federal navigability test applies here, a federal question may exist.” (citations omitted)).

84. *Id.* (quoting *United States v. Oregon*, 295 U.S. 1, 14 (1935)).

85. *Id.* at 160.

86. *Id.* (quoting *United States v. Texas*, 339 U.S. 707, 716 (1950)).

it had granted.⁸⁷ By contrast, imposing the federal rule of navigability on states that were previously “sovereigns of their soil” prior to the Union (and so the judges of the navigability of the rivers through that soil) would thereby inequitably *divest* extant rights.⁸⁸ That different states possess different title in different lands is an incident of fact, not status.⁸⁹ Viewed properly, therefore, North Carolina’s position implies no inequality at all, at least not of a sovereign sort:

The only “inequality” resulting from the application of these principles is that an Original State may possess a land title that a newly admitted state could never inherit from the United States. Such an outcome, however, does not offend the EFD. The Supreme Court has concluded that “[t]here has never been equality among the States” with respect to economic standing or stature. In fact, “the United States has the power to divest a future State of its equal footing title to submerged lands.” Simply put, the Supreme Court has determined that the EFD does not mandate equality of the several States in the manner posited by the majority.⁹⁰

In closing, Judge King invoked fears about disrupting long-held presumptions of property ownership and disposition.⁹¹ Applying the federal standard to the original thirteen states amounted to nothing more than an *ex post facto* divestiture, throwing centuries of settled claims into doubt.⁹² And given sharp differences in state law regarding submerged lands and navigability, this “sea change” might ripple up and down the Atlantic seaboard that hosted the original states.⁹³

87. *Id.* at 160–61.

88. *Id.* at 161 (quoting *Texas*, 339 U.S. at 716).

89. *See id.* at 160–61.

90. *Id.* (first quoting *Texas*, 339 U.S. at 716; and then quoting *United States v. Alaska*, 521 U.S. 1, 5 (1997)).

91. *See id.* at 161–62.

92. *Id.* at 161.

93. *Id.* at 162.

III. A QUESTION NOT PRESENTED IN *ALCOA*: WHAT OF THE FOURTEENTH STATE, VERMONT?

Apropos of the Atlantic seaboard, all of the original thirteen states abut the Atlantic Ocean, except for Pennsylvania. Not so the first new state admitted to the Union, Vermont, whom is thoroughly landlocked, bordered today by New York to the west, New Hampshire to the east, Massachusetts to the south, and the Canadian border to the north. Setting Canada aside, the three adjacent states played prominent roles in making Vermont’s admission to the Union unique, and as such, she provides the most prominent example of how North Carolina’s theory might affect other later-admitted states. One would think Vermont would have been a prominent player in the Revolutionary era given her location, but as the scholar John Rowell said as introduction of his magisterial account of Vermont’s origins, “the history of the government of Vermont prior to the adoption of the Constitution is involved in much obscurity.”⁹⁴ Notwithstanding uncertainty of government, however, she was indeed an active participant in the events of the Revolution, culminating with her admission as the fourteenth state in 1791; she would eventually trumpet her status as the first new state in her Latin motto: *stella quarta decima fulgeat*, “[m]ay the [fourteenth] star shine bright.”⁹⁵

A. Vermont in the Revolutionary Era

Vermont had not been a distinct colony under British rule.⁹⁶ Rather, her interior territory had been the subject of competing claims of her colonial neighbors in Massachusetts, New Hampshire, and New York for much of the eighteenth century.⁹⁷ The earliest settlements in

94. John W. Rowell, *Chapter CVIII: Constitutional History of Vermont*, in 3 THE NEW ENGLAND STATES: THEIR CONSTITUTIONAL, JUDICIAL, EDUCATION, COMMERCIAL, PROFESSIONAL AND INDUSTRIAL HISTORY 1377 (William T. Davis ed., 1897); accord Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CALIF. L. REV. 291, 371–75 (2002).

95. VT. STAT. ANN. tit. 1, § 518 (2015).

96. See *State v. Elliott*, 616 A.2d 210, 214–16 (Vt. 1992).

97. See *id.*; FRANCIS NEWTON THORPE, FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3737 n.a (1909); Rowell, *supra* note 94, at 1377.

the area were launched under Massachusetts provincial authority, but after a series of disputes over the latitudinal border between Massachusetts and New Hampshire, George III finally abrogated Massachusetts's charter-based claims and, in 1740, set the borderline where it stands today;⁹⁸ New Hampshire thereafter exercised effective control over the area.⁹⁹ New York, however, spying an opportunity for gain, undertook a lengthy campaign to extend the state's border east to the Connecticut River to embrace the disputed area.¹⁰⁰ The conflict between New York and New Hampshire over the longitudinal border persisted desultorily for two decades, until George III at last decided in favor of New York in 1764, setting her boundaries as inclusive of modern Vermont.¹⁰¹

This presented difficulties for the 138 settlements chartered under New Hampshire's authority west of the Connecticut River in what had abruptly become recognized as New York.¹⁰² Rather than simply novate and accept these charters, New York made the fateful decision to maintain the position that the *cis*-Connecticut-River territory had always been New York's, and thus that the New Hampshire grants were null and void.¹⁰³ This ham-handed maneuver engendered in the territory a great mass of landed settlers virulently opposed to New York rule who quickly coalesced in conventions to support their collective protection and self-determination against what were seen as New York's usurpations.¹⁰⁴ New York responded in kind with increasingly harsh attempts to maintain law and order.¹⁰⁵ Great Britain, meanwhile, theretofore a largely absentee landlord, sought to impose a standstill with a ruling in 1767 that New York should authorize no further grants herself, to little effect given its relapse into

98. Rowell, *supra* note 94, at 1377.

99. *Id.*; see Elliott, 616 A.2d at 215–16.

100. See Rowell, *supra* note 94, at 1377; see also *Vermont v. New Hampshire*, 289 U.S. 593, 598 (1933).

101. See *Vermont*, 289 U.S. at 600; Elliott, 616 A.2d at 216; Rowell, *supra* note 94, at 1377.

102. See *Vermont*, 289 U.S. at 599; Elliott, 616 A.2d at 215–16; Rowell, *supra* note 94, at 1377–78.

103. See Rowell, *supra* note 94, at 1377–78.

104. *Id.* at 1378.

105. See *id.*; Elliott, 616 A.2d at 216–17.

noninterference thereafter.¹⁰⁶ And in the interim, a militia known as the “Green Mountain Boys” arose as a martial adjunct to the political process underway.¹⁰⁷ The conflict reached a head in 1775, when

at a meeting of the committees, appointed by a large body of the inhabitants on the east side, it was resolved to wholly renounce and resist the administration of the government of New York till such time as the lives and property of the inhabitants should be secured by it, or until such time as they could have opportunity to lay their grievances before His Most Gracious Majesty in Council, together with a proper remonstrance against the unjust conduct of the government, with an humble petition to be taken out of so oppressive a jurisdiction, and either annexed to some other government or erected and incorporated into a new one. This is the last expression of loyalty to the king by any representative body in the state.¹⁰⁸

This proto-declaration-of-independence, of course, was followed the next year by New York herself declaring her independence from Great Britain, leaving the status of Vermont in considerable doubt.¹⁰⁹ The proto-state of Vermont remained a staunch supporter of the revolutionary cause, albeit tempered by her delegates’ insistence they not do so as a portion of New York when they appeared before the Continental Congress in 1776.¹¹⁰ Keen to avoid internecine discord, the Congress advised them to submit to New York’s superintendence during the exigency of the Revolution, after which their petition for independence could be entertained.¹¹¹ But although continuing in the cause of the rebellious colonies, Vermonters simultaneously persisted in advancing their own cause of independence, culminating in January 1777 when a convention for the

106. *Elliott*, 616 A.2d at 216, 218.

107. *Id.* at 216.

108. Rowell, *supra* note 94, at 1379.

109. *See id.*; THORPE, *supra* note 97, at 3737 n.a.

110. *See* Rowell, *supra* note 94, at 1379; *see also* THORPE, *supra* note 97, at 3737 n.a.

111. Rowell, *supra* note 94, at 1379–80.

populace of the *cis*-Connecticut-River region declared themselves a state independent of New York.¹¹² In doing so, it cited and adopted the direction of the Congress that in areas where inadequate governance had been established, the people ought to institute such governance in the interest of their collective good.¹¹³

New York was understandably “much disturbed by these proceedings.”¹¹⁴ She contrived to obtain from the Congress a repudiation of the Vermont declaration of independence from New York and a disavowal of any equivalence between the colonies’ right of self-determination in withdrawing from Great Britain and the Vermonters’ attempt to withdraw from New York.¹¹⁵ (Indeed, there appears no contemporaneous comment on the obvious irony of arrogating to declare her own independence from Great Britain while denying that of her own subjects on like grounds.) The people of the nascent Vermont Republic, however, did not desist, but instead debated and adopted a constitution to govern their state that same year.¹¹⁶

The legislature prescribed by that constitution was duly elected and convened in March 1778, notwithstanding the vicissitudes of war with Great Britain.¹¹⁷

Over the ensuing years, the Revolutionary executive, legislature, and judiciary of Vermont were augmented and carried out the business of government in like manner as those of other, more clearly recognized states.¹¹⁸ Notably, Vermont’s 1777 constitution contained a clause calling for a septennial “council of censors” charged with ensuring the constitution’s integrity, and after initial growing pains, that council called for a new state constitutional convention,

112. *Id.* at 1379–85; Kesavan & Paulsen, *supra* note 94, at 372; *see* Vermont v. New Hampshire, 289 U.S. 593, 607 (1933); State v. Elliott, 616 A.2d 210, 216 (Vt. 1992).

113. Rowell, *supra* note 94, at 1385; *see also* ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 1776-1791, at 63 (1955).

114. Rowell, *supra* note 94, at 1386.

115. *Id.* at 1386–87.

116. *Id.* at 1387–96; *see also* VT. CONST. of 1777, in THORPE, *supra* note 97, at 3737–49; *see also* RUTLAND, *supra* note 113, at 63.

117. Rowell, *supra* note 94, at 1397.

118. *See* Kesavan & Paulsen, *supra* note 94, at 372–73; RUTLAND, *supra* note 113, at 63 (“Inasmuch as Vermont began conducting the business of government as a *de facto* body, it seems proper to include here its Declaration of Rights of 1777.”); Rowell, *supra* note 94, at 1397–1400.

which led to the adoption of a revised charter in 1786.¹¹⁹ And as Rowell relates, “[d]uring the next septenary the executive and the legislative departments so well obeyed the constitutional injunction of keeping within their respective powers that the council of censors of 1792 found nothing of theirs to be unconstitutional nor censurable” and no sweeping revisions needed.¹²⁰

By 1792 as well, the Revolution was over and the fate of Vermont settled. The latter had been accomplished by an Act of Congress of February 18, 1791, admitting Vermont as a state and effective a fortnight later.¹²¹ The long delay in Congressional action was a legacy of the long-standing disputes with Vermont’s neighbors: “In March, 1781, Massachusetts assented to the independence of Vermont, which adjusted her difficulties with New Hampshire in 1782, but it was 1790 before New York consented to her admission into the Union.”¹²² New York, persevering in her position that the territory in question had theretofore been hers, had procrastinated until the potential of a slavery-permitting state being admitted impelled her to concede,¹²³ though she extracted a \$30,000 concession from Vermont

119. See Rowell, *supra* note 94, at 1400–01; VT. CONST. of 1777, in THORPE, *supra* note 97, at 3749–61.

120. Rowell, *supra* note 94, at 1402.

121. See *State v. Elliott*, 616 A.2d 210, 217 (Vt. 1992); THORPE, *supra* note 97, at 3761 n.a.

122. THORPE, *supra* note 97, at 3737 n.a.; see also *Elliott*, 616 A.2d at 217. Some authorities give dates for earlier “conditional” assents. See, e.g., Kesavan & Paulsen, *supra* note 94, at 372–73 (“Two States, New Hampshire and Massachusetts, conditionally recognized Vermont’s independence from New York in 1777 and 1781, respectively.” (citing *Vermont v. New Hampshire*, 289 U.S. 593, 608 (1933))).

123. See Kesavan & Paulsen, *supra* note 94, at 373 n.275; Sen. William Doyle, *Vermont Joins the Union*, WORLD ONLINE (July 26, 2013), <https://www.vt-world.com/vermont-joins-the-union.html> (“At the time there was debate as to whether the capital of the new nation would be located in New York or Philadelphia, and Hamilton realized that if Vermont were admitted to the Union, her vote would be most important. He also realized it was important that a northern free state be admitted to offset two southern slave states, Kentucky and Tennessee, which would soon join the Union. To Nathaniel Chipman, Alexander Hamilton wrote, ‘one of the first subjects of deliberation with the new Congress will be the independence of Kentucky, for which the southern states will be anxious. The northern will be glad to send a counterpoise in Vermont.’”); *infra* Section IV.C.1 (discussing the admission of Kentucky).

in the process.¹²⁴ As for what entity was admitted to statehood, in 1992, the Supreme Court of Vermont expounded that the unique tug-of-war between New York and New Hampshire had wreaked a qualitative change in the status of the Vermonters, though what the resulting entity was, and whether it was sovereign, the high court would not say.¹²⁵ The Supreme Court of the United States was even less sure, avoiding the quandary entirely.¹²⁶

In any event, the federal legislation effecting admission was brief to the point of terseness, the operative text directing only that “the said state, by the name and style of ‘The State of Vermont,’ shall be received and admitted into this Union, as a new and entire member of the United States of America.”¹²⁷ However perfunctory the invitation, the state had finally arrived at her debutante ball: on March 4, 1791, Vermont became the fourteenth state of the Union and the first after the British colonies that had acceded as the original thirteen states.¹²⁸

B. Judicial Abdication on Pre-Statehood Sovereignty

As the views of the state and federal Supreme Courts noted above indicate, historians were not the only ones attempting to unravel the tangled skein of Vermont’s status as sovereign. Both chronologically and jurisprudentially, the federal Supreme Court has precedence, and so it is with its 1933 opinion in *Vermont v. New Hampshire* the discussion rightly begins.¹²⁹ A case under the Court’s original jurisdiction seeking settlement of the boundary between Vermont and New Hampshire, its progress was notably protracted. The Supreme Court Reporter observed in preamble that the “bill in this

124. Doyle, *supra* note 123; *see also* *Vermont v. New Hampshire*, 289 U.S. 593, 608 (1933).

125. *Elliott*, 616 A.2d at 218.

126. *See Vermont*, 289 U.S. at 608. *But see id.* at 607 (special master finding Vermont sovereign). Commentators have ducked the question as well, *see, e.g.* Paul E. McGreal, *There is No Such Thing as Textualism: A Case Study in Constitutional Method*, 69 *FORDHAM L. REV.* 2393, 2415 & n.116, 2429 & n.172 (2001), though some have proven bolder. *See, e.g.*, Kesavan & Paulsen, *supra* note 94, at 375.

127. Act of Feb. 18, 1791, ch. VII, 3 Stat. 191; *see* Kesavan & Paulsen, *supra* note 94, at 374; THORPE, *supra* note 97, at 3761 n.a; Doyle, *supra* note 123.

128. *See* Doyle, *supra* note 123.

129. 289 U.S. 593 (1933).

boundary suit was filed on December 18, 1915, and the answer on July 11, 1916. There were several amendments of the pleadings, some before and some after issue joined.”¹³⁰ This might seem ordinary enough, until the reporter reveals that these amendments evidently delayed the appointment of the special master *for fifteen years* until October 13, 1930.¹³¹ It was then with relative alacrity that the special master filed his report three years later, to which New Hampshire posed exceptions.¹³²

The earlier settlement of a different adjudicator—King George III—had set the boundary between New York and New Hampshire at the “western banks of the River Connecticut,” which was the source of the trouble.¹³³ Vermont explained this should mean the *low-water* mark of the river, while New Hampshire counterclaimed it should be at the *top margin* of the river’s ebb, affording New Hampshire a foothold on the western Vermont shore in times of low water.¹³⁴ This might only call for an ordinary application of riparian law to the British decree, but Vermont went further, claiming the settlement of George III had been entirely “nullified” by the “successful revolution of the inhabitants of the New Hampshire grants,” and thus that her territory should extend to the midpoint or “thread” of the river, following the default standard for land grants giving rise to that rebellion.¹³⁵ This latter claim thus implicated the timing and nature of Vermont’s original sovereignty, plunging the special master into the obscure historical waters outlined above.¹³⁶

The special master found that regardless of the effect of the Green Mountain rebellion, the decree was never meant to extend beyond the low water mark, affirming Vermont’s view on that front.¹³⁷ With this much the Court agreed after a relatively cursory appraisal: history, it seemed, tilted towards Vermont’s interpretation;¹³⁸ the two

130. *Id.* at 595.

131. *Id.*

132. *Id.*

133. *Id.* at 596.

134. *Id.*

135. *Id.*

136. *Id.* at 596–98.

137. *Id.* at 597.

138. *Id.* at 597–602 (“The special master concluded that the purpose and effect of the order were to leave undisturbed the boundary of New York as established by

states had long administered the river according to Vermont's view;¹³⁹ and Vermont's approach avoided the practical problems occasioned if an "abutting owner, on the view insisted upon by New Hampshire, could not cross the bank to the water without trespass."¹⁴⁰ This might have been the end of the matter but for

the history of Vermont as a revolutionary government and the consequent uncertainty whether she was admitted under the second clause of [A]rticle IV, [Section] 3, of the Constitution as a new state formed out of the territory of New York, with her boundary accordingly determined by that of New York, or whether she was admitted under the first clause of [A]rticle IV, [Section] 3, as an independent revolutionary state with self-constituted boundaries.¹⁴¹

The special master had also found for Vermont on that predicate question: whether Vermont effected her withdrawal to become an independent revolutionary state or remained a rebellious province of New York.¹⁴² In his view, "Vermont was admitted as an independent state with self-constituted boundaries."¹⁴³ Although Congress had not expressly recognized her in the Articles of Confederation or Constitution, that independence was effectively recognized *nunc pro tunc* by New Hampshire in 1777, Massachusetts in 1781, and finally

the grant to the Duke of York of all the lands from the west side of the Connecticut River; that the boundary fixed was therefore at the river and not at some point upon its bank. We think this conclusion correct.").

139. *Id.* at 603–04 ("Subsequent events attest the validity of this conclusion."); *id.* at 615–16.

140. *Id.* at 605–06.

141. *Id.* at 606–07.

142. *Id.* at 607 ("This movement culminated in 1777 in the Declaration of Independence by the towns comprising the New Hampshire grants on both sides of the Green Mountains, which proclaimed that the jurisdiction granted by the Crown 'to New York government over the people of the New Hampshire Grants is totally dissolved,' and that a free and independent government is set up within the territory now Vermont, bounded 'east on Connecticut River . . . as far as the New Hampshire Grants extends.' From that time until the admission of Vermont into the Union in 1791 an independent government was maintained with defined geographical limits extending on the east to the Connecticut River.").

