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Retained by the People: Federalism, the Ultimate Sovereign, and Natural Limits on Government Power

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**RETAINED BY THE PEOPLE: FEDERALISM,
THE ULTIMATE SOVEREIGN, AND NATURAL
LIMITS ON GOVERNMENT POWER**

Stephanie Hall Barclay*

ABSTRACT

Brewing tensions between state governments and the federal government have reached a boiling point unmatched since the civil rights debates of the 1960s. In light of the rapid expansion of federal power combined with colliding views on various policies, the call for states' rights has increasingly become a rallying cry for lawmakers that has gained traction with groups on varying points along the political spectrum, as well as a frequent theory employed by the Supreme Court. While the system of federalism created by the Constitution certainly has its unique benefits, and while it is true that the federal government was delegated less power than the state governments, a states' rights model of federalism relies on the following three assumptions that are problematic from a historic perspective: (1) it was the states who granted the federal government certain sovereign powers and who retain ultimate sovereignty; (2) there is a zero-sum balance of power between these two sovereigns, and any reduction in federal power must be accompanied by an enhancement of state powers; and (3) when states are governing within their sphere of sovereign authority, their plenary police powers are only limited by explicit state or federal constitutional provisions.

Through new historical analysis of ratification debates, original state constitutional provisions, and antebellum case law, this Article challenges the underlying assumptions of a states' rights conception of federalism and instead illustrates that the people—as a sovereign body separate and distinct from the states—were viewed by both the framers and states as the ultimate source and residuary location of sovereign power. It was the people who formed both state and federal governments to act as agents for the people, exercising a bounded portion of the people's sovereignty. As ultimate sovereigns, the people also have the ability to reserve additional powers to themselves without being required to delegate those powers to either state or federal governments in a zero-sum shuffling of sovereign authority. Finally, this Article demonstrates that the American model of popular sovereignty is more than merely an interesting academic concept. Certain sovereign powers were understood to remain with the people and have not been delegated to any government—such as the power to arbitrarily violate natural rights. This model of federalism was understood to impose additional

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substantive limitations on both federal and state powers dating back to the American Revolution. Viewed through this historic lens, federalism was not intended merely as a means of protecting the rights of states. Rather, the American conception of federalism was conceived as a means of protecting the rights of the people, and the division of limited powers between the federal and state governments is useful only inasmuch as it is accomplishing that end. Under this model, the ideals of limited government and strong protections of fundamental rights are not at odds with each other, but are rather principles that complement each other in providing for the welfare and security of the nation's ultimate sovereign—the people.

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INTRODUCTION

Brewing tensions between state governments and the federal government have reached a boiling point unmatched since the civil rights debates of the 1960s.¹ In light of the rapid expansion of federal power combined with colliding views on policies, the call for states' rights has increasingly become a "rallying cry of lawmakers"² that has gained traction with groups on varying points along the political spectrum.³

¹ See Huma Khan, *States Battle with Federal Government on Health Care*, ABC NEWS (Nov. 22, 2010), <http://abcnews.go.com/Politics/health-care-battles-brew-medicaidvictim-%20states/story?id=12207997>; Michele McNeil, *State-Federal Tensions Loom in Standards Effort*, ED. WEEK, Jan. 14, 2010, at 26–27; Michael Ollove, *State Resistance to Gov't Goes Back to USA's Beginnings*, USA TODAY (Aug. 22, 2013), <http://www.usatoday.com/story/news/nation/2013/08/22/stateline-stateresistance-%20federal-government/2684921/>; *The New Obamacare-Inspired States' Rights Movement*, GOVERNING MAG. (Nov. 2013), <http://www.governing.com/columns/potomac-chronicle/col-new-states-rights-movement.html>.

² Kirk Johnson, *States' Rights is Rallying Cry of Lawmakers*, N.Y. TIMES, Mar. 17, 2010, at A1; see also Tal Kopan, *Leading the Fight for States' Rights*, POLITICO (Oct. 26, 2013), <http://www.politico.com/story/2013/10/kris-kobach-states-rights-98879.html>.

³ Frank B. Cross & Emerson H. Tiller, *The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence*, 73 S. CAL. L. REV. 741, 745 (2000)

One recent example of this movement is the states' resistance to the federal Real ID Act passed in 2005, which imposed heightened requirements on states in the issuance of driver's licenses.⁴ Opponents of the Act argued that it violates the Tenth Amendment because the federal government is legislating in an area typically reserved to the states.⁵ Since the Act's passage, over a dozen states have passed laws prohibiting state agencies from complying with this act within their borders, and additional states have passed legislation denouncing the Real ID Act.⁶

States' rights advocates have also challenged federal gun control laws, such as the National Firearms Act, as an invasion of states' rights.⁷ At the beginning of 2010, seven states joined with Montana in a lawsuit seeking to declare this law invalid.⁸ Additionally, at least thirty-seven states have passed legislation to in some way inhibit federal gun legislation, according to the Brady Center to Prevent Gun Violence.⁹

Increasingly, progressives have also relied on states' rights arguments to justify causes such as legalizing marijuana or preventing the Defense of Marriage Act from infringing on states' marriage laws.¹⁰ Eighteen states have legalized marijuana for

(“While decisions in favor of states' rights are often considered conservative, defense of states' rights may sometimes have a liberal outcome, and liberal constitutional scholars have increasingly embraced federalism for their own ends.”); Robert J. Reinstein, *Foreword: On the Judicial Safeguards of Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV. 343, 352–53 (2008) (noting that “states' rights federalism” arguments have been used to advance both conservative and liberal agendas).

⁴ CHRISTOPHER WOLF, RECENT FEDERAL DEVELOPMENTS IN PRIVACY AND INFORMATION SECURITY 473–74 (2009). I am indebted to Ryan Card for the sources related to the Real ID Example.

⁵ Anthony D. Romero, Op-Ed., *Opposing View: Repeal Real ID*, USA TODAY (Mar. 6, 2007), http://web.archive.org/web/20070311050643/blogs.usatoday.com/oped/2007/03/post_14.html.

⁶ *Anti-Real ID Legislation in the States*, ACLU, <http://www.realnightmare.org/news/105/>; see also *Governor Signs Bill Defying U.S. ID Law*, BILLINGS GAZETTE (Montana) (Apr. 17, 2007), http://billingsgazette.com/news/state-and-regional/montana/governor-signs-bill-defying-u-s-id-law/article_1855fed8-6e4c-5be1-82de-7ffe2f953c0c.html; Declan McCullagh, *Maine Rejects Real ID Act*, CNET NEWS (Maine) (Jan. 25, 2007), http://news.cnet.com/2100-7348_3-6153532.html; Dena Potter, *Real ID Mandate Resisted in Virginia*, WASH. TIMES (Virginia) (Jan. 3, 2009), <http://www.washingtontimes.com/news/2009/jan/03/some-legislators-oppose-real-id-act-mandate/?page=all>. More states are in the process of enacting such legislation.

⁷ See Barak Y. Orbach et al., *Arming States' Rights: Federalism, Private Lawmakers, and the Battering Ram Strategy*, 52 ARIZ. L. REV. 1161, 1164 (2010); Glenn Harlan Reynolds & Don B. Kates, *The Second Amendment and States' Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1737, 1749 (1995).

⁸ Matt Gouras, *More States Join Fight with Feds over Guns*, BLOOMBERG BUSINESSWEEK (Apr. 13, 2010), <http://www.businessweek.com/ap/financialnews/D9F28DHG0.htm>.

⁹ Tal Kopan, *States Seek to Nullify Obama Efforts*, POLITICO (July 27, 2013, 3:14 PM), <http://www.politico.com/story/2013/07/states-nullification-obama-94826.html>.

¹⁰ Kathleen M. Sullivan, *From States' Rights Blues to Blue States' Rights: Federalism After the Rehnquist Court*, 75 FORDHAM L. REV. 799 (2006); see, e.g., Alreen Hussein,

medical purposes, and Washington and Colorado have legalized marijuana even for recreational purposes.¹¹ These states passed such laws in the face of clearly conflicting federal drug legislation. To a growing extent, the arguments in favor of states' rights have moved beyond the realm of political rhetoric and have been accepted by the Supreme Court.¹²

Though many of the policy goals of states' rights supporters certainly may be laudable, the political and scholarly discussion justifying a conception of states' rights federalism generally relies on three assumptions that are problematic from a historic perspective. First, states' rights advocates often argue that it was the states who granted the federal government certain sovereign powers, and it is the states who retain ultimate sovereignty. As articulated by Justice Brennan, the "States granted Congress

Comment, *The Growing Debate on Medical Marijuana: Federal Power vs. States Rights*, 37 CAL. W. L. REV. 369 (2001); George F. Will, *DOMA Infringes on States' Rights*, WASH. POST (Mar. 21, 2013), http://www.washingtonpost.com/opinions/george-f-will-doma-infringes-on-states-rights/2013/03/20/fa845348-90bb-11e2-bdea-e32ad90da239_story.html; Barry Friedman, *Guns, Pot and States Rights*, HUFFINGTON POST (May 22, 2013, 1:47 PM), http://www.huffingtonpost.com/barryfriedman/guns-pot-and-states-right_b_3320982.html; Ilya Somin, *The DOMA Decision and Federalism*, VOLOKH CONSPIRACY (June 26, 2013, 11:29 AM), <http://www.volokh.com/2013/06/26/the-doma-decision-and-federalism/>.

¹¹ *State Marijuana Laws*, TENTH AMENDMENT CTR., <http://tracking.tenthamendmentcenter.com/issues/state-marijuana-laws/#> (click on the green states to view the year in which each legalized medical marijuana; all of the green states have done so but Delaware, where it has been approved by popular referendum but still awaits official state implementation) (last visited Oct. 23, 2014).

¹² See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 801 (1995) (rejecting the argument that the Constitution created a direct link between the people and the federal government, as opposed to the states and federal government); *United States v. Lopez*, 514 U.S. 549, 551–52, 567–68 (1995) (striking down a federal gun statute that went beyond the "few and defined" federal powers and interfered in the "numerous and indefinite" state powers); *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring) (arguing that the same federal gun statute "upset[] the federal balance to a degree that render[ed] it [] unconstitutional"); *New York v. United States*, 505 U.S. 144 (1992) (emphasizing the benefits of federalism and holding that direct federal coercion of the states was unconstitutional); *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (describing need to maintain a balance of power between the state and federal government as "joint sovereigns"). Supreme Court voting patterns in federalism cases from 1985 to 1997 were studied by Frank Cross and Emerson Tiller. The findings indicate that conservative justices were roughly one-and-a-half times more likely to use states' rights to defeat a liberal plaintiff's claims than a conservative plaintiff's claims, and roughly twice as likely to use states' rights to support a conservative plaintiff's claim than a liberal plaintiff's claim. Conversely, liberal justices were more than twice as likely to use states' rights to defeat a conservative plaintiff's claim than to defeat a liberal plaintiff's claim, and almost twice as likely to use states' rights to support a liberal plaintiff's position than to support a conservative plaintiff's position. Cross & Tiller, *supra* note 3, at 760–61, tbl. 2, tbl. 3. *But see* Michael C. Dorf, *Whose Ox Is Being Gored? When Attitudinalism Meets Federalism*, 21 ST. JOHN'S J. LEGAL COMMENT. 497, 512 (2007) (arguing that Cross and Tiller may have overstated the impact of justices' ideology by conflating issues of federal preemption doctrine with issues of states' rights).

specifically enumerated powers,”¹³ and retain residuary sovereignty under the Constitution.¹⁴ Evidence of this belief is illustrated by the fact that thirty-seven states have proposed legislation or state resolutions asserting their sovereignty, and fourteen states had passed such legislation as of 2010.¹⁵ Many of these resolutions purport to remind the federal government that it has derived its delegated powers from the states, and “each State to itself” has reserved “the residuary mass of right to their own self-government.”¹⁶ For example, Alaska’s sovereignty resolution states that “the Alaska State Legislature hereby claims sovereignty *for the state* under the Tenth Amendment to the Constitution of the United States over *all powers* not otherwise enumerated and granted to the federal government by the Constitution of the United States.”¹⁷ Under the auspices of the Tenth Amendment, many other states, such as Arizona, have sought to remind the federal government that it should act as an agent of the states: “[w]hereas, the scope of power defined by the Tenth Amendment means that the federal government was created by the states *specifically to be an agent of the states*.”¹⁸

¹³ *Fitzpatrick v. Bitzer*, 427 U.S. 445, 457–58 (1976) (Brennan, J., concurring).

¹⁴ For example, in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997), the Court reaffirmed the “residuary and inviolable sovereignty” of the states, and determined that they could not be “commandeered” into enforcing federal laws or regulations. 521 U.S. 898, 919 (quoting THE FEDERALIST No. 39, at 245 (James Madison)).

¹⁵ Alabama, Alaska, Arizona, Idaho, Kansas, Louisiana, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, and Wyoming passed such resolutions. See Ed Hornick, ‘Tenther’ Movement Aims to Put Power Back in States’ Hands, CNN (Feb. 10, 2010, 8:25 AM) <http://www.cnn.com/2010/POLITICS/02/10/tenth.amendment.movement/>; see also Orbach et al., *supra* note 7, at 1194, n.183 (citing S.J.R. 27, 2010 Leg. (Ala. 2010) (introduced on January 14, 2010, signed into law on January 22, 2010); H.J.R. 27, 26th Leg. (Alaska 2009) (introduced on Mar. 19, 2009, filed without the Governor’s signature on August 5, 2009); H.C.R. 2001, 49th Leg. (Ariz. 2010) (introduced on January 11, 2010, filed with the Secretary of State on Apr. 22, 2010); H.J.M. 4, 60th Leg. (Idaho 2009) (introduced on Mar. 4, 2009); S.C.R. 1615, 2010 Leg. (Kans. 2010) (introduced on Mar. 16, 2009, effective date is Mar. 29, 2010); S.C.R. 2, 2009 Leg. (La. 2009) (introduced on Apr. 27, 2009); L.R. 539, 101 Leg. (Neb. 2010) (introduced on Mar. 30, 2010, adopted on Apr. 13, 2010); H.C.R. 3063, 2009 Leg. (N.D. 2009) (introduced on Mar. 20, 2009); H.J.R. 1003, 52nd Leg. (Okla. 2009) (introduced on February 2, 2009, vetoed by the Governor on Apr. 24, 2009); H.C.R. 1028, 52nd Leg. (Okla. 2009) (introduced on Apr. 29, 2009, filed with Secretary of State without Governor’s signature on May 14, 2009); S.B. 424, 118 Leg. (S.C. 2010) (introduced on February 12, 2009, adopted on Mar. 9, 2010); H.C.R. 1013, 85th Leg. (S.D. 2009) (introduced on Mar. 2, 2009); S.J.R. 311, 106th Leg. (Tenn. 2009) (introduced on Apr. 16, 2009); S.C.R. 3, 2010 Leg. Gen. Sess. (Utah 2010) (introduced January 7, 2010, signed into law on Mar. 26, 2010); H.J.R. 2, 60th Leg. (Wyo. 2010) (introduced on February 9, 2010, signed into law on Mar. 8, 2010)).

