THE UNWRITTEN CONSTITUTION FOR ADMITTING STATES

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The United States has experimented with several different constitutions for adding states. Of all of these regimes, the shortest lived was also the one selected by the Federalist drafters of the Constitution. Under this regime, Article IV, Section 3 bestowed on Congress broad power to govern new territories as colonies of the original states, allowing Congress to place any conditions that they pleased on their admissions. This regime was created by Federalists, like Gouvernour Morris, who were suspicious of Scots-Irish frontiersmen and eager to settle western territory using land companies who would insure that new settlers were deferential to Federalist leadership back east and loyal to the national government. Whatever its merits in terms of text and original understanding, however, the Federalist constitution of company towns was quickly supplanted by a constitution of popular sovereignty. Initially devised by the Northern Democratic Party between 1845 and the Civil War to overcome intraparty divisions over slavery, the Republican Party preserved the basic structure of popular sovereignty after the Civil War to become the unwritten constitution for adding states today. Our national experience with the constitution of state admissions is that cross-partisan constitutional conventions, not text or original understanding, are the real foundations of durable constitutional rules.

INTRODUCTION

James Pfander and Elena Joffroy have provided this Symposium with a fascinating and important account of how unwritten constitutional conventions can supplant constitutional text.[1] As they explain, the "now existing" clause of Article I, Section 9 "empowered Congress to restrict the geographic scope of slavery and to use new state admission legislation to condition statehood in ways that could enforce the prohibition of slavery."[2]

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1. James E. Pfander & Elena Joffroy, *Equal Footing and the States "Now Existing": Slavery & State Equality over Time*, 89 FORDHAM L. REV. 1975 (2021).

2. *See id.* at 1978.

This power, however, was stripped away after ratification through the gradual adoption by Congress and the U.S. Supreme Court of the so-called "equal footing" doctrine—the idea that, because new states must be admitted on equal terms with existing states, Congress cannot condition the admission of the former on the new states' prohibiting slavery. This triumph of unwritten convention over the express text of Article I, Section 9 is all the more striking because the delegates at the Philadelphia Convention expressly excised the guarantee of equal footing from the "Admission Clause" of Article IV, Section 3. That "equal footing" has limited Congress's powers is not merely an instance of an unwritten convention's taking precedence over express text; it is also an instance of a convention's rising up from the grave, like an unkillable zombie after having been expressly interred by constitutional drafters.

In what follows, I will supplement Pfander and Joffroy's account with an explanation for why "equal footing" could prove so durable despite being so inconsistent with constitutional text. As I explain below (and at greater length in another article), equal footing, together with the related principle of popular sovereignty, helps solve a problem of political risk created by Article IV's conferring on Congress the power to add new states to the Union by a simple majority vote. As explained in Part I, I agree with Pfander and Joffroy that Congress's admission power under Article IV, Section 3 was likely intended to be an unlimited power. Indeed, the best reading of the original Federalist Constitution is that Congress enjoyed the power to rule western states as colonies without any limits on such power rooted in new states' alleged "equal footing" to existing states.

As I explain in Part II, however, this unlimited power proved to be a political headache for Congress, because it created the risk that parties in Congress could splinter over the terms under which new states were admitted. Because such new states each earn two senators upon admission to the Union regardless of population, the addition of new states can radically change the balance of power in Congress. The equal footing doctrine and the related principle of popular sovereignty helped control this political uncertainty by delegating decisions about sensitive issues like slavery, aid for church schools, and noncitizens' and women's suffrage to the voters of prospective states. These were all issues over which political parties were internally divided. The convention of having the voters of a prospective state decide on the terms of the state's admission allowed the majority party in Congress to avoid taking positions on such sensitive issues while still allowing admission of new states likely to elect senators belonging to that majority party.

Do equal footing and popular sovereignty count as constitutional law? Measured against the original Federalist Constitution, certainly not. Nor can these principles be explained by abstractions like the notion of "equal sovereignty" invoked in *Shelby County v. Holder*.[3] As Professor Peter

3. 570 U.S. 529 (2013).

Westen argued decades ago, "equality" writ large is essentially empty.[4] In particular, as explained in Part III, equal sovereignty cannot explain why Congress and the Court embraced its particular versions of equal footing and popular sovereignty, while discarding rival versions that were equally plausible from the standpoint of abstract equality. Instead, the doctrine and convention are best explained as the product of partisan self-interest: because equal footing and popular sovereignty provide a cross-partisan benefit that is useful to whichever party happens to control the national government, these principles have staying power that the Court can exploit to fashion doctrine useful to Congress. In effect, the Court provides Congress with a helping hand, not a judicial constraint, in enforcing equal footing as a supplement to the principle of popular sovereignty.[5] More generally, one can argue that this is how constitutional law is made—as a compromise to induce political stability, not as formal enactments dreamed up at a magical moment of ratification. Constitutional text that cannot produce that necessary stability is discarded, and unwritten doctrines like equal footing and popular sovereignty take its place.

