

OR TO THE PEOPLE: POPULAR SOVEREIGNTY AND THE POWER TO CHOOSE A GOVERNMENT

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To protect state sovereignty, contemporary textualism has reinvigorated the Tenth Amendment as a judicially enforceable limit on federal powers. However, in casting the Tenth Amendment as the states' rights amendment, these textualists have inexplicably glossed over the Tenth Amendment's final four words, which reserve powers to "the people." This Article highlights this inconsistency and argues that this omission ignores a vital structural protection against federal and state tyranny. Viewed through the same textualism that reinvigorated state sovereignty, the Tenth Amendment's final words cannot be redundant or superfluous but rather define and protect the people as a sovereign body capable of wielding specific powers—particularly those powers that the Constitution places beyond the reach of our governments. Primarily, the Tenth Amendment protects that power which is at the heart of popular sovereignty as well as the foundation of our democracy, the power of the people to choose their government. The Tenth Amendment ought to protect popular sovereignty—as it protects state sovereignty—by serving as a source for robust judicial review of federal and state laws that infringe on popular sovereignty. Recognizing this overlooked portion of the Tenth Amendment could alter current legal doctrine surrounding voting rights by treating free, fair, and accessible elections as a matter of competing sovereign powers rather than individual voting rights. By ignoring the people in the Tenth Amendment, American jurisprudence has ignored a vital structural protection against federal and state tyranny and risked government-driven erosion of democracy in America.

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“The adversaries of the Constitution seem to have lost sight of the people altogether in their reasonings on this subject; and to have viewed these different establishments, not only as mutual rivals and enemies, but as uncontrolled by any common superior in their efforts to usurp the authorities of each other. These gentlemen must here be reminded of their error.”

—James Madison¹

“When one wants to speak of the political laws of the United States, it is always with the dogma of the sovereignty of the people that one must begin.”

—Alexis de Tocqueville²

¹ THE FEDERALIST NO. 46 (James Madison).

² ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, VOLUME ONE 53 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1835).

INTRODUCTION

“We the People”³ are the source of law for the United States Constitution.⁴ That “[w]e the people”⁵ have power over our own destinies was the driving ideological force behind the American Revolution, the founding of our nation, and the Constitution that now binds it.⁶ “We the people”⁷ devised a system of republican government that would represent us instead of rule us. Popular sovereignty—broadly speaking, the right of the people to make laws and be ruled by them⁸—is enshrined in our Republic.⁹ And yet, “[w]e the people”¹⁰ are absent from structural balance of power debates in modern constitutional law.

Much of the modern resurgence of federalism can be credited to a textualist reading of the Tenth Amendment.¹¹ Once treated as merely a “truism,”¹² the Tenth Amendment now protects state sovereignty as a judicially enforceable limit on federal powers.¹³ But the Tenth Amendment does not refer exclusively to state sovereignty. Rather, it declares 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.*”¹⁴ The textualists that revived the Tenth

³ U.S. CONST. pmbl.

⁴ See THE FEDERALIST NO. 39 (James Madison) (explaining that our government, and the Constitution itself, are “derived from the people”); THE FEDERALIST NO. 49 (James Madison) (“[T]he people are the only legitimate fountain of [governmental] power . . .”); Kurt T. Lash, *Federalism, Individual Rights, and Judicial Engagement*, 19 GEO. MASON L. REV. 873, 878 (2012) (“[T]he underlying principle of the document was one of delegated power—and powers are not delegated from the ether.”).

⁵ U.S. CONST. pmbl.

⁶ *Id.*; THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

⁷ U.S. CONST. pmbl.

⁸ At the outset I will clarify that popular sovereignty as discussed by this piece is a far more substantive concept than the procedural requirement described by some, including Robert Post. See Robert Post, *Democracy, Popular Sovereignty, and Judicial Review*, 86 CALIF. L. REV. 429, 437–38 (1998). Post argues that popular sovereignty is a procedural criterion, and therefore popular sovereignty could serve anti-democratic ends, such as voting for a king. *Id.* However, I take this as a dissolution of both democracy and sovereignty, since it is the continued power of a body that is the essence of sovereignty. Without power, there is no sovereignty, and so I would describe the vote for a king as a democratic majoritarian dissolution of popular sovereignty.

⁹ Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 749 (1994) (“The central pillar of Republican Government, I claim, is popular sovereignty.”).

¹⁰ U.S. CONST. pmbl.

¹¹ See, e.g., *Printz v. United States*, 521 U.S. 898 (1997).

¹² *United States v. Darby*, 312 U.S. 100, 124 (1941).

¹³ *New York v. United States*, 505 U.S. 144 (1992); cf. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012); *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

¹⁴ U.S. CONST. amend. X (emphasis added).

Amendment have quietly ignored this vital last phrase. Where, I ask, have the people gone and what has become of our powers?

In this Article, I argue that ignoring the popular sovereignty provision of the Tenth Amendment is not only inconsistent with the text, but also dangerous. Current doctrine improperly or insufficiently protects the exercise of the exclusive power that I identify as the heart of the people's power: the power to choose our government. In America we have become accustomed to the idea of a "right to vote" which belongs to each individual, but can be burdened, greatly limited, or taken away by the state. In doing so we dangerously treat a sovereign power—whose legitimacy lies in mass collective exercise—as an individual right, and we continue to not even see—let alone protect—the forest for the trees. If we do not recognize and safeguard those *powers* the Constitution reserves to the people as a separate sovereign body, there may be little to stop either state governments or the federal government from setting the rules by which they stay in power, and thus slowly eroding the democratic heart of our Republic.

The Court's current interpretation of the Tenth Amendment rests on a presumption that balancing powers between the states and a national government protects the people. As Justice Scalia explained: "[T]he power surrendered by the people is first divided between two distinct governments Hence . . . security arises to the rights of the people. The different governments will control each other."¹⁵ This argument asks the people to trust that their interests will be protected by two admittedly power-hungry governments. Or else, trust that the states will be the champions of the people by speaking for them as their closest representatives.¹⁶ Unfortunately, history—especially the Jim Crow South—has proven state governments are capable of doing quite the opposite: silencing their citizens in order to stay in power.

In the pages that follow, I offer several arguments for how the Tenth Amendment preserves the separate powers of the people. The most central is a textual argument. The Tenth Amendment explicitly mentions the powers of the people separately. It says powers not delegated are reserved to the states "or" the people. It does not say the remaining powers are to be reserved to the people "through" the states, or that they are to be reserved to the states "and" the people. Nowhere

¹⁵ *Printz*, 521 U.S. at 922 (citing THE FEDERALIST NO. 51 (James Madison)); see also *Bond v. United States*, 564 U.S. 211, 221 (2011) ("State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." (quoting *New York v. United States*, 505 U.S. 144, 181 (1992))).

¹⁶ Some scholars have called the states "[the] political body of people." William T. Barrante, *States Rights and Personal Freedom Breathing Life into the Tenth Amendment*, 63 CONN. B.J. 262, 274 (1989).

does the text suggest that the powers of the people are somehow part of—or even lesser than—the powers of state governments. Furthermore, the text of the Tenth Amendment does not describe the powers wielded by the United States government as powers the people “surrendered” or “relinquished.” It describes those powers as “delegated,”¹⁷ and a delegated power must be anchored to another political body capable of revoking it.

Additionally, ignoring the people in the text of the Tenth Amendment would be inconsistent with canons of textual interpretation. If we accept the assumption—as many have suggested—that the Constitution anticipates that the voice and the powers of the people are synonymous with the states, the last four words would be superfluous. Such superfluity is entirely inconsistent with the Court’s current reading of the Ninth Amendment in which the rights retained by the people resoundingly communicate to the government: go this far but no farther.¹⁸ The Tenth Amendment’s popular sovereignty provision may mean many things, but it certainly means more than the Court currently recognizes.¹⁹

In the Tenth Amendment and throughout the rest of the Constitution are explicit indications that there are some powers neither the states nor the federal government can wield. And those powers must belong to the people.²⁰ Democracy and popular sovereignty are not only values enshrined in our Republic: they are structures set into our Constitution. In short, the Tenth Amendment defines federalism as a delicate balance, not between two sovereigns, but three.²¹

¹⁷ U.S. CONST. amend. X. Articles I, II, and III specify federal powers as “granted” or “vested” in their respective branches. U.S. CONST. arts. I–III. Both of these terms similarly suggest a carefully limited delegation rather than a broad and irrevocable transfer.

¹⁸ Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and “Expressly” Delegated Power*, 83 NOTRE DAME L. REV. 1889, 1954 (2008) (“This renders the Amendment’s closing declaration of the ultimate sovereignty of the people as something of an oddity—either ignored altogether or construed in a manner completely the opposite of the same words in the Ninth Amendment. In the beginning, however, the words ‘by the people’ and ‘to the people’ represented the same concept of retained sovereignty, a concept which necessarily entails a strict construction of delegated power.”).

¹⁹ See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 122 (1998).

²⁰ Cf. *Andrews v. Andrews*, 188 U.S. 14, 32–33 (1903) (“It would thus come to pass that the governments, state and Federal, are bereft by the operation of the Constitution of the United States of a power which must belong to, and somewhere reside in, every civilized government.”).

²¹ See Jay S. Bybee, *The Tenth Amendment Among the Shadows: On Reading the Constitution in Plato’s Cave*, 23 HARV. J.L. & PUB. POL’Y 551, 565–66 (2000) (recognizing that although overlooked in the Court’s precedent, the Tenth Amendment defines a “triangular” relationship of powers).

I challenge constitutional law scholars and practitioners to reconsider the substantive power of the last four words of the Tenth Amendment. I argue that the Tenth Amendment defines “the people” as a body that is capable of retaining—and required to wield—sovereign powers that are distinct from the powers of our sovereign governments. As such, the Tenth Amendment should no longer be exclusively synonymous with states’ rights. Rather, it is time we reinvigorate the Tenth Amendment as a protection of popular sovereignty.

What appears to be the primary barrier to taking the popular sovereignty provision of the Tenth Amendment seriously is the assumption that the sovereign boundaries delineated by the Constitution—and policed by the Tenth Amendment—are absolute and therefore cannot overlap.²² While there are some generally accepted areas of concurrent sovereign authority not expressly delegated by the Constitution—criminal punishment for example²³—when discussing the limits of sovereign powers, the Court traditionally relies on a model of non-overlapping powers. Competing sovereignty is usually an external limit. Where the sovereignty of one government begins, the sovereignty of the other ends. Even when the boundaries of sovereign powers are unclear—such as the limits of the Commerce Clause or federal preemption—the Court usually treats these cases as a discovery, or assertion, of the limits of sovereign powers.²⁴ The logic usually being that the Constitution placed powers with one group or another—full stop. As a consequence, the Court has historically been very resistant to the continued overlap of sovereign authority.²⁵

²² An absolute sovereign is the supreme, exclusive, and unqualified power. Within its realm it shares no power with any other body and answers to no higher power. The concept of absolute sovereignty is often misattributed to philosopher Jean Bodin, although like most western philosophers, his conception of sovereignty recognizes the need for external legitimacy, whether it is from God or the will of the people. See William A. Dunning, *Jean Bodin on Sovereignty*, 11 POL. SCI. Q. 82, 94 (1896). Niccolo Machiavelli is one of the few political philosophers who believed in absolute sovereignty. NICCOLO MACHIAVELLI, *Chapter IX—Concerning a Civil Principality*, in THE PRINCE (1532). His prince was the source of legitimacy, shared none of his powers, and saw reliance on others as only weakness. See *id.*

²³ See *Heath v. Alabama*, 474 U.S. 82, 88 (1985) (defining the dual sovereignty doctrine for criminal punishment).

²⁴ In these border cases of sovereign powers, one sovereign or another wins the day and the other goes home empty-handed. While it may have been unclear which sovereign had a certain power before the case, it is not unclear after. In preemption, while a state may have had a sovereign power prior to the conflicting federal law, once the federal government acts, they exclusively occupy the field. See, e.g., *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) (explaining that the Constitution commands that “all conflicting state provisions be without effect”). Similarly, the case establishing the Dormant Commerce Clause, *Gibbons v. Ogden*, uses absolutist language that clearly contemplates a system where powers are “exclusive” rather than negotiated. 22 U.S. 1, 9 (1824). A less hostile view of overlapping powers may presume a continued negotiation of authority in these areas rather than a conclusive determination.

²⁵ See, e.g., *Missouri v. Holland*, 252 U.S. 416, 434 (1920).

This general resistance to recognizing the Constitution as creating a system of overlapping powers creates a unique challenge for popular sovereignty. It is difficult to imagine how the people retain any non-overlapping powers as a separate sovereign. Indeed, other than the power to abolish government through uprising, what powers do the people have that none of their governments can touch, interfere with, or mediate? Without a judicial precedent for how to negotiate overlapping sovereign powers, it is very difficult—though not impossible—for courts to devise appropriate tests to determine and enforce these boundaries.

However, we are presently much closer to an enforceable popular sovereignty because of the recent accommodation doctrine put forward in *United States v. Comstock*.²⁶ The Court's *Comstock* opinion acknowledges the continued overlap of state and federal sovereignty and implements a test to ensure mutual respect and caution. *Comstock*'s holding that federal lawmaking is constitutionally permissible under the Tenth Amendment if it appropriately "accommodates" or "accounts" for a state's sovereign interests²⁷ could easily carry over into popular sovereignty. The federal government and the states could be required by the Tenth Amendment to consider and accommodate the sovereign interests of the people when legislating. If either a state or the federal government fails to accommodate popular sovereignty and chooses to transgress upon those powers reserved to the people, a court would be required to strike down that law as unconstitutional.

Arguably the federal judiciary already accommodates popular sovereignty by refraining from answering questions best left to the people under the political question doctrine.²⁸ Furthermore, under the theory of popular constitutionalism, many scholars have argued that social movements and changes in public sentiment affect the constitutional interpretations made by courts, legislators, and executives²⁹—a deference to the power of the people to shape and interpret constitutional meaning. In addition to providing a constitutional home for the political question doctrine and popular constitutionalism, a popular sovereignty Tenth Amendment would

²⁶ 560 U.S. 126 (2010).

²⁷ *Id.* at 143–44.

²⁸ In *Luther v. Borden*, the case establishing the political question doctrine, the Court cited no explicit constitutional provision but relied upon a popular sovereignty argument that, as the dissent described it, the judicial "power begins after [the People's] ends." 48 U.S. 1, 52 (1849) (Woodbury, J., dissenting).

²⁹ See Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737 (2007); Tom Donnelly, *Making Popular Constitutionalism Work*, 2012 WIS. L. REV. 159; Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto Era*, 94 CALIF. L. REV. 1323 (2006); David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001); Mark V. Tushnet, *Popular Constitutionalism as Political Law*, 81 CHI.-KENT L. REV. 991 (2006).

robustly protect the power of the people to independently exercise our most fundamental sovereign power: the power to choose our government. Courts could more aggressively prevent the states and the federal government from interfering with the right to vote, thereby preventing either sovereign from the frightening tyranny of setting the rules by which they stay in power.

While this Article may present a novel idea, it should not be controversial. As the Court stated recently in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, popular sovereignty is the “animating principle of our Constitution.”³⁰ The text of the Tenth Amendment recognizes and protects popular sovereignty as one means of preventing government tyranny.³¹ Given the fear of tyranny and the veneration of democracy enshrined in our founding, it should be unfathomable that in the twentieth century the people’s right to vote was not—and could not be—robustly protected by the courts, such that Congress was forced to step in through the Voting Rights Act. And it is even more unfathomable that in the name of state sovereignty, the Supreme Court strike down portions of the Voting Rights Act which preemptively ensured that state governments could not systematically exclude part of their electorate.³² Pending now before the Court is a case concerning partisan gerrymandering, which is at its heart about the ability of the people to properly be heard. Without recognizing the structural role of the people, the Court will likely focus on the judicial utility of formulas rather than the adequate and appropriate function of powers as they would if this were a federalism case.³³

The final words of the Tenth Amendment are a structural protection for the democratic part of our democracy. Through judicial review, the courts should rely on the Tenth Amendment to robustly protect the power of the people to independently exercise our fundamental sovereign power to choose our government. Courts could look directly at questions of voter access and prevent the states and the

³⁰ *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2671 (2015).

³¹ See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1426, 1456 (1987) (discussing how sovereignty has developed into an oppressive concept that is traditionally countered by individual rights in American jurisprudence, while an empowered “unitary People thesis” is ironically supported by the presence of “the people” in the Tenth Amendment).

³² *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013). The majority opinion quoted the entire text of the Tenth Amendment, but left popular sovereignty out of its analysis. *Id.* at 2623. The opinion mentioned that liberty is protected by the division of sovereign powers and then stated without further analysis that: “the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, ‘the power to regulate elections.’” *Id.* (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 461–62 (2013)).

³³ *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2017), *cert. granted*, 137 S. Ct. 2289 (2017).

federal government from eroding voter access when it suits them. The Tenth Amendment guards the exclusive right of the collective American population to choose their government unencumbered. The Constitution protects the independent and free exercise of democracy.

Rather than fight a legal battle over the burdens on individual rights, courts would police the boundary surrounding the free exercise of voting powers from interference by states or the federal government. Instead of going to court over specific prohibitions on certain voting laws, litigants could challenge whether any voting laws appropriately accommodate and preserve popular sovereignty—that is, whether they actually work to protect voters and increase voter access. It is not merely the rights of individuals, but the sovereignty of the people that is denied by discriminatory voting laws, and it is through the constitutional protection of that sovereignty that courts should be required to strike those laws down.³⁴

No government should set the rules by which it retains power. Voting should be accessible to the people³⁵ and *how* accessible should not be a policy choice that is left to the discretion of a government with a potentially competing agenda.³⁶ Since the United States extended voting to more than just white men in the late 1800s, American voter turnout has hovered around forty to sixty percent³⁷—one of the lowest in the developed world.³⁸ Turnout is low at least in part because Americans have accepted this reality: that our government can make voting hard—or at least prohibitively inconvenient—for the people, and that the people will, en masse, not participate. In Alabama, where the

³⁴ While I do not present it as thoroughly in this Article, it is also clear that legislatures and executives should be required—as constitutional actors—to pass laws and set procedures which maximize the equal participation of all eligible Americans in elections. Though ensuring that such actors maximize voter participation would be hard to ensure, it is likely that gross negligence would land the government action at issue in court, and thus be policed by the same mechanism discussed in more detail throughout.