¹⁶ H.R. Con. Res. 6, 2009 Sess. (N.H. 2009), available at <http://www.gencourt.state.nh.us/legislation/2009/HCR0006.html>.

¹⁷ Michael Boldin, *Palin Signs Alaska Sovereignty Resolution*, TENTH AMENDMENT CTR. (July 13, 2009), http://tenthamendmentcenter.com/2009/07/13/palin-signs-alaska-sovereignty-resolution/#.0Db_IdWSo (emphasis added).

¹⁸ H.R. Con. Res. 2024, 49th Leg., 1st Reg. Sess. (Ariz., 2009), available at <http://www.azleg.gov/legtext/49leg/1r/bills/hcr2024p.htm> (emphasis added).

Although both politicians and Supreme Court justices also discuss the principle of popular sovereignty—that government derives its power from “the People”¹⁹—the states are often treated as proxies for the people.²⁰ As such, the people are often referred to as “the People of the State of” a specific state, or the people of the several states, and are thus given no separate and distinct sovereign importance under this federalism scheme.²¹ The states are therefore treated as the ultimate holders of residuary sovereignty under this view.²²

The second assumption is that because the “atom of sovereignty” in our federal system is “split” between the states and federal government,²³ there is a zero-sum balance of power between these two sovereigns, and any reduction in federal power must be accompanied by an enhancement of state powers, or vice versa. The Supreme Court articulated this view in *Ex parte Commonwealth of Virginia*,²⁴ when it stated, “Indeed, every addition of power to the general government involves a *corresponding diminution* of the governmental powers of the States. It is carved out of them.”²⁵

¹⁹ Wilson R. Huhn, *Constantly Approximating Popular Sovereignty: Seven Fundamental Principles of Constitutional Law*, 19 WM. & MARY BILL RTS. J. 291, 293–95 (2010).

²⁰ See Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331, 355–56 (2004).

²¹ See, e.g., *10th Amendment Resolution*, TENTH AMENDMENT CTR., <http://tenthamendmentcenter.com/10th-amendment-resolution/> (last visited Oct. 23, 2014).

²² See EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 282–84 (1988); Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the Slaughter-House Cases Without Exhuming Lochner: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. REV. 1, 9–10 (1996) (“Put another way, the claim that the people actually rule is a legal fiction—useful, instructive, partially true, but still a legal fiction. For the governors and the governed are different, and the power the people give to the governors may be used to the disadvantage of the people themselves.”); see also Huhn, *supra* note 19, at 330–31 (“[T]o speak of ‘states’ rights’ is to confuse a State with an individual.”); Timothy Zick, *Active Sovereignty*, 21 ST. JOHN’S J. LEGAL COMMENT. 541, 541–42 (2007) (“The states are treated now more like nations or persons; they have constitutional rights to such things as autonomy, equality, and due process.”); Timothy Zick, *Statehood as the New Personhood: The Discovery of Fundamental ‘States’ Rights*,” 46 WM. & MARY L. REV. 213, 216 (2004).

²³ *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995).

²⁴ 100 U.S. 339 (1879).

²⁵ *Id.* at 346 (emphasis added); see also *Alden v. Maine*, 527 U.S. 706, 757 (1999) (“The principle of sovereign immunity as reflected in our jurisprudence strikes the proper balance between the supremacy of federal law and the separate sovereignty of the States.”); *New York v. United States*, 505 U.S. 144, 181–82 (1992) (“[T]he Constitution divides authority between federal and state governments”); *Tennessee v. Davis*, 100 U.S. 257, 266–67 (1879) (“[W]hen the national government was formed, some of the attributes of State sovereignty were partially, and others wholly, surrendered and vested in the United States. Over the subjects thus surrendered the sovereignty of the States ceased to extend. Before the adoption of the Constitution, each State had complete and exclusive authority to administer by its courts all the law, civil and criminal, which existed within its borders. Its judicial power extended over every legal question that could arise. But when the Constitution was adopted, a portion of that

Under this states' rights model of federalism, increasing states' rights, or states' scope of sovereign authority, is necessary to limit federal power.²⁶

The third assumption is that when states are governing within their sphere of sovereign authority, their plenary police powers are only limited by explicit state or federal constitutional provisions.²⁷ While a number of scholars tout the benefits of states being able to exercise additional power,²⁸ critics point to the fact that a states'

judicial power became vested in the new government created, and *so far as thus vested it was withdrawn from the sovereignty of the State.*" (emphasis added)).

²⁶ See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 571–72 (1985) (Powell, J., dissenting) ("The Framers believed that the separate sphere of sovereignty reserved to the States would ensure that the States would serve as an effective 'counterpoise' to the power of the Federal Government . . . [B]y usurping functions traditionally performed by the States, federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties.").

²⁷ Chief Justice Rehnquist described the "plenary police power" held by states, as opposed to the federal government, as "power that would authorize enactment of *every type of legislation.*" *United States v. Lopez*, 514 U.S. 549, 566 (1995) (emphasis added); see also Randy Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 475 (2004) ("[T]he 'police power' of the states . . . is notorious for being difficult to define and limit." (citing JOHN W. BURGESS, 1 POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW: SOVEREIGNTY AND LIBERTY 213 (Boston, Ginn & Co. 1890) ("I can find no satisfactory definition of this phrase, 'police power,' in the decisions of the Supreme Court itself.")); Walter Wheeler Cook, *What is the Police Power?*, 7 COLUM. L. REV. 322, 322 (1907) ("No phrase is more frequently used and at the same time less understood than the one which forms the subject of the present discussion."); Collins Denny, Jr., *The Growth and Development of the Police Power of the State*, 20 MICH. L. REV. 173, 173 (1921) ("The police power of the state is one of the most difficult phases of our law to understand, and it is even more difficult to define it and to place it within any bounds."); Brent E. Simmons, *The Invincibility of Constitutional Error: The Rehnquist Court's States' Rights Assault on Fourteenth Amendment Protections of Individual Rights*, 11 SETON HALL CONST. L.J. 259, 333–34 (2001) ("During the pre-Civil War era, only a few provisions of the Constitution restricted state interference with *national* rights—*i.e.*, rights secured against state infringement by the Constitution . . . [S]tates had no inherent duty to respect the national rights of U.S. citizens . . .").

²⁸ See, e.g., Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447 (1995); Erwin Chemerinsky, *Rehabilitating Federalism*, 92 MICH. L. REV. 1333 (1994); Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499 (1995); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317 (1997); Robert P. Inman & Daniel L. Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 TEX. L. REV. 1203 (1997); Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265 (1990); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988); Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J.L. ECON. & ORG. 1 (1995).

rights model of federalism, focused on expanding unlimited powers for states, has proven to be detrimental to our nation²⁹ and has been “regularly deployed,” even in this modern era, “to thwart full remedies for violations of constitutional rights” and individual liberties.³⁰

Thus, under the conventional states’ rights model of federalism, Americans are caught in a false dilemma in which they must choose between either big federal government, with its attendant protections of individual liberties but lack of local accountability, or the plenary power of states, which act as a strong check on federal powers but provide less protection for individual rights.³¹ However, the three assumptions that underpin this model of federalism not only have a tenuous pedigree, they are—more importantly—not justified by an original meaning understanding of the constitutional framework, nor the historical context surrounding the drafting of the Constitution.

Through new historical analysis of ratification debates, state constitutional provisions, and antebellum case law, this Article challenges the assumptions underlying the

²⁹ These types of states’ rights arguments were used by Southern states to justify the enforcement of slavery, and eventually provided the impetus for the Civil War. See Alfred L. Brophy, Note, *Let Us Go Back and Stand upon the Constitution: Federal-State Relations in Scott v. Sandford*, 90 COLUM. L. REV. 192, 193–98 (1990); see also MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986).

³⁰ Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); see also Huhn, *supra* note 19, at 328–29 (“During the antebellum period ‘states rights’ became the battle cry of nullifiers and secessionists in support of slavery. After the Civil War, state sovereignty remained the principal argument in opposition to the protection of newly freed slaves, and ‘states rights’ was the constant refrain of segregationists up to and throughout the Civil Rights Movement of the 1950s and 1960s. In the late nineteenth century, these racists were joined by industrialists seeking immunity from federal laws outlawing abusive practices such as monopolization and child labor, and for fifty years the Supreme Court enthusiastically enforced their agenda under the banner of ‘state sovereignty.’ Not until the mid-twentieth century did the Roosevelt Court and the Warren Court recognize Congress’s power to adopt laws protecting workers and racial minorities. Historically, ‘state sovereignty’ was used to diminish the right of the American people to defend themselves from oppression.”); Simmons, *supra* note 27, at 373 (“The states’ rights jurisprudence and judicial activism of the Rehnquist Court pose a direct threat to the roles of Congress and the courts—both state and federal—in securing the privileges and immunities of national citizenship, as well as the guarantees of due process and equal protection.”).

³¹ Some scholars have observed that states have not always used their plenary power to fulfill their original mandate of protecting individual rights. See, e.g., CURTIS, *supra* note 29; Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 265 (1983) (“The states, receding from the front ranks as defenders of individual freedom, eventually came to be regarded as obstacles to liberty.”). But other scholars have noted ways in which states have granted more individual liberties than are granted under the federal Constitution. See, e.g., G. Alan Tarr & Mary Cornelin Porter, *Gender Equality and Judicial Federalism: The Role of State Appellate Courts*, 9 HASTINGS CONST. L.Q. 919, 953–54 tbl.A (1982) (observing states that were either moderately willing or willing to extend protection for individual rights beyond those recognized by the Burger Court); Mary Ellen Cusack, Comment, *Judicial Interpretation of State Constitutional Rights to a Healthful Environment*, 20 B.C. ENVTL. AFF. L. REV. 173, 175 (1993).

states' rights federalism model and instead illustrates that the people—as a sovereign body separate and distinct from the states—were viewed as the ultimate source and residuary location of sovereign power.³² As such, it is the people who formed both state and federal governments to act as agents for the people, exercising a bounded portion of the people's sovereignty.³³ The people also have the ability to reserve additional powers to themselves and need not be required to delegate those powers to either state or federal governments in a zero-sum shuffling of sovereign authority. Finally, this Article demonstrates that the American model of popular sovereignty is more than merely an interesting academic concept. Certain sovereign powers were understood to remain with the people and have not been delegated to any government—such as the power to arbitrarily violate natural rights. Government actions of this nature are without authority and void.³⁴ As such, this model of sovereignty was understood to impose additional substantive limitations³⁵ on both federal and state powers dating back to the American Revolution.³⁶

³² See *infra* Part I.

³³ See *infra* Part I and Part II.

³⁴ See *infra* Part III.

³⁵ A number of scholars recognize the framer's conception of individuals retaining certain rights whenever they enter civil society, with these rights operating as binding limits on government power, but these scholars generally base these substantive protections of rights on social contract theory in general focused on the federal government, rather than a popular sovereignty conception of federalism that limits both state and federal governments. See Randy E. Barnett, *Implementing the Ninth Amendment*, in *THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT* 1, 7 (Randy E. Barnett ed., 1989); Thomas C. Grey, *The Original Understanding and the Unwritten Constitution*, in *TOWARD A MORE PERFECT UNION: SIX ESSAYS ON THE CONSTITUTION* 145, 162–67 (Neil L. York ed., 1988); John Kaminski, *Restoring the Declaration of Independence: Natural Rights and the Ninth Amendment*, in *THE BILL OF RIGHTS* 141 (John Kukla ed., 1987); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1161–67 (1987); Jeff Rosen, Note, *Was the Flag Burning Amendment Unconstitutional?*, 100 YALE L.J. 1073, 1074–81 (1991); see also Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1266 n.198 (1990) (citing additional works that treat natural rights theory as a key to understanding the Ninth Amendment). In contrast, other scholars argue that “the historical evidence shows that the other rights ‘retained’ by the people are those which the framers of the proposed Constitution sought to secure by the granting of specified and limited powers to the national government.” Charles J. Cooper, *Limited Government and Individual Liberty: The Ninth Amendment's Forgotten Lessons*, 4 J.L. & POL'Y 63 (1987); Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239, 315–17 (1989); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 269–73 (1988); Thomas B. McAfee, *The Bill of Rights, Social Contract Theory, and the Rights “Retained” by the People*, 16 S. ILL. U. L.J. 267, 268 (1992); Arthur E. Wilmarth, Jr., *The Original Purpose of the Bill of Rights: James Madison and the Founders' Search for a Workable Balance Between Federal and State Power*, 26 AM. CRIM. L. REV. 1261, 1287–89, 1297–98, 1301–03 (1989).

³⁶ Some scholars believe that an additional “revolution in federalism” occurred with the passage of the Thirteenth and Fourteenth Amendments. Simmons, *supra* note 27, at 336; see

From this historic perspective, federalism was not intended merely as a means of protecting the rights of states. Rather, the American conception of federalism was conceived as a means of protecting the rights of the people, and the division of limited powers between the federal and state governments is useful only inasmuch as it is accomplishing that end. Under this model, the ideals of limited government and strong protections of fundamental rights are not at odds with each other, but are rather principles that complement each other in a federalism model aimed at providing for the welfare and security of the nation's ultimate sovereign—the people.

I. THE PEOPLE AS ULTIMATE SOVEREIGNS

One of the traditional arguments in favor of the states' rights model of federalism is that it was the states who inherited the ultimate sovereignty of the nation at the founding of the new American republic, and it was the states who delegated some of their sovereign authority to create the federal government.³⁷ However, historic evidence strongly suggests that the framers believed it was the people who inherited the ultimate sovereign power previously wielded by the British Parliament, and though the states did lose some of their sovereignty upon the creation of the federal government, it was the people that diverted these sovereign powers from one type of government to another.