I. THE ORIGINAL FEDERALIST CONSTITUTION OF UNLIMITED CONGRESSIONAL POWER

Pfander and Joffroy provide a succinct and convincing account of how Gouverneur Morris eliminated any reference to equal footing from Article IV of the original Constitution.[6] In brief, the Constitution, as originally written, represented a compromise under which new states would gain representation in Congress equal to existing states, but Congress would also enjoy unlimited power to dictate the terms under which new states would be admitted.[7]

Pfander and Joffroy speculate that Morris pressed for such broad congressional power because granting newly admitted states equal footing with the original states would allow the spread of slavery.[8] Morris and other Federalists, however, had another more immediate and self-interested reason to give Congress plenary power over the admission of new states carved out of western territories: they distrusted intensely the economic incentives and

4. *See generally* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

5. For expositions of various models of judicial review that explain judicial constraints on the legislature as aids in stabilizing coalitions by making commitments to interest groups credible or by removing divisive issues from the legislative agenda, see Howard Gillman, *Courts and the Politics of Partisan Coalitions*, *in* THE OXFORD HANDBOOK OF LAW & POLITICS 1 (Keith Whittington et al. eds., 2008); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35 (1993); Matthew Stephenson, *"When the Devil Turns . . .": The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59 (2003); Keith Whittington, *"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583 (2005).

6. Pfander & Joffroy, *supra* note 1, at 1977.

7. *Id*.

8. *Id.* at 1987.

political motivations of the disproportionately Scots-Irish settlers who were streaming into the Ohio River Valley. The Scots-Irish had a reputation for violently feuding with each other, against neighboring Indian tribes, and occasionally even against eastern authorities, as well as for subsistence farming with little investment in improvements and small hope of producing a surplus for transatlantic export.[9] Federalists repeatedly denounced these squatters on the public domain as "a parcel of banditti, who will bid defiance to all authority," "the Indigent and Ignorant," and even "white Indians."[10] Easterners, even Virginians like Senator William Grayson, preferred the more economically profitable New England style of "progressive seating," in which settlers filled up "compact" settlements in towns before the hinterlands were open to the market.[11] "I dread the cold and sower Temper of the back Counties," Morris confided to George Washington in a letter, a sentiment likely shared by the would-be Virginian landlord of the western "Banditti."[12]

By giving Congress plenary power to place conditions on the admission of new states, Morris and other Federalists could ensure that new states would not be admitted until they were populated by more people deemed more orderly and economically productive than the Scots-Irish.[13] When Morris, on August 29, 1803, successfully moved for the deletion of "equality" language from Article IV, he preserved eastern power over western settlement, thereby controlling the political power of Scots-Irish squatters whom he deeply distrusted. This congressional control, however, was

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9. KEVIN T. BARKSDALE, THE LOST STATE OF FRANKLIN: AMERICA'S FIRST SECESSION 3 (2009); DAVID HACKETT FISCHER, ALBION'S SEED: FOUR BRITISH FOLKWAYS IN AMERICA 605–782 (1989); ERIC HINDRAKER & PETER C. MANCALL, AT THE EDGE OF EMPIRE: THE BACKCOUNTRY IN BRITISH NORTH AMERICA 125–60 (2003) (describing the siege of Philadelphia by western "Paxton Boys"); BETHEL SALER, THE SETTLERS' EMPIRE: COLONIALISM AND STATE FORMATION IN AMERICA'S OLD NORTHWEST 55–79 (2015); Françoís Furstenberg, *The Significance of the Trans-Appalachian Frontier in Atlantic History*, 113 AM. HIST. REV. 647, 659 (2008) (describing the "ambiguous loyalties of western colonists"). On the regulators' rebellion in the Carolinas, see generally MARJOLEINE KARS, BREAKING LOOSE TOGETHER: THE REGULATOR REBELLION IN PRE-REVOLUTIONARY NORTH CAROLINA (2002).

10. PETER ONUF, STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE 16–17, 21, 25, 29–30 (1987); *see also* ANDREW R. L. CAYTON, THE FRONTIER REPUBLIC: IDEOLOGY AND POLITICS IN THE OHIO COUNTRY, 1780–1825, at 6–8 (1986).

11. ONUF, *supra* note 10, at 31, 37, 40, 43. On Virginians' acceptance of the New England system for settling land as superior to the Virginian system of "indiscriminate location," see PAUL FRYMER, BUILDING AN AMERICAN EMPIRE: THE ERA OF TERRITORIAL AND POLITICAL EXPANSION 52 (2017).

12. Letter from Gouverneur Morris to George Washington (Oct. 30, 1787), *in* 1 COMMENTARIES ON THE CONSTITUTION: PUBLIC AND PRIVATE 513, 513 (John P. Kaminski et al. eds., 1981).

13. As I explain in a longer article, many Federalists pinned their hopes on the Ohio Land Company, a corporation chartered by the Confederation Congress while the Philadelphia Convention was debating the status of western lands. Led by New England ministers and Revolutionary War officers, the Ohio Company proposed to settle industrious and deferential New Englanders in the Ohio River Valley to the exclusion of unruly Scots-Irish squatters. Roderick M. Hills Jr., Our Unwritten Constitution of Empire: Doctrines and Conventions for Adding (and Not Adding) States 11–13 (n.d.) (unpublished manuscript) (on file with the *Fordham Law Review*).

qualified by those new states' immediately obtaining equal representation in Congress. As he later explained to Henry Livingston during the congressional debates over the government of the new Louisiana territory, he "always thought that, when we should acquire Canada and Louisiana it would be proper to govern them as provinces, and allow them no voice in our councils."[14] But he admitted that, "[i]n wording the third section of the fourth article, I went as far as circumstances would permit to establish the exclusion," conceding that "had it been more pointedly expressed, a strong opposition would have been made."[15] Professor Thomas Colby has argued that this letter suggests that the Convention left the scope of Congress's powers undecided.[16] In light of the entire Convention debates over the status of western states, however, the letter points to precisely the compromise described by Pfander and Joffroy: new states, contrary to Morris's fondest hopes, would receive equal voice in our councils, but Morris secured in return a delegation of unlimited power to Congress to place conditions on a state's admission.[17] That was a compromise that "went as far as circumstances would permit" to limit what Morris took to be the ill effects of such equal congressional representation on the original states.[18]

II. THE CONSTITUTION OF POPULAR SOVEREIGNTY, 1845–1912

That equal "voice in our councils" would eventually undermine Morris's compromise. As explained in more detail below, equal representation in the Senate created hydraulic pressure for both political parties in Congress to enforce principles of equal footing and popular sovereignty in admission conditions, setting aside the quasi-colonial congressional control over the west envisioned by Morris.

