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POPULAR SOVEREIGNTY AND THE DOCTRINE OF PLENARY STATE LEGISLATIVE POWER

NINA NEFF*

ABSTRACT

Unlike the federal legislature, state legislatures possess plenary power, except insofar as they are limited by state constitutions. Though state plenary power is rooted in the legal authority of popular sovereignty, the doctrine of plenary state legislative power dulls democratic power by eliminating a potential right to local self-governance and by inducing courts to underenforce constitutional limits on state legislatures. These trends do not square with our democratic intuitions or with our desire to have a sense of efficacy, energy, and power in our own ability to influence the laws of our communities. This Article suggests that the doctrine of state legislative plenary power as it is reflected in contemporary case law is inconsistent with historical conceptions of popular sovereignty that dominated intellectual life at our country's founding. It urges courts, scholars, and the public to give renewed attention to the intellectual

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2

WILLIAM & MARY LAW REVIEW ONLINE [Vol. 62:001

underpinnings of popular sovereignty and imagines what it might look like for a state's citizens to actively and independently decide which powers they cede to their state legislatures—and which they retain for themselves.

2020] POPULAR SOVEREIGNTY 3

TABLE OF CONTENTS

INTRODUCTION 4

I. PROBLEMS WITH THE DOCTRINE OF PLENARY POWER FOR
STATE LEGISLATURES 4

A. Underdevelopment of a Right to Local Self-Rule 5

*B. Plenary Legislative Power as a Limit on State Courts’
Interpretive Function* 12

II. POPULAR SOVEREIGNTY IN TENSION WITH THE
DOCTRINE OF LEGISLATIVE PLENARY POWER. 17

A. Popular Sovereignty as Indivisible Authority 18

B. Two Challenges to Plenary Power of State Legislatures . . 20

CONCLUSION 23

INTRODUCTION

Unlike the U.S. Congress, which is a legislature of limited, enumerated powers, state legislatures are presumed in constitutional law to have broad plenary power, except insofar as they are limited (explicitly or impliedly) by the state and federal constitutions.¹ Vermont Supreme Court Chief Justice Isaac Fletcher Redfield wrote in 1854 that state legislatures “have the same unlimited power in regard to legislation which resides in the British parliament, except where they are restrained by written constitutions.”² He argued that legislative power was committed “in the most general and unlimited manner to the several state legislatures, saving only such restrictions as are imposed by the constitution of the United States, or of the particular state in question.”³

Part I of this Article argues that the doctrine of general and unlimited state power results in anti-democratic trends within state and local government law doctrine, namely underdevelopment of a communal right to self-government and underenforcement of state constitutional limits on legislative power. Part II examines historical conceptions of popular sovereignty that dominated intellectual life at our country’s founding and concludes that the doctrine of state legislative plenary power as it is reflected in contemporary case law is inconsistent with the premise that all legitimate sovereign authority resides with the people. The Article concludes by urging scholars, courts, and the public to intentionally reassert the democratic public’s rightful control over state and local government law.

I. PROBLEMS WITH THE DOCTRINE OF PLENARY POWER FOR STATE LEGISLATURES

The doctrine of plenary legislative power deeply affects our conception both of what counts as a legitimate constitutional right and

1. RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 54-55 (8th ed. 2016).

2. *Thorpe v. Rutland & Burlington R.R. Co.*, 27 Vt. 140, 142 (1854).

3. *Id.* at 143.

of who counts as a legitimate interpreter of those rights. This Part argues that the doctrine has served to (1) discount any potential federal constitutional right to local self-governance, despite its deep importance to our democratic institutions, and (2) elevate legislatures over courts as the proper interpreter of state constitutional rights.

A. Underdevelopment of a Right to Local Self-Rule

Multiple, often overlapping local governments significantly impact our lives in matters of education, policing, incarceration, emergency medical services, public safety, utility provision, local infrastructure maintenance, taxes, housing, sanitation, healthcare, permitting, and other aspects of daily living.⁴ The Supreme Court has recognized that these institutions structure the everyday affairs of most Americans and that their “responsible and responsive operation” is “of increasing importance to the quality of life of more and more of our citizens.”⁵

Yet Americans enjoy few protections of their capacity for local self-government. The plenary power of state legislatures includes power over local governments. “Plenary power in the legislature for all purposes of civil government is the rule” of state government,⁶ and municipal governments are mere “creatures of the [l]egislature.”⁷ Professor Gerald Frug has argued that the United States as a country has chosen to have “powerless cities” and that it has made “this choice ... largely ... through legal doctrine.”⁸

The earliest and most decisive version of this doctrine was Dillon’s Rule, under which municipal governments could legally exercise only powers that were (1) expressly granted by the state legislature, (2) fairly or necessarily implied from expressly granted

4. See BRIFFAULT & REYNOLDS, *supra* note 1, at 2.

5. *Avery v. Midland Cnty.*, 390 U.S. 474, 475-76, 481-82 (1968) (applying the one-person, one-vote argument to local governments despite Texas’s argument that local governments, as mere administrative arms of the state, did not present any equal protection difficulties in voting matters).

6. *Gangemi v. Berry*, 134 A.2d 1, 5 (N.J. 1957) (quoting *People ex rel. Wood v. Draper*, 15 N.Y. 532, 543 (1857)).

7. *Holmes v. City of Fayetteville*, 150 S.E. 624, 627 (N.C. 1929).

8. Gerald E. Frug, *The City As a Legal Concept*, 93 HARV. L. REV. 1057, 1059-60 (1980).

powers, or (3) essential and indispensable.⁹ The rule included a standard of strict judicial scrutiny requiring that “any fair doubt as to the existence of power [be] resolved by the courts ... against the existence of the power.”¹⁰ Though Dillon’s Rule has generally fallen into disfavor, local governments in many jurisdictions still cannot make laws except pursuant to explicit grants of power from the state legislature.¹¹

Indeed, local governments do not have a right to exist,¹² to assert rights on behalf of their residents,¹³ or to consent or object to annexation.¹⁴ Rather, states have the power to create local governments (or not) and the power to delegate authority to them (or not).¹⁵ Local communities may be regulated by jurisdictions in which their residents cannot vote¹⁶ and may be outvoted on local matters by voters who do not live in the community.¹⁷ Municipalities are

9. BRIFFAULT & REYNOLDS, *supra* note 1, at 327 (quoting JOHN FORREST DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 89 (4th ed. 1890)).

