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Wilson R. Huhn

Repository Citation

Wilson R. Huhn, *Constantly Approximating Popular Sovereignty: Seven Fundamental Principles of Constitutional Law*, 19 Wm. & Mary Bill Rts. J. 291 (2010), <https://scholarship.law.wm.edu/wmborj/vol19/iss2/2>

**CONSTANTLY APPROXIMATING POPULAR SOVEREIGNTY:
SEVEN FUNDAMENTAL PRINCIPLES OF
CONSTITUTIONAL LAW**

Wilson R. Huhn*

constantly looked to,
constantly labored for,
and even though never perfectly attained,
constantly approximated¹

In 1988, renowned historian Edmund S. Morgan published *Inventing the People: The Rise of Popular Sovereignty in England and America*.² In that brilliant and wide-ranging book Morgan traces how, between the time of the English Civil War in the mid-seventeenth century and the adoption of the American Constitution in 1787, the idea of “popular sovereignty”—the right of the people to govern themselves—replaced the notion of “the divine right of kings” as the acknowledged source of political power.³ The central theme of Morgan’s work is that while popular sovereignty is a “fiction” in the sense that the people of a nation cannot actually rule themselves without creating a government,⁴ over the centuries our ancestors constantly labored to create a society and a government which gradually came closer to the realization of that principle—a closer approximation of the ideal of popular sovereignty.⁵ At the end of *Inventing the People*, Morgan concludes:

* C. Blake McDowell, Jr., Professor of Law, University of Akron School of Law; B.A. Yale University, 1972; J.D. Cornell Law School, 1977. I wish to thank my colleagues, Tracy Thomas, Elisabeth Reilly, and Richard Aynes, for their valuable comments and suggestions, and my research assistant, Joshua Dean, for his untiring efforts. This research was funded with a summer fellowship from The University of Akron School of Law.

¹ Abraham Lincoln, Speech at Springfield, Illinois (June 26, 1857), *reprinted in 2 COLLECTED WORKS OF ABRAHAM LINCOLN* 406 (Roy P. Basler ed., 1953) [hereinafter *COLLECTED WORKS*] (referring to the “standard maxim for free society” that “all men are created equal”).

² EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* (1988).

³ *See id.* at 54 (“[T]he paths taken in both England and America were first laid out in seventeenth-century England when Parliament challenged the king and replaced divine right with the sovereignty of the people.”); *id.* at 255–56 (summarizing the work of the Levelers, John Locke, and other English citizens from that era who developed the principle of popular sovereignty).

⁴ *See id.* at 13 (“Government requires make-believe.”).

⁵ *See id.* at 152 (“The history of popular sovereignty in both England and America after 1689 can be read as a history of the successive efforts of different generations to bring the facts into closer conformity with the fiction, efforts that have gradually transformed the very structure of society.”).

From its inception in the England of the 1640s the sovereignty of the people had been filled with surprises for those who invoked it. It was a more dynamic fiction than the one it replaced, more capable of serving as a goal to be sought, never attainable, always receding, but approachable and worth approaching. It has continually challenged the governing few to reform the facts of political and social existence to fit the aspirations it fosters. The presumption that social rank should convey a title to political authority was only the first casualty in its reformations, and we have not yet seen the last. The fiction endures. The challenge persists.⁶

The principle of popular sovereignty is what distinguished the new American republic from every other nation which preceded it in human history.⁷ Popular sovereignty remains the single most important animating principle of American constitutional law. But the concept of popular sovereignty is not a simple, unitary idea; instead, it comprises a number of interrelated and mutually reinforcing elements. In particular, the American conception of popular sovereignty embraces the following seven fundamental principles:

1. *The Rule of Law.* The people are sovereign and their will is expressed through law. The Constitution is ordained and established as law—the supreme law of the land.
2. *Limited Government.* The people are sovereign, not the government. By adopting the Constitution the people created the government, imposed limits upon its power, and divided that power among different levels and branches.
3. *Inalienable Rights.* Every individual person is sovereign in the sense that he or she retains certain inalienable rights, which the government is bound to respect.
4. *Equal Political Rights.* Each person is a sovereign political actor; therefore each person has an equal right to participate in government. Accordingly, the Constitution protects freedom of political expression, freedom of political association, the equal right to vote, and the principle of majority rule.
5. *Separation of Church and State.* The people are sovereign, not God. Laws reflect the will of the people, not the presumed will of God.

⁶ *Id.* at 306.

⁷ See Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 761 (1994) [hereinafter Amar, *Central Meaning*] (referring to the people's adoption of the Constitution of the United States as "the most participatory, majoritarian (within each state) and populist event that the planet Earth had ever seen").

Religious authority is not a legitimate basis to support the enactment or interpretation of any law or the adoption of any official practice.

6. *The Power of the National Government Over the States*. The American people are sovereign, not the states. No state has the power to secede from the union or to nullify any federal law. The states retain only those powers not granted to the federal government or reserved to the people.
7. *National Independence and the Limited Authority of International Law*. The American people as a whole are sovereign and independent and are not subject to any foreign law or power. The political representatives of the American people have the power to abrogate treaties or other forms of international law.

Over the centuries each of these constitutional principles has blossomed and borne fruit. As Morgan predicted, the principle of popular sovereignty in all of its manifestations has continued to change and develop, resulting in profound changes in the interpretation of the Constitution.⁸

Part I of this article defines the meaning of the term “sovereignty” generally. Part II describes how the concept of popular sovereignty was understood in America at the time of the founding and during the antebellum period, particularly as it found expression in the Declaration of Independence and the speeches of Abraham Lincoln. Part III of this article discusses the seven principles which are implicit in the American concept of popular sovereignty, and how the evolving nature of our understanding of these principles has affected the interpretation of the Constitution down to the present day.

I. THE MEANING OF “SOVEREIGNTY”

I use the term “sovereignty” to mean “the right to rule.”⁹ I refer to sovereignty as a “right” because sovereignty is more than the mere possession or exercise of power. When the people of a society regard their ruler as a sovereign, if that ruler is deposed the people still consider that person to be the rightful ruler.¹⁰ For that reason, and not because of the former leader’s virtues or for reasons of political expediency, the people may attempt to restore the former ruler to power. Sovereignty is a psychological and sociological determinant which affects the political life of the nation.

People of different societies may profoundly disagree in their understanding of where sovereignty resides. Over time and in different places people have held wildly

⁸ See Timothy Zick, *Are the States Sovereign?*, 83 WASH. U.L.Q. 229, 283 (2005) [hereinafter Zick, *Are the States Sovereign?*] (“[S]overeignty has never in fact been the bright line Classicists embrace. It is, rather, a still-evolving concept that admits of no easy definition.”).

⁹ See DANIEL FARBER, *LINCOLN’S CONSTITUTION* 27 (2003) (“When Americans debated sovereignty before the Civil War, they were debating the ultimate locus of political authority.”).

¹⁰ JOHN NEVILLE FIGGS, *THE DIVINE RIGHT OF KINGS* 5–6 (2d ed. 1914); MORGAN, *supra* note 2, at 18.

divergent opinions about the ultimate source of political power. People in some societies have believed that the right to rule is determined by the will of God.¹¹ In the past, monarchs rested their claim to power upon “the divine right of kings.”¹² Even in the present day, the Saudi royal family and the Supreme Leader of Iran contend that they are entitled to rule because they uniquely represent and defend Islamic principles.¹³ In other societies sovereignty is thought to arise from superior knowledge or adherence to a “true” political philosophy. For example, in some countries the Communist Party has based its claim to the leading role in society¹⁴ upon the premise that it possesses a superior understanding of history and economics.¹⁵ In the United States, however, all just powers of government are derived “from the consent of the governed,”¹⁶ a principle which is known as “popular sovereignty.”¹⁷ As mentioned above,

¹¹ See FIGGS, *supra* note 10, at 5–6 (discussing the theory of the divine right of kings).

¹² See J. C. D. CLARKE, *ENGLISH SOCIETY, 1688–1832: RELIGION, IDEOLOGY AND POLITICS DURING THE ANCIEN REGIME* 86–87 (1985); MORGAN, *supra* note 2, at 18.

¹³ See Ann Elizabeth Mayer, *Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?*, 15 MICH. J. INT’L L. 307, 364 (1994) (referring to “Iran’s theocracy” and the fact that Saudi Arabia’s Basic Law endorses “the divine right of Saudi kingship”); Neil Shevlin, *Velayat-E Faqih in the Constitution of Iran: The Implementation of Theocracy*, 1 U. PA. J. CONST. L. 358, 365 (1998) (describing the influence of Ayatollah Khomeini’s teaching that “there should be no distinction between religion and government in an Islamic state” on the Iranian Constitution).

¹⁴ See XIANFA pmbl. (2004) (China) (referring to “the people’s democratic dictatorship” which in effect grants control to the Communist Party); JOSEONMINJUJU-UI-INMINGONGHWAGUG SAHOEJU-UIHEONBEOB [Constitution] art. 12 (1998) (N. Korea) (“The State shall adhere to the class line, strengthen the dictatorship of people’s democracy and firmly defend the people’s power and socialist system against all subversive acts of hostile elements at home and abroad.”); KONSTITUTSIJA SSSR (1977) [KONST. SSSR] [USSR Constitution] art. 6 (“The leading and guiding force of the Soviet society and the nucleus of its political system, of all state organisations and public organisations, is the Communist Party of the Soviet Union.”).

¹⁵ See, e.g., VLADIMIR ILYICH LENIN, EIGHTH CONGRESS OF THE R.C.P.(B.): REPORT ON THE PARTY PROGRAMME (Mar. 19, 1919), *reprinted in* 3 V.I. LENIN: SELECTED WORKS 152 (1967) (“[A]ll countries are on the way from medievalism to bourgeois democracy or from bourgeois democracy to proletarian democracy. This is an absolutely inevitable course.”); VLADIMIR ILYICH LENIN, WHAT IS TO BE DONE: BURNING QUESTIONS OF OUR MOVEMENT (1902), *reprinted in* 1 V.I. LENIN: SELECTED WORKS 104 (1967) (rejecting democratic methods of reform in the belief that it would lead only to trade-unionism, and in particular rejecting “freedom of criticism,” stating, “[t]hose who are really convinced that they have made progress in science would not demand freedom for the new views to continue side by side with the old, but the substitution of the new views for the old”); see also VLADIMIR ILYICH LENIN, EIGHTH PARTY CONGRESS OF THE R.C.P.(B.): REPORT ON THE PARTY PROGRAMME (Mar. 18, 1919), *reprinted in* 29 V.I. LENIN: COLLECTED WORKS 151 (1965) (threatening the middle peasants and the petty bourgeoisie that if they join forces with the bourgeoisie, “we shall be obliged to apply the measures of the proletarian dictatorship to you, too,”—that is, they “will be stood against the wall”).

¹⁶ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

¹⁷ Nathan Tarcov, *Popular Sovereignty (In Democratic Political Theory)*, in 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1426 (1986).

Edmund Morgan has traced the growth and development of the idea of popular sovereignty from its antecedents in England to its ultimate acceptance at the founding of the United States.¹⁸

The term “sovereignty” has been the subject of much scholarly criticism.¹⁹ For example, at the conclusion of a series of two articles perceptively critiquing how courts and commentators have employed the concept of sovereignty, Professor Jack N. Rakove states, “Sovereignty is too vague and anachronistic a term to allow us to reason about anything more than our propensity to keep using it.”²⁰

In one sense, Professor Rakove is right. The term “sovereignty” does not refer to a definite legal formula which can be syllogistically applied to resolve specific questions of law. However, even though sovereignty is not a precise legal doctrine, I believe that Professor Rakove is wrong to dismiss the importance of the concept of sovereignty, particularly with respect to constitutional analysis. Sovereignty is a belief system; it is a psychological or sociological construct that represents a society’s fundamental understanding of the proper source and allocation of political power. In the United States, the sovereignty of the people comprehends a welter of interlocking values which include the rule of law, limited government, personal autonomy, the democratic process, the separation of church and state, the reserved powers of the States, and national identity. Insofar as constitutional law represents the sum and interplay of fundamental American political values, the concept of popular sovereignty plays a valuable and important role in the interpretation of the Constitution.

Furthermore, because our society is organized on many levels, a theory of sovereignty must be capable of explaining the allocation of power within and among the different segments of society. It is unrealistic or at least anachronistic to speak of sovereignty as if a single individual or institution might claim the right to exercise *all* power within a society. Any theory of sovereignty must take into account the allocation of political power among individuals, administrative agencies, political subdivisions, the national government, foreign nations, and international bodies. This article describes how the concept of popular sovereignty has affected the interpretation of the Constitution in all of those various contexts.

II. POPULAR SOVEREIGNTY AT THE TIME OF THE FOUNDING AND IN THE ANTEBELLUM PERIOD

Professor Morgan and other scholars have richly described how the concept of popular sovereignty was germinated in the English Civil War and how it came to

¹⁸ See generally MORGAN, *supra* note 2.

¹⁹ See Jack N. Rakove, *Making a Hash of Sovereignty, Part II*, 3 GREEN BAG 51 (1999).

²⁰ *Id.* at 59; see also STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 3 (1999) (referring to disagreement among scholars about the nature and significance of sovereignty, and stating, “This muddle in part reflects the fact that the term ‘sovereignty’ has been used in different ways.”); *id.* (identifying four different categories of sovereignty for purposes of international law: “international legal sovereignty, Westphalian sovereignty, domestic sovereignty, and interdependence sovereignty”).

fruition in America during and after the Stamp Act crisis of 1765.²¹ In the Glorious Revolution of 1688, Parliament deposed James II and installed in his place William III and Mary II.²² In the Declaration of Right of 1689, Parliament overthrew the principle of the divine right of kings and declared itself sovereign.²³ However, as a practical matter Parliament did not exercise authority over the American colonies.²⁴ The charters of the American colonies had been granted by the King, and during the seventeenth and eighteenth centuries the colonies had grown accustomed to governing themselves by means of elected colonial legislatures operating under royal governors.²⁵ Even after the Glorious Revolution, Parliament was largely content to allow the King to rule the colonies in this manner.²⁶ When Parliament finally asserted itself in America in the 1760s by enacting unpopular laws such as the Sugar Act and the Stamp Act, the colonists rebelled,²⁷ asserting that Parliament lacked the power to regulate or to tax them because the colonists were not represented in Parliament.²⁸ However, the colonists did not seek representation in Parliament,²⁹ instead they sought the freedom to make their own laws.³⁰

The Americans and the British failed to compromise their differences over these matters in part because they held incompatible understandings about the nature and location of sovereignty.³¹ The British considered sovereignty to be a single, unitary

²¹ See, e.g., MORGAN, *supra* note 2, at 146–48.