Despite being contested, Congress's plenary power to impose any conditions it pleased on the admission of new states was, prior to 1845, initially recognized by both Congress and the Court. This recognition was not undisputed: as Pfander and Joffroy note, Southerners contested Missouri's admission on the condition that slavery be prohibited within its territory by invoking the equal footing principle.[19] Even earlier, Tennessee politicians seeking control over federal lands unsuccessfully pressed the idea that equal footing entitled new states to ownership of the federal public domain within their boundaries.[20] Alabama Senator John McKinley renewed this same version of equal footing in the late 1820s when seeking

14. Letter from Gouverneur Morris to Henry W. Livingston (Dec. 4, 1803), *in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 523, 523 (Max Farrand ed., 1911).

15. *Id.*

16. Thomas Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. 1087, 1103 (2016) ("The most that can be comfortably said about the framing history, then, is that the Framers chose not to resolve the equal footing issue explicitly at the Convention.").

17. Pfander & Joffroy, *supra* note 1, at 1985.

18. *Id.* at 1984.

19. *Id*. at 1996.

20. Hills, *supra* note 13, at 19–20.

"retrocession" of federal land to new state governments.[21] Later, as a Supreme Court Justice, McKinley actually persuaded a majority of the Court to endorse a version of this principle in *Pollard v. Hagan*.[22]

The dominant position, however, was that Congress could unilaterally impose conditions on new states' admission regardless of whether these conditions deprived states of powers enjoyed by the original members of the Union. When Louisiana was admitted in 1812, for instance, Congress, suspicious of the new state's francophone and Roman Catholic residents, enacted an enabling act requiring that the new state government use English, crimes be tried by jury, and civil and religious liberties be protected.[23] The Supreme Court gave Congress complete power to unilaterally impose draconian conditions on new states in *Green v. Biddle*,[24] when the Court upheld the condition that all land title in Kentucky was governed by Virginia law, because such a legal regime was required by the compact approved by Congress under which Kentucky was admitted to the Union.[25]

By the mid-1840s, however, the original consensus about Congress's power was shattered by the sectional controversy over slavery. After the conquest of the western United States following the Mexican-American War, Congress faced the problem of admitting states carved from this new territory. Deciding on the conditions for admission placed each political party, Whig and Democratic, in a dilemma: should the new state constitution allow or prohibit slavery? Since each party drew from both Northern and Southern constituencies, banning or allowing slavery in new states threatened to tear the political parties apart. To duck this volatile issue, Democratic politicians developed the principles of equal footing and popular sovereignty. They took the position that it was up to the people of the prospective state to decide by popular vote whether or not to adopt a prohibition on slavery in their state constitution. As then representative Stephen Douglas declared in 1845 while supporting the admission of Iowa and Florida, Douglas did not need "to go into a discussion of the slavery question, or the propriety of the various provisions of the constitutions of Iowa and Florida" because "[t]he people of each State are to form their constitution in their own way and in accordance with their own views, subject to one restriction only; and that was, it should be republican in its character."[26]

Equal footing as a solution to intraparty strife came in different varieties. Douglas's version of equal footing in the Florida-Iowa debate was especially strong insofar as he urged that Congress could not demand any condition but

21. *Id.* at 27.

22. 44 U.S. (3 How.) 212 (1845).

23. Act of Feb. 20, 1811, ch. 21, §§ 1–4, 2 Stat. 641, 641–43. On the debates over Louisiana's admission, see PETER J. KASTOR, THE NATION'S CRUCIBLE: THE LOUISIANA PURCHASE AND THE CREATION OF AMERICA 143–47 (2004).

24. 21 U.S. (8 Wheat.) 1 (1823).

25. Hills, *supra* note 13, at 22–23.

26. CONG. GLOBE, 28th Cong., 2d Sess. 273, 284 (1845); *see also* Hills, *supra* note 13, at 34.

a republican form of government as the price of admission.[27] Almost simultaneously, the Supreme Court adopted a weaker version in *Permoli v. Municipality No. 1*,[28] stating that any conditions contained in the federal enabling act under which Louisiana was admitted could not be enforced to limit the state government's power after admission. The condition in question protected Father Permoli's religious liberty (he had been barred from holding an open casket funeral by a local health law), but the principle plainly limited Congress's powers unilaterally to impose antislavery conditions on new states through federal statutes. According to *Permoli*, "all [such conditions were] superseded by the state constitution," lacking any legal "force, unless they were adopted by the constitution of Louisiana, as laws of the state."[29] *Permoli*'s version of equal footing was weaker than Douglas's version: the Court acknowledged that an enabling act from Congress could demand any provisions that Congress pleased from a proposed state constitution and turn down prospective states that refused to adopt such limits.[30] Rather than limiting *what* conditions Congress could impose, *Permoli* simply limited *how* Congress could enforce them. Congress could reject a prospective state's request for admission altogether for any reason, but Congress could not admit a state based on conditions contained only in a federal statute that the state's people had not also ratified in a popular referendum.