143. *Id.*

New York in 1790.¹⁴⁴ The special master nonetheless rejected Vermont’s efforts to expand her reach to the thread of the river because Congress and the Vermont Republic alike had agreed that the boundary of Vermont would lie at the low-water mark by resolutions of August 20, 1781, and February 22, 1782, respectively. It was with these boundaries that Vermont (by her own definition) had entered the Union.¹⁴⁵

New Hampshire had objected strenuously, particularly to the notion that the Court had any business adjudicating whether Vermont was truly independent without clearer evidence of the view of the United States at her admission.¹⁴⁶ Practicing traditional parsimony, the Court found that “the questions raised by these conclusions of the Special Master and the contentions of New Hampshire with respect to them need not be decided.”¹⁴⁷ During the fifteen years of the Vermont Republic, New York had maintained her claims over her territory, even as Vermont delegates participated in the continental Congress while the question of Vermont’s borders and statehood were debated.¹⁴⁸ As a result of these debates, Congress demanded the border be settled at the low-water mark of the Connecticut River, and the Vermont Republic acquiesced by enacting legislation to that effect.¹⁴⁹ With this, Congress was satisfied, but New York’s obstruction prevented “further progress” until New York authorized commissioners in 1789 with power to consent to the terms of Vermont’s admission, which they did.¹⁵⁰ Whether this acquiescence was political in character, or in the nature of a constitutional cession, was not resolved by the record or Congress’s curt language in admitting Vermont.¹⁵¹ But regardless of Vermont’s pre-statehood sovereignty, what was clear was that her eastern boundary was to be the low-water mark of the Connecticut River. With the question presented answered, the Supreme Court trailblazed no further.¹⁵²

144. *Id.* at 607–08.

145. *Id.* at 608.

146. *Id.*

147. *Id.*

148. *Id.* at 608–11.

149. *Id.* at 610–11.

150. *Id.* at 611.

151. *Id.* at 611–12.

152. *Id.* at 612.

Only slightly less shy was the Supreme Court of Vermont, taking up the question some fifty years later in *State v. Elliott*.¹⁵³ There, a group of thirty-six persons claiming to be representatives of Native Americans holding aboriginal title in their ancestral lands challenged criminal charges for fishing without a license at an organized “‘fish-in’ demonstration,” apparently intended to create standing for their dispute.¹⁵⁴ The trial court agreed, and Vermont sought review of the ensuing dismissal in her supreme court, which reversed.¹⁵⁵ Dispositive of the case was whether the conduct of the European settlers in Vermont had served to extinguish aboriginal rights or whether those rights were left intact and coextant with the establishment of the state.¹⁵⁶ The trial court had thought the latter, but the Vermont Supreme Court thoughtfully chronicled the extraordinary events leading to Vermont’s admission as a state and found it unambiguous that the European settlers had sought to terminate residual aboriginal rights by their continuous course of action.¹⁵⁷

While the Supreme Court had outright refused to grapple with the question of sovereignty openly, the Vermont Supreme Court resorted to a series of ramified ambivalences.¹⁵⁸ When the court wrote of “the emergence of Vermont for a short time in history as an entity separate from the authority of Great Britain and its provinces of New Hampshire and New York, or any other government,” one might be forgiven for inferring it recognized the Vermont Republic as sovereign.¹⁵⁹ Yet sentences later, the court is found describing that entity as “the ‘Republic’ of Vermont” (scare quotes intended).¹⁶⁰ Later the high court complained that “the court [below] did not analyze the period of Vermont’s independence as a part of the continuum leading to extinguishment. Instead, the court discarded this history”¹⁶¹ One finds reference to the early Vermonters’ “assertion of dominion over the area inspired Vermont’s revolt against New York and its

153. 616 A.2d 210 (Vt. 1992).

154. *See id.* at 211.

155. *Id.* at 211–12.

156. *Id.* at 212–14.

157. *Id.* at 214–19.

158. *Id.* at 218–20.

159. *Id.* at 218.

160. *Id.*

161. *Id.* at 219.

stance as an independent republic.”¹⁶² Yet the court refused to actually state that Vermont had been *sovereign*, not merely functionally independent.

Providing a capstone to this ambivalence, the high court finally admitted what had become clear, namely that it was ruling “[w]ithout deciding whether Vermont legitimately achieved sovereignty.”¹⁶³ This abdication defied the court’s previous acknowledgement that the “purpose of 1777 Vermont Constitution was to make clear that the claims of New York were invalid” and that to resolve the instant case, “the relevant focus is on what Vermonters intended to do with the land.”¹⁶⁴ How could that focus be vindicated without determining what “purpose” the Vermont Constitution achieved and thus the legitimacy of whatever that achievement was? Ultimately, however, the court was fatally flummoxed by the very obscurity that Rowell had attributed to Vermont’s preadmission governance.¹⁶⁵ Thus the court could only “concede that the period preceding Vermont’s statehood was a confusing era, and that valid questions remain as to the legitimacy of the opposing governing entities.”¹⁶⁶ The most it was willing to say of the outcome of the Revolutionary period was that any aboriginal claims were assuredly extinguished with finality upon Vermont’s admission to the Union, and that sufficed to decide the case.¹⁶⁷

C. The Original-Thirteen Theory and Public-Trust Doctrine in Vermont

What might Vermont’s uncertain status entail under North Carolina’s theory of the original thirteen states? If Vermont entered as an independent republic, she would be materially indistinguishable from North Carolina’s factual posture: she would have taken title to her lands upon her declaration of independence, subject to her own laws regarding navigability and any protected public trust in navigable waters. That independent republic’s later admission to the Union, then, would have altered none of those prerogatives, such that Vermont, like

162. *Id.* at 220.

163. *Id.*

164. *Id.*

165. *See supra* note 94 and accompanying text.

166. *Elliott*, 616 A.2d at 221.

167. *Id.*

the original thirteen states, would be afforded the right to adjudge such matters in her own courts without regard for federal definitions of navigability. Indeed, to continue North Carolina's logic, how could a doctrine of equal footing that did not exist at the time of Vermont's admission purport to divest her of lands she would otherwise hold? True, Vermont acceded to the Union under the New States Clause of Article IV, whereas the original thirteen states did so by virtue of their ratification of the Constitution itself. But in both cases the terms of the Constitution controlled their admission, and no term therein explicitly directs any divestiture of lands already held by the state—as North Carolina had underscored.

On the other hand, if Vermont were to have entered via the cessions variously made by Massachusetts, New Hampshire, and New York, her position would be different. This is because the controlling law and source of her territory post-admission would change: in the independent republic stance, the Vermont Republic herself defined the extent of her sovereign control of submerged lands; in the cessionary stance, it was the laws of New York, New Hampshire, and Massachusetts that defined sovereign authority over submerged lands, and thus Vermont's law could go no further than theirs in the inherited lands. Under the original-thirteen theory, when a state is created from federal lands, her maximal bounds are circumscribed by what was held by the United States; so too would Vermont's maximal bounds be limited to that held by the ceding states. This result would be problematic for Vermont, however, as her lands were disputed by three other states, and it is ill-resolved which (if any) cessions operated to grant Vermont her present-day territories. A conservative application of the original-thirteen theory might then imply that Vermont's standard for title in navigable waters could be no more expansive than that of the most parsimonious of the ceding states.

So which is it then?¹⁶⁸ The Supreme Court had dodged the question,¹⁶⁹ and the Supreme Court of Vermont achieved more in confusion than clarity as to what sort of entity Vermont constituted before admission.¹⁷⁰ Some further insight might be gleaned from

168. Cf. Kesavan & Paulsen, *supra* note 94, at 373–75 (considering the question and deciding Vermont is more likely sovereign).

169. Vermont v. New Hampshire, 289 U.S. 593, 608–12 (1933); *see supra* text accompanying notes 149–55.

170. Elliott, 616 A.2d at 218–20.

Vermont jurisprudence applying state standards of navigability over submerged lands in cases invoking the public-trust doctrine—just as North Carolina had sought to do.¹⁷¹ Vermont has provided that the navigable (“boatable” in Vermonter parlance) waters of the state were reserved to the people since her first constitution of 1777.¹⁷² The second constitution of 1786 retained this principle,¹⁷³ and it remains unchanged in the charter governing Vermont to this day.¹⁷⁴

Although such a servitude for fishery would not fully comprehend the public-trust doctrine, the Supreme Court of Vermont has made clear from early on that her navigable waters enjoy far broader protections.¹⁷⁵ In 1918, the court found, in the much-cited *Hazen v. Perkins*, that the possessor of a right to take water from a navigable lake could not retrofit the dam constructed by the state to maintain water levels in order to effect his state-sanctioned taking.¹⁷⁶ In sweeping language, the court expounded the bedrock fiduciary duty of the sovereign to her people to vouchsafe all navigable waters and the submerged lands below for the common good, beyond even the supreme legislative power to gainsay:

Being public waters according to the test afforded by the [Vermont] Constitution, the grants of land bounding upon the lake pass title only to the water’s edge, or to low-water mark if there be a definite low-water line. The bed or soil of such boatable lakes in this state is held by the people in their character as sovereign in trust for public uses for which they are adapted. The defendant, did not therefore acquire any title to the waters of the lake, as such, nor to the lands covered by such waters, by

171. See *supra* Part II.

172. VT. CONST. of 1777, ch. II, § XXXIX, in THORPE, *supra* note 97, at 3748.

173. VT. CONST. of 1786, ch. II, § XXXVII, in THORPE, *supra* note 97, at 3760.

174. Compare VT. CONST. ch. II, § 67 (“The inhabitants of this State shall have liberty in seasonable times, to hunt and fowl on the lands they hold, and on other lands not inclosed, and in like manner to fish in all boatable and other waters (not private property) under proper regulations, to be made and provided by the General Assembly.”), with VT. CONST. of 1793, ch. II, § 40, in THORPE, *supra* note 97, at 3770.

175. See, e.g., *State v. Cent. Vt. Ry., Inc.*, 571 A.2d 1128 (Vt. 1989); *In re Lake Seymour*, 91 A.2d 813 (Vt. 1952); *State v. Malmquist*, 40 A.2d 534 (Vt. 1944); *State v. Quattropani*, 133 A. 352 (Vt. 1926); *Hazen v. Perkins*, 105 A. 249 (Vt. 1918).

176. 105 A. at 250–51.

grants from private sources. And the General Assembly cannot grant to private persons for private purposes the right to control the height of the water of the lake, or the outflow therefrom, by artificial means, for such a grant would not be consistent with the exercise of that trust which requires the State to preserve such waters for the common and public use of all.¹⁷⁷

Eight years later, in *State v. Quattropani*, the court found the pond in question boatable “within the meaning of that term as used in our Constitution,”¹⁷⁸ and citing *Hazen*, rejected a challenge to a littoral landowner who challenged an ordinance preventing watercraft from using the lake to ensure its purity as potable water despite its boatable nature.¹⁷⁹ The state’s right to so regulate was an incident of her police power, which “in its broadest significance is but another name for sovereignty itself.”¹⁸⁰ Expanding on the navigability test, *State v. Malmquist* in 1944 explained that “public and boatable water within the meaning of our Constitution” means “capable of use for ‘common Passage’ as a highway,”¹⁸¹ and thus enjoined a dam-owner from releasing such waters that drained Lake Fairlee to the public detriment.¹⁸² And the *In re Lake Seymour* court in 1952 likewise found the eponymous lake boatable and upheld the Public Service Commission’s setting of mandatory levels for the lake after the concern that owning a downstream dam had begun to alter the lake’s dimension via blasting.¹⁸³ These latter cases too relied on *Hazen* in insisting that Vermont could grant no right to a private party athwart the public’s interest in navigable waters and the submerged lands thereunder.¹⁸⁴

177. *Id.* at 251 (citations omitted).

178. 133 A. at 353.

179. *Id.* at 353–54. Credit is due to Thomas H. Greer, editor-in-chief of the Review, for observing, and thus allowing me to benefit from, the impossibly unlikely opportunity to juxtapose the terms “boatable” and “potable.” Both he and Vermont (for perpetuating the former term into modernity) are owed a debt of gratitude by any fond of punnery.

180. *Id.* at 353.

181. 40 A.2d 534, 538 (Vt. 1944).

182. *Id.* at 538–40.

183. 91 A.2d 813, 816–18 (Vt. 1952).

184. *See id.* at 818; *Malmquist*, 40 A.2d at 538.

Indeed, the constitutional language demands that lands underlying boatable waters *cannot* be alienated for they cannot be private property¹⁸⁵—as the court repeatedly confirmed.¹⁸⁶ The state high court provided an admirable capstone to this precedent in the 1989 case *State v. Central Vermont Railway*,¹⁸⁷ summing up the century of case law while sustaining a grant to a railway allowing *use* of littoral submerged lands in Lake Champlain in a fashion consistent with commerce but denying the railway title.¹⁸⁸ All of this would be music to North Carolina’s ears: time and again, Vermont went unchallenged in applying her own definition of navigable waters and finding submerged lands underlying those waters reserved for the public trust, usable only for the common good, and inalienable to a contrary private concern.¹⁸⁹ Were Alcoa’s dams blockading Vermont’s boatable Lakes Champlain, Seymour, or Fairlee, they could be adjudged an impediment to navigation and the common good and thus could not be maintained as a private concession;¹⁹⁰ nor would Vermont recognize that fee simple absolute *could* lay to a private party in the submerged lands of the public trust.¹⁹¹

The fatal flaw in translating these findings to North Carolina’s position is the lack of indicia that Vermont’s definition of navigability differed in result from that of the federal government or her cessionary parents: there was no debate on the point.¹⁹² As the influential *Hazen* court observed, “[v]ery likely we might take judicial notice that the waters of this lake are boatable, as part of the principal features of the geography of the state”—that is, it was so obvious that a natural lake is

185. See *New England Trout & Salmon Club v. Mather*, 35 A. 323, 325 (Vt. 1896).

186. See, e.g., *Lake Seymour*, 91 A.2d at 818; *Malmquist*, 40 A.2d at 538; *State v. Quattropani*, 133 A. 352, 354 (Vt. 1926); *Hazen v. Perkins*, 105 A. 249, 251 (Vt. 1918).

187. 571 A.2d 1128 (Vt. 1989).

188. *Id.* at 1132–34.

189. See, e.g., *Cent. Vt. Ry., Inc.*, 571 A.2d at 1128; *Lake Seymour*, 91 A.2d at 813; *Malmquist*, 40 A.2d at 534; *Quattropani*, 133 A. at 352; *Hazen*, 105 A. at 251.

190. Cf. *Cent. Vt. Ry., Inc.*, 571 A.2d at 1132–34; *Lake Seymour*, 91 A.2d at 817–18; *Malmquist*, 40 A.2d. at 538.

191. See *Hazen*, 105 A. at 251.

192. See, e.g., *Quattropani*, 133 A. at 353 (“It is agreed that Berlin pond is ‘boatable’ within the meaning of that term as used in our Constitution, c. 2, § 63.”).

navigable that evidence need not even be presented.¹⁹³ For this proposition, moreover, *Hazen* cited *The Montello*,¹⁹⁴ one of the earliest cases applying the federal rule of navigability announced in *The Daniel Ball*.¹⁹⁵ Under that rule, the question is not whether rapids, cascades, or other barriers exist, but whether waterways are “navigable in fact,” that is, “when they are used, or are susceptible of being used, in their [ordinary condition], as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.”¹⁹⁶ And the foundational case propounding Vermont navigability law looked to English and federal common law as its lodestar,¹⁹⁷ rejecting the dissent’s reductionist definition of boatable as literally able to float a boat¹⁹⁸ in favor of a construction consistent with the federal rule.¹⁹⁹ The waters Vermont finds boatable would then be so by federal standards as well.²⁰⁰

193. *Hazen*, 105 A. at 250; see *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 696–99 (1899) (discussing judicial notice of navigability).

194. *The Montello*, 87 U.S. (20 Wall.) 430 (1874).

195. *Hazen*, 105 A. at 250.

196. *The Montello*, 87 U.S. at 439.

197. See *New Eng. Trout & Salmon Club v. Mather*, 35 A. 323, 324–27 (Vt. 1896) (extensively summarizing Roman, British, and federal law in expounding the standard for Vermont boatability).

198. *Id.* at 328–30 (Thompson, J., dissenting).

199. *Id.* at 325–26 (majority opinion).

200. For example, in *Hazen*, the court went on to explain:

The master reports that this lake has an area of some 640 acres; that on its shores are located from 80 to 100 cottages, occupied during the summer season for purposes of pleasure and recreation; that there are also located on the lake two hotels and a large casino or place of amusement, and several girls’ camps, so that during the camping season the lake is a considerable summer resort, the number of people annually frequenting it as such being estimated at about 7,000, that the lake is used extensively for boating by the occupants of the cottages around it, for which purpose a considerable number of rowboats and canoes are used, together with ten or more motorboats; that a steamboat plies thereon, making regular trips during the summer season for the purpose of carrying passengers around the lake; and that on the shore adjacent to some of the cottages are boathouses and retaining walls, and structures of one sort or another for use in getting into and out of the boats and canoes. On these facts the waters of Lake Morey are boatable, as matter of law, and

This distinction also highlights the problem with North Carolina’s supposition that her own courts’ long reliance on North Carolina navigability law is probative²⁰¹: where federal law does not command a different result, it does not preempt,²⁰² and thus there is little oddity to a state court applying a tantamount law with which it is familiar.²⁰³ Federal oversight only becomes dispositive if a party suggests—as did Alcoa, successfully—that federal law demands a different result.²⁰⁴ One would rightly suppose that many segments of North Carolina’s rivers are navigable under federal law and North Carolina law alike²⁰⁵—so obviously so that they are subject to judicial

therefore they are public waters within the provisions of the Constitution

105 A. at 250.

201. North Carolina *ex rel.* N.C. Dep’t of Admin. v. Alcoa Power Generating, Inc., 853 F.3d 140, 157–58 (4th Cir. 2017) (King, J., dissenting); *see also* Peter N. Davis, *State Ownership of Beds of Inland Waters: A Summary and Reexamination*, 57 NEB. L. REV. 665, 668–69 (1978) (explaining how state courts had generally applied their own navigability law without complaint prior to 1922 when three cases demonstrated a federal superintendence).

202. *Compare* English v. Gen. Elec. Co., 496 U.S. 72, 78–79 (1990) (stating that state law is only preempted “to the extent that it actually conflicts with federal law”), *and* Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n, 461 U.S. 190, 204 (1983) (same), *with* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 94 (1824) (reversing state judgment in conflict with federal prerogatives over navigability).

203. *Cf.* United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 696–99 (1899) (discussing when judicial notice may be taken where relevant navigability is obvious to all).

204. *See* Alcoa, 853 F.3d at 163–64 (King, J., dissenting) (discussing similarities and differences between North Carolina and federal law of navigability).

205. *Id.* at 164 (“On its face, North Carolina’s navigability test is somewhat similar to the federal navigability test, in that both tests weigh the question of whether waters have been or can be used by watercraft.”); *see also* Gaither v. Albemarle Hosp., 70 S.E.2d 680, 691 (N.C. 1952) (“In this connection, it is noted that Pasquotank River is a navigable stream.”). *Compare, e.g.,* Richards v. Blake Builders Supply Inc., 528 F.2d 745, 746 (4th Cir. 1975) (“Both of these occurrences were on navigable waters. Oceangoing vessels ply the Cape Fear River, at least as far as Wilmington.”), *with* Cromartie v. Stone, 140 S.E. 612, 615 (N.C. 1927) (titling “Cape Fear” river a “public highway” because navigable), *and e.g.,* State Water Control Bd. v. Hoffman, 427 F. Supp. 585, 588 (W.D. Va. 1977) (holding that “the Roanoke River, at least up to the geography now occupied by Smith Mountain Lake, is a navigable water of the United States”), *vacated*, 574 F.2d 191 (4th Cir. 1978) (confirming that “the evidence clearly

notice²⁰⁶—occasioning no need for resort to federal courts. Technically, absent the original-thirteen theory, federal jurisdiction would remain available regardless, as the question of whether the federal standard alters the calculus is itself a federal question.²⁰⁷ But one would be unsurprised if parties to mine-run disputes—at least where the waterways were self-evidently navigable or nonnavigable under both standards—opted against incurring the added time, bother, and expense of literally “making a federal case out of”²⁰⁸ the matter.²⁰⁹

Taken together, Vermont’s navigability and public-trust cases do not illuminate her preadmission status as sovereign (or not), and thus her current status under the original-thirteen theory. None address the situation where Vermont’s law of navigability differs from that of the federal law, for no differences should exist, according to Vermont’s highest court.²¹⁰ What the cases do therefore illuminate is that North

supported a finding of navigability of the Roanoke River from Albemarle Sound up to the confluence of the Roanoke and the Pigg” despite dispute as to its navigability thereafter), *with* *State v. Armistead*, 200 S.E.2d 226, 230 (N.C. Ct. App. 1973) (“It is conceded by the defendants that . . . the Roanoke River is a navigable water.”).

