The Arizona "Junior Priority": How Would That Work?

Stuart L. Somach*

Section 301(b) of the Colorado River Basin Project Act (CRBPA) directs the Secretary of the Interior to curtail Central Arizona Project (CAP) diversions during shortage conditions in order to protect specified California uses and other "users of the same character" in Arizona and Nevada. In effect, the provision establishes a congressionally imposed "junior priority" for post-1968 Arizona entitlement holders, most notably the CAP, thereby subordinating Arizona's Colorado River apportionment to other states' apportionments during periods of scarcity. This Article examines whether that Arizona-specific subordination is consistent with constitutional limits on Congress's authority under principles of federalism.

The Article focuses on the Supreme Court's equal sovereignty doctrine, as articulated in Shelby County v. Holder and its antecedents, and on the closely related structural principles underlying the anti-commandeering cases. After tracing the development of equal sovereignty from the "equal footing" cases through Northwest Austin Municipal Utility District No. One v. Holder and Shelby County, the Article addresses whether Arizona's congressional delegation's support for the CRBPA can operate as a waiver of a structural federalism objection. Drawing on New York v. United States and related anti-commandeering precedent, it concludes that state consent cannot expand Congress's enumerated powers or ratify departures from the constitutional structure designed to preserve the federal-state balance.

Applying Shelby County's three-part framework, the Article argues that § 301(b) imposes uniquely disparate geographic treatment on Arizona; intrudes into an area of core state sovereign interest in water allocation and administration; and lacks a sufficiently tailored relationship to the CRBPA's stated purposes. On this account, § 301(b) exceeds constitutional limits on Congress's ability to diminish one State's sovereignty relative to its sister

---

* Mr. Somach is a founder Shareholder in the law firm of Somach Simmons & Dunn. He has represented the Central Arizona Project since 1993 in litigation and other matters, including litigation against the United States over the repayment of the Central Arizona Project. He represented the State of Arizona with respect to the negotiation of the current operating guidelines on the Colorado River. He also represented the Arizona Power Authority over the allocation of Hoover Power within Arizona.

States, rendering the provision vulnerable to invalidation under equal sovereignty and related federalism doctrines.

INTRODUCTION

In § 301(b) of the Colorado River Basin Project Act (CRBPA)[1] (§ 301(b)), Congress directed the Secretary to curtail diversions by the Central Arizona Project (CAP) from the Colorado River during times of shortage[2]:

> [T]o assure the availability of water in quantities sufficient to provide for the aggregate annual consumptive use by holders of present perfected rights, by other users in the State of California served under existing contracts with the United States by diversion works heretofore constructed, and by other existing Federal reservations in that State, of four million four hundred thousand acre-feet of mainstream water, and by users of the same character in Arizona and Nevada.

This provision effectively makes post-1968 entitlement holders in Arizona, including the CAP, "junior" in the Lower Basin.

According to the Supreme Court, Congress offends the equal sovereignty doctrine when a statute: (1) involves disparate geographic application between States (also known as "disparate treatment"); (2) involves an area of peculiarly State or local policy-making; and (3) is insufficiently related to the problem the statute seeks to solve.[3]

This article evaluates the equal sovereignty doctrine, and the intellectually adjacent constitutional doctrine of anti-commandeering, arguing that the application of these doctrines to § 301(b) has the effect of invalidating § 301(b). First, I examine the origins of the equal sovereignty principle, including its application in *Shelby County*. Because the Arizona congressional delegation acquiesced to § 301(b), I next examine whether the principles of State sovereignty encompassed by the equal sovereignty doctrine can be waived by a State's congressional delegation. Finally, I apply the equal sovereignty test to § 301(b).

I. EQUAL SOVEREIGNTY DOCTRINE

Congress's legislative authority under Article I of the United States Constitution is constrained by the "necessary and proper" clause, along with

---

1. Colorado River Basin Project Act, Pub. L. No. 90-537, 82 Stat. 885, 888 (1968) (codified at 43 U.S.C. § 1521(b)).

2. The CRBPA defines the triggering "shortage" condition as "any year in which, as determined by the Secretary, there is insufficient mainstream Colorado River water available for release to satisfy annual consumptive use of seven million five hundred thousand acre-feet in Arizona, California, and Nevada." *Id.*

3. Shelby County v. Holder, 570 U.S. 529, 542–45, 550–51 (2013).

a non-exclusive list of authorities in section 8 of Article I of the United States Constitution.[4] *McCulloch v. Maryland* interpreted this as the authority to adopt statutes which the Constitution does not prohibit.[5] However, another constraint on congressional authority to legislate is federalism.[6]

Federalism takes many forms, and equal sovereignty and anti-commandeering are doctrines that describe some of the constitutional limits on Congress's authority to interfere with state sovereignty.[7] Equal sovereignty refers to congressional treatment of States as equals, whether at the time of admission to the Union or in subsequent statutes.[8] Anti-commandeering refers to Congress's inability to "commandeer" state governments to achieve the ends of federal statutes.[9]

A. Shelby County

In 2013, the United States Supreme Court relied on the equal sovereignty doctrine to invalidate § 4 of the Voting Rights Act.[10] At its heart, the *Shelby County* Court's reliance on the equal sovereignty doctrine to strike down § 4 was a decision based in federalism—and a decision that elevated federalism concerns over the unique nature of statutes adopted to effectuate the Fifteenth

---

4. U.S. CONST. art. I, § 8.

5. McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 420 (1819) ("If [the necessary and proper clause] does not enlarge, it cannot be construed to restrain the powers of congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government.").

