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A NEO-FEDERALIST INTERPRETATION OF
THE TENTH AMENDMENT

by

TERRENCE M. MESSONNIER∗

PART I: INTRODUCTION

When the First Congress convened, a bill of rights was a major topic on the agenda. A bill of rights had been the subject of extensive debates during the ratification process, and several state conventions had proposed amendments.1 Of

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No paper is written without the author getting extensive support from the people around him or without feeling the effects of the world in which the author moves. This article was written over the past three years in six distinct stages during a time in which both the world at large and my personal world was in constant transition.

The first stage in the writing of this piece was completed in the fall of 1989. Most of the general ideas in this Article date from this period. Special thanks for their assistance during this period goes to the Notes Topics Committee of Volume 99 of the Yale Law Journal, especially Luis Hernandez.

The second stage of this Article was written in the Spring of 1990. The major addition of this period was the section on national sovereignty. Special thanks for their advice goes to my fellow students in Professor Ackerman’s seminar on the Republican Revival.

The third stage of this Article was written in the Summer and Fall of 1990. This stage involved revisions of the section on how popular sovereignty compares to the other theories, including footnote on sovereignty in the Soviet Union. Special thanks for their advice and support goes to my fellow members of the Notes Topics Committee of Volume 100 of the Yale Law Journal and the Notes Editing Committee of Volume 100, especially Alex Azar and John Hu斯顿.

The fourth stage was written during the Spring of 1991. Greater depth was added throughout the entire article. Special thanks to Bruce Ackerman, Akhil Amar, Kate Smith, Guido Calabresi, Jean Koh Peters, Jay Pottenger, Michael Malinowski, Peter Burke, Greg Gust, Steven Vaughn, Zureen Tai-Zubarié, Andrew Golub, Graham Anderson, Rob Riley, Frank Jimenez, Eric Lasker, Mark Elliot, Michael Caglioni, Brennan Van Dyke, Andrew Cappel, E. Christi Cunningham, Diana Jarvis, Tomas Vachuda, Victor Hong, Jon Neustrom, Andrew Cheng, Carla Christofferson, Chris Coons, and Jeff Baird.

The fifth stage was written during the summer of 1991. The comparison to the work of other scholars and the discussion of the crime bill were written during this period. This stage finished on the first day of the Soviet Coup attempt, and the pessimistic footnote on the use of force against the people dates to this time. Thankfully, my pessimism was misplaced.

The sixth stage consists entirely of the edit work on this article and the writing of this footnote. Special thanks goes to the judges, staff, and clerks of the Missouri Supreme Court for making this wandering nomad feel welcome and at home. Extra special thanks goes to the Honorable Duane Benton, who has proven to be a wonderful person to work for, as well as a great judge. Also special thanks to my fellow clerks, especially Jatha Sadowski, Barbara Parker, Sherry Gunn, Michael Ksiling, Dan Wichmer, Dyan McGuire, Randy Eggert, and Greg George.

Lastly, aside from absolving all of the above named people from responsibility for the unorthodox positions taken in this Article, I would like to dedicate this Article to the peoples of the former Warsaw Pact. While ideas about the role of the People as an active vibrant force in government has often been only theoretical in discussing this country, the Peoples of Eastern Europe have risked and sometimes lost, their lives to gain what we take for granted. Their actions have been a tremendous source of inspiration in the writing of this article.

the ten amendments adopted, the first eight deal with relatively specific rights. The Ninth and Tenth Amendments deal with the concern that a list of some limits on the government implied that those were the only limits. The Ninth Amendment cryptically states that "the enumeration...of certain rights, shall not be construed to deny or disparage others retained by the people." The Tenth Amendment states that "the Powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This apparent simplicity obscures the Tenth Amendment's role as one of the few clauses in the Constitution that deals with the division of power between the different levels of government.

The controversy over the division of power between a federal government and the state governments goes as far back as 1776. The issue of state sovereignty was a vital part of the politics in the United States before the Civil War. While the Civil War ended some aspects of this debate, it did not end all of them.

Over the past fifty years, the issue of state sovereignty has been relevant to many debates. When the courts have considered this issue, they have often turned to the Tenth Amendment. Most of the concern over the issue of state sovereignty and the related question of federalism have come, not from the courts, but from the political branches. If Tenth Amendment has become relevant only to the political branches, as this author will argue that it has, then why was the lack of a Tenth Amendment-like provision one of the key issues if not the key issue in the ratification process of the Constitution?

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3 E.g., prohibition on establishment of religion, U.S. Const. amend. I; right to a jury in criminal cases, U.S. Const. amend. VI.
4 U.S. Const. amend. IX.
5 See also U.S. Const. art. I, § 8 (enumerated powers); U.S. Const. art. I, § 10 (prohibitions on state actions); U.S. Const. art. IV, § 1 (full faith and credit provision); U.S. Const. art. IV, § 4 (guarantee of republican form of government); U.S. Const. art. VI, cl. 2 (supremacy clause).
6 E.g., Kentucky Resolutions (Kentucky claimed power to nullify federal law), Hartford Convention (meeting of New England states to consider secession during War of 1812).
10 See infra notes 92-96 and accompanying text.
11 See W. Murphy, supra note 1, at 337-38, 345, 367-68, 396, 398-99 (six of the thirteen state ratifying conventions requested that the First Congress propose some explicit protection of reserved powers as part of recommendation for Bill of Rights, vote on ratification was close in most of the six states).
While some modern scholars claim that language is meaningless,\textsuperscript{12} this author disagrees. It is true that our historical distance requires that we exercise some caution in interpreting their language, but the Federalists and Anti-Federalists were engaged in a discussion over the future of this country in which the terms were crystal clear to most people on both sides.

At the heart of the debate was the question of who would be the sovereign in this country. This Article argues that the Tenth Amendment was the last relevant legal expression of the resolution of this debate. As such, the Tenth Amendment embodies the conception of who the sovereign is in the American system of government. In Part II, this Article examines the claim that the federal government is sovereign. Specifically, this Article explores constitutional theories and court opinions that treat the federal government as sovereign for all practical purposes. In Part III, this Article considers theories of dual sovereignty and state sovereignty. In Part IV, this Article argues that popular sovereignty accurately reflects the intent of the Framers. This Article speculates on the effect of this interpretation of the Tenth Amendment on constitutional jurisprudence.

At the outset, there are two considerations. First, there is both a moral and an historical aspect to the theory of popular sovereignty. The moral aspect is the claim, found in the Declaration of Independence, that the right of the people to alter their form of government is absolute.\textsuperscript{13} This aspect of popular sovereignty appears in this paper through the use of experiences of other countries in the discussion of the meaning of popular sovereignty. While the author feels that these examples are useful in that context, this paper is not in the end about the moral aspect of popular sovereignty. The objective of this paper is to show that popular sovereignty in this country is included as part of the constitutional order rather than, as Blackstone would claim, merely the right to throw out the entirety of the old constitutional order and replace it with a new constitutional order.\textsuperscript{14} Second, despite the meanings that have been added to the term since 1789-91, “sovereignty” or the “sovereign” had one meaning for both the Federalists and the Anti-Federalists. While the modern era has created these additional connotations, \textit{Black’s Law Dictionary} still contains the old, accurate definition: “The supreme, absolute, and uncontrollable power by which any independent state is governed.”\textsuperscript{15} Two things follow from this definition: 1) there can be no power higher than the sovereign’s and 2) therefore, there can be no limits on the sovereign. If there is a logical flaw in the above statement the remainder of this article and the arguments in the 1780’s are irrelevant to modern scholarship.

\begin{footnotesize}


\textsuperscript{15} \textit{Black’s Law Dictionary} 1396 (6th Ed. 1990) (“Sovereign”) (emphasis added).
\end{footnotesize}
If the statement does not contain a logical flaw, then modern constitutional scholarship should be re-examined in light of popular sovereignty.

PART II: THE TENTH AMPENDMENT ON THE SOVEREIGNTY OF THE FEDERAL GOVERNMENT

To the best of this author's knowledge there has never been a serious claim that the United States Government is a sovereign body, at least not in the way that this Article uses the term sovereign or the way that scholars use the term when they say that the British Parliament is sovereign. That statement would appear to make this part of the article nice, neat, and short. Unfortunately, modern constitutional theory is not that simple and clear-cut. Since 1962, one of the primary quandaries of constitutional theory has been the counter-majoritarian difficulty. This Article contends that the counter-majoritarian difficulty all but recognizes the sovereignty of the federal government. In Section A, this Article examines implicit assumptions underlying the counter-majoritarian difficulty and some of the proposed solutions. This Article will then demonstrate in Section B how similar reasoning has emerged in Supreme Court decisions. Section C will examine how the Framers dealt with these implicit assumptions. Section C will also offer a preliminary suggestion on how to refocus the discussion of these issues to recognize the limited nature of government.

A. The Counter-Majoritarian Difficulty

The Counter-majoritarian difficulty begins by making a fundamental distinction between the judiciary and the rest of the federal government: while judges have life tenure, all other officials either serve at the will of a higher-ranking official or have terms of six-years or less. From this theoretical accountability in the "political" branches, the judiciary is turned into a counter-majoritarian institution. As such


17 See A. Bickel, The Least Dangerous Branch (1962).

18 The claim that the "political branches" are truly accountable must sound dubious to most readers in this day and age. A large percentage of the eligible population does not vote in the general election during presidential years; and even fewer vote in so-called "off-years." Many of these people are not even registered to vote. See, e.g., House Passes Voter Registration Bill, Facts on File World News Digest, Feb. 23, 1990, United States Section, at 121 Col. A21 (estimate that close to 70 million eligible voters are not registered); The 1990 Elections; Voter Turnout Still Poor, With 3 Exceptions, New York Times, Nov. 11, 1990, Sec. 1, at 27, col. 1 (36 percent turnout for Congressional elections nationwide); 50.16% Voter Turnout was Lowest Since 1924, New York Times, Dec. 18, 1988, Section 1, at 36, col. 1 (91.6 million Americans voted in Presidential election, this number represents about 50% of eligible voters).

If this trend was not sufficient to raise questions concerning the majoritarian nature of these branches, there are sufficient reasons to give credence to claims that the election system is no longer responsive to the will of those who do vote. A large number of seats in the House of Representatives are gerrymandered. In these districts, the only election that really counts is the primary of the majority party in which only a tiny percentage of the constituents of the representative vote. Even those people do not have much of a say, as an in-party challenge to an incumbent is a rare event. In other districts and in Senate races, the pattern of
an institution is anti-democratic and therefore bad in most circumstances, a need to justify judicial review is created.\textsuperscript{19}

It is the need to justify judicial review that has driven modern constitutional theory. Underlying the philosophical stance of the counter-majoritarian difficulty is the assumption that, in most circumstances, the judiciary should defer to the political branches. One of the main goals of constitutional theory since 1962 has been defining the circumstances that are exceptions to the rule of deference.\textsuperscript{20} The exceptions fit into one of two categories: structural concerns and the Bill of Rights.\textsuperscript{21}

The exception that makes the most sense under the counter-majoritarian difficulty is the structural concern model exemplified by the writings of John Ely.\textsuperscript{22} Under this model, the Judiciary’s role is to prevent the government from taking campaign contributions makes it difficult to field a competitive challenge. The presidential nomination system is currently designed to produce a winner by financial exhaustion before voters in the larger states have a say, though this may be changing. The result has been the nomination by running away from the mainstream. The general election may seem representative, but discussions about altering the electoral college procedure in populous southern and western states may change that perception.