206. *E.g.*, *Miller v. Coppage*, 135 S.E.2d 1, 4–5 (N.C. 1964) (“In addition, we take judicial notice of the fact that Neuse River in Pamlico County is a large, navigable river.”).

207. *See Alcoa*, 853 F.3d at 147–48 (discussing *United States v. Utah*, 283 U.S. 64 (1931)).

208. *Doe v. Dekalb Cty. Sch. Dist.*, 145 F.3d 1441, 1453 n.21 (11th Cir. 1998).

209. *See United States v. Rio Grande Dam & Immigration Co.*, 174 U.S. 690, 697–98 (1899) (“Indeed, it would seem absurd to require evidence as to that which every man of common information must know. To attempt to prove that the Mississippi or the Missouri is a navigable stream would seem an insult to the intelligence of the court. The presumption of general knowledge weakens as we pass to smaller and less known streams; and yet, within the limits of any State, the navigability of its largest rivers ought to be generally known, and the courts may properly assume it to be a matter of general knowledge, and take judicial notice thereof.” (quoting *Wood v. Fowler*, 26 Kan. 682, 682–87 (Kan. 1882))).

210. *See New England Trout & Salmon Club v. Mather*, 35 A. 323, 325–27 (Vt. 1896). The dissent in *Trout & Salmon Club* would surely beg to differ, arguing that since time immemorial, Vermont recognized an enhanced public right in any waters capable of bearing a boat. *Id.* at 330–32 (Thompson, J., dissenting). That extreme position would of course diverge sharply from the federal standard, as well as permitting public domain in ponds little bigger than a puddle, and it is not difficult to see why it garnered no other takers in dissent. *See id.* North Carolina’s standard, however, is not so far off. *See Alcoa*, 853 F.3d at 147–48 (King, J., dissenting) (noting North Carolina assesses waters’ navigability “by a more practical test of [its] capacity

Carolina’s arguments may be less meaningful than they seem, for in many cases, federal and state navigation law coincide.²¹¹ If that is the case, one wonders why even bother endorsing a doctrine occasioning such uncertain exceptionalism rather than a uniform rule for all states.

IV. MESSING WITH TEXAS, AND OTHER STATES WITH CLAIMS OF EXCEPTIONALISM

And it is a most *uncertain* exceptionalism, notwithstanding the false definitude of the “original-thirteen” moniker suggesting that it might be limited to thirteen states alone. Vermont is only the foremost of the remaining thirty-seven states that poses a compelling argument for enhanced prerogatives—even if the question of *which* prerogatives are snarled in the obscurity of her history.²¹² Were a constitutional Bureau of State Sovereignty opened for business, a lengthy queue that might seek to qualify for tenderer embrace by the Union awaits. The Fourth Circuit majority nominated Maine and West Virginia as cessions of the thirteen original states (but omitted Kentucky and perhaps Vermont).²¹³ Peter Davis, a legal scholar cited warmly by the dissent, likewise identified Maine and West Virginia but added Texas and Hawaii as candidates for preferential treatment.²¹⁴ He also (erroneously²¹⁵) relegated Kentucky to the hoi polloi “states created from federal lands” while implicitly privileging Vermont by her omission from that list together with the four expressly noted.²¹⁶ The heterogeneity of such authorities underscores that a limiting principle is elusive if the original-thirteen theory is taken to its logical conclusion rather than artificially limiting it by *ipse dixit* to the original thirteen states.

to float boats used as instruments of commerce, in the interchange of commodities, and large enough for the purpose” (quoting *Broadnax v. Baker*, 94 N.C. 675, 681 (N.C. 1886))).

211. See Davis, *supra* note 201, at 702 (cataloging that the vast majority of later-admitted states use a definition of navigability at least as rigorous as the federal standard).

212. See *supra* Part III.

213. *Alcoa*, 853 F.3d at 146 n.2.

214. Davis, *supra* note 201, at 667 n.10.

215. See *infra* Section IV.C.1.

216. Davis, *supra* note 201, at 702.

A. *One Lone Republic: The Lone Star State, Texas*

It need hardly be said that Texas is a state that values her exceptionalism in a more general sense.²¹⁷ Of the fifty states, she is the second largest (after Alaska), the second most populous (after California), and the second most economically productive (also after California). Much has been made of other amorphously exceptional characteristics of Texas.²¹⁸ Her anthem earnestly showers herself with superlatives, being “so wonderful, so great,” the “boldest and grandest,” and “supremely blest.”²¹⁹ No state is immune to self-congratulatory puffery, but Texas takes the boisterous art of self-aggrandizement to an endearing acme.²²⁰ All of this is summed up nicely in that distinctively Texan admonition: “Don’t mess with Texas.”²²¹

One relevant way in which Texas is unique is her status as the only later-admitted state to be admitted to statehood as a clearly (*pace* Vermont) sovereign republic.²²² The fabled six flags of Texas represent the six historical sovereigns over her lands, commencing with Spain, passing to France, thence back to Spain, onward to Mexico on her independence from Spain, thereafter to the Texas Republic after another declaration of independence, and ending of course with the

217. See generally CAL JILLSON, *LONE STAR TARNISHED: A CRITICAL LOOK AT TEXAS POLITICS AND PUBLIC POLICY* (2d ed. 2015); MICHAEL S. ARIENS, *LONE STAR LAW: A LEGAL HISTORY OF TEXAS* (2011); Michael G. Kelley, *Most Desperate People: The Genesis of Texas Exceptionalism* (May 7, 2011) (unpublished Ph.D. dissertation, Georgia State University) (on file with author and available at https://scholarworks.gsu.edu/history_diss/24/).

218. See Glen Sample Ely, *Texas: Where the West Begins*, in SAM W. HAYNES & CARY D. WINTZ, *MAJOR PROBLEMS IN TEXAS HISTORY* 9, 10 (2016); Kelley, *supra* note 217.

219. Kelley, *supra* note 217, at 5.

220. See *id.* at 5–15; Ely, *supra* note 218, at 9–12; Vasan Kesavan & Michael Stokes Paulsen, *Let’s Mess with Texas*, 82 *TEX. L. REV.* 1587, 1587–91, 1587 n.2 (2004).

221. See Jacqueline Lang Weaver, *The Tragedy of the Commons from Spindletop to Enron*, 24 *J. LAND RESOURCES & ENVTL. L.* 187, 187 (2004) (adverting to “the state’s feisty ‘Don’t Mess with Texas’ motto”); Kesavan & Paulsen, *supra* note 220, at 1587 n.2.

222. Ely, *supra* note 218, at 9–12 (“Still others say that the state is unique, winning its independence from Mexico and existing as an independent republic for ten years before joining the Union.”).

United States (accounting also for her brief sojourn in the Confederacy).²²³ The Texas Republic period lasted ten years, during which she was acknowledged by the United States, and after which that republic acceded to the United States in 1845.²²⁴ Under Spanish and then Mexican rule (French control was exceedingly brief), the territory developed her own set of water use grants; those first two sovereigns applied the doctrine of prior appropriation, also known by shorthand as “first in time, first in right.”²²⁵ On independence, however, the Texas Republic adopted the riparian water doctrine providing all river-abutting owners reasonable use.²²⁶ And Texas both before and after statehood asserted her supervening sovereign title in such surface waters.²²⁷

The incidents of Texas’s unique status at admission to the Union formed the basis for the dispute in *United States v. Texas*, decided by the Supreme Court in 1950.²²⁸ The dispute revolved around Texas’s rights in the submerged lands off her Gulf of Mexico coast, over which the state claimed “exclusive possession, jurisdiction[,] and control” to three marine leagues, predicated on the acts of her First Congress as the Texas Republic.²²⁹ Although acknowledging precedent granting the federal government “paramount rights in, and full dominion and power over, the marginal sea off the shores” of other states, “there is a difference in this case which, Texas says, requires a different result. That difference is largely in the preadmission history of Texas.”²³⁰ To wit: the Texas Republic, by her own law, held both *dominium* (property right) and *imperium* (governmental power) over the marginal sea and supposedly surrendered only her *imperium* to the Union at

223. See Cynthia DeLaughter, *Priming the Water Industry Pump*, 37 HOUS. L. REV. 1465, 1482 n.147 (2000); see also Kesavan & Paulsen, *supra* note 220, at 1620 & n.130.

224. *United States v. Texas*, 339 U.S. 707, 713 (1950); see also Ely, *supra* note 218; Kesavan & Paulsen, *supra* note 220, at 1592–93.

225. DeLaughter, *supra* note 223, at 1482–83.

226. *Id.* at 1483.

227. See *id.* at 1481 & n.143 (“[S]urface water is owned by the State, except for surface water grants, pursuant to a sovereign’s original land grant.”).

228. 339 U.S. at 709–15.

229. *Id.* at 710–11.

230. *Id.* at 712.

statehood.²³¹ Texas thus retained *dominium* in the form of sovereign title at statehood, unlike other states not sovereign at statehood who never had any *dominium* over their marginal seas to retain.²³²

The United States challenged virtually all of Texas's factual predicates as to her preadmission sovereignty, as well as the effects of loose language in the instrument of Texas's accession.²³³ And "Texas ma[de] an earnest plea to be heard on the facts as they bear on the circumstances of her history which, she says, sets her apart from the other States on this issue."²³⁴ But the Supreme Court found such factbound preferentialism unwarranted and unneeded, for the equal-footing doctrine resolved the case.²³⁵ That doctrine "has long been held to have a direct effect on certain property rights," specifically "ownership of the shores of navigable waters and the soils under them."²³⁶ Indeed, the doctrine arose to ensure that later-admitted states acquired sovereign title in such property precisely because the thirteen original states retained title to such navigable water themselves; to admit a new state without precisely the same retained right would deny equal footing.²³⁷ The equal-footing doctrine has thus *always* mandated

231. *Id.* at 712–13.

232. *Id.* at 713.

233. *Id.* at 713–15. As a sample for the interested scholar:

Texas claims that during the period from 1836 to 1845 she had brought this marginal belt into her territory and subjected it to her domestic law which recognized ownership in minerals under coastal waters. *This the United States contests.* Texas also claims that under international law, as it had evolved by the 1840's, the Republic of Texas as a sovereign nation became the owner of the bed and sub-soil of the marginal sea *vis-a-vis* other nations. Texas claims that the Republic of Texas acquired during that period the same interest in its marginal sea as the United States acquired in the marginal sea off California when it purchased from Mexico in 1848 the territory from which California was later formed. *This the United States contests.*

Id. at 713–14 (emphases added).

234. *Id.* at 715.

235. *Id.* ("We are of the view that the 'equal footing' clause of the Joint Resolution admitting Texas to the Union disposes of the present phase of the controversy.").

236. *Id.* at 716.

237. *Id.*

that the United States vest title to internal navigable waters at statehood.²³⁸

But what is good for the goose is good for the gander, for Texas could not bring with her into the Union territorial prerogatives *not* available to the other states:

The “equal footing” clause, we hold, works the same way in the converse situation presented by this case. It negatives any implied, special limitation of any of the paramount powers of the United States in favor of a State. Texas prior to her admission was a Republic. We assume that as a Republic she had not only full sovereignty over the marginal sea but ownership of it, of the land underlying it, and of all the riches which it held. In other words, we assume that it then had the *dominium* and *imperium* in and over this belt which the United States now claims. When Texas came into the Union, she ceased to be an independent nation. She then became a sister State on an “equal footing” with all the other States. That act concededly entailed a relinquishment of some of her sovereignty. . . . We hold that as an incident to the transfer of that sovereignty and claim that Texas may have had to the marginal sea was relinquished to the United States.²³⁹

Whereas state sovereignty had always carried with it sovereign title over internal navigable waters, external waters were historically within the purview of the national government whose duty it was to represent all the state in “external affairs” such as “respects foreign commerce, the waging of war, the making of treaties, [and] defense of the shores.”²⁴⁰ Texas’s erstwhile sovereign property rights to the contrary, whatever they were, were thus extinguished upon admission.²⁴¹

238. See *id.* at 716–17 (quoting *United States v. Oregon*, 295 U.S. 1, 14 (1935)).

239. *Id.* at 717–18.

240. *Id.* at 718–19.

241. See *id.* at 718.

The Constitution, it transpires, *can* mess with Texas.²⁴² Read carefully, *United States v. Texas* outlined seventy years ago the rejoinder to North Carolina's inventive original-thirteen theory, for accession to the Union *does* work a divestiture—of a great many rights, as it happens.²⁴³ Some of these are real property rights: that at issue in *Texas* was Texas's surrendered sovereign title in her littoral seas, but another may be *nonnavigable* waters in which the preadmission state might have granted herself title (but federal law would not).²⁴⁴ As with other aspects of her previous sovereignty incompatible with the system erected by the Constitution, such property rights would be extinguished.²⁴⁵ Now, it may be objected that there is no such express incompatibility as to nonnavigable waters inscribed in the Constitution, but neither is there one regarding the breadth of a state's continental shore.²⁴⁶ Rather, taught the Supreme Court in *Texas*, the very structure of the dual-sovereignty United States dictates that the Constitution and federal law arising thereunder circumscribe a state's territorial sovereignty upon admission.²⁴⁷ (Though, as discussed below in Section IV.D, Congress could and later would grant its own title in marginal seas to the abutting states by law.²⁴⁸) What the equal-footing doctrine demands, naturally enough, is that federal law place all states on equal footing upon their entry.

And in the end, even canonically independent Texas is on unsure ground in her *de jure* sovereignty: as with Vermont, the Court declined the state's "earnest plea" to decide the issue of what sovereign rights the Texas Republic held,²⁴⁹ only going so far as to say that whatever they were, they had no bearing on Texas's status upon statehood.²⁵⁰ (The Supreme Court would return to Texas's status in

242. Cf. Kesavan & Paulsen, *supra* note 220.

243. See *Texas*, 339 U.S. at 718.

244. *Id.* at 717–19.

245. *Id.* at 718.

246. See *id.*

247. *Id.* at 717–29.

248. 43 U.S.C. § 1301 (2018) (originally enacted as Submerged Lands Act of 1953, ch. 65, § 2, 67 Stat. 29, 29–30).

249. *Texas*, 339 U.S. at 715.

250. *Id.* at 717–18 (“We assume that as a Republic she had not only full sovereignty over the marginal sea but ownership of it, of the land underlying it, and of all the riches which it held. In other words, we assume that it then had the dominium

1960, only to adopt a similarly hesitant approach to the consequences of her preadmission status.²⁵¹) Sovereignty and the nature of statehood are one of the greater mysteries of the law: “Perhaps,” concluded one historian with an meditative air, “the Lone Star State and its multiple identities are just too confusing to unravel.”²⁵²

B. *Two Erstwhile Sovereigns: California and Hawaii*

Yet if it seems *Texas* casts grave doubt on the original-thirteen theory, one must recall that *Alcoa* and *Davis*—in elaborating on the theory—thought it might extend to certain other states yet unaddressed.²⁵³ Next in the queue for preferential treatment come California and Hawaii, both of which too have pressed litigation before the Supreme Court over their territorial sovereignty.²⁵⁴ The two share the rare status of having once enjoyed self-governance (albeit only notionally in California’s case), but they differ crucially from *Texas* in having been annexed to the United States under federal control prior to being admitted as a state. This makes all the difference, but it is worth treating the claims of each briefly in turn.

1. The Bear Flag Revolution and the Golden State

California’s prehistory is not wholly dissimilar from *Texas*’s.²⁵⁵ Originally colonized by Spain, she avoided the latter’s brief French

and imperium in and over this belt which the United States now claims. When *Texas* came into the Union, she ceased to be an independent nation.”).

251. See *United States v. Louisiana*, 363 U.S. 1, 30, 71 (1960); *infra* notes 413–14.

252. Ely, *supra* note 218, at 10. Ely continues: “With its immense land size, its notable environmental, geographical, and cultural differences, its status as a one-time independent republic, its colorful history and larger-than-life legends, *Texas* does indeed seem ‘like a whole other country.’” *Id.*

253. See *supra* notes 213–20 and accompanying text.

254. See, e.g., *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009); *United States v. California*, 381 U.S. 139 (1965); *United States v. California*, 332 U.S. 19 (1947).

255. See generally JOHN L. KESSELL, *SPAIN IN THE SOUTHWEST: A NARRATIVE HISTORY OF COLONIAL NEW MEXICO, ARIZONA, TEXAS, AND CALIFORNIA* (2002); 2 THEODORE H. HITTELL, *HISTORY OF CALIFORNIA* (San Francisco, Pac. Press Publ’g 1885).

overlordship to transition directly into Mexican rule in 1823.²⁵⁶ Mexico established a far more responsive government to the people, for “[f]rom this time forward, consequently, the Californias [Baja and Alta] were no longer royal or imperial provinces; but republican territories.”²⁵⁷ So matters stood for a quarter century, even as Texas rebelled and split away from Mexico in the 1830s, joining the Union in 1845.²⁵⁸ That recent example was likely on the minds of the Californian people, however, when a group in Sonoma rose in rebellion in the summer of 1846 in what would be called the Bear Flag Revolution, securing full possession of Sonoma by June 14.²⁵⁹ As an early historian commented:

It cannot be said to have been a wise movement. Had it not been for the war which followed and which had in fact already commenced, though unknown in California, and the occupation of the country by the United States which took place a few weeks afterwards, it would doubtless have proved a very unwise movement.²⁶⁰

Nonetheless, by July 5, a convention had been assembled to discuss the animation of the nascent California Republic under John C. Fremont.²⁶¹ But external events had overtaken them, as the United States landed military forces at Monterrey on July 7, hoisting the American flag and signaling the opening of hostilities against Mexico in California.²⁶² The California Republic followed suit: “Two days afterwards the American flag was raised at Monterey; and, as soon as the news reached Sonoma, the bear-flag was hauled down and the stars and stripes run up in its place.”²⁶³ The Mexican-American War was underway,²⁶⁴ not to end for another two years with the treaty of Guadalupe-Hidalgo in 1848, under which Mexico ceded Alta

256. See HITTELL, *supra* note 255, at 43–50.

257. *Id.* at 50.

258. *See id.* at 453–55.

259. *See id.* at 408–52.

260. *Id.* at 435.

261. *See id.* at 449–52.

262. *Id.* at 462–63.

263. *Id.* at 452.

264. *Id.* at 463–66.