²² See *id.* at 105–07 (describing the transfer).

²³ See *id.* at 94–121 (describing the Glorious Revolution).

²⁴ *Id.* at 122 (“[T]hose who settled England’s American colonies were building societies where the authority of England’s king was ostensibly undiluted by his unruly English Parliament.”).

²⁵ See *id.* at 122–30 (describing the development of the colonial legislatures).

²⁶ See *id.* at 145 (“As long as the system worked, both sides could and did take considerable pride in it . . .”).

²⁷ See *id.* at 239 (“The Americans’ quarrel with England began, as everyone knows, with the attempt of Parliament to levy taxes on the colonists in the Sugar Act of 1764 and the Stamp Act of 1765.”).

²⁸ See *id.* at 213 (“Boston led the way in May 1764 when Samuel Adams opened his public career as a revolutionary by drafting instructions for the Boston representatives, denouncing the levying of taxes on colonies by Parliament.”); *id.* at 231 (“When Parliament undertook in the 1760s and 1770s to bind the colonists with legislation contrary to their wishes, the colonists had ready-made representative bodies to challenge the credentials of an English House of Commons to speak for them.”); see also Circular Letter from the Select-Men of Boston to the Gentlemen Select-Men of Charlestown (Sept. 14, 1876), available at http://www.masshist.org/revolution/doc-viewer.php?item_id=259&mode=nav (“Taxes equally detrimental to the Commercial interests of the Parent Country and her Colonies, are imposed upon the People, without their Consent . . .”).

²⁹ See MORGAN, *supra* note 2, at 242 (“It was not that the colonists themselves wished to be represented in Parliament.”).

³⁰ See *id.* at 243 (“[T]hey were affirming, without at first being fully aware of what they were doing, that the American colonies were different national communities from the one that was represented in Parliament.”).

³¹ See John V. Jeziarski, *Parliament or People: James Wilson and Blackstone on the*

entity—the sole and original source of political power—and they thought that this right to rule was incapable of being shared.³² According to Blackstone, there is in every form of government “a supreme, irresistible, absolute, uncontrolled authority, in which . . . the rights of sovereignty, reside.”³³ Originally, the British considered that this unitary and absolute sovereign authority resided in the King; after the Glorious Revolution, they believed it was vested in Parliament.³⁴ After the Stamp Act crisis of 1765, American colonists came to believe that sovereignty rested with the people rather than Parliament,³⁵ but there was another even more significant difference between the British and American conceptions of sovereignty. Americans held a much more complex understanding of the notion of sovereignty than did the British. This multi-faceted American conception of popular sovereignty is described in the following section.

A. Popular Sovereignty at the Time of the Founding

The second sentence of the Declaration of Independence³⁶ announces the fundamental principle that “all Men are created equal.”³⁷ This statement had two important implications for Americans of the founding generation. First, no individual, at birth, is entitled to possess more political power than any other individual. Accordingly, Americans were rejecting not only the divine right of kings, but the entire institution

Nature and Location of Sovereignty, 32 J. HIST. IDEAS 95–100 (1971).

³² See 1 WILLIAM BLACKSTONE, COMMENTARIES *48–49 (asserting that in every form of government there is “[A] supreme, irresistible, absolute, uncontrolled authority, in which . . . the rights of sovereignty, reside By the sovereign power . . . is meant the making of laws”); *id.* at *156–57 (arguing against lodging sovereignty in the people as a whole, and stating, “the power of parliament is absolute and without control”); see also JEFFREY GOLDSWORTHY, THE SOVEREIGNTY OF PARLIAMENT: HISTORY AND PHILOSOPHY 1–8 (1999) (describing the history of the concept of parliamentary sovereignty from the thirteenth century onward, and defending the principle of parliamentary supremacy).

³³ See BLACKSTONE, *supra* note 32, at *48–49.

³⁴ See FOUNDING AMERICA: DOCUMENTS FROM THE REVOLUTION TO THE BILL OF RIGHTS xii (Jack N. Rakove, ed., 2006) (“Since the Glorious Revolution of 1688, Parliament had been recognized as the sovereign source of law within Britain.”).

³⁵ See *id.* (“[T]he Revolution really began in the mid-1760s, when the colonists first argued that Parliament had no authority to impose taxes or other laws on a people who sent no representatives of their own to distant London.”); see also Jezierski, *supra* note 31, at 106.

³⁶ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). The Declaration states:

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—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, 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, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.

³⁷ *Id.*

of the aristocracy. The second immediate implication of the phrase “all Men are created equal” was that the American people are equal to the British people, and that as “one People”³⁸ Americans were ready to assume their “separate and equal Station”³⁹ among the nations of the world. To the founders, equality meant both individual freedom and national independence.

The second sentence of the Declaration also expresses the principle that all persons “are endowed by their Creator with certain unalienable Rights.”⁴⁰ This is not a mere sentiment; to the contrary, it was the sole justification offered for the institution of government: “to secure these Rights, Governments are instituted among Men.”⁴¹

Finally, the second sentence of the Declaration expressly declares the principle of popular sovereignty: All “just Powers” of government are “deriv[ed] . . . from the Consent of the Governed.”⁴² The founders described the circumstances under which people have the right to form a new government:

[W]hensoever any form of Government becomes destructive of these Ends [to secure the people’s rights to life, liberty, and the pursuit of happiness], it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.⁴³

The founders claimed that the systematic deprivation of the colonists’ rights by the British Parliament and King justified the Revolution. The final paragraph of the Declaration⁴⁴ constitutes an act of popular sovereignty. The act of declaring

³⁸ *Id.* para. 1. The Declaration states:

When in the Course of human Events, it becomes necessary for one People to dissolve the Political Bands which have connected them with another, and to assume among the Powers of the Earth, the separate and equal Station to which the Laws of Nature and of nature’s God entitle them, a decent Respect to the Opinions of Mankind requires that they should declare the causes which impel them to the Separation.

³⁹ *Id.*

⁴⁰ *Id.* para. 2.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* para. 32. The Declaration states:

WE, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the World for the Rectitude of our Intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly Publish and Declare, That these United Colonies are, and of Right ought to be, Free and Independent States; that they are absolved from all Allegiance to the British Crown, and that all political Connection between them and the State of Great-Britain, is and ought to be totally dissolved; and that as

independence is taken “in the Name, and by Authority of the good People of these Colonies.”⁴⁵

By declaring the former colonies to be “Free and Independent States,”⁴⁶ this final paragraph also lays the foundation for the principle of “state sovereignty.” This paragraph refers to the “united States of America,”⁴⁷ (the word “united” is not capitalized) and throughout the paragraph the colonies and states are referred to in the plural form.⁴⁸ The obvious implication is that the states are separate entities, not merely part of a larger national entity.

Following the Revolution, Americans initially adopted a form of government which recognized each state as sovereign. The first Constitution for the United States of America was the Articles of Confederation, a “firm league of friendship” among the several states.⁴⁹ It was entitled a confederation between the states,⁵⁰ and, pursuant to its terms, the representatives to the Continental Congress voted as states.⁵¹ The central government was relatively weak; the Articles make no provision for a separate executive or judicial branch of government,⁵² nor was Congress given any power to impose direct taxes or regulate commerce among the states.⁵³ Furthermore, the Articles expressly provided that “[E]ach state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.”⁵⁴

Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do. And for the support of this Declaration, with a firm Reliance on the Protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *See id.* (stating in reference to the colonies that “they are absolved from all Allegiance to the British Crown,” that the political connection between “them” and the State of Great Britain is dissolved, and in reference to the states, that “they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do”).

⁴⁹ ARTICLES OF CONFEDERATION of 1777, art. III.

⁵⁰ *Id.* (entitled, “[The] Articles of Confederation and Perpetual Union between the States of New Hampshire, Massachusetts Bay Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia.”).

⁵¹ *See id.* art. V, § 4 (providing that “each State shall have one vote”).

⁵² *See id.* art. IX, § 5 (providing for the appointment of a “Committee of the States” to exercise executive-like powers); *id.* at art. IX, § 2 (authorizing Congress to resolve disputes among the states).

⁵³ *See id.* art. IX, §§ 4–5.

⁵⁴ *Id.* art. II.

There are elements of the Articles of Confederation that militate against the concept of “state sovereignty.” The name of the country was now the “United States of America”—unlike in the Declaration, the word “United” was capitalized,⁵⁵ thus implying that the United States was a single entity. The Articles impose a number of limitations on the states; limitations that are inconsistent with full sovereignty. For example, the states were forbidden to enter into treaties or engage in war without the consent of Congress.⁵⁶ Most significantly, the Articles of Confederation were expressly made “perpetual.”⁵⁷

However, the American people soon wearied of the “league of friendship” that was the Articles of Confederation,⁵⁸ and in 1788 they ratified the present Constitution of the United States.⁵⁹ The Constitution differs from the Articles of Confederation in several fundamental respects that pertain to the doctrine of popular sovereignty. First, unlike the Articles, the Constitution is “ordain[ed] and establish[ed]” by the “People of the United States,”⁶⁰ not by the States. Second, the Constitution is intended to be “a more perfect Union” than the Confederation.⁶¹ Third, the Constitution is expressly created by the people for the purpose of “secur[ing] the Blessings of Liberty to ourselves and our Posterity.”⁶² Fourth, the Constitution provides that it is “the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”⁶³ Fifth, and most significantly, there is no reference to the sovereignty of the states in the Constitution. In sum, the Constitution is a much closer approximation of popular sovereignty than the Articles of Confederation.

B. Popular Sovereignty in the Conflict Over Slavery—a “People’s Contest”

During the antebellum period, the controversy over slavery rose to a crescendo, tearing this nation apart.⁶⁴ To a surprising extent, the debate was framed in terms of

⁵⁵ *Id.* art. I.

⁵⁶ *See id.* art. VI § 1, § 5.

⁵⁷ *Id.* art. XIII (“And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.”).

⁵⁸ *Id.* art. III.

⁵⁹ MARC LANDRY & SIDNEY M. MILKIS, *AMERICAN GOVERNMENT: BALANCING DEMOCRACY AND RIGHTS* 39 (2d ed. 2008).

⁶⁰ U.S. CONST. pmb. (“We the People of the United States . . . do ordain and establish this Constitution for the United States of America.”).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* art. VI, cl. 2.

⁶⁴ *See* JAMES M. MCPHERSON, *THE ILLUSTRATED BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 65–82* (2003).

“sovereignty,” but “sovereignty” appeared in several guises. It is common knowledge how the principle of “state sovereignty” was utilized in support of slavery to justify nullification and secession,⁶⁵ and how Daniel Webster rebutted those arguments in his *Second Reply to Hayne*⁶⁶ and the *Seventh of March Speech*.⁶⁷ Less familiar is how the principle of “popular sovereignty” was employed both in support of and in opposition to slavery.

The term “popular sovereignty” was the slogan that Stephen Douglas used to justify the Kansas-Nebraska Act of 1854 which authorized each new state to decide whether it would enter the Union as a slave or as a free state.⁶⁸ Douglas gave the following explanation for having sponsored this law: “My object was to secure the right of the people of each State and of each Territory, North or South, to decide the question for themselves, to have slavery or not, just as they chose”⁶⁹ Douglas, of course, did not believe that African-Americans should have a voice in the matter. Instead, he understood popular sovereignty to mean government “by the white man, for the benefit of the white man, to be administered by white men, in such manner as they should determine.”⁷⁰

In 1857 the Supreme Court decided *Dred Scott v. Sandford*,⁷¹ which struck down the Missouri Compromise that had excluded slavery from the northern portion of the American territories. In his opinion for the Court, Chief Justice Roger Taney stated that “the people of the United States” are the political body who “form the sovereignty,” and noted that the central question in the case was whether blacks “compose a portion of this people, and are constituent members of this sovereignty.”⁷² Invoking the interpretive principle of original intent, Taney concluded:

⁶⁵ See REPORT OF THE SPECIAL COMM. TO THE S.C. HOUSE OF REPRESENTATIVES (THE S.C. EXPOSITION) (1828), as reprinted in 10 THE PAPERS OF JOHN C. CALHOUN 531–33 (Clyde N. Wilson & W. Edwin Hemphill eds., 1977) (arguing in favor of interposition and state nullification of federal law); Senator John C. Calhoun, Final Remarks to the Senate of South Carolina, A Warning to the North (Mar. 4, 1850), reprinted in THE CAUSES OF THE CIVIL WAR 40–45 (Kenneth M. Stampp ed., 3d rev. ed. 1991) (warning that northern hostility to slavery would lead to disunion).

⁶⁶ Daniel Webster, Second Reply to Hayne (Jan. 26–27, 1830), reprinted in DANIEL WEBSTER: “THE COMPLETEST MAN” 113–20 (Kenneth E. Shewmaker ed., 1999) (closing with the words, “[l]iberty and Union, now and for ever, one and inseparable!”).

⁶⁷ Daniel Webster, Seventh of March Speech (Mar. 7, 1850), reprinted in DANIEL WEBSTER: “THE COMPLETEST MAN,” *supra* note 66, at 121 (ridiculing the idea of “Peaceable secession! Peaceable secession!”).

⁶⁸ Senator Stephen A. Douglas, Remarks to Public Reception in Chicago (July 9, 1858), in POLITICAL DEBATES BETWEEN HON. ABRAHAM LINCOLN AND HON. STEPHEN A. DOUGLAS IN THE CELEBRATED CAMPAIGN OF 1858, at 5 (Columbus, Follett, Foster & Co. 1860) [hereinafter Douglas, Remarks].

⁶⁹ *Id.* at 8.

⁷⁰ *Id.* at 15.

⁷¹ 60 U.S. 393 (1857) (finding that blacks, whether slave or free, were not citizens of the United States).

⁷² *Id.* at 404.

We think they are not [included within “the people of the United States”], and that they are not included, and were not intended to be included, under the word “citizens” in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.⁷³

Abraham Lincoln refuted both Douglas and Taney in their assertions that blacks possessed neither individual nor political sovereignty. On October 16, 1854, in his famous speech at Peoria, Illinois, Abraham Lincoln responded to Douglas’s statement that the principle of self-government was not applicable to blacks:

The doctrine of self-government is right—absolutely and eternally right—but it has no just application, as here attempted. Or perhaps I should rather say that whether it has such just application depends upon whether a negro is *not* or *is* a man. If he is *not* a man, why in that case, he who *is* a man may, as a matter of self-government, do just as he pleases with him. But if the negro *is* a man, is it not to that extent, a total destruction of self-government, to say that he too shall not govern *himself*? When the white man governs himself that is self-government; but when he governs himself, and also governs *another* man, that is *more* than self-government—that is despotism. If the negro is a *man*, why then my ancient faith teaches me that “all men are created equal;” and that there can be no moral right in connection with one man’s making a slave of another.⁷⁴

Lincoln then drew a direct link between popular sovereignty and individual sovereignty:

[N]o man is good enough to govern another man, *without that other’s consent*. I say this is the leading principle—the sheet anchor of American republicanism. Our Declaration of Independence says:

“We hold these truths to be self evident: that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are

⁷³ *Id.*; see also Douglas, Remarks, *supra* note 68, at 21 (agreeing with Taney’s assessment).