A. *The People Inherited Parliament's Ultimate Sovereignty*

Gordon Wood describes the “doctrine of sovereignty” as the “constitutional issue dividing Britain and America” in the years surrounding the Revolutionary War.³⁸ Indeed, the “theory of sovereignty pervaded the arguments of the whole Revolutionary generation” from the early 1760s until the adoption of the federal Constitution in the late 1780s.³⁹ The “assumption that there could be but one final, indivisible, and

also ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 250–51 (1988); HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW 387 (1982); JACOBUS TENBROEK, EQUAL UNDER LAW (originally published as: THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT), 160 (1969). When this revolution occurred, “[t]he Fourteenth Amendment did not create new privileges. It created a new method of protecting old and inadequately secured privileges.” Curtis, *supra* note 22, at 24–25; *see also* Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and The Slaughter-House Cases*, 70 CHI.–KENT L. REV. 627, 628 n.6 (1994) (“The legislative history makes it clear that the framers of the Fourteenth Amendment did not mean to ‘establish’ any new substantive rights; rather, they intended it to be a procedure through which they could enforce existing substantive rights.”).

³⁷ *See supra* notes 13–18 and accompanying text; *see also* Brophy, *supra* note 29, at 193–98.

³⁸ GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787, at 344–45 (1969).

³⁹ *Id.* at 345.

incontestable supreme authority” in every form of government, to which all other authorities were subordinate, was widely accepted, and thus every new institution or idea had to be reconciled with this assumption.⁴⁰ However, the key question was *where* this ultimate power resided.⁴¹

In England, the question of where ultimate sovereignty resided had been decided after the English Civil War of the 1640s, at which time it was established that ultimate sovereignty resided in Parliament.⁴² Sir William Blackstone described Parliament as “the place where that absolute despotic power which must in all governments reside somewhere, is intrusted by the constitution of these kingdoms.”⁴³ Blackstone also explained that the “power and jurisdiction of parliament” was so “transcendent and absolute, that it cannot be confined . . . True it is, that what the parliament doth, no authority upon Earth can undo.”⁴⁴

The colonists understood this British view that ultimate sovereignty resided in Parliament, but the colonists rejected this model and chose instead to place the unlimited sovereign power inherited from Parliament in the people of the United States.⁴⁵

⁴⁰ *Id.*; see also JAMES OTIS, THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED 12 (1764) (“an original supreme Sovereign, absolute, and uncontrollable, *earthly* power *must* exist in and preside over every society; from whose final decisions there can be no appeal but directly to Heaven.”).

⁴¹ WOOD, *supra* note 38, at 345.

⁴² Amar, *supra* note 30, at 1430–32 (“Colonial leaders took up arms in 1776 not simply because they found Parliament’s actual policies during the 1760’s and 1770’s intolerable in fact, but also because—as a matter of principle—they could not accept the British idea that Parliament had legitimate authority to do anything it wanted to the colonies . . . many colonial leaders argued that various Parliamentary enactments were void because they violated higher principles of the British Constitution reflected in revered texts like Magna Charta, and in fundamental unwritten and common law traditions.”); see also Huhn, *supra* note 19, at 293–94 (“People of different societies may profoundly disagree in their understanding of where sovereignty resides. Over time and in different places people have held wildly divergent opinions about the ultimate source of political power.”). For additional discussion of rise of popular sovereignty, see HENRY NOEL BRAILSFORD, THE LEVELLERS AND THE ENGLISH REVOLUTION (1961); JOSEPH FRANK, THE LEVELLERS (1955); PAULINE GREGG, FREE-BORN JOHN: A BIOGRAPHY OF JOHN LILBURNE (1961); MORGAN, *supra* note 22, at 282–84; Michael Kent Curtis, *In Pursuit of Liberty: The Levellers and the American Bill of Rights*, 8 CONST. COMMENT. 359, 377–86 (1991); David N. Mayer, *The English Radical Whig Origins of American Constitutionalism*, 70 WASH. U. L. Q. 131, 204–08 (1992) (discussing views of Radical Whigs).

⁴³ WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 160–61 (Wayne Morrison ed., 2001).

⁴⁴ *Id.* at 160. In a vague sense the British people believed that sovereignty resided in the people as well, but they differed with the Americans in that they believed that Parliament was the absolute embodiment of the people, and thus no actions of the Parliament could be contrary to the will of the people. Amar, *supra* note 30, at 1436.

⁴⁵ See WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 14–17, 63 (1980) (explaining that in the Revolutionary Era, “popular sovereignty had emerged as the basic

James Wilson acknowledged that the “supreme, absolute, and uncontrollable” power in England “is lodged in the British Parliament,” but Wilson criticized this frame of government and explained that though “Great Britain boasts . . . of the improvement she has made in politics . . . it by no means goes far enough.”⁴⁶ Contrary to England’s frame of government, Wilson asserted, along with countless other American founders, that “in our governments, the supreme, absolute, and uncontrollable power *remains* in the people.”⁴⁷

In asserting popular sovereignty, the colonists were not merely engaging in “an intellectual shift of a political conception.”⁴⁸ Rather, the “Americans were fundamentally unsettling the traditional understanding” of how the people participated in their government.⁴⁹ Thus, the American Revolution was not merely an overthrow of England’s governmental authority; it was a revolution of the colonists’ very “conceptions of law, constitutionalism, and politics,” which resulted in a “radical redistribution of the powers of society” and a “shattering of the categories of government that had dominated Western thinking for centuries.”⁵⁰ As described by Wood, this shift “gave coherence and reality, even a legal reality, to the hackneyed phrase, the sovereignty of the people.”⁵¹

principle of legitimate government”); WOOD, *supra* note 38, at 182 (“It was axiomatic by 1776 ‘that the only moral foundation of government is, the consent of the people.’”); Carlos E. Gonzalez, *Representational Structures Through Which We the People Ratify Constitutions: The Troubling Original Understanding of the Constitution’s Ratification Clauses*, 38 U.C. DAVIS L. REV. 1373, 1385 (2005) (“During [the Revolutionary Era], Americans cleanly rejected the British notion that sovereignty rested in Parliament, and, instead, firmly embraced the republican notion that sovereignty rests with the People.”).

⁴⁶ JONATHAN ELLIOT, 2 ELLIOT’S DEBATES ON THE FEDERAL CONSTITUTION 423 (2d. ed. 1891) [hereinafter 2 ELLIOT].

⁴⁷ *Id.* at 432. To provide further historic support of this theory, James Madison stated that “the people were in fact, the fountain of all power.” WOOD, *supra* note 38, at 533. James Otis stated that the “supreme 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.” OTIS, *supra* note 40. Mr. Maclaine of North Carolina stated that “[t]here is no people on earth so well acquainted with the nature of government as the people of America generally are. We know now that it is agreed upon by most writers, and men of judgment and reflection, that all power is in the people, and immediately derived from them.” JONATHAN ELLIOT, 4 ELLIOT’S DEBATES ON THE FEDERAL CONSTITUTION 161 (2d. ed. 1996) [hereinafter 4 ELLIOT]. Similarly, Justice Iredell stated that the American government “is founded on much nobler principles” than other countries like England. In contrast to other governments, in America “[t]he people are known with certainty to have originated [their government] themselves.” *Id.* at 9. Charles Pinckney of South Carolina stated, “[w]e have been taught here to believe that all power of right belongs to the people; that it flows immediately from them How different are the governments of Europe! There the people are the servants and subjects of their rulers.” *Id.* at 319.

⁴⁸ WOOD, *supra* note 38, at 383.

⁴⁹ *Id.*

⁵⁰ *Id.* at 383, 385.

⁵¹ *Id.* at 383.

Although the exact framework of the people's sovereignty in America took years to crystallize,⁵² Justice Story argued that one of the first sovereign acts of the American people was the Declaration of Independence.

[T]he declaration of the independence of all the colonies . . . was “a declaration by the representatives of the United States of America in Congress assembled;” “by the delegates appointed by the good people of the colonies,” as in a prior declaration of rights they were called. It was *not* an act done by the state governments then organized; nor by persons chosen by them. It was emphatically the act of the *whole people* of the United Colonies, by the instrumentality of their representatives, chosen for that among other purposes. It was an act *not competent to the state governments*, or any of them, as organized under their charters, to adopt. Those charters neither contemplated the case, nor provided for it. It was an act of *original, inherent sovereignty by the people themselves*, resulting from their right to change the form of government, and to institute a new government, whenever necessary for their safety and happiness.⁵³

On a similar note, one Massachusetts representative said that the people of America were “a people who have fought, who have bled, and who have conquered; who, under the smiles of Heaven, have established their independence and sovereignty, and have taken equal rank among the nations of the earth.”⁵⁴ Thus, once America won the Revolutionary War and cast off the yoke of England, it was the “people of the nation,” and not the states, who inherited “the absolute sovereign[ty] of the nation.”⁵⁵

⁵² *Id.* at 344–89, 354 (“The problem of sovereignty was not solved by the Declaration of Independence. It continued to be the most important theoretical question of politics throughout the following decade, the ultimate abstract principle to which nearly all arguments were sooner or later reduced.”); *see also* Amar, *supra* note 30, at 1446 (“In relocating sovereignty from the government to the People, the revolutionary generation initially seemed to have in mind the People of each state, and not the People of the United States as a whole. The colonies united to declare their independence, but their Declaration proclaimed them to be ‘free and independent *states*’—independent even of each other, save as they chose to concert their action. In short, they were united states, not a unitary state; they were thirteen Peoples, not (yet) one People.”).

⁵³ JONATHAN ELLIOT, 1 ELLIOT’S DEBATES ON THE FEDERAL CONSTITUTION 66 (2d. ed. 1996) (emphasis added) [hereinafter 1 ELLIOT]. Indeed, the very Declaration of Independence itself articulates that “Governments are instituted among Men, deriving their just powers from the consent of the governed.” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

⁵⁴ 2 ELLIOT, *supra* note 46, at 121.

⁵⁵ 1 ELLIOT, *supra* note 53, at 65; *see also* Thomas G. West, *The Political Theory of the Declaration of Independence*, in THE AMERICAN FOUNDING AND THE SOCIAL COMPACT 95 (Ronald J. Pestritto & Thomas G. West eds., 2003).

An examination of early state constitutional provisions illustrates that state governments understood sovereignty to originate from and reside with the people.⁵⁶ In the decade following the Declaration of Independence, state governments instituted new constitutions at the recommendation of Congress in order to form “new governments on a popular basis.”⁵⁷ As noted by Wood, it is unsurprising that in the revolutionary atmosphere of America at the time, “special elections were held in seven of the colonies prior to the framing of new constitutions,”⁵⁸ which declared that sovereignty resided in the people. For example, South Carolina’s Constitution stated that “[a]ll power is originally vested in the people; and all free governments are founded on their authority.”⁵⁹ Maryland’s Constitution stated that “all government of right originates from the people.”⁶⁰ The vesting provision in North Carolina’s Declaration of Rights stated that “all political Power is vested in and derived from the People only.”⁶¹ Virginia’s provision stated that “all power is vested in, and consequently derived from the people.”⁶² Massachusetts’s Constitution described “[a]ll power [as] residing originally in the people.”⁶³

Another example is early constitutional provisions which declared that only the people possessed the power to change the structure of their government to meet their

⁵⁶ Maryland, Massachusetts, New Jersey, North Carolina, Pennsylvania, South Carolina, Vermont, and Virginia all had these types of constitutional provisions. *See* MARYLAND DECLARATION OF RIGHTS of 1776, art. I, *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 676 (Neil H. Cogan ed. 1997) [hereinafter THE COMPLETE BILL OF RIGHTS]; MASS. CONST. of 1780, pt. 1, art. VII, *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra*, at 677; N.J. CONST. of 1776, preamble, *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra*, at 678; NORTH CAROLINA DECLARATION OF RIGHTS of 1776, § 1, *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra*, at 678; PA. CONST. of 1776, preamble, *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra*, at 678; S.C. CONST. of 1790, art. IX, § 1, *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra*, at 680; VT. CONST. of 1777, preamble, *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra*, at 680; VIRGINIA DECLARATION OF RIGHTS of 1776, § 2, *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra*, at 680.

⁵⁷ BENJAMIN FLETCHER WRIGHT, JR., AMERICAN INTERPRETATIONS OF NATURAL LAW 101 (1931).

⁵⁸ WOOD, *supra* note 38, at 332 n.49 (the new elections were held in New Hampshire, Pennsylvania, Delaware, Maryland, North Carolina, and Georgia). Though the use of constitutional conventions was not formalized at this point, and will be discussed in greater length in Part II, it is worth noting that later states attempted to enact their new constitutions through constitutional conventions. *Id.* at 332.

⁵⁹ S.C. CONST. of 1790, art. IX, § 1 (1790), *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra* note 56, at 680.

⁶⁰ MARYLAND DECLARATION OF RIGHTS of 1776, art. I, *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra* note 56, at 676.

⁶¹ NORTH CAROLINA DECLARATION OF RIGHTS of 1776, § 1, *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra* note 56, at 678.

⁶² VIRGINIA DECLARATION OF RIGHTS of 1776, § 2, *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra* note 56, at 680.

⁶³ MASS. CONST. of 1780, pt. 1, art. V, *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra* note 56, at 677.

needs. For example, the Massachusetts Constitution stated that “the *people alone* have an incontest[a]ble, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity and happiness require it.”⁶⁴ Pennsylvania’s Constitution stated that “the people have a right, by common consent to change [the government], and take such measures as to them may appear necessary to promote their safety and happiness.”⁶⁵ This power is parallel to that held by Parliament, which, as Blackstone explained, was the power to “change and create afresh even the constitution of the kingdom, and of the parliaments themselves.”⁶⁶

In a vague sense the British people had believed that sovereignty resided in the people as well, but they differed with the Americans in that they believed that Parliament was the absolute embodiment of the people, and thus no actions of Parliament could be contrary to the will of the people.⁶⁷ As discussed above, Americans rejected this view of sovereignty when they made a distinction that the people, and not another form of government, inherited Parliament’s sovereignty. Thus, the people of the United States, and not the states themselves or as proxies of the people, assumed the ultimate sovereign power of Parliament, including the power to change and reform government.

B. The People, Not the States, Diverted Sovereign Powers to the Federal Government, and Thus Retained Residuary Sovereign Powers

While it is true that the state governments did lose some of their sovereign powers to the federal government, contrary to the arguments of states’ rights advocates, it was the people that diverted these sovereign powers from one form of government to another. Supporters of the states’ rights model of federalism often turn to the Tenth Amendment as authority for this conventional claim: since the Constitution reserves undelegated power to the states, they argue that the states were the source of this power to begin with. However, a textual aspect of this amendment that is often overlooked is that undelegated power is “reserved to the States respectively, *or to the people*.”⁶⁸ It is important that the Tenth Amendment designates no clear actor that divides and reserves this power.⁶⁹ As Justice Thomas correctly observed, “[w]ith this careful last phrase, the Amendment avoids taking any position on the division of

⁶⁴ MASS. CONST. of 1780, pt. 1, art. VII, *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra* note 56, at 677 (emphasis added).