California and much other territory to the United States.²⁶⁵ With the Gold Rush having begun two weeks before the treaty was signed, the status of California loomed large, and President James K. Polk exhorted Congress to provide for organizing a territorial government in California.²⁶⁶ Such legislation, however, was obstructed by the ongoing obsession in Congress with the balance between slave and free states, with the result that military authorities perforce continued to administer the region²⁶⁷ until California was admitted directly to statehood in 1850, following a compromise in Congress.²⁶⁸

Thus even though not a sovereign directly at admission, California is the only state to ever be created from newly acquired lands that had *not* been organized into a territory under the federal government’s authority to govern such territories.²⁶⁹ Absent an imposition of federal oversight, might not California’s sovereign prerogatives as a state look back—as Texas had urged—to her last instituted government, rather than the United States? This was answered in the negative soon enough in *Cross v. Harrison*,²⁷⁰ in which a company brought suit to recover duties exacted by the military-appointed collector of port duties, alleging he had no constitutional power to do so before Congress acted to bring California under federal *imperium*.²⁷¹ Declining to place postbellum California in some sort of constitutional limbo while awaiting Congressional action, the Court ruled that “after the ratification of the treaty, California became a part of the United States, or a ceded, conquered territory.”²⁷² Such a conquest becomes automatically subject to the generally applicable

265. *See id.* at 653–55. It also relinquished Mexico’s claims to Texas beyond the Rio Grande, settling that sore issue as well. *Id.*

266. *Id.* at 700–03.

267. *Id.* at 702–06 (“No government of any kind had been provided for California; and the country was left, as it had been left before, without any legal authority, except such as was exercised by a governor appointed by the president and the so-called de facto government which he had established.”).

268. *See id.* at 756–823.

269. *See* U.S. CONST. art. IV, § 3, cl. 2.

270. 57 U.S. (16 How.) 164 (1853).

271. *Id.* at 182–89.

272. *Id.* at 191. The alterative was thought to be absurd: “that the mere fact of a territory having been ceded by one sovereignty to another, opens it to a free commercial intercourse with all the world, as a matter of course, until the new possessor has legislated some terms upon which that may be done.” *Id.* at 192.

laws of Congress at the moment of her novation to the United States.²⁷³ This principle entails that, like other later-admitted states, postbellum California became fully seized of federal navigability law despite Congress's inaction in creating her a federal territory.

So much for Californian exceptionalism. This was confirmed in *United States v. California*, a precursor to the Texas litigation, which challenged California's right in her marginal seas (albeit absent Texas's ability to cite untrammelled sovereignty preadmission).²⁷⁴ During the military regency, California had called a convention to establish a constitution that would allow it to be admitted as a state, and that constitution set her littoral boundary at three marine leagues from shore; California now contended a century later in 1947 that the three-league distance still controlled after her admission to the Union.²⁷⁵ Indeed, California invoked the equal-footing doctrine to permit her such scope, claiming the original thirteen states possessed such sovereignty in their littoral waters.²⁷⁶ The government admitted the equal-footing doctrine afforded all states equal sovereign title in their internal navigable waters but argued that marginal seas had never been an incident of state sovereignty in the original thirteen states or thereafter.²⁷⁷ The Court agreed, finding the federal government the rightful sovereign in all the nation's marginal waters, and as California's exceptional constitution would garner to California what was properly vested in the federal government rather than the states, those putative rights could not be upheld.²⁷⁸ Equal footing was preserved.

2. The Newlands Resolution and the Aloha State

Hawaii, unlike California (or even Texas *à la* Mexico), was unambiguously sovereign before the advent of the United States.²⁷⁹ It

273. *Id.* at 197.

274. 332 U.S. 19 (1947).

275. *Id.* at 29–30.

276. *Id.* at 23–24.

277. *Id.* at 30–31.

278. *Id.* at 31–39.

279. *See Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 165–68 (2009); *Hawaii v. Mankichi*, 190 U.S. 197, 211–12 (1903); *id.* at 216 (“It is equally manifest that such could not have been the intention of the Republic of Hawaii in surrendering

was for this reason that Davis proposed that she was more similarly situated to the original thirteen states for purposes of assessing title in submerged lands.²⁸⁰ Yet Davis’s contention cannot be supported under the original-thirteen theory as developed in *Alcoa*, as a brief review of the Court’s treatment of Hawaiian history reveals.²⁸¹

Hawaii had long been a monarchy, but in 1893, a group of businessmen contrived to overthrow that monarch and reconstitute the islands as the Republic of Hawaii under a provisional regime, with the aim of joining the United States.²⁸² Congress acceded to this aim in 1898 via the Newlands Resolution, which, by the formal consent of the provisional government, annexed Hawaii “as a part of the territory of the United States, and subject to the sovereign dominion thereof,” with the condition that “municipal legislation of the Hawaiian Islands . . . not inconsistent with this joint resolution nor contrary to the Constitution of the United States, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine.”²⁸³ The resolution provided that Hawaii thereupon “cede[d] absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind” and that “all ‘property and rights’ in the ceded lands ‘are vested in the United States of America.’”²⁸⁴

Two years later, in 1900, Congress duly passed an organic act transmuting the Republic of Hawaii into the Territory of Hawaii and providing for her governance.²⁸⁵ The question in 1903’s *Hawaii v. Mankichi* was whether the initial annexation operated to apply federal law of its own force or whether that only occurred upon passage of the

its autonomy. Until then it was an independent nation, exercising all the powers and prerogatives of complete sovereignty.”).

280. Davis, *supra* note 201, at 667 n.10.

281. *Office of Hawaiian Affairs*, 556 U.S. at 165–68; *Mankichi*, 190 U.S. at 211–18.

282. *Office of Hawaiian Affairs*, 556 U.S. at 165–68.

283. *Mankichi*, 190 U.S. at 209 (quoting Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, Pub. L. No. 55-55, 30 Stat. 750, 750–51 (1898)).

284. *Office of Hawaiian Affairs*, 556 U.S. at 167 (quoting Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, Pub. L. No. 55-55, 30 Stat. 750, 750 (1898)).

285. *Mankichi*, 190 U.S. at 210–11.

organic act: a rather similar question to that in *Cross*.²⁸⁶ Here, however, the court decided the latter, contra the result in *Cross*.²⁸⁷ The crucial distinction was that the Newlands Resolution expressly provided that Hawaiian law should remain operative until Congress provided otherwise, which it did until Congress did, in the organic act:

From the terms of this resolution it is evident that it was intended to be merely temporary and provisional; that no change in the government was contemplated, and that, until further legislation, the Republic of Hawaii continued in existence. Even its name was not changed until 1900, when the “territory of Hawaii” was organized. The laws of the United States were not extended over the islands until the organic act was passed on April 30, 1900, when, so careful was Congress not to disturb the existing condition of things any further than was necessary, that it was provided (§ 5) that only “the laws of the United States which are not locally inapplicable shall have the same force and effect within the said territory as elsewhere in the United States.”²⁸⁸

There is thus a credible argument that, had the act passed by Congress in 1900 been one of admission to the Union, the original-thirteen theory would dictate that Hawaii entered subject to her own laws of navigability, as those would have defined her rights over submerged lands at statehood. But that is not what Congress did: instead, it organized the newly annexed islands into a federal territory subject to federal law, which they remained for the next sixty years until Hawaii became the fiftieth state in 1959.²⁸⁹ Lest there be any doubt, the organic act reiterated that Hawaii had ceded and granted in absolute fee lands theretofore held by the Hawaii as sovereign,

286. *Id.* at 214–16.

287. *Id.* at 211 (“By this act [of 1900] the Constitution was formally extended to these islands . . .”).

288. *Id.* at 215.

289. *See Office of Hawaiian Affairs*, 556 U.S. at 167–68.

subjecting them to federal law²⁹⁰—no different from any other state created from federal territory, contra Davis’s proposal.²⁹¹

The Supreme Court returned to Hawaii a century later in *Hawaii v. Office of Hawaiian Affairs*.²⁹² The Court pointed out that the act admitting Hawaii was quite explicit that (as required under the equal-footing doctrine) “effective upon its admission into the Union,” Hawaii had been vested as sovereign with “the United States’ title to all the public lands and other public property within the boundaries of the State of Hawaii, title to which is held by the United States immediately prior to its admission into the Union.”²⁹³ Such title, of course, would not necessarily include nonnavigable waters under federal law. In Hawaii, unlike most states who provided for public trust of sovereign lands by their own constitution or law, those lands were to be held for the public trust under the terms of the congressional act of accession itself.²⁹⁴ *Office of Hawaiian Affairs* arose because the Office of Hawaiian Affairs (“OHA”) had demanded that a developer seeking to sell such lands (proceeds to go to the trust) include a clause preserving any aboriginal rights in the trust lands.²⁹⁵ This the developer could not do without rendering title insurance unobtainable.²⁹⁶ Filing suit, OHA pointed to a resolution of Congress in 1993 that allegedly recognized that Hawaiian trust lands were encumbered by aboriginal rights.²⁹⁷

Although the state trial court rejected this novel argument, the Supreme Court of Hawaii reversed and entered an injunction.²⁹⁸ On certiorari, Supreme Court was not impressed.²⁹⁹ It aptly denominated the resolution in question as the “Apology Resolution,” for its purpose was quite transparently to apologize for United States interference in

290. *Id.*

291. *See* Davis, *supra* note 201, at 667 n.10; *id.* at 702 (omitting Hawaii from its list of “states created from federal territories”).

292. 556 U.S. 163 (2009).

293. *Id.* at 168 (quoting Act of Mar. 18, 1859, Pub. L. No. 86-3, § 5(b), 73 Stat. 4, 5 (1959)).

294. *Id.*

295. *See id.* at 170.

296. *See id.*

297. *See id.*

298. *Id.* at 171.

299. *Id.*

Hawaiian self-determination.³⁰⁰ The only textual basis for any recognition of indigenous rights that OHA could cite was found in the prefatory “‘whereas’ clauses,” which definitionally provide context rather than mandate.³⁰¹ But the court went further:

[T]he Apology Resolution would raise grave constitutional concerns if it purported to “cloud” Hawaii’s title to its sovereign lands more than three decades after the State’s admission to the Union. We have emphasized that “Congress cannot, after statehood, reserve or convey submerged lands that have already been bestowed upon a State.” And that proposition applies *a fortiori* where virtually all of the State’s public lands—not just its submerged ones—are at stake. In light of those concerns, we must not read the Apology Resolution’s nonsubstantive “whereas” clauses to create a retroactive “cloud” on the title that Congress granted to the State of Hawaii in 1959.³⁰²

The Court in *Office of Hawaiian Affairs* thus reaffirmed a vital lesson for the equal-footing doctrine: the Constitution demands that every state take equal title in her submerged lands upon admission to statehood, but federal mandate to determine state sovereign lands thereupon expires.³⁰³ Congress cannot, under some theory of implicit reservation or constitutional supremacy, purport to change its mind later and claw back what the state acquired as an incident of statehood,

300. *See id.* at 169 (resolving that the United States “apologizes to Native Hawaiians on behalf of the people of the United States for the overthrow of the Kingdom of Hawaii on January 17, 1893 with the participation of agents and citizens of the United States, and the deprivation of the rights of Native Hawaiians to self-determination”).

301. *Id.* at 175 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 578 n.3 (2008)).

302. *Id.* at 176 (quoting *Idaho v. United States*, 533 U.S. 262, 280 n.9 (2001)) (citing *Idaho*, 533 U.S. at 284 (Rehnquist, J., dissenting) (“[T]he consequences of admission are instantaneous, and it ignores the uniquely sovereign character of that event . . . to suggest that subsequent events somehow can diminish what has already been bestowed.”)).

303. *Id.*

for the title so bestowed thereafter emanates from the state’s own sovereignty.³⁰⁴

*C. Three (or Four) Cessions: Kentucky, Maine, and West Virginia
(and Vermont?)*

The Constitution provides that new states may be admitted by the cession of territory from an extant state with the approval of the ceding state and Congress.³⁰⁵ Yet all four states admitted under this process (arguably in Vermont’s case) predated the end of the Civil War, rendering the process moribund in the modern era.³⁰⁶ This obsolescence is partially explained in that the four were ceded in the context of the existential American quarrel over slavery, and by the imperative of each side to maintain parity of states pro and con³⁰⁷: New York finally abandoned her claims to Vermont’s territory to stave off an imbalanced admission of Kentucky as a cession from Virginia, a slave state;³⁰⁸ Maine was ceded by Massachusetts as part of the Missouri Compromise to counter the latter state’s admission,³⁰⁹ and

304. *Id.*; *accord Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 370–72 (1977).

305. U.S. CONST. art. IV, § 3, cl. 2. *See generally* Kesavan & Paulsen, *supra* note 94.

306. Those states would be, in order of admission to the Union, Vermont (14th), Kentucky (15th), Maine (23rd), and West Virginia (35th). *See* Kesavan & Paulsen, *supra* note 94, at 371–80; McGreal, *supra* note 126, at 2415–16 & nn.116–17; *id.* at 2429 & nn.171–72.

307. *Cf.* McGreal, *supra* note 126, at 2429 & nn.171–72; *id.* at 2433 & n.187 (“During the nation’s first century, acquisition of new territories served the United States’ immediate commercial and military interests. In addition, just prior to the Civil War, the North and South saw some urgency in admitting new states on their side of the slavery controversy.”).

308. *See Editorial Note: The Admission of Kentucky and Vermont to the Union*, NATIONAL ARCHIVES, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Jefferson/01-19-02-0103-0001> (last visited June 13, 2018) [hereinafter *Jefferson Papers*]; Doyle, *supra* note 123 (“New York’s attitude changed when it perceived that Vermont’s admission would help balance the admission of the new State of Kentucky”); Kesavan & Paulsen, *supra* note 94, at 375–78.

309. *See* James A. Woodburn, *The Historical Significance of the Missouri Compromise*, in ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR 1898, 251, 258 (Wash., D.C., Gov’t Printing Office 1894).

West Virginia was admitted as a self-serving “cession” authorized by the legislators from the anti-slavery Unionist counties of Virginia and ratified by that selfsame Union after Virginia purported to secede.³¹⁰ And though much verbiage has been spilt regarding Texas’s supposed entitlement to rive herself into five subsidiary states (“Texas Tots,” to use one academic review’s term) via cession,³¹¹ 175 years have passed without her doing so.

1. Circumstances of the Later Cessionary States

Vermont having already been discussed at length, a briefer digression is warranted on the circumstances of the latter three cessions. Kentucky was the fifteenth state, acceding mere months after Vermont, and on the basis of a congressional act predating that admitting Vermont.³¹² Kentucky too had vainly sought admission over the same decade, but with a crucial difference from Vermont: from the start, the trans-Appalachian Virginians accepted the jurisdiction of their mother state.³¹³ Virginia likewise recognized Kentucky’s potential for independence, providing in her constitution that her legislature might authorize such breakaway states.³¹⁴ Kentucky obtained this authorization in 1786, but the new state’s admission was frustrated by the Constitution’s entry into force mere days before the Continental Congress was set to admit her under the Articles of Confederation, depriving the Congress of authority to do so.³¹⁵ In December 1790, however, President George Washington recommended Kentucky’s admission under the new Constitution,³¹⁶ and Congress complied in less than two months.³¹⁷ Unlike Vermont’s terse induction, the act of admission for Kentucky makes clear beyond cavil that Kentucky acceded under the second clause of Article IV,

310. See Kesavan & Paulsen, *supra* note 94, at 297–332.

311. See generally, e.g., Kesavan & Paulsen, *supra* note 220; McGreal, *supra* note 126.

312. Act of Feb. 4, 1791, ch. 4, 1 Stat. 189; see Kesavan & Paulsen, *supra* note 94, at 375.

313. Kesavan & Paulsen, *supra* note 94, at 376–77.

314. *Id.*

315. *Id.* at 377.

316. *Id.* at 376.

317. Act of Feb. 4, 1791, ch. 4, 1 Stat. 189.

Section 4, by and with the consent of the Virginia commonwealth, and that her territory had previously been a “district . . . within the jurisdiction of the said commonwealth” and so passed to Kentucky directly.³¹⁸

If Kentucky thus provides a pure example of cession,³¹⁹ the circumstances of the sixteenth state, Tennessee, render her the only one.³²⁰ Beginning before the birth of the new nation and continuing thereafter, all of the original states surrendered their broader territorial claims to the federal government in a series of incremental cessions beginning with New York in 1780 to the last holdout of Georgia in 1802.³²¹ The Kentucky State Historical Society explains:

Neither Vermont nor Kentucky served a territorial apprenticeship; and to the public lands of neither, did the Federal Government lay claim. When Virginia ceded the Northwest territory, all the lands went with the cession, to be disposed of at the will of Congress. But Virginia retained title to the territory of Kentucky as part of her own autonomy, and to all public lands within her borders. It was different with Tennessee, when she assumed Statehood a few years after North Carolina had ceded Tennessee, with all territorial rights, to the Federal Government as Virginia did the Northwest. Tennessee was therefore included in the Act of Congress, May 26, 1790, establishing the Territory South of the Ohio, and received no proceeds from the sale of her public land. This applied generally to all states entering the Union after Kentucky.³²²

318. Kesavan & Paulsen, *supra* note 94, at 374–76 (“[T]he Kentucky Act makes clear that Kentucky was admitted into the Union pursuant to the second clause of Article IV, Section 3 with the consent of the legislature of Virginia and of Congress.”).

319. *See id.* at 375–76.

320. *Id.* at 378–80. Of course, the author is much obliged to the obvious support in no small way of the institutions resident in the State of Tennessee in the publication of this Article.

321. TOWNSEND MACCOUN, AN HISTORICAL GEOGRAPHY OF THE UNITED STATES 28–32 (Boston, Silver, Burdett & Co. rev. ed. 1890).

322. Zachariah Frederick Smith, *Kentucky and Virginia in 1907*, in 5 REG. OF THE KY. ST. HIST. SOC’Y 20, 26 (1907).

“Generally,” wrote the Society—but not universally.³²³ The next cessionary state was Maine, originally the northernmost district of Massachusetts.³²⁴ In 1819, Massachusetts had given the necessary consent for Maine’s admission, and Maine duly adopted a constitution and looked to Congress for statehood³²⁵ but, “having applied for admission[,] was refused unless Missouri was admitted with slavery.”³²⁶ At the time, the balance of free and slave states stood at eleven and eleven; the already-pending candidacy of Missouri had threatened to undo that parity and had thus been stalled.³²⁷ Maine’s application solved this problem, and the two petitioning states were packaged together with several other provisions in the so-called Missouri Compromise,³²⁸ with the result that Maine was admitted as the twenty-third state in 1820.³²⁹ As in Kentucky’s case, the act of admission expressly depended on Massachusetts’s consent and noted the state was to be formed out of her territory.³³⁰ Maine cannot rank as an unadulterated cession, however, for a portion of Maine as admitted “appears never to have been in the Province of Maine, or Massachusetts Bay, or State of Massachusetts,” and if so, “this tract was a parcel of the original public land of the United States, as defined by treaty with Great Britain.”³³¹

323. *Id.*

324. *See* MACCOUN, *supra* note 321, at 34–35.

325. *See* Woodburn, *supra* note 309, at 258–59.

326. MACCOUN, *supra* note 321, at 35.

327. Woodburn, *supra* note 309, at 254.

328. *See id.* at 259–63.

329. Act of Mar. 3, 1820, ch. 19, 3 Stat. 539, 544; *see* Woodburn, *supra* note 309, at 263–64. The very next page of the Statutes at Large records the other half of the bargain, with Missouri organized as a federal territory open to slavery. *See* 3 Stat. at 545–48.

330. 3 Stat. at 544 (“[B]y an act of the state of Massachusetts, passed on the nineteenth day of June, in the year one thousand eight hundred and nineteen, entitled ‘An Act relating to the separation of the district of Maine from Massachusetts proper, and forming the same into a separate and independent state,’ the people of that part of Massachusetts heretofore known as the district of Maine, did, with the consent of the legislature of said state of Massachusetts, form themselves into an independent state, and did establish a constitution for the government of the same, agreeably to the provisions of said act.”).