10. *Merriam v. Moody’s Ex’rs*, 25 Iowa 163, 170 (1868). For an example of the strict judicial construction at play in Dillon’s Rule cases, see *Early Estates, Inc. v. Hous. Bd. of Rev.*, 174 A.2d 117, 117, 119 (R.I. 1961) (finding the locality did not have power to establish regulations requiring landlords to provide hot water when the State had empowered the locality to adopt laws “for the establishment and enforcement[] of minimum standards for dwellings” but had not specifically authorized regulation of hot water).

11. See generally DALE KRANE, PLATON N. RIGOS & MELVIN B. HILL, JR., HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK (2001).

12. See *Hunter v. City of Pittsburgh*, 207 U.S. 161, 179 (1907) (holding that citizens of the States “have no right by contract or otherwise in the unaltered or continued existence of” their local government corporations).

13. See generally Kaitlin Ainsworth Caruso, *Associational Standing for Cities*, 47 CONN. L. REV. 59, 62, 68-71 (2014) (discussing federal case law denying municipalities standing to sue *parens patriae* on behalf of residents on the theory that political subdivisions have no sovereignty except that derived from the State).

14. *Jordan v. Town of Morningside*, 30 Fed. App’x 144, 147 (4th Cir. 2002) (holding that “the state is vested with the exclusive power to make annexation decisions”).

15. See, e.g., *Williams v. Baltimore*, 289 U.S. 36, 40 (1933) (“A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator.”).

16. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 61, 75 (1978) (holding that Alabama was constitutionally permitted to empower the city to exercise police power over an area within three miles of jurisdiction boundaries). For a general review of the constitutional issues attending extraterritorial regulation, see David E. Hunt, Comment, *The Constitutionality of the Exercise of Extraterritorial Powers by Municipalities*, 45 U. CHI. L. REV. 151, 157-71 (1977).

17. *May v. Town of Mountain Village*, 132 F.3d 576, 577, 579 (10th Cir. 1997) (upholding town charter’s extension of voting rights to nonresident property holders even when nonresidents could outvote residents).

severely limited in their control of incorporation, annexation, and jurisdictional boundaries. As mere creatures of the state, municipalities may be created, altered, and dismantled at the state's convenience.¹⁸ Even constitutional and statutory provisions that supposedly confer significant autonomy upon cities may, through the combination of powers granted and withheld, actually substantively limit the actions available to local governments.¹⁹

It is not only state courts that have been hostile to local government autonomy. Federal courts have not recognized any collective right of Americans to local self-governance.²⁰ Instead, they have limited the states' powers to create, structure, control, and dismantle local government only when such actions violate individual constitutional rights.²¹ Federal courts have proven to be the most significant constitutional limit on state control of localities. For example, the Supreme Court has struck down state statutes that prohibit localities from undertaking school bussing desegregation initiatives²² and enacting antidiscrimination ordinances.²³ This line of cases gestures obliquely to the virtues of local government,²⁴ but its holdings are based in individual liberties, not in a collective right to local self-government.²⁵ In fact, the federal courts have rejected multiple constitutional theories of a right to local self-governance,

18. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907).

19. See David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2263 (2003) (arguing that meaningful local autonomy is a "phantom"); see also GERALD E. FRUG & DAVID J. BARRON, *CITY BOUND: HOW STATES STIFLE URBAN INNOVATION* 61 (2008) ("All states ... have one thing in common: nowhere does home rule give cities local autonomy.").

20. See *infra* notes 25-28 and accompanying text.

21. *Gomillion v. Lightfoot*, 364 U.S. 339, 340, 347-48 (1960) (holding that the Fifteenth Amendment bars states from altering local government boundaries to disenfranchise black voters).

22. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 483-84, 486-87 (1982) (holding that a state ban on local school bussing initiatives was invalid under the Equal Protection Clause).

23. *Romer v. Evans*, 517 U.S. 620, 626-27, 635-36 (1996) (holding that a state ban on local anti-LGBT discrimination ordinances was invalid under the Equal Protection Clause).

24. Writing for the majority in *Romer*, Justice Kennedy invalidated a statewide amendment that prohibited local governments from legislating antidiscrimination protections for LGBT persons "no matter how local or discrete the harm, no matter how public and widespread the injury." *Id.* at 623, 631.

25. *But see* Lawrence Rosenthal, *Romer v. Evans as the Transformation of Local Government Law*, 31 URB. LAW. 257, 257 (1999) (arguing that *Romer* "cannot be reconciled with the traditional view that state governments have plenary authority" to structure and empower-or disempower-their political subdivisions).

including those grounded in the Contracts Clause,²⁶ the Due Process Clause,²⁷ and the Equal Protection Clause.²⁸

Modern scholars have challenged this doctrine by arguing that a right to collective, local self-governance may be found in other constitutional provisions. For example, Professor Nikolas Bowie has argued that the First Amendment right of freedom of association was meant to reserve for the people the right to operate local governmental bodies, or assemblies.²⁹ Jake Sullivan, drawing on historical records of ratification to argue for a Tenth Amendment right to local self-government, posits that “the Constitution may well carve out a limited space for the people to express themselves and exercise certain powers through local self-government—without interference by the state.”³⁰ David Barron has argued that cities have an important, independent interest in enforcing constitutional norms and that their importance to our constitutional order, although not explicitly acknowledged in the federal Constitution, is supported by an “organic conception of constitutional meaning.”³¹

However, these projects remain largely speculative. The black letter constitutional law continues to protect local governments from state action only insofar as individual liberties are implicated.³² Though the modern substantive due process doctrine has provided Americans with rights deemed so fundamental that the people could

26. See *City of Trenton v. New Jersey*, 262 U.S. 182, 184, 188 (1923) (declining to apply Trenton’s Contract Clause theory of restraint against New Jersey in which Trenton was successor to a private contract permitting tax-free water withdrawals and state-imposed taxes on the city); *Hunter v. City of Pittsburgh*, 207 U.S. 161, 179 (1907) (holding that citizens of the States “have no right by contract or otherwise in the unaltered or continued existence of” their local government corporations); *City of Worcester v. Worcester Consol. St. Ry. Co.*, 196 U.S. 539, 548-49 (1905) (holding that state legislatures may interfere in a contract between a local government and a private party).