⁶⁵ PA. CONST. of 1776, pmbl., *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra* note 56, at 678.

⁶⁶ BLACKSTONE, *supra* note 43, at 160.

⁶⁷ Amar, *supra* note 30, at 1435.

⁶⁸ U.S. CONST. amend. X (emphasis added).

⁶⁹ See Barnett, *The Proper Scope of the Police Power*, *supra* note 27, at 432 (noting that the Tenth Amendment “provides no explicit reference to the proper scope of state powers. It most assuredly does not say that the states have all powers not delegated to the federal government. Indeed, the Tenth Amendment is expressly noncommittal on the scope of state powers . . .”).

power between the state governments and the people of the States”⁷⁰ Thus, this provision is at least textually consistent with the theory that the people delegated powers to the federal government, and then left the remainder of the power to the states, or to themselves.⁷¹ To confirm the theory that the people, and not the states, delegated their powers, we must look to other contemporaneous sources.⁷²

Likely the most compelling historic evidence that the people, and not states, transferred certain sovereign powers to the federal government is found through examining the procedure used to ratify the federal Constitution. From early on, it was understood that since a federal constitution would be creating a new system of government, “the authority of [the] constitution depended on the mode of its adoption.”⁷³ John Adams, in his influential *Thoughts on Government*, voiced the assumption that the Constitution could be drafted and ratified legislatively.⁷⁴

However, other delegates expressed concern that it was imprudent to allow a group of “sitting legislators to frame the very fundamental rules under which they were operating.”⁷⁵ They viewed this conflict of interest as a “violation of reason and natural rights.”⁷⁶ They expressed further concern that a constitution drafted and ratified legislatively would possess the same authority as any other statute, which would allow subsequent legislatures to alter or even ignore such a constitution.⁷⁷ Thomas Jefferson argued that for a constitution to be binding, the voters must understand that they were authorizing a permanent charter of government.⁷⁸ James Madison shared Jefferson’s views, and he wrote to George Washington that “to give a new system its proper validity and energy, a ratification must be obtained from the people, and not merely from the ordinary authority of the [l]egislatures.”⁷⁹

The solution that states had begun to use in the 1770s and early 1780s was the use of constitutional conventions. Conventions had been used dating back to medieval English history, and had even been used in the English Glorious Revolution of 1688.⁸⁰

⁷⁰ U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 848 (1995) (Thomas, J., dissenting).

⁷¹ The legislative history surrounding the passage of the Tenth Amendment suggests that it was intended, in large part, to be a declaration of popular sovereignty. Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and “Expressly” Delegated Power*, 83 NOTRE DAME L. REV. 1889, 1924 (2008).

⁷² Barnett, *The Proper Scope of the Police Power*, *supra* note 27, at 434 (“While the Tenth Amendment establishes that federal powers are limited to those that are enumerated, it does not say whether any particular power is in the hands of the states or of the people To answer that question we must look elsewhere.”).

⁷³ JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 98 (1996).

⁷⁴ *Id.* at 97.

⁷⁵ *Id.* at 98.

⁷⁶ WOOD, *supra* note 38, at 338.

⁷⁷ RAKOVE, *supra* note 73, at 98.

⁷⁸ *Id.* at 99.

⁷⁹ *Id.* at 100.

⁸⁰ WOOD, *supra* note 38, at 310–11, 318.

However, the English viewed the use of conventions as inferior in legal authority to Parliament, because of the absence of the king, and they thus used conventions only as a last recourse when the country was in a state of revolution.⁸¹

While Americans originally may have shared the British view of conventions, Americans eventually came to view constitutional conventions as the only valid means of creating a new constitution, whereas the legislature afterward was the proper body to make laws in accordance with that constitution.⁸² By creating a convention where its members were “invested with powers to form a plan of government only, and not to execute it after it is framed,” political leaders were able to avoid the problem present when legislatures created laws that would later give those same legislators power.⁸³ As Kurt Lash explained, it also came to be accepted that “the people collectively held ultimate law making authority which they exercised when meeting in special extra-governmental conventions,”⁸⁴ which therefore gave the authority of the Constitution something beyond ordinary legislation. In a way, the use of conventions allowed Americans to civilize and channel revolutionary changes of government into peaceful means that could be invoked on any occasion at the pleasure of the people.⁸⁵ As Mr. Wolcott of Connecticut stated, “[n]ever before did a people in time of peace and tranquility, meet together by their representatives, and, with calm deliberation, frame for themselves a system of government. This noble attempt does honor to our country.”⁸⁶

⁸¹ *Id.* at 319.

⁸² *Id.* at 342, 338.

⁸³ *Id.* at 338 (emphasis removed); McAfee, *The Bill of Rights, Social Contract Theory, and the Rights “Retained” by the People*, *supra* note 35, at 275 n.19 (“The key development in the shift from reliance on popular legislatures to an enlarged view of popular sovereignty was the development of the institution of the popular constitutional convention that established a document that bound all branches of government . . . [T]he central American idea of constitutionalism as limiting government power could not fully emerge until the power of the legislature was disassociated from the power of the people.”); Thomas G. West, *The Rule of Law in the Federalist*, in *SAVING THE REVOLUTION* 150, 155 (Charles A. Kesler ed., 1987).

⁸⁴ Kurt T. Lash, *On Federalism, Freedom, and the Founder’s View of Retained Rights*, 60 *STAN. L. REV.* 969, 975 (2008); *see also* WOOD, *supra* note 38, at 337 (arguing that a constitutional convention was “in a special manner the epitome of the People”); Gonzalez, *supra* note 45, at 1384 (“only specially elected, popular constituent conventions, and not ordinary legislatures, were thought of as an adequate medium through which the sovereign People could sanction and ratify constitutional norms.”).

⁸⁵ WOOD, *supra* note 38, at 342 (noting that conventions seemed to have “legitimized revolution”); Amar, *supra* note 30, at 1435 n.41.

⁸⁶ 2 ELLIOT, *supra* note 46, at 200. James Wilson made a similar point when he stated:

America now exhibits to the world—a gentle, a peaceful, a voluntary, and a deliberate transition from one constitution of government to another. In other parts of the world, the idea of revolution in government is, by a mournful and an indissoluble association, connected with the idea of wars, and all the calamities attendant on wars. But happy experience

Thus, after the delegates to the federal convention had completed their draft of the Constitution, rather than asking Congress or the state legislatures to approve the Constitution, the convention called for ratifying conventions to be held in each state.⁸⁷ Section VII of the Constitution declares, “The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.”⁸⁸ This constitutional provision came as a result of the Framers’ recognition that the dramatic new form of government needed to be sanctioned by the people, rather than merely by the states. As Madison explained, the revolutionary nature of the new system required popular ratification because “the true difference . . . between a league or a treaty, and a [c]onstitution’ was the difference between ‘a system founded on the legislatures only, and one founded on the people.’”⁸⁹

There were multiple debates at the national convention which confirmed that state conventions were viewed as equivalent to popular ratification.⁹⁰ Virginia’s Governor Edmund Randolph offered the Virginia plan, which, *inter alia*, proposed that:

amendments which shall be offered to the Confederation, by the Convention ought at a proper time, or times, after the approbation of Congress to be submitted to an assembly or assemblies of Representatives, recommended by the several Legislatures to be *expressly chosen by the people*, to consider & decide thereon.⁹¹

Madison agreed with Randolph and argued that “it [was] indispensable that the new Constitution should be ratified in the most unexceptionable form, and *by the supreme authority of the people themselves*.”⁹²

Some representatives, such as Roger Sherman from Connecticut, argued that “popular ratification [was] unnecessary” since “[t]he articles of Confederation [already] provid[ed] for changes and alterations with the assent of Cong[ress] and ratification of the State Legislatures”⁹³ Elbridge Gerry of Massachusetts also disfavored popular

teaches us to view such revolutions in a very different light—to consider them only as progressive steps in improving the knowledge of government, and increasing the happiness of society and mankind.

2 ELLIOT, *supra* note 46, at 432–33.

⁸⁷ Gonzalez, *supra* note 45, at 1398 n.55. For an in-depth, historical discussion of the state ratifying conventions, see generally FRANCIS NEWTON THORPE, THE CONSTITUTIONAL HISTORY OF THE UNITED STATES (1901); THE CONSTITUTION AND THE STATES: THE ROLE OF THE ORIGINAL THIRTEEN IN THE FRAMING AND ADOPTION OF THE CONSTITUTION (Patrick T. Conley & John P. Kaminski eds., 1988).

⁸⁸ U.S. CONST. art. VII.

⁸⁹ WOOD, *supra* note 38, at 533 (quoting James Madison).

⁹⁰ For a thorough analysis of the ratification debates, see generally Gonzalez, *supra* note 45.

⁹¹ *Id.* at 1397 (emphasis added).

⁹² *Id.* at 1400 (emphasis added).

⁹³ *Id.*

ratification because he argued that the people “have the wildest ideas of Government in the world.”⁹⁴ Olliver Ellsworth of Connecticut worried about the chaos of these popular conventions, and explained that he:

wished also the plan of the Convention to go forth as an amendment to the articles of Confederation, since under this idea the authority of the Legislatures could ratify it If the plan goes forth to the people for ratification several succeeding Conventions within the states would be unavoidable [Conventions] were better fitted to pull down than to build up Constitutions.⁹⁵

It is telling that while opponents of Randolph’s proposal disagreed on the necessity of allowing for popular sovereignty in special conventions, they did equate Randolph’s proposal to “popular ratification,” even though state legislatures would recommend these assemblies.⁹⁶

Madison concluded the July 23 debate on the ratifying provision and argued that “the difference between a system founded on the Legislatures only, and one founded on the people, to be the true difference between a league or treaty, and a Constitution. [A] constitution established by the people themselves,” Madison explained, would be superior to a mere treaty, “founded on the Legislatures only.”⁹⁷ After Madison’s speech, the convention approved the “popular ratification” provision by a vote of nine states in favor and only one state opposed.⁹⁸ In sum, as one commentator noted, the evidence

⁹⁴ *Id.* at 1401.

⁹⁵ *Id.* at 1406.

⁹⁶ *Id.* at 1400.

⁹⁷ *Id.* at 1416. Chief Justice Marshall expressed almost identical sentiments to Madison regarding why the Constitution needed to be ratified by the people in conventions, in contrast to the Articles of Confederation requiring only ratification by the state legislatures. Marshall explained that while the sovereign consent of the states alone was sufficient for the “league” created under the Articles of Confederation:

when, “in order to form a more perfect union,” it was deemed necessary to change this alliance [the Articles of Confederation] into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of *referring it to the people*, and of *deriving its powers directly from them*, was felt and acknowledged by all. The government of the Union, then . . . is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

McCullough v. Maryland, 17 U.S. (4 Wheat.) 316, 404 (1819) (emphasis added). Thus, Marshall rejected the argument made by the counsel for the state of Maryland, who argued that the Constitution was “the act of sovereign and independent states . . . who alone are truly sovereign.” *Id.* at 402.

⁹⁸ Gonzalez, *supra* note 45, at 1417–18. Though the federal convention did debate this

that the framers of the Constitution viewed Article VII as submitting the Constitution to the consent of the people is “overwhelming. In the arguments the delegates made, the way they framed those arguments, and the arguments they chose not to make, the delegates manifested a strong consensus on underlying premises. Ratification by extraordinary assemblies or conventions, but not ordinary legislatures, was thought to equate with ratification by the People.”⁹⁹

There is also ample evidence that the state ratification conventions themselves understood that they were ratifying the Constitution as special representatives of the people, and not the states. For example, after receiving the Constitution from the national convention, the Congress issued to all state legislatures a unanimous resolution that the Constitution with this resolution “be transmitted to the several legislatures, in order to be submitted to a convention of delegates, chosen in each state by the *people* thereof.”¹⁰⁰

Further, in the ratification documents that the state delegations reported back to Congress, each of the states expressed an understanding that the convention had met and deliberated on behalf of the people, not the state itself. Delaware started its ratification letter with the statement, “We, the deputies of the people of the Delaware state, in Convention met.”¹⁰¹ Pennsylvania similarly described the convention as “we, the delegates of the people,” and explained that this convention was “in the name and by the authority of the same people.”¹⁰² In New Jersey, the state legislature had even enacted legislation “to authorize the people of this state to meet in convention, deliberate upon, agree to, and ratify, the Constitution.”¹⁰³ Massachusetts’s ratification report explained that the convention “[does], in the name and in behalf of the people . . . assent to and ratify the said Constitution for the United States of America.”¹⁰⁴ The Georgia delegates described themselves as the “delegates of the people” and explained that “in virtue of the powers and authority to [them] given by the people” they ratified the Constitution.¹⁰⁵ South Carolina described the convention as the “Convention of the people.”¹⁰⁶ New Hampshire expressed gratitude to the “Supreme Ruler of the universe” for the opportunity that the “people of the United States” had to “deliberately and

issue one final time before finalizing the ratification provision, the delegates voted again on the provision on September 10, 1787, and gave unanimous approval to the provision. *Id.* at 1418, 1424.

⁹⁹ *Id.* at 1425.

¹⁰⁰ 1 ELLIOT, *supra* note 53, at 320 (emphasis added); see also *McCulloch*, 17 U.S. (4 Wheat.) at 403 (noting that the Constitution was “reported to the then existing Congress of the United States, with a request that it might ‘be submitted to a Convention of Delegates, chosen in each State by the people thereof’”).

¹⁰¹ 1 ELLIOT, *supra* note 53, at 319.

¹⁰² *Id.*

¹⁰³ *Id.* at 320.

¹⁰⁴ *Id.* at 322.

¹⁰⁵ *Id.* at 324.