Permoli's version of equal footing gradually was accepted as the governing standard for admissions of new states. One major step toward such acceptance was Stephen Douglas's showdown with President James Buchanan over the admission of Kansas in December of 1857. President Buchanan sought to push a bill through Congress admitting Kansas to statehood under a state constitution proposed by proslavery delegates meeting in Lecompton, Kansas. The Lecompton Convention, however, was not fairly elected and did not represent the dominant free-state sentiment in Kansas.[31] President Buchanan nevertheless endorsed the admission of

27. CONG. GLOBE, 28th Cong., 2d Sess. 273, 284 (explaining that Douglas "had doubts as to the power of Congress to reject a State, being now a part of the territory of the United States, merely on account of her peculiar domestic institutions," because "whenever a new State was admitted into the Union, it came in on an equal footing, in all respects, with the original States; and all attempts to deprive her of that equality, by act of Congress, was in derogation of the constitution of the United States, and consequently void").

28. 44 U.S. (3 How.) 589 (1845).

29. *Id.* at 610. The three statutes were: Act of Mar. 2, 1805, ch. 23, 2 Stat. 322, under which the Territory of Orleans was created; Act of Feb. 20, 1811, ch. 21, 2 Stat. 641; and Act of Apr. 8, 1812, ch. 50, 2 Stat. 701, under which Louisiana was admitted to the Union. *Id.* at 594–95.

30. *Id.* at 609 (declaring that Louisiana's enabling act "declare[d] in advance, to the people of the territory, the fundamental principles their constitution should contain," which "was every way proper under the circumstances" and that, after a proposed state was "formed, and presented," Congress had the power only to "judge whether it contained the proper principles, and to accept it if it did or reject it if it did not").

31. NICOLE ETCHESON, BLEEDING KANSAS: CONTESTED LIBERTY IN THE CIVIL WAR ERA 141–42, 144–45 (2004); 2 WILLIAM W. FREEHLING, THE ROAD TO DISUNION: SECESSIONISTS TRIUMPHANT, 1854–1861, at 133 (2007); ROY NICHOLS, THE DISRUPTION OF AMERICAN DEMOCRACY 119–20, 130, 147 (1948).

Kansas on the basis of this document, simply as a way to placate the South and resolve the slavery question in Kansas quickly. In a stunning repudiation of party loyalty, Douglas defied Buchanan in a speech on December 9, 1857, demanding respect for "the great principle of self-government, which left the people of each State and each Territory free to form and regulate their domestic institutions in their own way, subject only to the Constitution of the United States."[32]

Douglas emerged from this showdown victorious and popular,[33] and his eventual victory in this showdown established an important precedent in support of popular sovereignty: the state constitution that formed the basis for admission of a state to the Union had to be approved by the people of the state and not simply custom-tailored by Congress. Both sides of the aisle, from Abraham Lincoln to proslavery "fire-eaters" like Preston Brooks, acknowledged the force of his principle, grudgingly conceding that the people of Kansas had the right to admission on their own terms.[34]

The Republican Party had self-interested reasons to endorse equal footing and popular sovereignty. Like the Democrats, they faced the threat of intraparty schism if Congress took stances on issues over which the national party was divided. By delegating such questions to local voters, the Republicans could duck the sensitive issue, maintain party unity, and still admit a state likely to vote for Republican senators. The benefits of popular sovereignty and equal footing became apparent as early as 1857, when Congress debated the admission of Minnesota. Based on support from German-American residents in the eastern part of the state, Minnesotans had submitted a state constitution permitting noncitizens to vote. The Republican Party, however, was exceedingly reluctant to take any position on noncitizens' suffrage. Competing with the anti-immigrant Know-Nothing Party for voters, it was to the Republican advantage to rely on a neutral principle by which to duck the question. Popular sovereignty provided the

32. Senator Stephen Douglas, Speech on the President's Message (Dec. 9, 1857).

33. On the popularity of Douglas's stance in Illinois, see NICHOLS, *supra* note 31, at 171. Of Lincoln's three opponents in 1860, Douglas was by far the most successful, winning 1.3 million votes to Southern candidate John C. Breckenridge's 850,000. Leading conservative Republicans in the east took notice, actively courting Douglas to jump ship and join the Republicans. *See* Allen C. Guelzo, *Houses Divided: Lincoln, Douglas, and the Political Landscape of 1858*, 94 J. AM. HIST. 391, 396 (2007).

34. As Representative Preston Brooks stated, "should the people of Kansas comply with the terms of the Kansas-Nebraska Act as I understand it, and apply for admission as a free State, they will encounter no obstacle in my vote." CONG. GLOBE, 34th Cong., 3d Sess. 108 (1856) (statement of Rep. Preston Brooks). Lincoln endorsed the power of Kansas settlers to adopt a state constitution protective of slavery in the joint debate with Stephen Douglas at Freeport, on August 27, 1858. THE LINCOLN-DOUGLAS DEBATES: THE FIRST COMPLETE, UNEXPURGATED TEXT 94 (Harold Holzer ed., 1993) ("[I]f slavery shall be kept out of the Territories during the territorial existence of any one given Territory, and then the people shall, having a fair chance and a clear field, when they come to adopt the constitution, do such an extraordinary thing as to adopt a slave constitution, uninfluenced by the actual presence of the institution among them, I see no alternative, if we own the country, but to admit them into the Union.").

perfect method: whatever the merits of the Minnesotans' proposal, they had a right to decide the issue for themselves.[35]