6. *See, e.g.*, Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); *see also* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012), for a more current view of federalism.

7. While no one disputes the proposition that:

> [T]he Constitution created a Federal Government of limited powers [citation]; and while the Tenth Amendment makes explicit that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"; the task of ascertaining the constitutional line between federal and state power has given rise to many of the Court's most difficult and celebrated cases.

New York v. United States, 505 U.S. 144, 155 (1992) (some internal quotes omitted).

8. Coyle v. Smith, 221 U.S. 559, 567 (1911) ("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.") (internal quotes omitted).

9. Murphy v. NCAA, 584 U.S. 453, 458 (2018) (federal statutes which "commandeer" State governments to enact federal regulatory programs are not "compatible with the system of 'dual sovereignty' embodied in the Constitution").

10. Shelby County v. Holder, 570 U.S. 529, 544 (2013).

Amendment.[11] In deciding *Shelby County*, the Court ignored stare decisis.[12] The Voting Rights Act, specifically §§ 4 and 5, had been challenged and found constitutional at least four times before.[13] Also, plaintiff Shelby County brought a facial constitutional challenge to §§ 4(b) and 5.[14]

As it concerns the federalism principles, the Court had rejected reliance on equal sovereignty principles in State challenges to federal statutes.[15] For example, in *South Carolina v. Katzenbach,* also a Voting Rights Act challenge, the Court rejected South Carolina's equal sovereignty argument, finding such principles available only in challenges to statutes "upon which States are admitted to the Union."[16]

The reversal of the *Katzenbach* limitation on equal sovereignty was signaled in a 2009 Voting Rights Act decision, *Northwest Austin Municipal Utility District No. One v. Holder*.[17] The Court's clever use of ellipses transformed the *Katzenbach* limitation into permission:

> The [Voting Rights] Act also differentiates between the States, despite our historic tradition that all the States enjoy equal sovereignty. Distinctions can be justified in some cases. "The doctrine of the equality of States . . . does not bar . . . remedies for *local* evils which have subsequently appeared." But a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets.[18]

---

11. *Id.* at 566 (Ginsburg, J., dissenting) ("It is well established that Congress' judgment regarding exercise of its power to enforce the Fourteenth and Fifteenth Amendments warrants substantial deference.").

12. *Id.* at 531 (majority opinion).

13. *See, e.g.*, South Carolina v. Katzenbach, 383 U.S. 301 (1966); Georgia v. United States, 411 U.S. 526 (1973); City of Rome v. United States, 446 U.S. 156 (1980); Lopez v. Monterey Cnty., 525 U.S. 266 (1999).

14. As the dissent noted: "A facial challenge to a legislative Act . . . is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Shelby County*, 570 U.S. at 581 (Ginsburg, J., dissenting) (internal quotes omitted).

15. James Blacksher & Lani Guinier, *Free at Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right to Vote* Shelby County v. Holder, 8 HARV. L. & POL'Y REV. 39, 44 n.24 (2014) ("After *Katzenbach*, it could not have been clearer that the equal sovereignty principle was limited exclusively to the admission of new states, and did not apply when Congress wielded its authority to protect the right to vote under the Fifteenth Amendments, as it did with the Voting Rights Act and its reauthorizations.").

16. 383 U.S. at 329.

17. Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 197 (2009).

18. *Nw. Austin*, 557 U.S. at 203 (citations omitted).

The quote from *Katzenbach* is misleading at best;[19] the strategic placement of ellipses creates an opening to *apply* equal sovereignty to protect States disparately treated by federal statute, as opposed to out of *Katzenbach*'*s* wholesale rejection of equal sovereignty in any dispute other than the admission of States to the Union.

Primarily in reliance on the above-quoted dicta from *Northwest Austin,* the *Shelby County* Court found § 4 was unconstitutional because States have a "fundamental principle of equal sovereignty."[20] The Court also relied on *Coyle v. Smith*, which explained the "[Nation] was and is a union of States, equal in power, dignity and authority."[21] Acknowledging that *Coyle* involved a challenge to an admission statute, "*Katzenbach* rejected the notion that the principle operated as a *bar* on differential treatment outside that context.[22] At the same time, as we made clear in *Northwest Austin,* the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States."[23] The Court goes on:

> Indeed, the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized. . . .At the same time, as we [noted] in *Northwest Austin,* the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States.
>
> The Voting Rights Act sharply departs from these principles. It suspends *all* changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D.C. . . . .
>
> And despite the tradition of equal sovereignty, the Act applies to only nine States (and several additional counties). While one State waits months or years and expends funds to implement a validly

---

19. The actual quote states:

> In acceptable legislative fashion, Congress chose to limit its attention to the geographic areas where immediate action seemed necessary. *The doctrine of equality of States, invoked by South Carolina, does not bar [Congress's] approach, for that doctrine applies only to the terms upon which States are admitted to the Union and not to the remedies for local evils which have subsequently appeared*.

Katzenbach, 383 U.S. at 328–29 (emphasis added) (citations omitted).