331. MACCOUN, *supra* note 321, at 35 & n.3.

The final cessionary state was West Virginia, admitted in 1863.³³² The circumstances of her admission are fraught, to say the least,³³³ for after Virginia’s ordinance of secession in 1861, delegates from twenty-six of the western counties that would soon become the new state declared the ordinance invalid after assembling in Wheeling, the largest city in the region.³³⁴ One source is at least concise: “Forming a legislature, which they claimed to be the real executive body, they gave the assent required by the Constitution to the organization of a new State, and applied for admission as West Virginia. Congress recognized their action and the State was admitted”³³⁵ Far more has been written about West Virginia; indeed, authors have questioned whether the Wheeling cession was valid and the state’s admission constitutional.³³⁶ (Congress and the cabinet sharply debated the same question in 1863 before deciding they were.³³⁷) Although West Virginia can best be characterized as a cessionary state, the nature of her admission can be no clearer than Vermont’s if a respectable scholar may describe her admission as follows: “West Virginia thus formally became a State—if it ever did—on June 20, 1863.”³³⁸

2. Slicing the Nation into Ribbons

These cessionary states resemble the original thirteen and differ from other later-admitted states under the reasoning given by the dissent in *Alcoa*. More precisely still, under such reasoning those states share the same incidents of sovereignty attending that one of the original thirteen which gave them birth. If the original-thirteen theory

332. See generally Kesavan & Paulsen, *supra* note 94.

333. *Id.* at 298–99.

334. *Id.*

335. MACCOUN, *supra* note 321, at 42; see Kesavan & Paulsen, *supra* note 94, at 299–301.

336. E.g., Kesavan & Paulsen, *supra* note 94 (positing the question in its title: “Is West Virginia Unconstitutional?”).

337. See *id.* at 302 (“Congress, after much debate over whether this consent was spurious . . . passed a West Virginia statehood bill in December 1862, and President Lincoln, after much debate in the cabinet over the same issue . . . signed it.”).

338. *Id.* Even the date seems to be in doubt. Compare *id.*, with MACCOUN, *supra* note 321, at 42 (giving the date as June 19).

is credited, and those states entered the Union with their idiosyncratic rules of sovereign title and ensuing public trust in their territory intact, it follows that those same rules pass on when some of that territory is ceded to a new state. Once again, there would be no federal question because there is no federal involvement in ownership of the lands. Instead, Kentucky and West Virginia would inherit sovereign title as defined by Virginia state law (which in turn was defined by what law the colony of Virginia prescribed prior to the Union), and Maine would take title subject to Massachusetts state (and thus preadmission) law. Under the original-thirteen theory, therefore, cessionary states are more progeny of the original thirteen than the federal creations that animated the *PPL Montana* decision and cases regarding other later-admitted states.

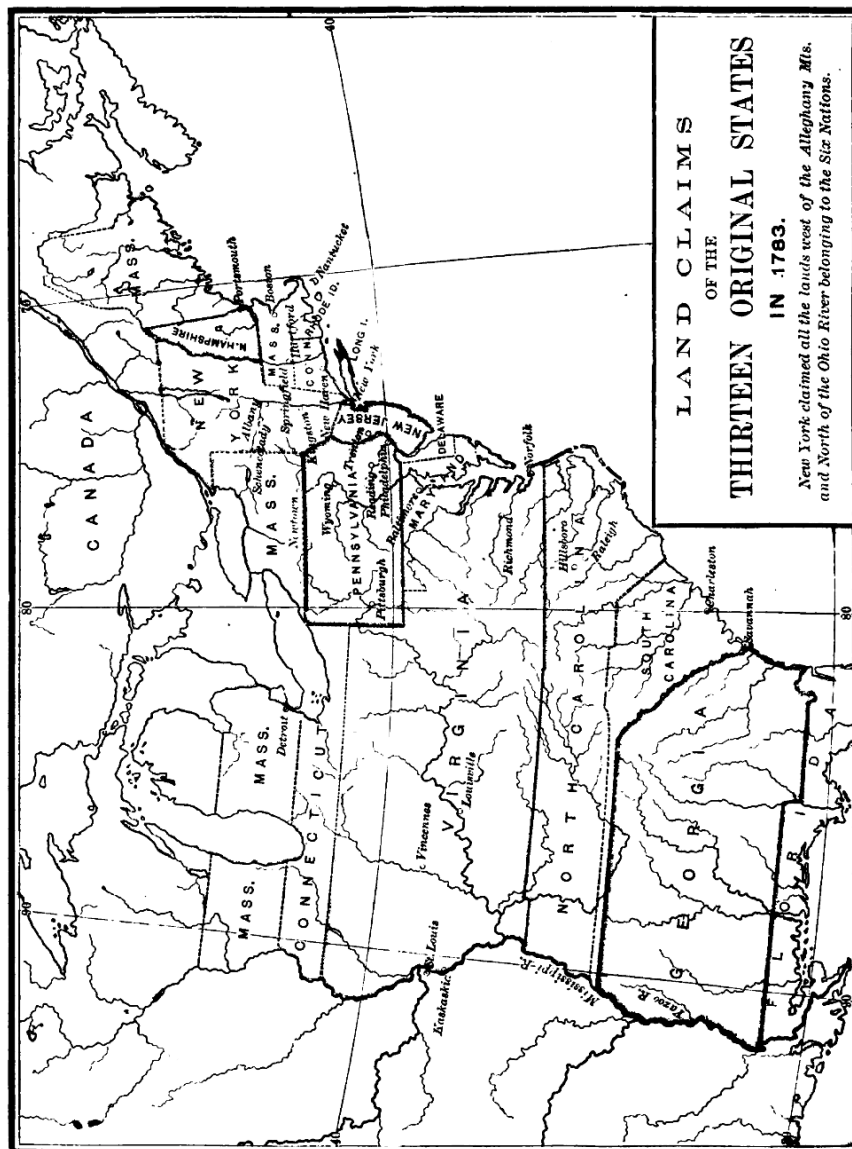
Had the mechanism of cessionary statehood not proven so little-used, the ensuing crazy quilt of divergent state practices would threaten to undermine the basic motto of the union, *e pluribus unum*. Like Virginia with the lands that would form Kentucky, a majority of the original states had held “sea to sea charters” from the crown: within defined latitudinal definitions, the granted territory extended as far west as British control lay, and nominally to the Pacific Ocean.³³⁹ As it happened, Virginia and the other states agreed to cede those territories to the federal government so the latter could assume responsibility for subdividing the lands into further states.³⁴⁰ Had they not, however, each successive state created from a state’s band of territory would inherit the idiosyncratic title laws of the original state. The United States would look much like the stripes on the flag it adopted: not a single nation, but horizontal bands of differing incidents of sovereignty governed by the pre-revolutionary law of the original state on the Atlantic seaboard—an illustration of these latitudinal land claims appears overleaf.³⁴¹ (South Carolina’s band was only twelve miles in

339. These states were Massachusetts, New York, Connecticut, Virginia, North Carolina, South Carolina, and Georgia. See MACCOUN, *supra* note 321, at 26–28 (“Six of the States had well defined limits, New Hampshire, Rhode Island, New Jersey, Pennsylvania, Delaware, and Maryland. Seven of them under the sea to sea charters laid claim to all the western country.”).

340. *Id.* at 28–30.

341. The similarity to the flag is, of course, entirely coincidental.

height!³⁴²) A constitutional doctrine that only avoids slicing the nation into ribbons by an accident of history does not recommend itself.



Source: TOWNSEND MACCOUN, AN HISTORICAL GEOGRAPHY OF THE UNITED STATES (Boston, Silver, Burdett & Co. rev. ed. 1890).

342. MACCOUN, *supra* note 321, at 28.

In any event, neither Kentucky nor West Virginia appears to have ever pressed the view that her sovereign rights in submerged lands are pendent on those of her cessionary mother state. Maine did go to court along with the other twelve states abutting the Atlantic Ocean in *United States v. Maine*³⁴³ to press expanded claims to their littoral waters, resting their claims on status “as successor in title to certain grantees of the Crown of England.”³⁴⁴ But although several other states were singled out for particular treatment as successors, there was no discussion of Maine’s claim passing by way of Massachusetts whatsoever.³⁴⁵ Regardless, Maine’s attempt was rejected, as the Court found any such preadmission sovereign rights (had they ever existed) were extinguished at statehood, just as in California and Texas.³⁴⁶ Moreover, Maine’s position under the original-thirteen theory, if credited, could yield the most perplexing result yet, involving different regimes of sovereignty in different portions of the same state: Massachusetts’s in those lands received from her and that of federal law in any areas received from the public lands of the United States. That the original-thirteen theory might yield such intrastate discrepancy in sovereign prerogatives can only provide one more reason for its rejection.

*D. Five Secessions: Texas, Louisiana, Mississippi, Alabama, and Florida*³⁴⁷

The tortuous political tale of West Virginia necessarily invokes the fortunes of Virginia and her sister states in the Confederacy: “The legitimacy of West Virginia’s ‘secession’ from Virginia thus depends, ironically, on the illegitimacy of Virginia’s secession from the United States, and on the further legal fictions that succeed upon the unsuccessful secession of a section,” quips one essay enamored of

343. 420 U.S. 515 (1975).

344. *Id.* at 517–18.

345. *See id.* & n.3 (distinguishing provenance of the claims of New York and Florida).

346. *Id.* at 523–27.

347. Of the eleven states of the Confederacy, another four—Virginia, North and South Carolina, and Georgia—were original states, leaving only Tennessee and Arkansas unaddressed here, for the straightforward reason that both lack the coastline that animated the litigation of this Section.

paronomasia.³⁴⁸ Scholars have debated the cogency of President Abraham Lincoln’s “unshakable constitutional premise” that the Union was indissoluble and thus the Confederate states’ purported secessions inoperative.³⁴⁹ Under this view, the Confederate states remained members of the Union but lacked effective governance or representation, until such time as they were readmitted to that representation upon the restoration of republican government consistent with the Guarantee Clause.³⁵⁰ Congress’s acts of readmission thus only purported to certify that such a government existed, permitting it to seat the states’ representatives and senators.³⁵¹ Cogency aside, the Supreme Court held as much just after the Civil War in *Texas v. White*:³⁵²

When, therefore, Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union, and all the guaranties of republican government in the Union, attached at once to the State. The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States.³⁵³

1. The Submerged Lands Act of 1953

Nevertheless, the events of the Civil War were not without consequence—but first some recapitulation is necessary. The triad of early cases addressing the lands beneath marginal seas that began with *United States v. California*³⁵⁴ is completed with *United States v.*

348. Kesavan & Paulsen, *supra* note 94, at 303. This author is hardly immune to the same penchant, and this is a particularly fine example from a fine pair of wordsmiths.

349. *See id.* at 301–13.

350. *Id.* at 307–10.

351. *See id.* at 310 n.68; *see also* *Texas v. White*, 74 U.S. 700, 730 (1869).

352. 74 U.S. at 700.

353. *Id.* at 726.

354. *United States v. California*, 332 U.S. 19 (1947); *see supra* Section IV.B.1.

Louisiana,³⁵⁵ the companion case to *United States v. Texas*,³⁵⁶ discussed above.³⁵⁷ Louisiana, although a fellow secessionist with Texas in the Confederacy, lacked Texas's argument of prior sovereignty on which to depend. Thus, the disposition of her claims was concise to the point of brusqueness, finding no distinction between Louisiana and California other than the former's greater ambition: California had sought title only out to three marine leagues, while Louisiana sought twenty-seven miles.³⁵⁸ The holding in *California* thus controlled and needed no reiteration: Louisiana no less than "California, like the thirteen original colonies, never acquired ownership in the marginal sea. The claim to our three-mile belt was first asserted by the national government."³⁵⁹ So far, so good (as far as equal footing goes).

A number of coastal states, however, were not pleased with the rejection of state sovereignty over marginal seas and had the means to do something about it.³⁶⁰ Three years later, impelled by those states' representatives, Congress passed the Submerged Lands Act of 1953,³⁶¹ under which the federal government bequeathed its entitlement under the Constitution (as the *California-Texas-Louisiana* triad had established) to the lands submerged beneath the marginal seas abutting the states to each such state.³⁶² In one sense, the Act reaffirmed the universal application of the federal definition of inland territorial navigable waters because it defined the same as "all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States

355. *United States v. Louisiana*, 339 U.S. 699 (1950).

356. *United States v. Texas*, 339 U.S. 707, 709 (1950); *see supra* Section IV.A.

357. *See supra* Section IV.A; *see also* Bernard Schwartz, *The Supreme Court—October 1959 Term*, 59 MICH. L. REV. 403, 405 & n.11 (1961) (adverting to the trio of cases).

358. *Louisiana*, 339 U.S. at 705.

359. *Id.* at 704.

360. *See* *United States v. Louisiana*, 363 U.S. 1, 16–17 (1960) (detailing criticism of the marginal seas decisions and ensuing legislation).

361. Submerged Lands Act, ch. 65, 67 Stat. 29 (1953) (codified at 43 U.S.C. § 1301 (2018)); *see* Schwartz, *supra* note 357, at 405.

362. *See* 43 U.S.C. § 1311(b); *id.* § 1312 (confirming seaward boundaries, as defined); *see also id.* § 1301(a) (defining "lands beneath navigable waters"); *id.* § 1301(b) (defining "boundaries").

at the time such State became a member of the Union, or acquired sovereignty over such lands and water thereafter.”³⁶³ Much mischief, however, was sown by the provisions regarding the boundaries to the state title granted by the Act in marginal seas, which provided that

[t]he term “boundaries” includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section [1312 of this title] but in no event shall the term “boundaries” or the term “lands beneath navigable waters” be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico.³⁶⁴

Most obviously, the Act discriminated between states abutting the Gulf of Mexico and any other marginal sea³⁶⁵—the Gulf states’

363. *Id.* § 1301(a)(1).

364. *Id.* § 1301(b). Section 1312 in turn provided that

[t]he seaward boundary of each original coastal State is hereby approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is hereby approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State’s seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress.

Id. § 1312.

365. Those states abutting the Great Lakes were naturally constrained by the international boundary with Canada, as specified by the Act. *Id.*

limit of three marine leagues is thrice that afforded to all others.³⁶⁶ This occasioned litigation challenging Congress's capacity to enact the Submerged Lands Act in the first place, which the Supreme Court decided in *Alabama v. Texas* in 1954.³⁶⁷ In a single-paragraph unsigned opinion, the Court dismissed the claims as meritless, relying on Article IV, Section 3 in holding the "power of Congress to dispose of any kind of property belonging to the United States 'is vested in Congress without limitation.'"³⁶⁸ But several justices thought the issue worthy of further comment. Concurring, Justice Stanley Reed examined and rejected the argument that the Act offended the equal-footing doctrine, for the "requirement of equal footing does not demand that courts wipe out diversities 'in the economic aspects of the several States', but calls for 'parity as respects political standing and sovereignty'"; the "power of Congress to cede property to one state without corresponding cession to all states has been consistently recognized."³⁶⁹

Justice Hugo Black dissented.³⁷⁰ Littoral waters and the ocean beyond were not comparable to commonplace property; they "are the highways of the world" and properly administered at the national level.³⁷¹ Accordingly, he would have "beware[d] of extending the concept of state ownership of land under inland streams to the vast ocean areas of the world" and allowed the suit to proceed.³⁷² Also dissenting,³⁷³ Justice Thurgood Marshall expanded Justice Black's concerns about federal self-abnegation: "Could Congress cede the great Columbia River or the mighty Mississippi to a State or a power company? I should think not. For they are arteries of commerce that attach to the national sovereignty and remain there until and unless the

366. A marine league constituting three nautical or geographical miles, and those themselves are roughly fifteen percent larger than a statute or land mile. *See* *United States v. Louisiana*, 363 U.S. 1, 9 n.6 (1960).

367. 347 U.S. 272 (1954) (per curiam).

368. *Id.* at 273 (quoting *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915)).

369. *Id.* at 275 (Reed, J., concurring) (quoting *United States v. Texas*, 339 U.S. 707, 716 (1950)) (citing *United States v. Wyoming*, 335 U.S. 895 (1948)).

370. *Id.* at 277–81 (Black, J., dissenting).

371. *Id.* at 278–79.

372. *Id.* at 279.

373. *Id.* at 281–83 (Marshall, J., dissenting).

Constitution is changed.”³⁷⁴ But he also engaged with Justice Reed on the equal-footing doctrine, invoking the recent *United States v. Texas* decision:

If it were necessary for Texas to surrender all her property and political rights in the marginal sea in order to enter the Union on an “equal footing” with the other States, pray how can she get back some of those rights and still remain on an “equal footing” with the other States? That is the unresolved question in these cases. That is the question which points up the grievances of Alabama and Rhode Island. For what Texas (and a few other States) obtain by the present Act of Congress is what we held the “equal footing” clause forbade them to retain. The “equal footing” clause, in other words, prevents one State from laying claim to a part of the national domain from which the other States are excluded. Today we permit that precise “inequality among the States” which we earlier said was precluded by the “equal footing” clause.

Alabama and Rhode Island can justly complain. So can the other States. Our Union is one of equal sovereigns, none entitled to preferment denied the others. That is what the “equal footing” standard means or it means nothing. Today powerful political forces are marshalled to wipe out our prior decisions for the benefit of a favored few. But those decisions were sound in constitutional theory and they should stand.³⁷⁵

As Justice Marshall hinted, the most devilish clause was that which rendered the littoral title relinquished by the federal government to any given state dependent on those boundaries she possessed at statehood “or as heretofore approved by the Congress,” both of which conditions permit for discrepant entitlements amongst the states.³⁷⁶ And where real property is at stake, claimants have been avid if not

374. *Id.* at 282.

375. *Id.* at 283.

376. 43 U.S.C. § 1301(b) (2018).

avaricious since the feudal era.³⁷⁷ It is thus utterly unsurprising that every one of the five Gulf Coast states—Texas, Louisiana, Mississippi, Alabama, and Florida—found herself in litigation seeking to settle whether her respective seaward titles lay at the default three-mile mark, the maximal three-marine-league mark, or somewhere else.³⁷⁸

2. Picking Winners and Losers on the Gulf Coast³⁷⁹

Two succeeded, and three failed. All the Gulf states contended the Act and history alike set their boundaries at three marine leagues; the United States thought those boundaries were clearly staked at three miles.³⁸⁰ The Court started on a note favorable to the government: its review of legislative history revealed the general consensus that custom had afforded the original states sovereignty to three miles, and thus some combination of the equal-footing doctrine, federal practice, general concerns of parity, and the *Pollard* doctrine of sovereignty over territorial navigable waters ensured the three mile boundary to all states equally.³⁸¹ But the Court went on to find the Act intended that “the States should be ‘restored’ to the ownership of submerged lands within their present boundaries, determined, however, by the historic action taken with respect to them jointly by Congress and the State”—if they could prove their historical claim.³⁸² Rather anticlimactically,

377. Cf. *MONTY PYTHON AND THE HOLY GRAIL* sc. 19 (EMI Films 1975) (“FATHER: . . . Now listen lad, in twenty minutes you’re getting married to a girl whose father owns the biggest tracts of open land in Britain. / HERBERT: But I don’t want land. / FATHER: Listen, Alice,— / HERBERT: ‘Erbert. / FATHER: Herbert. We live in a bloody swamp. We need all the land we can get. / HERBERT: But I don’t like her. / FATHER: Don’t like her?! What’s wrong with her? She’s beautiful, she’s rich, she’s got huge . . . tracts of land.”).

378. *United States v. Louisiana*, 363 U.S. 1, 4–5 (1960).