⁷⁴ Abraham Lincoln, Peoria Speech (Oct. 16, 1854), in 2 COLLECTED WORKS, *supra* note 1, at 265–66 [hereinafter Lincoln, Peoria].

instituted among men, *deriving their just powers from the consent of the governed.*⁷⁵

Lincoln then took one more step in defining the relation between individual sovereignty and popular sovereignty. He asserted that, because no man has the power to govern another man without that other's consent, it follows that the law must also treat all men equally and allow every person an equal voice in the government:

I have quoted so much at this time merely to show that according to our ancient faith, the just powers of governments are derived from the consent of the governed. Now the relation of masters and slaves is, *pro tanto*, a total violation of this principle. The master not only governs the slave without his consent; but he governs him by a set of rules altogether different from those which he prescribes for himself. Allow all the governed an equal voice in the government, and that, and that only is self government.⁷⁶

According to Abraham Lincoln, the principles of liberty, equality, and self-government are not competing principles; instead, they are mutually-reinforcing aspects of the same underlying truth. Stephen Douglas may have appropriated the term "popular sovereignty," but Lincoln embodied it.

In his speech on June 16, 1857, Lincoln responded to Taney's and Douglas's assertions that the framers intended to exclude blacks from the phrase "all men are created equal."⁷⁷ Lincoln noted that the Declaration was clear on this point—that Taney and Douglas were "doing . . . obvious violence to the plain unmistakable language of the Declaration."⁷⁸ He noted that the framers "defined with tolerable distinctness, in what respects they did consider all men created equal—equal in 'certain inalienable rights, among which are life, liberty, and the pursuit of happiness.' This they said, and this meant."⁷⁹ He then explained why the framers wrote the Declaration so broadly as to include the entire human family:

They meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere.⁸⁰

⁷⁵ *Id.* at 266.

⁷⁶ *Id.*

⁷⁷ Abraham Lincoln, Speech on the *Dred Scott* Decision (June 16, 1857), in 2 COLLECTED WORKS, *supra* note 1, at 405–06.

⁷⁸ *Id.* at 405.

⁷⁹ *Id.* at 405–06.

⁸⁰ *Id.* at 406.

Four years later, at the commencement of the Civil War, Lincoln once again invoked the principle of popular sovereignty, this time in opposition to secession.⁸¹ Lincoln believed that people have a right to revolution, but it is not a legal right. It is, instead, a moral right, and their right to rebel or secede thus depends upon the legitimacy of the cause for which they are fighting.⁸² Slavery, of course, was an unjust cause.⁸³ Nor could the people of any democracy claim to have a legitimate right to secede simply because they had lost an election; to accept such a proposition meant that democracy itself was impossible. Lincoln explained this principle in his address to Congress on July 4, 1861:

And this issue embraces more than the fate of these United States. It presents to the whole family of man, the question, whether a constitutional republic, or a democracy—a government of the people, by the same people—can, or cannot, maintain its territorial integrity, against its own domestic foes. It presents the question, whether discontented individuals, too few in numbers to control administration, according to organic law, in any case, can always, upon the pretences made in this case, or on any other pretences, or arbitrarily, without any pretence, break up their Government, and thus practically put an end to free government upon the earth.⁸⁴

In this speech Lincoln argued forcefully and at length against the notion of state “sovereignty”⁸⁵ and the legality of secession.⁸⁶ He specifically contrasted the

⁸¹ President Abraham Lincoln, First Inaugural Address—First Edition & Revisions (Mar. 4, 1861), *in* 4 COLLECTED WORKS, *supra* note 1, at 253.

⁸² President Abraham Lincoln, Address to Congress (July 4, 1861), *in* 4 COLLECTED WORKS, *supra* note 1, at 434 n.83 [hereinafter Lincoln, Congress] (“The right of revolution, is never a legal right. The very term implies the breaking, and not the abiding by, organic law. At most, it is but a moral right, when exercised for a morally justifiable cause. When exercised without such a cause revolution is no right, but simply a wicked exercise of physical power.”).

⁸³ Lincoln, Peoria, *supra* note 74, at 266 (“[T]here can be no moral right in connection with one man’s making a slave of another.”).

⁸⁴ Lincoln, Congress, *supra* note 82, at 426.

⁸⁵ *Id.* at 434. Lincoln stated:

Much is said about the “sovereignty” of the States; but the word, even, is not in the national Constitution; nor, as is believed, in any of the State constitutions. What is a “sovereignty,” in the political sense of the term? Would it be far wrong to define it “A political community, without a political superior”? Tested by this, no one of our States, except Texas, ever was a sovereignty. And even Texas gave up the character on coming into the Union; by which act, she acknowledged the Constitution of the United States, and the laws and treaties of the United States made in pursuance of the Constitution, to be, for her, the supreme law of the land.

Id.

⁸⁶ *See id.* at 434–40 (contending that secession is not permitted under the Constitution).

Declaration of Independence and Constitution of the Union to the Declaration and Constitution of the Confederacy:

Our adversaries have adopted some Declarations of Independence; in which, unlike the good old one, penned by Jefferson, they omit the words “all men are created equal.” Why? They have adopted a temporary national constitution, in the preamble of which, unlike our good old one, signed by Washington, they omit “We, the People,” and substitute “We, the deputies of the sovereign and independent States.” Why? Why this deliberate pressing out of view, the rights of men, and the authority of the people?⁸⁷

Ultimately, Lincoln said, the Civil War was “a People’s contest” that was being waged to defend fundamental human rights:

This is essentially a People’s contest. On the side of the Union, it is a struggle for maintaining in the world, that form, and substance of government, whose leading object is, to elevate the condition of men—to lift artificial weights from all shoulders—to clear the paths of laudable pursuit for all—to afford all, an unfettered start, and a fair chance, in the race of life.⁸⁸

Lincoln’s understanding of the Declaration led him to the conclusion that popular sovereignty is not limited to the right to vote—and certainly not limited to one race of man. It is instead a complex amalgam of interlocking and mutually supporting values.

I suggest that popular sovereignty comprises at least seven separate ideals: the rule of law, limited government, individual rights, equal political rights, separation of church and state, limited state sovereignty, and national sovereignty. These principles, and the complex relation among them, are described below.

III. SEVEN PRINCIPLES OF CONSTITUTIONAL LAW ARISING FROM THE CONCEPT OF POPULAR SOVEREIGNTY

A. The Rule of Law

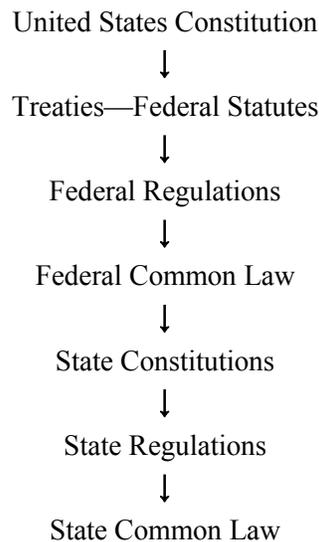
The first aspect of constitutional law that is derived from the principle of popular sovereignty is simply that the Constitution is law: it is law because the

⁸⁷ *Id.* at 438.

⁸⁸ *Id.*

people have the original right to create law,⁸⁹ and the Constitution is just such a constituent act.⁹⁰

Not only is the Constitution a law, it is also “a superior, paramount law.”⁹¹ Article VI, Clause 2 of the Constitution expressly provides that the Constitution is “the supreme law of the land,”⁹² thus placing the Constitution at the pinnacle of the hierarchy of American law. This hierarchy is made necessary by the fact that the American people have distributed power among different branches and levels of government. The people have created a national government as well as individual states; in addition, there are legislative branches that enact statutes and ratify treaties, executive branch agencies that issue regulations under the authority of statutes, and courts that create the common law as well as interpret the written law. The hierarchy of American law is as follows:



⁸⁹ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (Marshall, C.J.) (“That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected.”).

⁹⁰ See U.S. CONST. pmb. (“We, the people of the United States . . . do ordain and establish this Constitution for the United States of America.”); *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 328 (1816) (stating that the Constitution “is the voice of the whole American people . . .”).

⁹¹ *Marbury*, 5 U.S. at 177 (“The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.”); *id.* (“Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.”).

⁹² U.S. CONST. art. VI, cl. 2.

Obedience to the law is simply adherence to the will of the people—what Rousseau called submission to the “general will.”⁹³ At the beginning of his legal and political career, Abraham Lincoln urged Americans to make obedience of the law a “political religion”:

Let every American, every lover of liberty, every well wisher to his posterity, swear by the blood of the Revolution, never to violate in the least particular, the laws of the country; and never to tolerate their violation by others. . . . Let reverence for the laws become the *political religion* of the nation⁹⁴

Arguably the greatest challenge to the supremacy of the Constitution and the authority of the Supreme Court during the 20th century was the Little Rock school desegregation case, *Cooper v. Aaron*.⁹⁵ After the Little Rock School Board adopted a limited plan to integrate the city’s Central High School, the Governor of Arkansas called out the National Guard to prevent black students from entering the school.⁹⁶ The Governor’s action was in direct defiance of the Supreme Court’s ruling in *Brown v. Board of Education*,⁹⁷ and it increased public hostility to the integration plan.⁹⁸ When the Guard withdrew and the black children again attempted to attend the school, they had to be withdrawn because of what the Supreme Court called a “large and demonstrating crowd,”⁹⁹ and what Peter Irons describes as “howling mobs” of “racial bigots” who “circled the school.”¹⁰⁰ In *Cooper*, the Supreme Court reaffirmed *Brown* and declared that obedience to the Constitution is “indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us.”¹⁰¹ The Court added “[o]ur constitutional ideal of equal justice under law is thus made a living truth.”¹⁰²

⁹³ See JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 81 (Maurice Cranston trans., Penguin Classics 1968) (1762).

⁹⁴ Abraham Lincoln, Address to Young Men’s Lyceum (Jan. 27, 1838), in 1 COLLECTED WORKS, *supra* note 1, at 112.

⁹⁵ 358 U.S. 1 (1958) (ordering the Little Rock School Board to desegregate the city’s schools).

⁹⁶ See *id.* at 11 (“On the morning of . . . September 4, 1957, the Negro children attempted to enter the high school but, as the District Court later found, units of the Arkansas National Guard ‘acting pursuant to the Governor’s order, stood shoulder to shoulder at the school grounds and thereby forcibly prevented the 9 Negro students . . . from entering,’ as they continued to do every school day during the following three weeks.”).

⁹⁷ 347 U.S. 483 (1954) (striking down official racial segregation of the public schools).

⁹⁸ *Cooper*, 358 U.S. at 10 (“[F]rom that date [of the Governor’s action] hostility to the Plan was increased . . . [and became] more bitter and unrestrained.”).

⁹⁹ *Id.* at 12.

¹⁰⁰ MAY IT PLEASE THE COURT: THE MOST SIGNIFICANT ORAL ARGUMENTS MADE BEFORE THE SUPREME COURT SINCE 1955, at 250 (Peter Irons & Stephanie Guitton eds., 1993).

¹⁰¹ *Cooper*, 358 U.S. at 20.

¹⁰² *Id.*

The Rule of Law binds not only the states and the political branches of the federal government, but the courts as well. Once the Supreme Court has taken a position on a fundamental point of constitutional law, it is reluctant to overturn such a decision in the absence of special circumstances.¹⁰³ In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹⁰⁴ Justices Sandra Day O'Connor, Anthony Kennedy, and David Souter jointly authored a plurality opinion in which they considered whether to reaffirm or overturn *Roe v. Wade*.¹⁰⁵ They stated that if the Court were to overrule *Roe* simply because of popular opposition to the decision it would "seriously weaken . . . the rule of law."¹⁰⁶ They explained that people's acceptance of their decisions was dependent upon the belief that the Court's rulings were "grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make."¹⁰⁷ The Justices contended that the doctrine of *stare decisis* applies with even stronger force "whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution," as it had in *Roe*.¹⁰⁸ The Justices offered two examples of cases where the Court had been justified in overruling major precedent: *West Coast Hotel v. Parrish*,¹⁰⁹ overruling *Adkins v. Children's Hospital*,¹¹⁰ and *Brown v. Board of Education*,¹¹¹ overruling *Plessy v. Ferguson*.¹¹² In each of

¹⁰³ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–55 (1992) (plurality opinion) (identifying four factors that should be taken into account in determining whether to reaffirm or overrule a previous constitutional decision). The plurality stated that in making this determination it was appropriate to consider:

[W]hether the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.

Id. (citations omitted).

¹⁰⁴ 505 U.S. 833 (reaffirming the central holding of *Roe v. Wade*).

¹⁰⁵ 410 U.S. 113 (establishing the right of a woman to terminate a pregnancy prior to viability of the fetus).

¹⁰⁶ *Casey*, 505 U.S. at 865 (plurality opinion) ("[O]verruling *Roe*'s central holding would not only reach an unjustifiable result under principles of *stare decisis*, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law.").

¹⁰⁷ *Id.* at 865–66.

¹⁰⁸ *Id.* at 867.

¹⁰⁹ 300 U.S. 379 (1937) (upholding minimum wage law).

¹¹⁰ 261 U.S. 525 (1923) (striking down minimum wage law).

¹¹¹ 347 U.S. 483 (1954) (striking down official segregation of the public schools).

¹¹² 163 U.S. 537 (1896) (upholding state law requiring the segregation of the races in railroad cars).

those cases the Court came to the belief that the factual premises of the prior decision simply were not true; changes in fact or changes in understandings of fact necessitated a change in the interpretation of the Constitution.¹¹³

In the field of constitutional law the principle of the Rule of Law demands not only the obedience of the citizenry, executive officers, and legislative bodies to the dictates of the Constitution, but also the willingness of the Supreme Court to accord appropriate respect to previous interpretations of the Constitution, particularly decisions that purport to settle national controversies.