20. 570 U.S. at 544 (emphasis omitted).
21. *Id.* (internal quotes omitted); Coyle v. Smith, 221 U.S. 559, 567 (1911).
22. *Shelby County*, 570 U.S. at 544.
23. *Id.*

> enacted law, its neighbor can typically put the same law into effect immediately, through the normal legislative process.[24]

B. Locating Equal Sovereignty Concepts in the Constitution and Case Law

As many commentators noted, the *Shelby County* analysis was limited.[25] In his article *In Defense of the Equal Sovereignty Principle*,[26] Professor Thomas B. Colby acknowledges the shortcomings of the majority's analysis in *Shelby County* and explores whether the application of equal sovereignty principles should be limited to the terms upon which States are admitted to the union as *Katzenbach* held,[27] or whether the principle of equal sovereignty is instead a constitutional attribute of State sovereignty that continues after admittance. Colby concludes that "*Shelby County's* critics are only half right—and that the *Shelby County* majority, despite its cursory analysis, is half right too."[28]

1. Equal Sovereignty Is an Element of Constitutional Federalism and Not an Invented Doctrine

As the *Shelby County* dissent amplifies, "equal sovereignty" has long been considered synonymous with "equal footing," and argues the *Katzenbach* limitation should therefore remain in place.[29] "Equal footing" cases involved challenges to congressional enabling acts that limited State authority.[30] *Shelby County*'s invocation of equal sovereignty rests heavily on *Coyle,* another "equal footing" case.[31]

In *Coyle*, the Court considered the validity of a 1910 state law moving the state capitol from Guthrie to Oklahoma City.[32] Oklahoma's enabling act, by contrast, required Oklahoma to maintain the state capitol in Guthrie until at

---

24. *Id.* at 544–45 (quoting, in part, *Coyle*, 221 U.S. at 567, 580) (internal quotes omitted).

25. *See infra* Section III.C; *supra* note 14.

26. Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L. J. 1087 (2016).

27. *See, e.g.*, Zachary S. Price, *NAMUDNO's Non-Existent Principle of State Equality*, 88 N.Y.U. L. REV. ONLINE 24 (2013).

28. Colby, *supra* note 26, at 1091.

29. *Shelby County*, 570 U.S. at 587–90 (Ginsburg, J., dissenting).

30. *See, e.g.*, Pollard v. Hagan, 44 U.S. 212, 223 (1845) (explaining that a statutory term of admission runs afoul of the equal footing doctrine if it results in an unequal "municipal right of sovereignty").

31. *Shelby County*, 570 U.S. at 544.

32. Coyle v. Smith, 221 U.S. 559, 562–63 (1911).

least 1913.[33] The Supreme Court held "[t]he power to locate its own seat of government, and to determine when and how it shall be changed from one place to another" are essential state powers; to give effect to the enabling act provision would mean Oklahoma would "be placed upon a plane of inequality with its sister states in the Union."[34] The *Shelby County* Court cites a different, broader description of the nature of equality between the States: "Our Nation 'was and is a union of States, equal in power, dignity and authority.' . . . Indeed, 'the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized.'"[35]

In Colby's view, this broad declaration of State sovereignty makes the doctrine of equal sovereignty either the same as, or an umbrella for, "equal footing."[36] The *Shelby County* dissent's more limited interpretation of equal sovereignty is at odds with the equal footing cases themselves, which discuss the equal footing requirement within a larger constitutional structure.[37] In other words, equality among the States is a constitutional condition that applies after statehood. A series of intrastate waterway regulation disputes highlight pre-*Shelby County* cases that apply the equal sovereignty concept.

2. Intrastate Waterway Regulation Cases

Numerous States—Illinois, Oregon, and California, among others—were admitted to the Union with language in their enabling acts providing that navigable waters in the new State "shall be common highways and forever free."[38] When State or local governmental authorities built bridges that interfered with navigation, private entities sued to have the bridges removed, in reliance on the language in the enabling act.[39] Cases involving these types of disputes provide another means by which to evaluate the breadth of the equal sovereignty principle.

---

33. *Id.* at 564.
34. *Id.* at 565.
35. *Shelby County*, 570 U.S. at 544 (quoting *Coyle*, 221 U.S. at 567, 580).
36. Colby, *supra* note 26, at 1108.
37. *Shelby County*, 570 U.S. at 588–89 (Ginsburg J., dissenting).
38. *See, e.g.*, Ordinance of 1787: The Northwest Territorial Government, art. IV (1787).
39. *See* cases cited *infra* Sections I.B.2.a, I.B.2.b.

a. Escanaba Co. v. Chicago

In *Escanaba Co. v. Chicago*, the Supreme Court analyzed whether bridges located on navigable streams were subject to federal or state authority.[40] Escanaba and Lake Michigan Transportation Company (Escanaba) sued the City of Chicago over a municipal ordinance regulating the operation of draw bridges located on the Chicago River.[41] The ordinance required drawbridges be closed at specific times each day, during which Escanaba vessels could not navigate beyond such bridges.[42] Escanaba claimed the ordinance, by temporarily preventing navigation of the Chicago River, violated the Commerce Clause and Northwest Ordinance, the act which established conditions for admitting new States to the Union from the Northwest Territory.[43]