³⁵ See, e.g., Steven J. Rosenstone, *Economic Adversity and Voter Turnout*, 26 AM. J. POL. SCI. 25 (1982) (concluding that holding elections on weekdays and imposing voter identification requirements creates unofficial economic barriers); Paul Waldman, *Could Oregon's Voting Law Signal a Democratic Push to Open Up Elections?*, WASH. POST (Mar. 17, 2015), <http://www.washingtonpost.com/blogs/plum-line/wp/2015/03/17/could-oregons-voting-law-signal-a-democratic-push-to-open-up-elections> (discussing Oregon's automatic DMV voter registration law).

³⁶ See Editorial Bd., *The Big Lie Behind Voter ID Laws*, N.Y. TIMES (Oct. 12, 2014), <http://www.nytimes.com/2014/10/13/opinion/the-big-lie-behind-voter-id-laws.html> (“The next time voter ID laws reach the justices, they should see them for the antidemocratic sham they are.”).

³⁷ See *National General Election VEP Turnout Rates, 1789–Present*, U.S. ELECTION PROJECT, <http://www.electproject.org/national-1789-present> (last visited Feb. 1, 2017).

³⁸ See Adam Taylor, *American Voter Turnout Is Still Lower Than Most Other Wealthy Nations*, WASH. POST (Nov. 10, 2016), <https://www.washingtonpost.com/news/worldviews/wp/2016/11/10/even-in-a-historic-election-americans-dont-vote-as-much-as-those-from-other-nations>.

public battle for the Voting Rights Act was waged just over fifty years ago, the Alabama Secretary of State called automatic voter registration a “sorry and lazy way out.”³⁹ While sometimes a government’s motivation is voter suppression, other times it may be simply prioritizing what is more convenient or efficient for the government, rather than what is convenient or accessible for the people. In either case, something has gone wrong with the way that “we the people” exercise our power in American democracy.

Lower voter turnout and the Court’s continued struggle to decide election law cases under the Constitution in a manner that fully protects the right to vote should serve as a wakeup call that the Court has an incomplete picture of the sovereign powers at stake. While the Constitution explicitly forbids denying the right to vote for specific reasons,⁴⁰ characterizing voting as a “fundamental right” guaranteed only through the Fourteenth Amendment⁴¹ does not fit with the structural prominence that democracy has been afforded since the beginning of our Republic. The Tenth Amendment could provide the basis for a more robust protection of voting rights as exercise of sovereign power that demands aggressive judicial defense.⁴² The right to vote ought to be policed as an integral part of the Republic’s balance of powers.

This Article proceeds in four parts. Part I begins with a history of sovereignty and federalism in American law, specifically the cases involving the Tenth Amendment. Much of the debate about the meaning of the Tenth Amendment has relied exclusively on originalist arguments, despite intense scholarly disagreement about the sincerity of the founding fathers’ belief in popular sovereignty and the original understanding of the Tenth Amendment. In light of this disagreement, I emphasize the need for a textualist reading that reflects the words of the

³⁹ See Mark Joseph Stern, *Alabama Secretary of State: Helping More People Vote Would “Cheapen the Work” of Civil Rights Heroes*, SLATE (Nov. 2, 2016), http://www.slate.com/blogs/the_slatest/2016/11/02/alabama_secretary_of_state_says_more_voting_would_cheapen_the_work_of_civil.html.

⁴⁰ U.S. CONST. amend. XV (right to vote cannot be “denied or abridged” on account of “race, color, or previous condition of servitude”); *id.* amend. XIX (right to vote cannot be “denied or abridged” on account of “sex”); *id.* amend. XXIV, § 1 (right to vote cannot be “denied or abridged” on account of “failure to pay any poll tax or other tax”); *id.* amend. XXVI, § 1 (right to vote for those over 18 cannot be “denied or abridged” on account of “age”).

⁴¹ *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966).

⁴² The inconsistencies and limits of the Court’s “fundamental” right to vote jurisprudence have been pointed out by many scholars who view current doctrine as incomplete and unsatisfactory. See, e.g., Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL’Y 143 (2008); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 717 (1998) (criticizing the Court’s election law jurisprudence as balancing the right to vote with state interests, rather than recognizing the structural need for a political market).

Tenth Amendment as enacted. I then move through the Court's long history of delineating sovereign powers and find that popular sovereignty is a relatively recent disappearance. Not until the 1980s did the Court begin quoting the Tenth Amendment, but omitting the last four words and treating it as the states' rights amendment. Before the 1980s, popular sovereignty was at least sporadically mentioned along with state and federal sovereignty.⁴³

In Part II, I present a textualist argument for a popular sovereignty Tenth Amendment. I begin by discussing the potential for a new era of tripartite sovereignty in the Court—including popular sovereignty—made possible by the Court's decision in *Comstock* which recognizes overlapping sovereign powers. Next, I describe how the text of the Tenth Amendment and the rest of the Constitution clearly define and protect a distinct sphere of powers forbidden to the states and federal government—powers that necessarily remain with the people. Here I also consider the debates over who “the people” of the Tenth Amendment are. Though fascinating, I find this debate ultimately irrelevant, since regardless of whether “the people” are a national collective or the people of the several states, their sovereign powers are not protected by the current state sovereignty-focused interpretation of the Tenth Amendment. Even if “the people” are the people of the several states instead of a national collective, they are similarly susceptible to state government repression of their sovereign powers to choose their government. I then return to the text of the Constitution—specifically the explicit limits on federal and state powers—to highlight a few of the powers the Constitution implies the people share with their government or retain exclusively.

In Part III, I show how overlapping and dependent sovereignty should not be as innovative or challenging to implement as one might otherwise presume, since it has long been recognized in western political philosophy and in even other parts of American law, specifically, in federal Indian law. By exploring how complicated sovereignty can be, I reveal how one-dimensional much of the Court's discussion of it has been. The acknowledgement of overlapping sovereignty and development of accommodation doctrine in *Comstock* represents a long overdue evolution in the understanding of sovereignty in American constitutional law.

Finally, in Part IV, I discuss how the Tenth Amendment could require courts to robustly police the boundaries of popular sovereignty and strike down laws which burden voter access, and mention—albeit

⁴³ See *United States v. Comstock*, 560 U.S. 126 (2010).

very briefly—other potential uses for this doctrine based on other “powers” that the people might have.

I. HISTORY

In America, popular sovereignty is central to the narrative we tell about our founding. Alexis de Tocqueville describes America as a unique example where the “dogma” of popular sovereignty is realized as more than an underlying value that is “hidden” or “buried” underneath a system in which power was truly controlled by elites.⁴⁴ American popular sovereignty has

disengaged from all the fictions with which one has taken care to surround it elsewhere; one sees it re clothed successively in all forms, according to the necessity of the case. Sometimes the people in a body makes the laws as at Athens; sometimes deputies whom universal suffrage has created represent it and act in its name under its almost immediate surveillance.⁴⁵

“The people,” he wrote, are the creators, as well as the supreme authority, of American government: “The people reign over the American political world as does God over the universe.”⁴⁶

Yet, there are those who doubt whether or not—behind all of this outward celebration and rhetoric—the American people really do have power over our government and if the framers ever understood the Constitution as preserving us power at all. This Part traces the history of these debates about the power of the people, and the distribution of powers between the federal government, the states, and the people.⁴⁷ This historical overview proceeds in four sections. The first Section concerns America’s founding and argues that given the absence of a definitive originalist interpretation of the Tenth Amendment, we ought to rely on the plain meaning of the text as enacted while contextualizing it within the broader constitutional value of popular sovereignty undoubtedly enshrined in our Constitution. The second Section evaluates early case law, showing that the Court not only considered, but highly regarded, popular sovereignty along with federal and state sovereignty. The final Section covers the period of time when the Court

⁴⁴ DE TOCQUEVILLE, *supra* note 2, at 54.

⁴⁵ *Id.* at 55.

⁴⁶ *Id.*

⁴⁷ For additional pieces discussing the history of the Tenth Amendment broadly, see John R. Vile, *Truism, Tautology or Vital Principle? The Tenth Amendment Since United States v. Darby*, 27 CUMB. L. REV. 445 (1997); Vince Lee Farhat, *Term Limits and the Tenth Amendment: The Popular Sovereignty Model of Reserved Powers*, 29 LOY. L.A. L. REV. 1163 (1996).

considered the Tenth Amendment a mere truism until it was reinvigorated as a state sovereignty protection. I argue that the powers of the people were left out of this reinvigoration for more contextual than substantive reasons, and so there is no definitive barrier to their inclusion now.

A. *The Founding*

It was expounded with pride by the framers of our Constitution that, “The fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority.”⁴⁸ We, the people, were the source of law for the Constitution. Our consent was necessary to found our Republic and is continually necessary to keep it afloat.

Though it seems obvious, the creation of the Republic is evidence that the collective of “the people” is a body that is capable of acting together, of holding sovereign power,⁴⁹ of making laws, and of making governments.⁵⁰ Therefore, the starting point for our discussion of popular sovereignty must not be whether or not popular sovereignty is possible, but why it has become a concept so foreign and challenging to constitutional law practitioners. It should not be farfetched to imagine that the people who had overthrown the tyranny of power concentrated in too few hands would leave enough power for themselves to make sure their government continued to serve and protect their interests.⁵¹

Popular sovereignty and the rights of the people were undoubtedly a concern,⁵² and a popular sovereignty interpretation of the Tenth Amendment was explicitly part of its ratifying debate. Leading up to the adoption of what became the Ninth and Tenth Amendments was a robust debate about the rights and powers of the people, states, and

⁴⁸ THE FEDERALIST NO. 22 (Alexander Hamilton).

⁴⁹ DE TOCQUEVILLE, *supra* note 2, at 116 (“[American government] define[s] sovereignty as the right to make laws.”).

⁵⁰ It is part of the liberty of the individual people of America to be able to act collectively. “No taxation without representation” and the “Right of the People to alter or to abolish” are both battle cries of collective rights that are a part of and also necessary to preserve individual liberty. *See* Lash, *supra* note 4, at 874.

⁵¹ As de Tocqueville said, “Americans are evidently preoccupied with one great fear. They perceive that among most peoples of the world, the exercise of the rights of sovereignty tends to be concentrated in a few hands and they are frightened at the idea that in the end it will be so with them.” DE TOCQUEVILLE, *supra* note 2, at 368–69.

⁵² Christian G. Fritz, *Alternative Visions of American Constitutionalism: Popular Sovereignty and the Early American Constitutional Debate*, 24 HASTINGS CONST. L.Q. 287, 288–89 (1997).

federal government. The language for the Tenth Amendment that Madison originally proposed was: “The powers not delegated by this constitution, nor prohibited by it to the states, are reserved to the states respectively.”⁵³ The Tenth Amendment’s language, as Madison argued, was meant to define the powers in the Constitution as either granted or pre-existing, and either way, in some relationship with other powers as defined by the document itself.⁵⁴ Taking account of this, the Senate added “or to the people” to the Amendment’s original draft without discussion.⁵⁵ This addition would not have come up unless enough people felt it necessary to add language that confirmed that there must be some powers reserved to the people that belong neither to the federal nor to the state governments.⁵⁶ It is unlikely that a specific addition such as this served no purpose.

Some have even argued that the addition of these four words to the Tenth Amendment was a unique departure of the American Constitution—an unfathomable and brave answer to the problem of pluralism and the limits of governmental sovereignty.⁵⁷ Regardless of whether or not the Tenth Amendment was an innovative recognition of popular sovereignty, it is generally an amendment intended to stand guard against the encroachment of federal powers. Whether expansive or limited, the “delegated powers” defined by the Tenth Amendment create limits on federal power that conversely delineate what powers remain with the states and the people.

One of the first arguments about the meaning of text of the Tenth Amendment is, of course, the discussion of the existence of

⁵³ James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791).

⁵⁴ As Madison put it in his 1791 speech to Congress, what eventually became the Ninth Amendment prevented “a latitude of interpretation” of federal power while what eventually became the Tenth “exclud[ed] every source of power not within the constitution itself.” *Id.*

⁵⁵ Note, *The Tenth Amendment as a Limitation on the Powers of Congress*, 52 HARV. L. REV. 1342, 1343 (1939) (citing 1 ANNALS OF CONG. 432, 441, 761, 767–68 (1789)).

⁵⁶ Jake Sullivan, *The Tenth Amendment and Local Government*, 112 YALE L.J. 1935, 1937–38 (2003).

⁵⁷ SAMUEL H. BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* 150–52 (1993) (“While it was conceded that the many did seek many things, it was further argued that they could also bring themselves to act as one without calling in the rule of the few. Such was ‘the People’ of the doctrine of popular sovereignty. As the constituent authority in the state, the people laid down the fundamental law of the constitution and could intervene to maintain the constitutional order . . . Here was the underlying issue between the Americans and the British which emerged in the course of the long controversy leading to independence . . . Their great and unbridgeable disagreement was over the location of this ultimate authority. For the British it was parliament; for the Americans it was ‘the People.’ . . . To appeal to this superior authority against transgressions of the fundamental law did not disrupt the social order or send society back into the state of nature but rather called into action the sovereign law-making power, the people. The existence of such a continuing constituent sovereignty made natural federalism possible.”); GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787* 599 (1969).

unenumerated powers in the seminal case *McCulloch v. Maryland*.⁵⁸ Chief Justice John Marshall reasoned that the omission of the word “expressly” in the Tenth Amendment swept in implied powers from the rest of the Constitution’s structure.⁵⁹ However, even in this famous and foundational debate about the best originalist meaning of the Tenth Amendment, there is no consensus.⁶⁰ Marshall’s reading of this omission is only one interpretation of many, even at the time of the founding. Others may in fact have read “expressly” into the existing text,⁶¹ expecting that we narrowly construe federal power in order to protect popular as well as state sovereignty.⁶² In support of this reading is the fact that the same man who wanted to add “expressly” to the Tenth Amendment also proposed adding “or to the people”—suggesting a similar intent to limit federal power and protect popular sovereignty.⁶³ One addition made it in but the other did not, and all within the context of disagreement at the founding. So, what are we to do with this window into history? Is there a clear and binding original understanding we can look to for guidance when interpreting the Tenth Amendment?⁶⁴ It would seem not.

Although American culture has in many ways canonized our founding fathers and deified our founding principles, our origin story included fierce debates between men with competing agendas and ideologies.⁶⁵ The writing and ratification of our Constitution was neither easy nor inevitable. Some scholars describe ratification as a subversive accomplishment by our federalist founders, who had veiled anti-populist agendas.⁶⁶ Many agree that the antifederalist charge that

⁵⁸ *McCulloch v. Maryland*, 17 U.S. 316 (1819).

⁵⁹ *Id.* at 406; see also David M. Sprick, *Ex Abundanti Cautela (Out of an Abundance of Caution): A Historical Analysis of the Tenth Amendment and the Continuing Dilemma over “Federal” Power*, 27 CAP. U. L. REV. 529 (1999).

⁶⁰ See Thomas B. McAfee, *Federalism and the Protection of Rights: The Modern Ninth Amendment’s Spreading Confusion*, 1996 B.Y.U. L. REV. 351, 359–65 (arguing that many ratification debates about potential amendments which had state rights provisions were considered the same as ones that had popular sovereignty).

⁶¹ Some constitutional history scholars, such as Kurt Lash, argue that James Madison likely thought that “the addition of the Ninth and Tenth Amendments merely confirmed the preexisting principle of expressly delegated power.” Lash, *supra* note 18, at 1892.

⁶² *Id.* at 1894.

⁶³ *Id.*

⁶⁴ See generally Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 858–59 (1989).

⁶⁵ See, e.g., CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913); WOOD, *supra* note 57.

⁶⁶ See, e.g., Michael Parenti, *The Constitution as an Elitist Document*, in *HOW DEMOCRATIC IS THE CONSTITUTION?* 39, 55 (Robert A. Goldwin & William A. Schambra eds., 1980) (citing JACKSON TURNER MAIN, *THE ANTIFEDERALISTS* (1961)) (describing the ratification of an “elitist” document that aligned with the upper-class interests of the Framers as the result of a

the new Constitution established a federal government insulated from the people and under the direct influence of a new aristocracy was not far off base.⁶⁷ The federalists did not trust that the people were competent to decide their own destinies. These scholars argue that the structure of our government shows a deep distrust of the people that is incompatible with the framers' regular professions of devotion to popular sovereignty.⁶⁸

The founders themselves had different views of what role the people should have in their government or what role the Constitution's text, in fact, gave them. In the moment of its conception, a diverse group of brilliant legal thinkers were unable to interpret these words as having a common understanding. As such, originalism as a reason to discredit the substantive reservation of power in the people, is, at best, one of several competing arguments amongst the scholars who have specialized in the origins of America's Constitution and its continued relevance to constitutional interpretation.

Although we are left with an unsatisfying answer to the question of the Tenth Amendment's original understanding, some portion of this history can provide us with interpretive guidance. Our founding is inescapably a story about the consent of the governed. Even if some of the federalist framers hoped that the structure of their government would circumvent the will of the people, they would undoubtedly be disappointed. The people were either convinced to ratify—or at least did not again rebel to overthrow—the Constitution because of a grand and effective piece of rhetoric employed by the federalists: popular sovereignty.

Even if the founders were anti-populist and anti-democratic, as some scholars suggest,⁶⁹ the founding narrative is still democratic and dependent on the power of the people because the federalists needed to lie about their intentions in order to gain the *necessary* support of the people.⁷⁰ And in that lie—if it was indeed a lie—they put weight in the

complex lobbying campaign that included everything from reliance on low voter turnout and property restrictions to outright bribery).

⁶⁷ Gordon S. Wood, *Democracy and the Constitution*, in HOW DEMOCRATIC IS THE CONSTITUTION?, *supra* note 66, at 2–3.

⁶⁸ See generally Sanford Levinson, *Popular Sovereignty and the United States Constitution: Tensions in the Ackermanian Program*, 123 YALE L.J. 2644, 2657–58 (2014).

⁶⁹ See, e.g., WOOD, *supra* note 57, at 513 (describing the Constitution as “an aristocratic document designed to check the democratic tendencies of the period”).