Even if the system seemed more open to the nomination and election of representative candidates, a system that elects candidates (or electors if dealing with the presidency) from small districts on a plurality (or "first past the post") basis may allow the individual winners to be representative but doesn’t guarantee that the decision of a majority of these winners will also be representative. In addition, the fact that decision-making is by a majority of the winners of these individualized districts reduces each individual winner’s responsibility for that decision and hence their accountability.

Given these circumstances, it should not be surprising that, to the extent that a will of the majority can be determined today, the desire of the majority is to be left alone with the little government intervention and a smaller tax burden.

In short, while someone has to be allowed to govern, in today’s conditions, the theoretical accountability of the government does not seem to be sufficient to describe it as truly majoritarian.\textsuperscript{19} It is obvious that this description of the problem of justifying judicial review is entirely moralistic in tone. While most of this Article will be proving that the principles that create this problem are not the ones on which this country’s form of government is based, the moral claim does deserve some response. The primary claim of this Article is, however, that the system does include the use of judicial review to keep the political branches within their designated limits and therefore, even if judicial review is bad, a constitutional change would be required to alter the power of the judiciary.

On the moral level, the response is essentially that citizens are not perfect people and the entire system of government including judicial review is designed to reflect that. If citizens were perfect people, they could devote the needed attention to each election for political office and still function in a modern society. In reality, citizens have limited time. Many decisions are made by bureaucrats and impact only a small number of people. The absence of judicial review would mean that those actions which violate the basic principles expressed by this country during times of great political activity would be undermined by individuals taking advantage of the fact that it is difficult to sustain such activity given the constraints on the time of the average person. If one accepts the arguments found in the discussion of the nature of popular sovereignty convincing, then a true majority of the society can change those basic values at any time. See infra notes 169-177 and accompanying text. As such, judicial review actually protects the majority from the actions of the minority who compromise the government and is, therefore, under the majoritarian moral assumptions of Bickel’s argument, moral. Cf. Ackerman, \textit{The Storrs Lecture: Discovering the Constitution}, 93 YALE L.J. 1013 (1984); Amar, \textit{The Bill of Rights as a Constitution}, 100 YALE L.J. 1131 (1991).

Another major line, into which this Article fits, is rejecting the assumptions of the counter-majoritarian difficulty on both historical and philosophical grounds. See, e.g., Ackerman, supra note 16, at 462-65.

The Bill of Rights has been used as a basis for the importation of a third type of exception. This exception has been the use of fundamental values, sometimes called natural law, as a restraint on the powers of the government. For further details, see J. Ely, \textit{DEMOCRACY AND DISTRUST} 43-72 (1980).
actions that would eliminate or dilute the votes and voices of the current minority. Essentially, the majority can do anything it wants except disenfranchise the minority. Under this system of thought, the courts function as referees that do not care what opposing political groups do on the field as long as neither group fouls the other. In short, this type of exception to the counter-majoritarian difficulty treats process as everything and substance as unimportant.

The alternative exception considers legislative substance and values to be crucially important. Where Dean Ely abstracts the Bill of Rights and other provisions to create a constitution concerned primarily with structure, this model takes these provisions at what resembles face value. The most conservative version of this model comes from Judge Bork who argues that judges should respect the choice of the majority unless that choice "clearly runs contrary to a choice made in the framing of the Constitution." While many scholars opposed the nomination of Judge Bork to the Supreme Court, the opposition was based more on how Judge Bork defined "clearly" and on what choices Judge Bork thought had been made than on his willingness to invalidate federal statutes that violated the Bill of Rights. Though in some circumstances it may be more difficult, it is by no means impossible to argue for an interpretation of the Bill of Rights based on original intent that is much more libertarian and/or much more liberal than Judge Bork's.

Both models share a basic underlying premise. That premise is an assumption that most acts of the political branches will be legitimate. These acts are legitimate because, in most circumstances, the majority should get what it wants simply because it is the majority. Under these theories, a statute is presumed constitutional, unless and until the parties challenging the statute demonstrate that it violates either a procedural or a substantive protection. While this approach to a statute may be proper once a court has established that the authority that passed the statute has the power to legislate that area, it ignores the theory that governments in this country have limited powers. Unfortunately, during the last fifty years, so have the courts.

B. The Judicial Version of the Counter-Majoritarian Difficulty — The Footnote

A history of the Supreme Court might, on the basis of the results, the numbers,
and the types of cases, be divided into three eras. In the first era, only two federal statutes were invalidated by the Supreme Court: one on quasi-separation of powers concerns and one on the question of the competence of the federal government. In the second era, running from about 1860 to 1936, the number of cases in which federal statutes were invalidated on the question of competence increased along with the rest of the court’s docket with most of the cases involving progressive regulations of the workplace and marketplace. In the third era, coming from about 1936 to the present, the Court has maintained a large docket. One can find federal statutes invalidated based on both separation of powers and Bill of Rights concerns. Yet to the best of the author’s knowledge, not one federal statute has been struck down on the question of competence.

If there is one pronouncement of the Court that best represents the third era, it is footnote four of Carolene Products. This footnote is the judicial equivalent of the academic discourse on the counter-majoritarian difficulty. In this footnote, the Court declared that it would yield to the government on most legislation

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26 Those who have read the articles of Bruce Ackerman will notice the similarities of the periods covered by the judicial eras in this article with the constitutional eras in Professor Ackerman's articles. See, e.g., Ackerman, supra note 16, at 462-65. This similarity is partially coincidental and partially intentional. The coincidental nature comes from the fact that the dividing points chosen by Ackerman were crucial moments of our constitutional history. As such, it should not be surprising that the Supreme Court's approach to the legal issue that concerns this Article shifted at the same times that the rest of its jurisprudence shifted. The intentional similarity comes from this Article's self-conscious vision of itself as being inspired by and a reaction to the theories of Professors Ackerman and Amar.

27 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). While this case could be classified as dealing with the powers of the government, it is slightly more accurate to classify it as dealing with the powers of the legislature with respect to another branch of the government. In other words, this case was a battle for power between the “political” branches and the judiciary.

28 Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 432-52 (1856). This case is probably the first case in which the Supreme Court said that a piece of legislation dealt with a matter which was completely outside of the powers and jurisdiction of the federal government. For the remainder of this Article, this author will often refer to this type of issue as one of the competence of the federal government.


32 There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions than are most other types of legislation.

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

excepting violations of the Bill of Rights and those procedures which are part of
guaranteeing a democratic system. The shift in approach entailed by this footnote
can best be seen by examining how it has altered one of the key doctrinal debates of
the previous era.

One of the oldest constitutional doctrines of the Court is that the grant of power
found in the commerce clause includes the power to regulate things that "affect
commerce." One of the earliest cases using this concept was Gibbons v. Ogden.\(^3\)
The concept emerged from a discussion of what it meant to regulate commerce
among the states. In this context, the issue was not what affects commerce but rather
what affects whether or not the commerce is among the states.\(^3\)\(^5\) Earlier in the
opinion, Chief Justice Marshall, speaking for the Court, declared that the term
commerce described "the commercial intercourse between nations, and parts of
nations, in all its branches, and is regulated by prescribing rules for carrying on that
intercourse."\(^3\)\(^6\) This description was part of an effort to explain why the power to
regulate navigation was included in the power to regulate commerce. It is in this light
that the concept affecting interstate commerce emerges.

\(Gibbons\)\(^3\)\(^7\) concerned the constitutionality of a New York statute governing the
licensing of boats on its rivers. Such boats were used, or could be used for, among
other things, the transportation of goods from the interior of the state to other states
and other countries. In these circumstances, the Court reasoned that Congress had
the power to regulate navigation, within a state, "connected with ‘commerce with
foreign nations, or among the several states, or with the Indian tribes.’"\(^3\)\(^1\) Taken as
a whole, the Gibbons Court’s concept of affecting interstate commerce was very
narrow. In the 1930’s, the doctrine was narrowly construed to keep most industrial
processes out of the reach of federal regulatory powers.\(^3\)\(^9\)

In the current era, however, the phrase has effectively been rendered meaning-
less.\(^4\)\(^0\) A good example of this misuse of the English language is found in Garcia
v. San Antonio Metropolitan Transit Authority.\(^4\)\(^1\) While the wages of all workers
does in some cases affect commerce, when the employer is an intra-state monopoly,

\(^{33}\) U.S. CONST. art. I, § 8, cl. 3.
\(^{34}\) Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).
\(^{35}\) Id. at 194-98.
\(^{36}\) Id. at 189-90.
\(^{38}\) Id. at 195.
495 (1935).
\(^{40}\) It should be noted that in dicta, the Gibbons Court mentioned that the principle that the words of the
Constitution should not be extended "beyond their natural and obvious import" was uncontroversial. Gibbons,
22 U.S. (9 Wheat.) at 188.
\(^{41}\) Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 537 (1985). The Court notes that
the local nature of an industry is no longer an exception to the power to regulate commerce. This claim can
only lead a sensible person to ask why, if the Framers intended to regulate "local" industry, was the power
to regulate commerce qualified by phrases such as "among the states."
the impact on inter-state commerce is relatively small and remote. Under the Court’s current interpretation of the term, it is difficult to imagine anything that does not affect commerce.

The logical result of modern judicial doctrine is that, barring the violation of some constitutional right, the government can do whatever it wants to do. Such a doctrine is far removed from the intent of the Framers.

C. The Eighteenth Century Concept of Limited Government and the Tenth Amendment

During the ratification debates, there were two major arguments successfully raised by the Anti-Federalists: 1) The Constitution lacked a Bill of Rights; and 2) The Constitution eliminated state sovereignty. Both of these perceived flaws were the subject of official recognition by several, if not the majority, of the state ratifying conventions. While this Article will address the response to the issue of state sovereignty later, the response to the demand for a Bill of Rights touches on the current discussion.

In the Federalist Papers, Alexander Hamilton argued that a Bill of Rights was not necessary. According to Hamilton, the Constitution itself established a limited government. As such, amendments placing restrictions where none were needed would imply that the absence of explicit restrictions meant that there were no restrictions.

In light of Hamilton’s responses, it is useful to look at the text of the Constitution and the Bill of Rights. Most of the restrictions found in these documents can be matched with one or more explicit grants of power to the United States Government. There are a handful of restrictions, including most of the First Amendment and the Ninth Amendment, which are not directly linked to grants of powers. Here the Tenth Amendment becomes useful.

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42 W. MURPHY, supra note 1, at 267-399.
43 Id. 337-38, 345, 367-68, 385, 386, 398-99, 404 (Six states requested some protection of the reserved powers of the states with a seventh officially “understanding” that such protection was not necessary. All seven proposed other limits on the federal government.).
44 See infra notes 100-129 and accompanying text.
46 For example, the Constitution grants the government the power to make criminal laws in certain areas. U.S. Const. art. I, § 8, cl. 6, 10. The ex post facto clause, U.S. Const. art. I, § 9, cl. 3, prohibits the making of such laws when they are intended to apply to acts already committed and the application of such laws to prior acts. Likewise, the prohibition on cruel and unusual punishment, U.S. Const. amend. VIII, prevents Congress from specifying excessive penalties in laws passed under those provisions. Congress has the power to raise and support an army. U.S. Const. art. I, § 8, cl. 12. They are prohibited from requiring that part of the support come from designating individual citizens to provide quarters for members of that army. U.S. Const. amend. III. A spiritually-inclined person with a sense of creativity could argue that the general welfare of the nation includes its spiritual welfare and, therefore, that Congress could spend money to support an established religion under its power to spend money for the general welfare. U.S. Const. art. I, § 8, cl. 1. The Establishment Clause, U.S. Const. amend. I, prevents that.
The Tenth Amendment is, in part, a reflection of the Founding Generation's opposition to unlimited government. To them, one of the purposes of having a written constitution was that such a constitution sets limits on a government by the mere fact of giving a government some powers but not others.\(^{47}\) Faced with a demand for even more protection, the First Congress proposed, and the states ratified, a series of amendments in which most protected specific rights,\(^{48}\) one protected rights generally,\(^{49}\) and one re-affirmed the concept of limited government.\(^{50}\) This Tenth Amendment serves as a reminder that there are some powers delegated to the federal government and the remaining powers are reserved to others.