27. See *City of Trenton*, 262 U.S. at 188 (1923) (rejecting due process claims under the same reasoning that controlled the Court’s Contracts Clause analysis).

28. See *Williams v. Baltimore*, 298 U.S. 36, 40 (1933) (rejecting the city’s equal protection challenge).

29. Nikolas Bowie, *The Constitutional Right of Local Self-Government*, 130 YALE L.J. (forthcoming 2020) (manuscript at 6-7).

30. Jake Sullivan, Comment, *The Tenth Amendment and Local Government*, 112 YALE L.J. 1935, 1936-39 (2003).

31. David J. Barron, *The Promise of Cooley’s City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 518, 612 (1999).

32. See *supra* notes 21-23 and accompanying text.

not have given them over to their state legislatures, these rights are still individual, not collective.³³

Instead, local communities are, in themselves, constitutional non-entities; they are “invisible” to constitutional law, and their immense impact on our everyday lives emerges in the “gaps between the rules.”³⁴ The state’s broad power remains at odds with Americans’ lived experience of local governments as vital to daily life and with a number of widely shared democratic intuitions about the consent of the governed, participatory democracy, and federalism.

First, the principle of consent of the governed is enshrined in the Declaration of Independence.³⁵ This Enlightenment-era concept, which appears in the works of John Locke and Thomas Hobbes as well as in the writings of American revolutionaries such as Thomas Paine, posits that a government’s legitimacy is derived from the consent of the people who are governed.³⁶ Akhil Amar has persuasively argued that consent of the governed is so foundational to the legitimacy of American government that it gives Americans the right to change the Constitution through a “majoritarian and populist mechanism” that would not require the participation of state or federal legislatures.³⁷

33. However, rather than relying on substantive due process, Michael Lawrence has made a creative argument for the right of localities themselves to invoke procedural due process claims against their states. See Michael A. Lawrence, *Do “Creatures of the State” Have Constitutional Rights?: Standing for Municipalities to Assert Procedural Due Process Claims Against the State*, 47 VILL. L. REV. 93 (2002).

34. “[T]he city (and the wider metropolitan area) is mostly invisible to the doctrine. It emerges in the gaps between the rules.” RICHARD SCHRAGGER, *CITY POWER: URBAN GOVERNANCE IN A GLOBAL AGE* 131 (2016).

35. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“Governments are instituted among Men, deriving their just Powers from the Consent of the Governed.”).

36. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); THOMAS HOBBS, *LEVIATHAN* (Oxford Univ. Press 1909) (1651); THOMAS PAINE, *COMMON SENSE* (Edward Larkin ed., Broadview Press 2004) (1776).

37. See Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994). Nicholas O. Stephanopoulos has also shown that federal courts view consent of the governed—and its companion, electoral accountability—to be a “rhetorical trump card,” even as he argues “that [electoral] accountability has no (or almost no) business being used this way.” Nicholas O. Stephanopoulos, *Accountability Claims in Constitutional Law*, 112 NW. U. L. REV. 989, 1009–21, 1067 (2018) (quoting Jacob E. Gersen & Matthew C. Stephenson, *Over-Accountability*, 6 J. LEGAL ANALYSIS 185, 232 (2014)).

Consent of the governed, far from a mere abstraction, is a concept that undergirds most Americans' day-to-day sense of government's role. Schoolchildren learn about this premise of our government when they are taught that there should be "no taxation without representation,"³⁸ and legal scholars draw on it when they consider the role of an unelected judiciary in invalidating democratic legislation.³⁹ Americans who participate in recall efforts for state or local officials are aware of a collective right to withdraw consent for governance from a previously elected official.⁴⁰ In the context of local government, local communities are intuitively outraged by state action, such as annexation or extraterritorial regulation, that changes the form, structure, or balance of government without consent of those living in these communities.⁴¹ The fact that local powerlessness cuts against such a fundamental premise of American government is reason to doubt that the black letter law has accurately captured the role of cities in our constitutional order.

Second, Americans' ability to participate directly in our democracy is a point of patriotism and civic pride. This participatory style of democracy earned the admiration of Alexis Tocqueville in his seminal *Democracy in America*, in which the French national lauded New England townships for fostering civic involvement, political education, communal responsibility, independence, self-esteem, and political awareness in their citizens.⁴² The widespread implementation of open meetings laws that allow the public to observe and participate in local government assemblies reflects the ongoing relevance of participatory democracy to our political system.⁴³

38. Grant Dorfman, *The Founders' Legal Case: "No Taxation Without Representation" Versus Taxation No Tyranny*, 44 Hous. L. Rev. 1377, 1378-80 (2008).

39. See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (2d ed. 1986) (advocating for judicial restraint in invalidating the actions of elected branches).

40. See Timothy Zick, *The Consent of the Governed: Recall of United States Senators*, 103 DICK. L. REV. 567, 600-607 (1999).

41. *But cf.* Laurie Reynolds, *Rethinking Municipal Annexation Powers*, 24 URB. LAW. 247, 247-48, 260-62 (1992) (explaining that almost all states require the consent of voters for annexation although there is no federal constitutional requirement that they do so).

42. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 52-66 (Eduardo Nolla ed., James T. Schleifer trans., Liberty Fund, Inc. 2012) (1835).

43. See Peter G. Guthrie, Annotation, *Validity, Construction, and Application of Statutes Making Public Proceedings Open to the Public*, 38 A.L.R.3d § 4 (1971).

Americans' enthusiasm for direct democracy further shows that we continue to value direct participation in the lawmaking process.⁴⁴

Third, our federalist system is legitimated by the premise that local problems are solved most precisely and justly by local solutions.⁴⁵ Local solutions can take into account the local community's preferences and values, accommodate unique geographic and economic concerns, experiment with innovative solutions to widespread problems, and allow jurisdictions to compete for Tieboutian "foot vot[ers]."⁴⁶ If a commitment to these advantages of decentralization induces us to protect state autonomy from the federal government, it should also induce us to protect local autonomy from the state government so that the state and the nation as a whole can enjoy both inter- and intra-state federalism benefits.⁴⁷

The persistence of creature of the state doctrine, despite its evident tension with democratic intuitions about consent of the governed, direct democracy, and decentralization, can be explained partly by early assumptions that local governments were prone to corruption. John Stuart Mill argued in 1861 that local governments tend toward pettiness and parochialism.⁴⁸ Indeed, modern local governments also struggle against capture and self-dealing.⁴⁹ Even

44. See generally JOSEPH F. ZIMMERMAN, *THE INITIATIVE: CITIZEN LAWMAKING* 6-9 (2d ed. 2014) (discussing the adoption and modern-day use of initiatives).

45. The Founders' arguments for a centralized federal government were premised on the assumption that small state governments would retain control over local concerns. See, e.g., THE FEDERALIST NO. 45 (James Madison) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.")

46. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 417-18 (1956). I borrow this term from David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763, 802 (2017).

47. Professor Schleicher's concern is with the interstate federalism benefits of which we are deprived when state and local elections become second order to national elections and national political parties. Schleicher, *supra* note 46, at 769.

48. JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 113-14 (Longmans, Green, & Co. 1919) (1861); see also Roger B. Porter, *John Stuart Mill and Federalism*, 7 PUBLIUS 101, 114-16 (1977).

49. Richard Fausset, Monica Davey & Tim Arango, *It's the Human Way: Corruption Scandals Play Out in Big Cities Across U.S.*, N.Y. TIMES (Feb. 5, 2019), <https://www.nytimes.com/2019/02/05/us/fbi-corruption-investigations.html> [<https://perma.cc/X877-R6UZ>]

the fiercest localists may be grateful for state plenary power to control local governments when we see how the latter may become hotbeds of elitism,⁵⁰ prejudice,⁵¹ selfishness,⁵² and parochialism.⁵³ However, I will argue in Part II that the state legislature's broad power over local governments is simply not consistent with the Framers' assumptions about the nature of popular sovereignty.

B. Plenary Legislative Power as a Limit on State Courts' Interpretive Function

The doctrine of plenary state power has also influenced how courts interpret and enforce state constitutional provisions that limit the legislature. Because the legislature has plenary power, courts have been extraordinarily deferential to legislatures, on the theory that to second-guess the legislature is to aggrandize the judiciary beyond its intended role. This section highlights how courts have persistently underenforced state constitutional provisions, including those that impose procedural requirements on lawmakers, that require all public money to be spent for a public purpose, and that create a local right to home rule.⁵⁴

(discussing corruption scandals in Chicago, Atlanta, Los Angeles, and Philadelphia).

50. *Britton v. Town of Chester*, 595 A.2d 492, 493-94, 498 (N.H. 1991) (invalidating local zoning scheme that effectively barred low- and moderate-income people from moving to the Town of Chester).

51. *Stout v. Jefferson Cnty. Bd. of Educ.*, 882 F.3d 988, 1014-17 (11th Cir. 2018) (invalidating city school board's racially motivated attempt to secede from countywide education plan).

52. *W. Orange-Cove Consol. I.S.D. v. Alanis*, 107 S.W.3d 558, 562-565 (Tex. 2003) (noting that wealthy school districts brought litigation objecting to Texas's efforts to ameliorate gross inequalities between the richest and the poorest school districts).

53. *Associated Home Builders, Inc. v. City of Livermore*, 557 P.2d 473, 475-76, 489-90 (Cal. 1976) (holding city ordinance was not facially invalid that placed a freeze on residential development until local educational, sewage, and water standards were met and effectively barred new residents from joining the community).

54. Other scholars have criticized state courts for underenforcing substantive provisions in state constitutions. *See, e.g.*, Maureen E. Brady, *The Damagings Clauses*, 104 VA. L. REV. 341 (2018) (critiquing underenforcement of state constitutional clauses that require state compensation for state damage to private property); Cynthia Soohoo & Jordan Goldberg, *The Full Realization of Our Rights: The Right to Health in State Constitutions*, 60 CASE W. RES. L. REV. 997 (2010) (urging state courts to more vigorously enforce state constitutional rights to health); Scott R. Bauries, *The Education Duty*, 47 WAKE FOREST L. REV. 705 (2012) (arguing that courts should adopt a "fiduciary" analysis in evaluating state legislatures' duties under state constitutional education clauses).

Unlike the federal Constitution, state constitutions typically place on their legislatures procedural requirements designed to promote transparency, deliberation, and accountability.⁵⁵ Such requirements were amended into state constitutions in the latter half of the nineteenth century, in response to the Jacksonian concern that legislatures were operating in secrecy, corruption, carelessness, and confusion.⁵⁶ These procedural amendments created “a blueprint for the due process of deliberative, democratically accountable government.”⁵⁷

However, as Robert F. Williams has forcefully argued, legislators have not always honored these procedural requirements.⁵⁸ Particularly when legislation is controversial, legislators may take pains to avoid the sort of transparent, deliberative, accountable lawmaking that these process requirements are designed to provide.⁵⁹ Perhaps this is unsurprising—we may blame human nature for politicians’ desire to escape accountability. What is more surprising is that state courts have often let them get away with it.⁶⁰

Courts have been wary of intruding into the internal affairs of a coequal branch of government,⁶¹ and legislative competence is presumed.⁶² Courts defend their unwillingness to enforce the Constitution under the political question doctrine, sometimes refusing even to consider whether the legislature has complied with constitutional

55. BRIFFAULT & REYNOLDS, *supra* note 1, at 63-64.

56. G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 99-100, 118-19, 100-01 nn.20-21 (1998).

57. Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 253 (1976).