⁷⁰ The people who were able to vote and thus needed to be convinced in 1787 are only a small subset of those who are able to vote now. However, the meaning of this popular ratification process was to create the constitutional value that the *citizens* of United States of America—now a larger body—were given the power to create or reject, and to always continually oversee their government. As such this necessary support is not the votes needed for ratification, but the acquiescence necessary to prevent another revolution.

consent of the governed and enshrined popular sovereignty and democracy as the value that has won the day in our contemporary understanding of our founding.⁷¹ Popular sovereignty is now a constitutional value that colors the entire founding document, as it should. In this way we are haunted and always kept in check by their grand and effective rhetoric.⁷² It is only proper that we accept our Constitution as a document protecting popular sovereignty, the belief of countless Americans who played no role in the ratifying debates but read the Constitution in its plain text as a document focused on them. It is that interpretation, and only that interpretation, that passes muster.

As many textualists have argued in the context of statutory interpretation, the document whose letter becomes the law is often a messy reflection of compromise more than it is a representation of a singular discernable will of a collective congress.⁷³ Even if we do not read into the Constitution the populist ideology that accomplished its ratification, we must not read it out in favor of an anti-populist interpretation that would belie the process. At best, the text of our Constitution has multiple readings to reflect the compromises between conflicting readings, intentions, and understandings.

Given the lack of consensus in scholarship about the original understanding of the Tenth Amendment, a textual reading of the Tenth Amendment is needed, and more than adequate to reinvigorate popular sovereignty.⁷⁴ We should take insights from contract law and statutory interpretation to discover a constitutional textualism that embodies this perfect, delicate, and necessary compromise between the federalists, the anti-federalists, and the people. We have a founding document that can be construed in different ways because it needed to be—and was—even as it was written.

⁷¹ See Amar, *supra* note 9, at 761 (arguing that despite anti-populist intentions, “In fact, [the ratification of the Constitution] was the most participatory, majoritarian (within each state) and populist event that the planet Earth had ever seen”).

⁷² Indeed, it is often the non-binding pieces of rhetoric that emphasize the people, such as the Preamble to the Declaration of Independence, or the Preamble to the Constitution, that are quoted to give context to Constitution. See, e.g., President Barack Obama, Inaugural Address (Jan. 21, 2013) (beginning his speech with the Preamble to the Declaration of Independence and then using the phrase “we the people” five times as the unifying theme of his address).

⁷³ John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 99 (2006) (“[S]emantic meaning is the currency of legislative compromise.”).

⁷⁴ Compare *United States v. Darby*, 312 U.S. 100, 124 (1941) (“There is nothing in the history of its adoption to suggest that it was more than declaratory . . .”), with *United States v. Butler*, 297 U.S. 1, 68 (1936) (“[I]t follows that those [powers] not expressly granted, or reasonably to be implied from such as are conferred, are reserved to the states or to the people. To forestall any suggestion to the contrary, the Tenth Amendment was adopted.”).

B. *Early Interpretations*

For the first one hundred and fifty years of the Republic, the Supreme Court debated the meaning of the reserved powers in the Tenth Amendment, all the while acknowledging popular sovereignty. In what is widely viewed as the first significant Supreme Court case on the delineation of sovereignty, *Chisholm v. Georgia*,⁷⁵ the Court extensively discussed popular sovereignty and this served as a resounding affirmation of the importance that the early Court placed upon it within the structure of constitutional powers. The opinions of Chief Justice John Jay—one of the original authors of the federalist papers—and Justice James Wilson—a member of the committee of detail which selected the words of the Constitution at the Philadelphia Convention—both expounded on popular sovereignty.⁷⁶

In both of their discussions, there is an indication that the people as a collective were still powerful actors in the Constitution, and that they held powers that were separate from the states.⁷⁷ Chief Justice Jay wrote, “the sovereignty of the nation is in the people of the nation, and the residuary sovereignty of each State in the people of each State,”⁷⁸ and that after the Revolution “the sovereignty devolved on the people . . . [who] have none to govern but themselves; the citizens of America are equal as fellow citizens, and as joint tenants in the sovereignty.”⁷⁹

Similarly, Justice Wilson claimed that the people retained not only “Supreme Power” over the federal government but over state governments through their similar systems of republican governance.⁸⁰ This meant that the people, when ratifying the Constitution, not only guarded the power they gave to the federal government and retained over it, but the power they gave and retained over states as well. Wilson argued that there must be substantive powers reserved by the people from their state governments that they retained and guarded: “[T]he citizens of Georgia . . . as a part of the ‘People of the United States,’ did not surrender the Supreme or Sovereign Power to that State; but, as to the purposes of the Union, retained it to themselves.”⁸¹

⁷⁵ 2 U.S. 419 (1793) (suit against the state of Georgia for payments owed for goods provided during the Revolutionary War).

⁷⁶ Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 628 (2010).

⁷⁷ Kurt T. Lash, *On Federalism, Freedom, and the Founders’ View of Retained Rights: A Reply to Randy Barnett*, 60 STAN. L. REV. 969, 982 (2008).

⁷⁸ *Chisholm*, 2 U.S. at 471 (opinion of Jay, C.J.).

⁷⁹ *Id.* at 471–72.

⁸⁰ *Id.* at 457 (opinion of Wilson, J.).

⁸¹ *Id.* There is a reading of this opinion that assumes that Justice Wilson meant that the

Nearly fifty years later, in *Martin v. Hunter's Lessee*,⁸² Justice Story reaffirmed both “the people of the United States” as the creators of constitutional law and also as a body that was capable of carefully granting, prohibiting, and structuring the powers of the federal and state governments as they “deem[ed] proper and necessary . . . according to their own good pleasure.”⁸³ In this balancing of powers, Justice Story had “little doubt” that the people could also “reserve to themselves those sovereign authorities which they might not choose to delegate to either.”⁸⁴ Justice Story’s portrait of federal powers—including those that gave the Court supremacy on all matters of constitutional interpretation—required powers to flow directly from the sovereign people to the federal government, rather than via the powers of the states.

The first Supreme Court Justice to explicitly acknowledge the popular sovereignty enshrined within the Tenth Amendment was Justice Taney, who did so in his final opinion before his death. In *Gordon v. United States*,⁸⁵ Justice Taney declared that the Tenth Amendment was a strict limit upon the federal government that prevented it from encroaching on the pre-constitutional sovereign powers of the states *or* the people.⁸⁶ He further suggested that if the federal government did so encroach, it is the responsibility of the Court to strike down such laws.⁸⁷

Concurring in *United States ex rel. Turner v. Williams*,⁸⁸ Justice Brewer explicitly stated that the Tenth Amendment’s reservation of powers in the people had not yet been given its due.⁸⁹ He suggested that, either contrary or in addition to the existing ratification procedures in Article V, the people as a collective—and not merely their representative governments—must act directly in order to grant any more powers to their expanding governments.⁹⁰

people guarded their power only by guarding states’ power. I find this inconsistent with Justice Wilson’s earlier acknowledgement that republican governance created ultimate oversight power in the people. Since both governments were republican and so both have a relationship of subservience to the power of the people, the states did not, nor could not, subsume all the powers of the people.

⁸² 14 U.S. 304 (1816) (establishing the Supreme Court’s supremacy over state courts on matters of constitutional interpretation).

⁸³ *Id.* at 324–25.

⁸⁴ *Id.*

⁸⁵ 117 U.S. 697 (1864) (concerning the Court’s appellate jurisdiction over cases from the Court of Claims).

⁸⁶ Justice Taney carefully remembers to include the powers of the states “or the people” in his discussion of the Tenth Amendment. *Id.* at 705.

⁸⁷ *Id.*

⁸⁸ 194 U.S. 279 (1904).

⁸⁹ *Id.* at 295–96 (Brewer, J., concurring).

⁹⁰ *Id.*

However, this idea of direct action by the people to redefine the limits of their delegated sovereignty—via constitutional amendment at least—did not live long. The Court disagreed with this suggestion of Justice Brewer’s and held in *United States v. Sprague*⁹¹ that the people did not retain the power to go around Congress and amend the Constitution. Justice Roberts wrote for the Court that the power to unilaterally amend the Constitution exceeded the people’s reserved powers. Rather, that power had been previously delegated to Congress and their state conventions through the process set up Article V.⁹²

A general principle that *Sprague* suggests is that once delegated, the powers of the people may not be taken back, other than through the process of amending the document that delegated that power. As a specific rule it also suggests that the power to amend the Constitution is just such a delegated power. That means that the sovereignty of the people remains as the original source of authority and continued government legitimacy, but that the people cannot be a *supreme* sovereign authority in a true sense because they have been limited by their own delegation. Unless of course, they decided to destroy and remake the entire government, in which case such authority must be beyond reproach.

In *Missouri v. Holland*,⁹³ Justice Holmes suggested that in competing state and governmental powers, there was a substantive difference in these realms of power that ought to define their proper separation. He argued that in the realm of traditional state power, the Tenth Amendment might be a limit on federal power. However, even in this realm of traditional state power, there was a balancing test that involved weighing the competing interests. “The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment.”⁹⁴ He went on to decide the case based on the height of federal interest compared to the transitory nature of the state interest.

In the 1904 case *United States v. Butler*,⁹⁵ the Court first struck down a law as a violation of the Tenth Amendment, thus declaring for the first time that the Tenth Amendment must not be a mere empty

⁹¹ 282 U.S. 716 (1931) (holding that the Constitution gives Congress the exclusive power to decide upon the method—state legislature or constitutional conventions—of ratifying new constitutional amendments).

⁹² *Id.* at 733–34.

⁹³ 252 U.S. 416 (1920) (upholding the supremacy of federal treaty-making powers over state powers to regulate migratory birds, the Tenth Amendment notwithstanding).

⁹⁴ *Id.* at 433–34.

⁹⁵ 297 U.S. 1 (1936) (holding that an agricultural subsidy coupled with a requirement to reduce crop production exceeded federal powers and interfered with the reserved powers of the states).

statement, but a source of law for figuring out what powers were granted and where they currently reside. Justice Roberts’s majority opinion declared: “The question is not what power the Federal Government ought to have, but what powers in fact have been given by the people.”⁹⁶ The Court reasoned that way based on the very presence of the Tenth Amendment and its careful language implying that those powers not delegated were reserved and therefore a “prohibited end” to the federal government.⁹⁷ Finally, rather than a normative question about constitutional meaning, the Tenth Amendment made the delineation of sovereign powers a question of constitutional textual interpretation.⁹⁸

In summary, for the first few hundred years, the Court continually affirmed the existence of popular sovereignty within the Constitution, only debating its extent when compared to the other sovereign powers held by the federal and state governments. However, the people dropped out of the equation, as the next Section will discuss, as the Court began considering the Tenth Amendment as a battleground for debating the lines between state and federal power.

C. *Continued Debate: Truism to Revival as an Enforceable Limit*

Following *United States v. Butler*, the size of the federal government drastically changed in the early twentieth century. After the dust settled following the New Deal’s expansion of federal power,⁹⁹ the Court entered a period where it considered very few limits to federal power. Until the 1970s, no one assumed that the Tenth Amendment could be an enforceable limit on national power.¹⁰⁰

This is in large part because of the 1941 case *United States v. Darby*,¹⁰¹ in which the Court decided that it was within Congress’s power under the Commerce Clause to regulate—through the Fair Labor Standards Act—employees of companies engaged in purely intra-state commerce. Darby Lumber claimed that this regulation infringed on state sovereignty in violation of the Tenth Amendment. In response to

⁹⁶ *Id.* at 63.

⁹⁷ *Id.* at 68.

⁹⁸ For an early discussion of the early twentieth century potential for spending power limitations of the Tenth Amendment long before *Dole*, see *The Tenth Amendment as a Limitation on the Powers of Congress*, *supra* note 55.

⁹⁹ See generally *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding federal power to legislate under the Commerce Clause following a period of Court resistance).

¹⁰⁰ H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 634 (1993).

¹⁰¹ 312 U.S. 100 (1941).

this Tenth Amendment claim, the Court stated with decisive language that:

The [Tenth] amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.¹⁰²

The Court also relied on the history of the Court's debate on the Tenth Amendment—the same history discussed above—and yet the Court interpreted none of precedent (the Court did not mention *Butler*) as recognizing the Tenth Amendment's substantive power. Called empty by the Court, *Darby* for a time eliminated the potential power of the Tenth Amendment as a basis for declaring federal or state laws unconstitutional.¹⁰³ It was over thirty years before the Court would reconsider this reading of the Tenth Amendment. Although the Court did not find that the federal wage and salary controls at issue in *Fry v. United States*¹⁰⁴ interfered with state sovereignty, it posited that the Tenth Amendment may be a bit more than a truism.

While the Tenth Amendment has been characterized as a “truism,” stating merely that “all is retained which has not been surrendered,” it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.¹⁰⁵

As of 1975, the Tenth Amendment was back on the table as a potential substantive piece of law.

The next year, in *National League of Cities v. Usery*,¹⁰⁶ the Court quoted the same language from *Fry*¹⁰⁷ along with language from *New York v. United States*¹⁰⁸ to end the period of the Tenth Amendment as a mere “truism.” It struck down the application of the Fair Labor

¹⁰² *Id.* at 124.

¹⁰³ See Erwin Chemerinsky, *Is the Rehnquist Court Really That Conservative?: An Analysis of the 1991–92 Term*, 26 CREIGHTON L. REV. 987, 988–89 (1993) (discussing the political realities after *Darby* that further enforced the weakness of federalism in this period).

¹⁰⁴ 421 U.S. 542 (1975).

¹⁰⁵ *Id.* at 547 n.7 (citation omitted).

¹⁰⁶ 426 U.S. 833 (1976) (quoting *Darby*, 312 U.S. at 124).

¹⁰⁷ *Id.* at 842–43.

¹⁰⁸ *Id.* at 843; *New York v. United States*, 326 U.S. 572, 586 (1946) (“Concededly a federal tax discriminating against a State would be an unconstitutional exertion of power over a coexisting sovereignty within the same framework of government.”).

Standards Act upon state employees as an illegal interference with state sovereignty.¹⁰⁹

In a scathing dissent, Justice Brennan criticized the Court for both its departure from precedent,¹¹⁰ and also for confusing the relationship between the powers delegated by the people and the powers reserved to the states. To Justice Brennan, the Tenth Amendment’s “clear wording” “differentiat[ed] ‘the people’ from ‘the States,’” and any powers once within the sovereignty of the people and then delegated to Congress, the states could not claim.¹¹¹ As such, if it is within Congress’s commerce power, the people gave this power to Congress and the states cannot claim it. Brennan’s defense of a separate and enforceable sphere of popular sovereignty was the last the Court has seen in forty years.

Nine years later, the Court reversed itself and overturned *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*.¹¹² In *Garcia*, the Court took a weak reading of the Tenth Amendment, arguing instead that the structural balance of powers protections built into the rest of the Constitution sufficiently delineated state and federal powers—and protected their interests from encroachment—without the Tenth Amendment. Specifically, political safeguards built into the representative structure of the Constitution would protect federalism concerns.¹¹³ The will of the people would emerge through state lawmaking and be protected by their federal representatives who would protect the interests of their states as much as the federal government as a whole.¹¹⁴ The Court also recognized the subjective nature of the “traditional” state sovereignty test, and the resulting risk of judicial activism overtaking any analysis of what was “traditional” and what was not.¹¹⁵

¹⁰⁹ *Nat’l League of Cities*, 426 U.S. at 845.

¹¹⁰ *Id.* at 861–62 (Brennan, J., dissenting).

¹¹¹ *Id.* at 868 n.9.

¹¹² *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (overruling *Nat’l League of Cities*, 426 U.S. 833).

¹¹³ *Id.*; see also *Gregory v. Ashcroft*, 501 U.S. 452, 479 (1991) (“As long as ‘the national political process did not operate in a defective manner, the Tenth Amendment is not implicated.” (quoting *South Carolina v. Baker*, 485 U.S. 513, 513 (1988))); Lash, *supra* note 4, at 876 (“In other words, the Court seems unsure whether federalism is simply a good idea that Congress ought to respect, or whether federalism is in fact a constitutional right of the people that Congress must respect.”).

¹¹⁴ *Garcia*, 469 U.S. at 546.

¹¹⁵ “Any rule of state immunity that looks to the ‘traditional,’ ‘integral,’ or ‘necessary’ nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes.” *Id.* at 546–47; see also Arthur J.R. Baker, *Fundamental Mismatch: The Improper Integration of Individual Liberty Rights into Commerce Clause Analysis of the Patient Protection and Affordable Care Act*, 66 U. MIAMI L. REV. 259, 295–96 (2011).

Once again—as Justice Powell noted in his dissent—the Tenth Amendment had no power.¹¹⁶ Justice Powell accused the Court of paying “only lipservice” to state sovereignty, federalism, and “barely acknowledg[ing] that the Tenth Amendment exists.”¹¹⁷ For Justice Powell, if the Tenth Amendment didn’t reflect that there were limits beyond enumeration, why bother? The Tenth Amendment served the purpose of making sure that in addition to the limits in the rest of the Constitution, the federal government did not touch what always belonged to the states. A weak Tenth Amendment and broad Commerce Clause gave the federal government unlimited power and created a “view of federalism [that] relegate[s] the States to precisely the trivial role that opponents of the Constitution feared they would occupy.”¹¹⁸

In a portion of his dissenting opinion, Justice Powell quotes an edited version of the Tenth Amendment: “That Amendment states explicitly that ‘[t]he powers not delegated to the United States . . . are reserved to the States.’”¹¹⁹ This particularly edited version—omitting the portion of the Tenth Amendment which discusses the powers prohibited to the states, and the powers reserved to the people—is the one that subsequently gained momentum.¹²⁰ This selective reading, in effect, recasts the Tenth Amendment as exclusively a protection of retained state sovereignty. Furthermore, Justice Powell—like the majority—claimed state sovereignty had a closer relationship with the people and would express their will and protect their liberties through that relationship.¹²¹ Justice Powell even hinted at the idea that through direct observation and democratic oversight, the people share the power of lawmaking with and through state sovereignty.¹²² Thus from Justice Powell, we not only have a state sovereignty edit of the Tenth Amendment, but a strong rationale for wrapping up the powers reserved to the people into state sovereignty.

The Tenth Amendment as a states’ rights amendment is a logical emergence from the cases that were the battleground of its resurgence.

¹¹⁶ *Garcia*, 469 U.S. at 559–60 (Powell, J., dissenting) (“Despite some genuflecting in the Court’s opinion to the concept of federalism, today’s decision effectively reduces the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the Commerce Clause.”).

¹¹⁷ *Id.* at 575.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 574.

¹²⁰ Though he elsewhere quotes the Tenth Amendment in its entirety. *Id.* at 567, 574.

¹²¹ *Id.* at 571–72.