For this distinction to work, the competence of the federal government to legislate over a particular issue has to be closely and seriously examined when raised in a case. Presuming constitutionality is fine when competence is not an issue. In such a case, the person challenging a law is pointing to a clause that the challenger claims was violated. The person challenging on competence grounds is situated differently. That challenger is asking to be shown where the federal government gets its power. When competence is an issue, presuming a statute to be constitutional is precisely what a court must not do. The opposite of Judge Bork's approach is appropriate here. Rather than requiring evidence that a governmental act is prohibited, the Tenth Amendment requires proof that a governmental act is permitted by the Constitution.\(^{51}\) While the "necessary and proper" clause\(^{52}\) requires that these powers be interpreted as having penumbras,\(^{53}\) the courts must construe these powers more narrowly than is currently the case. This aspect of the Tenth Amendment provides some protection to the average American from a drastic alteration of life by a temporary majority.

The remaining three visions of sovereignty, and of the Tenth Amendment, presume a limited national government. Where they differ is on the question of where the power to alter the limits rest or, in other words, where the sovereign power lies in society.

PART III: CURRENT THEORIES OF INTERPRETATION OF THE TENTH AMENDMENT

The courts and many articles have made one of two assumptions about the Tenth Amendment. The first assumption is that the Tenth Amendment states a truism that all powers not delegated to the federal government were reserved to the


\(^{48}\) U.S. Const. amend. I-VIII.

\(^{49}\) U.S. Const. amend. IX.

\(^{50}\) U.S. Const. amend. X.

\(^{51}\) This evidence can come from the original text or written amendments. There may also be unwritten amendments that should be taken into account. See Ackerman, supra note 16 at 510-14.

\(^{52}\) U.S. Const. art. I, § 8, cl. 18.

\(^{53}\) Cf. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (power to charter bank found in the "penumbras" of other powers).
states.\textsuperscript{54} The second assumption is that the Tenth Amendment protects state sovereignty.\textsuperscript{55} A close look at both theories indicates that neither is an accurate interpretation of the Tenth Amendment.

\textbf{The Truism Theory}

The interpretation that the Tenth Amendment expresses a mere truism is the easier of the two assumptions to dismiss. This interpretation is either a non-interpretation or a claim of dual sovereignty. At its most basic level, it is a non-interpretation. It avoids the question of who delegates/re-delegates power to the national government and the state governments. Taking the theory at face value implies that the answer to that question might be found by looking at the rest of the Constitution. The only part of the Constitution that deals with the issue is Article V which when read literally reflects a version of dual sovereignty.\textsuperscript{56}

The truism-dual sovereignty approach reflects Madison’s view of the Constitution.\textsuperscript{57} While Madison’s point of view was discussed during the ratification debates, it was most often discussed as an incurable problem with the Constitution since most people considered dual or divided sovereignty to be a logical impossibility.\textsuperscript{58} This makes it highly unlikely that the Tenth Amendment was adopted to implement dual sovereignty.

\textsuperscript{54} See United States v. Darby, 312 U.S. 100, 125 (1941) (minimum wage law was legitimate exercise of congressional authority over interstate commerce and thus did not violate Tenth Amendment).


\textsuperscript{56} By dual sovereignty, this article means a situation where multiple bodies acting independently are absolutely required to agree before the fundamental rules of a society can be changed. A literal interpretation of Article V requires such an agreement. All of the options for amending the Constitution require some national body and bodies in three-fourths of the states to concur before it can be amended. A majority of the nation cannot amend without the concurrence of three-fourths of the states. Three-fourths of the states cannot amend without the concurrence of the majority of the nation. The result is that no one entity is sovereign. U.S. CONST. art V.

\textsuperscript{57} See \textit{The Federalist No. 39}, at 246 (J. Madison) (C. Rossiter ed. 1961). See also Amar, supra note 13, at 1063-64.

\textsuperscript{58} G. WOOD, \textit{THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787,} at 527-32 (1969); See also Amar, supra note 13, at 1062-64.

To the modern mind, it may seem mysterious why there is a logical problem with divided sovereignty and how a logical problem became a key issue. Onlookers today have the advantage of historical distance and 200 years in which the Constitution has proven adequate. In 1787, people were four years removed from a war fought in part over the relationship between colonial legislatures and the British Parliament. In their minds, the question of sovereignty would determine who would control the relationship between a national government and the state governments. They could understand the need for the concurrence of all branches of the multi-branch legislature before a constitutional change could take place; they had lived peacefully with that since 1688. In such a system, no branch was sovereign; but the government as a whole was sovereign.

The requirement of the coordination of two separate levels of government was a different matter. There was no physical embodiment in one place at one time of the two levels that could be called the sovereign. The concept of sovereignty demanded that something be the sovereign. Claiming that both the national government and the state government were each independently sovereign just could not solve the problem. Such a claim instantly raised the question of who won when there was a disagreement on
An additional problem comes from the way that the truism theory has developed. An honest reading of the framing of the Constitution and of the discussion of the Tenth Amendment in early cases indicates that the Tenth Amendment was at least meant to guarantee that the national government's powers were very limited. When one recognizes that these powers were very limited, the question of who has the power to re-delegate powers between governments gains primary importance. Limiting themselves under the truism theory to only Article V, the post-New Deal courts, attempting to uphold the vast expansion in the areas being covered by federal laws, have resorted to reinterpreting enumerated powers in a way that eliminates the limits implied by those clauses. This method of interpretation ignores the history surrounding the framing of the Constitution and makes the Tenth Amendment meaningless.

The truism theory does make a valuable contribution to the discussion of the Tenth Amendment: it emphasizes the distinction between delegated powers and reserved powers. Such a distinction is important only to the extent that courts are accurate in their interpretation of the meaning of the particular powers that are delegated. The more mechanistic aspects of the truism theory, however, do not accurately reflect the actual discussions over the Constitution and have contributed to jurisprudential errors in cases over the past fifty years. The other current theory on the Tenth Amendment, the state sovereignty theory, reflects, in part, the view of some of the participants in the actual discussion over the Constitution.

The Theory of State Sovereignty

While the theory of state sovereignty has a long history, the exact meaning of the term "state sovereignty" has never been clear. For the purposes of this Article, the term "state sovereignty" will be treated in its most literal sense. Under this constitutional change. The dual sovereignty response was neither the national nor the state governments won. By the definition of sovereignty as the ultimate power in society, that meant that neither was sovereign. In essence, it is a vicious circle. Sovereignty requires a body; dual sovereignty provides two bodies; but, when examined closely, neither is sovereign. The need for a body, however, creates the fear that, when a sovereign is absolutely needed, one will be found possibly in the form of the national government. When one has fought a war to move power to the local level, one is going to be loathe to go to a system that could give the national government absolute control over the powers of the local level.

59 See supra notes 45-50 and accompanying text.
63 For a discussion of other problems with interpreting the Constitution as requiring amendment exclusively through Article V, see infra notes 100-129 and accompanying text.
64 Part of the problem is that the term is an oxymoron. Even Black's Law Dictionary lacks precision on the meaning of the term. See Black's LAW DICTIONARY 1396 (6th ed. 1990) ("sovereign state"). Compare with id. at 1409 ("state sovereignty").
65 State sovereignty, in its narrowest sense, is the concept that the states are the source of sovereignty. Often, the term has been used to refer to other concepts like states' rights and state powers which has created extensive interpretive problems.
definition, the theory of state sovereignty has three major facets. First, sovereign power is divided between the state governments and the national government. Second, the national government is sovereign only with regards to those powers that the states surrendered to it. Third, the national government is forbidden from intruding into the matters that the states kept to themselves. This theory’s image of the Constitution is a contract between sovereign states. The only way to increase the national government’s power is an amendment agreed to by the states under the format of Article V.

This Article will examine, in Subsection 1, the historical background that supports the theory of state sovereignty. Subsection 2 will focus on the current status of the theory. In Subsection 3, this Article will discuss the reasons why the theory of state sovereignty does not represent an accurate interpretation of the Tenth Amendment.

1. The Historical Background

Any history of theories of sovereignty in this country must begin with the United Kingdom in the 18th century. Under British political theory, sovereignty rested with the King in Parliament. The legitimacy of any law rested on the approval of both the King and Parliament which together represented the entire empire. In studying sovereignty in this country’s political system, the question becomes where could sovereignty be found in this country immediately after the Declaration of Independence. Supporters of state sovereignty believe that the answer to this question is the states. An examination of the history of the United States from 1775 to 1792 provides significant support for their position.

The first place to look for evidence concerning the sovereignty of the individual states in this period is the Declaration of Independence and related resolutions. Of these documents, the most important is the resolution of July 2, 1776 that actually declared independence. This resolution stated “that these United

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66 Both of these first two points can be stated in an even more narrow fashion by claiming that the national government is not truly given sovereignty but rather is allowed to act as the agent of the sovereign states which have agreed to pool their sovereignty for this purpose.


68 Documents of American History, supra note 13, at 100. This resolution contained three parts of which only the first part was passed on July 2, 1776 with other parts being approved later.

This first part, which will be discussed infra note 69 and accompanying text, was the act that legally declared independence. What we think of as the Declaration of Independence is “merely” a document explaining why this action was necessary. The relationship between these two documents can be thought of as roughly similar to the relationship between a statute and its legal history or to a decision and the associated opinion.

The third part is also relevant to our debate in that it called for the framing of a plan for the confederation of the states. It did not create a confederation or require that all of the states join such a confederation; it simply started the process of drafting what eventually became the Articles of Confedera-
Colonies are... free and independent States." Two points must be noted about this resolution. First, it did not establish an entity called the United States of America. Second, the plural was used to describe the former colonies and the new independent states. There is no suggestion that these colonies had become subdivisions of a new nation.

The Declaration of Independence provides further support for the theory of state sovereignty. The Declaration states, "That these United Colonies are... Free and Independent States..." It also states "That as Free and Independent States they have full power to levy War, conclude Peace, contract Alliances, and to do All other Acts and things which Independent states may of right do." As with the resolution, these clauses do not refer to an entity known as the United States but rather refer to thirteen entities. These thirteen entities are declared to have all the powers that a country/state has. In these clauses, the language is always in the plural rather than the singular.

Further evidence can be found in the actions of the Continental Congress two weeks later. At that time, Congress changed the title of the Declaration from "A Declaration by the Representatives of the United States of America" to "The Unanimous Declaration of the thirteen united States of America." This alteration supports the theory that the Continental Congress acted, not as representatives of subunits called states, but rather as the "ambassadors" of the states.