Following the Civil War, Republicans repeatedly discovered the benefits of relying on equal footing and popular sovereignty to duck issues that could divide the party while still admitting underpopulated states that could expand Republican control in the Senate. In every case of postbellum admissions, they followed the practice, beginning with the admission of Iowa in 1846, of requiring voters to approve the proposed state constitution in a referendum. Such referenda were not mere formalities; they could materially slow the admission of states from which Republicans hoped to win electoral advantages. Voters in Colorado and Nebraska, for instance, refused to approve state constitutions in September of 1864, thereby frustrating the Republican Party's leadership in Congress who wanted to admit these two states in time for their electoral votes to count in the 1864 presidential elections.[36] Congressional Republicans also could not dictate terms to local voters, because those voters were sometimes happy to refuse admission to the Union on terms most preferred by the Republican Party. New Mexico's Republican territorial leadership, for instance, drafted a proposed state constitution in 1889 that banned public aid to church schools in hopes of inducing anti-Catholic Republicans in Congress to favor admission.[37] The price of this concession to national opinion, however, was forfeiture of local voters' support: hostility from Hispanic and Roman Catholic voters helped to defeat the measure in the required referendum.[38] For other states, Republicans in Congress succeeded in pressuring local voters to accede to federal conditions. Mormons in Utah Territory had to prove that they had been thoroughly "Americanized" by rejecting polygamy before Utah could be admitted as a state.[39]

The postbellum version of popular sovereignty and equal footing adopted by Republicans, in short, was the weak version first described by *Permoli*. Congress could impose any conditions it pleased on the admission of new states, but those conditions had to be ratified by the voters in the prospective state. In some sense, this was hardly equal footing at all. After all, there was nothing equal about the various terms under which New Mexico and Utah were admitted to the Union. Congress's willingness to impose unequal, custom-tailored conditions on the admission of new states led William Dunning to conclude in 1888 that the equal footing doctrine had not, in fact,

35. For the debate over Minnesota's admission, see CONG. GLOBE, 34th Cong., 3d Sess. 808–14, 849–65, 872–77 (1857).

36. HOWARD R. LAMAR, THE FAR SOUTHWEST, 1846–1912: A TERRITORIAL HISTORY, 219–22 (2000); Earl S. Pomeroy, *Lincoln, the Thirteenth Amendment, and the Admission of Nevada*, 12 PAC. HIST. REV. 362, 364 (1943).

37. ROBERT W. LARSON, NEW MEXICO'S QUEST FOR STATEHOOD, 1846–1912, at 160–61 (1968).

38. *Id.* at 167–68.

39. *See generally* GUSTAVE O. LARSON, THE "AMERICANIZATION" OF UTAH FOR STATEHOOD (1970).

won acceptance as a constitutional principle.[40] Dunning's mistake, however, was to misunderstand the equality guaranteed by *Permoli*, which insured only that local voters would each enjoy equal power to decline the unequal terms on which Congress offered admission and to limit Congress to the single remedy of refusing admission to voters who rejected those terms. Paired together in this way, equal footing and popular sovereignty formed a consistent constitutional convention governing every state from the admission of Iowa in 1846 to the admission of New Mexico in 1912.

III. EQUAL FOOTING AND POPULAR SOVEREIGNTY AS SELF-ENFORCING CONVENTIONS

What explains and justifies equal footing and popular sovereignty as principles for our constitution for state admissions? Lawyers naturally are tempted to derive these from principles embedded in the text, purpose, history, or structure of the Constitution. As Pfander and Joffroy show, however, the text and original understanding of the Constitution are flatly inconsistent with equal footing and popular sovereignty. What about more abstract constitutional principles embedded loosely in the concepts of state sovereignty and equality? As explained below, the idea that equal footing and popular sovereignty can be derived from some abstract principle of "equal state sovereignty" is unsustainable. Instead, the doctrine and convention are best explained by cross-partisan self-interest that led to a durable constitutional practice.

A. The Empty Idea of Equal State Sovereignty

Consider, first, why equal state sovereignty cannot explain equal footing or popular sovereignty.[41] The problem with any such explanation is that the concept of equal state sovereignty cannot differentiate between the very specific notions of equal footing and popular sovereignty that have won congressional and judicial endorsement from all of the other versions that have been consigned to historical oblivion. Equal state sovereignty is, like equality itself, an empty concept that can accommodate many different limits on Congress's Article IV admission power.[42] To explain the specific concepts that we actually have, one must turn to some other concepts.

Consider why equal state sovereignty, understood in the abstract, cannot explain the strangely attenuated concept of equal footing followed by the Court and Congress. Congress may not limit a state's equal footing with

40. William A. Dunning, *Are the States Equal Under the Constitution?*, 3 POL. SCI. Q. 425, 452 (1888) (using the standard of a "positive sanction of all three co-ordinate departments of the government . . . the theory of equal states falls to the ground"). Dunning, a famous critic of Reconstruction, had special reason to reject the idea that the readmission of the Southern states had been consistent with equal footing.

41. For defenses of the idea that equal state sovereignty can yield the determinate concept of equal footing, see Colby *supra* note 16. *See also* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 274–75 (2005).

42. Westen, *supra* note 4.

terms in a federal enabling act that prospectively limit a new state's powers. Congress *may*, however, condition a prospective state's admission on that prospective state's having a state constitution specified by Congress. As stated in *Coyle v. Smith*,[43] the canonical statement of the principle is that "[t]he constitutional provision concerning the admission of new states is not a mandate, but a power to be exercised with discretion" such that "Congress may require, under penalty of denying admission, that the organic law of a new state at the time of admission shall be such as to meet its approval."[44] Thus, Congress *could* (for instance) admit Oklahoma only on the condition that Oklahoma's constitution mandate that the state capital be located in Guthrie.