B. Limited Government

The second corollary that is derived from the axiom that the people are sovereign is that the government is *not* sovereign. In the United States, the people do not serve the government; rather, the government serves the people.¹¹⁴ In *Marbury v. Madison*,¹¹⁵ the foundation case in constitutional law, Chief Justice John Marshall asked, “Is it to be contended that the heads of departments are not amenable to the laws of their country?”¹¹⁶ His answer, of course, was that public officials *are* subject to the law: “The government of the United States has been emphatically termed a government of laws, and not of men.”¹¹⁷ The Court in *Marbury* found that even the President is under the law.¹¹⁸ The Court stated that in adopting the Constitution the people of the

¹¹³ See *Casey*, 505 U.S. at 861–64 (discussing the overruling of *Plessy* and *Adkins*); *id.* at 863 (“*West Coast Hotel* and *Brown* each rested on facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions.”).

¹¹⁴ See 4 ANNALS OF CONG. 934 (1794) (statement of Rep. James Madison) (“If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.”).

¹¹⁵ 5 U.S. (1 Cranch) 137 (1803) (establishing the principle that laws that are in conflict with the Constitution are void).

¹¹⁶ *Id.* at 164.

¹¹⁷ *Id.* at 163.

¹¹⁸ *Id.* at 167 (ruling that if a public official has been appointed for a term of years and there is no provision permitting his removal by the President, then the President has no power to remove that official). The Court stated:

If, by law, the officer be removable at the will of the President, then a new appointment may be immediately made, and the rights of the officer are terminated. But as a fact which has existed cannot be made never to have existed, the appointment cannot be annihilated; and consequently if the officer is by law not removable at the will of the President; the rights he has acquired are protected by the law, and are not resumable by the President.

Id. at 167; see also *United States v. Nixon*, 418 U.S. 683 (1974) (ordering President Nixon to turn over the Watergate tapes); *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952) (declaring President Truman’s seizure of the steel industry unconstitutional).

United States not only created a government, but they had placed upon that government “certain limits not to be transcended.”¹¹⁹

Over time, the general powers of the federal government have greatly expanded, typically during times of great crisis: the Civil War,¹²⁰ the Great Depression,¹²¹ and the Civil Rights Movement.¹²² The people have approved this expansion by repeatedly enacting amendments to the Constitution vesting power in Congress to enact “appropriate legislation”¹²³—a process that James McPherson refers to as the promotion of “positive liberty.”¹²⁴ However, the Constitution still constrains the government in the exercise of those powers.¹²⁵

An important feature of “limited government” under the Constitution is the doctrine of Separation of Powers, which safeguards freedom by dividing governmental power into different functions and distributing these functions among competing branches of the government.¹²⁶ As Madison says in *The Federalist* No. 51, to prevent tyranny “[a]mbition must be made to counteract ambition.”¹²⁷ Louis

¹¹⁹ *Marbury*, 5 U.S. at 176. “This original and supreme will organizes the government, and assigns, to different departments, their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments. The government of the United States is of the latter description.” *Id.*

¹²⁰ See David P. Currie, *The Civil War Congress*, 73 U. CHI. L. REV. 1131, 1131 (2006) (describing the far-reaching legislation enacted by Congress during the Civil War, and stating, “the nonmilitary legislation of the Civil War years also reflected a veritable revolution in the understanding of federal authority”).

¹²¹ See Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1253–62 (describing the expansion of federal power during the New Deal and the Supreme Court’s response).

¹²² See *id.* at 1272–78 (describing expansion of regulatory power as a result of Great Society programs).

¹²³ For examples where Congress has been granted the power to enforce an amendment by appropriate legislation, see U.S. CONST. amend. XII, §2; U.S. CONST. amend. XIV, §5; U.S. CONST. amend. XV, §2; U.S. CONST. amend. XVIII, §2, repealed by U.S. CONST. amend. XXI; U.S. CONST. amend. XIX; U.S. CONST. amend. XXIII, §2; U.S. CONST. amend. XXIV, §2; U.S. CONST. amend. XXVI, §2.

¹²⁴ JAMES M. MCPHERSON, *ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION* 62–63, 137–38 (1991) (drawing the distinction between “positive liberty” and “negative liberty,” and defining “positive liberty” as “freedom to achieve a status of freedom previously denied by disability or law”). *But see* DAVID KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995*, 481–83 (1996) (criticizing the Roosevelt administration for failing to secure a constitutional amendment expanding Congress’s power under the Commerce Clause).

¹²⁵ See U.S. CONST. art. VI.

¹²⁶ *But see* Patrick M. Garry, *The Unannounced Revolution: How the Court Has Indirectly Effected A Shift in the Separation of Powers*, 57 ALA. L. REV. 689 (2006) (arguing that over the past few decades the doctrine of separation of powers “has worked to shift power from Congress to the federal judiciary”).

¹²⁷ *THE FEDERALIST* NO. 51, at 246 (James Madison) (David Wooten ed., 2003); *see also* *THE FEDERALIST* NO. 47, at 232 (James Madison) (David Wooten ed., 2003) (“The

Brandeis echoed this view in his dissenting opinion in *Myers v. United States*,¹²⁸ where he stated:

The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.¹²⁹

Similarly, Justice Anthony Kennedy has stated that “[l]iberty is always at stake . . . [in] the separation of powers.”¹³⁰

The doctrine of Separation of Powers is of greatest importance in situations where the country faces a crisis and the people are tempted to address the crisis by concentrating governmental power in one branch or public officer. For example, over the years both the President and Congress have sought to control government spending by having one government official or institution assume responsibility for balancing the budget.¹³¹ However, the Supreme Court has ruled that neither the President, nor the Congress, nor both branches acting together have the authority to alter the Constitutional allocation of powers in this regard. In *Train v. New York*, the Court ruled that the President lacked statutory authority to impound funds to reduce the deficit;¹³² in *Bowsher v. Synar*, the Supreme Court ruled that Congress could not confer the power to balance the budget on the Comptroller General, an official within the legislative branch;¹³³ and in *Clinton v. New York*, the Court ruled that Congress could not vest the power of the line item veto in the President.¹³⁴ These measures might have proven useful or efficient, but the Court ruled that they were inconsistent with the system of separation of powers set forth in the Constitution.

accumulation of all powers legislative, executive, and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny.”)

¹²⁸ 272 U.S. 52 (1926) (ruling that the President has the exclusive power to remove officials appointed with the advice and consent of the Senate).

¹²⁹ *Id.* at 293 (Brandeis, J. dissenting).

¹³⁰ *Clinton v. New York*, 524 U.S. 417, 449–50 (1998) (Kennedy, J., concurring) (“The Constitution’s structure requires a stability which transcends the convenience of the moment. The latter premise, too, is flawed. Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.” (citations omitted)).

¹³¹ See, e.g., Richard A. Gephardt, *The Congressional Budget Impasse*, 16 ST. LOUIS U. PUB. L. REV. 5 (1996) (describing the history behind and the events of the 1995–96 budget impasse).

¹³² *Train v. New York*, 420 U.S. 35 (1975) (striking down the President’s impoundment of funds allocated to the Environmental Protection Agency).

¹³³ *Bowsher v. Synar*, 478 U.S. 714 (1986) (striking down the Balanced Budget and Emergency Deficit Control Act, also known as the Gramm-Rudman-Hollings Act).

¹³⁴ *Clinton*, 524 U.S. 417 (striking down the Line Item Veto Act).

In times of war the country faces even graver dangers, and people's fear may lead them to approve extraordinary measures. The Alien and Sedition Act adopted during the "silent war" with France;¹³⁵ the decisions of military commanders under Lincoln to close newspapers or imprison civilians accused of aiding the Confederacy;¹³⁶ the enactment and enforcement of the Espionage Act during World War I;¹³⁷ the internment of Japanese-American citizens and resident aliens during World War II;¹³⁸ the President's seizure of the steel industry during the Korean conflict;¹³⁹ and the surveillance of antiwar groups during the Vietnam War¹⁴⁰ were all challenged as unconstitutional, and in each instance the eventual judgment of history has been harsh.¹⁴¹ In the course of the present War on Terror, lawyers for the Justice Department claimed extraordinary power for the President to detain prisoners without trial and subject them to cruel methods of interrogation.¹⁴² In four cases decided in the past six years,

¹³⁵ See *New York Times v. Sullivan*, 376 U.S. 254, 273 (1964) ("[T]he great controversy over the Sedition Act of 1798 . . . first crystallized a national awareness of the central meaning of the First Amendment."); MICHAEL KENT CURTIS, *FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY* 52–117 (2000) (describing the adoption, enforcement, and reaction to the Alien and Sedition Acts); Geoffrey R. Stone, *Free Speech and National Security*, 84 IND. L.J. 939 (2009) (describing limitations on freedom of speech during war at different times in American history); *id.* at 941–42 (discussing Alien and Sedition Acts).

¹³⁶ See *Ex Parte Milligan*, 71 U.S. (1 Wall.) 2 (1866) (striking down a person's conviction in military court for conspiring to overthrow the government, on the ground that the civil courts were open); CURTIS, *supra* note 135, at 306–09 (describing measures taken during the Civil War to stifle dissent); Stone, *supra* note 135, at 942–44.

¹³⁷ See Stone, *supra* note 135, at 944–46 (describing the Espionage and Sedition Acts).

¹³⁸ See *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding order excluding persons of Japanese ancestry from the west coast during World War II); see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 215 (1995) (stating that the Court in *Korematsu* had "inexplicably" upheld the exclusion order, and quoting Justice Murphy's dissent characterizing the order as the product of "racism").

¹³⁹ See *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579 (1952) (striking down action of the President taking control of the nation's steel industry during the Korean War).

¹⁴⁰ See INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS: FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. NO. 94-755, bk.2, at 10–15 (1976) (describing the F.B.I.'s COINTELPRO program and its concerted effort to discredit Dr. Martin Luther King, Jr.); Stone, *supra* note 135, at 951–52; see also Jonathan D. Forgang, Note, "*The Right of the People*": *The NSA, the FISA Amendments Act of 2008, and Foreign Intelligence Surveillance of Americans Overseas*, 78 FORDHAM L. REV. 217, 234 (2009) (summarizing facts leading to adoption of Foreign Intelligence Surveillance Act of 1978).

¹⁴¹ See *supra* notes 135–40 and accompanying text.

¹⁴² See, e.g., Memorandum from Jay S. Bybee to John Rizzo, Acting General Counsel of the Central Intelligence Agency (Aug. 1, 2002), available at http://www.washingtonpost.com/wp-srv/nation/pdf/OfficeofLegalCounsel_Aug2Memo_041609.pdf (approving waterboarding,

the Supreme Court has ruled against the government and determined that suspected terrorists are entitled to fair hearings to determine their status and their guilt.¹⁴³ As Justice Robert Jackson stated in *Youngstown Sheet & Tube v. Sawyer*:

The purpose of lodging dual titles [President and Commander in Chief] in one man was to insure that the civilian would control the military, not to enable the military to subordinate the presidential office. No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role.¹⁴⁴

The lesson is clear: even in time of war, the government is constrained by law.

C. *Inalienable Rights*

Even though the people have the right to create a government and to invest it with various powers, our constitutional system also assumes that individuals retain an irreducible portion of sovereignty, their inalienable rights. As Alexander Bickel noted, this involves a contradiction: how is it possible that the actions of a popularly elected government founded upon the principle of popular sovereignty can be constrained by the decisions of an unelected judiciary?¹⁴⁵ The answer, of course, is that the people also expect the Constitution to protect them in the exercise of their inalienable rights.

confinement of a prisoner in a small dark box with insects, and sleep deprivation, among other techniques); *see also* Wilson Huhn, *Waterboarding Is Illegal*, WASH. U. L. REV. COMMENTARIES (May 10, 2008), <http://lawreview.wustl.edu/slip-opinions/waterboarding-is-illegal/>. *See generally* Wilson Huhn *Treatment of Detainees*, WILSON HUHN: AMERICAN CONSTITUTIONALLAW, <https://sites.google.com/site/huhnconstitutionallaw/discussion/treatment-of-detainees> (last visited Nov. 15, 2010) (collecting documents).

¹⁴³ *See Boumediene v. Bush*, 553 U.S. 723 (2008) (finding prisoner status hearings and appeal mechanism in Military Commissions Act not an adequate substitute for habeas corpus proceedings); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (finding that procedures in war crimes trials before military commissions fell short of requirements under Geneva Convention and Uniform Code of Military Justice); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (finding Due Process Clause applicable to prisoner status hearings); *Rasul v. Bush*, 542 U.S. 466 (2004) (finding that federal district court has jurisdiction to hear habeas corpus proceeding involving prisoner held in Guantanamo).

¹⁴⁴ *Steel Seizure*, 343 U.S. at 646.

¹⁴⁵ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–17* (1962) (“[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it.”); *id.* at 16 (“The root difficulty is that judicial review is a counter-majoritarian force in our system.”).

The theory of the social contract assumes that government arises from the consent of sovereign individuals: in a state of nature, each person has the right to do with himself as he pleases, but in joining or remaining in a society, a person agrees to cede some of his natural sovereignty to the rulers of the community.¹⁴⁶ The essential question is, in entering into the social contract, how much sovereignty must each person give up?¹⁴⁷

Thomas Hobbes believed that individuals grant virtually all power to government.¹⁴⁸ Hobbes, a product of the English Civil War, feared political and social discord and was willing to trade liberty for security.¹⁴⁹ The Framers of our Constitution instead took inspiration from John Locke, a child of the Glorious Revolution,¹⁵⁰ who

¹⁴⁶ See generally THOMAS HOBBS, *THE LEVIATHAN* 81–86 (A.R. Waller ed., Cambridge Univ. Press 1904) (1651). Hobbes described man's condition in a state of nature as constant warfare—the life of man is “solitary, poor, nasty, brutish, and short.” *Id.* at 84; see also JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 101–06 (Ian Shapiro ed., Yale Univ. Press 2003) (1690) (discussing the state of nature); ROUSSEAU, *supra* note 93, at 64–65 (explaining the change from the state of nature to civil society).

¹⁴⁷ See Anita L. Allen, *Social Contract Theory in American Case Law*, 51 FLA. L. REV. 1, 39 (1999) (summarizing the uses of social contract theory in American case law, and concluding that social contract theory is ambiguous on the question of the proper balance between governmental power and individual rights). Professor Allen states:

Social contract theory is too flexible to point with certainty in any one direction, particularly where the right answer is a matter of controversy, and particularly in the absence of detailed argument and analysis of the sort associated with the discipline of academic philosophy rather than the pragmatic discipline of law. As the examples of flexibility cited throughout this article show, using the apparatus of social contract theory, one can make the case for individual rights against government and likewise the case for government authority over individuals.

Id.

¹⁴⁸ See HOBBS, *supra* note 146, at 120.

¹⁴⁹ See Gregory H. Fox, *Strengthening the State*, 7 IND. J. GLOBAL LEGAL STUD. 35, 42 (1999) (“The great theorists of State consolidation, such as Thomas Hobbes and Jean Bodin, wrote of domestic absolutism as a necessary response to conditions of pervasive disorder; the English civil war in the case of Hobbes and the continental religious wars for Bodin.”).