The Declaration of Independence made another point that supports the theory of state sovereignty: it called the new entities 'states'. The Declaration's language shows that the Continental Congress knew what a state was. They referred to Great Britain as "the State of Great Britain." They listed several powers of sovereign states. In 1776 and in modern international political theory, the term "state" has only one meaning: a sovereign entity that is subject to no higher government. There were also examples in other countries of decentralized governments with regional autonomy. Thus, one can assume that when the Continental Congress stated that the colonies were independent states, it meant that they were independent states just as other nations were independent states. Therefore, proponents of state sovereignty have the weight of historical evidence on their side in claiming that, in 1776, the original states were sovereign.
Another source of evidence for the theory of state sovereignty is the Articles of Confederation. As the "constitution" of the United States between 1781 and 1789, any change in the status of the states before 1789 would be in the Articles of Confederation. The Articles, however, declared that "Each state retains its sovereignty, freedom, and independence, and every Power...which is not by this confederation expressly delegated to the United States, in Congress assembled." The delegates to the Congress of the United States were to be appointed by the states and were subject to recall by them. The number of delegates appointed by any state was a decision made by that state as each state was responsible for maintaining their own delegates. Regardless of the number of delegates sent, each state was given one vote. Thus, while some powers were given to the federal government, it is clear that the Articles protected state sovereignty.

As such, there is ample evidence that each of the original states were sovereign in May of 1787 when the Constitutional Convention met. While the original text of the Constitution claimed that the new national government would be supreme in the areas delegated to it, it does not claim that the national government is sovereign in all matters. As concerns were raised during the ratification process about the national government intruding into matters not delegated to it, many state conventions requested an amendment similar to Article II of the Articles of Confederation. Thus, according to the state sovereignty theory, the Tenth Amendment was proposed and ratified to confirm and protect the existence of the state sovereignty.

2. The Current Status of the Theory

In the period beginning with United States v. Darby, the dominant theory of the Tenth Amendment was that as stated a mere truism. Beginning in the late 1960's, did declare independence. See Morris, supra note 7, at 1068-74. On balance, however, the evidence seems to indicate that the Continental Congress was seen as a coordinating body for independent states rather than as the government of a nation.

78 One of the technical problems in writing this piece has been the vague status of the Articles in the legal history of this country. It is not a constitution but it is also something more than a treaty. It is not until this century with the rise of supra-national organizations that the structure of the confederation have been repeated. It is only in these organizations where bodies are found that allow the majority of members to pass measures seeking to direct the conduct of sovereign states. In short, the best concept for a modern scholar of the Articles is to conceive of the Congress that existed under them as a cross between the United Nations and the European Economic Community.

79 ARTICLES OF CONFEDERATION art. II.
80 ARTICLES OF CONFEDERATION art. V, § 1.
81 ARTICLES OF CONFEDERATION art. V, § 2.
82 ARTICLES OF CONFEDERATION art. V, § 3.
83 ARTICLES OF CONFEDERATION art. V, § 4.
84 U.S. Const. art. VI, cl. 2.
85 See W. Murphy, supra note 1, at 337-38, 344-46, 367-68, 385, 397-98.
86 U.S. v. Darby, 312 U.S. 100 (1941).
there were indications that the Supreme Court believed that the Tenth Amendment protected some aspect of state sovereignty.\textsuperscript{87}

The state sovereignty theory\textsuperscript{88} was established as the dominant theory in \textit{National League of Cities v. Usery}.\textsuperscript{89} In \textit{National League of Cities}, the Court declared that the extension of the Fair Labor Standards Act in 1974\textsuperscript{90} to state and municipal employees constituted a violation of state sovereignty. For several years following \textit{National League of Cities}, the question before the federal courts was what constituted an invasion of state sovereignty.\textsuperscript{91} In \textit{Garcia v. San Antonio Metropolitan Transit Authority},\textsuperscript{92} the Supreme Court decided that the judiciary could not resolve the matter.\textsuperscript{93} The 5-4 majority did not abandon the theory of state sovereignty.\textsuperscript{94} Rather, they argued that the procedural protections of state sovereignty in the national government were sufficient.\textsuperscript{95}

The majority approach in \textit{Garcia}, while reducing the role of the courts in protecting state sovereignty, does not return to the truism theory. Instead, it functionally treats the issue of state sovereignty as a political question if the political process is functioning. This approach implies that in certain circumstances the state sovereignty theory could be invoked to limited the action of the national government.\textsuperscript{96}

Given the focus of the Supreme Court, it is not surprising that academia has also focused on state sovereignty. Various articles have argued that state sovereignty protects the state's role as representative of its residents,\textsuperscript{97} that state sovereignty is essential to preserving freedom,\textsuperscript{98} and other similar points. The common feature of

\textsuperscript{87}See Fry v. United States, 421 U.S. 542, 547 n.7 (1975) (Tenth Amendment limits Congress's power when power is used to invade state sovereignty); Maryland v. Wirtz, 392 U.S. 183, 196 (1968) (Court has power to prevent destruction of states as sovereign entities). Compare with Fry v. United States, 421 U.S. 542, 549-59 (Rehnquist, J., dissenting) (application of wage-freeze law to states violated state sovereignty under Tenth Amendment); Maryland v. Wirtz, 392 U.S. 183, 201-05 (Douglas, J., dissenting) (extension of minimum wage law to state-owned enterprises violated state sovereignty under Tenth Amendment).

\textsuperscript{88}One thing must be noted about the modern judicial version of state sovereignty and the Tenth Amendment: It is not really about state sovereignty and the preservation of state powers from federal usurpation. Instead, it is an application of the Eleventh Amendment's protection of states from the judiciary to also protect them from direct regulation by the political branches. Like the Eleventh Amendment, it does not protect private individuals from the effects of federal usurpation of state powers.


\textsuperscript{91}See, e.g., William v. Eastside Mental Health Center Inc., 669 F.2d 671 (11th Cir.) \textit{cert. denied} 459 U.S. 976 (1982); Amersbach v. City of Cleveland, 598 F.2d 1033 (6th Cir. 1979); United States v. Best, 573 F.2d 1095 (9th Cir. 1978); Puerto Rico Telephone Company v. FCC, 553 F.2d. 694 (1st Cir. 1977).

\textsuperscript{92}Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985).

\textsuperscript{93}Id. at 546-47, 556-57.

\textsuperscript{94}The dissenters would have upheld the principles of \textit{National League of Cities v. Usery}, 426 U.S. 833 (1976). Garcia, 469 U.S. at 557-88.

\textsuperscript{95}Garcia, 469 U.S. at 556.

\textsuperscript{96}Id.

these articles is that most of them interpret the Tenth Amendment through the theory of state sovereignty. While there is significant evidence supporting the state sovereignty theory in the period prior to the framing of the Constitution, the same is not true in the period after the framing.

3. The Problems with the Theory

In interpreting a provision of the Constitution, modern scholars deal with two concerns. The first concern is whether an interpretation accurately takes into account the history surrounding the framing of the provision. The second concern is whether an interpretation makes sense as part of the interpretation of the entire Constitution. When applied to the state sovereignty theory of the Tenth Amendment, these concerns raise serious questions about the validity of the theory.

When one looks at the framing of the Constitution, it becomes clear that the original Constitution does not protect state sovereignty. An examination of the Constitutional Convention indicates that it consistently voted for a Union over a Confederation of sovereign states. The members of the Convention felt that a union needed a bicameral legislature and that a confederation only needed a unicameral legislature; they voted for a bicameral legislature. They provided for the compensation of Congressmen by the national government rather than the states. They voted to allow Congress to alter state laws governing congressional elections. They voted to allow Congress to make laws governing the organization of state militias. The delegates voted to prohibit the states from exercising many of the powers of sovereign states. They voted to make state constitutions inferior to national laws. They voted to allow the amendment of the Constitution without the unanimous consent of the states and to allow Congress to bypass the state legislatures in the amendment process.

The debates surrounding the ratifying conventions indicate that both sides understood that the Constitution did not protect state sovereignty. A common feature of the literature opposing the Constitution was the argument that it was replacing a federation of thirteen sovereign states with one sovereign nation. The literature supporting the Constitution treated the encroachment upon state sovereignty as a secondary issue and emphasized the necessity of the changes. In the state ratifying conventions, both sides essentially agreed that the Constitution does not protect state sovereignty.

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99 See supra text accompanying notes 67-85.
100 W. MURPHY, supra note 1, at 155-57; U.S. CONST. art. I, § 1.
101 W. MURPHY, supra note 1, at 165-69; U.S. CONST. art. I, § 6, cl. 1.
102 W. MURPHY, supra note 1, at 176-77; U.S. CONST. art. I, § 4, cl. 2.
103 W. MURPHY, supra note 1, at 188-90; U.S. CONST. art. I, § 8, cl. 16.
104 W. MURPHY, supra note 1, at 204-11; U.S. CONST. art. I, § 10.
105 W. MURPHY, supra note 1, at 219-21; U.S. CONST. art. VI, cl. 2.
106 W. MURPHY, supra note 1, at 244-47; U.S. CONST. art. V.
107 See W. MURPHY, supra note 1, at 269-84.
destroyed state sovereignty. 109 Given this consensus, it is clear that the original text does not protect state sovereignty. 110 This lack of protection was one of the reasons why many of the state conventions demanded amendments. 111

As the Tenth Amendment was the only amendment in the Bill of Rights which mentioned the relationship between the states and the nation, it is the only potential source for meeting this concern. 112 Any argument that the Tenth Amendment protects state sovereignty is based on the its similarity with Article II of the Articles of Confederation. 113

There are two major changes from Article II to the Tenth Amendment that argue against the state sovereignty theory. First, the Tenth Amendment does not mention state sovereignty. The first object clause of Article II, which protected each state's "sovereignty, freedom, and independence," was deleted from the Tenth Amendment. Second, the adverb "expressly" is also deleted. The deletion of "expressly" implies the existence of powers which were not "expressly delegated." The combination of these changes makes it clear that the Tenth Amendment was not meant to turn the Constitution into a contract between sovereign states like the Articles of Confederation.

Further evidence can be found in the Civil War. The names of the opposing side in the Civil War are a reflection of their views on state sovereignty. One side, the Confederacy, was based on the theory that the Constitution was a compact

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109 Id. at 400-06. Compare 2 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, 1344 (Philadelphia, 2d 3d. 1836) (Constitution destroys state sovereignty - J. Nason, opponent of Constitution); 3 J. ELLIOT, supra, at 44 (Constitution denies state sovereignty - P. Henry, opponent) with 2 J. ELLIOT, supra, at 497 (Constitution not a contract between sovereign states - J. Wilson, supporter); 4 J. ELLIOT, supra at 300-09 (States never were sovereign - C. Pinckney, supporter). Most arguments focused on the ability of the states to survive under the proposed Constitution. Both sides noted the change from "We the States" to "We the People." See generally 2, 3, 4 J. ELLIOT, supra. 110 Like all attempts to reconstruct the intent of the framers, this Article must deal with the problems of historical research. Which documents are preserved is a mixture of luck and who won. Given this problem, what can be stated with reasonable confidence? First, the Anti-Federalists appeared to be united in their belief that state sovereignty was not protected by the Constitution. Second, the Anti-Federalists appear to have started out with a majority in sufficient state conventions to block ratification. Third, some Federalists agreed with the Anti-Federalists that state sovereignty was not protected by the Constitution. Fourth, there is little evidence to indicate that those who were originally opposed to the Constitution but nevertheless voted to ratify it were convinced on the state sovereignty issue. In short, especially when combined with the decisions made in framing the Constitution, there is no reason to believe that the original text of the Constitution protected state sovereignty.

111 W. MURPHY, supra note 1, at 404. Many of the proposed amendments were based on Article II of the Articles of Confederation. See generally 2, 3, 4 J. ELLIOT, supra note 109.

112 The only other possibility is the Eleventh Amendment which is limited by its language to the Judiciary. U.S. CONST. amend XI.

113 Compare "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," U.S. CONST. amend. X, with "Each 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," ARTICLES OF CONFEDERATION art II.
between sovereign states. Such a theory logically implies that a state could secede at any time. The other side, the Union, could only defend its actions by arguing that the Constitution was the governing document of one nation instead of a compact between sovereign states. It is not surprising that many Southerners in the post-Civil War era and in the 1950's argued for state sovereignty. They knew that a construction of the Constitution that recognized state sovereignty would indicate that the Confederacy was in the right as far as secession is concerned.