58. See Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 48 U. PITT. L. REV. 797, 824 (1987).

59. See, e.g., *Bevin v. Commonwealth ex rel. Beshear*, 563 S.W.3d 74, 77-81, 93-94 (Ky. 2018). In *Bevin*, the legislature flouted procedural rules to push through highly controversial pension reform legislation within the last days of the legislative session. *Id.*

60. Note, though, that some courts have followed Williams’s argument that “[w]hen fundamental elements of this constitutionally mandated process are ignored and not remedied by the legislative or executive branches, the courts should step in and examine reliable evidence of violations.” Williams, *supra* note 58, at 826-27; see also *City of Philadelphia v. Commonwealth*, 838 A.2d 566, 586 (Pa. 2003) (upholding procedural requirements on the legislature because they had been ratified “with the electorate’s overall goal of curtailing legislative practices that it viewed with suspicion”).

61. Linde, *supra* note 57, at 243-45.

62. NORMAN SINGER & SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 15:6 (8th ed. 2018) (“The extrinsic evidence rule accords to the enrolled bill a *prima facie* presumption of validity.”).

procedural requirements.⁶³ Some judges and scholars also worry that such procedural requirements are no longer necessary now that the spoils system of governance is long behind us, and that these procedural requirements hamper the legislative process and impede legislative productivity.⁶⁴ The result is that constitutional procedural burdens on state legislatures lose some of the force of law and are less likely to be obeyed.⁶⁵

The doctrine of plenary legislative power has made a casualty of the public purpose amendments that were widely ratified by states in the nineteenth century.⁶⁶ Public purpose amendments require states to appropriate funds or take on debt only for public purposes.⁶⁷ Public purpose clauses, which are contained in all but four state constitutions, arose in response to wasteful and speculative giveaways to corporations that led to state defaults and fiscal distress.⁶⁸ They were widely implemented to keep legislatures from giving taxpayer monies away to favored private entities in an effort to attract economic development.⁶⁹

State courts with fresh memories of state fiscal distress originally enforced public purpose requirements rigorously.⁷⁰ Even in states that had not amended the public purpose requirement into their constitutions, state courts were sympathetic to public purpose

63. See *Tuck v. Blackmon*, 798 So. 2d 402, 404-07 (Miss. 2001) (refusing to enforce a provision of the Mississippi Constitution requiring a full reading of any law before passage).

64. Professor Frank Grad was an early proponent of this view. Frank P. Grad, *The State Constitution: Its Function and Form for Our Time*, 54 VA. L. REV. 928, 964-66 (1968). Courts have also expressed an unwillingness to enforce onerous burdens on legislators. See, e.g., *Bevin*, 563 S.W.3d at 90 (refusing to interpret a constitutional requirement that a 291-page bill be “read at length” to mean that such bill must be read in its entirety because “[s]uch a literal interpretation of the words produces an unreasonable and absurd result” that the Kentucky Constitution’s framers would not have intended).

65. *But see* Williams, *supra* note 58, at 827.

66. See Richard Briffault, *The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 911 (2003).

67. *Id.* at 910-11.

68. *Id.* at 910-12; Ralph L. Finlayson, *State Constitutional Prohibitions Against Use of Public Financial Resources in Aid of Private Enterprises*, 1 EMERGING ISSUES STATE CONST. L. 177, 182 (1988).

69. Briffault, *supra* note 66, at 911-12; David E. Pinsky, *State Constitutional Limitations on Public Industrial Financing: An Historical and Economic Approach*, 111 U. PA. L. REV. 265, 279-81 (1963).

70. See, e.g., *Sharpless v. Mayor of Philadelphia*, 21 Pa. 147, 169 (1853) (“[A] law authorizing taxation for any other than public purposes is void.”).

arguments.⁷¹ Enforcement remained strong until the 1930s, when the Great Depression put more pressure on state governments to compete for private capital.⁷²

However, modern courts tend to defer to the legislature both on the meaning of public purpose and on determinations of what will achieve the desired public purpose.⁷³ Like the judicial refusal to enforce state legislative procedure requirements, courts frame this deference in terms of judicial humility and democratic values; the Arizona Supreme Court remarked that “the primary determination of whether a specific purpose constitutes a ‘public purpose’ is assigned to the political branches of government, which are directly accountable to the public.”⁷⁴ Such language invokes majoritarian principles, but its tacit message is that legislatures, not courts, are the legitimate interpreters of state constitutions. The effect of this deference is to neutralize voters’ power to limit the legitimate objects of state spending, even through the rigorous process of constitutional amendment. Viewed in this way, judicial deference to state legislatures is not majoritarian at all.

Additionally, some modern courts underenforce home rule provisions in state constitutions.⁷⁵ Home rule provisions began to appear in state constitutions in the nineteenth century and were associated with the Progressive movement’s push to curb legislative corruption, inefficiency, and excessive state interference in municipal affairs.⁷⁶ These constitutional clauses overturned Dillon’s Rule and secured to local communities control over the matters that affected them most intimately.⁷⁷ Home rule doctrines vary immensely from state to state and from locality to locality (many states provide home rule authority only for certain municipalities).⁷⁸

Home rule provisions may arise pursuant to statute or to constitutional amendment; they may provide only for lawmaking

71. BRIFFAULT & REYNOLDS, *supra* note 1, at 678.

72. Briffault, *supra* note 66, at 912.

73. *See, e.g.*, *Libertarian Party of Wis. v. State*, 546 N.W.2d 424, 428, 440 (Wis. 1996) (deferring to the state legislature on whether an act providing for construction and maintenance of professional baseball parks served a public purpose).