Escanaba establishes that: (1) for subjects of national character, Congress has exclusive regulatory authority, which must be applied with "uniformity of regulation affecting alike all States" and (2) for subjects that are local in their nature or operation, or are a mere aid to commerce, the State may exert its authority to regulate the subject, which authority is reserved to the State until Congress interferes and supersedes it pursuant to the Supremacy Clause.[44] The Court reasons that States have such authority because they are the first to know the importance of such activities "and are more deeply concerned . . . [about] their wise management."[45] "[T]he states have full power to regulate within their limits matters of internal police, . . . [and] promote the peace, comfort, convenience, and prosperity of their people."[46] This power includes "the construction of roads, canals, and bridges, and the establishment of ferries."[47]

The first question was whether the operation of bridges spanning the Chicago River is a subject of national character. The Court found that while the Chicago River is navigable and facilitates considerable interstate and foreign commerce, the operation of the bridges itself was a subject local in nature.[48] The Chicago River is entirely within the State of Illinois: "Illinois is more immediately affected by the bridges over the Chicago river and its branches than any other state, and is more directly concerned for the

40. Escanaba & Lake Mich. Transp. Co. v. City of Chi., 107 U.S. 678, 679 (1883).
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 687.
45. *Id.* at 683.
46. *Escanaba Co.*, 107 U.S. at 683.
47. *Id.*
48. *Id.*

prosperity of the city of Chicago, for the convenience and comfort of its inhabitants, and the growth of its commerce."[49] Therefore, the Court expressed that the operation of bridges over navigable streams that are entirely within the limits of a State is local in their nature.[50]

Next, the Court answered whether Congress's enactment of the Northwest Ordinance, and specifically the language that navigable waters "shall be common highways and forever free," stripped Illinois of its authority. The Court held that pursuant to the equal-footing doctrine, the Northwest Ordinance's limitations upon a territory's powers "ceased to have any operative force" after statehood.[51] The Court also rejected the argument that federal appropriations to improve the Chicago River stripped the State of its authority, stating that congressional improvements would destroy a State's authority only when such improvements directly interfere "so as to supersede [State] authority and annual [sic] what [the State had] done in the matter."[52]

b. Willamette Iron Bridge Co. v. Hatch

In *Willamette Iron Bridge Co. v. Hatch*, the Supreme Court again reviewed whether bridges located on navigable streams were subject to federal or state authority.[53] The Oregon Legislature authorized Portland Bridge Company to construct a bridge across the Willamette River, a river wholly within the State, "for any and all purposes of travel or commerce."[54] As assignee of the Portland Bridge Company, Willamette Iron Bridge Company began construction in 1880.[55] Hatch and Lownsdale (collectively, "Hatch") owned or leased wharves and warehouses upstream of the bridge.[56] Hatch also owned licensed vessels to assist by towing arriving and departing vessels.[57] Hatch filed suit, claiming the bridge will prevent vessels from navigating the Willamette River in violation of the Commerce Clause and the Act of Congress of February 14, 1859 (11 Stat. 383), admitting Oregon into the Union ("Act of 1859").[58]

---

49. *Id.*
50. *Id.* at 687; *see also* Newark v. Cent. R.R. Co., 297 F. 77, 81 (3d Cir. 1924) ("Until the dominant power given by the Constitution is exercised by appropriate legislation, the power of the states is plenary.").
51. *Escanaba Co.*, 107 U.S. at 688.
52. *Id.* at 690.
53. Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1, 6 (1888).
54. *Id.* at 2.
55. *Id.* at 3.
56. *Id.* at 4.
57. *Id.*
58. *Id.* at 6.

Similar to *Escanaba*, *Willamette* establishes that: (1) until Congress enacts laws regulating navigable waters, there is no federal common law prohibiting the construction of obstructions and nuisances in navigable waters; and (2) until Congress enacts such laws, the States have plenary power over navigable waters.[59]

Further, the *Willamette* Court evaluated the same language regarding "navigable waters" being "common highways, and forever free."[60] Relying on *Escanaba*, among other cases, the Court found Oregon was not prevented from constructing bridges over navigable streams for two reasons: first, "states do have the same power to authorize the erection of bridges, dams, etc., in and upon the navigable waters wholly within their limits, as have the original states;"[61] and second, § 2 of the Act of 1859 "does not refer to physical obstructions, but to political regulations which would hamper the freedom of commerce."[62] Thus, the Court found the Act of 1859 did not regulate navigable waters, and Oregon retained plenary power to construct the bridge.[63]

c. Conclusions Regarding Intrastate Water Regulation Cases

The cases discussed above[64] support Colby's view—and the *Shelby County* Court's view—that the equal sovereignty doctrine is a broad constitutional principle that applies to States whether at statehood or after. However, the cases all emphasize the intrastate nature of the waterways that were subject to challenges.

*C. The Equal Sovereignty Doctrine in Lower Courts Post-*Shelby County

The *Shelby County* dissent characterized the majority opinion as a "ratchet[ing] up" of "pure dictum in *Northwest Austin,* attributing breadth to the equal sovereignty principle in flat contradiction of *Katzenbach*," and criticized the plurality's unwillingness to wrestle with—or even mention—the historical deference to congressional action under the Civil War

59. *Id.* at 12.
60. *Id.* at 4.
61. *Id.* at 10.
62. *Id.* at 12.
63. *Id.*
64. I examined additional equal footing cases but included only those that are most relevant to the discussion.