From a jurisprudential point of view, the greatest challenge to state sovereignty comes from the Civil War Amendments. The theory of state sovereignty claims that the national government's powers were delegated to it by the states. As the power was given by the states, any change in the division of power must be by a process agreed to by the states. In the Constitution, that process is governed by the provisions listed in Article V. These provisions give the states a significant portion of the amendment power. Thus, the powers reserved to the states can only be altered by the consent of the states.

An examination of the history surrounding the Civil War Amendments shows that the rules of the amendment process were repeatedly violated to force these amendments through despite the objections of over 1/4 of the states. The Thirteenth Amendment was ratified by state legislatures that were threatened with the possibility of dissolution if the Amendment was rejected. It was also made clear that, even though these states never legally left the Union, they would be obliged to accept the Thirteenth Amendment before they could fully function as states. Under such conditions, one cannot claim that the states consented to the redivision of powers found in the Thirteenth Amendment. The Fourteenth Amendment was proposed by a Congress that had excluded all members from all former Confederate states. At the same time, this “Rump” Congress made it clear that none of them would be seated until the Fourteenth Amendment became part of the Constitution and had been ratified by the state of the member seeking to be seated. When the governments of the former Confederate states attempted to

114 See DOCUMENTS OF AMERICAN HISTORY, supra note 13, at 376 (Preamble to Confederate Constitution); id. at 389-91 (Address by Jefferson Davis to Confederate Congress).
115 See id. at 389-91.
116 See id. at 385 (Lincoln’s First Inaugural Address).
117 See Holifield, The Secession of Southern States Did Not Constitute a Rebellion or an Insurrection Against the United States Because They Legally Exercised Their Reserve Powers, 16 ALA. L. 76 (1955); Watts, The Relation of the Separate States to the Union, 18 ALA. L. 302 (1957) (Re-printing of speech given by former Confederate governor of Alabama at memorial service for Jefferson Davis in 1889).
118 A logical corollary of this theory is that a consent is valid only if freely given.
119 Ackerman, supra note 16, at 500-07; See 2 B. Ackerman, Discovering the Constitution, ch. 6, at 10-79 (unpublished manuscript) (on file with author).
120 2 B. Ackerman, supra note 119, at ch. 7, at 94-112.
121 Id.
122 Under the provisions of Article V, the former Confederate States, by acting together, could have defeated any amendment.
123 Ackerman, supra note 16, at 502-03; 2 B. Ackerman, supra note 119, ch. 8, at 76.
124 2 B. Ackerman, supra note 119, at ch. 8, at 98-99.
reject the Fourteenth Amendment, Congress passed legislation dissolving the governments of all former Confederate states, except Tennessee, and imposed military government upon those states. This legislation also provided that martial law would not be lifted in a given state until the Fourteenth Amendment had been ratified by that particular state and by 3/4 of all of the states. It was only under this "hostile" military occupation that a sufficient number of the former Confederate states ratified the Fourteenth Amendment to give it the required 3/4 majority. Under such circumstances, it is clear that these amendments were not ratified by sovereign state governments. Yet under a state sovereignty theory of the Tenth Amendment, as the power to ratify is not delegated to the national government, it must be reserved to the states. Thus, the state sovereignty theory poses a crucial decision. Either we can reject the Civil War Amendments, or we can reject the state sovereignty theory. Presumably, we are reluctant to dispose of amendments whose validity had been accepted for over 120 years.

125 Ackerman, supra note 16, at 500-01; 2 B Ackerman, supra note 119, at ch. 9, at 44-45.
126 Ackerman, supra note 16, at 500-02; 2 B Ackerman, supra note 119, at ch. 9, at 76-77.
127 Ackerman, supra note 16, at 500-02; 2 B Ackerman, supra note 119, at ch. 9, at 78.
128 2 B. Ackerman, supra note 119, at ch. 10, at 33.
129 Some criticism has been made by readers of early drafts of this Article concerning its reliance on a "Southern, white" history of the Civil War Amendments. The critique tends to make three points: 1) martial law was necessary to prevent violence and other forms of electoral fraud; 2) once the Thirteenth Amendment was passed, blacks in the South were a necessary component of any electoral process: and 3) if one adds the black vote to the vote of white Unionists, one gets majority support for the Reconstruction program.

The first point makes a valid argument. There was sufficient violence in the South to justify the imposition of the martial law. This violence does not justify the dissolution of the state governments or the continued prohibition on the representation of these states in Congress until the dictates of the Radical Republicans were met regarding Constitutional Amendments.

The second point appeals to our notions of justice. This appeal is misplaced. When the original Constitution was ratified and when the original state constitutions were made, only propertied white males were allowed to participate. The property requirements may have been minimal, but they still excluded all white women and some white males. After the passage of the Thirteenth Amendment, black males still could not vote in the North. True, a vote in the South without black males voting was much less representative of the view of the majority of the people in those states, but if the justification is based on percentage of population, the first priority should have been to give the vote to white women. Even if this argument is correct, it does not justify the exclusion of all Senators and Congressmen elected by those states before the completion of the ratification of the Thirteenth Amendment.

The third point makes some unsubstantiated assumption about the views of Southern Unionists. If there was a typical Southern Unionist in the late 1860's, it would have been President Andrew Johnson who resisted the congressional program every step of the way. If one looks for the typical Southern Unionist in 1861, it would have been Sam Houston, the governor of Texas, who had done too much in his life to make Texas part of the United States to support leaving the Union.

In addition, there were two very good reasons to oppose secession in 1861 that do not imply support for the abolition of slavery. First, in 1861, the most that the Republican party could do was to prevent the spread of slavery to the territories. Second, they just might have believed that there was not a right to secede. In short, without evidence that would indicate that a significant number of Unionists were anti-slavery, the attempt to create a pro-Fourteenth Amendment majority does not hold water.

In essence, the action of Congress indicates that they were not willing to allow the Southern states to truly have a choice about the Fourteenth and Fifteenth Amendment. Some of their actions might be justified on the need to restore order. The rest indicate an intent to force the Southern states to ratify those amendments. Even if those states would have voted to ratify if given a free choice, the normal assumption is that a choice made under coercion is not the choice that would have been made in the absence of that coercion. In either case, the choice of a state under coercion is not the free choice of a sovereign state.
When one examines the historical evidence supporting the theory of state sovereignty and balances it against the historical evidence opposing the theory and the problems caused in the rest of our constitutional jurisprudence by the theory, it becomes clear that there is a need to search for a better alternative.

PART IV: THE THEORY OF POPULAR SOVEREIGNTY: A BETTER APPROACH

The theory of popular sovereignty provides a different answer to the question of where sovereignty lies in the constitutional scheme. Under this theory, ultimate sovereignty rests not in a government but rather in the People of the country as a whole.

If one reconsiders the three points that were examined under the theory of state sovereignty, some subtle differences emerge. First, sovereignty remains undivided with the People. Powers are distributed to the state and national governments, but the People remain the ultimate authority. Second, governments act as agents of the sovereign, and thus take on attributes of sovereignty, only to the extent that they are exercising powers that have been delegated to them. Third, governments are forbidden from exercising powers not delegated to them. The image of the Constitution under this theory is not a contract but rather an expression of the popular will. Thus, while in normal circumstances one would expect that the People would choose to express themselves through the mechanisms of Article V, it is understandable, especially in emergencies, that there will be times when the will of the People is expressed in other ways.

In Section A, this Article will examine the historical evidence supporting the theory of popular sovereignty. Section B will focus on how popular sovereignty deals with the problems raised against the other theories. In Section C, this Article will speculate on the impact of the theory of popular sovereignty on several cases.

A. The Historical Background

While the history of the original thirteen states contains strong features of state sovereignty, there are equally strong features of popular sovereignty. During the period of the American Revolution and the Articles of Confederation, Americans were engaged in establishing new political systems and new political theories of sovereignty. It should not be surprising that they did not accept the British theory of sovereignty.

The first expressions of popular sovereignty can be found in the Declaration of Independence. The Declaration proclaims that governments derive their powers

130 See supra notes 65-66 and accompanying text.
132 See supra notes 67-85 and accompanying text.
133 See supra text accompanying note 67.
from the consent of the governed.\textsuperscript{134} It also claims that governments are formed by the people.\textsuperscript{135} The Declaration asserts that, as the colonial governments had been prevented from functioning, "the Legislative Powers. . . have returned to the People at large. . ."\textsuperscript{136} Finally, the Declaration states that the Continental Congress was acting "by Authority of the good People of these Colonies."\textsuperscript{137}

The history of the states during the period reflects the shift from a theory that located sovereignty in a government to one that located sovereignty in the People. In Massachusetts, in 1776, three-fourths of the towns agreed to let the legislature frame the state constitution. By 1779, changes in voters' attitudes forced the legislature to call a convention to frame that constitution.\textsuperscript{138} Similar events occurred in other states.\textsuperscript{139} In 1776, the concept that sovereignty rested with the People was accepted as a theoretical principle.\textsuperscript{140} This traditional theory argued that while sovereignty ultimately resided with the people, the people had transferred the sovereign power to the government.\textsuperscript{141} As such, the claim that sovereignty resided with the people was merely a theory. The conflicts within the states during the next several years turned popular sovereignty from a theory into a practice. By 1787, the experiences in the states indicated that a new theory of sovereignty was being practiced.

There were several differences between the new theory and the old. First, power was delegated in a written constitution of a higher legal status than normal laws.\textsuperscript{142} As such, all power not delegated was retained by the People who remained the ultimate sovereign.\textsuperscript{143} Second, no legislature had the authority to alter its power. The only proper way to alter a constitution was by a convention which represented the People.\textsuperscript{144} Thus, on the eve of the Constitutional Convention, it was understood that sovereignty rested with the People and that any institution that represented the People only represented them for limited purposes.

With this understanding of the political theory of the time, several points emerge from the framing of the Constitution that support interpreting the Tenth Amendment through theories of popular sovereignty. First, the meeting that framed the Constitution was, according to the resolution calling for the meeting, a

\begin{itemize}
\item \textsuperscript{134} \textit{Documents of American History}, \textit{supra} note 13, at 100.
\item \textsuperscript{135} \textit{Id.}
\item \textsuperscript{136} \textit{Id.} at 101.
\item \textsuperscript{137} \textit{Id.} at 102.
\item \textsuperscript{138} G. \textit{Wood}, \textit{supra} note 58, at 340-41; \textit{see also Journal of the Convention for Framing a Constitution of Government for the State of Massachusetts from the Commencement of Their First Session, September 1, 1779, to the Close of Their Last Session, June 16, 1780, at 6-7, 189-90, 216-21, 225-56 (Boston 1832).}
\item \textsuperscript{139} \textit{E.g.} New Hampshire, Pennsylvania, Delaware, South Carolina; \textit{see G. \textit{Wood}}, \textit{supra} note 58, at 328-43.
\item \textsuperscript{140} G. \textit{Wood}, \textit{supra} note 58, at 362.
\item \textsuperscript{141} \textit{Id.} at 373-4.
\item \textsuperscript{142} \textit{Id.} at 275-282.
\item \textsuperscript{143} \textit{Id.} at 388-89.
\item \textsuperscript{144} \textit{Id.} at 336-43.
\end{itemize}
"Convention which was to propose alterations in the system of government."145 Second, the Framers claimed to speak in the name of "We the People."146 Third, the Constitution was to be ratified by conventions of the states.147 In the context of the times, while all of these points were explicit statements, the emphasis on conventions was most explicit. As mentioned above,148 conventions were meetings which had the sole purpose of representing the People in the writing of constitutions. Thus, paying particular attention to the language of the time, it is clear that the Framers and Ratifiers saw their actions as representatives of the People rather than of the states. As such, the entire framing of the Constitution can best be understood as a series of acts of popular sovereignty in which the People took power away from the state governments and gave it to a national government.