74. *Turken v. Gordon*, 224 P.3d 158, 165 (Ariz. 2010).

75. *See infra* notes 82-83 and accompanying text.

76. *See KRANE ET AL.*, *supra* note 11, at 10-11.

77. *See id.*

78. *Id.* at 13-17.

that is consistent with state law, or they may provide some immunity from state laws in matters of local concern.⁷⁹ As of a 2016 survey, forty-four states provide for some form of home rule, and thirty-two of those states have home rule provisions enshrined in their constitutions.⁸⁰

However, state legislatures have often been successful at reabsorbing the power that home rule amendments delegate to municipalities. Even communities that have a state constitutional right to home rule may find their laws overturned when the state legislature preempts local government action it disfavors.⁸¹ Courts have also granted legislatures wide latitude in interpreting home rule provisions in state constitutions,⁸² at times proving exceedingly deferential to legislatures regarding whether local government legislation is properly “local.”⁸³

The willingness of some courts to defer to legislative judgment and underenforce home rule provisions is particularly concerning because a constitutional amendment, while less onerous at the state

79. *Id.* at 4, 13-17.

80. Jon D. Russell & Aaron Bostrom, *Federalism, Dillon Rule and Home Rule*, WHITE PAPER (Am. City Cnty. Exch., Arlington, Va.), Jan. 2016, at 6-7.

81. See Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1999-2008 (2018) for an excellent review of aggressive (“punitive” and “nuclear”) state preemption of local laws on politically controversial subjects such as cooperation with Immigration and Customs Enforcement, gun regulations, minimum-wage laws, and environmental regulations. For an in-depth look at state preemption of local environmental laws, see Richard C. Schragger, *The Attack on American Cities*, 49 TEX. L. REV. 11163, 1169, 1173-74 (2018).

82. See Frug, *supra* note 8, at 1059-60, 1117 (arguing that cities, even those with home rule, stand essentially powerless before state legislatures). *But see* Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 1 (1990) (“The insistence on local legal powerlessness reflects a lack of understanding of the scope of local legal authority. Most local governments in this country are far from legally powerless. Many enjoy considerable autonomy over matters of local concern. State legislatures, often criticized for excessive interference in local matters, have frequently conferred significant political, economic and regulatory authority on many localities. State courts, usually characterized as hostile to localities and condemned for failing to vindicate local rights against the states, have repeatedly embraced the concept of strong local government and have affirmed local regulatory power and local control of basic services. Localism as a value is deeply embedded in the American legal and political culture.”).

83. See, e.g., *City of La Grande v. Pub. Emps. Ret. Bd.*, 576 P.2d 1204, 1206-08, 1211 (Or. 1978) (holding that a constitutional provision granting local governments immunity from preemptive state legislation applied only to matters of local government form and structure and did not apply to issues of substantive law in which the legislature had determined that an issue was one of statewide concern).

level than at the federal level, is still typically subjected to heightened requirements such as legislative approval by a supermajority and ratification by the voters of the state.⁸⁴ Home rule requirements, like state legislative procedure requirements and the public purpose doctrine, entered into the law as a result of reform movements.⁸⁵

Constitutional amendments that imposed procedural, public purpose, and home rule burdens on state legislatures' plenary power were successful because they sought to cure real ills and protect citizens from legislative misconduct and intrusion. They were popular enough with the democratic public to survive rigorous constitutional amendment procedures across many U.S. states. Their underenforcement, and in particular their underenforcement on majoritarian grounds, undercuts the most democratic tool Americans possess: constitutional amendment.

II. POPULAR SOVEREIGNTY IN TENSION WITH THE DOCTRINE OF LEGISLATIVE PLENARY POWER

"The Framers split the atom of sovereignty," Justice Kennedy famously remarked in his concurrence with the majority opinion in *U.S. Term Limits, Inc. v. Thornton*.⁸⁶ But this is a charge against which the Framers were eager to defend. Far from splitting sovereignty, the Framers located total sovereignty in the people and recognized the power of the people to delegate power among governments.⁸⁷

This Part reviews theories of popular sovereignty that significantly influenced the great compromise of American federalism. Based on evidence that the Founders conceived of sovereignty as resting originally and irrevocably with the democratic public, it concludes that federalism contains inherent limits on the power of state legislatures, either because the people did not delegate all

84. BRIFFAULT & REYNOLDS, *supra* note 1, at 60.

85. *See supra* notes 75-76 and accompanying text.

86. 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

87. C. E. MERRIAM, JR., HISTORY OF THE THEORY OF SOVEREIGNTY SINCE ROUSSEAU 85 (Batoche Books 2001) (1900) ("The acceptance of this idea was enormously facilitated by reason of the prevalence of the theory that the Government was at best but an agent or delegate of another power, the real source of authority, the 'people.'").

lawmaking power to their state legislatures or because the people retained the power to revoke state legislative power through constitutional amendment.

A. Popular Sovereignty as Indivisible Authority

Dominant Western political theory has recognized sovereignty as absolute and indivisible since the sixteenth century.⁸⁸ John Locke's great innovation in the eighteenth century was locating ultimate sovereignty in the people, for whom the government is a mere "fiduciary."⁸⁹ Under this framework, the state is not itself sovereign, but is rather an agent of the sovereign people in whom the people have placed their trust. Locke "split the atom" of sovereignty by locating it not in a single government, but in a plurality that is at the same time single: the community and the people.