¹⁵⁰ See Jeffrey M. Gaba, *John Locke and the Meaning of the Takings Clause*, 72 MO. L. REV. 525, 531 (2007). Professor Gaba states:

In 1690, after a return from exile in Holland following the successful “Glorious Revolution,” Locke published the *Two Treatises of Government*, his extraordinarily influential work of political philosophy. Although there is some dispute over when each part was drafted, the basic purposes of the *Two Treatises*—a refutation of the power of the monarchy, a description of the legitimate basis for democratic government and a justification for revolution against illegitimate government—were closely tied to the currents of revolution that culminated in William and Mary's ascension to the throne.

Id.

maintained that people are possessed of natural rights—rights that cannot be waived because they are inherent.¹⁵¹ The Declaration of Independence expressly adopts Locke’s position, stating that each person is endowed with “certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness.”¹⁵² Furthermore, unlike Hobbes, the founders of our country believed that the purpose of government was not to prevent discord, but to preserve freedom; the Declaration expressly states that the purpose of government is “to secure these Rights,”¹⁵³ and the Constitution provides that one of its purposes is to “secure the blessings of liberty.”¹⁵⁴

In the 1886 case of *Yick Wo v. Hopkins*,¹⁵⁵ the Supreme Court explained the relationship between the sovereignty of the government and the sovereignty of the individual.¹⁵⁶ While the people as a whole are sovereign,¹⁵⁷ the rights to “life, liberty, and the pursuit of happiness” are “individual possessions” which are “secured by . . . maxims of constitutional law.”¹⁵⁸

After 1937, the Supreme Court turned from the protection of property rights to the protection of personal rights, greatly expanding the number and scope of civil rights in myriad fields of constitutional law:¹⁵⁹ procedural fairness,¹⁶⁰ equal

¹⁵¹ See *id.* at 579. Gaba states:

John Locke, political philosopher and all around polymath, stands as a central figure in the development of Western conceptions of property rights and democratic institutions. If not the sole voice that is echoed in the American revolution and the Constitutional Convention, he clearly influenced the founders, particularly James Madison, and he thus represents an intellectual force that is a legitimate part of the current debate over the relationship between government power and individual property rights.

Id.

¹⁵² THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

¹⁵³ *Id.*

¹⁵⁴ U.S. CONST. pmbi.

¹⁵⁵ 118 U.S. 356 (1886) (striking down the refusal of municipal authorities to allow persons of Chinese ancestry to operate laundries).

¹⁵⁶ *Id.* at 369–70 (“When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.”).

¹⁵⁷ *Id.* at 370 (“Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts.”).

¹⁵⁸ *Id.*

¹⁵⁹ See BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 263 (1993) (stating that the Warren Court “rewrote much of the corpus of American constitutional law”); Wilson R. Huhn, *In Defense of the Roosevelt Court*, 2 FLA. A & M U. L. REV. 1 (2007) [hereinafter Huhn, *Roosevelt Court*] (describing the achievements of the Roosevelt Court).

¹⁶⁰ See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970) (extending the right of procedural due process to the termination of welfare benefits by an administrative agency).

protection,¹⁶¹ freedom of expression,¹⁶² and freedom of religion.¹⁶³ As Justice Jackson stated in 1943 in *West Virginia State Board of Education v. Barnette*:¹⁶⁴

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.¹⁶⁵

In recent decades the Supreme Court has been particularly active in recognizing different facets of the right to privacy, which it has described as the right of the individual to make “personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”¹⁶⁶ In 2003 the Court stated:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.¹⁶⁷

Another specific right that the Court has recognized that is a direct consequence of the concept of individual sovereignty is the right of the individual to participate in the political process on an equal basis with other persons.

D. Equal Political Rights and Majority Rule

The fourth idea that emerges from the principle of popular sovereignty is that because every individual is a sovereign political actor, each individual therefore has

¹⁶¹ See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (striking down official segregation of the public schools).

¹⁶² See, e.g., *New York Times v. Sullivan*, 376 U.S. 254 (1964) (imposing “actual malice” test and other requirements in libel actions brought by public officials on account of statements regarding their official duties).

¹⁶³ See, e.g., *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963) (striking down state law requiring the reading of Bible verses in the public schools).

¹⁶⁴ 319 U.S. 624 (1943) (striking down children's suspension from public school for refusing to salute the American flag).

¹⁶⁵ *Id.* at 638.

¹⁶⁶ *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

¹⁶⁷ *Id.* at 574 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

an equal right to participate in the political process. Accordingly, the Constitution protects freedom of political expression,¹⁶⁸ freedom of political association,¹⁶⁹ and the equal right to vote.¹⁷⁰ In addition, the idea that each person possesses an equal amount of sovereignty is the foundation for the principle of majority rule.¹⁷¹

By declaring that “all men are created equal,” the founders of this country rejected the concept that private individuals were entitled to exercise a hereditary form of political power.¹⁷² The Enlightenment ideal of popular sovereignty represented a break from the feudal concept of hereditary entitlement. Article I, Section 9 of the Constitution prohibits the federal government from granting titles of nobility,¹⁷³ and Article I, Section 10 imposes the same prohibition on the states.¹⁷⁴ However, the normative principle of equality was not exhausted with the establishment of a republic; it has also proven useful in opposing arbitrary discrimination of any form.¹⁷⁵ In his

¹⁶⁸ See, e.g., *New York Times v. Sullivan*, 376 U.S. 254 (1964) (overturning jury verdict against newspaper that ran advertisement from civil rights organization describing police treatment of civil rights demonstrators).

¹⁶⁹ See, e.g., *NAACP v. Alabama*, 357 U.S. 449 (1958) (striking down state court order requiring NAACP to disclose names of members).

¹⁷⁰ See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964) (striking down malapportionment of state legislative districts).

¹⁷¹ See Amar, *Central Meaning*, *supra* note 7, at 749 (“The central pillar of Republican Government, I claim, is popular sovereignty.”); *id.* at 757 (“[T]his linkage between Republicanism and majority rule runs throughout *The Federalist Papers*, and Founding era discourse”); *id.* at 753, 762–66 (citing James Madison, James Wilson, Alexander Hamilton, and other founders on the central importance of majority rule).

¹⁷² See Richard J. Lazarus, *Debunking Environmental Feudalism: Promoting the Individual Through the Collective Pursuit of Environmental Quality*, 77 IOWA L. REV. 1739, 1742 (1992) (“An important characteristic of the political feudal regime is that feudal leaders, within their respective geographic areas, possess great discretion in their exercise of authority over dependents who have sworn personal allegiance to their lords.”).

¹⁷³ U.S. CONST. art. I, §9, cl. 8.

¹⁷⁴ *Id.* art. I, §10, cl. 1.

¹⁷⁵ For example, Lincoln compared slavery to monarchy, stating that both institutions were grounded in “the same tyrannical principle.” Abraham Lincoln, Seventh and Last Debate with Senator Stephen A. Douglas at Alton, Ill. (Oct. 15, 1858), *reprinted in* 3 COLLECTED WORKS, *supra* note 1, at 315. Lincoln stated:

That is the real issue. That is the issue that will continue in this country when these poor tongues of Judge Douglas and myself shall be silent. It is the eternal struggle between these two principles—right and wrong—throughout the world. They are the two principles that have stood face to face from the beginning of time; and will ever continue to struggle. The one is the common right of humanity and the other the divine right of kings. It is the same principle in whatever shape it develops itself. It is the same spirit that says, “You work and toil and earn bread, and I’ll eat it.” No matter in what shape it comes, whether from the mouth of a king who seeks to bestride the people of his own nation and live

dissenting opinion in *Plessy v. Ferguson*¹⁷⁶ opposing state-sponsored racial segregation, Justice John Harlan noted (ruefully, defiantly, hopefully) that:

[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.¹⁷⁷

Of all of the aspects of the principle of “popular sovereignty,” the matter of equal political rights has undergone the greatest change and the most dramatic transformation since the founding. The Constitution originally provided that United States Senators were to be appointed by the state legislatures;¹⁷⁸ it still dangerously provides that Presidential Electors are to be appointed in the manner directed by the state legislatures.¹⁷⁹ Only the members of the House of Representatives were to be elected by the people.¹⁸⁰ Furthermore, the franchise was limited to a small minority of the people; women, blacks, and men without property were disenfranchised.¹⁸¹ The most numerous and

by the fruit of their labor, or from one race of men as an apology for enslaving another race, it is the same tyrannical principle.

Id.

¹⁷⁶ 163 U.S. 537 (1896).

¹⁷⁷ *Id.* at 559 (Harlan, J., dissenting).

¹⁷⁸ U.S. CONST. art. I, § 3, cl. 1 (“The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years . . .”).

¹⁷⁹ *See id.* art. II, § 1, cl. 2 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . .”).

¹⁸⁰ *See id.* art. I, § 2, cl. 1 (“The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . .”).

¹⁸¹ *See Harper v. Va. Bd. of Elections*, 383 U.S. 663, 684 (1966) (Harlan, J., dissenting) (“Property qualifications and poll taxes have been a traditional part of our political structure. In the Colonies the franchise was generally a restricted one.”); *id.* at 684–85 (offering several justifications for property qualifications and poll taxes). Justice Harlan stated:

[I]t is only by fiat that it can be said, especially in the context of American history, that there can be no rational debate as to their advisability. Most of the early Colonies had them; many of the States have had them during much of their histories; and, whether one agrees or not, arguments have been and still can be made in favor of them. For example, it is certainly a rational argument that payment of some minimal poll tax promotes civic responsibility, weeding out those who do not care enough about public affairs to pay \$1.50 or thereabouts a year for the exercise of the franchise. It is also arguable, indeed it was probably accepted as sound political theory by a large percentage of Americans through most of our

obvious changes to the text of the Constitution over the intervening centuries have been to broaden the franchise and strengthen our democracy. The Fifteenth Amendment extends the vote to blacks and other racial minorities;¹⁸² the Seventeenth Amendment provides for the direct election of United States Senators;¹⁸³ the Nineteenth Amendment extends suffrage to women;¹⁸⁴ the Twenty-third Amendment grants the residents of the District of Columbia the right to vote for President;¹⁸⁵ the Twenty-fourth Amendment abolishes poll taxes in federal elections;¹⁸⁶ and the Twenty-sixth Amendment lowers the voting age in federal and state elections to eighteen years.¹⁸⁷

In recent decades the Supreme Court has contributed to this process of democratization by outlawing “white primaries,”¹⁸⁸ banning poll taxes in state elections,¹⁸⁹ invalidating malapportionment schemes¹⁹⁰ and striking down other devices intended to deprive persons of equal opportunity to participate in the political process or to make their vote less effective.¹⁹¹ Moreover, to permit meaningful participation by every person in the political process, the Supreme Court now accords substantial protection to the rights of political expression¹⁹² and political association,¹⁹³ and has also struck

history, that people with some property have a deeper stake in community affairs, and are consequently more responsible, more educated, more knowledgeable, more worthy of confidence, than those without means, and that the community and Nation would be better managed if the franchise were restricted to such citizens. Nondiscriminatory and fairly applied literacy tests . . . find justification on very similar grounds.

Id. (citations omitted); see also Charles S. Daskow & David A. Sonner, *Vox Populi: Is It Time to Reform the Electoral College?*, 55 *FED. LAW.* 33, 34–35 (2008) (describing differences in number of qualified voters in different states at the time of the founding based on race and property).

¹⁸² U.S. CONST. amend. XV, § 1.

¹⁸³ *Id.* amend. XVII.

¹⁸⁴ *Id.* amend. XIX, § 1.

¹⁸⁵ *Id.* amend. XXIII, § 1.

¹⁸⁶ *Id.* amend. XXIV, § 1.

¹⁸⁷ *Id.* amend. XXVI, § 1.

¹⁸⁸ See, e.g., *Smith v. Allwright*, 321 U.S. 649 (1944) (striking down the rules of the Democratic Party of Texas forbidding blacks from voting in primary elections).

¹⁸⁹ See *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) (striking down poll tax in state elections).

¹⁹⁰ See *Reynolds v. Sims*, 377 U.S. 533 (1964) (striking down malapportionment scheme for state legislative districts).

¹⁹¹ See *Rogers v. Lodge*, 458 U.S. 613 (1982) (striking down at-large system of voting that deprived blacks of representation in county government); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (striking down law redrawing boundaries of City of Tuskegee to exclude black population).

¹⁹² See *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (finding that there is “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open”).

¹⁹³ See *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) (“It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of

down barriers to equal opportunity for education.¹⁹⁴ Additionally, the Supreme Court has upheld the constitutionality of the Voting Rights Act, landmark legislation that opened the political process to blacks and other minorities.¹⁹⁵ All of the foregoing decisions strengthen our democratic institutions, which, according to John Hart Ely, is a principal function of constitutional law.¹⁹⁶ As the Supreme Court said in 1996 in *United States v. Virginia*,¹⁹⁷ “[a] prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded.”¹⁹⁸

The principle that every individual has an equal right to vote received its highest expression in *Reynolds v. Sims*,¹⁹⁹ which applied the previously-established principle of “one person, one vote” to cases of malapportionment.²⁰⁰ In its decision, the Court stated:

To the extent that a citizen’s right to vote is debased, he is that much less a citizen. . . . A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm. This is the clear and strong command of our Constitution’s Equal Protection Clause. This is an essential part of the concept of a government of laws and not men. This is at the heart of Lincoln’s vision of “government of the people, by the people, [and] for the people.” The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races.²⁰¹

the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.”).

¹⁹⁴ See *United States v. Virginia*, 518 U.S. 515 (1996) (ordering state to admit women to state military college on an equal basis with men); *Plyler v. Doe*, 457 U.S. 202 (1982) (striking down state law requiring undocumented alien children to pay tuition to attend public school); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (striking down official racial segregation of the public schools).

¹⁹⁵ See *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (upholding 1965 Voting Rights Act as a valid enactment under Section 2 of the Fifteenth Amendment).

¹⁹⁶ See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 87–104 (1980) (setting forth the theory of “representation-reinforcement”).

¹⁹⁷ 518 U.S. 515 (ordering the state of Virginia to admit women to state military college on the same basis as men).

¹⁹⁸ *Id.* at 557.

¹⁹⁹ 377 U.S. 533 (1964) (striking down apportionment scheme that permitted gross variations in numbers of persons among state legislative districts).

²⁰⁰ *Id.* at 558 (“The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.” (quoting *Gray v. Sanders*, 672 U.S. 368, 381 (1963))).