This understanding leads to a different picture of the desire for a Bill of Rights. The reason behind that desire was the fear that the language of the original text could be construed as granting a broader power than those delegated.149 Since the purpose of a constitution is to keep the powers of government limited, these concerns led to the passage of the Bill of Rights including the Tenth Amendment. As mentioned earlier, the Framers of the Tenth Amendment clearly rejected the desire of some to protect state sovereignty.150 Given the concerns of the time, and the amendment’s language, if the Tenth Amendment does not protect state sovereignty, the only alternative is that it was meant to protect popular sovereignty.

B. Popular Sovereignty as a Solution to the Problems Posed by the Other Theories

When one looks at the Tenth Amendment as an expression of popular sovereignty, the Tenth Amendment become a vital part of the Constitution. Interpreting the Tenth Amendment under the popular sovereignty theory has the advantages of the truism and state sovereignty theories while avoiding their disadvantages. These advantages and disadvantages can be seen by looking at three different issues: constitutional change, secession, and limitation on government.

Before looking at these three issues, a brief examination of alternative versions of popular sovereignty is necessary.

1. Alternative Theories of Popular Sovereignty

The three theories of popular sovereignty that this Article discusses, dualist democracy, "deliberate" popular sovereignty, and unrestricted popular sovereignty,
are more alike than different. They all emphasize (at least post-Civil War) a national people. They all accept the possibility of amending the Constitution without following the literal rules laid down in Article V. They all accept that the national government has more power today than it did in 1890. They all believe that most of the time the government is merely an agent of the people and thus possesses only limited powers. In fact, with one major exception, which theory is used makes almost no difference in analyzing the past. The major difference comes only when the theories look forward to predicting possible future changes. This difference focuses on the use and understanding of the term “convention” in the three theories.

a. Dualist Democracy

At heart of the dualist democracy version of popular sovereignty is its understanding of the traditional meaning of the word “convention.” According to the dualist theory of popular sovereignty, the Framers understood that a convention could be, and often was, “an assembly whose legal right to make constitutional proposals is open to good faith legal doubt”. When this understanding is applied to Article V, the dualist believes that a strict and literal interpretation of the rules governing the amendment process would be erroneous. Thus, the dualist accepts the possibility of “conventions” that follow the spirit of the Framers rather than the letter of Article V.

By looking at the “conventional” method of amending the Constitution found in Article V, the dualist finds four general requirements in the specific requirements of the Article: a signal that serious constitutional change must be considered; the proposal, in some form, of a solution to the perceived constitutional problem; the “triggering” of a particular mechanism/process for the ratification of the proposal; the ratification or rejection of the proposal by the People through their control over the appointed mechanism. The major difference between the dualist and the literal

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151 See Amar, supra note 131, at 1455-62; infra notes 178-80 and accompanying text; cf. 2 B. Ackerman, supra note 119, at ch. 5, at 3-4 (secession no longer an issue after the Civil War).
152 See Ackerman, supra note 16, at 490-515; Amar, supra note 13, at 1054-66; infra notes 169-77 and accompanying text.
153 See Ackerman, supra note 16, at 457-59; infra note 188. The “deliberate” popular sovereignty theory, however, is more like the truism theory. It credits the growth in national power almost solely to the growth of interstate commerce.
154 See Ackerman, supra note 19, at 1027-31; Amar, supra note 131, at 1443, 1448-50; infra notes 181-86 and accompanying text.
155 The exception is the New Deal which does not meet the requirements of the “deliberate” popular sovereignty theory for an action by the People. See Amar, supra note 13, at 1090-96.
156 Ackerman, supra note 19, at 1017 n. 6; see also 2 B. Ackerman, supra note 119, at ch. 5, at 17, 19-26, 35-37; cf. G. Wood, supra note 58, at 310-19 (origin of convention as legally deficient assembly).
157 See Ackerman, supra note 19, at 1060-69; 2 B. Ackerman, supra note 119, at ch. 5.
158 “The Congress... on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which... shall be valid... as part of this Constitution, when ratified... by Conventions in three-fourths (of the several States) as the one or the other mode of Ratification may be proposed by Congress... U.S. Const. art. V.
159 See 2 B. Ackerman, supra note 119, at ch. 7, at 7-13; see also id. at ch. 11, at 6-12.
language of Article V is the dualist’s interpretation that the institutions mentioned in the provisions of Article V aren’t exclusive.\(^{160}\)

While an alternative version of the four steps\(^{161}\) provides a possible test for determining when a movement actually speaks for the People,\(^{162}\) dualism falls short of a complete understanding of the meaning of popular sovereignty in several respects. First, dualism places too much emphasis on Article V. A constitution is a mechanism that limits governments.\(^{163}\) The power to alter the form of government still rests with the People even if they share it with the government. Thus, the literal provisions of Article V would not be exclusive even if it did not refer to conventions. Second, dualism places too much emphasis on the role of governmental institutions in constitutional change. While this myopia among constitutional lawyers is understandable, the attempt to gain control of the government may be the last step in a constitutional change if it is a step at all. The Populist Movement did not control any significant government position prior to the election of 1896, nor did the Republicans prior to the election of 1860, but both managed to turn these elections into significant referenda on this country’s constitutional order. On a practical level, there may never be a constitutional change that would be deemed legitimate under an “unrestricted” popular sovereignty but not under dualism. On the theoretical level, however, the differences in the picture of the relationship of governors and governed between dualism and both of the other forms of popular sovereignty are significant.

b. “Deliberate” Popular Sovereignty

At the heart of the “deliberate” version of popular sovereignty is a concept concerning what constitutes an action by the People. In the eyes of this version, the People act only through “deliberate majorities.”\(^{164}\) Such a deliberate majority is best represented, and perhaps might only exist, when the People are assembled in convention.\(^{165}\) Unlike dualism, however, deliberate popular sovereignty has the traditional concept of convention in mind and denied the possibility of ordinary branches of government ever acting as “conventions.” Under this theory, ordinary government bodies are limited to Article V.\(^{166}\) There are no limits under this theory on a “deliberate majority” of the People.\(^{167}\)

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160 See id. at ch. 7, at 7-13; see also id. at ch. 11, at 6-12.
161 Constitutional impasse, followed by triggering election, followed by loss of institutional legitimacy by those institutions on the losing side, followed by switch-in-time by these same institutions to preserve their independence on other matters. See Ackerman, supra note 16, 507-10.
162 See infra note 174.
164 Amar, supra note 13, at 1060-66.
165 Id. at 1066, 1100-01.
166 Id. at 1087-96.
167 Id. at 1060-76.
While deliberation is something that we may wish to be present when significant decisions are made and the Framers may have preferred that the People express themselves through conventions, the context of the Framing does not lend support to the argument that these are required. In addition, the entire argument for popular sovereignty is the claim that the Framers believed in the right of the People to alter form of government at will without any express provision. It is logically inconsistent to argue that while this right was not limited by the express terms of the Constitution, it was limited by the mental reservations of the Framers. Only an unrestricted form of popular sovereignty avoids this inconsistency. As such, in the remainder of this Article, the term popular sovereignty will be used only in reference to this unrestricted form of popular sovereignty. It is this form of popular sovereignty which will be compared to the truism and state sovereignty theories beginning with the issue of constitutional change.

2. Constitutional Change

The issue of constitutional change demonstrates the interrelatedness of Article V and the Tenth Amendment. Interpreting Article V provides a prospective, "how-to," guide on changing the Constitution. Applying the Tenth Amendment requires taking a retrospective look to discover what powers have been delegated.

For different reasons, both the truism and the state sovereignty theories interpret Article V as the exclusive way of changing the Constitution. The history of the time surrounding the Framing seems to deny both of these requirements as the People frequently acted outside of conventions and without apparent deliberation. See G. Wood, supra note 58, at 319-28.

Also the connection between conventions and the deliberate majority of the People is flawed for three reasons. First, as with any other election of representatives, the election of delegates to the convention is subject to the possibility of distortion due to the fact that the votes of the minority within an electoral district are discarded entirely and votes for the winner in excess of those needed for election are superfluous. In other words, as the size of a given delegate's victory is irrelevant, the one vote in the convention does not reflect the actual relative strength of different viewpoints within the electoral district. As there is no guarantee that the cumulative effects of this distortion will cancel out the individualized distortions, there is no guarantee that the original feeling of the convention as a whole will accurately reflect the feeling of the People at the time that the delegates were elected. The other two grounds show why a convention favors the side whose delegates are better organized. On the one hand, discussion of the matter before the conventions can turn a minority into a majority either through reasoned argument or by giving assurances about matters tangential to the matter at hand. These arguments and assurances might not be convincing to the People outside the convention. On the other hand, the convention could move to a quick vote with little or no discussion. Thus, a well organized majority can force a quick vote while a well organized minority can delay a vote. All three of these possibilities eliminate any reason to suspect that the result of a convention is guaranteed to be the decision of a deliberate majority of the People. In fact, the Federalist showed a lack of respect for "deliberate majorities" by effectively using these last two strategies, quick votes when in the majority and delaying when in the minority, at the various state ratifying conventions. See W. Murphy, supra note 1, at 309-99.

Under the truism theory's formalistic approach, since Article V is the only section that delegates the amendment power, there are no other mechanisms for change. Under the state sovereignty theory, Article V is the only mechanism for change to which the states have agreed and, therefore, is the only mechanism allowed. In fact, a strict interpretation of state sovereignty would imply that Article V is sufficient only as long as all of the states are willing to abide by amendments passed under Article V.
of this country shows that this interpretation has not been followed. The theory of popular sovereignty does not have this problem.

The approach of the theory of popular sovereignty to change is driven by the essential fact of sovereignty: that there is no institution with power over the sovereign. As such, the sovereign is above any law. In popular sovereignty, the sovereign is the people. Congressmen, bureaucrats, judges, state legislators, etc. are only agents of the sovereign. Under this theory, Article V creates a process by which the agents can request new instructions from the sovereign or alter the instructions under the sovereign's supervision. Under both of these alternatives, the sovereign can prevent the agents from usurping power. While the rules of Article V constrain the agents, they do not constrain the sovereign. As such, the People can alter the Constitution via any mechanism that they wish. They can approve changes either explicitly by a national

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170 See supra notes 119-29 and accompanying text. In fact, the Supreme Court has interpreted the issue as a political question. See Coleman v. Miller, 307 U.S. 433, 447-450 (1939) (using ratification of Fourteenth Amendment as precedent).

171 See Black's Law Dictionary, supra note 15, at 1395 ("sovereignty"). The definition of sovereignty drives this Article's theory of popular sovereignty. By definition, there is no earthly power above the sovereign. This definition is also at the root of sovereign immunity. Compare id. at 1395 ("sovereignty") with id. at 1396 ("sovereign immunity").

At the heart of sovereignty is the concept of that the lawgiver is above the law. If one follows this principle to its logical conclusion, it means that the sovereign people cannot be bound by Article V or any other rules governing constitutional change. If Article V or any other rule was interpreted as binding the people, the effect would be divided sovereignty which was a theoretical impossibility to the Founding Fathers.

172 Article V allows the use of conventions, at either the national or the state level, to amend the Constitution. This is the traditional mechanism: proposal by Congress and ratification by state legislatures. Compare with Amar, supra note 13, at 1060 (view of popular sovereignty must function via a regulated process).