It is, at least at first glance, a little perplexing why such completely permissible "conditions precedent" are not a blatant denial of the equal sovereignty that purportedly justifies the equal footing doctrine. After all, the original states were merely required to ratify the original U.S. Constitution pursuant to that document's Article VII. Why, then, should an outside authority dictate the content of the newer-admitted states' constitutions as those states' price of admission to the federal Union?

Coyle's only justification for Congress's unfettered discretion to condition admission on a congressionally approved state constitution is that such limits on a state's sovereignty are not federal limits at all but instead self-imposed restrictions based on state law: "A Constitution thus supervised by Congress would, after all, be a Constitution of a state, and as such subject to alteration and amendment by the state after admission. Its force would be that of a state Constitution, and not that of an act of Congress."[45] As an exposition of any deep principle of equal state sovereignty, these two sentences leave something to be desired: they combine tautology with a question-begging assertion. Of course, a constitution dictated by Congress counts as "a Constitution of a state" if one stipulates that it is not "an act of Congress." But if Congress practically dictates the terms of such a document, then in what practical sense is such a document the sovereign decision of "the state"? Moreover, such a document being "subject to alteration and amendment by the state after admission" depends entirely on the content of the document being dictated by Congress. Congress made admission of New Mexico contingent on the new state's submitting for popular ratification an amendment making easier the process for amending the state constitution.[46] Congress could presumably make an opposite demand, insisting on an especially onerous amendment procedure. What deep unwritten principle explains why such congressional entrenchment of a congressionally designed state constitution is not a denial of equal state sovereignty?

The emptiness of equal state sovereignty becomes apparent when one surveys the varieties of state equality that have been rejected by Congress

43. 221 U.S. 559 (1911).
44. *Id.* at 568.
45. *Id.*
46. LARSON, *supra* note 37, at 292–93, 296–98.

and the Court. Tennessee insisted that equality required that they be admitted with the same right to land as the original states, which would require the federal public domain to be ceded to new states upon admission. Senator and later Justice McKinley reiterated this version of equality in the late 1820s and again in *Pollard*. Congress and the Court, however, had consistently rejected this principle of equality, not because it could not be defended as a logical deduction from the abstraction of equal state sovereignty but rather because eliminating the federal public domain would prevent the federal government from providing public goods ranging from forts to railroads that the political nation desired.

Likewise, equal state sovereignty cannot explain the rejection of the broader form of equal footing initially championed by Stephen Douglas, under which new states can be refused admission only if their proposed constitution does not constitute a republican form of government. This form of equality was repeatedly defended by Democrats in the debates over admission of Florida and Iowa, but it was soundly rejected by the political practice of Republican congresses following the Civil War. As an exposition of equal state sovereignty, Douglas's theory of state equality seems superior to the equal footing doctrine that actually has governed the admission of new states. After all, the original states were not required to surrender polygamy or the recall of state judges as a price of admission. Why should newer states have to incorporate such limits into their constitutions? *Coyle* and *Permoli*, however, both brusquely ignored such logic, instead holding that Congress can custom-tailor unique conditions for the admission of each state, just so long as such conditions are enforced "under penalty of denying admission" rather than through specific performance of the terms contained in enabling acts after admission.[47]

In short, there is likely no concept of equality writ large that can distinguish between the sorts of equal footing that Congress and the Court have rejected and those that eventually won acceptance. This does not mean that "equality talk" was unimportant in the development of our constitution of empire. To the contrary, partisans have repeatedly invoked equal footing and equal sovereignty as rhetoric for defending their particular conceptions of equality. To determine which versions prevailed and which failed, however, one must look to a principle with more differentiating power.

B. Cross-Partisan Congressional Self-Interest and Constitutional Conventions

Consider another explanation for our constitution of empire rooted in institutional self-interest. Equal footing is better explained as the product of partisan competition rather than any inference from the empty concept of equal state sovereignty. Because each party perceives an advantage in

47. *Coyle*, 221 U.S. at 568 ("Congress may require, under penalty of denying admission, that the organic law of a new state at the time of admission shall be such as to meet its approval.").

admitting states likely to favor them in the Senate, partisan competition tends over time to expand admission.[48]

Equal footing and popular sovereignty, however, let each party pursue partisan advantage without risking intraparty fracture by reducing divisions over divisive issues like slavery, alien suffrage, and aid to religious schools. The principle of popular sovereignty was essentially conjured up in the mid-1840s as a constitutional requirement to prevent the antebellum Democratic Party from splitting into irreconcilable Northern and Southern factions. The Whig and Republican parties likewise also saw immediate advantages to ducking sensitive issues by delegating them to local voters, such as the question of noncitizens' suffrage, which was also a matter on which Whigs and Republicans faced existential challenge from the Know-Nothing Party. By delegating the resolution of this issue to territorial voters, Republicans could insulate themselves from nativist divisions that would destroy their party just as surely as divisions over slavery would destroy the democracy.