¹⁰⁶ *Id.* at 325.

peaceably” enter into a new and “solemn compact with each other, by assenting to and ratifying a new Constitution.”¹⁰⁷ North Carolina’s report explained that the Convention had met “in behalf of the freemen, citizens, and inhabitants of the state.”¹⁰⁸ And Connecticut, Virginia, and Rhode Island’s ratification reports all described the members of the convention as the “delegates of the people.”¹⁰⁹

Moreover, statements by delegates made during the debates at the state conventions clearly illustrate that the delegates understood the significance of their special role as direct representatives of the people. Pendleton of Virginia pointed out that “the *people*, by us, are peaceably assembled, to contemplate, in the calm lights of mild philosophy, what government is best calculated to promote their happiness and secure their liberty.”¹¹⁰ Governor Huntington of Connecticut explained that “[n]ever before did a *people*, in time of peace and tranquility, meet together *by their representatives*, and, with calm deliberation, *frame for themselves* a system of government.”¹¹¹ Melancton Smith of New York said in this convention, “the representative ought to understand and govern his conduct by the true interest of the *people*.”¹¹² James Wilson of Pennsylvania explained that “the *people* may change the constitutions whenever and however they please” and that the convention “at this moment, speak[s] and deliberate[s] under [the people’s] immediate and benign influence.”¹¹³ Further, Wilson expressed pride that this convention “exhibits to the world” the people’s ability to gently and peaceably “transition from one constitution of government to another.”¹¹⁴ George Mason of Virginia expressed that “this Convention, *appointed by the people*” was a “great and important occasion, for securing . . . the happiness and liberty of the people . . .”¹¹⁵ Edmund Archibald Maclaine of North Carolina explained that the Constitution had been “submitted by the legislatures to the *people*; so that when it is adopted, it is the act of the *people*.”¹¹⁶ These are only a few examples of the statements by delegates illustrating their understanding that they represented the people, and not the states, in choosing to authorize and ratify the Constitution.

The statements made by delegates at state conventions also illustrate their understanding that though the states were losing some of their sovereign power, it was the people, as the source of all power, who were shifting some aspects of power from one form of government to another. James Wilson from Pennsylvania observed that “[i]n

¹⁰⁷ *Id.* at 326.

¹⁰⁸ *Id.* at 333.

¹⁰⁹ *Id.* at 321, 327, 334.

¹¹⁰ JONATHAN ELLIOT, 3 ELLIOT’S DEBATES ON THE FEDERAL CONSTITUTION 293 (2d. ed. 1996) [hereinafter 3 ELLIOT] (emphasis added).

¹¹¹ 2 ELLIOT, *supra* note 46, at 200 (emphasis added).

¹¹² *Id.* at 272 (emphasis added).

¹¹³ *Id.* at 432 (emphasis added).

¹¹⁴ *Id.* at 432–33.

¹¹⁵ 3 ELLIOT, *supra* note 110, at 3 (emphasis added).

¹¹⁶ 4 ELLIOT, *supra* note 47, at 16 (emphasis added).

this Constitution, *all authority is derived from the people*,” and that this new form of government “receive[d] its political existence from *their* authority.”¹¹⁷ Further, the power the people delegated for this national government was only “a part of their original power They never part with the whole; and they retain the right of recalling what they part with.”¹¹⁸ In response to concerns of his fellow delegates that states were losing portions of their sovereignty, Wilson openly admitted to his state convention that “state sovereignties will, under this system, be disrobed of part of their power.”¹¹⁹ But Wilson argued that since

sovereignty resides in the people . . . and the people are the source of authority, the consequence is, that *they may* take from the subordinate governments powers with which they have hitherto trusted them, *and place those powers in the general government*, if it is thought that there they will be productive of more good. They can distribute one portion of power to the more contracted circle, called state governments; they can also furnish another proportion to the government of the United States. Who will undertake to say, as a state officer, that the people may not give to the general government what powers, and for what purposes, they please? The [power of the] general government . . . [could not] be drawn from any other source, or vested in any other authority, than that of the people at large; and I consider this authority as the rock on which this structure will stand.¹²⁰

Edmund Pendleton of Virginia echoed Wilson’s thoughts when, in response to concerns about why the Constitution said “We the People,” instead of “We the States,” Pendleton asked the rhetorical questions: “[W]ho but the people can delegate powers? Who but the people have a right to form government? . . . What have the state governments to do with it?”¹²¹ John Marshall of Virginia similarly stated that both state and federal “government[s] derived [their] powers from the people, and each was to act according to the powers given it.”¹²² Maclaine of North Carolina asserted, “The people, sir, are the only proper authority to form a government. They, sir, have formed their state governments, and can alter them at pleasure. Their transcendent power is competent to form this or any other government which they think promotive of their happiness.”¹²³ The fact that these quotes were spoken by state representatives to leaders

¹¹⁷ 2 ELLIOT, *supra* note 46, at 434–35.

¹¹⁸ *Id.* at 437.

¹¹⁹ *Id.* at 443 (emphasis omitted).

¹²⁰ *Id.* at 443–44 (emphasis added).

¹²¹ 3 ELLIOT, *supra* note 110, at 37.

¹²² *Id.* at 419.

¹²³ 4 ELLIOT, *supra* note 47, at 161.

at a state convention is powerful evidence that the states themselves were aware that the sovereign power for the national government was being delegated by the people, and not the states.

In addition to the ratification debates, amendments proposed by various states after their ratification conventions present evidence that even the states viewed the people as the primary actors who were diverting certain sovereign powers from state government to federal government. For example, one of New York's proposed amendment states "that every Power, Jurisdiction and Right, which is not by the said Constitution clearly delegated to the Congress of the United States, or the departments of the Government thereof, *remains to the People of the several States, or to their respective State Governments to whom they may have granted the same.*"¹²⁴ Rhode Island's ratification report, which it issued after the Constitution had already been ratified by the requisite number of states, expressed this identical principle.¹²⁵ This language is interesting because it clearly separates the power of the people from the rights of the states. It also makes clear that it is the people who have delegated power to both the federal and state governments. Virginia, North Carolina, and Rhode Island all offered an amendment which stated that "all power is naturally vested in, and consequently derived from, the people; that magistrates, therefore, are their trustees and agents, and at all times amenable to them."¹²⁶ Not only does this proposed amendment confirm the idea of the people as sovereigns, it illustrates that the delegates recognized that the power for the new national government originated in the people, just as the power from the states did.

A final evidence that the people were the actors in the delegation of power to the federal government comes from early antebellum Court decisions. In *Martin v. Hunter's Lessee*,¹²⁷ the Supreme Court stated that "[t]he constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by 'the people of the United States.'"¹²⁸ In *Ware v. Hylton*,¹²⁹ the Court stated in reference to the people that "by *their authority* the Constitution of the United States was established . . ."¹³⁰ In *Chisolm v. Georgia*,¹³¹ the Court explained that "the people, in their collective and na-

¹²⁴ Amendments Proposed by the New York Convention (July 26, 1788), *reprinted in* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 21–22 (Helen E. Veit et al. eds., 1991) (emphasis added).

¹²⁵ Powers not delegated "remain to the people of the several states, or their respective state governments, to whom they may have granted the same." 1 ELLIOT, *supra* note 53, at 334.

¹²⁶ 1 ELLIOT, *supra* note 53, at 334; 3 ELLIOT, *supra* note 110, at 657; 4 ELLIOT, *supra* note 47, at 243.

¹²⁷ 14 U.S. (1 Wheat.) 304 (1816).

¹²⁸ *Id.* at 324.

¹²⁹ 3 U.S. (3 Dall.) 199 (1796).

¹³⁰ *Id.* at 236.

¹³¹ 2 U.S. (2 Dall.) 419 (1793).

tional capacity, established the present Constitution.”¹³² And, probably the most famous Supreme Court case to illustrate this principle was *McCulloch v. Maryland*.¹³³ As Chief Justice Marshall described it, “The *people* of the United States have seen fit to divide sovereignty, and to establish a complex system. They have conferred certain powers on the State Governments, and certain other powers on the National Government.”¹³⁴

The fact that the people were originally viewed as the body that delegated powers to the federal government has important implications for understanding who holds residuary sovereignty. Since it was the people who delegated certain powers to both the state and federal governments in the first place, it is the people who retain all undelegated powers. This challenges the states’ rights idea that all plenary powers not delegated to the federal government reside in the state governments. In fact, only the powers that the people had delegated to *and left with* state governments were “reserved to the states” through the Tenth Amendment. The remainder of sovereignty stayed where it started—with the people.

II. GOVERNMENT AS AGENTS

The concept of the people as sovereigns was “preposterous,” to many steeped in British legal thought, who viewed this new model as the “repudiation” and “breakdown of all governmental order.”¹³⁵ How could the “supreme, absolute, indivisible, sovereign power” necessary in every form of government reside in the people when the people were not able to exercise this power on a day-to-day basis?¹³⁶ The answer came through the use of agency law: namely, governments were created as agents of people and were entrusted with a limited portion of the people’s sovereign power.¹³⁷

There is much historic evidence to support the idea that the power wielded by governments was both delegated to them by the people and was merely a portion of the people’s sovereign power. Whig leaders in the 1770s asserted that “Political power

¹³² *Id.* at 470–71.

¹³³ 17 U.S. (4 Wheat.) 316 (1819).

¹³⁴ *Id.* at 326 (emphasis added); *see also* *N. River Steamboat Co. v. Livingston*, 1 Hopk. Ch. 149, 159 (N.Y. Ch. 1824) (“The national government . . . was not carved out of existing state sovereignties; it was the offspring of the people’s choice, coming direct from them.”).

¹³⁵ WOOD, *supra* note 38, at 383. Some critics described this new model of government as “both arrogant and imprudent.” *Id.* at 379.

¹³⁶ *Id.* at 370, 373, 382.

¹³⁷ Amar, *supra* note 30, at 1432–35 (“[T]he very notion of sovereignty as then understood in Britain suggested that sovereignty was unlimited. How, then, could the power of colonial governments be legally limited if the sovereign was by definition above the law? The ultimate American answer, in part, lay in a radical redefinition of *governmental* ‘sovereignty.’ Just as a corporation could be delegated limited sovereign privileges by the King-in-Parliament, so governments could be delegated limited powers to govern. Within the limitations of their charters, governments could be sovereign, but that sovereignty could be bounded by the terms of the delegation itself.”).

is of two kinds, one principal and superior, the other derived and inferior The principal supreme power is possessed by the people at large, the derived and inferior power by the servants which they employ.”¹³⁸ Notice that these political speakers use the language of agency law, describing the people as the principals and the government as merely their trustees or servants. Similarly, Samuel Chase described the power of the people as “the light of the sun, native, original, inherent, and unlimited by human authority.”¹³⁹ In contrast, the power of government officials was described as “the reflected light of the moon . . . only borrowed, delegated and limited by the grant of the people.”¹⁴⁰

Thus, because the government is entrusted to use power ultimately belonging to the people, according to Samuel Chase, government was “the trustee[] of the people[,] accountable to them,” and “subject to the will of their *principals*.”¹⁴¹ Patrick Henry of Virginia similarly explained that since the people have delegated power to the government, “[t]he governing persons are the servants of the people.” The historic understanding of this agency relationship is also illustrated through some of the proposed amendments states made to the federal Constitution. For example, Virginia and North Carolina recommended that an amendment be added which said that “all power is naturally invested in, and consequently derived from, the people; that magistrates, therefore, are the trustees and agents, and at all times amenable to them.”¹⁴²

In conformity with the idea that governments acted with entrusted sovereignty as agents of the people, some of the early state governments “had originally been designed as corporate charters.”¹⁴³ For example, the 1629 Massachusetts Royal Charter

¹³⁸ WOOD, *supra* note 38, at 364. As explained by Justice Story, when the colonists spoke of sovereignty, they generally used the word in two different senses: sovereignty in the “largest sense” meant “supreme, absolute, uncontrollable power . . . the absolute right to govern”; which power resided “in the people”; and sovereignty in a “far more limited sense,” used “to designate such political powers as, in the actual organization of the particular state or nation, are to be exclusively exercised by certain public functionaries, without the control of any superior authority,” which power was exercised by the state governments. 1 ELLIOT, *supra* note 53, at 63–64. Thomas Cooley also confirmed this distinction and explained that “[t]he American legislatures only exercise a certain portion of the sovereign power. The sovereignty is in the people; and the legislatures which they have created are only to discharge a trust of which they have been made a depository, but with well-defined restrictions.” THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWERS OF THE STATES OF THE AMERICAN UNION 87 (1868).

¹³⁹ WOOD, *supra* note 38, at 371.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 371. Similar to the principle espoused by Chase, Virginia, North Carolina, and Rhode Island all offered an amendment to the federal Constitution which stated that “all power is naturally vested in, and consequently derived from, the people; that magistrates, therefore, are their trustees and agents, and at all times amenable to them.” 1 ELLIOT, *supra* note 53, at 334; 3 ELLIOT, *supra* note 110, at 657; 4 ELLIOT, *supra* note 47, at 243.

¹⁴² 3 ELLIOT, *supra* note 110, at 657; 4 ELLIOT, *supra* note 47, at 243.

¹⁴³ Amar, *supra* note 30, at 1427 (noting that governments were framed according to

described the newly established state as a “company” and appointed a “Governor and Deput[y] Governor of the said [c]ompany,” as well as assistants, with authority to manage the affairs of the company.¹⁴⁴ One scholar noted that this “commercial charter[]” was a “concession[] of powers by the crown to enterprisers willing to undertake the risks of exploration and settlement.”¹⁴⁵ This power was given to these corporate officers, or political leaders, to act on behalf and for the benefit of the sovereign at that time, which was England. The royal charter stated that “for the better Execuon [sic] of our Royall [sic] Pleasure and Graunte [sic] in this behalf, Wee doe [sic] . . . nominate, ordeyne [sic], make, [and] constitute” a governor, assistant governor, and board of assistants to “continue in the . . . several Offices . . . in such manner . . . hereafter declared and appointed.”¹⁴⁶ Even later crown charters, such as those given to New York, Maryland, and the Carolinas, created governing powers to be used on behalf of the crown and that were “incapable of alteration or amendment except by concession from the grantor,” or the crown.¹⁴⁷

Once the source of sovereign power, or the principal in the agency relationship, became the people and not the British government, the state governments became agents of the people. State charters eventually came to be known as constitutions,¹⁴⁸ and many of the states’ early constitutional provisions written after the revolution illustrate this new agency relationship between the people and the state governments. Virginia’s provision stated 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.”¹⁴⁹ South Carolina’s constitution stated that “all free governments are founded on [the people’s] *authority*, and are instituted for their peace, safety and happiness.”¹⁵⁰ Maryland’s vesting provision stated that “all government of right originates from the people, is founded in compact only, and *instituted solely for the good of the whole*.”¹⁵¹

“corporate charter established by the People of America”); *see also* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 447 (1793) (opinion of Iredell, J.) (“‘[C]orporations,’ in its largest sense, has a more extensive meaning than people generally are aware of. Any body politic (sole or aggregate) whether its power be restricted or transcendent, is in this sense ‘a corporation.’ . . . In this extensive sense, not only each State singly, but even the United States may without impropriety be termed ‘corporations.’”).