¹²² *Id.* at 575–76 (“[W]e identified the kinds of activities engaged in by state and local governments that affect the everyday lives of citizens. These are services that people are in a position to understand and evaluate, and in a democracy, have the right to oversee . . . and that the States and local governments are better able than the National Government to perform them.” (citation omitted)).

Since *Darby*, the decline and rise of the Tenth Amendment as an enforceable limit on federal power occurred in cases about federal laws that regulated state or in-state employment. From this context, the rights of states as semi-independent sovereigns were the agenda through which advocates framed the reinvigoration of the Tenth Amendment—thereby ignoring popular sovereignty.¹²³

Ten years after *Garcia*, in *U.S. Term Limits, Inc. v. Thornton*,¹²⁴ the Court heard a case on the Tenth Amendment that made a popular sovereignty argument in addition to a state sovereignty claim for the first time since *Sprague*.¹²⁵ Arkansas had enacted, by a popular ballot measure, a law that placed term limits on the state's congressional representatives.¹²⁶ However, finding that this was an impermissible use of powers the people had delegated away to Congress, the Court struck down the Arkansas law.¹²⁷ The Court also rejected the argument that placing term limits on its representatives was part of the state of Arkansas's reserved powers under the Tenth Amendment based on the theory that a term limit power could not be pre-constitutional and thus retained; and furthermore the Constitution itself is the exclusive source of qualifications.¹²⁸ The Court made a somewhat stealthy popular sovereignty argument, saying that it could not be within the pre-constitutional power of the states—or the people of the several states—to change the term limits of their representatives, because those powers originated with the union and therefore must have belonged originally to the people of the United States as a whole before being delegated exclusively to Congress.¹²⁹ The Court relied on the Tenth Amendment, debates from the founding, and early arguments of Chief Justice John Marshall to support the proposition that these powers were beyond state sovereignty because they were powers created at unification, whose sovereign authority could not come from state governments.¹³⁰ In this

¹²³ This is possibly—as I will discuss extensively later in this Article—because it was a problem for the Court to reconcile how sovereign spheres of power could be both absolute and overlapping, and popular sovereignty is an overlapping, overseeing, and overarching sovereignty. It is hard to figure out where popular sovereignty ought to be if it would then create an absolute limit on state and federal power.

¹²⁴ 514 U.S. 779 (1995).

¹²⁵ *Id.*; *United States v. Sprague*, 282 U.S. 716 (1931).

¹²⁶ *Thornton*, 514 U.S. at 783–85.

¹²⁷ *Id.* at 800–01.

¹²⁸ *Id.*

¹²⁹ *Id.* at 794.

¹³⁰

[H]istorical materials, our opinions, and the text of the Tenth Amendment draws a basic distinction between the powers of the newly created Federal Government and the powers retained by the pre-existing sovereign States. As Chief Justice Marshall explained, “it was neither necessary nor proper to define the powers retained by the

way, though the opinion may seem to rely on language about two sovereigns, it actually relies on the belief in three¹³¹: two with pre-constitutional original powers—the people and the states—and the federal government, which could only have delegated sovereign powers coming either from the states or the people. Those powers that originated with the union then necessarily came *not from the states* but from *the people of the United States*.

In dissent, Justice Thomas discussed these popular sovereignty concerns directly.¹³² Justice Thomas disagreed with the Court's suggestion that "the people of the United States" rather than "the people of the several states," were "the people" of the Tenth Amendment, maintaining instead that "the people of the several States are the only true source of power."¹³³ Confidently rejecting the notion of "the people of the United States" and their popular sovereignty at all, he saw the last phrase of the Tenth Amendment as nothing more than a "careful" decision by the founders not to take a side on the distribution of powers between the people of the states and their governments.¹³⁴ Justice Thomas's interpretation of the Tenth Amendment is that through participation in state government "[i]t is up to the people of each State to determine which 'reserved' powers their state government may exercise."¹³⁵ The popular sovereignty recognized by the Tenth Amendment was the sovereignty of the people of the states to then further empower their state governments. To Justice Thomas, the undifferentiated people of the entire nation was not contemplated by a Constitution that specifies so many ways in which the people can act through state identities,¹³⁶ and by implication the people's interests are

States. These powers proceed, not from the people of America, but from the people of the several States; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument."

Id. at 801 (quoting *Sturges v. Crowninshield*, 4 Wheat. 122, 193 (1819)).

¹³¹ William Barrante articulated a similar textual reading of the Tenth Amendment as creating three levels of power. However, he interpreted the power of individuals or corporations to act in private and non-political capacities as the powers preserved by it, and further limited their scope only to what the state choose to leave them. See Barrante, *supra* note 16, at 273–74. For reasons that will become apparent in my later discussion of state tyranny, see *infra* Section II.A, I cannot accept this reading.

¹³² *Thornton*, 514 U.S. at 846 (Thomas, J., dissenting).

¹³³ *Id.* at 847.

¹³⁴ *Id.* at 848.

¹³⁵ *Id.*

¹³⁶ *Id.* at 848–49 ("[It makes] no sense to speak of powers as being reserved to the undifferentiated people of the Nation as a whole, because the Constitution does not contemplate that those people will either exercise power or delegate it. The Constitution simply does not recognize any mechanism for action by the undifferentiated people of the Nation . . . [It requires] conventions of the people in each State [and] . . . Members of Congress to be chosen State by State . . . Even the selection of the President—surely the most

protected by their states so they have nothing to fear from them and need no further constitutional protections. Justice Thomas's dissent,¹³⁷ along with his careful recasting of "the people" as the people of the states, laid the foundation for the new and expansive Tenth Amendment that arose in the 1990s.¹³⁸

In *New York v. United States*,¹³⁹ the Court held that "Congress may not simply 'commandeer[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program'" and by putting unconstitutionally coercive conditions upon them.¹⁴⁰ With this holding, we entered a new period of the Tenth Amendment as a powerful tool for striking down federal legislation that infringes on state sovereignty.¹⁴¹

Five years later in *Printz v. United States*¹⁴², the Court struck down another law as illegal interference on state powers. Writing for the majority, the great textualist of the Court, Justice Scalia asserted, "[i]t is incontestable [sic] that the Constitution established a system of dual sovereignty."¹⁴³ Although he quotes the full text of the Amendment including the final four words, he discusses retained powers, residual powers, and sovereignty concerns only between the states and the federal government.¹⁴⁴

Justice Scalia mentions the people only twice. First, quoting the *Federalist Papers* to argue for the people as objects of governance: "Federal Governments would exercise concurrent authority over the people—who were, in Hamilton's words, 'the only proper objects of government.'"¹⁴⁵ And second, to imply that the people surrendered all their power to the state and federal governments, but that their interests are nonetheless protected by the two governments. He again quoted

national of national figures—is accomplished by an electoral college made up of delegates chosen by the various States In short, the notion of popular sovereignty that undergirds the Constitution does not erase state boundaries, but rather tracks them.").

¹³⁷ Farhat, *supra* note 47, at 1164 ("While the majority approaches the Qualifications Clause from a point of view of *expressio unius est exclusio alterius*, Thomas frames the issue as whether the states have power to act where the Constitution does not specifically preclude action. His affirmative answer carries revolutionary implications for those who advocate a return to constitutional federalism." (citations omitted)).

¹³⁸ See Sprick, *supra* note 59.

¹³⁹ 505 U.S. 144 (1992).

¹⁴⁰ *Id.* at 161 (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981)).

¹⁴¹ *Cf. Shelby Cty., Ala. v. Holder*, 133 S. Ct. 2612 (2013); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012); *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995); *Garcia v. San Antonio Trans Auth.*, 469 U.S. 528 (1985).

¹⁴² 521 U.S. 898 (1997).

¹⁴³ *Id.* at 918 (citations omitted).

¹⁴⁴ *Id.* at 919.

¹⁴⁵ *Id.* at 920 (citing THE FEDERALIST NO. 15, at 109).

from the *Federalist Papers*: “[T]he power surrendered by the people is first divided between two distinct governments Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.”¹⁴⁶ This move is incredibly clever, because it simultaneously recasts or ignores popular sovereignty in the Tenth Amendment, while emphasizing how dual competing sovereignty—modern federalism—can protect the rights and interests of the people.

Scholar Kurt Lash has pointed out that that as a result of these kinds of arguments about federalism, the Tenth Amendment has developed a robust sense of *individual rights*—rather than collective rights—that have bled into what would otherwise be a discussion about *collective powers*.¹⁴⁷ Federalism is then a structural protection for states’ power, and merely a protection of the people’s individual rights from government encroachment.¹⁴⁸ This comes at the expense of federalism as a judicially enforceable protection of collective rights—specifically the rights of the people to a more direct self-rule. Lash argues this comes at the expense of the rights of the people to collectively form and rule themselves through local government, while I argue it ignores the vital role popular sovereignty plays as a structural limit—overseeing and limiting government power.¹⁴⁹

Today, national popular sovereignty is overlooked not only in the Tenth Amendment, but also in debates about federalism and the separation of powers, generally. Akhil Amar has reminded us that “the people” of the Tenth Amendment are the same “the People” of the Preamble and of the Ninth Amendment, and as such, there is no reason to construe this inclusion of “the people” as any less important.¹⁵⁰ It is time to remember and revive “the people” in the Tenth Amendment.

II. THE THIRD SOVEREIGN

This Part primarily lays out a textual and structural argument for the Tenth Amendment’s reservation of powers to the people as a third

¹⁴⁶ *Id.* at 922 (citing THE FEDERALIST NO. 51, at 323).

¹⁴⁷ Lash, *supra* note 4, at 875.

¹⁴⁸ *Id.* at 885–86.

¹⁴⁹ Lash says of the Tenth Amendment that: “The Founders understood that the judiciary would enforce the people’s retained right to local self government along with every other right.” *Id.* at 876.

¹⁵⁰ AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 122 (1998). Amar has argued elsewhere that the people of the nation retain the right to amend the Constitution outside of Article V. Amar, *supra* note 9.

and separate sovereign.¹⁵¹ It begins by discussing the Court's recent opinion in *Comstock v. United States*, and how it lays the groundwork for a judicially enforceable popular sovereignty Tenth Amendment by acknowledging overlapping sovereignties and proposing an accommodation framework for navigating them.¹⁵² It then proceeds to discuss various textual and structural counterarguments. After addressing these counterarguments is an overview of the debates surrounding who "the people" are.¹⁵³ Although many argue that "the people" means the citizens of the states as represented by their state governments, I conclude that "the people" must define powers held directly by a collective—as opposed to a government or many individuals with severable rights. I argue that whether "the people" are the citizens of each state or a national collective, their powers are dangerously ignored in the current interpretation. The powers and sovereignty of the people are not concurrent with state governments and their interests cannot, and should not, be entirely entrusted to state sovereignty to protect. Finally, I provide a workable conception of what some of the powers of the people may be—although there may be others—based on the direct language of the Constitution and the implications of the Constitution's general limits on state and federal powers.

¹⁵¹ Generally, the Tenth Amendment does not read as an attempt to very carefully limit the powers left to the people. The Tenth Amendment discusses the distinctions between delegated and reserved powers, and in this sense, relies much more on general principles to define the appropriate realms of sovereignty than it does on careful and intricate rules to limit them. See *Martin v. Hunter's Lessee*, 14 U.S. 304, 326 (1816) ("On the other hand, this instrument, like every other grant, is to have a reasonable construction, according to the import of its terms; and where a power is expressly given in general terms, it is not to be restrained to particular cases, unless that construction grow out of the context expressly, or by necessary implication."); Lash, *supra* note 18 (arguing that "expressly" was not assumed in the language of the Tenth Amendment, but rather was explicitly rejected, meaning the Amendment speaks of general powers, not their express and exact limits).

¹⁵² 560 U.S. 126 (2010).

¹⁵³ The debate about if "the people" or "persons" can include non-citizens has also reached the Court. In 1990, a plurality of the Court in *United States v. Verdugo-Urquidez* concluded that "the people" mentioned in the Constitution's Preamble, Article I, and the First, Second, Fourth, Ninth, and Tenth Amendments is "a term of art" referring "to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community," in contrast with "the relatively universal term of 'person.'" *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265–66 (1990); see also J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 475 (2007).

A. *Distinct or Overlapping Powers: Comstock and Accommodation*

Previously, discussion of constitutional dual sovereignty has presumed that sovereign powers are necessarily hard limits upon one another¹⁵⁴—that they are ostensibly non-overlapping.¹⁵⁵ Given this assumption about sovereign powers, it is unsurprisingly difficult for the Court to consider how popular sovereignty could co-exist in any meaningful way beyond the theoretical ability to overthrow and reconstitute the government if consent of the governed really goes out the window. What sovereign power could the people exercise entirely without their government? Or what powers belong exclusively to the people that the federal and state governments could absolutely never touch?¹⁵⁶

This hard line harkens back to an older assumption about sovereignty and powers: the supreme and absolute power over a geographic region.¹⁵⁷ However, not only is that assumption about sovereign powers one that has been long challenged and discarded in political theory, but it has also been discarded in other realms of American constitutional law, namely the doctrines that protect and limit American Indian tribal sovereignty.¹⁵⁸ I will discuss both of these later, but in the history of the Court's discussion of sovereignty, the time for the Court to consider such a complicated but realistic notion of *overlapping* and as a result *accommodating* sovereignties finally arrived in 2010.

In 2010, the Court decided *United States v. Comstock*.¹⁵⁹ In *Comstock*, the Court upheld 18 U.S.C. § 4248, a federal statute that allowed the Department of Justice to detain, and federal district courts to commit, mentally ill sex offenders after the completion of their criminal sentences.¹⁶⁰ Writing for himself and six other Justices, Justice Breyer upheld the law as within Congress's power to enact under the Necessary and Proper Clause.¹⁶¹ Justice Breyer's opinion also discussed

¹⁵⁴ See, e.g., Kathleen M. Sullivan, *Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton*, 109 HARV. L. REV. 78, 98 (1995) (describing the *Thornton* opinion as an anti-federalist revival that relied heavily on a formalism that ignored the potential of overlapping powers).

¹⁵⁵ See *supra* note 24 (on non-overlapping preemption).

¹⁵⁶ This question explains much of the reliance on the Ninth Amendment, and the tendency to roll rights concerns into Tenth Amendment discussions.

¹⁵⁷ See generally Dan Philpott, *Sovereignty*, STAN. ENCYCLOPEDIA PHIL. (June 8, 2010), <http://plato.stanford.edu/archives/sum2014/entries/sovereignty>.

¹⁵⁸ See *infra* Section III.A.

¹⁵⁹ 560 U.S. 126 (2010).

¹⁶⁰ *Id.* at 130.

¹⁶¹ *Id.* at 133.

and rejected the argument that by wading into the states' traditional power to commit the mentally ill, 18 U.S.C. § 4248 "invad[ed] the province of state sovereignty" and was thus an unconstitutional violation of the Tenth Amendment.¹⁶² The majority reasoned that the limit of delegated power under the Tenth Amendment included the enumerated powers, as well as those required pursuant to those powers by the Necessary and Proper Clause.¹⁶³ These broader unenumerated powers are by definition not powers that the Constitution "reserved to the States," although they may include powers broad enough to overlap with traditional realms of state lawmaking.¹⁶⁴ The Court found the statute in question did not "invade state sovereignty or otherwise improperly limit the scope of 'powers that remain with the States.'"¹⁶⁵ Rather than characterize it as an impermeable limit on federal power, the Court proposed that "[t]o the contrary, [the Tenth Amendment] requires *accommodation* of state interests."¹⁶⁶

This innovative argument recognizes something long ignored in the debate about the Tenth Amendment and competing sovereign powers: it is nearly impossible to keep sovereign powers from overlapping in any system of non-authoritarian government. Powers kept in check must answer to another authority, another sovereign power.¹⁶⁷ *Comstock* offers the first real break with the idea of non-overlapping and mutually exclusive sovereignties in the Court's precedent.¹⁶⁸

In defining the scope of accommodation, the *Comstock* Court quoted *Darby*, not for its sweeping dismissal of the Tenth Amendment, but for the principle that Tenth Amendment should only be implicated as an enforceable limit on federal power when it interferes with "the core of sovereignty retained by the States."¹⁶⁹ This suggests that there are areas of one sovereign's power that extend over the other sovereign's yet do not infringe upon the heart of their powers that the Tenth

¹⁶² *Id.* at 143–44 (quoting *New York v. United States*, 505 U.S. 144, 155 (1992)).

¹⁶³ *Id.* at 144.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* (citing *id.* at 164 (Thomas, J., dissenting)).

¹⁶⁶ *Id.*

¹⁶⁷ See *infra* Part IV.

¹⁶⁸ See Margaret K. O'Leary, *Have No Fear (of "Piling Inference Upon Inference"): How United States v. Comstock Can Save the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act*, 97 CORNELL L. REV. 931, 961 (2012) ("Comstock's treatment of the Tenth Amendment illustrates a movement away from the 'traditional spheres of sovereignty' approach for deciding questions of constitutional allocation of power . . . [A]n objection based largely on a concept of mutually exclusive spheres of federal and state legislative action with rigid boundaries will not likely be persuasive.").

¹⁶⁹ *Comstock*, 560 U.S. at 144 (quoting *United States v. Darby*, 312 U.S. 100, 123–124 (1941)).

Amendment was meant to protect. And the Tenth Amendment requires that the test in these cases of overlapping sovereignty is whether one sovereign accounted for, and accommodated, the interests of the other.

Concurring in *Comstock*, Justice Kennedy expressed reservations about the potential for a broadening of federal powers, and so advised caution. Kennedy feared that by first inquiring about the scope of federal powers before asking what the core of state sovereignty is, we risk begging the question. Therefore, Justice Kennedy asserted that to protect reserved powers we ought to first assess the core of state sovereignty *as the limit* created by the Tenth Amendment.¹⁷⁰ Justice Thomas thought the time for a cautionary note was past and argued vehemently in dissent that the Court's decision undid the Tenth Amendment.¹⁷¹

Until *Comstock*, the fiction that the various sovereign powers of governance do not overlap was entrenched within the Court's understanding of sovereign powers for over two centuries. Previously the Court has implicated the potential for overlapping sovereignty only in its discussion of preclusion—specifically if there are areas of sovereign power that overlap but where one sovereign's interest beats the other in time or superiority.¹⁷² The *Comstock* decision opens a door to the Court's understanding of the balance of powers as a more complicated and negotiated relationship between the federal government, the people, and the states. Now the Court acknowledges that no bright line rule will suffice, and no sharp limits can define how the powers of a government work. Sovereigns will often make laws that interfere with or overlap each other, and this—rather than being a problem—is a reality that requires sovereign powers to consider and accommodate the other's interest. It might even implicate a balancing test that evaluates if there was a sufficient level of accommodation given the interests at stake.¹⁷³

Because of this new recognition of overlapping and accommodating sovereignty, the Court should now be able to take seriously that the sovereignty of the people is protected by our Constitution and enforceable by the Court. While it is difficult to conceive of powers that the state and federal government cannot touch,

¹⁷⁰ *Id.* at 153–54 (Kennedy, J., concurring).