²⁰¹ 377 U.S. at 567–68 (footnotes omitted).

The *Reynolds* Court also linked the principle of equal rights of citizenship to the concept of majority rule: “Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State’s legislators.”²⁰²

Despite this substantial progress, barriers to equal participation still exist in the political process. A notable problem yet to be resolved is that of “political gerrymandering”—the Supreme Court has still failed to develop a legal standard for evaluating the constitutionality of districting schemes that deprive a political party of representation proportionate to its voting strength.²⁰³ There is and no doubt always will be tension between the principle of equality and discrepant custom²⁰⁴ or other legitimate objectives,²⁰⁵ but the tide of history has flowed strongly towards broadening the franchise and removing obstacles to full and complete political equality.

E. Separation of Church and State

Because the right to rule arises from the will of the people and not from God, the principle of popular sovereignty necessarily implies the separation of church and state.²⁰⁶ The dominions of church and state are distinct because their powers are derived from different sources of authority.²⁰⁷

The dispute over separation of church and state in America traces back to the earliest colonial days. Within a few years of their arrival on these shores, two groups of Massachusetts Puritans contended over the proper role of religion in the government of the colony.²⁰⁸ On the one side was the ruling oligarchy of Massachusetts led by Governor John Winthrop; on the other stood Roger Williams and other religious dissenters.²⁰⁹ Historian James Ernst describes the conflict as centering on the dual principles of popular sovereignty and separation of church and state:

²⁰² *Id.* at 565.

²⁰³ *See* *League of Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) (failing to agree upon a standard for evaluating the constitutionality of politically-gerrymandered districts).

²⁰⁴ *See* U.S. CONST. art. I, § 3, cl. 1 (requiring each state to have equal representation in the United States Senate); *id.* art. II, § 1, cl. 2 (setting number of presidential electors from each state to equal number of senators and representatives combined).

²⁰⁵ *See* *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008) (upholding state law requiring government issued photo identification to vote).

²⁰⁶ *See* Jónatas E. M. Machado, *Freedom of Religion: A View from Europe*, 10 ROGER WILLIAMS U. L. REV. 451, 459 (2005) (“John Locke articulates a consistent political theory based on individual autonomy, popular sovereignty, limited government, separation of powers and separation of Church and State.”).

²⁰⁷ *Id.* at 452 (describing sources of authority for the separate dominions of church and state).

²⁰⁸ *See generally* JAMES ERNST, ROGER WILLIAMS: NEW ENGLAND FIREBRAND 97–137 (1932) (describing the conflict between Roger Williams and the authorities of the Massachusetts Bay Colony).

²⁰⁹ *Id.* at 136.

The Bay was for a union of church and state with the church in authority; [Williams] was for complete severance of church and civil state with the church subordinate in civil things. The Bay was a theocracy and an oligarchy; he upheld the sovereignty of the people and the rights of man and “right reason.”²¹⁰

The authorities of Massachusetts Bay accused dissenters, such as Roger Williams and Anne Hutchinson, of the crime of heresy, and exiled them upon conviction.²¹¹ These actions only increased the Colony’s thirst for purity. Two decades later, the Bay Colony executed four Quakers.²¹² A generation later, in 1692, a general madness overcame the Massachusetts Puritans, and they executed twenty persons at Salem whom they thought to be witches.²¹³ The Puritans felt justified in inflicting these punishments because they believed that the laws against heresy and witchcraft reflected the will of God.²¹⁴

In contrast to the leaders of the Massachusetts Bay Colony, Roger Williams, the founder of Rhode Island, argued that the people are sovereign. In 1644, he wrote: “the sovereign, original, and foundation of civil power lies in the people”²¹⁵ The same year he also coined the phrase “separation of church and state,” arguing that the leaders of Massachusetts Bay had made a fateful error in mixing the two institutions: “[W]hen [the Church] have opened a gap in the hedge or wall of Separation between the Garden of the Church and the Wilderness of the world, God hath ever broke down the wall itself . . . and made His Garden a Wilderness as at this day.”²¹⁶ Roger Williams welcomed people of all faiths, including Jews, to settle in Rhode Island.²¹⁷

²¹⁰ *Id.*

²¹¹ *See id.* at 134 (sentence of banishment pronounced upon Williams); *id.* at 211 (Anne Hutchinson and about thirty of her followers banished in 1638).

²¹² *Id.* at 375.

²¹³ *See* Jane Campbell Moriarty, *Wonders of the Invisible World: Prosecutorial Syndrome and Profile Evidence in the Salem Witchcraft Trials*, 26 VT. L. REV. 43, 43–44 (2001) (describing the Salem witch trials).

²¹⁴ *Id.* at 49.

²¹⁵ ROGER WILLIAMS, THE BLOODY TENENT, OF PERSECUTION, FOR CAUSE OF CONSCIENCE, DISCUSSED, IN A CONFERENCE BETWEENE TRUTH AND PEACE (1644), *reprinted in* PERRY MILLER, ROGER WILLIAMS: HIS CONTRIBUTION TO THE AMERICAN TRADITION 147 (1953).

²¹⁶ Steven G. Gey, *Vestiges of the Establishment Clause*, 5 FIRST AMEND. L. REV. 1, 52 n.73 (2006) (quoting Roger Williams, *Mr. Cotton’s Letter Examined and Answered* (1644)); *see also id.* at 52 (noting that “Roger Williams coined the phrase ‘wall of separation’”); ERNST, *supra* note 208, at 279 (“The political program of Roger Williams called for absolute liberty of conscience, separation of church and state, and people’s sovereignty, that is, government by consent of the governed of all classes”). *But see* PERRY MILLER, THE NEW ENGLAND MIND: THE SEVENTEENTH CENTURY 454 (1954) (“Even Roger Williams’ assertion of toleration came not from a political or constitutional scruple but from a conception of the spiritual life so exalted that he could not see it contaminated by earthly compulsion.”).

²¹⁷ *See* ERNST, *supra* note 208, at 350 (speaking of the Jews, Williams stated it was the duty of the chief magistrate of the colony to “make way for their free and peaceable habitation amongst us”).

The same battle over separation of church and state was waged again in the 1780s in the newly-founded State of Virginia. This time the protagonists were Governor Patrick Henry on one side and James Madison and Thomas Jefferson on the other.²¹⁸ Governor Henry proposed a law that would have imposed a tax for the support of the teachers of Christian education.²¹⁹ Madison and Jefferson opposed this law, and instead they secured the passage of Jefferson's famous Bill for Religious Liberty.²²⁰ The following year, the framers of the Constitution adopted a provision abolishing any religious test for holding public office,²²¹ and two years after that Congress adopted the First Amendment, which commences with the words: "Congress shall make no law respecting an establishment of religion"²²²

As with almost all of our rights, the right to separation of church and state lay dormant in the courts until the accession of the Roosevelt Court.²²³ In 1940, the Supreme Court incorporated the Religion Clauses into the Due Process Clause of the Fourteenth Amendment,²²⁴ and in 1947 Justice Hugo Black issued his famous opinion in *Everson v. Board of Education*, finding that the Establishment Clause demands the separation of church and state.²²⁵ Subsequent cases adopted the rule that the government must

²¹⁸ See CHARLES CERAMI, *YOUNG PATRIOTS: THE REMARKABLE STORY OF TWO MEN, THEIR IMPOSSIBLE PLAN, AND THE REVOLUTION THAT CREATED THE CONSTITUTION* 61–64 (2005) (describing the conflict over Henry's bill to provide an annual contribution to support the Christian religion).

²¹⁹ *Id.* at 61–62.

²²⁰ See *Everson v. Bd. of Educ.*, 330 U.S. 1, 11–12 (1947) (describing the efforts of Madison and Jefferson in opposing the tax and securing the enactment of the Virginia Bill for Religious Liberty); see also THOMAS JEFFERSON, *VIRGINIA STATUTE FOR RELIGIOUS FREEDOM*, (1786), reprinted in *FOUNDING AMERICA*, *supra* note 34, at 301–03 ("Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens . . . are a departure from the plan of the Holy author of our religion. . . . No man shall be compelled to frequent or support any religious worship, place, or ministry . . . or shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion"); JAMES MADISON, *A MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS* (1785), reprinted in *FOUNDING AMERICA*, *supra* note 34, at 295 ("[W]e hold it for a fundamental and unalienable truth, 'that religion, or the duty which we owe to the Creator and the manner of discharging it, can be directed only by reason and conviction . . . , not by force or violence.' The religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.").

²²¹ See U.S. CONST. art. VI, cl. 3 ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.").

²²² U.S. CONST. amend I.

²²³ See Huhn, *Roosevelt Court*, *supra* note 159.

²²⁴ See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (ruling that the Establishment Clause and the Free Exercise Clause are among the liberties protected by the Due Process Clause of the Fourteenth Amendment).

²²⁵ *Everson*, 330 U.S., at 16 ("In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'" (citation omitted)).

remain neutral with respect to religion;²²⁶ later still, the Court embraced the standard that the government may not endorse religion.²²⁷ Over the past seven decades, the Supreme Court has issued numerous opinions regarding government-sponsored prayer,²²⁸ the display of religious imagery on public land,²²⁹ and public funding to religious institutions.²³⁰

In my opinion, the single most important question that the Court has faced in the area of Separation of Church and State is whether the government has a legitimate interest in enforcing religiously motivated moral norms. This question frequently arises in right to privacy cases because many religious organizations take strong positions on issues such as abortion and equal marriage rights for gay and lesbian couples.²³¹ In his opinion dissenting from the decision of the Court in *Bowers v. Hardwick*²³² to uphold the constitutionality of a state statute making sodomy a crime, Justice Harry Blackmun argued that the state's invocation of religious authority in support of the statute actually undermined the constitutionality of the law:

The legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its

²²⁶ See, e.g., *McCreary Cnty. v. ACLU*, 545 U.S. 844, 860 (2005) (“The touchstone for our analysis is the principle that the ‘First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.’” (citations omitted)).

²²⁷ See *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring) (adopting the standard that the government may not “endorse” religion).

²²⁸ See, e.g., *Lee v. Weisman*, 505 U.S. 577 (1992) (striking down practice of prayer at public school graduation).

²²⁹ See, e.g., *McCreary*, 545 U.S. 844 (ordering removal of display of Ten Commandments from county courthouse); *Van Orden v. Perry*, 545 U.S. 677 (2005) (permitting display of statue of Ten Commandments on statehouse grounds).

²³⁰ See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding parental voucher option as applied to public, charter, private, and parochial schools).

²³¹ See Editorial, *The Myths of Prop. 8*, L.A. TIMES, Nov. 2, 2008, at A31 (opposing Proposition 8 and stating, “Religions and their believers are free to define marriage as they please; they are free to consider homosexuality a sin. But they are not free to impose their definitions of morality on the state.”); Janet Hook & Noam N. Levey, *Health Bill Picking Up Key Votes: Some Reluctant Democrats Fall into Line, and a Coalition of Nuns Gives Its Support*, L.A. TIMES, Mar. 18, 2010, at AA1 (noting that the U.S. Conference of Catholic Bishops had put out a statement opposing the health care reform bill in Congress because the proposed law inadequately protected against the use of federal funds to finance abortions); Letter from the First Presidency of The Church of Jesus Christ of Latter-day Saints to Church Leaders in California (June 30, 2008), available at <http://newsroom.lds.org/ldsnewsroom/eng/commentary/california-and-same-sex-marriage>; William F. Murphy et al., *Health Care for Life and for All*, ON FAITH, WASH. POST (Mar. 20, 2010, 3:30 AM), http://newsweek.washingtonpost.com/onfaith/guestvoices/2010/03/health_care_for_life_and_for_all.html (opposing health care reform on the ground that the bill inadequately protects against the use of federal funds to pay for abortions).

²³² 478 U.S. 186 (1986) (upholding state law criminalizing consensual acts of sodomy as applied to homosexuals).

conformity to religious doctrine. Thus, far from buttressing his case, petitioner's invocation of Leviticus, Romans, St. Thomas Aquinas, and sodomy's heretical status during the Middle Ages undermines his suggestion that [the statute] represents a legitimate use of secular coercive power. A State can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus.²³³

Justice Blackmun's position in *Bowers* reflects the fact that in the United States religious authority is not law. American lawyers and judges do not cite scripture or the statements of religious leaders as authority for what the law is. Neither the Bible, the Koran, nor the Torah may be legitimately invoked in determining the validity or the interpretation of regulations, ordinances, statutes, or constitutional provisions. The proper interpretation of American law depends upon the intent of the people who wrote or adopted the law, not the presumed intent of God. To the extent that the Court's decision in *Bowers* was based upon religious custom, it conflicted with the equally longstanding custom of not relying upon religious authority to interpret the law.

Seventeen years later in *Lawrence v. Texas*²³⁴ the Supreme Court reversed *Bowers*, but it did not adopt Justice Blackmun's reasoning condemning religious intolerance. Instead, the majority expressly adopted the reasoning that Justice John Paul Stevens had articulated in his dissenting opinion in *Bowers* that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."²³⁵ In her concurring opinion in *Lawrence*, Justice O'Connor expressed a similar view that "moral disapproval" by itself is an illegitimate basis for such laws.²³⁶ By contrast, Justice Antonin Scalia takes the position that the majority of the people have the right to enact their moral and religious views into law.²³⁷ The proper role of morality and religion will remain at the center of the debate over the constitutionality of laws affecting the right to privacy.

In the present day the debate over popular sovereignty and the separation of church and state defines the conflict between Islamic fundamentalism and western democracy.

²³³ *Id.* at 211–12 (Blackmun, J., dissenting) (citations and footnote omitted).

²³⁴ 539 U.S. 558 (2003) (striking down a state law making same-sex intercourse a crime).

²³⁵ *Id.* at 577 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

²³⁶ *Id.* at 582–83 (O'Connor, J., concurring); *id.* at 583 ("Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be 'drawn for the purpose of disadvantaging the group burdened by the law.'" (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996)).

²³⁷ See *Romer*, 517 U.S. at 636 (Scalia, J., dissenting) (Justice Scalia would have upheld the state constitutional amendment prohibiting the enactment of nondiscrimination laws protecting gays and lesbians on the ground that the amendment represents an attempt to "preserve traditional sexual mores.").