¹⁴⁴ FRANCIS THORPE, 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS 1857 (1909).

¹⁴⁵ BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 190 (1992).

¹⁴⁶ THORPE, *supra* note 144, at 1852.

¹⁴⁷ BAILYN, *supra* note 145, at 191.

¹⁴⁸ Amar, *supra* note 30, at 1434.

¹⁴⁹ VIRGINIA DECLARATION OF RIGHTS OF 1776, § 2, *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra* note 56, at 680 (emphasis added).

¹⁵⁰ S.C. CONST. of 1790, art. IX, § 1, *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra* note 56, at 680 (emphasis added).

¹⁵¹ MARYLAND DECLARATION OF RIGHTS OF 1776, art. I, *reprinted in* THE COMPLETE BILL

Massachusetts's constitution stated that "Government is instituted for the common good; for the protection, safety, prosperity and happiness of the people" ¹⁵² New Jersey's constitution states, "[Government] was by Compact, derived from the People, and *held for them*, for the common Interest of the whole Society" ¹⁵³

The analogy between constitutions and corporate charters has "profound implications." ¹⁵⁴ One important implication, which has been noted by scholars like Akhil Reed Amar, is that government power could be explicitly limited by the charter or constitution, and any government acts beyond the authority of this charter were automatically void for lack of authority. As described by Alexander Hamilton:

every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act therefore contrary to the Constitution, can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves [T]he Constitution ought to be preferred to the statute, *the intention of the people to the intention of their agents*. ¹⁵⁵

Though the idea of expressly limiting government action is a commonplace one in modern American constitutional law, as explained by James Wilson, this was a significant political advancement in government framework. "The idea of a constitution, limiting and superintending the operations of legislative authority, seems not to have been accurately understood in Britain. There are, at least, no traces of practice conformable to such a principle. The British Constitution is just what the British Parliament pleases." ¹⁵⁶ In contrast, "[t]o control the power and conduct of the legislature, by an overruling constitution, was an improvement in the science and practice of government reserved to the American states [I]n our governments . . . our constitutions are superior to our legislatures." ¹⁵⁷

Further, many early constitutional provisions illustrate that the people retained the power to change the explicit contours of their agency relationship with the government to better meet their needs. ¹⁵⁸ As James Wilson explained, the right of "the

OF RIGHTS, *supra* note 56, at 676 (emphasis added).

¹⁵² MASS. CONST. of 1780, pt. 1, art. VII, *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra* note 56, at 677.

¹⁵³ N.J. CONST. of 1776, preamble, *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra* note 56, at 678 (emphasis added).

¹⁵⁴ Amar, *supra* note 30, at 1433–34.

¹⁵⁵ THE FEDERALIST NO. 78, at 293–94 (Alexander Hamilton) (emphasis added).

¹⁵⁶ 2 ELLIOT, *supra* note 46, at 432.

¹⁵⁷ *Id.*

¹⁵⁸ *See, e.g.,* MASS. CONST. of 1780, pt. 1, art. VII, *reprinted in* THE COMPLETE BILL OF

people [to] change the constitutions whenever and however they please . . . is a right of which no positive institution can ever deprive them.”¹⁵⁹

A second implication of the corporate charter analogy, largely unexplored by scholars, is that the position of government officials as trustees and servants of the people creates a fiduciary duty under the common law between people and government. The common law at the time dictated that a high standard of conduct was required of the fiduciary, or trustee, in that the fiduciary had a duty of care, honesty, loyalty, and a responsibility to act in the best interest of the principal.¹⁶⁰ Scholars have noted that this high standard of care had a type of “moral element” that was prevalent in the courts’ enforcement of fiduciary duties.¹⁶¹ Indeed, in Justice Story’s treatise, he asserted that “Courts of Equity” will enforce fiduciary obligations in aid of “general public policy.”¹⁶²

Notably, this high standard of care was required of agents without any written or formal agreement; it was inherent in the fiduciary relationship. Further, the fiduciary relationship itself does not require a formal written agreement. In situations where an agent was given a “confidence” from the principal to act on his behalf, the “fiduciary character between the parties” is “naturally create[d].”¹⁶³ Interestingly, Justice Story noted that courts would only “interfere” to enforce such a high moral standard in such conflicts as “arise from some peculiar confidential or fiduciary relation between the parties.” Story pointed out that were it not for the fiduciary relationship, courts would “either abstain wholly from granting relief, or would grant it in a very modified and abstemious manner.” This illustrates first that courts would guard the fiduciary rela-

RIGHTS, *supra* note 56, at 677; PA. CONST. of 1776, pmb., *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra* note 56, at 678.

¹⁵⁹ 2 ELLIOT, *supra* note 46, at 432.

¹⁶⁰ For example, under the English common law in the case of *Keech v. Sandford*, 2 Eq. Cas. Abr. 741 (1726), “[w]hensoever a person clothed with a fiduciary or quasi fiduciary character or position gains some personal advantage by availing himself of such character or position, a constructive trust is raised by courts of equity, such person becomes a constructive trustee, and the advantage gained must be held by him for the benefit of his cestui que trust.” FREDERICK THOMAS WHITE & OWEN DAMES TUDOR, A SELECTION OF LEADING CASES IN EQUITY 695 (1897). This principle was carried forward to American common law in the case of *Michoud v. Girod*, 45 U.S. (4 How.) 503, 555 (1846), in which the Court cited English common law and held that “[t]he general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity. It restrains *all agents, public and private* . . .” (emphasis added).

¹⁶¹ Joseph F. Johnston, *Natural Law and Fiduciary Duties of Business Managers*, 8 J. MARKETS & MORALITY 27, 31 (2005); *see also* Curtis, *supra* note 22, at 6 (“The Constitution is a set of basic instructions from the people to their agents in the judicial, legislative and executive branches. In the law of agency, when specific instructions conflict with general purposes of the employer or principal, the agent is sometimes expected to follow broader goals—a reasonable interpretation of what the principal would want, rather than the principal’s more specific instructions.”); RESTATEMENT (SECOND) OF AGENCY § 33 (1958).

¹⁶² JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 308 (6th ed. 1853).

¹⁶³ *Id.* § 218.

tionship with “especial jealous[y],”¹⁶⁴ and second, as a condition of an agent’s ability to use the authority delegated him by his agent, courts would construe substantive limitations on the agent’s ability to act against the interest of the principle. If an agent exceeded these substantive fiduciary limitations, his actions would be void as outside the scope of his agency authority.

Thus, the agency relationship between the government and the people creates inherent limits on the government officials’ power, even if not expressly stated in the agency charter, or constitution. Consistent with this theory, Thomas Cooley described the American states as “wielding” the people’s sovereignty, but “hedged in on all sides by *important limitations*. . . .”¹⁶⁵

III. THE PEOPLE RETAINED SOVEREIGN POWER OVER NATURAL RIGHTS

Under the states’ rights model of federalism, since the residuary of sovereign power is reserved to the states, any action of the states not explicitly prohibited by a state or the federal Constitution is valid, even a violation of unenumerated fundamental rights of state citizens.¹⁶⁶ If indeed the states were ultimate sovereigns, this conclusion would be somewhat logical, since the relationship between the people and the state governments would be merely contractual. Thus, courts would likely only enforce express provisions of an agreement, and it is at least strongly debatable whether express natural rights provisions in the Bill of Rights applied to the states as a contractual matter.¹⁶⁷ However, as discussed in Parts I and II, the states are not the ultimate sovereigns, but are merely fiduciary agents of the people. In fact, allowing a government body, like the states or like Parliament, to hold ultimate and uncontrollable sovereignty even to the detriment of the people was exactly the political system that was rejected during the American Revolution.

The significance of this departure from the conventional model of federalism is that a higher standard of care was required of both state and federal governments, and substantive limitations inherent in their agency relationship prevented government from violating natural rights. In essence, though the Bill of Rights did not technically apply to states in the antebellum era,¹⁶⁸ it does represent the standard of care that is owed by legitimate governments as fiduciaries of their citizens.¹⁶⁹ Thus, power to arbitrarily in-

¹⁶⁴ *Id.*

¹⁶⁵ COOLEY, *supra* note 138, at 85 (emphasis added).

¹⁶⁶ *See supra* notes 26–29 and accompanying text.

¹⁶⁷ Caplan, *supra* note 31; Kurt T. Lash, *The Inescapable Federalism of the Ninth Amendment*, IOWA L. REV. 801 (2008); *see also* AKHIL REED AMAR, *THE BILL OF RIGHTS* 123 (1998); Jason Mazzone, *The Bill of Rights in the Early State Courts*, 92 MINN L. REV. 1 (2007). *But see* 2 WILLIAM WINDSOR CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 1069 (1980) (arguing that at least the portions of the Bill of Rights written in passive voice may have been intended to apply against the states).

¹⁶⁸ *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 247–49 (1833).

¹⁶⁹ *See infra* Parts III.A–C.

fringe on natural rights was a sovereign power retained by the people, and government actions of this nature are void without express authority. Evidence of this theory is illustrated below by examining the fiduciary relationship between government and the people in the context of natural rights, the Framers understanding of unenumerated limitations on government, and the protection of unenumerated rights by antebellum courts.

A. Government Fiduciary Duties Prevent Violations of Natural Rights

As discussed in Part II, the position of government officials as trustees and servants of the people created substantive limitations on valid government action. One type of limitation arising from this fiduciary agency was the inability of the government to arbitrarily infringe on the natural rights of the people. John Locke wrote, “[T]he legislative acts against the *trust* reposed in them when they endeavor to invade the property of the subject, and to make themselves, or any part of the community, masters or arbitrary disposers of the lives, liberties, or fortunes of the people.”¹⁷⁰ Similarly, Justice Story explained that while in England, it would have been legal for Parliament to infringe on individual rights since “an act of Parliament . . . is absolute and omnipotent” and that “[t]he judiciary is bound to carry it into effect at every hazard, *even though it should subvert private rights and public liberty.*”¹⁷¹ But in America, where the people are sovereign and the government acts as their fiduciary agent, such an act has no legal validity. Story explained:

[S]ince the American [R]evolution, no state government can be presumed to possess the transcendental sovereignty to take away vested rights of property; to take the property of A and transfer it to B by a mere legislative act. The government can scarcely be deemed to be free, where the rights of property are left solely dependent upon a legislative body, without any restraint.¹⁷²

In essence, power to arbitrarily infringe on or deny natural rights was one of the many sovereign powers retained by the people, and thus both state and federal governments lacked authority to deny these rights. As expressed by Madison:

[T]here are powers exercised by most other governments, which, in the United States are *withheld by the people*, both from the general government *and from the state governments*. Of this sort

¹⁷⁰ IUTISONE SALEVAO, *RULE OF LAW, LEGITIMATE GOVERNANCE & DEVELOPMENT IN THE PACIFIC* 76 (2005) (emphasis added).

¹⁷¹ 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1614 (5th ed. 1891) (emphasis added).

¹⁷² *Id.* § 1399.

are many of the powers prohibited by the Declarations of right prefixed to the Constitutions, or by the clauses in the Constitutions, in the nature of such Declarations.¹⁷³

Similarly, Wilson described a “bill of rights” as “an enumeration of the *powers reserved*.”¹⁷⁴ It is significant that both of these founders equate natural rights limitations on government with powers retained by the people. It is also important that while both founders recognize that a reservation of power over natural rights could be made explicit through an instrument like a Bill of Rights, both founders in this context were actually arguing that a written bill of rights was unnecessary, as this was presumed to be a power retained by the people.¹⁷⁵

This recognition of unenumerated limitations on government is consistent with the theory of a fiduciary relationship between the government and the people. As noted by Justice Story, if the relationship between the American people and government were merely a contractual relationship, similar to England, then courts would enforce only the explicit terms of the agreement, or constitution.¹⁷⁶ However, since the government acts as a fiduciary of the people, entrusted with the people power, this gives rise to the high standard of care required of fiduciaries, in which courts will construe inherent limitations on the government’s ability to act against the best interest of the people unless this sovereign power has been explicitly delegated by people.¹⁷⁷

Thus, as described by Wilson, a government action beyond “the bounds assigned to it,” either explicit in the agreement or inherent in the relationship, must be found by the court as “void” for lack of authority.¹⁷⁸ Maclaine similarly said that if the government made a law that infringed on “certain rights which never can, nor ought to, be given up,” then under the Constitution the government would have “no authority to make [that] law. There are limits beyond which [legislation] cannot go.”¹⁷⁹ Therefore, the reserved sovereign power of the people over natural rights created an unenumerated substantive limit on valid government action. As discussed in Parts III.B–C, evidence suggests that both the Framers of the Constitution and early antebellum courts understood these substantive limits to apply both to federal and state governments.

¹⁷³ JAMES MADISON, REPORT ON THE ALIEN AND SEDITION ACTS (JAN. 7, 1800), in JAMES MADISON: WRITINGS 608, 628 (Jack N. Rakove ed., 1999) (emphasis added). Similarly, as stated by the Continental Congress of 1774 in the Declaration of Rights, the inhabitants of the English colonies “are entitled to life, liberty, and property, and that they have never ceded any sovereign Power whatever right to dispose of either without their consent.” CURTIS, *supra* note 29, at 77.

¹⁷⁴ 2 ELLIOT, *supra* note 46, at 436 (emphasis added).

¹⁷⁵ Wilson stated, “[t]o every suggestion concerning a bill of rights, the citizens of the United States may always say, we reserve the right to do what we please.” *Id.* at 437.

¹⁷⁶ STORY, *supra* note 162, at 224–25, §§ 218, 308.

¹⁷⁷ *Id.* at 304.

¹⁷⁸ 2 ELLIOT, *supra* note 46, at 446.

¹⁷⁹ 4 ELLIOT, *supra* note 47, at 161.

B. Constitutional Framers Viewed Natural Rights Protections as a Limitation on Both State Governments and the Federal Government

During the debates at the federal constitutional convention, it is telling that many of the discussions about the protection of individual rights were not specific to the federal government, but in fact applied to all forms of government.¹⁸⁰ James Wilson, a defender of the federal Constitution said, “*Government*, in my humble opinion, should be formed to secure and to enlarge the exercise of the natural rights of its members; and *every government*, which has not this in view, as its principal object, is not a government of the legitimate kind.”¹⁸¹ Roger Sherman, a representative from Connecticut, proposed an amendment which described the natural rights retained by the people when they enter into any type of society, regardless of whether this society, or government, is state or federal.