Amendments.[65] Academic and judicial commentators (on the left and the right) panned Justice Roberts' reliance on the doctrine of equal sovereignty because of the paucity of intellectual support in the opinion itself, including the utter failure to engage in any constitutional analysis.[66] The opinion was also poorly received because of the widely accepted view that the doctrine is an "invention."[67]

Despite these shortcomings, states have begun to challenge federal statutes in reliance on the equal sovereignty doctrine. The opinions to date reflect a certain amount of flailing, as the Roberts' opinion is a slender reed upon which to apply (let alone extend) the *Shelby County* rule.[68] In all examples that could be located, courts declined to find the challenged statutes unconstitutional based on equal sovereignty principles either because the challenged statute failed one of the three prongs of the test, or because the court found a better basis for ruling and decided not to reach the issue.[69]

However, the indication is that the Supreme Court finds the equal sovereignty principle to be alive and well. In *Nat'l Pork Producers Council v. Ross*, a Dormant Commerce Clause challenge to a California pig welfare statute, the majority invokes equal sovereignty to take a shot at one of the opinions in dissent:

> But if that makes all the difference, it means voters in States with smaller markets are constitutionally entitled to greater authority to regulate in-state sales than voters in States with lager markets. So

---

65. Shelby County v. Holder, 570 U.S. 529, 566–70, 588 (2013) (Ginsburg, J., dissenting).

66. *See, e.g.*, Jon Greenbaum et al., Shelby County v. Holder*: When the Rational Becomes Irrational*, 57 HOW. L.J. 811, 843 (2014) ("The problem, of course, is that Chief Justice Roberts' reliance on 'the fundamental principle of equal sovereignty' is reliance on a constitutional principle that, to the extent it exists at all, is wholly inapplicable to the situation the Court faced in *Shelby County*.").

67. Neal Kumar Kaytal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2133 n.103 (2015); *see also* Colby, *supra* note 26, at 1090–97 (collecting highlights of *Shelby County*'s bad press).

68. *See, e.g.*, Mayhew v. Burwell, 772 F.3d 80, 93 (1st Cir. 2014) (rejecting Maine's challenge to expansion of Medicaid because the challenge "fails at every step of the analysis"); Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 730 F.3d 208, 238–39 (3d Cir. 2013) [hereinafter *NCAA*] (rejecting the challenge to a federal sports betting prohibition on the grounds that it failed the equal sovereignty test); In re Border Infrastructure Env't Litig., 284 F. Supp. 3d 1092, 1145 (S.D. Cal. 2018) (rejecting California's challenge to a homeland security statute on the grounds that it did not even offend disparate treatment of states); United States v. Pickard, 100 F. Supp. 3d 981, 1011–12 (E.D. Cal. 2015) (rejecting an equal sovereignty challenge to a prosecutorial guidance document on charging marijuana offenses because, *inter alia*, the document did not involve any action by Congress).

69. *See, e.g.*, cases cited *supra* note 68.

> much for the Constitution's "fundamental principle of equal sovereignty among the states."[70]

II. ANTI-COMMANDEERING DOCTRINE

A. Based on Principles from Anti-Commandeering Cases, There Is No Waiver of an Equal Sovereignty Challenge

Before analyzing whether § 301(b) violates the equal sovereignty doctrine under the three-part *Shelby County* test, I discuss below whether the State of Arizona, or another plaintiff, may have waived such a challenge due to the State's support of the CRBPA. This question has been raised given that § 301(b)'s legislative history is replete with statements made by members of the Arizona congressional delegation in support of the CRBPA and understanding of the consequences of shortage to Arizona resulting from § 301(b).[71]

If the principle of equal sovereignty is merely "the truism that the Union under the Constitution is essentially one of States equal in local governmental power,"[72] this principle acts as a restraint on *Congress's* authority. Thus, a State's *congressional* delegation that acquiesces to (or even embraces) legislation that is contrary to equal sovereignty cannot act as a waiver.[73] More directly, the anti-commandeering case of *New York v. United States* held that the "constitutional authority of Congress cannot be expanded by the 'consent' of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States."[74]

In *New York*, the Court addressed whether the take-title provision of the Low-Level Radioactive Waste Policy Act (Radioactive Waste Act) violated the anti-commandeering doctrine.[75] Among the defenses offered was the fact

---

70. 598 U.S. 356, 388 (2023) (quoting Shelby County v. Holder, 570 U.S. 529, 544 (2013)).

71. *See, e.g.*, *Colorado River Basin Project: Hearing on H.R. 4671 and Similar Bills Before the Subcomm. on Irrigation & Reclamation of the H. Comm. on Interior and Insular Affairs*, 89th Cong., 54–55 (1965) (statement of Rep. Udall, Member, Subcomm. on Irrigation and Reclamation) ("We have, as part of our great agreement with [California], agreed that the central Arizona project will be junior to the first 4.4 million acre-feet annual usage in California until such time as we make the river whole through importation or augmentation. These are the projections that existing users have, and we want to see that they get those protections. . . . Arizona will bear the risk until such time as we augment the river and make it whole. I think we will have it augmented before this time comes.").