The Republicans' continuation of popular sovereignty after the Civil War, therefore, was a rational partisan strategy rather than loyalty to a mere precedent. Repeatedly, Republicans were confronted with local party organizations holding positions at variance with significant parts of the national party. In New Mexico, the question was public aid for Catholic schools, while in Wyoming, the issue was female suffrage. Invoking the constitutional entitlement of local voters to resolve such issues by a popular vote was a convenient way to avoid splitting the party over such issues. As New York's senator Thomas Platt stated in 1890 during the debate over Wyoming's admission, he himself was opposed to female suffrage but this "is a question which these men and these women in Wyoming have a right to determine for themselves."[49] Rebutting Missouri Democratic Senator George Vest who sought to split the Republicans over the question, Platt invoked the Democrats' own invention of local popular sovereignty, proclaiming that he was "surprised that gentlemen who are so devoted to home rule as a sacred right" would try to exclude Wyoming over the question of female suffrage.[50]

Popular sovereignty and equal footing, in short, had bipartisan appeal because they served intraparty unity. Their durability was not the result of some deduction from the "structure" of the written Constitution or any immanent purpose allegedly lurking between that Constitution's lines. They were not derived from abstractions like equal state sovereignty. They were instead the product of partisan self-interest aided by a judiciary solicitous of the need for Congress to delegate important matters to subnational constituencies. Together with equal footing, popular sovereignty insured that each party within Congress could gain Senate votes from new states without

48. *See generally* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES (2000).

49. 21 CONG. REC. 6490 (1890) (statement of Sen. Thomas Platt).

50. *Id.*

endangering party unity on issues over which the national or local parties were divided.

C. Understanding Constitutional Law as Credible Coalitional Commitment

Equal footing and popular sovereignty fit a model of judicial review in which the Court provides Congress with a helping hand in achieving durable partisan coalitions.[51] This model of courts and constitutions answers the otherwise baffling counter-majoritarian difficulty: why would powerful elected politicians defer to judicial opinions or even written constitutions that constrain the formers' power?[52] One answer is that constitutional terms and judicial opinions provide focal points around which the public can rally, thereby overcoming obstacles to collective action that prevent a diffuse public from enforcing protections for their private rights.[53] Another analogous answer is that politicians suffer from collective problems of their own. They must make credible commitments to each other to keep issues off the agenda that could endanger their partisan organizations' unity. Constitutional constraints backed by judicial review make such commitments more credible by giving politicians plausible political cover when challenged by defectors who would disrupt the commitment for immediate advantage. Senator Platt could rebuff Senator George Graham Vest's effort to split the Republican Party over women's suffrage precisely because popular sovereignty was a "sacred right" to which even conservative Republican voters hostile to women's suffrage would (perhaps grudgingly) defer.

The role of constitutional doctrine and conventions in providing political cover illustrates how partisan self-interest and more conventional modes of legal interpretation interact. To be credible as a device for securing party unity, constitutional rules have to be credibly constitutional: they have to have sufficient roots in popular culture that their invocation inspires respect rather than sneers. Only a sacred right can provide the political cover that politicians need to repel provocateurs who put issues on the agenda in defiance of an issue-suppressing commitment. Constitutional concepts that lack a sufficient pedigree in text, precedent, or history will be unable to anchor party unity, because those concepts will seem like efforts by one faction within a party to gain an advantage over another with a conveniently jerry-rigged principle that will be discarded once it has served its opportunistic purpose.

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51. *See supra* note 5 and accompanying text.

52. Daryl Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657 (2011).

53. Peter Ordeshook, *Constitutional Stability*, 3 CONST. POL. ECON. 137, 148 (1991). This point has been made in the legal literature frequently since the 1990s, especially to justify judicial review. *See, e.g.*, Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229 (2004); David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723 (2009); Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245, 263 (1997).

Equal footing and popular sovereignty, however, illustrate how this essential constitutional pedigree need not rest on text or original understanding. These principles were created in the 1840s, more than a half century after the ratification of Article IV. Nevertheless, they could form the basis for stable intraparty compromise because they resonated with long-standing American political traditions that Americans could intuitively endorse.

The persuasiveness of the pedigree of these concepts can be illustrated by contrasting them with Stephen Douglas's utterly unsuccessful attempt to extend popular sovereignty to territorial legislatures. Under this version of the principle, territorial legislatures created by federal statute would be "sovereign" over "domestic institutions" (Douglas's code word for slavery), excluding direct congressional authority over such questions. Douglas pressed this idea during the 1854 debates over the Kansas-Nebraska Act[54] on a gamble that Congress could admit Kansas and Nebraska while sidestepping a debate about permitting slavery north of the Missouri Compromise's 36°30′ line. The story of how Douglas lost this bet has been told too many times to need recounting in detail here.[55] Briefly, Douglas sponsored a bill in Congress to organize territorial legislatures in Kansas and Nebraska possessing the power to permit or forbid slavery within their limits. Although Douglas masterfully steered the bill through Congress, the Kansas-Nebraska Act ignited a firestorm of controversy that nearly destroyed his political career.[56]

The fiasco of Douglas's idea of territorial legislative sovereignty illustrated the interdependence of constitutional principle and partisan necessity. Douglas had hoped that both Southern and Northern Democrats would be able to sidestep their differences over slavery through a mutual constitutional commitment to delegate the slavery question exclusively to territorial legislatures. This effort at partisan unity, however, depended on territorial legislatures' being perceived by voters and politicians as autonomous entities separate from the Congress that created them. Unfortunately for Douglas, antebellum America was not prepared to accept any such concept of territorial government. The problem was not that Douglas's position was indefensible as a matter of text, precedent, or history. In these respects, Douglas's argument was weak[57] but arguably no weaker

54. Ch. 59, 10 Stat. 277 (1854).

55. For classic accounts of the demise of the alliance, see DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 178–88 (1978); NICHOLS, *supra* note 31, at 153–75 (discussing the defeat of the Lecompton Constitution); DAVID M. POTTER, THE IMPENDING CRISIS, 1848–1861 (1963).