¹⁷¹ *Id.* at 154 (“The Court’s discussion of the Tenth Amendment invites the inference that restrictions flowing from the federal system are of no import when defining the limits of the National Government’s power . . .”).

¹⁷² See, e.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 806 (1995).

¹⁷³ See O’Leary, *supra* note 168, at 960 (“[F]ederal involvement in a traditional area of state sovereignty did not doom the statute under the Tenth Amendment . . . [so long as it] meet[s] the minimum threshold of accommodation of state interests required by the Tenth Amendment.”).

it is not difficult to conceive of powers that belong to the people, that are mediated by the government, but that require their consideration and accommodation. Sometimes the federal and state governments may be unconstitutionally interfering with the power of the people to—for example—make their own laws and be ruled by them. And in these instances, the Court should strike these laws down, not because they violate other constitutionally protected individual rights, but because they run afoul of the right of the people to rule themselves.

Following the Court's decision in *Comstock*, it should no longer be possible for the Court to ignore the textual argument for the powers of the people as the third—and original—sovereign of American government.¹⁷⁴ A Tenth Amendment that allows sovereign powers to overlap and requires their accommodation includes ample room for the powers of the people to be broadly defined and given similar consideration and accommodation as those extended to the federal and state governments. Since *Comstock*, the Court's conception of sovereignty, and the spheres of sovereign powers, has changed. No longer do these spheres have impermeable boundaries that prohibit one sovereign from putting a toe out of line and into the other's realm.¹⁷⁵

B. *Textual Argument for the Three Sovereigns*

The Tenth Amendment's full text is as follows: "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."¹⁷⁶

The most natural reading of the Tenth Amendment recognizes three spheres of sovereignty: powers belonging to the federal government, powers belonging to the states, and powers belonging to the people. Although the text is ambiguous enough to have caused centuries of debates on the division of federal and state power, it is even more ambiguous about the distribution of powers between the governments and the people.¹⁷⁷

¹⁷⁴ In a brief note, Kathryn Abrams argued that following the model of the Ninth Amendment, a structural reading of the Tenth Amendment could be a more enforceable protection of state sovereignty, and potentially to the rights of the people to political participation. See Kathryn Abrams, Note, *On Reading and Using the Tenth Amendment*, 93 YALE L.J. 723, 739 (1984).

¹⁷⁵ See Sullivan, *supra* note 154, at 96 (describing the Court's earlier view as "formal[ist] federalism" with an "essentialist notion of separate spheres" that bars one sovereign from "invading" the traditional realm of the other).

¹⁷⁶ U.S. CONST. amend. X.

¹⁷⁷ Barnett, *supra* note 76, at 626–27 (discussing the text of the Tenth Amendment and Justice Thomas's commentary on the division of power between the federal government, states, and the people in his dissenting opinions in *Thornton* and *Comstock*).

Generally, the Amendment defines the relationship between those spheres of power as follows.¹⁷⁸ It separates out those powers that are (a) not delegated to the federal government and (b) not prohibited by the Constitution to the states, and says that all those powers belong to the States “or to the people.”¹⁷⁹ The explicit use of “or” suggests that these powers are not entirely coextensive. For if the powers of the states and the people were coextensive, and the intent of the Tenth Amendment was to express that the powers of the people were always properly wielded by state government, surely “and” or “with” would be the better conjunction. The use of “or” implies that these powers are either entirely non-overlapping or, at a minimum, that some of these powers are separate rather than shared. Whether the powers of the states and the people are mostly separate or entirely so, the text of the Tenth Amendment also explicitly specifies another set of powers that must be retained by the people because they are (a) not delegated to the federal government and (b) prohibited by the Constitution to the states. Figure 1, below, provides a visual representation of the three spheres of overlapping powers outlined in the Tenth Amendment.

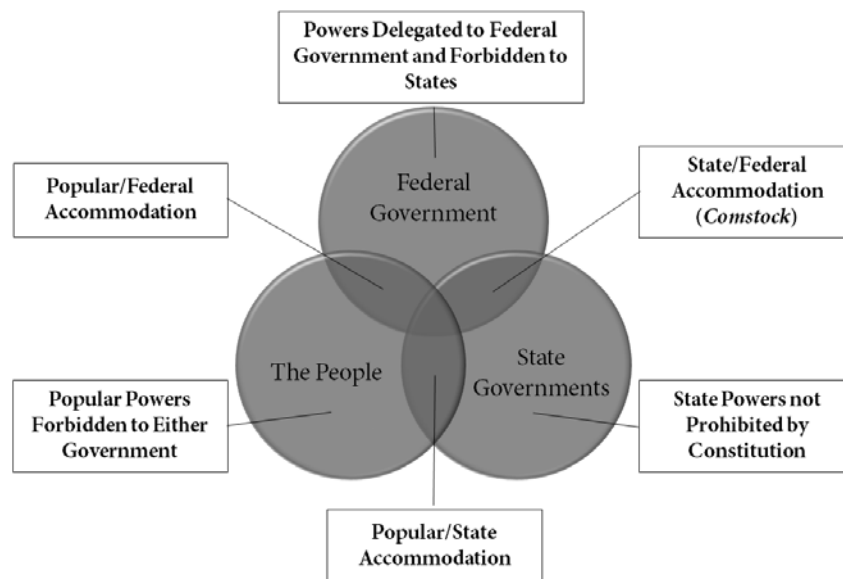


Figure 1: Overlapping Sovereign Powers

¹⁷⁸ U.S. CONST. amend. X.

¹⁷⁹ *Id.* (emphasis added).

The Constitution constructs a system of three sovereigns that negotiate and wield powers. However, this single visual representation does not capture the unique nature of the third sovereign. The people are at once one of the three sovereigns the Constitution contemplates as negotiating and wielding sovereign powers, and the overarching sovereign that all power comes from and would revert back to. While a shallow view of popular sovereignty would only view the people as a source of sovereign authority, no longer relevant, I argue that they are actually a continually powerful sovereign capable of revoking or reassuming delegated powers as pictured in Figure 2.

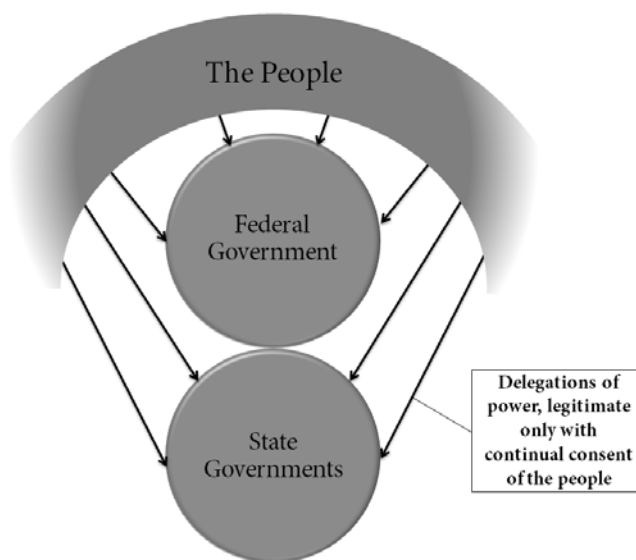


Figure 2: Overarching Sovereign

As mentioned earlier in this piece, Justice Scalia, Justice Thomas, and others have discounted the text and glossed over “the people” in the Tenth Amendment by reasoning that the last four words are redundant and unnecessary because two competitive governments sufficiently protect the people.¹⁸⁰ As Justice Scalia said, “[t]he great innovation” of dual sovereignty is that each government is incentivized to protect its powers and thereby limit the power of the other competing sovereign.¹⁸¹ “This separation of the two spheres is one of the Constitution’s

¹⁸⁰ See *supra* Section II.C (discussing *Printz v. United States*, 521 U.S. 898 (1997)); see also Jesse H. Choper, *The Scope of National Power Vis—Vis the States: The Dispensability of Judicial Review*, 86 *YALE L.J.* 1552, 1613 (1977).

¹⁸¹ *Printz*, 521 U.S. at 920.

structural protections of liberty” that protect any sovereign from amassing too much power and becoming tyrannical.¹⁸² But is that really what the Constitution says? Further, are our powers of self-governance really protected by two power-hungry and ever-expanding governments? If so, why add the provision about reserving powers to the people? Can government protect the people better than themselves?

The framers could not have conceived of how incredibly powerful our modern governments would become,¹⁸³ nor how diverse and complicated modern democracy would be. However, it is reasonable to assume that a people who just overthrew their government would be weary of it. The Tenth Amendment provides a rational and necessary set of perpetual checks on expanding government. And it carefully does not describe two sovereigns capable of holding all the powers necessary to rule in America, it describes three.¹⁸⁴

In addition to the two sovereign governments is the non-government sovereign that is the original source of all governmental powers, and that keeps government sovereigns legitimate by connecting them directly to the will and consent of the people. It is the people who retain ultimate supreme sovereign authority over both state and federal governments.¹⁸⁵ And indeed the people must have a separate voice—be a separate sovereign—in order to truly give legitimacy to either government. A people who could not disagree with and, if necessary, withdraw their consent from their government is a captured people whose government is certainly not a democracy (and it is not far-

¹⁸² *Id.* at 921.

¹⁸³ *New York v. United States*, 505 U.S. 144, 157 (1992) (“The Federal Government undertakes activities today that would have been unimaginable to the Framers . . . because the Framers would not have conceived that *any* government would conduct such activities”)

¹⁸⁴ See Amar, *supra* note 31, at 1491–92 (“[N]o other provision of the Constitution focuses so clearly on the triangular interrelations among the national government, the state governments, and the People themselves”); Sullivan, *supra* note 56, at 1939 (“The Tenth Amendment, viewed against this backdrop, expresses a triangular relationship among the federal government, state governments, and the people.”).

¹⁸⁵ In *Chisholm v. Georgia* is a seminal discussion of sovereignty in America that defines a necessary ultimate power retained by the people. Justice Wilson discussed three conceptions of sovereignty, and rejected all of them as inapplicable in the United States: (1) sovereign as opposite to subjects—deficient because the people are sovereigns and subjects; (2) sovereign as government of independent power—deficient because the people have power over the government; and (3) sovereign as the authority who makes and is above the law—deficient because the laws rest upon consent of the governed. See *Chisholm v. Georgia*, 2 U.S. 419, 457 (“As a citizen, I know the Government of that State to be republican; and my short definition of such a Government is, one constructed on this principle, that the Supreme Power resides in the body of the people. As a Judge of this Court, I know, and can decide upon the knowledge, that the citizens of Georgia, when they acted upon the large scale of the Union, as a part of the ‘People of the United States,’ did not surrender the Supreme or Sovereign Power to that State; but, as to the purposes of the Union, retained it to themselves.”).

fetched to call it a kind of tyranny). In the Tenth Amendment is skepticism of expanding governmental power, both federal and state.

In the constitutional debate about the Tenth Amendment is a considered focus on what, if any, necessary limits on federal power are created by reserving powers to the states. Whether there are powers forbidden to the federal government because they are retained by the states is a limit by structural implication that is currently given a lot of weight by the Court. Yet overlooked by the Court are several explicitly defined limits on federal and state powers created by the text of the Tenth Amendment. While the Tenth Amendment does not explicitly mention any powers “forbidden” to the federal government, it explicitly sets out that there must be some powers *forbidden to the states*. And since there is a broad set of powers *not delegated to the federal government*, there must be some powers that are not delegated to the federal government and forbidden to the states.¹⁸⁶ And those powers must be retained *only by the people*¹⁸⁷—though they may be subject to similar encroachment at the hands of either government that the adamant defenders of state sovereignty fear at the hands of the federal government.

I will discuss the powers of the people in more detail later,¹⁸⁸ though there must be some limits on governmental powers that are too obvious to state, and pausing on them now demonstrates how they fit into this textual and structural argument. The power to choose our governmental representatives, for example, is an obvious power that the state cannot itself exercise without the people—at least not in a democracy. However, there are other powers the government simply does not have, even if it followed all the constitutional proscriptions—the text of the Constitution does not explicitly prohibit all possible government misconduct, even the most egregious. There is some unspoken assumption of rationality behind our idea of what powers a government has. Governments cannot do anything within the rules as technically and hardly construed. We count on the political check to keep government from doing anything too crazy, but what if we had a

¹⁸⁶ Although it is possible there are no powers not delegated to the federal government or prohibited to the states, that presumes: (1) that the Constitution defines a rule with no applications, and (2) that all powers reside in either government sovereign, making the clause reserving powers to the people entirely pointless. This reading simply shreds too much of the text of the amendment and presumes too much governmental power to be acceptable.

¹⁸⁷ This kind of reasoning about retained powers has long been applied to discourse on the Ninth Amendment. Proponents of a fundamental rights reading of the Ninth Amendment argue that the reservation of rights to the people in the Ninth Amendment—with similar language and structure to the Tenth Amendment—creates an area of rights in addition to those explicitly protected by the rest of the Constitution that the Ninth Amendment prohibits any government from infringing upon. See McAfee, *supra* note 60, at 357–58.

¹⁸⁸ See *infra* Section II.D.

Congress or state legislature that agreed to take their remaining terms and pass whatever they wanted without caring about reelection? What if Congress began taxing all citizens at ninety-nine percent to directly improve the general welfare via the glory of government by building themselves solid gold offices? One can think through a number of unexpected and unacceptable government actions that are not otherwise unconstitutional, except we assume they cannot possibly have that power. We assume there are things that the government simply cannot do because it is beyond the authority we gave them.¹⁸⁹ But it is merely a gut assumption, without a constitutional basis that would allow a court to cite an absolute absurdity principle to strike down a government action that seems far beyond the scope of its powers.

Bringing the people back into the structuring powers of the Tenth Amendment solves the problem of its potential structural redundancy—or textual superfluity with the Ninth Amendment. The argument that the Tenth Amendment is a “truism” or a “tautology,”¹⁹⁰ rests on the logic that we assume all powers not delegated via the Constitution do not belong to the federal government anyway as a basic and intuitive rule of constitutional construction. Therefore, the limits of federal power are already limited by the Constitution’s silences—what was not delegated—and therefore the Tenth Amendment is redundant. It does no work other than to reiterate this basic interpretive rule.¹⁹¹ However, if you place the people back into the equation, the Tenth Amendment specifies that the federal and state governmental powers—even when combined—are not unlimited because according to the terms of the Tenth Amendment, there must be powers beyond them that keep them in check.¹⁹²

If the Tenth Amendment is not redundant, some argue the last four words at least do no more than what the Ninth Amendment does: state that the government cannot construe a silence as a potential

¹⁸⁹ John Locke states in the *Two Treatises of Government* that the power of the government is limited to the public good. It is a power “that hath no other end but preservation” and therefore cannot justify killing, enslaving, or plundering the citizens. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 135 (1869).

¹⁹⁰ *New York v. United States*, 505 U.S. 144, 157 (1992).

¹⁹¹ *Id.* at 156.

¹⁹² See Sullivan, *supra* note 56, at 1937–38 (“Writing in 1962, Norman Redlich argued that the closing phrase of the Tenth Amendment identified a collection of powers ‘possessed by neither the federal government nor the states.’” (quoting Norman Redlich, *Are There “Certain Rights . . . Retained by the People?”*, 37 N.Y.U. L. REV. 787, 807 (1962))); cf. Akhil Reed Amar, *Constitutional Redundancies and Clarifying Clauses*, 33 VAL. U. L. REV. 1, 20 (1998) (arguing that although the last three words of the Tenth Amendment are redundant and may add only emphasis, “as a matter of popular sovereignty, the amendment’s last three words echo the Preamble’s first three, reminding us that here, the People rule”).

restriction on the private individual rights of the American people.¹⁹³ However, this immediately butts up against the interpretative canon against superfluity.¹⁹⁴ The last four words cannot merely reiterate the Ninth without being entirely pointless. Not only would an individual rights Tenth Amendment conflate it with the Ninth¹⁹⁵ or make the Ninth Amendment redundant, it would be inconsistent with the additional substantive credit we give the Ninth Amendment's reference to "the people."¹⁹⁶ Any fundamental rights interpretation of the Tenth Amendment turns it into a pointless emphasis of the rights already protected by the rest of the Constitution and enshrined as powerful despite their unenumeration by the Ninth.¹⁹⁷ If the Amendment is not redundant, and the last few words not superfluous, then we must find an independent and rational purpose for those words: such as to safeguard popular sovereignty.¹⁹⁸

Finally, it is highly unlikely that "the people" refers to the state governments because not only is that another redundancy with the reference to the states in the Tenth Amendment, but also throughout the Constitution, the framers demonstrated the ability to name states more explicitly. The "state legislature" or "legislature thereof" a state is mentioned throughout the Constitution.¹⁹⁹ And throughout the Constitution are references to "states" that clearly indicate the government.

The debate about the Tenth Amendment and popular sovereignty has primarily been waged through different originalist arguments. However, it is surprising—or alternatively hypocritical—that in the reinvigoration of the Tenth Amendment brought on partially by a textualist reading of the powers reserved to the states, the powers reserved to the people have been ignored. The last few words of the

¹⁹³ Randy E. Barnett, *Kurt Lash's Majoritarian Difficulty: A Response to a Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 937, 937 (2008) (calling a collective interpretation "a projection of contemporary majoritarianism onto a text that is and was most naturally read as referring to the natural rights retained by all individuals, and to these rights alone").

¹⁹⁴ William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar's Bill of Rights*, 106 MICH. L. REV. 487, 532 (2007) (noting that "a textualist strongly presumes that each word in the Constitution has meaning rather than being surplusage").

¹⁹⁵ Cf. Lash, *supra* note 4, at 881 ("What seems most jarring to our ears today is the characterization of reserved powers as one of the retained rights of the people.").

¹⁹⁶ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹⁹⁷ McAfee, *supra* note 60, at 357–58 (further arguing that the history of the debate over the Tenth Amendment shows that it was not a fundamental rights provision along with the Ninth).