72. Virginia v. West Virginia, 246 U.S. 565, 593 (1918).

73. *See id.* at 604.

74. New York v. United States, 505 U.S. 144, 180–83 (1992).

75. *Id.* at 144–45.

that New York's congressional delegation supported the statute, as well as state officials, and thus New York waived any anti-commandeering violations.[76]

Justice O'Connor found New York's support for the Radioactive Waste Act to be immaterial, and respondent's argument to be "troubling":

> State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power. Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.[77]

Thus:

> Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the "consent" of state officials. . . . The constitutional authority of Congress cannot be expanded by the "consent" of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States. State officials thus cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution.[78]

Accordingly, whether New York consented to the Radioactive Waste Act made no difference.[79]

---

76. *Id.* at 181 ("[P]ublic officials representing the State of New York lent their support to the Act's enactment.").

77. *Id.* at 181 (internal quotations and citations omitted).

78. *Id.* at 182.

79. *See also* Alison L. LaCroix, *The Interbellum Constitution: Federalism in the Long Founding Moment*, 67 STAN. L. REV. 397, 441–42 (2013):

> As modern federalism cases such as *New York v. United States*, *Printz v. United States*, and even *Garcia v. San Antonio Metropolitan Transit Authority*—and, of course, the portion of the *NFIB* decision that rejected the Commerce Clause and Necessary and Proper Clause justifications for the individual mandate—demonstrate, Congress can no longer use state consent as a defense against the charge that its regulation violates the Tenth Amendment.

B. The Leading Cases Instruct That the Anti-Commandeering Doctrine Protects the Federal-State Balance

If sovereignty cannot be waived for purposes of an anti-commandeering analysis, it is fair to assume that sovereignty cannot be waived for purposes of an equal sovereignty analysis. While the anti-commandeering doctrine is grounded in the Tenth Amendment and equal sovereignty apparently arises from the structure of the constitution,[80] the role of these legal principles in the operation of federalism under our system is similar.

The Supreme Court's foremost anti-commandeering cases are *New York v. United States*, *Printz v. United States*, and *Murphy v. NCAA*. Each case identifies the central component of the anti-commandeering doctrine: that the structure of our federal system requires a balance between sovereignties, the authority of each shall not be diminished or enlarged.[81]

1. *New York v. United States*

In *New York*, Justice O'Connor addressed the constitutionality of the Radioactive Waste Act which, *inter alia*, required states to take title to low-level radioactive waste unless the state was able to dispose of that waste—either itself or through an interstate compact—by a certain date.[82] The Court held that Congress could not compel a State "to enact or administer a federal regulatory program."[83] When States are commandeered in this manner, the Court reasoned, they cease to operate as "distinct sovereignties" because they act in obedience to another government rather than to their own constituents.[84]

---

80. Colby, *supra* note 26, at 1132–36.

81. Murphy v. Nat'l Collegiate Athletic Ass'n, 584 U.S. 453, 473–74 (2018) (describing the importance of the anti-commandeering doctrine).

82. New York v. United States, 505 U.S. 144, 153–54 (1992).

83. *Id.* at 188.

84. *Id.* at 155 (quoting THE FEDERALIST No. 82, at 491 (Alexander Hamilton) (Clinton Rossiter ed. 1961)); *see also* Heather K. Gerken, Comment, *Slipping the Bonds of Federalism*, 128 HARV. L. REV. 85, 96 (citations omitted):

> While the [*New York*] Court discusses both state and federal power, what gets the argument up and running is the notion that commandeering intrudes on state sovereignty. Indeed, as the Court hones in on the core constitutional infirmity in the challenged statute—the "take title" provision—its discussion focuses almost exclusively on protecting state sovereignty.

2. *Printz v. United States*

In *Printz v. United States*, the Court reviewed whether Congress could compel state and local law enforcement officials to conduct background checks on prospective handgun buyers.[85] Declining to find such congressional authority, the Court focused on the need to preserve state sovereignty:

> This separation of the two spheres [state and federal government] is one of the Constitution's structural protections of liberty. "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."[86]

Thus, "[i]t is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority."[87] When Congress commandeers a state legislature or its officials, Congress offends "the very principle of separate state sovereignty" and the federal system.[88]

3. *Murphy v. NCAA*

In *Murphy*, the Court examined whether the Professional and Amateur Sports Protection Act unconstitutionally commandeered the New Jersey Legislature by preventing it from repealing a state law that prohibited sports gambling.[89] The Court found that there was no meaningful difference between directing a State legislature to enact a new law or prohibiting the State from doing so.[90] The Court reiterated that such commandeering infringes on the "basic structure of government established under the Constitution."[91]

---

85. 521 U.S. 898, 902 (1997).
86. *Id.* at 921 (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)).
87. *Id.* at 928.
88. *Id.* at 932.
89. Murphy v. Nat'l Collegiate Athletic Ass'n, 584 U.S. 453, 453–54 (2018).
90. *Id.* at 474–75.
91. *Id.* at 471–72; *see also id.* at 473 (quoting *Printz*, 521 U.S. at 921) ("[T]he [anti-commandeering doctrine] serves as 'one of the Constitution's structural protections of liberty.'").