Locke's innovation was eagerly adopted by American revolutionists, who argued that the people, as the ultimate sovereign, had the right to overthrow a government that had betrayed its trust. James Otis declared: "[S]upreme absolute power is *originally* and *ultimately* in the people; and they never did in fact *freely*, nor can they *rightfully* make an absolute, unlimited renunciation of this divine right."⁹⁰ The Declaration of Independence famously located all lawful authority in the people and asserted that any temporal government is dependent on the consent of the people for legal legitimacy.⁹¹

Early American state declarations and constitutions also explicitly placed legal authority with the people. John Adams wrote in the Massachusetts Proclamation of January 23, 1776:

88. JEAN BODIN, ON SOVEREIGNTY: FOUR CHAPTERS FROM *THE SIX BOOKS OF THE COMMONWEALTH* 1 (Julian H. Franklin ed. & trans., 1992) (1576) ("Sovereignty is the absolute and perpetual power of a commonwealth."). For a good brief overview of the evolution of sovereignty definitions, see Timothy Zick, *Are the States Sovereign?*, 83 WASH. U. L.Q. 229, 239-41 (2005).

89. JOHN LOCKE, *Of the Subordination of the Powers of the Commonwealth*, in *TWO TREATISES OF GOVERNMENT* 196, § 149 (Thomas I. Cook ed., Hafner Publ'g Co. 1947) (1690).

90. JAMES OTIS, *THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED* 12 (3d ed., Bos. 1766).

91. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("Governments are instituted among Men, deriving their just Powers from the Consent of the Governed.").

It is a maxim, that in every government there must exist somewhere a supreme, sovereign, absolute, and uncontrollable power; but this power resides always in the body of the people; and it never was, or can be, delegated to one man or a few; the great creator having never given to men a right to vest others with authority over them unlimited either in duration or degree.⁹²

In the Virginia Declaration of Rights, from which James Madison drew heavily in drafting the Bill of Rights, George Mason wrote that all power was derived from the people, to whom government is a mere servant.⁹³ Other states employed similar language, and “[t]he political theory of the time was permeated through and through with the idea of popular sovereignty, and of the essentially fiduciary character of all Government.”⁹⁴

Locating all sovereignty in the people proved to be an important theoretical move during the ratification debates. As Justice Souter noted in his *Seminole Tribe* dissent, “[t]he American development of divided sovereign powers, which shattered the categories of government that had dominated Western thinking for centuries, was made possible only by a recognition that the ultimate sovereignty rests in the people themselves.”⁹⁵ In fact, Antifederalists argued that the Framers’ proposal of a divided government was a disingenuous attempt to secure federal control, since the concept of divided sovereignty was logically impossible.⁹⁶ James Madison responded to these critics with *The Federalist* No. 46, emphasizing

92. John Adams, By the Great and General Court of the Colony of Massachusetts Bay: A Proclamation (Jan. 23, 1776), reprinted in 1 CHARLES FRANCIS ADAMS, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 193 (Bos., Little, Brown and Co. 1856).

93. GEORGE MASON, VIRGINIA DECLARATION OF RIGHTS § 2 (1776) (“That all power is vested in, and consequently derived from, the people; that Magistrates are their trustees and servants, and at all times amenable to them.”).

94. MERRIAM, JR., *supra* note 87, at 168-69 n.472.

95. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 151 (1996) (Souter, J., dissenting) (internal citations and quotations omitted).

96. See, e.g., Thomas Tredwell, Speech at the New York Constitutional Ratification Debate (June 17, 1788), in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 403 (Jonathan Elliot ed., n.p. 1827) (“The idea of two distinct sovereigns in the same country, separately possessed of sovereign and supreme power, in the same matters at the same time, is as supreme an absurdity, as that two distinct separate circles can be bounded exactly by the same circumference.”).

that “[t]he federal and State governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes.”⁹⁷

Although eventual ratification did not settle the theoretical niceties of sovereignty,⁹⁸ the idea that all legitimate authority comes from the people became a central shared assumption of our democracy. In *Marbury v. Madison*, Justice John Marshall defended the right of the judiciary to judge the actions of a coequal branch of government by citing the higher authority: the people, from whom comes the “original and supreme will” that “organizes the government, and assigns, to different departments, their respective powers.”⁹⁹ This premise continues to enjoy relevance in modern federalism cases.¹⁰⁰

B. Two Challenges to Plenary Power of State Legislatures

Dominant conceptions of sovereignty at the Founding clarify that citizens of American states have at least two possible theories for reasserting their power over the state legislatures that are currently under-circumscribed by state and federal courts. First, the role of the people in delegating legislative power calls into serious question whether *Hunter* and the state legislative plenary power doctrine are correct as a matter of law. Second, the inherently revocable nature of delegations of power and the immutable sovereignty of the people

97. THE FEDERALIST NO. 46 (James Madison); *see also* THE FEDERALIST NO. 39 (James Madison) (“[W]e may define a republic to be ... a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior.”); THE FEDERALIST NO. 22 (Alexander Hamilton) (People are “that pure, original fountain of all legitimate authority”); James Wilson, Speech to the Pennsylvania Ratifying Convention (Oct. 6, 1787), in AMERICAN HISTORY THROUGH ITS GREATEST SPEECHES: A DOCUMENTARY HISTORY OF THE UNITED STATES 182, 184-85 (J.P. Gerard et al. eds., 2016) (defending the federalist conception of sovereignty).

98. *See* H. Jefferson Powell, *The Political Grammar of Early Constitutional Law*, 71 N.C. L. REV. 949, 985-87 (1993) (arguing that sovereignty was a “confusing,” “contested,” and “ambiguous” term at the Founding).

99. *Marbury v. Madison*, 5 U.S. 137, 176 (1803).

100. *See, e.g.*, *Gamble v. United States*, 139 S. Ct. 1960, 1990 (2019) (Ginsburg, J., dissenting) (“In the system established by the Federal Constitution, however, ‘ultimate sovereignty’ resides in the *governed*.” (first citing *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 819-20 (2015); and then citing *Martin v. Hunter's Lessee*, 14 U.S. 304, 324-325 (1816))).

suggest that Americans have the potential to revoke some or even all of the power that they have delegated to state legislatures.