¹⁹⁸ See Stephen M. Durden, *Textualist Canons: Cabining Rules or Predictive Tools*, 33 CAMPBELL L. REV. 115, 124 ("[A]n interpretation of one constitutional provision must be incorrect if it causes another provision to become surplusage.").

¹⁹⁹ U.S. CONST. art. I, §§ 2, 3, 4, 8; *id.* art. II, § 1; *id.* art. IV, §§ 3, 4; *id.* art. V; *id.* art. VI.

Tenth Amendment seem to remain a truism despite their textual placement on the same level as state powers. This inconsistent application of textualism is long overdue revisiting, especially when the potential cost is democratic legitimacy.

C. *Who Are “the People”?*

In this Section, I go through the debate over who “the people” of the Tenth Amendment are. If we accept that the Tenth Amendment protects the power and sovereignty of the people against encroachment by state or federal government, we still must distill who “the people” are. There are several arguments on this point. I begin with the easiest to dispense with: that “the people” refers to a group of individual severable right holders. I then discuss and refute the most prominent interpretation: that “the people” are “the people of the several states” which are—in the context of the federal constitution—the governments of those states. Ultimately, I conclude that the text and structure of the Constitution implies that the people must be some collective, either of state citizens or national citizens, but that it is unnecessary to prove either at this point since the group’s sovereign powers are being protected by the current system of interpretation.

1. The People as Many Individuals

First, there is an argument that the Tenth Amendment protects “the people” as a large collection of individuals rather than a collective body in any form. Randy Barnett argues that since the First and Second Amendments use “the people” as a way of protecting every individual’s rights—e.g., “the right of the people peaceably to assemble, and to petition the Government for a redress of grievances”²⁰⁰—the phrase “the people” in the Tenth Amendment cannot refer to “political collectives or electoral majorities,”²⁰¹ but instead must refer to individuals.²⁰²

However, the first problem with this argument is that it does not fit with a functional definition of individual sovereignty. In contrast to the kinds of powers wielded by the other larger sovereigns, individual

²⁰⁰ *Id.* amend. I.

²⁰¹ I disagree with Randy Barnett’s reading of Wilson’s *Chisolm* opinion as implying only individual sovereignty exercised in conjunction rather than as a collective is protected in the Tenth Amendment. See Barnett, *supra* note 193, at 947.

²⁰² I agree with Kurt Lash’s argument that to include in the definition of individual rights, the individual rights that enable collective action and can only be asserted collectively, is to collapse the distinction between collective and individual rights. See Lash, *supra* note 77, at 971.

powers in both political theory and throughout the rest of the Constitution are matters of personal autonomy or freedom.²⁰³ Individual freedom, otherwise explicitly addressed and protected by the Constitution, cannot be the added value of the Tenth Amendment.²⁰⁴

Furthermore, the strongest refutation of an individual rights interpretation of “the people” in the Tenth Amendment is—as discussed above²⁰⁵—that it would be entirely superfluous with the Ninth Amendment. It cannot be that the people as individuals retain powers (other than their rights and freedoms from the Ninth Amendment) that are in the same pot of sovereign powers at play in the rest of the Tenth Amendment. Indeed, individuals never did—and never could—delegate their individual powers in order to form a government. “The people” of the Tenth Amendment must be a collective body.

2. The People of the Several States Are the States

Currently, the most common interpretation of the Tenth Amendment is that it preserves states’ rights.²⁰⁶ As championed by Justices Scalia and Thomas,²⁰⁷ this relies on reading the powers reserved to the people as tied up in the powers that are reserved to the states; the state governments themselves are the “political body of people.”²⁰⁸ Supporting this argument is ample historical evidence that the framers thought of their state governments as much closer to the peoples’ daily lives while the federal government was an abstract construction of the Constitution, many steps removed from direct control by the people. As de Tocqueville described, “[t]he sovereignty of the states is natural; it exists by itself without effort, like the authority of the father of a family.”²⁰⁹

²⁰³ *Id.* at 969 (“[Barnett’s] ‘individualist’ reading of the Ninth and Tenth Amendments, however, is at odds with the common understanding of popular sovereignty at the time of the Founding and is contradicted by key pieces of historical evidence.”).

²⁰⁴ See *Martin v. Hunter’s Lessee*, 14 U.S. 304, 314–15 (1816) (“[Government] must operate upon the people of the United States in their personal and aggregate capacities.”); *Chisholm*, 2 U.S. at 470–71 (opinion of Jay, J.) (“[T]he people, in their collective and national capacity, established the present Constitution. It is remarkable that in establishing it, the people exercised their own rights, and their own proper sovereignty, and conscious of the plenitude of it, they declared with becoming dignity, ‘We the people of the United States, do ordain and establish this Constitution.’”).

²⁰⁵ See *supra* Section II.B.

²⁰⁶ See, e.g., *Printz v. United States*, 521 U.S. 898 (1997).

²⁰⁷ See *supra* Section I.C (discussing *Printz* and *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 848 (1995) (Thomas, J., dissenting)).

²⁰⁸ Barrante, *supra* note 16, at 274.

²⁰⁹ DE TOCQUEVILLE, *supra* note 2, at 157–58.

Some, such as Justice Thomas, have argued that “the people” of the nation as a whole did not exist pre-constitutionally—only “the people of the several states” did.²¹⁰ As such, “the people” of the nation as a whole may not have pre-constitutional powers to be reserved, and so the reading of “the people” into the state powers is logical. However, others, such as Justice Jay in *Chisholm* have argued that there must be—and has always been—a national collective and that the national collective is protected by the Tenth Amendment.²¹¹ According to this argument, even if the people of the whole of the United States did not exist prior to the union,²¹² it came about along with the formation of it. This national collective was born out of the Constitution just as the federal government was.²¹³ Otherwise the Constitution would seem more like a treaty of independent and severable bodies than like the formation of a new unified Republic supported by the people of the entire nation as a sovereign body.²¹⁴

²¹⁰ See *supra* Section I.C (discussing *Thornton*, 514 U.S. at 848 (Thomas, J., dissenting)).

²¹¹ See *supra* Section I.B.

²¹² Aside from structural and textual criticisms of this reading, there are historical suggestions that early understandings of the Tenth Amendment affirmed a national collective in addition to a state collective as well. The Confederate Constitution’s equivalent protections were careful to distance themselves from the national collective language, adopting instead language that declared in Article VI:

5. The enumeration, in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the *people of the several States*. 6. The powers not delegated to the Confederate States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people thereof.

CONFEDERATE CONST. (Mar. 11, 1861) (emphasis added); Lash, *supra* note 77, at 986–87 (discussing this point as well as the early debate between James Madison and Chief Justice John Marshall about the balance of national and state sovereign power, and popular legitimacy). Although the individual states remain a unit of governance and collective identity important to the people, the people of the United States, too, have an undeniable collective and unique national identity. We created a government to speak for our collective voice abroad and we pay taxes as a unitary collective. How could a legitimate government exist in conflict with the interests of states if no collective people with a separate identity were represented by it? We are a people, diverse but united by our government if nothing else. See *Dred Scott v. Sanford*, 60 U.S. 393, 395 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV (“The territory thus acquired, is acquired by the people of the United States for their common and equal benefit, through their agent and trustee, the Federal Government.”); *Barron v. City of Balt.*, 32 U.S. 243, 247 (1833) (“The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states.”).

²¹³ In fact, to ratify the Constitution and by doing so surrender state power, the collective people must have been more powerful than the people of the individual states were. McAfee, *supra* note 60, at 362.

²¹⁴ DE TOCQUEVILLE, *supra* note 2, at 350 (“[M]ere individuals unite to form a sovereign, and their union composes a people. Below the general government that they have given themselves, one then encounters only individual forces or collective powers, each of which represents a very minimal fraction of the sovereign.”); THE FEDERALIST NO. 32, at 191–92 (Alexander Hamilton) (Robert Scigliano ed., 2001) (discussing the “consolidation of the States into one

While I am inclined to agree with the latter position that a national collective reading of “the people” is at least possible, defining “the people” as a national collective is not necessary to dismiss the argument that state governments protect the powers of the people. Whether “the people” of the nation or the people of the several states, the people are not the states. While the powers of the states can be derivative and potentially closer to the powers of the people, they are nonetheless distinct from them.²¹⁵

The argument goes that, if “the people” are “the people of the states,” then state governments would be the closest representatives of their legitimate voice.²¹⁶ If a national collective reading of the people is plausible,²¹⁷ then the states speaking for that collective is impossible, since the larger body may have interests and perspectives not reflected

complete national sovereignty . . . [but] the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States”). *But see* Lash, *supra* note 77, at 976 (arguing that “had the Ninth and Tenth Amendments declared a unified national people,” they would have been rejected and undermined ratification). However, this presumes dissolution of states in favor of a national collective; when surely they can and do co-exist. *See* DE TOCQUEVILLE, *supra* note 2, at 105.

²¹⁵ *Cf.* Sullivan, *supra* note 154, at 79–80 (discussing *Thornton* as “a confrontation among the Justices over the basic structural principles of the federal union: are we one people insofar as we constitute the federal government, as the majority held, or rather, as the dissent would have it, irreducibly the peoples of the several states?”).

²¹⁶ Some have argued that the Tenth Amendment’s protection of the people is a limited protection by prohibiting the federal government from interfering with state governments providing essential services, and thereby protecting the right of the people of the states to manage those services. *See, e.g.,* Barrante, *supra* note 16, at 272.

²¹⁷ There are several indications that “the people of the nation” exist as a reading of the Tenth Amendment now if not also at the founding. In the Court’s precedent, “the people” are not discussed only in such words, they are also called “the people of the United States,” “the people of this nation,” and “the people of this country.” Both of these descriptors imply more of a collective identity. *See, e.g.,* *Time, Inc. v. Firestone*, 424 U.S. 448, 478 (1976) (“[T]he First Amendment guarantees to the people of this Nation that they shall retain the necessary means of control over their institutions that might in the alternative grow remote, insensitive, and finally acquisitive of those attributes of sovereignty not delegated by the Constitution.”); *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940) (“But *the people of this nation* have ordained . . .” (emphasis added)); *United Gas Pub. Serv. Co. v. Texas*, 303 U.S. 123, 153 (1938) (Black, J., concurring) (contrasting the laws of the state with the rules of the people of the nation: “as provided by the constitution and laws of that state, and in harmony with the traditions of the people of this nation”); *Conn. Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 90 (1938) (Black, J., dissenting) (“If *the people of this nation* wish to deprive the states of their sovereign rights . . .” (emphasis added)); *Decatur v. Paulding*, 39 U.S. 497, 522 (1840) (“[T]he people of this country . . .”); *see also* Amar, *supra* note 184, at 1491–92 (arguing the Tenth Amendment confirms the “ultimate sovereignty of a unitary American people” and not of state governments except as also through the people of the states); Farhat, *supra* note 47, at 1190 (“Differences arise over conflicting interpretations of the Tenth Amendment’s use of the phrase ‘the people.’ Construing ‘the people’ to mean ‘people of the States’—as Justice Thomas does—the Tenth Amendment reserves all nonenumerated power to the states. If ‘the people’ are ‘the undifferentiated people of the nation’—regardless of state boundaries—the Tenth Amendment provides less support for proponents of states’ rights.”).

even in the sum of the constituent parts. Nonetheless, even if a collective national people does not exist, the people of a state need to hold powers above and separate from their government to keep it in check, and that requires some separation between “the people of the several states” and “the states” in order to prevent tyranny. As the Court has remarked in one of its very first cases, “[l]et a State be considered as subordinate to the People,”²¹⁸ or else there is nothing to prevent the state government from becoming impermissibly powerful. This reading is further inconsistent with the nature of both state and federal governments as republics derived from the people.²¹⁹ An argument that state governments represent the unique interests of the people and are representative of the people forgets that the federal government is dependent upon and representative of the people on similar terms, if not a similar scale. This is visually illustrated by Figure 3, which compares the reading of the Tenth Amendment that forgets the power of the people (on the left) with the one that remembers the direct role the people have in their federal government (on the right).

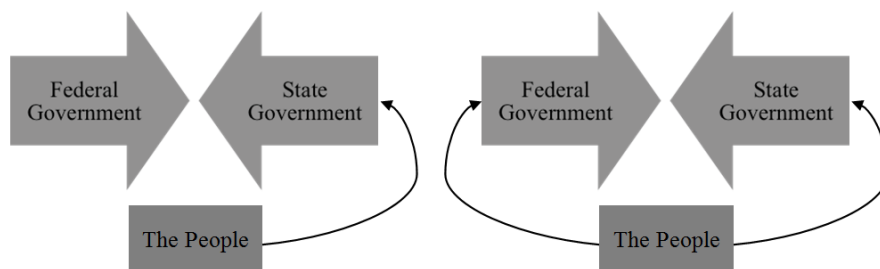


Figure 3: State and Federal Democratic Legitimacy

The argument that the people are not a constitutionally mediated voice through state governments is additionally supported by a few important historical developments. First, the Seventeenth Amendment, which established the direct election of senators, abolished a system where the voices of each state’s constituency flowed through state legislatures.²²⁰ The text of the Amendment specifies that in each state, “the people thereof” elect their senators, which is yet another affirmation that when used in the text of the Constitution, “the people” means a body of citizens and not their government.

Ultimately, the people cannot be merely many individuals and cannot be “state governments” to be consistent with the rest of the

²¹⁸ *Chisholm v. Georgia*, 2 U.S. 419, 455 (1793).

²¹⁹ See *supra* Section I.B (discussing *Chisolm*, 2 U.S. at 457 (opinion of Wilson, J.)).

²²⁰ U.S. CONST. amend. XVII.

Constitution. Therefore, “the people” are a collective.²²¹ That collective, whether of state citizens or national body, holds powers separate from their governments or the sum of the individual rights of its members. That “the people” could also refer to a national collective was certainly known and debated at ratification.²²²

Before moving away from the question of who the people are, I pause to note that there is a final objection to the argument that the people of the Tenth Amendment are a modern collective of the citizens of the United States: today’s diverse collection of the “people” is not what the founders meant. Originalist arguments for any reading of “the people” must surely admit that any original conception of popular sovereignty explicitly excluded the majority of the population.²²³ It considered slaves three-fifths of a person and prohibited slaves, women, and American Indians from voting. It is possible that the move from popular sovereignty as a powerful part of the Tenth Amendment to something inconceivable by the Court tracks the expansion and diversification of the electorate.²²⁴ But if that is so, not only should such a limiting of robust popular sovereignty be abhorrent to modern constitutional values, it should be all the more reason to look at the phrase “the people” and give it our modern diverse collective definition rather than relying on the past’s limited definition of “the people” long—and triumphantly—rejected by our nation.

²²¹ See *Chisholm*, 2 U.S. at 457 (opinion of Jay, J.) (“As a citizen, I know the Government of that State to be republican; and my short definition of such a Government is, one constructed on this principle, that the Supreme Power resides in the body of the people. As a Judge of this Court, I know, and can decide upon the knowledge, that the citizens of Georgia, when they acted upon the large scale of the Union, as a part of the ‘People of the United States,’ did not surrender the Supreme or sovereign Power to that State; but, as to the purposes of the Union, retained it to themselves.”)

²²² Barnett, *supra* note 193, at 953 (“So far as Lee and the majority in the Virginia senate were concerned, the public meaning of ‘the people’ in the Tenth Amendment was not a reference to the majoritarian or collective right of the people in the states to govern free of interference of the federal government. To the contrary, they read it as protecting the powers reserved to the people ‘as citizens of the United States.’ The very language they desired to protect states rights was, however, eventually incorporated into another constitution.”).

²²³ See, e.g., *Chisholm*, 2 U.S. at 471–72 (“[T]he sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects (unless the African slaves among us may be so called) and have none to govern but themselves; the citizens of America are equal as fellow citizens, and as joint tenants in the sovereignty.”).

²²⁴ Cf. *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1223 n.6 (2015) (Thomas, J., concurring) (discussing the decline of popular sovereignty in the New Deal as tied to the increasing disdain for the nuisance of an uninformed electorate compared to democratic representatives and especially compared to an agency expert in the rise of the administrative state).

D. *What Are Their Powers?*

While state governments are granted the general broad powers of governance—colloquially known as police powers—the federal government is one of limited powers. Certainly, the Constitution does not create general federal police powers.²²⁵

While the limits of federal powers are widely acknowledged and the logic is intuitive, the states must also be governments of limited powers in order to prevent tyranny and oppression. Additionally, with the creation of the Constitution, and the federal government, there are certain powers related to the federal government that are not delegated to it and *cannot belong to the states*. States cannot have powers that spring from the national government—including powers to oversee that government. Justice Story argued in his academic writing and the Court later affirmed,²²⁶ “the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them No state can say, that it has reserved, what it never possessed.”²²⁷ Therefore, there is a set of powers relating to the federal government, but not delegated to it, that states cannot have reserved because they lack prior ownership. Those powers must belong to the people.

There are also some powers explicitly forbidden to the states by the Constitution, and affirmed by the Tenth Amendment, as it explicitly mentions the powers “forbidden to the states.” This Section overall lays out some—but by no means all—of the powers that the Constitution suggests must belong to the people.

1. Emergency Federal Powers Prohibited to the States

There are certain federal powers, all from Article I, Section 10, that are powers of government that once belonged to the states but are now constitutionally prohibited to them. These are powers that states once had but gave up for a federal system. The constitutional prohibitions are seemingly to protect the federal government’s monopoly on those

²²⁵ Although not prescribed inherently by the language of the Tenth Amendment, because we assume there are limits to implied and enumerated powers, and we would find the Tenth Amendment’s discussion of reserved powers pointless if there were no applications, “the powers of [the federal government] are only a subset of all possible [] powers.” Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576, 629–30 (2014); Lash, *supra* note 4, at 881 (“[P]eople have not created a government of general police power.”).

²²⁶ U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 802 (1995).