The people have certain natural rights which are retained by them when they enter into Society, Such are the rights of Conscience in matters of religion; of acquiring property and of pursuing happiness & Safety; of Speaking, writing and publishing their Sentiments with decency and freedom; of peaceably assembling to consult their common good, and of applying to Government by petition or remonstrance for redress of grievances.¹⁸²

In addition, Madison explained that some of the amendments in the Bill of Rights embodied “those rights which are retained when particular powers are given up to be exercised by the legislature.”¹⁸³ Notably, Madison refers to rights retained by the

¹⁸⁰ I am indebted to Randy Barnett for many of the historic examples used in this section. Though Barnett and I use this evidence for different purposes—he to argue that the Ninth Amendment was meant to create a protection of individual rights, and I to argue that the people had retained natural rights as a limit against both state and federal governments—much of the evidence presented in Barnett’s article was useful for supporting both points. *See generally* Randy E. Barnett, *The Ninth Amendment: It Means What it Says*, 85 TEX. L. REV. 1 (2006).

¹⁸¹ 2 JAMES WILSON, *Of the Natural Rights of Individuals*, in THE WORKS OF JAMES WILSON 592 (Robert Green McCloskey ed., 1967) (emphasis added).

¹⁸² Roger Sherman, *Draft of the Bill of Rights*, in 1 THE RIGHTS RETAINED BY THE PEOPLE 351, 351 (Randy E. Barnett ed., 1989) (emphasis added).

¹⁸³ JAMES MADISON, SPEECH IN CONGRESS PROPOSING CONSTITUTIONAL AMENDMENTS (JUNE 8, 1789), in JAMES MADISON, WRITINGS 437, 445 (Jack N. Rakove ed., 1999). Madison also criticized governments—specifically state governments—that did not adequately protect natural rights. *See* Gazette of the United States (Phila.), June 10, 1789, *reprinted in* 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: 4 MAR. 1789–3 MAR. 1791, at 808, 824 (Charlene Bangs Bickford et al. eds., 1992) (“It has been observed, that the Constitution does not repeal the State bills of rights; to this it may be replied, that some of the States are without any—and that articles contained in those that have them, are very improper, and infringe upon the rights of human nature, in

people whenever they give power to *any* legislature, not just to the federal legislature. This illustrates the type of protection owed to the sovereign people by any form of government.

One particular protection of natural rights that illustrates a limitation both on federal and state governments is the Ninth Amendment. The purpose of the Ninth Amendment has been hotly debated,¹⁸⁴ but some scholars argue that its purpose was to create a rule of construction that was intended to give individual unenumerated rights the same protections as enumerated rights.¹⁸⁵ This reading of the Ninth Amendment comes from understanding the problem that it was intended to solve. One of the primary objections to the Constitution made by its opponents during the ratification debates was that the absence of a bill of rights would allow the federal government to violate individual rights.¹⁸⁶ The Federalists had two counter arguments.¹⁸⁷ First, that the Bill of Rights was unnecessary because the Constitution gave the federal government only limited and enumerated powers, and the federal government had not been given power to violate individual rights. This was not something that the government had the power to do.¹⁸⁸ Second, they argued that the Bill of Rights would be dangerous since it would be impossible to enumerate all natural rights, and the enumeration of some would imply that unenumerated rights had been “surrendered.”¹⁸⁹

While the Federalists’ arguments certainly entailed a certain degree of rhetorical and political maneuvering, it is significant that the Federalists’ first argument—that

several respects Beside some states have no bills of rights, there are others provided with very defective ones, and there are others whose bills of rights are not only defective, but absolutely improper; instead of securing some in the full extent which republican principles would require, they limit them too much to agree with the common ideas of liberty.”)

¹⁸⁴ See *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 249 (1989) (statement of Robert H. Bork) (comparing the Ninth Amendment to words covered by an ink blot); AMAR, *supra* note 167, at 120, 123–24; Caplan, *supra* note 31; Lash, *The Lost Original Meaning of the Ninth Amendment*, *supra* note 20, at 394–99; McAfee, *The Original Meaning of the Ninth Amendment*, *supra* note 35, at 1222.

¹⁸⁵ Barnett, *The Ninth Amendment: It Means What it Says*, *supra* note 180, at 14 (“It should be stressed that the individual natural rights model does not claim the Ninth Amendment to be a ‘source’ of independent rights—or . . . ‘a cornucopia of undefined federal rights’—that are immune from any government regulation. First, natural rights precede the Constitution, and the Ninth Amendment is not their ‘source.’ Instead, according to this model, the Ninth Amendment refers to these preexisting rights and requires that all natural rights be protected equally—not be ‘disparaged’—whether or not they are enumerated.”).

¹⁸⁶ *Id.*; see also LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 12 (1999).

¹⁸⁷ Barnett, *The Ninth Amendment: It Means What it Says*, *supra* note 180, at 7–8.

¹⁸⁸ *Id.* at 7 n.23 (citing THE FEDERALIST NO. 84, at 513–14 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?”)).

¹⁸⁹ *Id.* at 8.

the government could not infringe on rights if it had not been expressly given power to do so—is consistent with the theory that the government could not intrude on the rights of its citizens without explicit permission, since power over fundamental rights was one of the residuary sovereign powers that the people reserved. For example, during the debate about whether to include a bill of rights, Representative Theodore Sedgwick argued that the right of assembly was “a self-evident, unalienable right which the people possess; it is certainly a thing that never would be called in question.”¹⁹⁰ Representative Egbert Benson replied that “[t]he committee who framed this report [*i.e.*, the Bill of Rights] proceeded on the principle that *these rights belonged to the people*; they conceived them to be inherent; and all that they meant to provide against was their being infringed by the Government.”¹⁹¹ Note that both of these speakers agree that the Bill of Rights was unnecessary to create the natural rights of the people, because they are unalienable rights possessed by the people. The representatives merely disagree on whether the Bill of Rights would be useful as an added caution to prevent the government from infringing on these rights.

The second argument that the federalists made—that any enumeration of rights would devalue unenumerated rights—also supports the idea of powers reserved to the people. James Wilson said that “[a] bill of rights annexed to a constitution is an enumeration of the *powers reserved*.”¹⁹² Wilson was concerned that an “an imperfect enumeration would throw all implied power into the scale of the government; and the *rights of the people* would be rendered incomplete.”¹⁹³ Charles Pinckney, a representative from South Carolina, expressed similar concerns as Wilson and explained that his state had chosen to have “no bill of rights inserted in our Constitution” so as not to even create the impression that the people “had delegated to the general government a power to take away such of our rights as we had not enumerated.”¹⁹⁴ The first thing that is important to notice about these speakers is that both Wilson and Pinckney acknowledge that a bill of rights does not create natural rights, it merely enumerates, or lists, powers that the people had reserved to themselves and never given to the government. Both are concerned that any enumeration of rights might not adequately represent the vast retained rights of the people. Notice also that both speakers refer to a bill of rights in a general sense, rather than as a specific national term, and indeed Pinckney is specifically speaking of a state bill of rights. This is strong evidence that the constitutional Framers did not think that the rights enumerated in the federal Bill of Rights

¹⁹⁰ 1 ANNALS OF CONG. 731 (1789) (Joseph Gales ed., 1834) (statement of Rep. Sedgwick, Aug. 15, 1789).

¹⁹¹ *Id.* at 731–32 (statement of Rep. Benson) (emphasis added).

¹⁹² The Pennsylvania Convention (Nov. 28, 1787), in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 378, 388 (Merrill Jensen ed., 1976) (remarks of James Wilson) (emphasis added).

¹⁹³ *Id.*

¹⁹⁴ Charles Pinckney, *Pinckney: Speech in South Carolina House of Representatives*, in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 255 (Max Farrand ed., 1911).

were merely a limitation on federal government. Rather, these rights were a power that the people had retained from all forms of free republican governments.

In response to these arguments, the Anti-Federalists argued first that the enumeration of powers may not be an effective limitation on the federal government given the “necessary and proper clause”; and second, that the Constitution already enumerated some rights in Article I, Section 9, such as the writ of habeas corpus, and thus the threat of enumerating some rights had already been realized.¹⁹⁵ One thing to note about these arguments is that the Anti-Federalists were more interested in defeating ratification of the Constitution than in actually succeeding in obtaining a bill of rights.¹⁹⁶ Nevertheless, to appease the Anti-Federalists, the supporters of the Constitution pledged to create a Bill of Rights after the Constitution’s creation.¹⁹⁷

Thus, in the First Congress, Madison gave his famous speech in which he proposed a list of amendments outlining certain rights to be protected. At the end of this list was a paragraph that eventually became the Ninth Amendment. It stated:

The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights *retained by the people*; or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted *merely for greater caution*.¹⁹⁸

Both this version, as well as the final version of the Ninth Amendment, include the phrase “retained by the people,” which powerfully suggests that the government had never been granted power over such rights. Unless power over individual fundamental rights has been expressly delegated,¹⁹⁹ it is “retained by the people” as a residual sovereign power. This reading is supported by Madison’s view that the Bill of Rights was “inserted merely for greater caution.” Consistent with the first argument made by the Federalists, since the people had never given the government power over these fundamental rights, it was merely a redundant caution to remind the government that it still did not have power over these rights.

Some leading commentators have argued that the Ninth Amendment in the federal Bill of Rights was merely a protection of state rights, as opposed to natural individual rights. Russell Caplan, one of the early scholars to analyze the Ninth Amendment, argued that the “other rights” referenced in the Ninth Amendment referred only to rights created under state law, which states had the power to modify or eliminate.²⁰⁰

¹⁹⁵ Barnett, *The Ninth Amendment: It Means What it Says*, *supra* note 180, at 8.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ JAMES MADISON, SPEECH IN CONGRESS PROPOSING CONSTITUTIONAL AMENDMENTS (JUNE 8, 1789), *supra* note 183, at 437, 445 (emphasis added).

¹⁹⁹ And even if these rights were expressly delegated, as will be discussed in the subsequent section, such a delegation was viewed as invalid for future generations.

²⁰⁰ Caplan, *supra* note 31, at 259–60.

According to Caplan, the purpose of the Ninth Amendment was to prevent state law rights from being supplanted.²⁰¹ Similarly, Kurt Lash has argued that the Ninth Amendment was understood primarily “as a guardian of the retained right to local self-government.”²⁰² Thus, “[a]ll powers, jurisdiction, and rights not delegated to the federal government were to be retained by the states.”²⁰³ Lash also argues that the retained rights of the people are really the same thing as the retained rights of the several states.²⁰⁴

However, the fact that twelve out of thirty-three states in the antebellum era legislatively adopted constitutional provisions similar to the Ninth Amendment, and two states judicially adopted the principle similar to that embodied by the Ninth Amendment,²⁰⁵ is strong evidence that the Ninth Amendment was not merely a limitation on the federal government, but was in fact an embodiment of a principle that all governments were limited in their ability to infringe on individual’s natural rights.²⁰⁶ This is strong evidence that in the antebellum era it was understood that both state and federal governments must respect unenumerated natural rights retained by the people as the ultimate sovereign. Furthermore, the fact that state constitutional provisions used almost identical language as the Ninth Amendment to limit state government power over the

²⁰¹ *Id.* at 260–64.

²⁰² Lash, *The Inescapable Federalism of the Ninth Amendment*, *supra* note 167, at 801; *see also* AMAR, *supra* note 167, at 123 (“In particular, the Ninth [Amendment] warns readers not to infer from the mere enumeration of a right in the Bill of Rights that implicit federal power in fact exists in a given domain.”).

²⁰³ Lash, *The Lost Original Meaning of the Ninth Amendment*, *supra* note 20, at 358.

²⁰⁴ *Id.* at 394.

²⁰⁵ *People v. Morris*, 13 Wend. 325, 328 (N.Y. 1835); *McClenaghan v. McClenaghan*, 20 S.C. Eq. (1 Strob. Eq.) 295, 316–17 (1847).

²⁰⁶ *See* ALA. CONST. of 1819, art. I, § 30 (“This enumeration of certain rights shall not be construed to deny or disparage others retained by the people . . .”); ARK. CONST. of 1836, art. II, § 24 (“This enumeration of rights shall not be construed to deny or disparage others retained by the people . . .”); CAL. CONST. of 1849, art. I, § 21 (“This enumeration of rights shall not be construed to impair or deny others retained by the people.”); IOWA CONST. of 1846, art. II, § 25 (“This enumeration of rights shall not be construed to impair or deny others, retained by the people.”); KAN. CONST. of 1859, Bill of Rights, § 20 (“This enumeration of rights shall not be construed to impair or deny others retained by the people . . .”); ME. CONST. of 1820, art. I, § 24 (“The enumeration of certain rights shall not impair nor deny others retained by the people.”); MD. CONST. of 1850, Declaration of Rights, art. 42 (“This enumeration of rights shall not be construed to impair or deny others retained by the people.”); MINN. CONST. of 1857, art. 1, § 16 (“The enumeration of rights in this Constitution, shall not be construed to deny or impair others retained by and inherent in the people.”); N.J. CONST. of 1844, art. I, § 19 (“This enumeration of rights and privileges shall not be construed to impair or deny others retained by the people.”); OHIO CONST. of 1851, art. I, § 20 (“This enumeration of rights shall not be construed to impair or deny others retained by the people . . .”); OR. CONST. of 1857, art. 1, § 34 (“This enumeration of rights, and privileges shall not be construed to impair or deny others retained by the people.”); R.I. CONST. of 1842, art. I, § 23 (“The enumeration of the foregoing rights shall not be construed to impair or deny others retained by the people.”).

people contradicts any notion that states stood as proxies for the “people” and the Ninth Amendment was merely protecting states’ sovereign rights.

If one generation of “the people” did expressly delegate powers to the government to intrude on fundamental rights, this delegation was viewed as improper for future generations. One of the amendments proposed by Roger Sherman, a representative from Connecticut at the federal convention, explained “[t]hat there are certain natural rights, of which men, when they form a social compact, *cannot deprive or divest their posterity*, among which are the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety.”²⁰⁷ In addition, Maclaine argued that the people had “inherent, . . . unalienable, [and] indefeasible title to [natural] rights.”²⁰⁸ Some of the amendments proposed by states contained similar language,²⁰⁹ as did various state constitutions.²¹⁰ As Barnett explains, “those who enter into social compacts cannot deprive or divest their posterity

²⁰⁷ JOURNAL OF THE FIRST SESSION OF THE SENATE OF THE UNITED STATES, *reprinted in* 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: 4 MARCH 1789–3 MARCH 1791, at 160 (Linda Grant De Pauw et al. eds., 1972) (emphasis added).