56. POTTER, *supra* note 55, at 175. On the importance of nativism to the defeat of Northern Democrats, see William E. Gienapp, *Nativism and the Creation of a Republican Majority in the North Before the Civil War*, 72 J. AM. HIST. 529 (1985).

57. As Representative Thaddeus Stevens of Pennsylvania noted during the debates over the Compromise of 1850, "[f]or sixty years and upwards, after the passage of the ordinance of 1787 and the adoption of the Constitution, no one seriously doubted the right of Congress to control the whole legislation of the territories." CONG. GLOBE, 31st Cong., 1st Sess. 765 (1850) (statement of Rep. Thaddeus Stevens).

than *Permoli*'s version of the equal footing doctrine.[58] Douglas, after all, marshaled a lengthy political tradition in the theory's defense.[59] In particular, since the creation of the Wisconsin territorial government in 1836, Congress had conferred something like territorial home rule on territorial legislatures.[60] Judged by the traditional canons of textualism, history, and precedent, therefore, Douglas's constitutional theory was no worse than interpretations like *Permoli* that won widespread acceptance.

The problem instead was that, in the eyes of voters, territorial governments and their constituents depended too much on Congress's will and the vagaries of migration to insulate national politicians from blame for territorial legislatures' decisions. As Lincoln proclaimed, so long as slavery was being introduced into federal territory, "[w]e think that a respect for ourselves, a regard for future generations and for the God that made us, require that we put down this wrong where our votes will properly reach it."[61] Of course, if one accepted Douglas's theory, Congress's votes would *not* properly reach slavery in the territories. Accepting that theory, however, meant accepting the idea that Congress could deflect responsibility from itself merely by delegating power to a territorial sock puppet over which the federal government had substantial control—a sock puppet drawing authority, in turn, from an arbitrary number of settlers scattered temporarily in a geographical location entirely of Congress's choosing. National politicians North and South accordingly ridiculed such a notion as mere "squatter sovereignty."[62]

By contrast, *Permoli*'s invocation of the rhetoric of equal footing had roots extending back to the Land Ordinances of the 1780s. Likewise, popular sovereignty by voter referendum dated back to the ratification of the Massachusetts Constitution of 1780.[63] These were principles with a pedigree sufficient to ward off challenges to a commitment that both political parties had other reasons to maintain.

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58. *See supra* Part II.

59. Douglas's summation of his case for sovereign territorial legislatures rooted in historical practice is set forth in STEPHEN DOUGLAS, POPULAR SOVEREIGNTY IN THE TERRITORIES: THE DIVIDING LINE BETWEEN FEDERAL AND LOCAL AUTHORITY (New York, Harper & Bros., Publishers 1859).

60. On Wisconsin's territorial government as a new model for local autonomy in the western territories, see 1 ALICE E. SMITH ET AL., HISTORY OF WISCONSIN: FROM EXPLORATION TO STATEHOOD 243 (1973) (noting that the act that established the territory of Wisconsin "became the model for future territorial organic acts" characterized by "a relaxation in the rigid control over their government").

61. Abraham Lincoln, Speech at New Haven, Connecticut (Mar. 6, 1860), *in* 4 COLLECTED WORKS OF ABRAHAM LINCOLN, 1809–1865, at 13, 16 (Roy P. Basler ed., 1953).

62. For a typical expression of Southern fire-eaters' rejection of territorial legislatures' power to control slavery, see South Carolina's representative Preston Brooks's statement that "[w]e believe that squatter sovereignty is as fatal to us as the Wilmot proviso; and so believing, it would be suicide to wink at it." CONG. GLOBE, 34th Cong., 3d Sess. 111 (1856) (statement of Rep. Preston Brooks). For Lincoln's most famous attack on "squatter sovereignty," see Abraham Lincoln, House Divided Speech, Springfield, Illinois (June 16, 1858).

63. WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS (Rita & Robert Kimber trans., expanded ed. 2001).

The model of constitutional law as coalitional commitment, in sum, suggests that partisan self-interest and conventional legal sources of authority are both jointly necessary but individually insufficient to sustain a durable constitution. As conventional legal arguments, equal footing and popular sovereignty were not irresistibly persuasive. They seemed flatly inconsistent with text and original understanding and, in any case, they were no more consistent with conventional sources of constitutional authority than discarded analogous concepts. Equal footing and popular sovereignty, however, served to cement partisan coalitions in ways that every other version of the constitution of empire failed to do.

CONCLUSION

Our constitution for admitting new states cannot be found in the text of our Constitution. It is a set of unwritten conventions and judicial doctrines created to manage political crises that arose during the expansion of the United States across a continent. This unwritten regime is normatively a mixed bag, perhaps superior in some respects to the British Imperial Constitution insofar as our version conferred "home rule" on white and Protestant colonists much more quickly than did the British. Whatever its normative merits or demerits, however, it has lessons to teach about how constitutional law is really made—not merely through founding moments in which plain text is popularly ratified nor from learned inferences from the spirit of that written law but also from partisan commitments to manage conflict over admission of new members. That conflict was exacerbated by the high stakes of admission created by a compromise that gave new members the same overrepresentation in the Senate enjoyed by the original states. Whatever the colonial aspirations of the Federalist Framers, those stakes produced an anticolonial constitution whenever the two parties competed for the support of settlers in the territories.