Popular sovereignty is anathema to Islamic fundamentalists precisely because it requires the separation of church and state.²³⁸ Islamists sincerely believe that the law of man may not contradict the law of God.²³⁹ The influential Islamist political author Sayyid Qutb wrote:

This religion [Islam] is really a universal declaration of the freedom of man from servitude to other men and from servitude to his own desires, which is also a form of human servitude; it is a declaration that sovereignty belongs to God alone and that He is the Lord of all the worlds. It means a challenge to all kinds and forms of systems which are based on the concept of the sovereignty of man; in other words, where man has usurped the Divine attribute. Any system in which the final decisions are referred to human beings, and in which the sources of all authority are human, deifies human beings by designating others than God as lords over men. This declaration means that the usurped authority of God be returned to Him and the usurpers be thrown out—those who by themselves devise laws for others to follow, thus elevating themselves to the status of lords and reducing others to the status of slaves. In short, to proclaim the authority and sovereignty of God means to eliminate all human kingship and to announce the rule of the Sustainer of the universe over the entire earth.²⁴⁰

Professor Kent Gravelle has observed: “Although it may be difficult for a Westerner to understand, in an Islamic state, the government, religion, and law are inseparable.”²⁴¹ The refusal of Islamists to accept the principles of popular sovereignty and the separation of church and state—their fear that these principles are incompatible with Islam—is a principal cause of their failure to enter the modern world.²⁴²

However, the battle for the future of Muslim society—the dream of Islamic democracy—is slowly making headway.²⁴³ In contrast to Qutb, Tassaduq Hussain Jillani,

²³⁸ SAYYID QUTB, MILESTONES 58 (Unity Publ’g Co. rev. ed. 1981).

²³⁹ See *id.*; Kent Benedict Gravelle, *Islamic Law in Sudan: A Comparative Analysis*, 5 I.L.S.A.J. INT’L & COMP. L. 1 (1998).

²⁴⁰ QUTB, *supra* note 238, at 58.

²⁴¹ Gravelle, *supra* note 239, at 1–2 (identifying four groupings of countries depending upon how strictly each country applies Islamic law).

²⁴² See, e.g., FATIMA MERNISSI, ISLAM AND DEMOCRACY: FEAR OF THE MODERN WORLD (Mary Jo Lakeland trans., 1992) (describing how many Muslims have rejected modernity in reaction to the humiliation and frustration that they experienced during the period of colonialism, and how they do not trust the institution of democracy because it is a western ideal).

²⁴³ See Fareed Zakaria, *The Jihad Against the Jihadis: How Muslim Leaders Waged War on Extremists—and Won*, NEWSWEEK, Feb. 22, 2010, at 26 (“In most Muslim nations, main-

Chief Justice of the Supreme Court of Pakistan, has argued that Islam *is* consonant with democracy.²⁴⁴ Justice Jilani has stated that “although sovereignty theoretically lies with God Almighty, man has been made a deputy of divine authority—a delegatee of that power. The delegatees—in this case the people—in turn elect their assembly who, for all practical purposes, exercise the divinely delegated political power as a polity.”²⁴⁵

Qutb and Jilani are treading the same path taken by Winthrop, Williams, Henry, and Madison as they seek to reconcile religious devotion with self-government. As the principle of popular sovereignty gathers support in the Muslim world, recognition of the principle of separation of church and state will inevitably follow.

F. The Power of the National Government Over the States

Two decades ago, in his brilliant essay *Of Sovereignty and Federalism*, Akhil Amar drew the distinction between *state* sovereignty and *popular* sovereignty and persuasively argued that this Nation was founded upon the latter and not the former.²⁴⁶ There is abundant evidence to support this proposition, including the dramatic differences between the Articles of Confederation and the text of the Constitution;²⁴⁷ statements of drafters such as James Madison, Alexander Hamilton, and James Wilson;²⁴⁸ early decisions by the Supreme Court authored by John Marshall²⁴⁹ and Joseph

stream rulers have stabilized their regimes and their societies, and extremists have been isolated. This has not led to the flowering of Jeffersonian democracy or liberalism. But modern, somewhat secular forces are clearly in control and widely supported across the Muslim world. Polls, elections, and in-depth studies all confirm this trend.”)

²⁴⁴ See Tassaduq Hussain Jilani, *Democracy and Islam: An Odyssey in Braving the Twenty-First Century*, 2006 BYU L. REV. 727 (2006) (arguing that Islam is compatible with democracy).

²⁴⁵ *Id.* at 735.

²⁴⁶ Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987) [hereinafter Amar, *Of Sovereignty and Federalism*].

²⁴⁷ See *supra* notes 58–63 and accompanying text. But see Kurt Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and “Expressly” Delegated Power*, 83 NOTRE DAME L. REV. 1889, 1891–92 (2008) (contending that courts and commentators are “almost certainly wrong” in concluding that the omission of the word “expressly” in the Tenth Amendment means that the framers intended for the national government to have more implied powers than under the Articles of Confederation).

²⁴⁸ See Amar, *Of Sovereignty and Federalism*, *supra* note 246, at 1437.

²⁴⁹ See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 402–04 (1819).

In discussing this question, the counsel for the State of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent States.

.....

From these Conventions the constitution derives its whole authority. The government proceeds directly from the people; is “ordained and

Story,²⁵⁰ and famous speeches by Daniel Webster²⁵¹ and Abraham Lincoln.²⁵² All this evidence supports the basic idea that the Constitution emanated from the people and not from the states. This understanding animated not only the adoption of the Constitution but also the defense of the Union in the Civil War.²⁵³

Despite this persuasive evidence supporting the primacy of popular sovereignty, throughout American history there have been elements who insist on elevating the opposing principle of “state sovereignty.” During the antebellum period “states rights” became the battle cry of nullifiers and secessionists in support of slavery.²⁵⁴ After the Civil War, state sovereignty remained the principal argument in opposition to the protection of newly-freed slaves,²⁵⁵ and “states rights” was the constant refrain of segregationists up to and throughout the Civil Rights Movement of the 1950s and 1960s.²⁵⁶

established” in the name of the people; and is declared to be ordained, “in order to form a more perfect union, establish justice, ensure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity.” The assent of the States, in their sovereign capacity, is implied in calling a Convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negated, by the State governments. The constitution, when thus adopted, was of complete obligation, and bound the State sovereignties.

Id.

²⁵⁰ See *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 324 (1816) (“The 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.’”).

²⁵¹ See Senator Daniel Webster, *The Constitution Not a Compact Between Sovereign States*, Speech Before the Senate (Feb. 16, 1833), in 3 *WORKS OF DANIEL WEBSTER* 448, 479–86 (Boston, C.C. Little and J. Brown 1851).

²⁵² See *supra* notes 75–87 and accompanying text.

²⁵³ See *supra* notes 64–73 and accompanying text.

²⁵⁴ See *supra* note 65.

²⁵⁵ See Wilson Huhn, *The Legacy of Slaughterhouse, Bradwell, and Cruikshank in Constitutional Interpretation*, 42 *AKRON L. REV.* 1051, 1073–79 (2009) (contending that the Supreme Court erred in its interpretation of the State Action Doctrine, leaving blacks unprotected in their fundamental rights); Wilson Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 *HOFSTRA L. REV.* 1379, 1427–51 (2006) (arguing that the framers of the Fourteenth Amendment intended to grant Congress the power to prevent private parties from interfering with fundamental rights, at least in the event that the states failed to act).

²⁵⁶ See, e.g., Governor George C. Wallace, Inaugural Address (Jan. 14, 1963), available at http://www.archives.state.al.us/govs_list/InauguralSpeech.html. Governor Wallace said:

Today I have stood, where once Jefferson Davis stood, and took an oath to my people. It is very appropriate then that from this Cradle of the Confederacy, this very Heart of the Great Anglo-Saxon Southland, that today we sound the drum for freedom as have our generations of forebears before us done, time and time again through history. Let us rise to the call of freedom-loving blood that is in us and send our answer

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,²⁵⁷ and for fifty years the Supreme Court enthusiastically enforced their agenda under the banner of “state sovereignty.”²⁵⁸ 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.²⁵⁹ Historically, “state sovereignty” was used to diminish the right of the American people to defend themselves from oppression. As Akhil Amar so eloquently described these cases, “[w]henver the rhetoric of ‘states’ rights’ is deployed to defend states’ wrongs, our servants have become our masters; our rescuers, our captors.”²⁶⁰

to the tyranny that clanks its chains upon the South. In the name of the greatest people that have ever trod this earth, I draw the line in the dust and toss the gauntlet before the feet of tyranny . . . and I say . . . segregation today . . . segregation tomorrow . . . segregation forever.

. . . .

This nation was never meant to be a unit of one . . . but a united of the many . . . that is the exact reason our freedom loving forefathers established the states, so as to divide the rights and powers among the states, insuring that no central power could gain master government control.

. . . .

And so it was meant in our racial lives . . . each race, within its own framework has the freedom to teach . . . to instruct . . . to develop . . . to ask for and receive deserved help from others of separate racial stations. This is the great freedom of our American founding fathers . . . but if we amalgamate into the one unit as advocated by the communist philosophers . . . then the enrichment of our lives . . . the freedom for our development . . . is gone forever. We become, therefore, a mongrel unit of one under a single all powerful government . . . and we stand for everything . . . and for nothing.

Id.

²⁵⁷ See, e.g., Carl A. Auerbach, *Is Government the Problem or the Solution?*, 33 SAN DIEGO L. REV. 495, 502 (1996) (“[T]he Republican Party came to regard a strong federal government as a danger to corporate ascendancy . . .”).

²⁵⁸ See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (striking down National Industrial Recovery Act); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (striking down federal Child Labor Law); *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (striking down the Sherman Antitrust Act as applied to manufacturing); SCHWARTZ, *supra* note 159, at 182–84, 212–13, 232 (1993) (describing decisions of Supreme Court narrowly construing the power of Congress over interstate commerce).

²⁵⁹ See *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (upholding power of Congress to enact Civil Rights Act of 1964); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding power of Congress to enact the National Labor Relations Act); SCHWARTZ, *supra* note 159, at 237, 242–43 (describing decisions upholding Congress’s power to enact legislation under the Commerce Clause).

²⁶⁰ Amar, *Of Sovereignty and Federalism*, *supra* note 246, at 1520.

In recent years the Supreme Court has revived the concept of “state sovereignty,”²⁶¹ describing the principle as “a fundamental postulate [] implicit in the constitutional design.”²⁶² As Professor Timothy Zick has pointed out in a number of articles, this terminology has a rhetorical purpose.²⁶³ To speak of “state sovereignty” is to confuse a State with a Nation, and to speak of “states’ rights” is to confuse a State with an individual.²⁶⁴ In the service of this doctrine the Court has placed certain limits on the scope of Congress’s power. It has struck down some legislation on the ground that it exceeded Congress’s powers under the Commerce Clause²⁶⁵ and Section Five of the

²⁶¹ See *Alden v. Maine*, 527 U.S. 706 (1999) (holding that Congress could not subject state to suit in state courts without its consent); Zick, *Are the States Sovereign?*, *supra* note 8, at 243–47 (describing the history of the concept of “state sovereignty” in the Supreme Court). *But see* Terrence M. Messonnier, *A Neo-Federalist Interpretation of the Tenth Amendment*, 25 AKRON L. REV. 213 (1991) (interpreting the Tenth Amendment as recognizing the principle of state sovereignty).

²⁶² *Alden*, 527 U.S. at 729; *see also* *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O’Connor, J., dissenting) (“We enforce the ‘outer limits’ of Congress’ Commerce Clause authority not for their own sake, but to protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental to our federalist system of government.”); *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring) (“[T]he intrusion [on state sovereignty] is significant” and “contradicts the federal balance the Framers designed and that this Court is obliged to enforce”); *New York v. United States*, 505 U.S. 144, 177 (1992) (“Whether one views the take title provision as lying outside Congress’ enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the Constitution.”). *But see* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 548 (1985) (“We doubt that courts ultimately can identify principled constitutional limitations on the scope of Congress’ Commerce Clause powers over the States merely by relying on *a priori* definitions of state sovereignty.”).

²⁶³ See Timothy Zick, *Active Sovereignty*, 21 ST. JOHN’S J. LEGAL COMMENT. 541, 543 (2007) [hereinafter Zick, *Active Sovereignty*] (“Sovereignty has enormous rhetorical power.”); Zick, *Are the States Sovereign?*, *supra* note 8.

²⁶⁴ Professor Zick states:

The core of the federalism revival has been the transformation of states, from something akin to corporate forms to far more dignified nations or persons. Almost by sheer linguistic fiat, the Court has bestowed on states not only the inherent “dignity” of nations or persons, but a host of constitutional rights as well. Today states, like nations and persons, have “rights” to privacy, autonomy, equality, and due process. Nothing in the Constitution itself mandated this change in status. It is the result of what the Court itself has called “background principles” and constitutional and historical suppositions. Dignity, esteem, and the new states’ rights are, the Court has said, *inherent* attributes of statehood. They follow naturally from the fact of *being* what the Constitution minimally refers to as a “state.”

Zick, *Active Sovereignty*, *supra* note 263, at 552.

²⁶⁵ See *United States v. Morrison*, 529 U.S. 598 (2000) (striking down Violence Against Women Act as beyond the power of Congress under the Commerce Clause).

Fourteenth Amendment,²⁶⁶ it has ruled that state officials may not be “commandeered” to enforce provisions of federal law,²⁶⁷ and it has invoked the concept of “state sovereignty” to limit the power of Congress to enact laws granting individuals wronged by the state an action for money damages.²⁶⁸

A practical justification for the principle of state sovereignty is that if the states are permitted to experiment with legal and social innovations, other states or the federal government may learn from their experience. As Justice Louis Brandeis stated in this oft-quoted passage from his dissenting opinion in *New State Ice Co. v. Liebmann*:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.²⁶⁹

These words were quoted most recently by Justice O’Connor in her dissenting opinion in *Gonzales v. Raich*, arguing that the states should have the freedom to adopt laws permitting the medical use of marijuana.²⁷⁰

There is one area where the states clearly are not sovereign. Ever since the case of *United States v. Curtiss-Wright Corporation*,²⁷¹ it has been understood that the states have no authority in matters of foreign affairs because they lack “sovereignty” with respect to foreign nations.²⁷² Even during a time when the Supreme Court limited the authority of Congress to enact statutes regulating interstate commerce, the Supreme Court upheld a treaty that governed the treatment of migratory birds.²⁷³

²⁶⁶ See *City of Boerne v. Flores*, 521 U.S. 507 (1997) (striking down the federal Religious Freedom Restoration Act as beyond the power of Congress under § 5 of the Fourteenth Amendment).

²⁶⁷ See *Printz v. United States*, 521 U.S. 898 (1997) (striking down provisions of the Brady Handgun Violence Prevention Act that required state law enforcement officers to run background checks on gun buyers); *New York v. United States*, 505 U.S. 144 (1992) (striking down a provision of the federal Low-Level Radioactive Waste Policy Amendments Act of 1985 on the ground that the law required state legislatures to take title to radioactive waste).