²²⁷ 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 627, at 446 (Thomas M. Cooley eds., 1873).

powers. The making of money, treaties, etc. are powers that for efficiency, centrality, and practicality must be exercised by one sovereign.²²⁸

But what would happen if the federal government could no longer exercise those powers? For example, what if there were ever an Executive and a Congress held hostage by foreign interests that halted basic government functions and treaty-making to resolve the conflict? State governments are constitutionally prohibited from stepping up, and in the complete breakdown of these federal responsibilities, governance must be able to fall upon some collective body to step up where the federal government had failed. That body cannot be the states, so it must be “the people.” The people, are the original sovereign, but we are also identified by the Tenth Amendment as a continually existing third sovereign capable of reassuming powers that revert back to us in times of extreme governmental crisis. While many have observed that the U.S. Constitution contains no explicit provision for relaxing, reorganizing, or suspending either powers or personal rights during wartime, many have suggested that it implicitly does or ought to.²²⁹ However, the question remains whether the Constitution would even be legitimate in the extreme cases where the governmental bodies it charges with certain powers were incapable of exercising them. The presence of “the people” in the Tenth Amendment provides an answer. The constitution contemplates such a crisis and ensures that one of its sovereigns is always capable of reassuming delegated powers in times of crisis. Even without a suitable institutional government form, “the people” express the continued legitimacy of the Constitution in times of governmental failure.

If “the people” were an empowered and celebrated third sovereign, it is possible that we would be more likely to act as a coordinated and competent sovereign in such an emergency situation. While currently such a national crisis might result in anarchy, a reminder of the substantive responsibility of being “the people” might manifest increased capacity to govern. Instead of anarchy, “the people” could exercise suspended delegated powers directly by, for example, passing an emergency treaty through national referendum.

²²⁸ U.S. CONST. art. I, § 8, cl. 5; *id.* art. I, § 10, cl. 1.

²²⁹ See, e.g., Mark Tushnet, *Emergencies and the Idea of Constitutionalism*, in *THE CONSTITUTION IN WARTIME* 39, 40 (Mark Tushnet ed., 2005) (arguing that we ought to give more serious consideration to suspending the Constitution in wartime).

2. Post-Constitutional Limits

There are also certain federal powers that were created by the Constitution's formation of a national government and are therefore not powers that were delegated away from the state governments since they could not have existed in them prior to the Constitution. These are the kinds of federal government powers that came up in *Thornton*: to set term limits or specify other limits or modifications on federal government structures and functions that could not have existed prior to the Constitution.

These powers did not come from the ether but belonged to the people in the moment before delegation. For a collective national government to be created, the people must have held some powers to create it, structure it, and police it. The question now is if the people retain them. There is an argument that they must, since the states cannot police these federal powers, and it is difficult to imagine that the federal government always holds these self-structuring powers without oversight. However, that suggests that cases like *Thornton*, and *Arizona*—which similarly involved the people trying to wield an election power that the Elections Clause delegates to their state legislature²³⁰—were wrongly decided, and that “the people” ought to be able to step in and exercise a delegated power that they feel has lost democratic legitimacy. Un-delegate it, if you will. However, less controversial and more certain is that in a similar emergency situation as outlined above, the people and not the states are the sovereign body that would need to step in and make decisions about these post-constitutional federal issues. This suggests that these powers are at least in their sovereign realm, although mostly preempted by the exercise of federal power.

3. Powers Prohibited to the States and the Federal Government

There is of course, one obvious power that the people of the United States have that their government cannot. The Declaration of Independence states as a self-evident truth, “That to secure [unalienable] rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is *the Right of the People to alter or to abolish it . . .*”²³¹ This is the fundamental principle that the people are the “font of government

²³⁰ *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2674 (2015).

²³¹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

power”²³²—the source of law for the U.S. Constitution—and that the continued consent of the people is an unalienable collective right integral to our republican government. This “original right” to establish and then organize a government belongs to the people.²³³ “We the people”²³⁴ created this Constitution with the first principle that we can remake a government that no longer represents us. The right to create and to abolish is the ultimate right and the ultimate reserved power of the original sovereign.

Additionally, the Fourteenth, Fifteenth, and Nineteenth Amendments contain the most explicit limitation on state powers, and via incorporation, the federal powers as well. They are the explicit orders of what both states and the federal government *cannot do* with their sovereign powers²³⁵:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

....

The right of citizens of the United States to vote *shall not be denied or abridged* by the United States *or by any State* on account of race, color, or previous condition of servitude.

....

The right of citizens of the United States to vote *shall not be denied or abridged* by the United States *or by any State* on account of sex.

....

The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in

²³² *Arizona*, 135 S. Ct. at 2674.

²³³ *Marbury v. Madison*, 5 U.S. 137, 176 (1803) (“That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated.”).

²³⁴ U.S. CONST. pmbl.

²³⁵ Tracking his individual rights reading of the Tenth Amendment discussed above, Randy Barnett argues that the Tenth Amendment along with the rest of the Constitutional protections against state action define a kind of individual popular sovereignty which make it unconstitutional for people to sacrifice *individual autonomy choices*. Barnett, *supra* note 76, at 629–30. Thus, the Affordable Health Care Act’s insurance mandate is an unconstitutional infringement on the people’s sovereignty because it limits individual sovereignty. *See id.* *But see* Baker, *supra* note 115, at 302.

Congress, *shall not be denied or abridged* by the United States or any State by reason of failure to pay poll tax or other tax.

....

The right of citizens of the United States, who are eighteen years of age or older, to vote *shall not be denied or abridged* by the United States or by any State on account of age.²³⁶

These most explicit limits on state powers are all about ensuring the equal participation of Americans people in American citizenship²³⁷ and, most importantly, the democratic process. And if anything is at the very heart of popular sovereignty—the power of the people—it is the power of the people to choose government representatives and therefore to vote, unobstructed, by other sovereigns. Voting is the power that cannot ever belong to a government in a democratic republic.

One possible textualist objection is that the Elections Clause trusts state legislatures to protect the voice of the people by giving state legislatures the power to set the “[t]imes, [p]laces and [m]anner of holding [e]lections for Senators and Representatives,” except as regulated by Congress.²³⁸ However, the mediation of how a power is expressed is not the usurpation or legal wielding of it. While states may be able to set the ways in which an election is run, they cannot interfere with the fundamental *power of the people* to decide that election.

In order for the authority described in the Elections Clause to be consistent with the prevention of tyranny and the general right of the people to ensure that through democratic elections their government represents them, there it must be a limit to the power that state legislatures have.²³⁹ State legislatures could not—for example—hold

²³⁶ U.S. CONST. amend. XIV, § 1 (emphasis added); *id.* amend. XV, § 1 (emphasis added); *Id.* amend. XIX (emphasis added); *id.* amend. XXIV, § 1 (emphasis added); *id.* amend. XXVI, § 1 (emphasis added).

²³⁷ Through broad terms, the Constitution vaguely places the power to discriminate against, or to interfere with, the rights of certain classes of people beyond the sovereign powers of either the state or federal government. In addition to the protections afforded explicitly in the Constitution, it should be tied up in our sovereign powers as a collective to define how our society may or may not operate and who is equal among us. I am alluding quite explicitly to the idea that the evolution of equality is tied up in society’s definitions outside of the law. The evolution and recognition of equal rights for women and homosexuals—outside of constitutional amendment and over the objections of certain state government—are examples of this. Though this case is admittedly much more complex, and lies beyond the core thrust of this Article, there is an argument that a popular sovereignty Tenth Amendment would provide a constitutional home to some degree of popular constitutionalism.

²³⁸ U.S. CONST. art. I, § 4.

²³⁹ *Cf.* *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2674 (2015). In *Arizona*, the majority called the redistricting commission an “invention . . . in full harmony with the Constitution’s conception of the people as the font of governmental power.”

elections in the restricted access areas of their offices. Though it is an absurd hypothetical, it is difficult—without the Tenth Amendment—to think of *why* it is unconstitutional, or how it could be struck down other than through various voting rights statutes. But somehow, we still believe it ought to be prohibited by some other portion of the Constitution. Otherwise, as the anti-federalists feared, we might have a tyrannical government insufficiently answerable to the people.²⁴⁰ That is because the most natural—and necessary—reading of the Elections Clause is not a grant of power or sovereignty—or the go-ahead to interfere with the sovereignty of the people—but a grant of procedural authority. Someone has to organize elections, but that does not mean they control them.

III. COMPLICATED SOVEREIGNTIES

Justice Kennedy famously said that, “[f]ederalism was our Nation’s own discovery. The Framers split the atom of sovereignty.”²⁴¹ However, as I will show in this Part, the principles of divided and dependent sovereignties were acknowledged in western political philosophy long before the American Constitution. Furthermore, the concept of divided and dependent sovereignty as a part of our nation’s constitutional law is already present in the Court’s doctrines surrounding Indian tribes which are domestic dependent sovereigns.²⁴² For these reasons, the overlapping, dependent, and accommodating picture of tripartite sovereignty argued for in this Article—and that the Court’s decision in *Comstock*, opens the door to—should not be controversial.

A. *Political Thought Broadly*

The meaning of sovereignty has changed and been debated throughout the history of political thought, but in its most basic form it

but ultimately struggled to find a way around the elections clause although a robust reading of it did seem to controvert democracy. *Id.*

²⁴⁰ TURNER MAIN, *supra* note 66.

²⁴¹ U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

²⁴² While it is beyond the scope of my expertise and this Article, there is also an argument to be made that the system of local governments also recognizes complicated overlapping and limited sovereignties within American governance. See Sullivan, *supra* note 56, at 1936 (“[T]he Constitution may well carve out a limited space for the people to express themselves and exercise certain powers through local self-government—without interference by the state. More specifically, the Tenth Amendment endows the people with the right to choose and define their local government.”); Lash, *supra* note 4, at 881–82.

means absolute or supreme authority within a territory.²⁴³ Yet the absoluteness or supremacy of governmental authority has long—and rightfully—been dismissed as a dangerous fiction. The main currents in Western political philosophy that flowed into our Constitution recognized bifurcated sovereignty long ago and, even longer ago, acknowledged that these government powers must be limited or subject to oversight by divine or popular powers.

Western political philosophy struggled for a long time with the normative questions of governmental power and authority. Niccolo Machiavelli is one of the only thinkers who believed in truly absolute sovereignty. He sharply criticized sovereigns for even being concerned with morality, asserting that legitimacy flows from the power to take it and keep it. Indeed Machiavelli discouraged a sovereignty that was achieved through the consent and power of others because he thought it put the sovereign in a weaker position of dependence—limited sovereignty.²⁴⁴ Machiavelli's prince was a truly absolute sovereign, answerable to nothing and no one else in his realm. Machiavellian sovereignty and power are coextensive and absolute, and as such, a rare example of truly absolute and whole sovereignty. Other political philosophies put the sovereign necessarily subordinate to God, the laws of nature, or the will of the people (see Table 1).

TABLE 1							
SYSTEM	MACHIAVELLI	HOBBS	GROTIUS	ROUSSEAU	LOCKE	UNITED STATES	U.S. FEDERAL INDIAN LAW
LIMITING SOVEREIGN WITH OVERSIGHT	None: Power is the only limit	God	None (Initial Grant)	The People's Collective Will	The People, Natural Laws/Rights	The People	United States Congress
DEPENDENT SOVEREIGN	The Prince (avoids dependency)	Gov't. (Leviathan)	Gov't. (avoids dependency)	Gov't.	Gov't.	Federal and State Gov't.	American Indian Tribes

Table 1

French lawyer and philosopher, Jean Bodin (1530–96) is often credited as the first political philosopher to articulate a unique concept

²⁴³ For an overview of several western philosophers' theories of sovereignty and their incompatibilities with the practice of modern nation states, particularly with regard to international law, see Winston P. Nagan & Aitza M. Haddad, *Sovereignty in Theory and Practice*, 13 SAN DIEGO INT'L L.J. 429 (2012).

²⁴⁴ MACHIAVELLI, *supra* note 22 ("But he who reaches sovereignty by popular favour finds himself alone" and even more vulnerable than a prince who reaches power depending on the nobles).

of sovereignty. In a time when religious and political powers were starting to compete—or at least needed to reconcile their co-existence. Bodin called the prince the “absolute” sovereign and said, “Sovereignty is supreme power over citizens and subjects.”²⁴⁵ Though Bodin’s concept of absolute or supreme power is often mischaracterized by literally and selectively reading that passage, elsewhere Bodin makes clear that the sovereign and thus their power is—like all else—limited because it is bound by the laws of nature and of God.²⁴⁶ Bodin also suggests that sovereignty is an abstract notion; that a sovereign exists separate from the government, such that not all governments are true sovereigns if they lack legitimacy or power. Although Bodin calls the sovereign absolute, they are far from it, and their power exists apart from their personal identities and so can be taken away. Sovereignty is tied up in their legitimacy and authority in concert with the recognition of a higher power, and dependent on it for oversight—to keep the sovereign in check from becoming a tyrant.

Thomas Hobbes argued that sovereignty was formed through a contract in which the people gave up their power to the sovereign—the famous leviathan—in exchange for security from the harsh world.²⁴⁷ The leviathan becomes the sovereign power with legitimate authority from the initial contract. Once constituted, the will of the sovereign reigned supreme, except for similar limitations as prescribed by nature and God.²⁴⁸

Grotius took Hobbes’s notion of the covenant one step further and argued that sovereign power is an abstract legitimacy, that, once initially granted by the people, is irreversibly given away so that the sovereign power of the government “cannot be made void by any other human will,” including the people.²⁴⁹ Grotius argued the right of governing could be given to the government by the people without retaining rights for themselves. Sovereignty was a permanent conveyance:

At this point first of all the opinion of those must be rejected who hold that everywhere and without exception sovereignty resides in the people, so that it is permissible for the people to restrain and punish kings whenever they make a bad use of their power . . . We refute it by means of the following arguments. To every man it is permitted to enslave himself to any one he pleases for private

²⁴⁵ William A. Dunning, *Jean Bodin on Sovereignty*, 11 POL. SCI. Q. 82, 92 (1896).

²⁴⁶ *Id.*; Nagan & Haddad, *supra* note 243, at 439–41.

²⁴⁷ See generally THOMAS HOBBS, *LEVIATHAN OR, THE MATTER, FORME & POWER OF A COMMON-WEALTH ECCLESIASTICAL AND CIVIL* (George Routledge ed., 1886).

²⁴⁸ See *Sovereignty*, STAN. ENCYCLOPEDIA PHIL. (May 31, 2003), <http://plato.stanford.edu/entries/sovereignty>.

²⁴⁹ HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE*, BOOK 1 (Jean Barbeyrac & Richard Turk eds., 2005).

ownership, as is evident both from the Hebraic and from the Roman Law. Why, then, would it there not be as lawful for a People who are at their own disposal to deliver up themselves to some one person, or to several persons, and transfer the right of governing them upon him or them, retaining no vestige of that right for themselves?²⁵⁰

Grotius's argument is not so different from the notion of state governments as the best voice of the people; it requires that the people no longer be able to speak for themselves because they have formed a government. Grotius, like Machiavelli, lets his sovereign have an absolute power that is concerning for anyone skeptical of authoritarianism.

Thankfully, these strict or rigid notions of relinquished sovereignty are not the stream of thought that influenced the drafting of our Constitution and the subsequent development of our nation. John Locke—arguably the most influential thinker for our founding fathers—wanted to build a system that prevented tyranny, and so argued that the people may need government to protect their property and liberty, but that government must always answer to them, and through representative government the people would be protected from the potential dangers of government.²⁵¹ Similarly Jean Jacques Rousseau explicitly discussed his hatred of Grotius and Hobbes's notion of permanently relinquished popular sovereignty. He said Grotius “spares no pains to rob the people of all their rights and invest kings with them.”²⁵² Rousseau put forward a social contract theory that meant the people retained sovereignty although they formed a government. To preserve these powers and the authenticity—and non-corruption—of the general will, the people must be involved in and close to their government. These political philosophers were influential on the founders, with their careful distrust of a powerful government unanswerable to the people.

The field of political theory has long acknowledged that government must be kept in check by a higher power. We the people, and not God or natural law,²⁵³ play that role in American government. Sovereignty, as it made its way into American government, is a matter of authority—of power and legitimacy—negotiated by supremacy. It is not absolute power but supreme power, and supremacy is not incompatible with several spheres of sovereignty, rather it is necessary to make sense of them.

²⁵⁰ *Id.*

²⁵¹ LOCKE, *supra* note 189.

²⁵² JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT*, BOOK II (J.M. Dent ed., 1913).

²⁵³ *Cf.* *Swift v. Tyson*, 41 U.S. 1 (1842).

Authority must be legitimate or else it would be mere coercion. While Machiavelli may have been unique in arguing that mere power is legitimate, other philosophers have searched for the boundaries on and source of sovereignty's authority that create this legitimacy. Checked by God or the people, almost all other Western political theorists who developed the traditional idea of sovereignty recognize the limited and limitable aspects of sovereignty as opposed to other authorities—other sovereign powers.

Supremacy can extend to separate but parallel realms. The U.S. Constitution itself explicitly recognizes this in the Supremacy Clause,²⁵⁴ with the acknowledgement that the Supreme law of the land is made by and exists in different places. It is up to the courts to negotiate their conflicts and ensure that a supreme authority is preserved in its various constitutionally proscribed and circumscribed realms.

B. *In American Law: Domestic Dependent Tribal Sovereignty*

The Court's discussion of accommodation in *Comstock* aside, one of the strongest arguments against recognizing the sovereignty of the people through the Tenth Amendment is that it is difficult to think of how such an overlapping and somewhat dependent sovereignty would look like. It is much easier to write about and understand a system of rigid non-overlapping powers. However, the Court has already recognized and written hundreds of opinions that take on the question of mediated, complex, overlapping sovereignty. The Court recognizes and frequently writes about another five hundred and sixty-five "sovereign nations" which have even more limited and sovereign powers: Indian tribes. While the domestic dependent sovereignty of Indian tribes is not a perfect model for the tripartite sovereignty outlined by the Tenth Amendment, it proves that our judiciary is capable of working with unwieldy and complex notions of sovereignty.