379. In deliberately devolving the decision to the courts, *see id.* at 11 (holding that the “Act did not purport to determine, fix, or change the boundary of any State, but left it to the courts to ascertain whether a particular State had a seaward boundary”), Congress subjected the states’ claims of title to the courts’ traditional role of “picking winners and losers in adversarial proceedings.” *Obert v. Republic Western Ins. Co.*, 190 F. Supp. 2d 279, 284 (D.R.I. 2002).

380. *Louisiana*, 363 U.S. at 12–13.

381. *Id.* at 22–24 (“The upshot of all of these differing views was the confirmation of each coastal State’s seaward boundary at three geographical miles.”).

382. *Id.* at 24–30.

however, the Court signaled the resolution of those claims in advance by noting that “the last sentence of the present Act’s [section] 4 was added, for the specific purpose of assuring that the boundary claims of Texas and Florida would be preserved.”³⁸³

Taking Texas first, the Court undertook a lengthy review of its history before and after admission.³⁸⁴ The United States pleaded that although Texas might have thought herself seized of a three-marine-league boundary, nobody else did.³⁸⁵ The Court recurrently (and with evident irritation) observed that contemporary sources were wholly oblivious to the subject of the maritime boundary.³⁸⁶ Yet it ultimately held with Texas, for the Treaties of Guadalupe-Hidalgo and the Gadsden Treaty of 1853, and her act of accession itself, confirmed Texas in her three-league boundaries, ratifying those specified in the 1836 Boundary Act passed by the Republic of Texas.³⁸⁷ Though that had been insufficient to overcome equal footing, it was sufficient to form the basis for Congress’s grant under its plenary powers over the disposition of federal property.³⁸⁸

383. *Id.* at 29.

384. *Id.* at 36–64.

385. *See id.* at 38 (“The Government, while conceding that Texas continuously asserted by statute a three-league seaward boundary, contends that at no time before, during, or after admission did the United States or any other country recognize the validity of that boundary. It follows, therefore, the Government says, that since Texas upon entering the Union became subject to the foreign policy of the United States with respect to the ‘three-mile limit’ . . .”).

386. *See id.* at 47 (“Furthermore, a series of other events manifests a total lack of concern with the problem.”); *id.* at 50 (“The foregoing circumstances make it abundantly plain that at the time Texas was admitted to the Union, its seaward boundary, though expressly claimed at three leagues in the 1836 Texas Boundary Act, had not been the subject of any specific concern in the train of events leading to annexation.”); *id.* at 57 (“However, there is absolutely nothing to indicate that the Executive, any more than the Congress, was interested in, or was at all aware of any problem presented by, the seaward boundary of Texas claimed in its 1836 Boundary Act.”); *id.* at 60 (“While this misquotation of the Texas Boundary Act again demonstrates total insensitivity to any problem of a seaward boundary . . .”).

387. *Id.* at 60–65 (“We conclude, therefore, that pursuant to the Annexation Resolution of 1845, Texas’ maritime boundary was established at three leagues from its coast for domestic purposes.”).

388. *Id.*

Louisiana,³⁸⁹ Mississippi,³⁹⁰ and Alabama,³⁹¹ were “not so fortunate.”³⁹² In all three cases, the acts of admission made no particular specification of a marine boundary,³⁹³ historical practice suggested a three-mile boundary,³⁹⁴ or at least ambiguity as to where the boundary lay,³⁹⁵ and any contrary specificity vis-à-vis Texas or Florida did not operate to import such idiosyncrasy *sub silentio* onto these three states.³⁹⁶ Justices Black and Marshall again dissented, finding the concession afforded the Gulf states unseemly, but arguing that at least if Texas was to be privileged by so lax a statute, so too should be the other Gulf states.³⁹⁷

389. *Id.* at 66–79.

390. *Id.* at 79–82 (“Mississippi’s claim to a three-league seaward boundary must fail largely for the same reasons that have led us to reject the similar claim of Louisiana.”).

391. *Id.* at 82–83 (“The same reasons applicable to the claims of Louisiana and Mississippi compel us to hold that Alabama is not entitled to rights in submerged lands lying beyond three geographical miles from its coast.”).

392. *See id.* at 98 (Black, J., concurring in part and dissenting in part) (“The result of the Court’s holding in this and the Florida case is that Texas and Florida will have marginal belts that uniformly extend three leagues from their shores. The other Gulf States, however, are not so fortunate.” (footnote omitted)).

393. *See id.* at 67–69 (majority opinion).

394. *See id.* at 68.

395. *See id.* at 71–75.

396. *See id.* at 76–77.

397. *See id.* at 85–101 (Black, J., concurring in part and dissenting in part); *id.* at 100–01 (“Nothing in the Act itself indicates that Texas was to be given any more consideration in this case than Louisiana, Mississippi and Alabama. Had Congress wanted to give the land to Texas and refuse to give it to the other States it easily could have done so. . . . As Congress indicated, it is time that the problem be solved, the title be quieted and the controversy be stilled. In my judgment to interpret this Act in a way which grants the land to Texas and Florida and withholds it from the other Gulf States simply prolongs this costly and disquieting controversy. It will not be finally settled until it is settled the way Congress believes is right, and I do not think Congress will believe it right to award these marginal lands to Texas and Florida and deny them to the other Gulf States.”); *id.* at 101–20 (Douglas, J., dissenting in part); *id.* at 117 (“Yet if we are to decide these cases by substandards (lessening the requirements of proof as we should do if Congress intended to grant whatever the parties fairly claimed), then I agree with Mr. Justice Black that the discrimination in favor of Texas and against Louisiana, Alabama, and Mississippi is quite unjustified.”).

Florida was afforded separate treatment, and it is here at last that the events of the Civil War return to the fore.³⁹⁸ Florida argued neatly that (a) the constitution she had adopted in 1868 during the Reconstruction period had specified a marine boundary of three leagues, and that, (b) because that constitution had been submitted to Congress and approved as a predicate to Florida’s readmission to representation in the Union later in 1868, that therefore (c) Congress had provided the approval required by the Submerged Lands Act.³⁹⁹ The United States argued that Congress’s endorsement was limited to the scope of the Guarantee Clause in ensuring Florida’s constitution was republican in nature in order to permit her readmission, and decided nothing further.⁴⁰⁰ As with Texas, the Court lamented that the historical record was inconclusive.⁴⁰¹ Rather, the Court found dispositive that “the language of the Submerged Lands Act was at least in part designed to give Florida an opportunity to prove its right to adjacent submerged lands so as to remedy what the Congress evidently felt had been an injustice to Florida[,]” and it had made at least that *prima facie* showing.⁴⁰² Florida’s readmission to representation in the Union thus ratified its three-league boundaries⁴⁰³—allowing the Court

398. *Id.* at 13 (majority opinion) (“The particular claims of Florida, which involve primarily its readmission boundary, are considered in a separate opinion.”).

399. *United States v. Florida*, 363 U.S. 121, 123–25 (1960).

400. *Id.* at 125.

401. *See id.* at 127 (“The voluminous references to the Reconstruction debates fail to show us precisely how closely the Southern States’ Reconstruction Constitutions were examined.”).

402. *Id.* at 128; *see id.* at 130–31 (Frankfurter, J., concurring) (“To the contrary, in the case of Florida, authoritative legislative history makes it perfectly clear that the very question deliberately preserved by the Act of 1953 was whether congressional approval of the new Florida Constitution in the Reconstruction legislation of 1867–1868, by which Florida was restored to full participation in the Union, amounted to an approval of the three-league boundary which that constitution explicitly set forth. I sustain Florida’s claim because I find that its boundary was so approved.”).

403. *See id.* at 125 (majority opinion) (“The preamble to this ‘Admission Act’ declared that these States had adopted their constitutions ‘in pursuance of the provisions’ of the 1867 Acts, which Acts, as has been pointed out, required ‘examination and approval’ of the constitutions as a prerequisite to readmission of congressional representation. Thus by its own description, Congress not only approved Florida’s Constitution which included three-league boundaries, but Congress in 1868 approved it within the meaning of the 1867 Acts. In turn, the

to find it “unnecessary to decide the boundaries of Florida at the time it became a State.”⁴⁰⁴

If it seems unfitting that Florida should benefit by virtue of her rebellion, the Great Dissenter’s grandson thought so as well.⁴⁰⁵ Justice John Harlan wrote a discourse admonishing the Court mildly for confusing the admission of states with readmission:

My difficulty with Florida’s “readmission” claim begins with the proposition that a State relying on a readmission boundary stands on quite a different legal footing than one relying on an original admission boundary. In the latter instance the fixing of a boundary is a necessary incident of Congress’[s] power to admit new States. . . . Different considerations, however, obtain in the case of a State readmitted to “representation in Congress” after the Civil War. Such a State renounced the Union with boundaries already fixed by Congress at the time of original admission. When it was restored to full participation in the Union, there is no reason to suppose its territorial limits would not remain the same.⁴⁰⁶

So construed, the majority’s view ran contrary to the contemporaneous understandings of President Lincoln and the postbellum Court in *Texas v. White* as well. Congress was not in 1868 readmitting Florida to the Union—she never *left* the Union⁴⁰⁷—but reinstating her voting rights in Congress upon confirmation she had reinstated a republican form of government.⁴⁰⁸ Admitting a state requires settling the metes of her boundaries; restoring a state to

approval the 1867 Acts required appears to be precisely the approval the 1953 Act contemplates.”).

404. *Id.* at 123.

405. *See id.* at 132–42 (Harlan, J., dissenting).

406. *Id.* at 134–35.

407. *See Texas v. White*, 74 U.S. 700, 726 (1869).

408. *Florida*, 363 U.S. at 138 (Harlan, J., dissenting) (“Nor can a purpose to change Florida’s boundary be inferred from the bare context of the Congressional action. The constitutional area in which the Congress was moving in 1868 should not be forgotten. Congress was not undertaking to exercise its power to fix state boundaries incident to the admission of new States.”).

representation requires settling the form of her government.⁴⁰⁹ A Congress reeling from the Civil War and focused on the “Great acts of State” required to repair the Union surely did not pass *sub silentio* on the former.⁴¹⁰ To be sure, Justice Harlan noted, Congress *could* have rewarded Florida for her treason by awarding her title and domain over waters (on her own say-so) far beyond those states who had remained loyal, but there was no evidence whatsoever to impute to the postwar Congress such an illogical and retrograde intent.⁴¹¹

And if the Confederate states could relitigate their littoral seas based on readmission, they might well challenge what terms (tacitly) Congress adopted as to their internal navigable waters, the definition of which included a similarly inviting dangling clause under the Act: “. . . or acquired sovereignty over such lands and waters thereafter.”⁴¹² At least, however, the Court foreclosed that it was suggesting that *preadmission* uncertainties ordained modern property rights, noting, for example, that “Louisiana’s *preadmission* history is relevant in this case only to the extent that it aids in construing the Louisiana Act of Admission.”⁴¹³ This was because the states’ status before admission did not dictate their sovereign rights upon admission; that was to be established by the circumstances of their admission into the Union under the Constitution.⁴¹⁴ And legalistically, all the Act did was grant certain land rights theretofore inured to the federal government to the states, rather than alter their *preadmission* status or ensuing sovereign

409. *See id.* at 135–38 (“The statute refers in no way to boundaries; it does not even undertake to approve Florida’s Constitution, let alone the boundaries described therein; and it is entitled merely as ‘An Act to admit . . . Florida, to Representation in Congress,’ not as an act to admit it to the Union.”).

410. *Id.* at 139–40.

411. *Id.* at 138 (“This is not to say that Congress could not at the same time have changed any State’s original admission boundary, but only to raise the question whether it in fact did so. While the exercise of a particular constitutional power does not of course preclude resort to others, the nature of the power exerted in 1868 does seem to me to negative the idea that Congress also purported to exercise its power to change Florida’s boundary.”).

412. *Compare* 43 U.S.C. § 1311(a)(1), *with* 43 U.S.C. § 1301(a)(1). *See also supra* quoted text accompanying note 363.

413. *United States v. Louisiana*, 363 U.S. 1, 71 (1960).

414. *Id.* at 30 (“We conclude, therefore, that the States’ contention that *preadmission* boundaries, standing alone, suffice to meet the requirements of the statute is not tenable.”).

entitlements under the Constitution—however perplexingly Congress had managed to conflate those two issues with what could have been a straightforward transfer of land.⁴¹⁵

V. NOT MESSING WITH OKLAHOMA, AND THE EQUAL-FOOTING DOCTRINE

Parts II and III well illustrate a central problem posed by North Carolina's theory of exceptionalism: many if not most states can cite their own unique history as predicate for some sort of special treatment. Texas was a sovereign nation immediately prior to statehood,⁴¹⁶ while both Hawaii and California exercised sovereignty in their own right before being annexed into the United States, later to be reconstituted as states.⁴¹⁷ Kentucky and Maine comprised cessions of the original thirteen states rather than creations from federal lands.⁴¹⁸ Vermont, of course, might have been either: a sovereign republic whose claims to her territory were disputed by several of the original thirteen states, whose acquiescence paved the way to admission.⁴¹⁹ The eleven states of the Confederacy declared themselves sovereign from the Union, only to have their independence overturned by war—and were thus compelled to undergo readmission to representation in Congress, if not to the Union.⁴²⁰ West Virginia is another chimera: legalistically a cession of Virginia, but more truthfully a territory forcibly extracted from a rebellious state during the Civil War.⁴²¹ All told, such claimants would add another thirteen states to North Carolina's original thirteen, meaning that a *majority of the states* would be jostling for

415. See *Alabama v. Texas*, 347 U.S. 272, 273 (1954) (per curiam); see also Davis, *supra* note 201, at 696.

416. See *supra* Section IV.A.

417. See *supra* Section IV.B.

418. See *supra* Section IV.C.1.

419. See *supra* Part III.

420. See *supra* Section IV.D.

421. See *supra* Section IV.C.1.

individualized benefits.⁴²² Many of them, as has been seen, have tried already.⁴²³

A. The State of Sequoyah and the State of Oklahoma

To these must be added Oklahoma, the Sooner State. She too had an unusual history prior to statehood⁴²⁴—though by now, it should be apparent most any state can claim exceptionalism if it thinks hard enough. Just prior to its statehood, Oklahoma actually comprised two distinct entities: Indian Territory in the east, the stunted residuum of the once-vast regions set aside under the self-governance of Native Americans; and Oklahoma Territory in the west.⁴²⁵ The Indian Territory was not like other federal territories, for it was established by treaty between the tribes there settled and the federal government.⁴²⁶ As Justice Douglas would later explain, “[p]ursuant to these treaties, the Five Civilized Tribes ‘were indeed constituted as the sovereign

422. Those states would be, in order of admission to the Union: Delaware (1st), Pennsylvania (2nd), New Jersey (3rd), Georgia (4th), Connecticut (5th), Massachusetts (6th), Maryland (7th) South Carolina (8th), New Hampshire (9th), Virginia (10th), New York (11th), North Carolina (12th), Rhode Island (13th), Vermont (14th), Kentucky (15th), Tennessee (16th), Louisiana (18th), Mississippi (20th), Alabama (22nd), Maine (23rd), Arkansas (25th), Florida (27th), Texas (28th), California (31st), West Virginia (35th), and Hawaii (50th).

423. See, e.g., *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009); *United States v. Maine*, 420 U.S. 515 (1975); *United States v. California*, 381 U.S. 139 (1965); *United States v. Florida*, 363 U.S. 121 (1960), *United States v. Louisiana*, 363 U.S. 1 (1960); *United States v. Texas*, 339 U.S. 707, 715 (1950); *United States v. Louisiana*, 339 U.S. 699 (1950); *United States v. California*, 332 U.S. 19 (1947).

424. See generally Kevin Gover, *Oklahoma Tribes: A History*, 2 AM. INDIAN J. 2 (1977); Stacy L. Leeds, *Defeat or Mixed Blessing? Tribal Sovereignty and the State of Sequoyah*, 43 TULSA L. REV. 5 (2007); Steve Russell, *Sequoyah Rising: Doing What We Can with What We’ve Got*, 19 KAN. J.L. & PUB. POL’Y 1 (2009); Rennard Strickland, *Sequoyah Statehood, the Oklahoma Centennial and Sovereignty Envy: A Personal Narrative and a Public Proposal*, 30 AM. INDIAN L. REV. 365 (2006).

425. See *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 622–27 (1970); Gover, *supra* note 424, at 2–5.

426. See *Choctaw Nation*, 397 U.S. at 624–25; Gover, *supra* note 424, at 3 & nn.24–25 (quoting *Choctaw Nation*, 397 U.S. at 638–39 (Douglas, J., concurring)).

autonomy established in lieu of a prospective State.”⁴²⁷ By the Treaty of the Dancing Rabbit, indeed, the United States had promised

to convey the land to the Choctaw Nation in fee simple “to inure to them while they shall exist as a nation and live on it.” In addition, the United States pledged itself to secure to the Choctaws the “jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation . . . and that no part of the land granted to them shall ever be embraced in any Territory or State.”⁴²⁸

The latter portion of that promise, of course, was a lie—or at least was given the lie by passage of time.⁴²⁹ Several times in the late nineteenth century, the United States government had sought to adjust the status of the Indian Territory to accommodate increasing settlement, muddying the fact of their previously acknowledged sovereignty.⁴³⁰ Seeing the writing on the wall in an Act threatening to extinguish their sovereignty entirely, in 1905, the Indian Territory nations approved a constitution and submitted themselves to Congress for admission as the State of Sequoyah, hoping to secure self-

427. Gover, *supra* note 423, at 3 & nn.24–25 (quoting *Choctaw Nation*, 397 U.S. at 638–39 (Douglas, J., concurring)); *see id.* at 6 (“Prior to 1890 it is clear that the Oklahoma tribes maintained full sovereignty with regard to tribal territory and tribal members. After 1890 the situation becomes less clear.”).

428. *Choctaw Nation*, 397 U.S. at 625 (quoting Treaty of Dancing Rabbit Creek, 7 Stat. 333, 333–34 (1830)); *see also* Gover, *supra* note 424, at 3 (quoting and discussing same).

429. In *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903), the Supreme Court held that the United States was not bound by its own treaties with aboriginal peoples, ratifying the many such abrogations that had already occurred and would yet. *See* Russell, *supra* note 424, at 1 (“Just two years earlier, the U.S. Supreme Court had informed Indians that the U.S. need not be bound to Indian treaties if those obligations became inconvenient.”).

430. *Choctaw Nation*, 397 U.S. at 627 (“Then, again due in large part to the pressure of settlers who were encroaching on Indian lands, Congress acted to change the arrangement.”); Gover, *supra* note 424, at 5.

governance by that method.⁴³¹ But Congress proved diffident as President Theodore Roosevelt favored a single-state solution of admitting the Oklahoma Territory and Indian Territory as one.⁴³² Congress instead passed the 1906 Enabling Act, and it was a unified Oklahoma that acceded to the Union in 1907.⁴³³ In deference to her origins, however, Oklahoma’s Constitution provided that her people “agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof [*i.e.* Indian Territory], and to all lands lying within said limits owned or held by any Indian, tribe, or nation.”⁴³⁴ And the Five Tribes Act of the same year had recognized that “the tribal existence and present tribal governments of the Choctaw” and fellow tribes were to be “continued in full force and effect for all purposes authorized by law” indefinitely.⁴³⁵

It should surprise not a whit that Oklahoma ended up before the Supreme Court to litigate its rights in submerged lands beneath the navigable waters of the Arkansas River in the Choctaw region of the former Indian Territory, in *Choctaw Nation v. Oklahoma*.⁴³⁶ In a new twist, however, the Court found that title lay with Choctaw.⁴³⁷ The Court made much of the promise made in the Treaty of the Dancing Rabbit: “In light of this promise, it is only by the purest of legal fictions that there can be found even a semblance of an understanding (on which Oklahoma necessarily places its principal reliance), that the United States retained title in order to grant it to some future State.”⁴³⁸ In *State v. Elliott*, that state’s high court had determined that whatever else occurred before statehood, the act of Vermont’s admission completed the extinction of aboriginal claims in her lands, and these

431. See Leeds, *supra* note 424, at 5–6; see also Russell, *supra* note 424, at 2–3.

432. See Leeds, *supra* note 424, at 6; cf. Strickland, *supra* note 424, at 366–67 (“Primarily for partisan political reasons, Sequoyah was never admitted to the Union.”).