²⁶⁸ See *Alden v. Maine*, 527 U.S. 706, 729 (1999).

²⁶⁹ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

²⁷⁰ *Gonzales v. Raich*, 545 U.S. 1, 42–43 (2005) (O’Connor, J., dissenting).

²⁷¹ 299 U.S. 304 (1936) (upholding law delegating power to President to determine whether it would be a criminal offense to sell arms to the combatants in a South American conflict).

²⁷² *Id.* at 316 (“As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America.”); see also *id.* at 316–17 (discussing sovereignty theory at length).

²⁷³ *Missouri v. Holland*, 252 U.S. 416, 432 (1920) (“To answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States,

During this same period the Court often struck down laws making broad delegations of authority to the Executive Branch but upheld a law conferring broad discretion on the President to make it illegal to sell arms to the participants of a conflict in South America.²⁷⁴ In recent decades the Court has struck down a number of state laws denying equal benefits to aliens—even undocumented aliens—on the ground that only the federal government has authority to regulate immigration and naturalization.²⁷⁵ The principle of state sovereignty presents no barrier to the enforcement of international law;²⁷⁶ however, the principle of national sovereignty does. That is the subject of the following portion of this article.

G. National Independence and the Changing Role of International Law

The seventh and final manifestation of the principle of popular sovereignty is that the American people as a whole are sovereign and are therefore independent of any foreign power. Even though the founding generation relied upon principles of international law in declaring our independence,²⁷⁷ Americans resist the notion that

because by Article II, § 2, the power to make treaties is delegated expressly, and by Article VI treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land.”).

²⁷⁴ See *Curtiss-Wright*, 299 U.S. at 319–20 (1936) (“It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.”).

²⁷⁵ See, e.g., *Plyler v. Doe*, 457 U.S. 202 (1982) (striking down state law requiring children of undocumented aliens to pay tuition to attend public schools); *Graham v. Richardson*, 403 U.S. 365 (1971) (striking down state welfare laws discriminating against non-citizens).

²⁷⁶ But see *Medellín v. Texas*, 128 S. Ct. 1346 (2008) (finding that ruling of International Court of Justice, which held that United States had violated Vienna Convention by failing to notify criminal defendant of his rights under the Convention, did not preempt state laws governing challenges to criminal convictions).

²⁷⁷ See Cindy G. Buys, *Burying Our Constitution in the Sand? Evaluating the Ostrich Response to the Use of International and Foreign Law in U.S. Constitutional Interpretation*, 21 *BYU J. PUB. L.* 1, 15–16 (2007) [hereinafter Buys, *Burying*]. Professor Buys states:

Two areas of international law were particularly relevant to the creation and development of the United States as a constitutional government and its protection of individual rights. First, the international law concept of sovereignty helped the fledgling United States to gain international recognition and imposed obligations on the federal government vis-à-vis other nations, as well as towards its own subjects. . . . Second, the evolution of the meaning of sovereignty paralleled the development of international human rights law.

Id.

domestic law may be overridden by international law.²⁷⁸ Opposition to international law is based upon the idea that the invocation of treaty provisions, orders of international bodies, or the interpretations of the law by foreign tribunals all diminish the sovereignty of the American people.²⁷⁹

As a consequence, American courts have developed a number of doctrines that diminish the effectiveness of international law. These include the concept of non-self-executing treaties;²⁸⁰ the deference granted to the executive branch in the interpretation of treaties;²⁸¹ the power of Congress to revoke a treaty;²⁸² and the power of the President to unilaterally abrogate treaty obligations.²⁸³ Finally, in the area of constitutional interpretation, the Supreme Court has been slow to rely upon constitutional authority handed down by constitutional courts from other countries.²⁸⁴

²⁷⁸ See Zachary Larsen, *Discounting Foreign Imports: Foreign Authority in Constitutional Interpretation & the Curb of Popular Sovereignty*, 45 WILLAMETTE L. REV. 767, 778 (2009).

²⁷⁹ See, e.g., PATRICK J. BUCHANAN, *THE GREAT BETRAYAL: HOW AMERICAN SOVEREIGNTY AND SOCIAL JUSTICE ARE BEING SACRIFICED TO THE GODS OF THE GLOBAL ECONOMY* (1998) (opposing growing influence of international law); JEROME R. CORSI, *AMERICA FOR SALE: FIGHTING THE NEW WORLD ORDER, SURVIVING A GLOBAL DEPRESSION, AND PRESERVING U.S.A. SOVEREIGNTY* (2009) (same); KRASNER, *supra* note 20, at 125 (characterizing the invocation of national sovereignty against external influences of international human rights laws as “organized hypocrisy” and noting “Many contemporary observers have seen human rights as an issue area in which conventional notions of sovereignty have been compromised. They are right.”); NATHAN TABOR, *THE BEAST ON THE EAST RIVER: THE UN THREAT TO AMERICA’S SOVEREIGNTY AND SECURITY* (2006); Larsen, *supra* note 278, at 769 (“[R]eliance upon foreign and international law in construing constitutional provisions for purposes of judicial review should be rejected . . .”).

²⁸⁰ See *Medellin*, 128 S. Ct. 1346 (finding the Vienna Convention to be a non-self-executing treaty, and refusing to accord domestic effect to the decision of the International Court of Justice enforcing the Convention); David H. Moore, *Medellin, the Alien Tort Statute, and the Domestic Status of International Law*, 50 VA. J. INT’L L. 485, 488 (2010) (discussing the non-self-execution doctrine); *id.* at 507 (“*Medellin* directly limits the domestic role of treaties in U.S. courts and indirectly undermines reliance on [customary international law] by the federal judiciary.”).

²⁸¹ See Robert Knowles, *American Hegemony and the Foreign Affairs Constitution*, 41 ARIZ. ST. L.J. 87, 87 (2009) (“[L]egal doctrine has long called for especially strong foreign affairs deference to the Executive.”). *But see* David J. Bederman, *Medellin’s New Paradigm for Treaty Interpretation*, 102 AM. J. INT’L L. 529 (2008) (describing what he views in *Medellin* as a break from past practice in treaty interpretation).

²⁸² See *Reid v. Covert*, 354 U.S. 1, 18 (1957) (“[A]n Act of Congress, which must comply with the Constitution, is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.”).

²⁸³ *Goldwater v. Carter*, 444 U.S. 996 (1979) (refusing to overturn unilateral decision of President to abrogate self-defense treaty with Taiwan after he recognized Communist China as the legitimate government of China).

²⁸⁴ See Buys, *Burying*, *supra* note 277, at 1. Professor Buys states:

In the last few years, the U.S. Supreme Court has issued several high-profile opinions that refer to international and foreign law, igniting

International law is steadily becoming more important in two areas: international trade and human rights.²⁸⁵ In my opinion, it is likely that due to globalization, businesses will demand that there be uniform laws in order to facilitate the creation of a worldwide market for their goods and services. Similarly, consumers will demand access to information and freedom from dangerous products wherever they are produced, and workers will seek to eliminate unfair practices in competing labor markets around the world. Businesses, workers, and consumers will all demand the elimination of abusive practices and unfair methods of competition.²⁸⁶

In the context of human rights there will also be a demand for greater and more uniform protection. As noted above, during the administration of George W. Bush, Justice Department officials issued opinions promoting the doctrine of “the unitary executive,” in which they asserted that the President could ignore existing treaties governing the detention and treatment of prisoners, either because those treaties did not apply or because the Constitution authorized the President to ignore them.²⁸⁷ The

a heated debate among the justices, legal scholars, politicians, and commentators regarding the proper use of international and foreign law in Supreme Court jurisprudence. Justice Scalia, usually joined by Justice Thomas and Chief Justice Rehnquist, has led the fight against the use of foreign and, to a lesser extent, international law as a basis for constitutional decision-making. Justices Breyer, Ginsberg, Kennedy, O'Connor, Souter, Stevens, and White have asserted that international and foreign law have relevance to their work and that it is not inappropriate to refer to such sources in their decision-making.

Id. (citations omitted).

²⁸⁵ See Carlos Manuel Vasquez, *Trade Sanctions and Human Rights—Past, Present, and Future*, 6 J. INT'L ECON. L. 797 (2003) (examining increase in scholarly commentary on human rights law and international trade law).

²⁸⁶ See Cindy Galway Buys, *The United States Supreme Court Misses the Mark: Towards Better Implementation of the United States' International Obligations*, 24 CONN. J. INT'L L. 39, 40 (2008) (“[T]reaty-based obligations increasingly affect relations between the United States and its sub-federal units of government, in part because the subject matter of these treaties is expanding into areas traditionally regulated by the states. Non-state actors, such as individuals and businesses, frequently find that they also are directly affected by these international agreements.”); *id.* at 76 (“Given current trends, it appears highly likely that the United States and its citizens will be interacting more and more with other actors from around the world. As this trend towards globalization continues, the United States will increasingly be forced to determine how it will comply with various international obligations it may undertake to facilitate international trade and travel and other relations.”); see also Kenneth M. Casebeer, *The Power to Regulate “Commerce with Foreign Nations” in a Global Economy and the Future of American Democracy: An Essay*, 56 U. MIAMI L. REV. 25, 42 (2001) (arguing that the Rehnquist Court would interfere with America’s ability to negotiate international agreements regulating the global economy, stating, “the *Lopez* opinion stands as a potentially crippling barrier to competitiveness in nation-state negotiation over the terms of political control of the globalized market”).

²⁸⁷ See *supra* note 142.

Supreme Court rejected this broad interpretation of the power of the President, ruling in *Hamdan v. Rumsfeld*²⁸⁸ that the President is bound by the provisions of the Uniform Code of Military Justice²⁸⁹ and that the prisoner was entitled to a trial that was consistent with the mandates of the Geneva Conventions.²⁹⁰

As the nations of the world become more involved in each other's affairs, questions of international law are bound to arise more and more frequently, both in the area of economic regulation and in the area of human rights. Just as power over business regulation and civil rights passed from the states to the national government after 1937 in the United States,²⁹¹ so too in the next century governmental power will inevitably pass to international bodies, which are the only entities capable of dealing with problems such as global warming, slave labor, or torture of prisoners.

In my opinion, America and other nations will become reconciled to a regime of international law to the extent that such a system is congruent with the overarching principle of popular sovereignty. If international law is perceived as diminishing the freedom and independence of the American people, we should expect our citizens to continue to reject its legitimacy in the name of national sovereignty.²⁹² In contrast, if international law is understood as expressing the will of the people—if it reinforces principles of limited government and protects individual rights—if it is employed to restrain the actions of terrorist organizations that kill and maim civilians, multinational corporations that engage in abusive business practices, and rogue states that threaten the peace—international law will be accepted as a vital instrument in promoting equal justice under law.²⁹³

²⁸⁸ 548 U.S. 557 (2006) (granting prisoner's petition for habeas corpus relief).

²⁸⁹ *Id.* at 593 n.23 ("Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.").

²⁹⁰ *See id.* at 625 (ruling that the trial of petitioner violated the Geneva Conventions).

²⁹¹ *See* EDWARD S. CORWIN, *CONSTITUTIONAL REVOLUTION, LTD.* (1941) (describing the Court's shift towards upholding the constitutionality of commercial and social legislation); SCHWARTZ, *supra* note 159, at 234 ("A remarkable reversal in the Supreme Court's attitude toward the New Deal program took place early in 1937.").

²⁹² *See* Larsen, *supra* note 278. With respect to the related question of whether the Constitution accords rights to all of humanity, see J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 *GEO. L.J.* 463, 487–88 (2007). The author states:

Although many Founders may have believed that "all men" were naturally equal in their God-given rights-bearing capacity, as the Declaration of Independence suggested, it does not necessarily follow that they also thought that the government created by the U.S. Constitution would protect and enforce the constitutional rights of all men everywhere. . . . Accordingly, it is unlikely that the Founders approached the task of writing a constitution or bill of rights in 1787–1789 with the intent to enshrine natural rights of all mankind.

Id.

²⁹³ *See* Knowles, *supra* note 281, at 87 (proposing a "hegemony" theory under which American courts would lend legitimacy and stability to international law by ending deference

CONCLUSION

In the Declaration of Independence, the founders of this Nation recognized the consent of the people as the legitimate source of all political power.²⁹⁴ Their understanding of the concept of popular sovereignty is embodied by a number of interrelated and mutually supporting principles, including the rule of law, limited government, individual sovereignty, equal political rights, Separation of Church and State, limited state sovereignty, and national sovereignty. The Constitution—“the voice of the whole American people”²⁹⁵—made these principles into law.

But these principles were incompletely recognized at the founding. At that time, democracy was circumscribed by the twin facts that relatively few federal officers were elected directly by the people and relatively few citizens enjoyed the right to vote. The states were not subject to the Bill of Rights and were therefore free to deprive their residents of even the most elemental rights. The Constitution expressly countenanced slavery.

Even after slavery was abolished and the states were made subject to the Constitution, the Supreme Court failed to enforce its provisions. For one hundred and fifty years after the Constitution was written and for seventy years after the Fourteenth Amendment was approved in Congress, the Supreme Court was reluctant to recognize and protect even those individual rights which were explicitly set forth in the Constitution.

As Edmund Morgan stated, however, the ideal of popular sovereignty has “continually challenged” our society “to reform the facts of political and social existence to fit the aspirations it fosters.”²⁹⁶ In the centuries since the founding, and particularly since the investment of the Roosevelt Court in 1937, the interrelated principles of popular sovereignty have undergone enormous transformation. Although the government exercises broad new powers, its exercise of those powers is subject to the rule of law in the form of constitutional restraint including the separation of powers. The

to the executive branch interpretation of it); *see also* Buys, *Burying*, *supra* note 277, at 54 (suggesting that sovereignty theory indicates that the courts should give effect to international law when it expands human rights). Buys states:

Under the dictates of sovereignty theory, the Court would never be forced to adopt a foreign practice that is less protective of the people because that would be contrary to the entire purpose for which the government was created. Rather, the Supreme Court should continue to use foreign and international law to expand our conception of human rights consistently with the Constitution and should use international law as an interpretive and educational tool in appropriate circumstances as outlined above.

Id.

²⁹⁴ THE DECLARATION OF INDEPENDENCE (U.S. 1776).

²⁹⁵ *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 328 (1816).

²⁹⁶ *See* MORGAN, *supra* note 2, at 306.

Supreme Court now protects the rights of the individual, including the right to participate in the democratic process on an equal basis with other persons. The Separation of Church and State is now enforced, and the will of the whole American people as represented in Congress has largely achieved ascendancy over the sovereignty of the states. Looking to the future, international law seems destined to play a greater role in our society. Its acceptance and concomitant success will depend upon the extent to which it reflects the myriad values represented by the principle of popular sovereignty.