Although state plenary power is the rule under *Hunter*,¹⁰¹ this view was by no means universally accepted in early American history. The people, in ratifying the Constitution, delegated to the federal government certain enumerated and implied powers, later reserving to themselves and to the States “[t]he powers not delegated to the United States.”¹⁰² Were all of the powers not delegated to the federal government delegated to the state government, as Chief Justice Redfield asserted in *Thorpe*?¹⁰³ Or was the crystallization of a state legislative plenary power doctrine influenced more by British models of parliament than by the actual compact among U.S. citizens, their federal government, and their states? Early American jurists may not have seriously considered the right to local self-governance because the original state legislatures were smaller and more local than those of today. These jurists may have found that States’ rights under federalism adequately protected the democratic values of local control, participatory democracy, and federalism benefits.

Certain evidence suggests that the question of how much power the people had delegated to their states remained up for grabs during the eighteenth century, at least in theory. For example, Justice James Wilson, in *Chisolm v. Georgia*, may have “hinted that in his own private view, citizens of the States had not conferred sovereignty in the sense of absolute authority upon their state governments, because they had retained some rights to themselves.”¹⁰⁴ Justice Goldberg continued that tradition in his

101. See text accompanying *supra* note 18.

102. U.S. CONST. amend. X.

103. See *Thorpe v. Rutland & Burlington R.R. Co.*, 27 Vt. 140, 142 (1854).

104. See *Alden v. Maine*, 527 U.S. 706, 783 n.23 (1999) (Souter, J., dissenting). Justice Wilson wrote in his concurrence in *Chisolm v. Georgia*:

[A]ccording to some writers, every State, which governs itself without any dependence on another power, is a sovereign State. Whether, with regard to her own citizens, this is the case of the State of *Georgia*; whether those citizens have done, as the individuals of *England* are said, by their late instructors, to have done, surrendered the Supreme Power to the State or Government, and reserved nothing to themselves; or whether, like the people of other States, and of the *United States*, the citizens of *Georgia* have reserved the Supreme Power in their own hands; and on that Supreme Power have made the State *dependent*, instead of being sovereign; these are questions, to which, as a Judge in this cause, I can

concurring opinion in *Griswold v. Connecticut*, in which he held up the Ninth Amendment as a refutation of plenary state legislative power.¹⁰⁵

If we accept that the people have reserved certain powers neither enumerated nor necessarily implied in state constitutions, a space opens up for a constitutional right to local self-government. A potential doctrine of limited delegated power to state legislatures deserves to be further explored in modern scholarship and jurisprudence. Even if such a view cannot become law because of *Hunter* and a century of subsequent precedent, its exploration may illuminate the fundamental principles of popular sovereignty and cause state and federal courts to be more aware of the peoples' intent in delegating legislative power to state assemblies.

The second challenge to plenary state legislative power is more practical, because it does not challenge black letter law. It is simply an encouragement to the people of the various states to exercise a power that they possess under state and federal law: the power of amendment. Modern state constitutions, like the state declarations of the Founding Era, locate all authority in the people and recognize the authority of the people to alter and even abolish state constitutions.¹⁰⁶

Even assuming that Justice Redfield's view of the delegation to state legislatures as "total" is correct, people still retain rights enumerated in their state constitutions, including the right to rescind from the states by state constitutional amendment any power that they have given. If the people conclude that the states have failed in their role as fiduciary of the people's sovereign authority, they may alter or abolish the power of state legislatures. And indeed, they have done so—through constitutional amendments imposing procedural duties, public purpose requirements, and home rule doctrines, as well as through constitutional amendments

neither know nor suggest the proper answers; though, as a citizen of the *Union*, I know, and am interested to know, that the most satisfactory answers can be given.

Chisholm v. Georgia, 2 U.S. 419, 457 (1793) (Wilson, J., concurring) (citation omitted).

105. 381 U.S. 479, 496 (1965) (Goldberg, J., concurring).

106. Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, MICH. L. REV. (forthcoming 2020) (manuscript at 10-19) (on file with author) (cataloging provisions in state constitutions that locate authority in the people).

prohibiting special districts, special legislation, and other legislative abuses of power.¹⁰⁷ However, the persistent underenforcement of such amendments, coupled with the willingness of some courts to treat state legislatures as the proper interpreters of constitutional language,¹⁰⁸ indicates that more drastic measures may be necessary. As the sovereign, we the people have the power to radically alter state constitutions so that they grant limited enumerated powers, rather than general plenary powers, to state legislatures.

A model state constitutional amendment of this sort might read: “We the people, insofar as we have delegated all legislative power to the legislature, do hereby rescind that power. The state legislatures have only those powers enumerated in this constitution, and all those powers not delegated to the legislature remain with the people of this state.” Such an amendment would be entirely consistent with the compact we the people have made with our states. As the only sovereign, we are free to reassert our ultimate authority over the state government, which is our mere servant.¹⁰⁹ In so doing, we would have the opportunity to think with creativity and meaning about the role we want state governments to play in our lives and society.

CONCLUSION

The doctrine of broad and plenary state legislative power has limited the people’s democratic power within their states. Here, I have explored how the doctrine dulled our democratic power by eliminating a potential right to local self-governance and by inducing courts to underenforce constitutional limits on state legislatures. These trends are problematic because they do not square with our democratic intuitions or with our desire to have a sense of efficacy, energy, and power in our own ability to influence the laws of our communities.

However, the history of popular sovereignty’s role in the founding of our country reveals that this state of affairs was not unavoidable. Federal courts could have just as easily concluded that the people

107. *See supra* Part I.B.

108. *See supra* Part I.B.

109. *See supra* Part II.A.

of states delegated some, but not all, legislative powers to the state assemblies. Nor is it immutable. Citizens of the states retain the power to alter and abolish their state legislatures' powers, or to direct their courts to show less deference to legislative interpretations of state constitutions. Scholars, courts, and the public would do well to give the nature of popular sovereignty renewed attention so that the people can actively and independently define the nature of their state and local governments.