C. The Equal Sovereignty Doctrine Also Works to Secure the Federal-State Balance

The three cases make clear the anti-commandeering doctrine's specific purpose is to prevent Congress from instructing the States to legislate or regulate in particular ways—regardless of whether the federal government has authority over the subject matter. In this respect, the anti-commandeering decisions fit within the equal sovereignty doctrine: whereas federal statutes offend equal sovereignty when the statute imposes federal law or regulation directly on fundamentally State or local policymaking, federal statutes offend anti-commandeering when the statute directs the type of legislation a State may or may not adopt. As *New York* makes clear, States cannot waive anti-commandeering violations because it will upset the federal balance.[92] Similarly, there is no reason why States should be afforded the opportunity to upset the federal balance by waiving equal sovereignty violations. A State is the sum of its sovereign authority. If a State's sovereignty could be reduced unequally, then the States would be in no relevant sense "indestructible."[93]

With that said, *Shelby County* provides a limited exception to equal sovereignty violations: in "exceptional conditions"[94] and when the "disparate geographic coverage is sufficiently related to the problem it targets."[95] Thus, while generally inappropriate, the tailored exception secures the "harmonious operation of the scheme upon which the Republic was organized,"[96] while permitting flexibility in resolving "local evils" that subsequently appear after entering the Union.[97]

D. The State's Congressional Delegation Also Supported the Challenged Legislation in Shelby County

Like the Arizona congressional delegation's support for § 301(b), the jurisdictions targeted and covered by the preclearance formula had expressed broad support for reauthorizing the Voting Rights Act ("VRA"):

---

92. New York v. United States, 505 U.S. 144, 145 (1992).

93. Texas v. White, 74 U.S. 700, 725 (1869) ("The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.").

94. Shelby County v. Holder, 570 U.S. 529, 535 (2013) (quoting South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966)).

95. *Id.* at 542–45.

96. *Id.* at 544 (quoting Coyle v. Smith, 221 U.S. 559, 567 (1911)).

97. Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009) (quoting *Katzenbach*, 383 U.S. at 328–29).

> In 2006, Congress again familiarized itself with the operation of the statute; 98 Senators and 390 Representatives then voted to extend Section 5's application in the currently covered jurisdictions for an additional 25 years, subject to a review by Congress after 15 years. The court of appeals applied settled legal principles in affirming Congress's nearly unanimous determination that Section 5 remains an appropriate means of enforcing the guarantees of the Fourteenth and Fifteenth Amendments.[98]
>
> In 2006, Congress again reauthorized Section 5. . . . Congress enacted the 2006 Amendment by a unanimous (98-0) vote in the Senate and a nearly unanimous (390-33) vote in the House of Representatives.[99]
>
> VRA § 5, which originally was scheduled to expire in 1970, has been renewed by Congress four times. The 2006 renewal was endorsed by an overwhelming majority of both houses of Congress. The vote in the Senate was 98 to 0, and included Senators from every covered State. Moreover, the original enactment in 1965 and each of the reauthorizations of § 5 in 1970, 1975, and 1982 have been overwhelmingly bipartisan. In light of the polarization between the two parties that prevails in our day, we find the overwhelming bipartisan support for § 5's reauthorization a significant fact.[100]

The *Shelby County* Court made no mention of the record regarding the covered jurisdictions' support for reauthorizing the VRA. The lack of discussion of any potential waiver by a State in *Shelby County* further supports the conclusion that the Arizona congressional delegation could not have waived the State's sovereignty when they voted for § 301(b).

It is also worth noting that the plaintiff in *Shelby County* was not the State of Alabama—it was the county administering the elections.[101] Similarly, a political subdivision was the plaintiff in *Northwest Austin*.[102] The Court has had opportunities to carve out an exception to the equal sovereignty principle that might be applied against lesser political subdivisions of States. It is not clear how congressional interference with a local government's authority

---

98. Brief for the Respondents in Opposition at 31, Shelby County v. Holder, 570 U.S. 529 (2013) (No. 12-96).

99. Brief for the Federal Respondent at 5, Shelby County v. Holder, 570 U.S. 529 (2013) (No. 12-96).

100. Brief for Historians & Social Scientists as Amici Curiae Supporting Respondents at 2–3, Shelby County v. Holder, 570 U.S. 529 (2013) (No. 12-96).

101. *Shelby County*, 570 U.S. at 529.

102. *Nw. Austin*, 557 U.S. at 196.

offends federalism, but the Court's silence on this point suggests that the rule might be applied equally against any State or political subdivision of the State—such as Shelby County.

III. ANALYSIS OF § 301(B) UNDER EQUAL SOVEREIGNTY TEST

The three elements of an equal sovereignty challenge are: (a) a statute with disparate geographic application—also known as "disparate treatment;" (b) involving an area of peculiarly State or local policymaking; and (c) that is insufficiently related to the problem the statute seeks to solve.[103] Below, I discuss the relevant portions of the CRBPA and how the three-part test might be applied in an equal sovereignty challenge to § 301(b).

A. Disparate Treatment

The CRBPA generally is disparate in its geographic application. This on its own is not necessarily problematic—the Act's purpose is to identify and fund infrastructure build-out in the Colorado River Basin.[104] By its terms, the problem the Act seeks to solve is geographically limited. In this respect, the CRBPA is analogous to the federal immigration statute challenged by *In Re Border* and discussed above.