²⁰⁸ 4 ELLIOT, *supra* note 47, at 161.

²⁰⁹ See Amendments Proposed by the New York Convention (July 26, 1788), *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra* note 56, at 635 (“That the enjoyment of Life, Liberty, and the pursuit of Happiness are essential rights which every Government ought to respect and preserve.”); Amendments Proposed by the Virginia Convention (June 27, 1788), *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra* note 56, at 636 (“That there are certain natural rights of which men, when they form a social compact cannot deprive or divest their posterity, among which are the enjoyment of life and liberty, with the means of acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.”).

²¹⁰ See MASS. CONST. of 1780, pt. 1, art. I, *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra* note 56, at 637 (“A[ll] men are born free and equal, and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.”); N.H. CONST. of 1783, pt. 1, art. II, *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra* note 56, at 637–38 (“All men have certain natural, essential, and inherent rights; among which are—the enjoying and defending life and liberty—acquiring, possessing and protecting property—and in a word, of seeking and obtaining happiness.”); N.Y. CONST. of 1777, *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra* note 56, at 638 (“We hold these Truths to be self-evident, that all Men are created equal; that they are endowed by their Creator with certain unalienable Rights; that among these are, Life, Liberty and the Pursuit of Happiness”); PA. CONST. of 1776, ch. I, art. I, *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra* note 56, at 639 (“T[hat] all men are born equally free and independent, and have certain natural, inherent and unalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.”); VT. CONST. of 1777, ch. I, art. I, *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra* note 56, at 640 (“That all Men are born equally free and independent, and have certain natural, inherent and unalienable Rights, amongst which are the enjoying and defending Life and Liberty; acquiring, possessing and protecting Property, and pursuing and obtaining Happiness and Safety.”).

of these natural rights regardless of the powers they may delegate to government. In sum, they are inalienable.”²¹¹

C. Antebellum Courts Recognized Implicit Fundamental Right Limitations on State Governments as Inalienable

In the antebellum era, it was not seen as necessary for the people, as sovereigns, to explicitly list their rights in state constitutions in order to prevent the government from infringing on these rights. As mentioned in Part II, this was seen as an inherent limitation on government power resulting from the agency relationship between free governments and the people. Though many state constitutions did provide protections of individuals’ fundamental rights,²¹² historic evidence suggests that such constitutional provisions were added merely for caution to *recognize* pre-existing rights that government could not infringe on, but not to *create* these rights. As Justice Cooley observed:

[T]he people of the American States, *holding sovereignty in their own hands, have no occasion to exact pledges for a due observance of individual rights from any one*; but the aggressive tendency of power is such, that in framing the instruments under which their governments are to be administered by their agents, they have deemed it important to *repeat the guaranty*, and thereby adopt it as a principle of constitutional protection.²¹³

Chief Justice Marshall observed that explicit constitutional provisions are only one type of limitation on government. The first limitation comes from a “republican government[] in which the *residuary powers of sovereignty*, not granted specifically, by inevitable implication, are *reserved to the people*.”²¹⁴ Similarly, Justice Cooley

²¹¹ Barnett, *The Ninth Amendment: It Means What it Says*, *supra* note 180, at 40. This principle is clearly embodied in the Declaration of Independence which, after listing certain “unalienable” rights that all men are endowed with, such as “Life, Liberty and the pursuit of Happiness,” it explains that “whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). *But see* McAfee, *The Bill of Rights, Social Contract Theory, and the Rights “Retained” by the People*, *supra* note 35, at 276 (“[T]here were rights which the people ought always to retain when entering civil society—those which even the people may not legitimately yield up to government because they are inalienable. Even so, these rights were to be secured by the written Constitution. And even such natural and inalienable rights did not hold an inherent status within the legal and constitutional system absent provision for their security within the written Constitution.”).

²¹² For a list of state constitutional provisions that protected individual liberties in the antebellum era, see COOLEY, *supra* note 138, at 351 n.2.

²¹³ *Id.* at 351 (emphasis added).

²¹⁴ *McCulloch*, 17 U.S. (4 Wheat.) at 383 (emphasis added).

observed that some “limitations of legislative authority . . . are prescribed by constitutions, but others spring from the very nature of free government.”²¹⁵

The Supreme Court illustrated this principle in *Wilkinson v. Leland*,²¹⁶ a case in which Rhode Island, the only state in the union without a post-independence constitution,²¹⁷ claimed that its legislature could exercise all of the powers exercised by the British Parliament. In this particular case, the power at issue was the ability to validate an invalid deed. Justice Story, speaking on behalf of the Court, stated:

Even if such authority [to validate an invalid deed] could be deemed to have been confided by the charter [of Charles II] to the General Assembly of Rhode Island, as an exercise of transcendental sovereignty *before the Revolution*, it can scarcely be imagined that that great event could have left the people of that State subjected to its uncontrolled and arbitrary exercise At least no court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. *The people ought not to be presumed to part with rights so vital to their security and wellbeing, without very strong and direct expressions of such an intention.*²¹⁸

This case illustrates that the people retained their sovereign powers of natural rights even if delegations and limitations of power were not made explicit in a state constitution. Since the presumption was that states did not receive unrestrained sovereign power, it was understood that courts should not construe the people as having

²¹⁵ COOLEY, *supra* note 138, at 128–29.

²¹⁶ 27 U.S. (2 Pet.) 627 (1829).

²¹⁷ At Independence, Rhode Island had not felt a need to frame a new constitution, and thus merely kept its existing corporate charter with minimal changes. WOOD, *supra* note 38, at 276.

²¹⁸ 27 U.S. (2 Pet.) at 646–47 (emphasis added); *see also* COOLEY, *supra* note 138, at 165–66 (arguing that Justice Story’s reasoning in *Wilkinson* meant “that the power to do certain unjust and oppressive acts was not covered by the grant of legislative power” and that even if they were, “they would be impliedly prohibited because unjust and oppressive”). A state court in Alabama came to a similar conclusion. The court held that “[i]n the United States, certain political rights are conceded to be retained by the people, and the power to interfere with, or in any manner to impair them, not delegated to *any department* of the government.” *Holman’s Heirs v. Bank of Norfolk*, 12 Ala. 369, 415 (1847) (emphasis added); *see also* *Goshen v. Stonington*, 4 Conn. 225 (1822) (“With those judges, who assert the omnipotence of the legislature, in all cases, where the constitution has not interposed an explicit restraint, I cannot agree. Should there exist . . . a case of the direct infraction of vested rights . . . I could not avoid considering it as a violation of the societal compact.”).

delegated this power unless it was expressly given (as opposed to the power being expressly limited).

Many decisions by state courts illustrated a willingness on the part of judges to impose natural right limitations on the government, even where no explicit limitations were listed in a written state constitution.²¹⁹ These judicial decisions are relevant to determine the public understanding of the type of fundamental rights that were viewed as retained by the people. It seems that many of the rights embodied in the national Bill of Rights were of this type.²²⁰ For example, Justice Lumpkin held that the Georgia legislature's prohibition on possession of weapons violated the "natural"²²¹ or "unlimited right of the people to keep and bear arms,"²²² even though the Georgia Constitution contained no explicit protection for the right to bear arms. Lumpkin argued that this was a fundamental right reserved by the people against all governments, even if it was only an explicit limitation against the federal governments.

What advantage would it be to tie up the hands of the national legislature, if it were in the power of the States to destroy this bulwark of defense? . . . [A]re not the sovereign people of the State committed by this pledge to preserve this right inviolate? Would they not be recreant to themselves, to free government, and false to their own vow, thus voluntarily taken, to suffer this right to be questioned?²²³

Another example relates to the enforcement by courts of due process, even without an explicit protection in state constitutions. Justice Warner required the government

²¹⁹ This section of my Paper will only provide a few examples of state court decisions, but Jasson Mazzone's article on general constitutional law provides an excellent and thorough survey of state court decisions that relied on fundamental rights embodied in the federal Bill of Rights, even if not listed in the state's own constitution. *See Mazzone, supra* note 167.

²²⁰ The fact that natural rights such as those embodied in the national Bill of Rights are being applied against state governments may initially seem to conflict with the Court's famous decision in *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), that the Bill of Rights was not meant to apply against the states. However, Mazzone points out that this reading of *Barron* actually stood for a much narrower proposition, namely that "where the state's highest court had held that a state law did not violate a provision or principle of the Federal Bill of Rights, the United States Supreme Court would not reverse that decision and apply the Bill of Rights to state government." Mazzone, *supra* note 167, at 16. This was the case because of the Court's limited jurisdiction under the 1789 Judiciary Act. *Id.* at 218. However, *Barron* did not necessarily stand for the proposition that fundamental rights were only limits on the federal government. Thus while the Constitution as a positive law document was only meant to apply against the federal government, many of the rights embodied in the Constitution were understood to limit all forms of government.

²²¹ *Nunn v. State*, 1 Ga. 243, 251 (1846).

²²² *Id.*

²²³ *Id.* at 250–51.

to compensate a landowner for a taking, even without a state constitutional due process protection, because he viewed this as an implicit limitation on all governments.²²⁴ Warner explained that some of the provisions in the federal Bill of Rights, such as this one, “are declaratory of great fundamental principles . . . [a] common law principle, founded in natural justice, *especially applicable to all republican governments.*”²²⁵

Similarly, Justice Nisbet affirmed that due process was a requirement on both state and federal governments.²²⁶ He explained that if due process was not specifically mentioned in state constitutions (as it was in the federal Bill of Rights), that was only because the people felt more secure about the powers of the state governments, and viewed the ability of the federal government to infringe on rights as the greater menace.²²⁷

[I]t would be weak reasoning to say, that because the people of the States have denied to the Federal Government the right to assume private property for public use without compensation, they have thereby conceded it to the State Governments. The contrary inference is irresistible, to wit: that the people, feeling protected in the States by this limitation on the power of the State Governments, were induced to make sure of the same protection from the Federal Government, and that *the fif[th] article of the amendments to the Constitution is to be held and taken as a solemn avowal, by the people, that a power to take private property, without compensation, does not belong to any government.*²²⁸

The United States Supreme Court, sitting in diversity, also upheld implicit limitations on state government. In *Gelpcke v. City of Dubuque*,²²⁹ the Court upheld the validity of securities that were thought to have vested properly before a contrary state court decision, even though this specific property protection was not listed in the state’s

²²⁴ *Young v. McKenzie*, 3 Ga. 31, 45 (1847).

²²⁵ *Id.* at 43–44 (emphasis added).

²²⁶ *Parham v. Justices of Inferior Court*, 9 Ga. 341, 351 (1851).

²²⁷ *Id.*

²²⁸ *Id.* (emphasis added); *see also* *Sinnickson v. Johnson*, 17 N.J.L. 129, 146 (1839) (explaining that due process “is operative as a principle of universal law; and the legislature of this State, can no more take private property for public use, without just compensation, than if this restraining principle were incorporated into, and made part of its State Constitution”); *Gardner v. Trs. of Newburgh*, 2 Johns. Ch. 162, 166 (N.Y. Ch. 1816) (“This is a necessary qualification accompanying the exercise of legislative power, in taking private property for public uses; the limitation is admitted by the soundest authorities, and is adopted by all temperate and civilized governments, from a deep and universal sense of its justice.”); *L.C. & C.R.R. Co. v. Chappell*, 24 S.C.L. (Rice) 383, 387, 389 (1838) (describing due process as “principle of universal law”).

²²⁹ 68 U.S. (1 Wall.) 175 (1863).

constitution.²³⁰ Thus, these cases illustrate that even if limitations on government are not made explicit, there are certain powers, such as natural rights, that have been reserved by the people against all forms of government as an inherent limitation on legitimate government power.

CONCLUSION

The new analysis of historic evidence in this Article brings to light important information about the original understanding of the sovereign power of states, which has far-reaching implications for understanding federalism. While the system of federalism created by the Constitution certainly has its unique benefits, and while it is true that states were delegated more powers than the federal government, this Article challenges three justifications generally used in favor of promoting a states' rights conception of federalism: (1) that it was the states who granted the federal government certain sovereign powers and who retain ultimate sovereignty; (2) that there is a zero-sum balance of power between these two sovereigns, and any reduction in federal power must be accompanied by an enhancement of state powers; and (3) that when states are governing within their sphere of sovereign authority, their plenary police powers are only limited by explicit state or federal constitutional provisions.

In contrast to these problematic assumptions, the historic evidence demonstrates that the people, not the states, granted sovereign powers to the federal government, and retained ultimate sovereignty themselves. After the American Revolution, the people, not the states, were viewed as the ultimate sovereigns in the new republic. There are at least two examples that support this historic understanding. First, the early state constitutions expressly recognize that all sovereign power originates from the people, and that state governments had been entrusted by the people with a bounded sovereign power to be used for the benefit of the people. Second, the people, and not the states, delegated power to the federal government by diverting certain powers from the states to the federal government. Thus, under the Tenth Amendment, any powers not delegated to the states or federal government are reserved to the people, as part of their residuary and unlimited sovereignty.

It was also understood that among the residuary powers the people reserved against all governments were fundamental rights. Both the Framers of the federal Constitution, as well as early antebellum courts recognized that this reservation of power created a substantive limitation on both state and federal governments. The

²³⁰ *Id.*; see also *Citizens' Sav. & Loan Ass'n v. City of Topeka*, 87 U.S. (20 Wall.) 655 (1874). This is a later case, which is therefore less persuasive, but it stood for a similar principle as *Gelpcke*. The court stated that "[t]here are limitations of such powers which arise out of the essential nature of all free governments," including "[i]mplied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name." *Id.*

people had retained power over their rights, and therefore, the government was powerless beyond the realm of bounded sovereignty as originally delegated by the people. Thus, states were not understood to have power to arbitrarily invade on natural rights, limited only by explicit state or federal constitutional provisions.

It was also understood that even if fundamental rights were not explicitly protected in a government's constitution, power over these rights were still reserved to the people, since the people need not protect something that they never gave away. Furthermore, even if one generation of "the people" expressly delegated arbitrary power over these rights to a certain government, such delegation would be invalid for future generations because this was an inalienable sovereign power of the people. As such, federalism was only another tool instituted to protect the fundamental rights. Under this original understanding of our constitutional framework, arguments in favor of promoting federalism, enhancing states' powers, or limiting federal powers must always be aimed at protecting the residuary powers of America's true sovereign—the people.