This ability of the people to choose any mechanism that they desire in amending the Constitution makes it impossible to truly provide a rule of recognition. To paraphrase from Justice Stewart's opinion in Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring), you know it when you experience it.

A good working test can be extracted from Professor Ackerman's theory of dualist democracy. In most attempts at constitutional change, there will be proponents of the change and defenders of the status quo. The defenders will, in most circumstances, control some institution that has the power to prevent the change. The defenders, whether they are the courts, the president, Congress, the states, or the "leading force in society," have a vested interest in determining whether the proponents of change truly speak for the People. If the proponents do not speak for the People, the defenders can, depending on the strength of the proponents, either call for support from the People, crush the proponents without having to appeal to the People, or ignore the proponents entirely. Unless they blunder, the defenders of the status quo should be able to withstand any movement for constitutional change that is not supported by the People. If the People do support the change, the defenders face a different choice: either accept the change or face destruction. As such, one test for whether the People have spoken is to examine whether the defenders of the prior status quo have accepted the change. Cf. Ackerman, supra note 16, at 510-514. Contra Amar, supra note 13, at 1095-96.

173 See e.g., Ackerman, supra note 16, at 510-514. Contra Amar, supra note 13, 1095-96.
referendum or implicitly by turning an election into a referendum on the changes.\textsuperscript{176} They can even make changes by means of an armed rebellion.\textsuperscript{177} The major advantage of the theory of popular sovereignty is that is the only one of the three that can explain the Civil War Amendments and the drastic change in the interpretation of the Constitution by the Supreme Court in 1937.

3. Secession

Neither the state sovereignty nor the truism theories are able to explain why secession is illegal. In fact, the internal logic of both theories compels the conclusion that secession is legal. For the truism theory, the Tenth Amendment leaves all powers not mentioned in the Constitution to the states. While some provisions could be stretched to prohibit secession, a more realistic interpretation would admit that the right of secession was left to the states. The state sovereignty theory is even more pressed to deny the right to secession. As mentioned earlier,\textsuperscript{178} sovereignty means that the sovereign is under no authority to which it must submit. While a sovereign may agree to abide by another's rules, this agreement is binding only as long as the sovereign desires to obey that agreement. State sovereignty implies the right to secede and vice versa.\textsuperscript{179}

Popular sovereignty can offer an explanation why secession is impossible. Under popular sovereignty, the sovereign is a unitary and indivisible body known as the People of the United States. While an individual can physically leave the country and thus "secede" from this country, the individual cannot do it by declaring that her person and her property are an independent nation. The same is true for a group of individuals even if they constitute the majority of a state or group of states. Thus, popular sovereignty creates a relationship between the people and the national government that explains why secession is prohibited.\textsuperscript{180}

\textsuperscript{176} Compare Ackerman, \textit{supra} note 16, at 510 (triggering election as part of "ratification" of constitutional change) with Amar, \textit{supra} note 13, at 1066 (even explicit referendum may not be sufficient to "ratify" changes).

\textsuperscript{177} It is difficult to imagine the circumstances in which this method would be used today. The use of force, however, is not unprecedented. \textit{E.g.} English Civil War, Glorious Revolution of 1688, American Revolution, American Civil War.

\textsuperscript{178} See \textit{supra} notes 15, 171 and accompanying text.

\textsuperscript{179} The equality of the two concepts can be seen by events of the past several years in the former Soviet Union where, one-by-one, the component republics, which had the right to secede under the Soviet Constitution, are declaring sovereignty and unilaterally grabbing power from the central government.

\textsuperscript{180} An important thing to remember in this discussion on secession is that it focuses on what is legal and illegal under the existing constitutional order. History demonstrates that a territorial unit that want to form its own country will sometimes attempt to break away even though it does not have the right to secede. \textit{E.g.}, the American Revolution, the American Civil War. Likewise, the center will sometimes try to keep the territory under central control even though the territory has the right to secede. \textit{E.g.}, the Soviet Union in 1990 and 1991. This history serves as a reminder that a constitutional order is a fragile thing and can be significantly altered overnight. It does not, however, change the duty of lawyers and historians to record and discuss the laws that were disregarded by political actors.
4. Limits on Government

As discussed earlier, a major purpose of the Tenth Amendment was to impose a limit on the power of government. Both the truism and the state sovereignty theories have proved inadequate to prevent a usurpation of power by the federal government. Under the truism theory, the courts have generally used other amendments to limit governmental powers. Under the state sovereignty theory, the Amendment has only been used to protect the states from the federal government. Both of these approaches presume that the majority should normally get their way simply because they are the majority.

The theory of popular sovereignty makes a different assumption concerning governmental power. This assumption is that governments only have the powers that are given to them by the people. The people can choose to: 1) delegate a power to the national government; 2) allow the people of the states to decide whether to delegate it to the states or localities; 3) prohibit the exercise of a power (either completely or in part) by either the national government or the states; or 4) not delegate that power to anyone. Under popular sovereignty, the decision not to delegate is presumed to have been made unless a decision has been made to delegate. Therefore, popular sovereignty requires altering the traditional presumption of constitutionality. Federal courts should presume that a federal law is unconstitutional until the government can show that it is exercising a delegated power. The same would hold true with state courts examining state laws. This theory creates a structure of government in which the average citizen will have some assurance that he does not have to spend a large portion of his time discovering what every single congressional subcommittee, legislative subcommittee, and governmental agency is doing in order to feel that his fundamental rights are safe.

The contrast between the theory of popular sovereignty and the state sovereignty and truism theory in the areas of constitutional change and secessions

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181 See supra notes 42-53 and accompanying text.
182 See e.g., cases cited supra note 31.
184 These four possibilities include all three possible locations of power mentioned in the Tenth Amendment: the United States; the states; and the people. The fourth possibility, prohibiting the exercise of a power by a government, is implicit in the Tenth Amendment from the other provisions of the Constitution, especially the remainder of the Bill of Rights.
185 Once this burden has been met, the traditional presumption would still apply with regard to showing that the statute violated one of the prohibitions of the Constitution.
186 These fundamental rights will change from generation to generation. Popular sovereignty does not guarantee that any given right will be protected tomorrow. It does guarantee that it would take action by the people to threaten that right. Thus, for example, the only reason to presume that freedom of speech will be protected in fifteen years is that it is unlikely that we would choose to eliminate that right. The potential success of a “Flag Burning Amendment” shows that this may not necessarily be true. Contra Amar, supra note 13, at 1044 n.1; cf. Note, Was the Flag Burning Amendment Unconstitutional?, 100 YALI L.J. 1073 (1991).
demonstrates that only the theory of popular sovereignty can explain the historical practice of this country. Likewise, it is the only one of the three theories that appreciates the concept of limited government involved in the Tenth Amendment’s emphasis on delegated powers and the Founders’ fear about governments. The application of the popular sovereignty theory of the Tenth Amendment will require a change in the way that courts interpret the Constitution when the Tenth Amendment is explicitly or implicitly involved.

C. Theory in Practice

The effect of an interpretation of the Tenth Amendment based on popular sovereignty on constitutional law can best be seen by examining two cases decided under the alternative theories, and two hypothetical cases, and seeing how the decisions might come out under a theory of popular sovereignty.

As this project has developed, a major concern of readers of early drafts has been over the accuracy of the author’s image of how a court dealing with these cases under the rules envisioned by this piece’s model of popular sovereignty would actually decide the complex issues raised by these four cases. It will be conceded that, when faced with these same issues in reality, both parties should pay much more attention to the historical details than this Article does in this section. The key concern of this section is not over the actual opinions that would be written under the popular sovereignty models but rather over the fact that the opinions would reason in a neo-federalist way rather than in the current fashion. In other words, the current judicial discussion of the federal government’s powers pretends that nothing important has happened since 1870 and that nothing of great importance has happened since 1792 in terms of the government’s constitutional powers rather that recognizing that this century has seen a revolutionary alteration in the powers of the federal government. The result of this reasoning is the torturing of the English language to make old clauses fit new powers with the side effect that the new interpretations also fit powers that have never been given. This Article proposes that a more accurate approach would be to examine the new powers. Whether this Article’s examination of those new powers is correct is secondary to the argument that such an examination is necessary to improve the accuracy of constitutional interpretation.

All of these cases deal with the expanded application of the commerce clause after the mid-1930’s. This Article accepts the theory that the election of 1936 was an exercise in popular sovereignty. This acceptance is based on several facts: the abandonment of freedom of contract as a fundamental right soon after this election; the candidates’ conduct in this election; and the language of the cases in this period. See, e.g., Perry v. United States, 294 U.S. 330, 353-54 (1935) (Congressional voiding of gold clauses of government bonds violates popular sovereignty); A. A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935) (9-0 decision) (Congress not authorized to regulate wages of industry after produce leaves interstate commerce); Carter v. Carter Coal Co., 298 U.S. 238 (1936) (5-4 decision) (Congress not authorized to regulate wages and working conditions during production); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (5-4 decision switching to rational basis test for state economic legislation); NLRB v. Jones & Laughlin Steel Corp, 301 U.S. 1 (1937) (5-4 decision) (Congressional voiding of gold clauses of government bonds violates popular sovereignty); United States v. Darby, 312 U.S. 100 (1941) (9-0 decision) (Congress not authorized to regulate wages and working conditions during production); United States v. Darby, 312 U.S. 100 (1941) (9-0 decision) (Congress not authorized to regulate wages and working conditions during production). For further details, see Ackerman, supra note 16, at 511-515; Parrish, The Great Depression, the New Deal, and the American Legal Order, 59 Wash. L. Rev., 723, 729-35 (1984); 2 B. Ackerman, supra note 119, ch. 13, at 7-45.

While it is outside the scope of this Article to examine the exact powers delegated to the federal and state governments by the New Deal, the general history of the New Deal does give some idea of what those powers might be. While the early stages of the New Deal sought something resembling a corporatist state, the latter New Deal was much more limited. The federal government would be allowed to regulate conditions in the work place including salary levels; the federal government’s ability to guarantee a fair, open, and safe market was expanded to cover all markets, not just those for goods in interstate commerce; and the Fourteenth Amendment would no longer be read to protect freedom of contract. It should be noted that under a popular sovereignty theory of the Tenth Amendment the burden, in any case seeking to interpret these powers, rests with the government to justify an expansive definition of these powers rather than on private parties to justify a narrow definition of these powers.
The first case, *Heart of Atlanta Motel v. United States*,189 was decided under the truism theory of the Tenth Amendment. In that case, the Supreme Court upheld the constitutionality of Title II of the Civil Rights Act of 1964190 by means of the commerce clause.191 Title II prohibited discrimination in public accommodations which served interstate travelers or used products which had been in interstate commerce. The commerce clause gives Congress the power to “regulate Commerce ... among the several States ...,” or, in modern use to regulate interstate commerce. While interstate commerce has grown extensively since the framing of the Constitution, it is clear that the commerce clause has been extended to items unrelated to interstate commerce as understood by the framers. Even in the early 1800’s, there were institutions that catered to interstate travelers and institutions that sold items that had originated in other states.192 Yet, no one would have seriously contended in 1800 that Congress had the power to regulate these institutions. In fact, in the *Civil Rights Cases*,193 the Supreme Court had overturned legislation similar to Title II.194

The popular sovereignty theory provides an alternative means of justifying Title II. Rather than changing the meaning of a long-established clause, the theory of popular sovereignty allows the delegation of powers outside of the Article V process. Thus, the popular sovereignty theory recognizes that, during the New Deal, the People delegated extensive powers to the national government to guarantee an open and fair marketplace. Therefore, Title II of the Civil Rights Act of 1964 is a constitutional exercise of the national government’s broad, delegated, but unenumerated, power to guarantee an open and fair marketplace, in this particular instance in hotel rooms and public places for minorities.195 The positive effect of an interpretation based on popular sovereignty is that it avoids re-interpreting the commerce clause in such a way that almost any action could fall within the commerce clause.