Indian tribes were once entirely independent nations with singular authority over their territories. After the arrival of various European nations, American Indian tribes made treaties with the various European nations in a government-to-government relationship. However, the power of the European colonies and the ideology of Manifest Destiny were quickly at odds with the sovereignty of Indian tribes. America needed land, and needed to de-legitimize Indian land claims, so it was unclear what would happen to Indian self-rule. Eventually, the Supreme Court recognized that although it seemed

²⁵⁴ U.S. CONST. art. VI, cl. 2.

contrary to natural law, the rights of the Indian tribes to their lands was a right that the courts of the conquerors could not recognize.²⁵⁵

Chief Justice John Marshall then addressed the direct question of tribal sovereignty in a series of cases dealing with the Cherokee tribe of Georgia. In these opinions that form the foundation of Indian law, Justice Marshall recognized that tribes—now dependent on the United States government—were not “foreign nations” and yet still retained much of their governing powers.²⁵⁶ He affirmed the sovereignty of Indian nations yet he defined them as a special kind of limited and subservient sovereignty—he called them “domestic dependent nations.”²⁵⁷

Since then, a body of federal common law and constitutional law has developed to determine what tribal sovereignty means within the Constitution and the in context of federalism generally. Tribes are independent of state governments and state laws,²⁵⁸ with generally broad powers to make their own laws and be ruled by them.²⁵⁹ However, they are limited and dependent sovereigns, and to give coherence to that complicated idea, the Court first recognizes that (1) tribal sovereignty is always subject to the plenary power of Congress²⁶⁰; and (2) some powers have been implicitly divested from tribes. The Court has developed a test to determine this implicit divestiture: what powers are “inconsistent with their status”?²⁶¹

If the Court has figured out a way to define Indian tribal sovereignty such that it does not contradict the Constitution, surely recognizing and developing doctrine to protect the many competing interests implicated in sovereign powers of the collective people of the United States is not beyond them. It is reasonable to imagine that the Court could discuss the complicated aspects of popular sovereignty in similar terms of implicit powers that it uses to determine the appropriate scope of Indian sovereignty.

Indian sovereignty has even more questionable contradictions than a recognized popular sovereignty doctrine would. The Court has repeatedly held—and struggled²⁶²—with Congress’s plenary powers over

²⁵⁵ *Johnson v. M’Intosh*, 21 U.S. 543, 588 (1823).

²⁵⁶ *Cherokee Nation v. Georgia*, 30 U.S. 1, 2 (1831).

²⁵⁷ *Id.*

²⁵⁸ *Worcester v. Georgia*, 31 U.S. 515 (1832).

²⁵⁹ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

²⁶⁰ *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *see also* *United States v. Lara*, 541 U.S. 193 (2004).

²⁶¹ *Oliphant*, 435 U.S. at 208; *see also* *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Montana v. United States*, 450 U.S. 544 (1981); *United States v. Wheeler*, 435 U.S. 313 (1978).

²⁶² Justice Thomas wrote that Indian sovereignty has “two largely incompatible and doubtful

Indian affairs—a control which is absolute yet does not does dissolve separate sovereignty.²⁶³ We may uncover a similar seemingly irreconcilable tension between the robust view of popular sovereignty advocated by this piece and judicial review. Frank Michelman described this tension as between “democracy” and “Constitutionalism.”²⁶⁴ That is, the “law of lawmaking” as overseen by the judicial branch is in fundamental tension with a truly democratic power of the people to make the laws.²⁶⁵ It would seem constitutionalism necessarily places limits on democracy, just as Congress necessarily limits Indian tribal sovereignty. However, unlike the Indian tribes, the people of the United States continue to wield powers over the various constitutional lawmakers and interpreters: the power to abolish the Constitution or the entire government. While Congress may be able to dissolve the sovereignty Indian tribes without their consent, it is difficult to imagine any of our governments explicitly dissolving the sovereignty of the people without an uprising. Slow encroachment is possible—and indeed already a problem—but the power of the people over the existence of our government creates a situation, not of one-way dependency as with the Indians, but of far less contradictory co-dependent sovereigns.

IV. POTENTIAL APPLICATIONS OF A PEOPLE’S TENTH

In this final Part, I briefly outline some implications of a reinvigorated popular sovereignty Tenth Amendment. As already alluded to throughout this Article, the core of popular sovereign power is the right to choose government representatives. As such, voting rights are the obvious place where this argument has the most salience. However, I will also briefly discuss the potential of the Tenth Amendment to provide a textual constitutional home for popular constitutionalism and the political question doctrine.

assumptions. First, Congress (rather than some other part of the Federal Government) can regulate virtually every aspect of the tribes without rendering tribal sovereignty a nullity. Second, the Indian tribes retain inherent sovereignty to enforce their criminal laws against their own members.” *Lara*, 541 U.S. at 215 (Thomas, J., dissenting) (citations omitted).

²⁶³ *Wheeler*, 435 U.S. at 319.

²⁶⁴ Frank I. Michelman, *The 1996–97 Brennan Center Symposium Lecture*, 86 CALIF. L. REV. 399 (1998).

²⁶⁵ *Id.* at 400.

A. *A Constitutional Home*

First, a popular sovereignty Tenth Amendment would serve as a constitutional home to several interpretive constitutional law doctrines that are currently without an explicit textual constitutional basis. Specifically, it would give the federal judiciary and executive constitutional cover when relying on popular sentiment to interpret the Constitution, and it would allow the Court to walk ignore political questions which must be left up to the voters.

1. Popular Constitutionalism

While I believe that voting protections are the core of popular sovereignty, another potential use of a popular sovereignty Tenth Amendment in constitutional law is to create a constitutionally recognized home for the concept of popular constitutionalism. The scholars who have pioneered popular constitutionalism have argued²⁶⁶ that the people were intended to have and continue to have a role in interpreting the meaning of the Constitution.²⁶⁷ These scholars, such as Mark Tushnet and Larry Kramer, have argued that the founding generation not only believed that the people had the capacity to make and enforce constitutional meaning, but that the Constitution leaves subsequent generations with the power and the responsibility to continually be a part of this process of making and interpreting constitutional law.²⁶⁸ Through political accountability and the ultimate threat of revolution, the people even hold interpretive powers above the Court.²⁶⁹ Kramer argues that the judiciary is a dangerous vehicle of legal aristocracy, calling modern judicial review the “enemy” of popular constitutionalism, and so “the people” need to find ways of interpreting the Constitution and enforcing that interpretation outside of judicial

²⁶⁶ I mean here to very carefully distinguish popular constitutionalism from popular sovereignty. A too common mistake made in legal academia, this Article is careful to draw strict distinctions between popular sovereignty—the power and authority of the people—and one of its potential though not necessary components: popular constitutionalism—the power or right of the people to interpret the constitution. See, e.g., Daniel J. Hulsebosch, *Bringing the People Back*, 80 N.Y.U. L. REV. 653, 668 (2005) (criticizing Larry Kramer for conflating the two concepts).

²⁶⁷ LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

²⁶⁸ See *id.*; MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); Mark V. Tushnet, *Popular Constitutionalism as Political Law*, 81 CHI.-KENT L. REV. 991, 991–1006 (2006).

²⁶⁹ KRAMER, *supra* note 267, at 93–127.

review.²⁷⁰ He suggests that we have paid far too high a price—in entrenching the interpretations of a wealthy educated majority—for judicial review.²⁷¹

However, I agree with most popular constitutionalism scholars that popular constitutionalism is reconcilable and often dependent on judicial review.²⁷² Though not explicitly popular constitutionalism, theories of popular involvement in constitutional change articulated by Bruce Ackerman,²⁷³ Reva Siegel,²⁷⁴ and David Strauss²⁷⁵ offer a similar form of the people’s participation in legitimizing and making constitutional law. President Obama expressed a similar idea of popular participation and legitimizing of constitutional meaning: “But I do hope that people recognize that popular sovereignty, that listening to people and responding to people, is how to build a stable and peaceful world.”²⁷⁶

Kurt Lash has argued, quite persuasively, that popular sovereignty as expressed through popular constitutionalism, is an answer to the counter-majoritarian difficulty²⁷⁷ created by judicial review.²⁷⁸ Lash argues that the supermajority of the people generally—composed of greater numbers than usually the majority of the electorate—is the only body capable of giving legitimacy to the invalidation of duly enacted laws, and potentially even the departure from unpopular—and now perceived illegitimate—judicial precedent.²⁷⁹

A popular sovereignty Tenth Amendment could allow for executive actions and judicial review that listens to the people, and can explicitly cite changes to society, public opinion, or general norms in their opinions.²⁸⁰ The Tenth Amendment can provide a textual source in constitutional law for this principle of popular voice as a pre-

²⁷⁰ *Id.* at 125; see also Robert C. Post & Reva B. Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027 (2004).

²⁷¹ See KRAMER, *supra* note 267, at 125.

²⁷² Donnelley, *supra* note 29.

²⁷³ See BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998); Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737 (2007).

²⁷⁴ See Siegel, *supra* note 29.

²⁷⁵ Strauss, *supra* note 29.

²⁷⁶ BARACK OBAMA, INTERVIEW OF THE PRESIDENT IN ROUNDTABLE WITH FOREIGN PRINT MEDIA, 2008 WL 55009, at *4 (Jan. 4, 2008).

²⁷⁷ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

²⁷⁸ Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1446 (2007).

²⁷⁹ *Id.* at 1449.

²⁸⁰ DE TOCQUEVILLE, *supra* note 2, at 134 (“[Judicial Review] was the most dangerous blow delivered to the sovereignty of the states The Constitution, it is true, had set precise limits for federal sovereignty; but each time that sovereignty is in competition with that of the states, a federal court will pronounce.”).

constitutional power retained by the people²⁸¹ that must be protected by their government listening to it.²⁸² We now are in an age of modern technology and modern media where the nation is engaged in national conversations that the court can listen to. We can track how the will of the collective is changing over time, and our government—the Court especially—should no longer pretend to be blind to the constitutional understandings—of equality in particular—that are evolving in this country. Let them listen and cite that listening as a legal part of their recognition of popular sovereignty. Far too many of the terms of our Constitution, such as “equal”²⁸³ are social constructions that change with the people, and so it is only right that we let the people define them.

2. Political Question Doctrine

Finally, the Tenth Amendment may provide a constitutional text-based home for political question doctrine. When the political question doctrine was first invented by the Court in *Luther v. Borden*, they cited no explicit constitutional provision but relied upon a popular sovereignty argument that the judicial “power begins after [the People’s] ends.”²⁸⁴ The power to decide questions of policy belonged to the people and their representatives and not to the judiciary. It was the abstract idea of popular sovereignty that they cited, saying that,

[I]f the people, in the distribution of powers under the constitution, should ever think of making judges supreme arbiters in political controversies . . . they will dethrone themselves and lose one of their own invaluable birthrights; building up in this way—slowly, but surely—a new sovereign power in the republic, in most respects irresponsible and unchangeable for life, and one more dangerous, in theory at least, than the worst elective oligarchy in the worst of times.²⁸⁵

The Tenth Amendment could be a new textual, instead of a structural, home for the political question doctrine since the Court could claim that

²⁸¹ This argument makes even more sense considering that judicial review is post-constitutional.

²⁸² See *Dodge v. Woolsey*, 59 U.S. 331, 373–74 (1855) (Campbell, J., dissenting) (“I can imagine no pretension more likely to be fatal to the constitution of the court itself. If this court is to have an office so transcendent as to decide finally the powers of the people over persons and things within the State, a much closer connection and a much more direct responsibility of its members to the people is a necessary condition for the safety of the popular rights.”).

²⁸³ U.S. CONST. amend. XIV.

²⁸⁴ *Luther v. Borden*, 48 U.S. 1, 52 (1849) (Woodbury, J., dissenting).

²⁸⁵ *Id.* at 52–53.

the power to decide political questions was a power reserved to the people under the Tenth Amendment.

B. *Fundamental Sovereignty: The Voting Power*

The place where state or federal governments most detrimentally infringe upon the people's sovereign power is when they infringe on our very power to choose our government. Election laws and procedures necessarily give rise to, or can destroy, the legitimacy of an elected government as the means by which our governments actually represent the choice and consent of the governed.²⁸⁶

In *Thornton*, the Court may have rejected the state's argument that it had reserved powers to set term limits under the Tenth Amendment, but it did so under "democratic principles"; the implication of this must be that some power—such as the powers of the people to govern themselves—is beyond the scope of the states' powers. As the majority opinion stated,

Our conclusion that States lack the power to impose qualifications vindicates the same "fundamental principle of our representative democracy" that we recognized in *Powell*, namely, that "the people should choose whom they please to govern them." . . . [S]tate-imposed restrictions, unlike the congressionally imposed restrictions at issue in *Powell*, violate a third idea central to this basic principle: that the right to choose representatives belongs not to the States, but to the people.²⁸⁷

Voting rights are not merely individual rights, but an exercise of collective powers that do not, and cannot, belong to the states or the federal government without tyranny. Therefore, it is a transgression upon another sovereign's powers for the federal or a state government to unduly limit individuals' right to vote because as a collective they are an exercise of sovereign power. It cannot be a matter of optional government *policy* to have easily accessible elections. Yet without a structural protection and recognition of the power of the people, that is what it remains. This status quo is further suspect because it circumvents the government legitimacy questions raised by ignoring popular sovereignty as a continual check on governmental power. It is

²⁸⁶ See James A. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 52 U. PITT. L. REV. 189, 192 (1990).

²⁸⁷ U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 819–21 (1995); see also Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 70 (1978); Gardner, *supra* note 286 (arguing that a Lockean conception of popular sovereignty—the rightful rule by the people ("consent of the governed") through legitimate elections—is deeply enshrined within our Constitution).

vital that this power of the people not be infringed. The Court should strike down laws which unduly infringe upon the ability of citizens to vote for their government as not only a violation of any particular right to vote as a member of their protected group²⁸⁸ but as a part of the valid exercise of popular sovereignty protected by the Tenth Amendment.

The default of our voting system should be to encourage the participation by the people from whom the entire system gets its legitimacy. For example, a recently enacted Oregon law that automatically registers voters²⁸⁹ should not be innovative or surprising if we are truly a *representative* government ruled by the people. Elections should be easy—on Saturdays and without identification requirements that impose unofficial economic requirements²⁹⁰—and their accessibility should not be a policy choice that is left to the discretion²⁹¹ of a government with potentially competing agendas.²⁹² Unprotected classes of individuals should have equal access to vote because they are equal members of the people of the United States who are the source of power and legitimacy of our government. Subject to *Comstock's* accommodation framework, the Court would be able to hear such challenges as challenges to the structure and legitimacy of our government and strike down those laws that infringed upon or failed to sufficiently protect voting as the core of popular sovereignty.

CONCLUSION

Our nation's balance of power is incomplete without the people. After *Comstock* and its accommodation framework, it is easy to see how a court could use the Tenth Amendment to protect the powers of the people. Laws made by one sovereign, which infringe on one of the other sovereign's constitutionally protected core spheres of power cannot be law at all. The judicial branch has long recognized its unique power, and indeed responsibility, to strike down those laws that are contrary to the text of the Constitution.²⁹³ As such, any law that is made by either a state

²⁸⁸ U.S. CONST. amend. XV ("race, color, or previous condition of servitude"); *id.* amend. XIX ("sex"); *id.* amend. XXIV, § 1 ("failure to pay any poll tax or other tax."); *id.* amend. XXVI, § 1 ("age").

²⁸⁹ Waldman, *supra* note 35.

²⁹⁰ See Rosenstone, *supra* note 35.

²⁹¹ For representative checks are pointless if there are problems with voter access.

²⁹² Editorial Bd., *supra* note 36 ("The next time voter ID laws reach the justices, they should see them for the antidemocratic sham they are.")

²⁹³ See *McCulloch v. Maryland*, 17 U.S. 316, 423 (1819) ("Should congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case re-

or the federal government that interferes with the core sovereign power of the American people should be struck down as unconstitutional. It is time to bring the people back into the Tenth Amendment, in order to ensure that the people are always in our government.

The extent to which we now associate the Tenth Amendment with states' rights, and the extent to which we have dismissed popular sovereignty as anything other than states' rights is concerning and seems to be out of touch with the heart of what true popular sovereignty would be. This piece outlines a grave hypocrisy in the rise of state sovereignty through a textual reading of the Tenth Amendment without the people. However, in closing it is necessary to remind ourselves that the danger of tyranny alluded to throughout this Article is very real. A system which relies on states' rights to protect the people is very easily corrupted by a state government that has figured out how to exclude certain people from exercising their power to vote, and then wields further discriminatory power as "the will of the people."

"States' rights" became the battle cry of slavery, and then segregation, and most recently the movement against LGBTQ equality. And in all of these historical moments, the rhetoric used by the discriminatory states was "popular sovereignty."²⁹⁴ It is surely a gross perversion of popular sovereignty and a contradiction to use it as a vehicle to refuse to include all of the people as equal members of the empowered electorate. It is a veiled tyranny, but a threat of tyranny nonetheless. As President Lincoln observed:

Near eighty years ago we began by declaring that all men are created equal; but now from that beginning we have run down to the other declaration, that for some men to enslave others is a "sacred right of self-government." These principles can not stand together. They are as opposite as God and mammon; and whoever holds to the one, must despise the other.²⁹⁵

What is even more puzzling than the bedfellows of "popular sovereignty" and oppressive "states' rights," is that in many of these cases the Tenth Amendment is trotted out to support the states. The Tenth Amendment appears as a sword used by discriminatory state

quiring such a decision come before it, to say, that such an act was not the law of the land.").

²⁹⁴ See *id.*; *Romer v. Evans*, 517 U.S. 620 (1996); JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 58, 62 (1988); see also Brief of Ninety-Two Plaintiffs in Marriage Cases in Alabama, Alaska, Arkansas, Indiana, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Carolina, North Dakota, South Carolina, South Dakota, and Texas as Amici Curiae Supporting Petitioners, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556), 2015 WL 1022702, at *13-14.

²⁹⁵ Abraham Lincoln, Speech at Peoria, Illinois (Oct. 16, 1854).

governments. For example, I find the use of the Tenth Amendment in *Shelby County*,²⁹⁶ as the partial basis for denying the federal government the power to create voting rights protections fundamentally at odds with a Tenth Amendment that protects the people just as much as it does the states. Whether the Constitution empowers the federal government to protect the peoples' sovereignty from infringement by state governments is a question beyond the scope of this Article,²⁹⁷ but surely the Tenth Amendment cannot be considered an unchecked grant of power over elections to state governments to the degree that the Court construes it.

Relying on the Tenth Amendment's protection of popular sovereignty, courts are mandated to independently do the work of protecting the power of the people to vote in free, fair, easy, and accessible elections. Without recognizing the place of the people in our system of divided government, we threaten the fundamental democratic legitimacy of our Republic. The final four words of the Tenth Amendment cannot continue to be ignored by purported textualisms. The Constitution's text explicitly protects the powers—including the legitimate consent—of the governed. For our Republic to survive as a truly democratic one, we need to remember the people.

²⁹⁶ 133 S. Ct. 2612 (2013).

²⁹⁷ This question implicates questions about not only the sources of congressional power but potentially about the role of the each of the federal branches in enforcing the text of the Constitution. If, as I suggest, a federal court has the power to strike down a state law which unconstitutional infringes upon state sovereignty, might Congress have a similar power to prevent them through legislation?