433. Leeds, *supra* note 424, at 6.

434. OKLA. CONST. art. I, § 3.

435. Act of Apr. 26, 1906, ch. 1876, § 28, 1 Stat. 137, 148.

436. 397 U.S. 620 (1970).

437. *Id.* at 634–36.

438. *Id.* at 635.

thus passed to Vermont.⁴³⁹ Here, the Supreme Court found the opposite: that the Native American nations within Oklahoma had been granted land rights in the relevant area, and thus the concomitant right in the submerged beds of navigable waters.⁴⁴⁰ Even today, therefore, Oklahoma's history and the abortive State of Sequoyah still "cast a long shadow into twenty-first century Indian tribal and state relations in the forty-sixth state."⁴⁴¹

Oklahoma had a much earlier encounter with state sovereignty in *Coyle v. Smith*, predicated on another unique aspect of her admission.⁴⁴² The Enabling Act passed by Congress permitting her to apply for admission had provided that her capital be located at Guthrie and not be moved prior to 1913.⁴⁴³ The new state had contrarily done just that, voting to relocate her capital to Oklahoma City, and large Guthrie property-owners sought to block it.⁴⁴⁴ The Supreme Court was firm in preserving Oklahoma's prerogative:

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. That one of the original thirteen states could now be shorn of such powers by an act of Congress would not be for a moment entertained. The question,

439. 616 A.2d 210, 219–21 (Vt. 1992).

440. See *Choctaw Nation*, 397 U.S. at 635; Leeds, *supra* note 424, at 7 (noting the admission's "leaving the tribal governments intact in spite of the newly formed State of Oklahoma"); Strickland, *supra* note 424, at 366 ("The final congressional act in a series drawing an end to the Indian Territory continued indefinitely the rights and powers of tribal government as they now exist in Oklahoma . . ."); see also *id.* at 12–16 (arguing the nations of the Indian Territory actually benefitted by maintaining their sovereignty as Indian nations within the state of Oklahoma rather than joining as a separate state); Gover, *supra* note 424, at 10 ("Again, the state fails to take into account the inherent sovereign character of the Indian tribes."). The Choctaw also benefitted from a provision of that treaty which permitted the reasonable interpretation in favor of the Choctaw: "in the construction of this Treaty wherever well founded doubt shall arise, it shall be construed most favourably towards the Choctaws." *Choctaw Nation*, 397 U.S. at 631 (citation omitted).

441. Strickland, *supra* note 424, at 366.

442. 221 U.S. 559 (1911).

443. *Id.* at 564 (citing Enabling Act of June 16, 1906, ch. 3335, 34 Stat. 267).

444. *Id.* at 563.

then, comes to this: 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? The argument is, that while Congress may not deprive a state of any power which it possesses, it may, as a condition to the admission of a new state, constitutionally restrict its authority, to the extent, at least, of suspending its powers for a definite time in respect to the location of its seat of government. . . . That Congress may, in the exercise of such power, impose terms and conditions upon the admission of the proposed new state, which, if accepted, will be obligatory, although they operate to deprive the state of powers which it would otherwise possess, and, therefore, not admitted upon “an equal footing with the original states.”⁴⁴⁵

The answer was obviously in the negative: Oklahoma, no more than any other state, could be “shorn” of her coequal sovereignty, and thus the capital relocated to Oklahoma City, where it has remained ever since.⁴⁴⁶ This time, Congress could not mess with Oklahoma.

B. Returning to the Underpinnings of the Equal-Footing Doctrine

The influential *Coyle*, however, elucidates far more than the question of states’ sovereignty in their choices of capital; it provides a comprehensive survey of the contours of equal footing at the dawn of the twentieth century. Continuing from the subject of the Oklahoman capital, the Court had declaimed:

“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

445. *Id.* at 565–66.

446. *Id.* at 579–80.

powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission. Thus it would result, first, that the powers of Congress would not be defined by the Constitution alone, but in respect to new states, enlarged or restricted by the conditions imposed upon new states by its own legislation admitting them into the Union; and, second, that such new states might not exercise all of the powers which had not been delegated by the Constitution, but only such as had not been further bargained away as conditions of admission.⁴⁴⁷

The equal-footing doctrine originated in American jurisprudence on the premise that *imperium* and *dominium* over territorial navigable waters is an irreducible feature of sovereignty, and thus all states must be granted it equally.⁴⁴⁸ This was first and famously stated in *Pollard's Lessee v. Hagan*⁴⁴⁹: the “right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the states within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it,”⁴⁵⁰ and that when a later state 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” afforded the original.⁴⁵¹ By the twentieth century, this equal-footing doctrine had been reiterated many times as to many states in the many years since that first formulation in 1845.⁴⁵² Even in 1911,

447. *Id.* at 567.

448. See CRS ANNOT. CONST., *supra* note 25, at 985–86.

449. 44 U.S. (3 How.) 212 (1845).

450. *Id.* at 230.

451. *Id.* at 223.

452. See *United States v. California*, 332 U.S. 19, 41–42 (1947) (Reed, J., dissenting) (“California, as is customary, was admitted into the Union ‘on an equal footing with the original States in all respects whatever.’ . . . As was the rule, title to lands under navigable waters vested in California as it had done in all other states.”); *e.g.*, *Borax Consol., Ltd. v. City of Los Angeles*, 296 U.S. 10, 17 (1935); *Mann v. Tacoma Land Co.*, 153 U.S. 273, 284 (1894); *Shively v. Bowlby*, 152 U.S. 1, 49 (1894); *Sands v. Manistee River Imp. Co.*, 123 U.S. 288, 296 (1887); *Huse v. Glover*,

Coyle could thus recite an expansive list of such precedent in outlining its history and concluding that “it is equally well settled that the control of the State over its internal commerce involves the right to control and regulate navigable streams within the State until Congress acts on the subject.”⁴⁵³

But if the status of navigable streams was well settled, other waters had never enjoyed the same status: “The belief that local interests are so predominant as constitutionally to require state dominion over lands under its land-locked navigable waters finds some argument for its support. But such can hardly be said in favor of state control over any part of the ocean or the ocean’s bottom.”⁴⁵⁴ Justices Black and Marshall would have found the latter an irreducible function of *national* sovereignty, but the Court in *Alabama v. Texas* held otherwise.⁴⁵⁵ Title in all states’ marginal seas was removed to the national government at statehood by virtue of the equal-footing doctrine, and thereupon the doctrine’s force ended.⁴⁵⁶ Thereafter, Congress might grant a state whatever federal property it had to grant, and oceanic submerged lands were no different.⁴⁵⁷ The fact Congress was obliged to pass the Submerged Lands Act to effect its desired aim of granting certain states *unequal* property holdings underscores no such title accrued from the start.⁴⁵⁸ And the equal-footing doctrine is powerless to stop this latter-day act, for nothing prevents Congress from subsequently granting the states unequal or even unfair benefits

119 U.S. 543, 546 (1886); *Escanaba & Lake Mich. Transp. Co. v. City of Chicago*, 107 U.S. 678, 689 (1883); *Barney v. Keokuk*, 94 U.S. 324, 338 (1876).

453. *Coyle v. Smith*, 221 U.S. 559, 573 (1911).

454. *California*, 332 U.S. at 34.

455. 347 U.S. 272, 273 (1954) (per curiam).

456. *See United States v. Texas*, 339 U.S. 707, 717–18 (1950); *California*, 332 U.S. at 33–34.

457. *Alabama*, 347 U.S. at 273; *see also Beecher v. Wetherby*, 95 U.S. 517, 527 (1877) (upholding Congressional grant of lands in Wisconsin as exercise of Territories Clause); *Davis*, *supra* note 200, at 696.

458. *See United States v. Maine*, 420 U.S. 515, 524–25 (1975) (confirming that *Texas* is still good law and that the states only obtained their littoral seas under Congress’s grant in the Submerged Lands Act, not *ab initio*).

over their peers,⁴⁵⁹ so long as it acts within its enumerated powers over all states.⁴⁶⁰

Coyle's holding, meanwhile, rested on another state right of sovereignty, that of determining the seat of government.⁴⁶¹ But along the way, it had recognized still others as outside the reach of Congress to alter.⁴⁶² In the early *Martin v. Waddell's Lessee*, New Jersey's sovereign rights in her oyster beds were confirmed;⁴⁶³ *Ward v. Race Horse* endorsed Wyoming's equal-footing right to sovereign control over her wild game was endorsed;⁴⁶⁴ and *Bollin v. Nebraska* upheld the state's sovereign prerogative to prosecute via information rather than indictment.⁴⁶⁵ Equal grant of citizenship in new states is also comprehended.⁴⁶⁶ The guiding principle is that the states acquire identical powers of general government—the so-called “police power”⁴⁶⁷—to preserve public order, to institute and enforce law, and

459. Or is there? The Congressional Research Service writes that “in recent years the Court has relied on the general principle of ‘constitutional equality’ among the states to strike down both federal and state laws.” CRS ANNOT. CONST., *supra* note 25, at 983 n.275 (citing *Franchise Tax Bd. of Cal. v. Hyatt*, 136 S. Ct. 1277, 1282–83 (2016); *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 544 (2013)).

460. *Cf.* *Coyle v. Smith*, 221 U.S. 559, 573 (1911) (“The plain deduction from this case is that when a new State is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original states, and that such powers may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts, or stipulations embraced in the act under which the new state came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission.” (emphasis added)); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 230 (1845) (“As the provision of what is called the compact between the United States and the state of Alabama does not, by the above reasoning, exceed the power thereby conceded to Congress over the original states on the same subject, no power or right was, by the compact, intended to be reserved by the United States, nor to be granted to them by Alabama.” (emphasis added)).

461. *Coyle*, 221 U.S. at 579–80.

462. *See id.* at 573–78.

463. *Id.* at 571 (citing *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367 (1842)).

464. *Id.* at 576 (citing *Ward v. Race Horse*, 163 U.S. 504 (1896), *abrogated in part by* *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204–05 (1999)).

465. *Id.* at 576–77 (citing *Bollin v. Nebraska*, 176 U.S. 83 (1900)).

466. *See* *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 170 (1892).

467. As one Vermont case had explained, that shorthand “is but another name for sovereignty itself.” *State v. Quattropani*, 133 A. 352, 353 (Vt. 1926).

to tax.⁴⁶⁸ Indeed, it is because regulation of their internal navigable waters is at the core of states’ police powers that it has been so frequently litigated and affirmed.⁴⁶⁹ Notably, however, federal impingements by treaty with indigenous tribes did not compromise equal footing, stemming as they did from federal power to treat with Indian sovereigns.⁴⁷⁰ In addition to the rights in navigable waters at issue in *Choctaw Nation*,⁴⁷¹ the Court has found inoffensive to equal footing both reservations to Indian sovereigns of usufructuary rights in game and fish (abrogating *Ward*)⁴⁷² and interdictions against their import of goods.⁴⁷³

The equal-footing doctrine therefore constitutionalizes and standardizes a certain bundle of sovereign rights that states accrue when they join the Union: no more, and no less.⁴⁷⁴ Sovereign title to *navigable* waterways has been repeatedly confirmed in that bundle—

468. See CRS ANNOT. CONST., *supra* note 25, at 984 (“Broadly speaking, every new state is entitled to exercise all the powers of government which belong to the original states of the Union. It acquires general jurisdiction, civil and criminal, for the preservation of public order, and the protection of persons and property throughout its limits even as to federal lands Consequently, it has jurisdiction to tax private activities carried on within the public domain (although not to tax the Federal lands), if the tax does not constitute an unconstitutional burden on the Federal Government.” (first citing *Pollard’s Lessee v. Hagan*, 44 U.S. (3 How.) 212, 223 (1845); then citing *McCabe v. Atchison T. & S.F. Ry.*, 235 U.S. 151 (1914); and then citing *Wilson v. Cook*, 327 U.S. 474 (1946))).

469. See *Pollard’s Lessee*, 44 U.S. at 230 (“This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the states within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the states of the power to exercise a numerous and important class of police powers.”).

470. CRS ANNOT. CONST., *supra* note 25, at 985 (“But the constitutional authority of Congress to regulate commerce with Indian tribes is not inconsistent with the equality of new states . . .”).

471. See *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970).

472. See *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204–05 (1999), *abrogating Ward v. Race Horse*, 163 U.S. 504 (1896).

473. See *United States v. Sandoval*, 231 U.S. 28, 36–38 (1913).

474. CRS ANNOT. CONST., *supra* note 25, at 981.

but always with that pointed modifier, *navigable*.⁴⁷⁵ Thus by the ancient maxim of *expressio unius exclusio alterius*, such title in nonnavigable waterways is not.⁴⁷⁶

VI. ALL STATES ARE EQUAL, ~~BUT SOME STATES ARE MORE EQUAL THAN OTHERS~~

As for which waterways are which, North Carolina would have a regime under which all states enter the Union on equal footing, but some on more equal footing than others—to mangle the good work of George Orwell,⁴⁷⁷ as have others on hearing such a scheme.⁴⁷⁸ The Supreme Court has not spent such time endorsing and re-endorsing the equal-footing doctrine to have it manhandled by those who would benefit over the peers, as it said in 1950 as to Texas:

Unless any claim or title which the Republic of Texas had to the marginal sea is subordinated to this full paramount power of the United States on admission, there is or may be in practical effect a subtraction in favor of Texas from the national sovereignty of the United States. Yet neither the original thirteen States nor California nor Louisiana enjoys such an advantage. The “equal footing” clause prevents extension of the sovereignty of a State into a domain of political and sovereign power of the United States from which the

475. See, e.g., cases cited *supra* notes 442, 449.

476. See Davis, *supra* note 201, at 666–67 (distinguishing between nonnavigable waters the United States held as proprietor and navigable waters it held in trust for future sovereign states); *id.* at 697–98; see also *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (“As we have held repeatedly, the canon *expressio unius est exclusio alterius* does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an ‘associated group or series,’ justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence.”).

477. Cf. GEORGE ORWELL, *ANIMAL FARM* 112 (Harcourt, Brace & Co., 1946) (“All animals are equal but some animals are more equal than others.”).

478. E.g., Schwartz, *supra* note 357, at 407 (“Under the *Louisiana* decision, indeed, may we not convert the ‘equal footing’ standard into Orwellian terms: All states are equal; but some states are more equal than others.”); 99 CONG. REC. 3563 (1953) (statement of Sen. Humphrey).

other States have been excluded, just as it prevents a contraction of sovereignty which would produce inequality among the States. For equality of States means that they are not “less or greater, or different in dignity or power.” There is no need to take evidence to establish that meaning of “equal footing.”⁴⁷⁹

North Carolina wishes her own navigability law to control by virtue of her primogeniture over her sister states,⁴⁸⁰ but the many claimants of Part IV illustrate that attempts to draw crisp lines between the original thirteen states and their successors are destined to founder on historical untidiness.⁴⁸¹ Even setting aside the other claimants, the discursion through Vermont’s prehistory and judicial perplexity therewith illustrates the folly of resting modern state rights on the incidents of preadmission status hundreds of years prior.⁴⁸² United States law has much-diminished competency in deciding what measure of sovereignty a state held prior to the Union, as both the Vermont and federal Supreme Courts demonstrated in declining to decide the question.⁴⁸³ The Supreme Court did likewise in the original trio of marginal seas cases,⁴⁸⁴ and again in the trio redux following the Submerged Lands Act.⁴⁸⁵ And in *United States v. Maine* it reconfirmed beyond cavil that preadmission status does not control.⁴⁸⁶ What the

479. *United States v. Texas*, 339 U.S. 707, 719–20 (1950) (citations omitted).

480. *See* *North Carolina ex rel. N.C. Dep’t of Admin. v. Alcoa Power Generating, Inc.*, 853 F.3d 140, 156–58 (4th Cir. 2017) (King, J., dissenting); *North Carolina ex rel. N.C. Dep’t of Admin. v. Alcoa Power Generating, Inc.*, 989 F. Supp. 2d 479, 481–82 (E.D.N.C. 2013).

481. *See supra* Part IV.

482. *See supra* Part III.

483. *See* *Vermont v. New Hampshire*, 289 U.S. 593, 608–12 (1933); *State v. Elliott*, 616 A.2d 210, 220–21 (Vt. 1992).

484. *See* *United States v. Texas*, 339 U.S. 707, 715 (1950); *United States v. Louisiana*, 339 U.S. 699, 704–05 (1950); *United States v. California*, 332 U.S. 19, 29–31 (1947).

485. *See generally* *United States v. California*, 381 U.S. 139 (1965); *United States v. Florida*, 363 U.S. 121 (1960); *United States v. Louisiana*, 363 U.S. 1 (1960).

486. *See* 420 U.S. 515, 522–26 (1975) (“The States seriously contend that the prior cases, as well as the Special Master, were in error in denying that the original Colonies had substantial rights in the seabed prior to independence, and afterwards, by grant from or succession to the sovereignty of the Crown. Given the dual basis of

Constitution does—indeed must—prescribe is the measure of sovereignty each state holds *within* the structure of the Union, as these courts likewise evinced in resting their holdings on the state’s status *upon admission*.⁴⁸⁷

The equal-footing doctrine answers that latter question of sovereignty to establish that all states are made equal sovereigns in entering the Union,⁴⁸⁸ for it is Orwellian Newspeak to say that the later-admitted states are “equal” if the original states are “more equal” than them in their jurisdiction.⁴⁸⁹ Davis and the *Alcoa* dissent argue that the equal-footing doctrine has no effect on the original thirteen states, operating only on the later-admitted states.⁴⁹⁰ But equality is a dyadic operator: it cannot be parsed without reference to both operands.⁴⁹¹ A constitutional doctrine of equal footing must either work to grant the later-admitted states the selfsame rights as the original thirteen or to foreclose rights to the original thirteen unavailable to the later-admitted states.⁴⁹² The schoolchild at arithmetic can confirm that there is no other manner to make two entities equal than to add to the lesser or subtract from the greater.⁴⁹³ To wave away that reality by claiming the New States Clause and equal-footing doctrine can have no consequence for the original states would reduce the Constitution to a series of disconnected mandates read in stilted if blissful isolation rather than a unified whole.⁴⁹⁴

the California decision, however, and of those that followed it, the States’ claims of ownership prior to the adoption of the Constitution are not dispositive.”).

487. See *Coyle v. Smith*, 221 U.S. 559, 567 (1911); see also cases cited *supra* notes 483–86.

488. See *Coyle*, 221 U.S. at 567.

489. Cf. GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* (Harcourt Press 2003).

490. See 853 F.3d 140, 159 (4th Cir. 2017) (King, J., dissenting); Davis, *supra* note 201, at 667 n.10.

491. See *United States v. Texas*, 339 U.S. 707, 719–20 (1950).

492. See *id.*

493. See ZADOCK THOMPSON, *THE YOUTH’S ASSISTANT IN THEORETIC AND PRACTICAL ARITHMETIC* 13–15 (Burlington, Vt., Chauncey Goodrich 6th ed. 1832) (“Hence Subtraction is the reverse of Addition.”).