The second case is *Garcia v. San Antonio Metropolitan Transit Authority*.196 In *Garcia*, the Supreme Court was faced with the issue of whether the national government could impose minimum wage requirements on the state governments.

191 U.S. Const. art. I, § 8, cl. 3.
192 *E.g.*, cotton fabric, tobacco.
193 *Civil Rights Cases*, 109 U.S. 3 (1883).
194 *Civil Rights Act of 1875*, ch.114, §§ 1, 2, 18 Stat. 335.
195 An additional source of powers to justify the Civil Rights Act is Section 5 of the Fourteenth Amendment which gives Congress the power to make laws to enforce the Fourteenth Amendment. It should be noted, however, that the government did not attempt to use this section to justify the legislation in *Heart of Atlanta v. United States*, 379 U.S. 241 (1964). It should also be noted that this section was unsuccessfully relied upon in the *Civil Rights Cases*, 109 U.S. 3 (1883), as no one thought at that time that the commerce clause provided any power to the federal government to pass the type of legislation involved. If the Fourteenth Amendment provides the type of powers that can be used to support the legislation in this case, it is only through combining it with the New Deal changes to create a broader meaning of state action. Such a combination would be by a process similar to the way in which the Fourteenth Amendment has been used to make the Bill of Rights applicable to the states. Cf. Ackerman, *supra* note 16, at 515-45.
As discussed earlier, operating under the state sovereignty theory, the Court decided that it was unable to determine what features of state government were protected by state sovereignty. The Court's approach was based on the interpretation that the Tenth Amendment was a limit on enumerated powers. As the commerce clause had been interpreted by the Court to extend to such matters as the wage paid to employees, even for employers who did not sell products in other states, the only question before the Court was whether the legislation interfered with state sovereignty.

As with the issue of the Civil Rights Act, under a theory of popular sovereignty, the Court would have taken a different approach. Rather than using an expanded commerce clause, the Court would have recognized that the power to regulate labor relations that was granted to the national government by the People during the New Deal included the power to regulate minimum wages. The question would then become, not whether this legislation interfered with state sovereignty, but whether this broad power to regulate labor conditions included the power to set those conditions for state government employees. This issue is not as clear cut as the issue in the previous case. The Court could legitimately go either way based on its understanding of the evidence of extent of the growth of governmental power in the New Deal. It should be noted that other aspects of labor law have been extended to the states. It is difficult to see how the Court could invalidate minimum wage laws without also invalidating other labor laws as applied to the states. The historical search proposed here is quite different from the one proposed by the supporters of the dissent in *Garcia*. Here, the search focuses on whether the power to regulate labor conditions granted in the 1930's includes the right to regulate state governments in their actions as employers. The dissenters in *Garcia* focused their search on an attempt to find traditional state functions. The advantage of the popular sovereignty theory is that it focuses the debate on the extent of delegated powers and that it does not result in a construction of delegated powers that would make those powers unlimited. The commerce clause is limited to interstate commerce, and broad powers to make labor laws are limited to labor laws.

The advantage of keeping the concept of a government limited to delegated, even if some are unenumerated, powers becomes clear in our hypothetical cases.

197 Supra note 93 and accompanying text.
199 The popular sovereignty theory leads to an explanation for why such a search will not be fruitful. The Constitution does not distribute powers between the national government and the state governments in the way that state constitutions divide power between the state governments and local governments. The Constitution, for the most part, merely describes the powers and limits of the national government. The people of each state choose which powers will be given to their state government. The result is a system which allows the states to function as laboratories. Successful experiments may be picked up by other states, but not necessarily by all. As such, there is no reason to expect that there will be many functions which have always been filled by state governments rather than by private individuals.
In the first case, the Supreme Court has reversed *Roe v. Wade*; and Congress has passed a law making abortion illegal. When someone challenges the law in court, the Solicitor General claims that the statute creates a uniform national law on this issue and prevents the interstate travel to obtain abortions which would have resulted from differences in state laws. Under the truism and the state sovereignty theories, the commerce clause has been expanded to allow the national government to regulate almost anything involving interstate travel or substantial disparities between the states. As such, those arguing against the law are forced to search, probably in vain, for a convincing distinction. Under the theory of popular sovereignty, the challenge to the law is simple and direct. While it is arguable whether the People have prohibited the states from legislating on abortion, it is clear that no one has ever delegated the issue of the legality of abortion to Congress. Thus, a national law prohibiting abortions would be unconstitutional under a theory of popular sovereignty as it would be clear that the power was still reserved to the states or the people rather than delegated to the national government.

The second case comes to us from the Senate's version of the Violent Crime Control Act. Among the provisions of the act is a new federal felony, "Murder involving firearm." If this section becomes law, the use of a firearm in a murder will be a federal offense if either the murder occurred in the course of another federal offense or the firearm has moved through interstate commerce. It is the latter of these two jurisdictional clauses that is relevant here.

Congress has three potential sources of authority to pass laws creating federal crimes: 1) areas of criminal law specifically delegated to it; 2) general powers over federal possessions and other areas under federal jurisdiction; and 3) the power to pass those laws necessary and proper to implement other powers. These three sources give a significant power to the federal government to pass new criminal laws.

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201 The national government's ability to allocate tax dollars to assist those seeking abortions would be a different issue as would be the issue of regulating abortions to fulfill legitimate safety concerns. While the latter might become an avenue through which a prohibition could be pushed, such a course of action might be opposed on the ground that the health/safety concerns were a mere pretense. *Cf. McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (discussion of requirement that the end of a statute has to be within a specifically delegated power even if the means does not have to be).
202 Of course, a law prohibiting the states from declaring abortion illegal would be equally unconstitutional.
204 Id. at § 207, at S9988-89.
205 Id. at § 207(b), at S9989.
207 *E.g.*, Felonies on high seas, U.S. CONST., art. I, § 8, cl. 10; general power over District of Columbia and U.S. possessions within states, U.S. CONST., art. I, § 8, cl. 17; general power over territory and property of the United States, U.S. CONST. art. IV, § 3, cl. 2.
208 *E.g.*, enforcement of regulations of interstate commerce, U.S. CONST., art. I, § 8, cl. 3, 18; protection of post offices, U.S. CONST. art. I, § 8, cl. 7, 18.
laws. They do not, however, give the federal government an unlimited power to create new federal criminal laws.

The constitutionality of the section that is the subject of this discussion rests on whether it fits within the parameters of the interstate commerce clause. The modern interpretation of the commerce clause would seem to allow this act. After all, if the wages paid to the lowliest employee of a state government affects commerce, the uses to which an item that moved through commerce can be legally put certainly affects the commerce in that item. Thus, if this section were challenged in court and the Supreme Court follows its modern jurisprudence, the defendant would lose.

There is something deeply wrong with this analysis, however. Followed to its logical conclusion, the modern jurisprudence proclaims that a gun is tainted with the potentiality of its being in interstate commerce from when it was a lump of coal in the ground that might be used to generate the electricity at the plant where the gun was manufactured until the end of time. This conclusion contradicts the understanding of commerce found in cases ranging from *Gibbons v. Ogden* in the 1820's to *Carter v. Carter Coal Co.* in the 1930's. The point underlying the jurisprudence of the commerce clause from the Marshall Court to the Old Court was that, while it was difficult at times to tell when commerce went from being intra-state to being interstate, there was a point when an object entered the stream of commerce and a point where it left the stream of commerce. If the words of the interstate commerce clause have any meaning, when a good reaches the consumer, it stops being subject to regulation through the interstate commerce clause. Thus, based on the stricter interpretation of the commerce clause required by the theory of popular sovereignty, this section would be declared unconstitutional.

Before leaving the analysis of this proposal, this proposal offers a last chance to look at the broader issues involved. While the provisions of this act are careful

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210 The Framers of the Constitution granted the powers to regulate specific crimes and “felonies on the high seas.” Instead of these limited formulas, they could have granted an unlimited power in words like “define offenses against the United States.” The language chosen strongly implies that the federal government does not have a general power with regard to criminal law.
211 U.S. Const., art. I, § 8, cl. 3.
214 Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189-97 (1824) (defines commerce as matters connected to trade with discussion implying closely connected).
to avoid preemption of state laws, the ability to pass such a law implies the ability to preempt state laws through the supremacy clauses. This ability, implied by current jurisprudence, threatens to turn state governments into just another part of the federal bureaucracy. While there is a role for the federal government in solving the problems committed to the states under our Constitution, that role is mostly limited to providing support under the power to spend federal funds for the general welfare.

The history of this new "Murder with Firearm" law shows exactly the problem with extensive federal usurpation of state powers. This proposal comes from the junior senator from New York. If it becomes law, a large portion of the homicides committed in this country would become subject to the death penalty. This effect would presumably have only a minor significance in the states that have the death penalty and regularly sentence defendants to death.

It would have a much more significant effect in other states, especially those like New York which do not have a death penalty. To an outsider, this proposal looks like the action of someone who has found himself unable to succeed in convincing the voters of New York to take the actions necessary to get Albany to approve a death penalty and now turns to Washington to overturn the decision on a state matter of the State of New York.

If the Tenth Amendment has any role to play in our constitutional system, it is to allow the states to make their own decisions on those matters that have been delegated to them. It is unclear whether the death penalty would solve New York's crime problem, but the decision on this matter should belong to New Yorkers. If states are to function as laboratories, the Supreme Court must allow the states rather than the federal government to decide those matters such as general criminal law which have been delegated by the People to the states, not the federal government.

PART V: CONCLUSION

At its heart, the Tenth Amendment is a declaration that the national government is a government of limited powers. As this situation was true before its ratification, the amendment is, in one sense, a truism. However, an interpretation of the Tenth Amendment as just a truism misses a crucial point. That point is that the national government is not the source of the power in the system. As a result, the power not delegated to the national government is not sitting in a vacuum waiting to be delegated but rather returns to its source. Once one recognizes this fact, the question becomes what is its source. The words of the Tenth Amendment provide two answers, the states and the people.

216 Violent Crimes Control Act, supra note 203, at § 207(c), at 9989.
217 U.S. CONST., art. I, § 8, cl. 1.
218 Even in those states, it is conceivable that the law could be used against those defendants who were not given the death penalty in their state trials.
The theory of state sovereignty declares that the state is the ultimate source of power. The result of this theory is the contradiction of both the national government and the state governments being supreme and a focus on Article V as the only mechanism for the re-distribution of power.

The theory of popular sovereignty provides a necessary alternative. It declares that the state governments and the national government are creations of the People who allocate limited powers to both of them. Furthermore, the People are not limited to Article V as a mechanism for re-distributing power.

The history of constitutional practice reflects the problems of maintaining the fiction of a state sovereignty or truism theory of the Tenth Amendment. Unable to recognize some newly delegated powers, the courts are forced to either make previously delegated powers unlimited or deny the national government those new powers. Thus, bit by bit, the courts have been inching towards a government of unlimited enumerated powers. Popular sovereignty allows a limited government to be maintained by recognizing that new limited powers have been delegated.

As both our constitutional practice and the history of the framing support the theory of popular sovereignty, it is time for the courts to start acting on this interpretation of the Tenth Amendment. The alternative is the abandonment of the concept of a constitution as a limitation on government.