However, § 301(b) is further geographically disparate—and results in "disparate treatment" to Arizona, unlike all the statutes involved in the decision discussed. Although the CRBPA authorizes several projects, only the CAP and the State of Arizona are required by the CRBPA to forfeit a portion of their water apportionment in order to qualify for federal financing of the authorized project.[105] Effectively, the Act gives Arizona the CAP, and then takes away Arizona's Colorado River apportionment anytime the State might actually need the water.

B. Unique Area of State or Local Policymaking

This is likely the critical prong of the *Shelby County* test for a § 301(b) challenge. The CRBPA generally does not involve an area of uniquely State or local policymaking—the federal government, under the Reclamation Act, has been authorizing infrastructure projects since the turn of the twentieth

---

103. *Shelby County*, 570 U.S. at 530.

104. *See, e.g.*, *infra* text accompanying note 109.

105. Colorado River Basin Project Act, Pub. L. No. 90-537, 82 Stat. 885 (codified at 43 U.S.C. § 1521(b)).

century.[106] In addition, after *Arizona v. California*, the Lower Colorado River is uniquely federal—both in its administration and its method of apportionment.[107]

In *Arizona v. California,* the Supreme Court found that by adopting the 1928 Boulder Canyon Project Act, "Congress . . . intended to and did create its own comprehensive scheme for the apportionment among California, Arizona, and Nevada of the Lower Basin's share of the mainstream waters of the Colorado River."[108] Implementation of that "comprehensive scheme" included ratification by six of the seven basin States, including California, and authorizing the Secretary of the Interior ("Secretary") to "accomplish the division" between the Lower Basin States through contracts.[109] Congress differentially apportioned the Lower River to the states of California, Nevada, and Arizona, but the statutory division was not effective until: (a) the Boulder Canyon Project Act had been ratified by six of the seven States (including California); and (b) each State entered into a § 5 contract with the Secretary.[110] Both the administration of the Lower Colorado River and the apportionment by Congress and the Secretary's contracts make the Lower Colorado River a subject of federal policymaking in this unique way.

However, § 301(b) does involve an area of state or local policymaking insofar as the Secretary is directed to interpret *Arizona v. California* to deprive Arizona of its apportionment in times of shortage. State sovereignty[111] over regulation and administration of intrastate waters—*or* over a State's apportionment of an interstate river—is inherent in the Desert Land Act and cases interpreting the Desert Land Act. Arizona is no different. Its statutes provide: "The waters of all sources [within the State] belong to the public and are subject to appropriation and beneficial use as provided in this chapter."[112] Moreover, *Escanaba Co. v. Chicago* stands for the proposition that State sovereignty includes the ability to regulate intrastate

---

106. Reclamation Act of 1902, ch. 1093, 32 Stat. 388 (1902).
107. Arizona v. California, 373 U.S. 546, 564–65 (1963).
108. *Id.* at 564–565.
109. *Id.* at 561, 565.
110. *Id.*
111. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 536 (2012) (citations omitted):

> State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power. Because the police power is controlled by [fifty] different States instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed.

112. ARIZ. REV. STAT. ANN. § 45-141(A) (2021).

waters and that federal supremacy only applies if the federal statute is for a "national" purpose.[113] In this respect, the effect of § 301(b)—diminishing or depriving Arizona of CAP water—is analogous to § 4 of the Voting Rights Act, which the Court found to interfere with States' constitutional authority to regulate their own elections.

C. Sufficiently Related to the Problem

The purpose of the CRBPA is:

> [T]o provide a program for the further comprehensive development of the water resources of the Colorado River Basin and for the provision of additional and adequate water supplies for use in the upper as well as in the lower Colorado River Basin. This program is declared to be for the purposes, among others, of regulating the flow of the Colorado River; controlling floods; improving navigation; providing for the storage and delivery of the waters of the Colorado River for reclamation of lands, including supplemental water supplies, and for municipal, industrial, and other beneficial purposes; improving water quality; providing for basic public outdoor recreation facilities; improving conditions for fish and wildlife, and the generation and sale of electrical power as an incident of the foregoing purposes.[114]

The CRBPA also specified Arizona's repayment obligations for the CAP.[115]

Section 301(b) does not advance the goals of the CRBPA. In fact, it is arguably contrary to the goals insofar as it authorizes the CAP, finances the CAP, provides for Arizona to repay its CAP obligations, and then deprives Arizona of its water supply in times of shortage. In this respect, § 301(b) seems to satisfy the third step of the *Shelby County* test better than § 4 of the Voting Rights Act, which to date is the only statutory provision invalidated by principles of equal sovereignty.

IV. CONCLUSION

The language of § 301(b) clearly discriminates against the State of Arizona and the CAP, treating it differently than any other State on the Colorado River. The foundation of western water law and water rights is State

---

113. Escanaba & Lake Mich. Transp. Co. v. City of Chicago, 107 U.S. 678, 687 (1883).
114. 43 U.S.C. § 1501(a).
115. *Id.* § 1521(a).

primacy. In treating Arizona differently than any other State with respect to its apportionment of Colorado River water, Congress acts in a manner that clearly intrudes on the sovereign rights of Arizona violating both the Sovereign Rights and the Anti-Commandeering Doctrines, and provides Arizona with legal defenses to the application of § 603(b).