494. See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64 (1982) (“[T]he literal command of [Article] III, assigning the judicial power of the United States to courts insulated from Legislative or Executive interference, must be interpreted in light of the historical context in which the Constitution was written, and of the structural imperatives of the Constitution as a whole”); see also DAVID C.

As for whether addition or subtraction is the constitutional prescription in any given instance, the Supreme Court has answered those questions in its equal-footing cases. In *United States v. California* and *United States v. Louisiana*, it found those two states were denied just the same rights in their marginal seas as the original thirteen.⁴⁹⁵ In *United States v. Texas*, the Court made its subtraction plain, finding that the preadmission sovereign rights of Texas—whatever they were, for it declined to decide⁴⁹⁶—had been extinguished to the extent they exceeded the standard bundle available to all states.⁴⁹⁷ So too then the original thirteen states, by the same operation of the Constitution, as stated in *United States v. California*⁴⁹⁸ and confirmed in *United States v. Maine*.⁴⁹⁹ Indeed, the *Alcoa* dissent would seemingly have to agree, for it contends that federally nonnavigable lands that would accrue to the preadmission thirteen states *could not* pass to the later-admitted states formed of federal territories because the United States itself did not hold them.⁵⁰⁰ If that is true, then there is no choice at all: the “eminent domain” of the

WILLIAMS, THE MYTHIC MEANINGS OF THE SECOND AMENDMENT 19 (2003) (“[A]lthough the Constitution may historically be a product of jumbled and contradictory impulses, judges try to read it as a unified whole, resting on a consistent set of principles.”); *cf.* *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 884 (D. Md. 2018) (“In all, reading the Constitution as a complete document rather than piecemeal establishes that the President holds an ‘Office of Profit or Trust under [the United States].’”).

495. See *United States v. Louisiana*, 339 U.S. 699, 701–02 (1950); *United States v. California*, 332 U.S. 19, 29–31 (1947).

496. 339 U.S. at 715.

497. *Id.* at 720; see *United States v. Maine*, 420 U.S. 515, 523–24 (1975) (reaffirming *Texas*).

498. 332 U.S. at 31–32.

499. See 420 U.S. at 521–23 (addressing challenges in littoral seas as against the thirteen states—all but two original—abutting the Atlantic). The interested reader may recall from earlier that of the original states only Pennsylvania does not abut the Atlantic. How then only *eleven* original states? Connecticut’s maritime holdings are entirely “water-locked” by those of Rhode Island and New York.

500. See *North Carolina ex rel. N.C. Dep’t of Admin. v. Alcoa Power Generating, Inc.*, 853 F.3d 140, 159–60 (4th Cir. 2017) (King, J., dissenting).

original thirteen states *as admitted* can be neither lesser nor greater than that possible for the later-admitted states.⁵⁰¹

To be sure, the *Texas* Court was quick to note that “equal footing” does not mean identicalness in every regard, nor could it⁵⁰²:

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.⁵⁰³

This was selectively quoted by the *Alcoa* dissent to considerable persuasive effect.⁵⁰⁴ But that persuasiveness is abated by considering the following sentences, which greatly qualify the preface.⁵⁰⁵ For although the “requirement of equal footing was designed not to wipe out those diversities but to create parity as respects political standing and sovereignty,” nonetheless to *effectuate* parity of standing and sovereignty, “the ‘equal footing’ clause has long been held to have a direct effect on certain property rights”: most notably, in sovereignty over navigable waters.⁵⁰⁶

The final refuge of the original-thirteen theory is to embrace wholeheartedly its perverse result, arguing that the original thirteen states are *supposed* to be privileged over their peers by historical accident, and that the equal-footing doctrine does not operate to create equality.⁵⁰⁷ Or as the *Alcoa* dissent concluded: “Simply put, the

501. See *Pollard’s Lessee v. Hagan*, 44 U.S. (3 How.) 212, 223 (1845); *accord Maine*, 420 U.S. at 523–26; *Texas*, 339 U.S. at 717–18; *California*, 332 U.S. at 29–31.

502. 339 U.S. at 716.

503. *Id.* (citation omitted).

504. 853 F.3d at 160–61.

505. *Texas*, 339 U.S. at 716–17.

506. *Id.* at 716.

507. See, e.g., *North Carolina ex rel. N.C. Dep’t of Admin. v. Alcoa Power Generating, Inc.*, 989 F. Supp. 2d 479, 481–82 (E.D.N.C. 2013); see also, e.g., *United*

Supreme Court has determined that the EFD does not mandate equality of the several States in the manner posited by the majority.⁵⁰⁸ But the Court has not made any such determination, nor does it seem likely to endorse the proposition that its carefully tended equal-footing doctrine does not mandate equality.⁵⁰⁹ As discussed above, Judge King made a yeomanly effort to read exceptionalism into the strident language of equality in *Texas* and other cases⁵¹⁰ but ultimately could not overcome the transparent purpose of the Constitution and equal-footing clause by cleverness of casuistry.⁵¹¹ Equal footing, like other constitutional doctrines, is not an invention of the judiciary sixty years after the fact; it is a command of the Constitution.⁵¹² The federal law of navigability binds all the states equally.⁵¹³

Inevitably, there are a few difficult decisions to reconcile. The Submerged Lands Act cases are facially troubling in basing present-day property rights on differential bounds at the time of admission, leading one essayist (not to mention Justice Marshall⁵¹⁴) to bewail the end of the equal-footing doctrine.⁵¹⁵ Though admitting that “it is up to the Congress to dispose of federal property as it sees fit,” the essay advised that “[c]ongressional authority in this respect should not include the power to perpetuate or permit inequalities among the states.”⁵¹⁶ Perhaps it *should* not—the issue was furiously debated in Congress⁵¹⁷—but it *does*, as the Court had said many times in its equal-footing cases.⁵¹⁸ The Act did not operate upon sovereignty, but upon

States v. Maine, 420 U.S. 515, 516–20 (1975) (arguing for eleven of the original states based on colonial charters).

508. 853 F.3d at 161 (King, J., dissenting).

509. See *Maine*, 420 U.S. at 523–24; *Texas*, 339 U.S. at 715–20; United States v. California, 332 U.S. 19, 29–31 (1947).

510. See *Alcoa*, 853 F.3d at 159–62.

511. See *id.* at 147–50 (majority opinion).

512. *Contra id.* at 159 (King, J., dissenting) (“The EFD—a creature of the federal judiciary—did not exist until nearly sixty years after the State of North Carolina obtained its title to the Yadkin River.”).

513. *Id.* at 149–50 (majority opinion).

514. *Alabama v. Texas*, 347 U.S. 272, 281–83 (1954) (Marshall, J., dissenting).

515. Schwartz, *supra* note 357, at 407.

516. *Id.*

517. See 99 CONG. REC. 3519–68 (1953).

518. See *supra* notes 453–56 and accompanying text.

parcels of property under the Property Clause.⁵¹⁹ Congress can deed land to a state just as anyone else could deed land (say, a nonnavigable pond) to the state.⁵²⁰ What neither can do is alter the sovereign status of the state set at admission.⁵²¹ Lest there be any doubt the Submerged Lands Act cases might conflict with *Texas*, the Court reaffirmed its precedent beyond cavil in *United States v. Maine*.⁵²² Whatever a state's preadmission maritime jurisdiction, "[s]uch prior ownership nevertheless did not survive becoming a member of the Union."⁵²³

Then there is the odd case about the federal government's powers over territories prior to statehood. Although *Pollard's Lessee* had suggested otherwise,⁵²⁴ the Court recognized in *Shively v. Bowlby* that the Property Clause—in theory—permits the government to alienate title to particular navigable waters within a federal territory, denying them to the eventual state.⁵²⁵ This much the court summarized in *Utah Division of State Lands v. United States* in 1987.⁵²⁶ That case

519. *United States v. Maine*, 420 U.S. 515, 523–24 (1975).

520. *See, e.g., PPL Mont., LLC v. Montana*, 565 U.S. 576, 591 (2012) ("The United States retains any title vested in it before statehood to any land beneath waters not then navigable (and not tidally influenced), to be transferred or licensed if and as it chooses."); Davis, *supra* note 201, at 681–82; *id.* at 696 ("Subsequent to statehood, the federal government may convey the beds by express grant or patent, either to private individuals or to the state.").

521. *See Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 176–77 (2009); *Idaho v. United States*, 533 U.S. 262, 280 n.9 (2001); *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 370–72 (1977) ("Although federal law may fix the initial boundary line between fast lands and the riverbeds at the time of a State's admission to the Union, the State's title to the riverbed vests absolutely as of the time of its admission and is not subject to later defeasance by operation of any doctrine of federal common law.").

522. *United States v. Maine*, 420 U.S. at 523–24 ("[W]e are firmly convinced that we should not undertake to re-examine the constitutional underpinnings of the California case and of those cases which followed and explicated the rule that paramount rights to the offshore seabed inhere in the Federal Government as an incident of national sovereignty. That premise, as we have indicated, has been repeated time and again in the cases. It is also our view, contrary to the contentions of the States, that the premise was embraced rather than repudiated by Congress in the Submerged Lands Act of 1953.").

523. *Id.* at 523.

524. 44 U.S. (3 How.) 212, 230 (1845).

525. 152 U.S. 1, 48 (1894).

526. 482 U.S. 193, 196–97 (1987).

also, however, found for Utah, for the United States might only transfer title to another party if “rendered in clear and especial words,”⁵²⁷ a standard so high it had been met but once at the time of *Utah*, in *Choctaw Nation*, which rested on the Indian treaty with a fellow sovereign and was “literally a ‘singular exception.’”⁵²⁸ Returning to the subject in 2005, the Court held under *Utah* that despite the strong presumption against territorial alienation, Congress had indeed evinced the necessary clear intent to withhold submerged lands in various preserves, refuges, and reservations from Alaska during its time as a federal territory, and that sovereign title in those lands had therefore not passed to Alaska at statehood.⁵²⁹ Nonetheless, upon admission, equal footing etches a state’s territorial prerogatives in stone, as *Office of Hawaiian Affairs* emphasized in declining to even entertain the notion of a retroactive “cloud” on Hawaii’s sovereign rights.⁵³⁰ The Court there relied on *Idaho v. United States*,⁵³¹ in which Chief Justice William Rehnquist had written that “the consequences of admission are instantaneous, and it ignores the uniquely sovereign character of that event . . . to suggest that subsequent events somehow can diminish what has already been bestowed.”⁵³²

Ultimately, therefore, the Supreme Court’s course is clear. The paramountcy of equality was perhaps best illustrated in *Oregon v. Corvallis Sand & Gravel Co.*,⁵³³ in which the Supreme Court overruled a case only four years old, *Bonelli Cattle Co. v. Arizona*,⁵³⁴ whose invidious inversion of the equal-footing doctrine had become rapidly

527. *Id.* at 197–98.

528. *Id.* at 198 (quoting *Montana v. United States*, 450 U.S. 544, 555 n.5 (1981)).

529. *See* *United States v. Alaska*, 521 U.S. 1, 33–61 (1997).

530. 556 U.S. 163, 175–76 (2009); *accord* *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 370–72 (1977); *see also* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION §1398 (5th ed. 1891) (“Retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact.”).

531. *See* 556 U.S. 163, 176 (2009) (citing *Idaho v. United States*, 533 U.S. 262, 280 n.9 (2001) (Rehnquist, C.J., dissenting)).

532. 533 U.S. at 284.

533. 429 U.S. at 370–72.

534. 414 U.S. 313 (1973), *overruled by* *Corvallis Sand & Gravel Co.*, 429 U.S. at 382.

apparent.⁵³⁵ Oregon sought to quiet her title in a stretch of the navigable Willamette River, including one segment that only flooded after statehood due to an abrupt change (an avulsion, in the parlance of riparian law) in the river's course.⁵³⁶ Corvallis objected as owner of the pre-flooded lands, citing *Bonelli* for the principle that the equal-footing doctrine demanded even after statehood that federal law determine what effect the avulsion had—predictably, to settle title in Corvallis—and the Oregon courts agreed.⁵³⁷ *Bonelli* had addressed the inverse, whether a state retained sovereign title in formerly submerged waters that became dry after statehood, and held federal law applied.⁵³⁸ Oregon (supported by twenty-six states) contended *Bonelli* was wrongly decided and that her own law on avulsion should control, as the federal (and constitutional) equal-footing doctrine dictated only what sovereign title passed at statehood and no more; its force expired at the moment of admission: federal law would be therefore inapplicable to a later avulsion.⁵³⁹

Oregon was right, the Supreme Court held, and its earlier decision wrong⁵⁴⁰:

The [*Bonelli*] approach 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

535. See *Corvallis Sand & Gravel Co.*, 429 U.S. at 366 (“Those courts understandably felt that our recent decision in [*Bonelli*] required that they ascertain and apply principles of federal common law to the controversy. Twenty-six States have joined in three amicus briefs urging that we reconsider [*Bonelli*] because of what they assert is its significant departure from long-established precedent in this Court.”); Davis, *supra* note 200, at 677–78.

536. *Corvallis Sand & Gravel Co.*, 429 U.S. at 366–67.

537. *Id.* at 367–68.

538. *Id.* at 368–70.

539. *Id.*; see *id.* at 366.

540. *Id.* at 370–72 (“Our analysis today leads us to conclude that our decision to apply federal common law in *Bonelli* was incorrect.”).

law determinations antithetical to the desires of that State.⁵⁴¹

It is a similar perversion that North Carolina would inflict on her sister states—and that cannot stand. Equal footing is again preserved: *no* state need truckle to federal avulsion law after statehood just as *all* must follow federal navigability law at statehood. Even Davis, that proponent of the original-thirteen theory, admits *Oregon* got it right.⁵⁴² The rule that state law controlled the subsequent “incidents to title conveyed by the patent by federal” had been established as early as 1876.⁵⁴³ As a dutiful parent to her children, the Union sets all states equal in sovereignty at statehood, to make of their powers what their people will by the institutions of democracy vouchsafed by the Guarantee Clause.⁵⁴⁴ Whither the states then wander is one of the wonders of the weird but well-weathered workings of the American system of dual sovereignty.

VII. CONCLUSION

Despite initial appearances, the question of the proper jurisdiction for determining state sovereignty over submerged lands is not a mere minnow in the lake of constitutional jurisprudence; it is a leviathan the size of the cryptozoological plesiosaurid of Vermont’s Lake Champlain itself (Champ, naturally).⁵⁴⁵ Truly the states themselves as sovereigns are the prehistoric creatures surviving into present times: “The states existed before the United States came into being. They made an irrevocable surrender of certain of their powers and functions as states in order to create our country. But they did not surrender all of them. . . . [T]he powers they retain are living functions,

541. *Id.* at 378; accord Davis, *supra* note 201, at 679.

542. See Davis, *supra* note 201, at 665 (“The Court corrected its position in 1977 and restored the former bed title law.”).

543. See *id.* at 674 & nn.48–49.

544. U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government . . .”).

545. See BENJAMIN RADFORD & JOE NICKELL, LAKE MONSTER MYSTERIES: INVESTIGATING THE WORLD’S MOST ELUSIVE CREATURES 27–70 (2006). Vermont has several other lakes hosting such creatures as well, including the eponymous Seymour said to inhabit the lake at issue in *In re Lake Seymour*: “Obviously,” the author concludes, “every large lake should have one.” *Id.* at 71.

not obsolescent vestiges.”⁵⁴⁶ It is how these murkily submerged powers are apportioned among the states, new and old, that has caused all the unseemly ruckus.

Earlier, this Article conjured the likely disconcerting vision of a federal Bureau of State Sovereignty (BOSS, presumably, given the alphabet soup of D.C. institutions)⁵⁴⁷ arbitrating states’ competing claims of super-sovereignty. But the states’ sovereignty is already circumscribed by the federal government under the Constitution;⁵⁴⁸ they do not need a new BOSS nibbling at the fringes of their residual police powers guaranteed by the Tenth Amendment, setting state against state in a rat race to garner rights over their peers.⁵⁴⁹ As Laurence Lessig wrote elsewhere: “Liberty is not to be found in some new D.C. alphabet soup (WPA, FCC, FDA . . .) of bureaucracy.”⁵⁵⁰ No more seemly would be federal courts assuming the role of adjudicating which states are more equal than others, for “the 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.”⁵⁵¹

To turn to a phrasing rather less ponderous, Vasana Kesavan and Michael Stokes Paulsen, a doughty duo of scholars of state sovereignty,

546. Radin, *supra* note 27, at 100 (footnote omitted).

547. See Roy Domenico, Book Review, 17 J. COLD WAR STUDIES 178, 178 (2015) (reviewing KAETEN MISTRY, *THE UNITED STATES, ITALY AND THE ORIGINS OF THE COLD WAR: WAGING POLITICAL WARFARE, 1945–1950* (2014)) (discussing the “sometimes bewildering clash of alphabet soup agencies—AUSA, ECA, OPC, SANACC, and so forth—the kind of acronyms that enthrall bureaucrats”).

548. U.S. CONST. art VI, cl. 1 (Supremacy Clause); see, e.g., *id.* art. I, § 10, cl. 1 (Contracts Clause); *id.* cl. 2 (Import-Export Clause); *id.* cl. 3 (Compact Clause); *id.* art. IV, § 1 (Full Faith and Credit Clause); *id.* § 2, cl. 1 (Privileges and Immunities Clause); *id.* cl. 2 (Extradition Clause); *id.* § 3, cl. 2 (Property Clause); *id.* § 4 (Guarantee Clause); *id.* art. VI, §1, cl. 3 (No Religious Test Clause).

549. See Ronald J. Krotoszynski, Jr., *Listening to the “Sounds of Sovereignty” but Missing the Beat: Does the New Federalism Really Matter?*, 32 IND. L. REV. 11, 11 (1998) (“Meet the new boss, same as the old boss.” (quoting PETER TOWNSEND, *Won’t Get Fooled Again, on WHO’S NEXT* (MCA Records 1971))).

550. LAWRENCE LESSIG, *CODE: AND OTHER LAWS OF CYBERSPACE* xv (2d ed. 2006) (omission in original).

551. *Coyle v. Smith*, 221 U.S. 559, 580 (1911) (upholding the equal-footing doctrine).

once offered an amusing anecdote on the subject, recalled from law-school days:

The late Charles Black of the Yale Law School (from whom one of us had the privilege to study Constitutional Law), famously used an illustration to make a point about “state sovereignty” under the Constitution. “What’s all this about state sovereignty?” he would begin, and then slowly walk over to the chalkboard and draw a simple rectangle. “This,” he said, “is the ‘sovereign state’ of Kansas.” Long pause. “Now *that* isn’t a ‘sovereign state.’ That’s just some lines that somebody drew on a map. A ‘sovereign state’ doesn’t look like that.” Professor Black would then return to the blackboard and draw a more distinctive, less regular polygon, large, with a big panhandle. Texas. “Now *that*,” he would drawl. “*That’s* a ‘sovereign state.’”⁵⁵²

Such drollery presages the grave fate of the nation should the original-thirteen theory ever garner more acceptance. Perhaps then North Carolina’s advocacy of the But Some States Are More Equal Than Others Understanding *deserves* a dash of indecorousness in retort, in which case its acronym B.S.S.A.M.E.T.O.U. serves as admirably succinct rejoinder: “B.S., same to you.”

552. Kesavan & Paulsen, *supra* note 220, at 1620.